STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP1420-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES D. HEIDKE,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable David L. Borowski Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

1. Is the five-year mandatory minimum for using a computer to facilitate, but not actually complete, a second-degree sexual assault of a child constitutionally irrational, in violation of equal protection, given that there is no mandatory minimum for second-degree sexual assault of a child?

The circuit court denied Heidke's motion to strike the mandatory minimum as unconstitutional, finding that it had a rational basis. The court later sentenced Heidke to five years of initial confinement followed by two years of extended supervision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The court should hear oral argument, and the decision should be published. *See* Wis. Stat. §§ 809.22-23. This appeal involves a constitutional challenge to a statutory penalty scheme – one that requires the imposition of at least five years of confinement for using a computer to facilitate a second-degree sexual assault of a child, but does not require any mandatory minimum for actually completing a second-degree child sexual assault. In essence, this penalty scheme treats an attempt to commit a crime (albeit a specific type of attempt) more harshly than the actual completed crime.

Legislative classifications are generally owed deference; however, irrational classifications deny citizens equal protection under the law and are unconstitutional. *See* ***State v. Asfoor***, 75 Wis. 2d 411, 440, 249 N.W.2d 529 (1977). Whether this penalty scheme is irrational – indeed,

whether there could ever be a rational basis for treating an attempt more harshly than the actual completed crime – is an issue of substantial public interest, as well as an issue of first impression. *See* Wis. Stat. § 809.23(1)(a)1., 5. It is also an issue that is likely to recur in the future. Circuit courts are thus in need of guidance on this issue in the form of a published opinion. Moreover, giving the constitutional significance of the issue presented, this court may benefit from the opportunity to hear oral argument and ask questions.

STATEMENT OF THE CASE AND FACTS

On February 28, 2013, the State filed a criminal complaint charging Heidke with using a computer to facilitate a second-degree sexual assault of a child, contrary to Section 948.075 of the Wisconsin Statutes. (2:1). A violation of Section 948.075 is a Class C felony, and requires a court to impose a bifurcated sentence with a term of initial confinement of at least five years. Wis. Stat. § § 948.075(1r), 939.617(1).

According to the complaint, on February 20, 2013, Heidke posted a Craigslist ad seeking intimate relations with a younger person. (2:2). An undercover detective, purporting to be a fifteen-year-old child, responded to the ad by email. (2:2). At first, Heidke replied to the detective that he was "too young." (2:2). However, over the next several days, Heidke and the detective exchanged a number of additional electronic communications and eventually agreed to meet in person. (2:2-10). On February 23, 2013, Heidke drove to a location to meet with the detective and was arrested. (2:10). At all relevant times, Heidke was led to believe that the detective was a fifteen-year-old child. (2:10).

On May 9, 2013, Heidke filed a motion with the circuit court to strike the five-year mandatory minimum as unconstitutional. (10). He pointed out that a person convicted of using a computer to facilitate a second-degree sexual assault of a child must spend at least five years in prison, but a person convicted of actually completing a second-degree child sexual assault is not subject to any mandatory minimum. *See* Wis. Stat. § 939.617(1) (mandatory minimum); *compare* Wis. Stat. § 948.075(1r) *with* Wis. Stat. § 948.02(2). Thus, Heidke asserted that the mandatory minimum penalty is constitutionally irrational, in violation of his equal protection rights. (10:2-4).

After further briefing by the parties, on November 25, 2013, the circuit court, the Honorable David L. Borowski presiding, denied the motion in an oral ruling. (68:8; App. 108). The court first noted that the discrepancy pointed out by Heidke was indeed a peculiar one:

> The defense points out accurately that [] the mandatory minimum . . . sets up a situation where you could have someone, on one hand, charged with an actual sexual assault of a child, for instance, having contact with the child, where that person might be found guilty and sentenced to probation or sentenced to a two or three-year prison sentence . . . whereas in a case similar to Mr. Heidke's with the mandatory minimum, someone who arranged allegedly or ultimately arranged for a child to possibly have sex with the person over the internet, over the computer, would have a five-year mandatory minimum.

(68:4; App. 104).

The court agreed with Heidke that this dichotomy "is not the most rational." (68:4; App. 104). Nevertheless, the court found that the law was constitutional. In reaching this

conclusion, the court summarized part of the legislative history for Section 939.617. (68:5-8; App. 105-08). The court noted that the statute initially contained presumptive minimums only; however, in 2012, those presumptive minimums were changed to minimum penalties that are mandatory under almost all circumstances.[1] (68:5-6; App. 105-06; *see also* 2011 Wisconsin Act 272). Regarding this change, the court discussed the testimony of one of the bill's sponsors, former Representative Mark Honadel, to the Assembly Committee on Criminal Justice and Corrections:

> [Representative Honadel] discusses the issues with – he used the term somewhere I believe "abusers." He discusses the use of computers, the use of computers in exploiting children. He discusses the fact that since that law has passed that, frankly, courts have made the decision to often times not impose a presumptive minimum sentence, in other times, place defendants on probation and give them less than the presumed minimum sentence, either the three-year presumed minimum or in this case the five-year presumptive minimum.
>
> He goes on to rationalize and argue and he says, "now we must make sure the law that we pass is enforced. Child victims deserve truth and [sic] sentencing for their

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[1] Section 939.617 requires minimum terms of confinement, not only for using a computer to facilitate a child sex crime, but also for sexual exploitation of a child (Wis. Stat. § 948.05) and possession of child pornography (Wis. Stat. § 948.12). Regarding the latter two offenses, the statute contains an exception. Specifically, the court may impose probation or a sentence that is less than the mandatory minimum if the defendant is no more than forty-eight months older than child and the court finds that the best interest of the community will be served and the public will not be harmed. Wis. Stat. § 939.617(2). This exception does not apply to the offense of using a computer to facilitate a child sex crime. *See id.*

> abusers. Sending these convicts to prison for the intended length of sentence is the least we can do to keep children safe and relieve the anxiety of parents. We should send a clear message to pedophiles that this type of activity will not be tolerated in Wisconsin and if you do so you will go to prison."

(68:6-7; App. 106-07).

Based on this legislative history, the court found that the "the legislature certainly did ultimately have a reason for their actions." (68:7; App. 107). The court concluded as follows:

> [The legislature], frankly, believe[s] that people who use computers to facilitate child sex crimes should and must serve mandatory minimums. They decided to take that discretion away from courts relative to making it mandatory as opposed to presumptive. As I said earlier, the statues are all presumed constitutional. The defense has a very, very high burden to overcome in any of these challenges.
>
> I certainly, and it's obvious that both sides very seriously considered the defense position and the somewhat exceptional request to strike down that statute as unconstitutional, but, ultimately, I do not believe under the law, under the case law in Wisconsin that the defense has met their burden.
>
> So I'm denying the motion to dismiss the mandatory minimum penalty enhancer as unconstitutional.

(68:7-8; App. 107-08).

On December 20, 2013, the circuit court entered a written order denying Heidke's motion to strike the mandatory minimum as unconstitutional for the reasons explained in its oral ruling. (29; App. 112).

Thereafter, on June 11, 2014, Heidke pled guilty as charged to using a computer to facilitate a second-degree sexual assault of a child. (72:5). On September 12, 2014, the court conducted a sentencing hearing. (73). Both sides recommended the mandatory minimum term of confinement of five years. (73:12-13, 17). After hearing the parties' recommendations, the court made its remarks and then imposed a sentence of five years of initial confinement and two years of extended supervision. (73:34).

By way of explanation, the court stated that it took "great umbrage" at having its discretion taken away in this case. (73:28). It commented again on what it described as the "inappropriate . . . and bizarre dichotomy that the legislature has set up," explaining:

> you can actually assault a child as an adult and the court can give someone probation or a court can give someone a two-year prison sentence or probation with condition time, but in an attempted, which is basically what this is, computer crime attempt to possibly than engage in further assaultive behavior of a child requires a mandatory minimum. That in my view does not make sense.

(73:27).

The court asked if "absent this mandatory minimum, is it likely that I would be considering something less than five years," and it answered "Yes." (73:28-29). The court noted that Heidke was fifty-seven years old and was on the "low end" of all the following scales: "risk to the community, danger to the community, [and] likelihood to commit a further offense in the future." (73:24, 29). It also noted that he had been consistently employed prior to this incident, had no prior criminal record, and had cooperated while on pretrial release. (73:29).

Nevertheless, the court reiterated that it had no discretion in this area:

> In this case the legislature has taken away my discretion, and I have no choice but to impose a mandatory minimum of five years of initial confinement for Mr. Heidke.
>
> I do not think he needs five years of extended supervision. Fortunately, the legislature has deigned to allow me discretion in that area. I think two years of extended supervision is appropriate, and the court is sentencing Mr. Heidke to five years of initial confinement, two years of extended supervision for a total sentence of 7 years in the Wisconsin State Prison system.

(73:34).

Thereafter, Heidke filed a notice of intent to pursue postconviction relief, undersigned counsel was appointed, and this appeal follows. (54).

ARGUMENT

I. The Five-Year Mandatory Minimum for Using a Computer to Facilitate a Second-Degree Sexual Assault of a Child Violates Equal Protection, Both on Its Face and as Applied.

In this case, Heidke challenges the five-year mandatory minimum for violating Section 948.075, both facially and as applied to him. *See* Wis. Stat. § 939.617(1).[2]

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[2] Section 939.617(1) states in relevant part: "if a person is convicted of s. . . . 948.075 , . . . , the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years . . . ."

Section 948.075 provides in relevant part as follows:

> (1r) Whoever uses a computer communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02(1) or (2) is guilty of a Class C felony.
>
> . . . .
>
> (3) Proof that the actor did an act, other than use a computer communication system to communicate with the individual, to effect the actor's intent under sub. (1r) shall be necessary to prove that intent.

In essence, Section 948.075 criminalizes using a computer to attempt to commit a first-degree child sexual assault (Wis. Stat. § 948.02(1)) or second-degree child sexual assault (Wis. Stat. § 948.02(2)).

Although mandatory minimum penalties exist for most forms of first-degree child sexual assault,[3] there is no mandatory minimum for second-degree child sexual assault. Section 939.617 thus creates a penalty scheme in which a person who uses a computer to attempt a second-degree child sexual assault is subject to a five-year mandatory minimum, but a person who actually completes a second-degree child sexual assault is not subject to any minimum penalty.

Heidke argues that this dichotomy violates equal protection, both on its face and as applied in this case. With

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[3] Section 939.616 provides for mandatory minimum sentences for all forms of first-degree child sexual assault, except having sexual contact with a person who has not attained the age of thirteen (Wis. Stat. § 948.02(1)(e)).

respect to his facial challenge, he asserts that the mandatory minimum for the portion of Section 948.075 that prohibits using a computer to facilitate a second-degree child sexual assault – when contrasted with the lack of any mandatory minimum for actually completing a second-degree child sexual assault – is irrational under all circumstances. No reasonable person and no reasonable parent in particular, would ever claim that using a computer to attempt a child sexual assault is worse than actually sexually assaulting a child. As the circuit court stated in this case, "I think everyone would conceive it's worse to actually molest a child then to attempt to pick up a child on the internet." (61:9).

For the same reasons, the mandatory minimum for Section 948.075 is constitutionally irrational as applied to the facts of this case. Here, Heidke was charged with and convicted of using a computer to facilitate only a second-degree (not first-degree) child sexual assault. Moreover, the purported fifteen-year-old child did not actually exist. Under these circumstances, it is irrational to require a five-year mandatory minimum when no mandatory minimum is required for the more aggravated offense of completing a second-degree sexual assault of an actual child.

A. General legal principles and standard of review.

The right to equal protection under the law is guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 1 of the Wisconsin Constitution. Equal protection of the law means that all individuals similarly situated should be treated alike. ***United States v. Nagel***, 559 F.3d 756 (7th Cir. 2009) (finding that defendants who violate the computer solicitation law are not similarly situated for sentencing purposes with defendants who commit a controlled substance offense).

The constitutionality of a statute is a question of law that this court reviews *de novo*. ***State v. Cole***, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328. Statutes are presumed to be constitutional, and a party challenging a statute must demonstrate that it is unconstitutional beyond a reasonable doubt. ***State v. Baron***, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34. That presumption and burden apply to facial, as well as to as-applied, constitutional challenges. ***State v. Wood***, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63.

When a statute is challenged on equal protection grounds, the question is whether a rational basis exists for the classification, unless the statute impinges on a fundamental right or disadvantages a suspect class.[4] Under this "rational basis" test, equal protection is violated if there is no plausible policy reason for the classification or the classification is arbitrary in relation to the legislative goal. ***State v. Lynch***, 2006 WI App 231, ¶¶ 12-13, 297 Wis. 2d 51, 724 N.W.2d 656. When a statutory scheme creates an arbitrary or irrational penalty structure, it denies citizens their right to equal protection under the law and should be struck down. *See* ***Asfoor***, 75 Wis. 2d at 440-41.

B. The mandatory minimum for using a computer to facilitate a second-degree child sexual assault is irrational on its face.

Heidke first challenges the constitutionality of the mandatory minimum on its face. Under a facial challenge, the challenger must show that the law cannot be enforced under any circumstances. ***Olson v. Town of Cottage Grove***,

[4] Heidke does not assert that the mandatory minimum penalty at issue in this case violates a fundamental right or disadvantages a suspect class.

2008 WI 51, ¶ 44, n.9, 309 Wis. 2d 365, 749 N.W.2d 211. If a challenger succeeds in a facial attack on a law, the law is void "from its beginning to the end." ***State ex rel. Comm'rs of Pub. Lands v. Anderson***, 56 Wis. 2d 666, 672, 203 N.W.2d 84 (1973).

In this regard, Heidke asserts that the five-year mandatory minimum for the portion of Section 948.075 that criminalizes using a computer to facilitate a second-degree sexual assault of a child violates equal protection. The minimum penalty for this provision,[5] when contrasted with the lack of any mandatory minimum for actually completing a second-degree sexual assault of a child, is irrational under all circumstances. ***Asfoor*** compels that irrational penalty structure such as this be struck down as unconstitutional.

In ***Asfoor***, the defendant was convicted of *injury* by negligent use of a weapon, which was a felony at the time pursuant to Wis. Stat. § 940.24(1) (1973-74). 75 Wis. 2d at 420, 440. On appeal, he argued that because *homicide* by negligent use of a weapon under Wis. Stat. § 940.08(1) was a misdemeanor, his conviction violated equal protection. ***Id.*** at 437. The Wisconsin Supreme Court agreed that this penalty scheme created an equal protection violation, noting that it was "unable to conceive of any reason to support the statutory discrimination of the legislature," wherein a negligent act resulting in death carries a lesser penalty than a negligent act resulting only in bodily injury. ***Id.*** at 440. The court thus held that the penalty provision of Section 940.24(1), when

[5] The provisions of the Wisconsin Statutes are severable. If any provision of the statutes is invalid, or if the application of any provision to any person or circumstance is invalid, such invalidity does not affect other provisions or applications that can be given effect without the invalid provision or application. Wis. Stat. § 990.001(11).

contrasted with the penalty provision of Section 940.08(1), was unconstitutional. ***Id.*** at 441.

Like the penalty scheme in ***Asfoor***, the penalty scheme at issue here is also irrational. To prove a violation of Section 948.075, the State must prove the following four elements:

(1) The defendant used a computerized communication system to communicate with an individual.

(2) The defendant believed or had reason to believe that the individual was under the age of sixteen years.

(3) The defendant used a computerized communication system with the intent to have sexual contact or sexual intercourse with the individual, in violation of Section 948.02(1) or (2).

(4) The defendant did an act, in addition to using a computerized communication system, to carry out the intent to have sexual contact or sexual intercourse.

Section 948.075 thus criminalizes using a computer to attempt to commit an act of first-degree or second-degree child sexual assault. The State concurs with this interpretation, noting in its response brief filed with the circuit court that:

> the crux of this offense is not in actually commission [sic] of the crime of sexual assault, but in using a means, the computer, *in an attempt to commit a child sex crime*.

(15:4) (emphasis added).

Like using a computer to attempt a second-degree child sexual assault, the completed crime of second-degree child sexual assault is a Class C felony, punishable by up to

forty years' imprisonment (twenty-five years of initial confinement and fifteen year of extended supervision). Wis. Stat. §§ 948.02(2), 948.075(1r), 939.50(3)(c), 973.01(2)(b)3, (d)2. However, unlike a violation of Section 948.075, which carries a five-year mandatory minimum, second-degree sexual assault of a child carries no mandatory minimum penalty. Neither Section 939.617, nor any other statute, requires a minimum prison sentence for second-degree sexual assault of a child.

The legislature had no "plausible policy reason" for this bizarre classification. There simply is no rational basis for penalizing an attempt more severely than the completed crime – particularly in the context of a child sexual assault. Under this penalty scheme, a person who uses a computer in an attempt to engage in sexual contact or sexual intercourse with a child under sixteen will always receive at least five years of confinement, but a person who sexually assaults a child under sixteen can receive a sentence of less than five years or even probation. Thus, if Heidke had actually met a fifteen-year-old child at a grocery store or on street, rather than online, and the two later had sexual intercourse, he could have received a prison sentence of less than five years, or possibly even no prison sentence at all. But because he (unsuccessfully) attempted to have sexual contact with a fifteen-year-old child (who did not actually exist), he was subject to a minimum term of confinement of five years. This is irrational.

As an initial matter, a person convicted of using a computer to facilitate a second-degree sexual assault of a child is similarly situated to a person convicted of an actual second-degree child sexual assault for sentencing purposes. Both offenses require that the actor perform acts toward the commission of a second-degree child sexual assault. Section

948.075 also requires that the actor have the intent to have sexual contact or sexual intercourse with a child under sixteen.

Although Section 948.075 does not require that the offender actually engage in sexual contact or sexual intercourse with such a child, the end result of the respective crimes need not be the same. In ***Asfoor***, the end result – that is, whether death or injury occurred – was the only material difference between the two crimes at issue. 75 Wis. 2d at 440-41. Nevertheless, the court found that individuals convicted of the two crimes were similar situated for sentencing purposes. *See* ***id.***

Of course, the other salient difference here is that Section 948.075 requires the use of a computer communication system, whereas Section 948.02(2) does not. During briefing before the circuit court, the State asserted that "[t]he use of a computer and the internet, by its nature, can be a very private and discreet means of coaxing a child into sexual activity." (15:4). The State therefore posited that the mandatory minimum could serve as a useful deterrent to prevent "offenders from anonymously contacting and soliciting sex from children." (23:5).

This purported justification would be a rational basis for penalizing a violation of Section 948.075 more harshly than other forms of *attempted* second-degree child sexual assault. But that is not the issue here. The issue is whether there is any rational basis for penalizing using a computer to attempt a second-degree child sexual assault more harshly than *the actual completed crime* of second-degree child sexual assault.

This case is thus distinguishable from others, such as ***State v. Hermann***, 164 Wis. 2d 269, 474 N.W.2d 906 (Ct. App. 1991), which have upheld statutory schemes that penalize completed crimes more harshly when committed in particular "atmospheres." In ***Hermann***, the court of appeals upheld a statue that required a mandatory penalty for drug dealing within 1,000 feet of a school. The court reasoned that it was not patently arbitrary or irrational to seek to eliminate a "violent and dangerous atmosphere" created by drug dealing near schools. ***Id.*** at 284.

However, both offenses in ***Hermann*** involved the completed crime of drug dealing. The legislature created a mandatory minimum for selling drugs near a school, but not for selling drugs elsewhere, to help protect children and deter drug dealers from selling drugs near schools. This is a rational decision society can accept.

This case, by contrast, involves a decision to create a mandatory minimum penalty *for an attempt* to commit a child sexual assault, but not for the actual completed assault itself. That is not rational. Regardless of the form the attempt might take, an uncompleted child sexual assault is less aggravated than a completed one. This is true regardless of whether the attempt involves a computerized communication system, occurs at or near a school, or even in a child's own home. In the context child sexual assault, an attempt cannot possibly be worse than the actual completed crime.

During briefing before the circuit court, the State also argued that the disputed penalty scheme was rational because using a computer to facilitate a child sex crime is a "social evil in and of itself." (15:3). In support of this argument, the State cited ***State v. Hanson***, 182 Wis. 2d 481, 513 N.W.2d 200 (1994). In ***Hanson***, the defendant challenged the

statutory penalty scheme for enticement of a child with the intent of exposure. He argued that there was "no reason why enticement to commit the act of exposure, a Class C felony, should be more serious and thus have a greater penalty than the act of exposure itself, a Class A misdemeanor." ***Id.*** at 485-86.

The court in ***Hanson*** found that there was a legitimate justification for the enticement statute to have a higher penalty than actual exposure, noting that enticement of a child is "a social evil in and of itself regardless of the specific sexual motive which causes the defendant to act." ***Id.*** at 487. ***Hanson*** is distinguishable from this case, however. In ***Hanson***, the State strenuously argued that child enticement – like kidnapping – is a distinct social evil that poses a greater harm than simple exposure. In its brief, the State asserted that "[t]he isolation and control of a child often leads to tragic results which transcend the original sexual intent of the defendant." (16:2). It further argued that "the isolation of a child in a room or vehicle under the control of the defendant poses a danger more serious than simply causing a child to expose his or her genitals." (16:2). The court of appeals adopted this argument in ***Hanson***. *See* 182 Wis. 2d at 487.

It may have been rational for the legislature to conclude that removing a child from the public while intending to commit a crime against sexual morality is more dangerous and aggravated than simply causing a child to expose his or her genitals. It is irrational, however, to conclude that using a computer to attempt to have sexual contact or sexual intercourse with a child is more dangerous or aggravated than actually engaging in sexual contact or intercourse with a child. Again, no rational person would claim that an attempted child sexual assault, by whatever

means, is worse (or more harmful) than an actual child sexual assault.

Faced with this irrationality, the circuit court simply found that the legislature's desire to take away judicial discretion for this particular crime was a rational basis for the creating the mandatory minimum. But the circuit court failed to actually compare using a computer to facilitate a second-degree child sexual assault with the completed crime, and then determine if the penalty scheme created by Section 939.617 is rational.

The circuit court's decision was thus erroneous. ***Asfoor*** required that the circuit court do more than simply determine whether this particular mandatory minimum was rational in a vacuum. After all, in ***Asfoor***, the issue was not whether a rational basis existed for making injury by negligent use of a weapon a felony in-and-of-itself. It was whether this was rational in light of the fact that the more aggravated offense of homicide by negligent use of a weapon was a misdemeanor.

Similarly, the issue here is not simply whether there is a rational basis for having a mandatory minimum for using a computer to attempt to commit a second-degree sexual assault of a child. It is whether this mandatory minimum is rational in light of the fact that there is no mandatory minimum for the actual completed crime of second-degree child sexual assault.

No such rational basis exists. The penalty scheme created by Section 939.617(1) punishes an attempted crime more severely than the actual crime. This is irrational under all circumstances. This court should therefore find the five-year mandatory minimum for the portion of Section 948.075 that prohibits using a computer to facilitate a second-degree sexual assault of a child is unconstitutional on it face.

C. The mandatory minimum is irrational as applied in this case.

Heidke also asserts that the mandatory minimum penalty for Section 948.075, as applied in this case, violates his equal protection rights. In contrast to a facial challenge, with an as-applied challenge, the court assesses the merits of the challenge by considering the facts of the particular case in front of it, not hypothetical facts in other situations. ***State v. Hamdan***, 2003 WI 113, ¶ 43, 264 Wis. 2d 433, 665 N.W.2d 785. Under such a challenge, the challenger must show that his or her constitutional rights were actually violated. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim. ***Anderson***, 56 Wis. 2d at 672, 203 N.W.2d 84.

Although Section 948.075 proscribes using a computer to facilitate either a first or second-degree sexual assault of a child, in this case there is no allegation that Heidke ever intended or attempted to commit a first-degree child sexual assault. The complaint charged him with "us[ing] a computerized communication system to communicate with an individual whom he had reason to believe had not attained the again of 16 years, with intent to have sexual contact with that individual in violation of s. 948.02(2)." (2:1). The complaint also contained no factual allegations that suggested that Heidke intended to commit any acts that would have constituted first-degree sexual assault of a child. It did not allege that he intended to have sexual contact or intercourse with a person under the age of thirteen. *See* Wis. Stat. § 948.02(1)(am), (b), (e). Nor did it allege that he intended to use or threaten force or violence against the purported child. *See* Wis. Stat. § 948.02(1)(am), (c), (d). (*See generally* 2). Heidke pled guilty to the offense as charged in the complaint.

(72:5). He also stipulated to the facts in the criminal complaint for purposes of establishing a factual basis for his plea. (72:11).

For the reasons asserted in the previous section, under the facts of this case, Heidke is similarly situated for sentencing purposes to a person convicted of second-degree sexual assault of a child. Thus, there is no rational basis why he should be subject to a five-year mandatory minimum when a person convicted of the more aggravated offense of second-degree child sexual assault is not subject to any mandatory minimum. This is particularly true in a case like this where there was no real child, only a detective posing as a child. It is irrational to assign a harsher penalty to an attempted child sex crime, where the child did not actually exist, than to the actual completed crime of sexual assault of a real child.

This irrationality should have precluded the application the five-year mandatory minimum under the facts of this case. However, the circuit court erroneously denied Heidke's motion to strike the mandatory minimum as unconstitutional. As a result, Heidke was sentenced in violation of his equal protection rights.

CONCLUSION

The circuit court erred in denying Heidke's motion to strike the mandatory minimum penalty as unconstitutional. Heidke therefore respectfully requests that this Court reverse the order of the circuit court, declare the mandatory minimum penalty at issue in this case unconstitutional, both on its face and as applied, and remand the matter to the circuit court for resentencing.

Dated this 28th day of October 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 4,920 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 28th day of October.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of October 2015.

Signed:

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A P P E N D I X

I N D E X
T O
A P P E N D I X

Page