00-2841

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

Appeal From The Non-Final Orders Entered In
The Circuit Court For Outagamie County,
The Honorable Michael W. Gage, Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CRAIG W. ALBEE
State Bar No. 1015752
GLYNN, FITZGERALD & ALBEE, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 221-9600

Counsel for Defendant-Appellant

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STATEMENT OF ISSUES

1. Whether the child enticement statute is unconstitutional as applied to Internet communications where there is no face-to-face contact between the accused and the alleged child, in light of *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, which found the exposing children to harmful materials statute unconstitutional as applied to the Internet context because it chills the First Amendment rights of adults, who have no effective means of verifying the identity and age of the persons receiving their Internet communications.

The circuit court held that Wis. Stat. §948.07 is not unconstitutional as applied.

2. Whether the child enticement statute is violated by an attempted enticement of an adult whom the defendant believes is a child, given that the statute on its face requires proof of the "victim's" minority and the legislature's determination that the defendant's belief as to the "child's" age is irrelevant in prosecutions for child enticement.

The circuit court denied Robins' motion to dismiss on this ground.

3. Whether Robins' alleged conduct in setting up a sexual

liaison over the Internet with a person he believed to be a child and driving to the intended meeting point "demonstrate[s] unequivocally" that he would have committed the crime of child enticement, as is required to prove attempt.

The circuit court denied Robins' motion to dismiss on this ground.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate in this case under Wis. Stat. (Rules) 809.22 & 809.23. The Court's grant of the Petition to Bypass reflects that the issues presented are of substantial public interest.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Brian D. Robins appeals from the non-final orders entered October 2, 2000, in the Circuit Court for Outagamie County, the Honorable Michael W. Gage, presiding, in which the court denied Robins' pretrial motions to dismiss (R28; R38; App. 1-2).[1] After

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[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting (continued...)

Robins filed his appeal pursuant to Wis. Stat. §808.03(2) and Wis. Stat. (Rule) 809.50, this Court granted Robins' petition for bypass.

STATEMENT OF THE CASE

By criminal complaint filed February 8, 2000, the state charged Brian Robins with one count of child enticement, contrary to Wis. Stat. §948.07(1) (R3). Following Robins' bindover at the preliminary hearing on March 31, 2000, the state filed an Information charging Robins with the single count of child enticement as well as five counts of attempting to transfer harmful materials to a child (R6). These five counts later were dismissed by the trial court and are not at issue in this appeal. The material facts, for purposes of review of the issues raised, are disclosed in the criminal complaint and the preliminary hearing record.

From January 31 through February 5, 2000, Agent Thomas Fassbender of the Wisconsin Department of Justice, Division of Criminal Investigation, had a series of Internet Instant Message conversations on the Wisconsin M4M chat room with a person using

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[1](...continued)
the page number of the document. Where the referenced material is contained in the Appendix, it will be further referenced by Appendix page number as App. __.

the screen name "Wi4Kink."[2] During these conversations Fassbender used the screen name "Benjm13" and represented himself as a thirteen-year-old boy (R32:7, 9). Benjm13 and Wi4Kink had several sexually oriented communications in which they discussed oral sex, past sexual experiences, masturbation, ejaculation, and penis size (R32:9-17). Wi4Kink also transmitted sexually explicit photos to Benjm13 (R32:18-20).

Ultimately, Wi4Kink suggested that the two get a motel room together the following weekend to engage in sexual conduct (R32:13-14). Wi4Kink indicated that he knew that what was occurring was not legal (R32:15-16). Following that conversation, there were additional Internet communications in which Fassbender suggested meeting at a Burger King in Little Chute, which is where Benjm13 said he lived (R32:21-22). On the morning of February 5, final arrangements for the meeting at Burger King were made during a telephone conversation (R32:26, 43-44). Another officer, Officer Ray Lee, posed as Benjm13 for this telephone conversation (R32:43).

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[2] "Wisconsin M4M" means Wisconsin male-for-male or Wisconsin men-for-men (R32:33). Fassbender claimed that he did not target the chat room for any particular reason and he acknowledged that he had no reason to believe the communications in this chat room related to children (R32:33-34).

Having determined through America On Line that the screen name Wi4Kink was assigned to Brian Robins, the police set up surveillance at his Wauwatosa home on February 5 (R3).[3] Shortly after the telephone conversation with Lee, officers observed Robins drive from his home to the Burger King in Little Chute (R3). When Robins exited his car and began walking toward the restaurant, he was arrested by Fassbender (R32:29-30). Following his arrest, Robins admitted that he had been the person communicating on the Internet with Benjm13, that he did drive to the Burger King to meet Ben, that Ben had told him he was thirteen, and that his intent was to have sexual contact with Ben (R32:29-30; Exhibit 11).

Fassbender testified at the preliminary hearing that he was the person using the screen name Benjm13 and that he was actually forty-two years old (R32:31). To Fassbender's knowledge, neither Mr. Robins nor Wi4Kink had any sexually explicit conversations with anyone who was under the age of sixteen at any time during the course of the investigation (R32:31). Fassbender agreed that it is not uncommon for people to make misrepresentations regarding age on

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[3] There was no testimony at the preliminary hearing concerning police surveillance, but Robins' written statement (Exhibit 11) indicated that he was from Wauwatosa as did his chat room conversations with Benjm13.

the Internet and that people frequently present themselves as something they are not on the Internet (R32:48).

Based on these facts, Robins was bound over for trial (R32:52-53). Robins filed written motions challenging the criminal complaint, the evidence in support of bindover,[4] and the constitutionality of Wis. Stat. §948.07 (R4; R10; R17; R25; R32:4). On September 8, 2000, Judge Gage issued a written decision and order on the motion challenging the constitutionality of the child enticement statute (R27; App. 3-10), but he vacated the order on September 15, 2000, so that Robins could seek interlocutory review from the denial of all the motions at the same time (R34:5-6). On October 2, the court filed written orders denying all three of Robins' motions (R28; R38; App. 1-2). Judge Gage did not explain the basis for denying the motions challenging the complaint and the bindover. His decision finding Wis. Stat. §948.07 constitutional is contained in the Appendix and summarized in the argument below.

The court of appeals granted Robins' petition for leave to

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[4] The facts set forth in the complaint are not materially different from the facts testified to by Fassbender at the preliminary hearing. The challenges to the sufficiency of the complaint and to the sufficiency of the evidence for bindover rely on the same arguments.

appeal Judge Gage's non-final orders (R29). This Court granted Robins' Petition to Bypass. Trial court proceedings have been stayed while Robins pursues this appeal.

ARGUMENT

I.

THE CHILD ENTICEMENT STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE INTERNET BECAUSE IT DOES NOT REQUIRE PROOF THAT THE ACCUSED KNEW THE CHILD WAS A MINOR.

In *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, Weidner sent sexually explicit and nude photos over the Internet to a sixteen-year-old girl who had told Weidner that she was under eighteen. Weidner never communicated with the girl except through the Internet and they did not have any face-to-face contact. Based on the Internet communications, the state charged Weidner with disseminating harmful materials to minors, contrary to Wis. Stat. §948.11. The circuit court dismissed, finding that the statute was unconstitutional because it did not require the state to prove the defendant's knowledge of the victim's minority status.

This Court agreed and held that the harmful to minors statute is unconstitutional as applied to the Internet and other situations where there is no face-to-face contact between the

defendant and the child. *Weidner* explained that,

> Because age represents the critical element separating illegal conduct from that which remains protected, to avert significant constitutional dilemmas some form of scienter must be implied in a statute imposing criminal liability based on age ... Indeed, scienter constitutes the rule in our criminal jurisprudence and is generally presumed even absent express statutory reference.

Weidner, 2000 WI 52, ¶11.

The state claimed the statute was constitutional because it contained an affirmative defense that allowed the defendant to escape criminal liability by proving he had reasonable cause to believe the victim was 18 or older and had taken steps to verify the victim's age. This Court rejected that claim, emphasizing that the *state* must bear the burden of proving scienter in order for the statute to be constitutionally valid. *Weidner*, 2000 WI 52, ¶¶33, 39. This Court stressed the difficulties of verifying age over the Internet in finding the statute unconstitutional:

> The holding in *Zarnke* was premised on the inability of distributors of child pornography to ascertain reliably and conveniently the age of child victims. We believe the same holds true for persons using the internet to distribute materials deemed harmful to minors.
>
> * * *
>
> The internet provides no effective means to

> gauge the identity and age of persons who access material through use of this continuously evolving technology... . Participants in chat rooms often assume pseudonyms and do not divulge truthful personal data. Requiring the transmission of documentation constitutes an encroachment into the personal lives of those who use the Internet precisely because it affords anonymity.
>
> * * *
>
> The state's proposal that those recipients send proof of age via regular mail also fails to recognize that the delay adversely affects the dissemination of ideas and images that enjoy First Amendment protection. Moreover, sending documents via internet or mail does not obviate the uncertainty as to whether the documentation corresponds to the recipient's personal data. The lack of face-to-face interaction, which impairs the ability to ascertain reliably the age of the recipient, effectively serves to chill speech.

Weidner, 2000 WI 52, ¶¶27-31.

Weidner logically flowed from *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999), in which this Court found Wis. Stat. §948.05, prohibiting the sexual exploitation of a child, unconstitutional. That statute's constitutional flaw was in failing to require proof that a distributor of sexually explicit materials knew the person depicted in the materials was a minor. *Id.*, 589 N.W.2d at 371-72. *Zarnke* holds that the defendant's knowledge of minority is

an essential element of the offense, as a constitutional matter, in cases where there is no personal meeting between the accused and the child victim. *Id.* at 374-376. The Court recognized that imposing strict liability regarding minority status where there is no personal contact inhibits the freedom of expression by making persons more reluctant to use it, noting that "'[t]he opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor or receiver.'" *Id.* at 376 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994)).

The constitutionality of a statute is a question of law that this Court reviews *de novo*. *E.g., Zarnke*, 589 N.W.2d at 373. While in most cases the party challenging the constitutionality of a statute bears the burden of proving its unconstitutionality, where, as here, the statute implicates First Amendment rights, the state must prove beyond a reasonable doubt that the statute is constitutional. *Id.*

Section 948.07, Wis. Stats.,[5] the child enticement statute,

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[5] **948.07 Child Enticement** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle,

(continued...)

as applied here, suffers from the same constitutional defect as the statutes at issue in *Weidner* and *Zarnke*. Under Wis. Stat. §948.07, "[k]nowledge of [the victim's] age by the defendant is not required and mistake regarding [the victim's] age is not a defense." Wis. JI-Criminal 2134 (1998). However, *Weidner* and *Zarnke* demonstrate that knowledge as to minority is a constitutionally required element where there is no personal meeting between the accused and the child such as where all communication takes place over the Internet.

The conduct that forms the basis for the enticement claim in this case, that Robins had sexually explicit Internet communications with a person he never met and made arrangements to meet that person to have sexual contact, is lawful, constitutionally protected communication if it takes place between adults. The constitutional problem is that Wis. Stat. §948.07, like §§948.11 and 948.05, does not require the state to prove that the defendant knew that the person he was communicating with was a child.

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[5](...continued)

building, room or secluded place is guilty of a Class BC felony:

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

* * *

Consequently, in situations where there is no personal meeting between the two, such as over the Internet, there is no way to effectively verify the age and the identity of the other person. Thus, the child enticement statute impermissibly forces adults to choose between not exercising their First Amendment rights or risking violation of the statute if it turns out that the person on the other end of the Internet conversation is a minor.

While in the usual case it is reasonable and constitutional to require the defendant to ascertain the other person's age before engaging in sexual contact or before causing or attempting to cause the person to enter a room with the intent of having sexual contact, that rationale does not hold true when there is no personal meeting between the parties. *See X-Citement Video*, 513 U.S. at 72 n.2; *State v. Kevin L.C.*, 216 Wis. 2d 166, 576 N.W.2d 62, 72 (Ct. App. 1997). Absent face-to-face contact, the statute simply goes too far by forcing persons to act at their own peril when they choose to use the Internet for arranging consensual sexual encounters.

Judge Gage found, however, that Wis. Stat. §948.07 is constitutional, even as applied, for two reasons. First, the court concluded that the statute does not implicate the First Amendment because it regulates conduct, rather than speech (R27:6; App. 8).

Second, the court held that *Weidner* and *Zarnke* are distinguishable because in those cases there was an affirmative defense which shifted the burden to the defendant to prove lack of knowledge, whereas under the child enticement statute there is no affirmative defense (R27:6-7; App. 8-9). Neither of the circuit court's points is persuasive.

Judge Gage found that the First Amendment was clearly implicated in *Zarnke* and *Weidner* because "speech or expression constitutes the crime in itself in §§948.05 and 948.11(2)." R27:6; App. 8. The same is true under the child enticement statute as applied to Robins, however, because his alleged actions all were expressive in nature. The state's theory in this case is that Robins' "speech," his Internet communications and telephone call, constituted an attempt to commit child enticement. The focus of this "as applied" challenge is on whether Robins' alleged actions involved speech, not on whether the offense may be committed in other ways that do not implicate First Amendment concerns. In determining whether Robins' actions constitute speech or conduct, the question is "whether [Robins'] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . . ." *Spence v. Washington*, 418 U.S. 405, 409

(1974). Judge Gage erroneously considered the statute on its face rather than as applied to the specific conduct alleged against Robins.

The child enticement statute prohibits persons from causing or attempting to cause a child to enter a secluded place with the intent to have sexual contact. The causing or attempting to cause can be accomplished physically or by solicitation through speech as alleged here. The circuit court's view that the child enticement statute regulates only conduct and not speech is demonstrably false with respect to Robins, who is being charged solely as a result of sexually-charged communications. Because Robins' alleged enticement consists only of speech that is protected if directed at an adult, the burden falls squarely on the state to prove the constitutionality of the statute as applied. As the court held in *Zarnke*:

> The First Amendment is implicated in this question because the "age of the performers is the crucial element separating legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S.Ct. 464, 130 L.Ed.2d 372. "[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment," *Id.* at 72, 115 S.Ct. 464 while nonobscene, sexually explicit materials involving persons under the age of 18 are not.

Zarnke, 589 N.W.2d at 373 n.2.

Under the child enticement statute as well, age is the crucial element separating legal innocence from wrongful conduct. Robins' communications are protected if directed to an adult, but may be criminalized if *knowingly* directed to a child. The statute, however, does not require proof of knowledge, and therefore encompasses protected communications.

Judge Gage's second major point is based on a misunderstanding of *Weidner* and *Zarnke*. The underlying constitutional problem in those cases, as here, is that the state is not required to prove knowledge regarding the victim's minority even in situations where there is no personal interaction between the accused and the victim. Further, in each instance, the legislature has directed expressly by statute that the lack of such knowledge is not a defense. *See* Wis. Stat. §§939.23(6) & 939.43(2).

In *Weidner* and *Zarnke* the statute at least provided the defendant with an opportunity to prove the reasonableness of his belief that the victim was an adult. Nevertheless, the statutes were deemed constitutionally repugnant because the state did not have to prove knowledge. That problem is more acute under the child enticement statute, which imposes strict liability as to age, because the defendant is not even allowed to defend himself by affirmatively

establishing the reasonableness of his belief that his communications were to an adult. *Compare Zarnke*, 589 N.W.2d at 376 (noting that a strict liability offense is one which affords an individual no opportunity to prove a lack of knowledge and finding that "§948.05, as it applies to distributors, is indistinguishable from a strict liability statute, since it is virtually impossible for a defendant as a distributor to meet his or her [affirmative defense]"). In either situation, the state is impermissibly relieved of its burden of proving the defendant's knowledge regarding the victim's age.

As applied to Robins' conduct, the child enticement statute is materially indistinguishable from the statutes at issue in *Weidner* and *Zarnke*, which were held unconstitutional for failing to require proof of knowledge of the victim's minority in cases where there has been no face-to-face contact. Accordingly, this Court should find the child enticement statute unconstitutional as applied to situations where there is no face-to-face contact such as over the Internet.

II.

ROBINS' ALLEGED CONDUCT IN ARRANGING A SEXUAL LIAISON WITH AN ADULT POLICE OFFICER DOES NOT CONSTITUTE CHILD ENTICEMENT.

The Information alleges that Robins did "with the intent to

have sexual contact with a child, attempt to cause the child to go into a vehicle, building or room contrary to Wis. Stats. §948.07(1)." (R6). The state has not alleged a violation of the general attempt statute, Wis. Stat. §939.32. It is undisputed that Robins' only acts of enticement were directed at an adult police officer rather than a child under the age of 16.

These circumstances give rise to several significant questions about whether the statute may be applied to these facts. First, may a defendant be convicted for child enticement for acts directed at an adult given the plain language of the statute (and the jury instruction) requiring the alleged victim to be a minor. Second, given that "attempt," as used in the statute, modifies "to cause," does a charge under §948.07 also include attempts based on the accused's erroneous belief that the person is a minor. Third, in view of the legislature's express indication that the accused's belief concerning the age of the person enticed is irrelevant, does this prosecution violate the principle that the legislature has exclusive authority to declare what conduct is criminal. Fourth, is attempt properly alleged as to a strict liability element in light of Wisconsin law that one cannot attempt to commit a crime which does not include an element of specific intent. Fifth, given that the state has charged an "attempt"

based both on Robins' alleged erroneous belief that Fassbender was a child and based on his failure to succeed in getting Fassbender to enter a room, does the allegation here amount to an impermissible charge of attempting to attempt a crime. Unless the state can successfully run this entire gauntlet of issues, the child enticement charge must be dismissed.

A court does not have subject matter jurisdiction over a non-existent offense. *State v. Christensen*, 110 Wis. 2d 538, 542, 329 N.W.2d 382, 383 (1983). Criminal subject matter jurisdiction, conferred by law, is the power of the court to inquire into the charged crime, to apply the applicable law and to declare the punishment. *State v. Cvorovic*, 158 Wis. 2d 630, 462 N.W.2d 897, 898 (Ct. App. 1990). Whether attempted child enticement is a prosecutable offense under the circumstances alleged here is a matter of statutory interpretation. Statutory interpretation presents a question of law which this court reviews *de novo*. *Id.*

A. The Legislature Created A Strict Liability Offense As To The Minority Of The Victim And Therefore The Statute Cannot Be Judicially Modified To Allow Convictions Where The Accused Believed An Adult Was A Child.

Under Wis. Stat. §948.07 and its accompanying jury instruction, Wis. JI-Criminal 2134 (1998), the state must prove that

"the victim had not attained the age of 16 years."[6] The instruction emphasizes that proof of knowledge of the victim's age is not required and that mistake as to age is not a defense. *See also* Wis. Stat. §§939.23(6) & 939.43(2). Thus, as to the age element, child enticement is a strict liability offense and the legislature has expressly provided that the defendant's belief as to the victim's age is irrelevant and may not be considered. Consequently, if the other elements are proved, child enticement is committed if the "victim" is under age sixteen regardless of the knowledge or belief of the enticer and no crime at all is committed if the person enticed is sixteen or older regardless of the knowledge or belief of the enticer.

This interpretation is confirmed by *State v. Smith*, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), in which this Court recognized that it is "legally impossible" for a defendant to commit child enticement if the alleged victim has attained sixteen years of age. There the defendant pled to child enticement for engaging in sexual relations with a sixteen-year-old girl in exchange for dismissal of sexual

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[6] If the objective of the enticement is sexual contact or intercourse, then the state must prove that the child has not attained the age of 16, rather than 18, which is the applicable age if the defendant is alleged to have intended one of the other prohibited acts. *See* Wis. JI-Criminal 2134 n.2.

assault charges. The court held that the defendant was entitled to withdraw his *Alford* plea to the child enticement charge because it was legally impossible for him to have committed the offense. Likewise, it was legally impossible for Robins to have committed this offense with Fassbender because Fassbender was an adult.

Attempted child enticement, as applied to the enticement of an adult posing as a child, is unenforceable because the legislature has not created any such crime. To recognize the crime of attempted child enticement under these facts is tantamount to enforcing a common-law crime. The legislature not only has not enacted such a crime, but has expressly provided that the defendant's belief regarding the age of the "victim" is irrelevant to whether a crime has been committed. *See* Wis. Stat. §939.23(6) ("[c]riminal intent does not require proof of knowledge of the age of a minor"); Wis. Stat. §939.43(2) ("A mistake as to the age of a minor . . . is not a defense"); Wis. JI-Criminal 2134.

Despite the legislature's decision not to include a *scienter* requirement with respect to age, the attempted child enticement charge against Robins necessarily incorporates an element, proof that the defendant believed the person was underage, that does not exist in the child enticement statute. At trial, the circuit court would be

required to alter the jury instructions to include an element of its own making. The state thus has created an entirely new offense in violation of Wis. Stat. §939.10 and the legislature's exclusive authority to proscribe what conduct is criminal.

Section 939.10, Wis. Stats., provides:

> **Common-law crimes abolished; common-law rules preserved.** Common-law crimes are abolished. The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved.

By abolishing common-law crimes, the legislature prevented courts from criminalizing acts that our legislature has not made illegal by statute. *See Cvorovic*, 462 N.W.2d at 899 ("'[o]nly a legislature can denounce crimes ... . Nowhere in this country can a man be condemned for a nonexistent crime'") (quoting *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), *cert. denied,* 455 U.S. 920 (1982)); *Wray v. State*, 87 Wis. 2d 367, 275 N.W.2d 731, 734 (Ct. App. 1978) ("criminal offenses are exclusively statutory"); *State v. Genova*, 77 Wis. 2d 141, 252 N.W.2d 380, 383 (1977) ("We must look to the Wisconsin legislature's definition of a crime, not the common-law definition"). *Cf. Stockbridge School District v. DPI Boundary Appeal Bd.*, 202 Wis. 2d 214, 550 N.W.2d 97, 102 (1996) ("Modifications of the statute, if it works badly or in undesirable

ways . . . must be obtained through legislative, not judicial action.").

If mistake in age is not a defense, it also cannot be an offense. Wisconsin law imposes strict liability if certain acts, otherwise lawful with adults, are performed with a child regardless of the defendant's knowledge that the person is underage.[7] These statutes, including the child enticement statute, do not purport to extend to acts committed with persons the actor "believes to be" or "appears to be" a child. *Compare* 18 U.S.C. §2423(b) (criminalizing the crossing of state lines with the *intent* to engage in sexual act with

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[7] As a result, an adult who has sexual contact with a young-looking girl without concern for her age commits a felony if she happens to be a day younger than sixteen years of age and no crime at all if she happens to be a couple days older. No one supposes that the crime of attempted sexual assault of a child is committed in the second instance if the adult mistakenly believed that the girl's sixteenth birthday was not until the following week. The Missouri Supreme Court pondered this same hypothetical in *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 336, 340-41 (1939) (citations omitted):

> So, also, in the case of a prosecution under the statute of this state, which makes it rape in the second degree for a man to perpetrate an act of sexual intercourse with a female not his wife under the age of 18 years. There could be no conviction if it was established upon the trial that the female was in fact over the age of 18 years, although the defendant believed her to be younger and intended to commit the crime. No matter how reprehensible would be his act in morals, it would not be the act forbidden by this particular statute.

a juvenile); 18 U.S.C. §2256(8)(B) (criminalizing a visual depiction that "is, or appears to be" of a minor engaging in sexually explicit conduct).[8] If the legislature desires to extend criminal liability to situations like this one, it must amend the statute. As written, the statute draws a clear line between lawful and unlawful conduct that does not turn on intent. The strict liability element regarding age requires a high standard of care when dealing with persons who may possibly be underage, but by the same token the statute does not penalize those who act with disregard for a young person's age if the person happens to be an adult.

B. Wisconsin Does Not Recognize Attempts To Commit A Strict Liability Crime Or Attempts To Attempt A Crime.

This prosecution also must be dismissed because attempts

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[8] In *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 876 (2001), the court held that those provisions of the Child Pornography Prevention Act of 1996 which prohibit visual depictions that "appear to be" of minors engaging in sexual conduct violate the First Amendment. Computer imaging technology allows child pornographers to now create visual depictions that are virtually indistinguishable from real child pornography. The court held that while child pornography may be criminalized, there was not a sufficiently compelling basis for criminalizing depictions that "do not involve any human victim in their creation or presentation" and "censorship through the enactment of criminal laws intended to control an evil idea" cannot satisfy the constitution.

only apply to crimes or elements of crimes that require proof of specific intent and not to crimes of recklessness or strict liability. In *State v. Briggs*, 218 Wis. 2d 61, 579 N.W.2d 783, 785-786 (Ct. App. 1998), for example, this Court held that there is no crime of attempted felony murder because felony murder does not require intent and therefore, "'is not reconcilable with the concept of attempt.'" (quoting *State v. Carter*, 44 Wis. 2d 151, 170 N.W.2d 681, 683 (1969)). *Briggs* emphasized that "under Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent." *Briggs*, 579 N.W.2d at 785. *See also Carter*, 170 N.W.2d at 683 (holding that crimes of attempted second degree murder, attempted third degree murder, and attempted manslaughter did not exist under former Wisconsin law because intent "is not an element of any of these crimes" and the language of the statutes "is not reconcilable with the concept of attempt"); *State v. Melvin*, 49 Wis. 2d 246, 181 N.W.2d 490, 492 (1970) ("Homicide by reckless conduct does not require any intent to attain a result which if accomplished would constitute a crime; and consequently, one cannot attempt to commit a crime which only requires reckless conduct and not a specific intent"); *compare State v. Seifert*, 155 Wis. 2d 53, 454 N.W.2d 346, 351 (1990) ("Because imperfect self-defense

manslaughter is a crime requiring a showing of intent, there is a crime of attempted imperfect self-defense manslaughter").

This case is distinguishable from *State v. Kordas*, 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995), in which the court of appeals held that the crime of attempting to receive stolen property is committed if the defendant receives property that he believes is stolen, but which, in fact, is not. In *Kordas*, however, the completed crime of receiving stolen property requires the state to prove that the defendant "knew or believed" that the property received was stolen property. Therefore it is a defense to the completed crime that the defendant did not know that the property was stolen. *See* Wis. JI-Criminal 1481 (1992). The defendant's state of mind is irrelevant, however, to the completed crime of child enticement. The state need not prove that the defendant knew the person was a child and the defendant's mistake regarding the child's age is not a defense no matter how reasonable that mistake may have been. *See* Wis. Stat. §§939.23(6) and 939.43(2); Wis. JI-Criminal 2134. A guilty mind is not required in contrast to the statute at issue in *Kordas*.[9]

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[9] Moreover, *Kordas* did not allege an "attempt to attempt" to receive stolen property. The property that Kordas believed to be stolen had actually been received by him.

In *People v. Campbell*, 72 N.Y.2d 602, 532 N.E.2d 86, 88-89 (1988), New York's highest court held that attempted second degree assault, which requires that the defendant caused injury to an officer while intending to prevent him from performing his lawful duty, is a legal impossibility because the statute imposes criminal responsibility for an unintended injury and one cannot be convicted for attempting to cause an unintended result. The court further held that attempt could not be charged because:

> It engrafts . . . an element of intent that the main crime lacks. The result is an unacceptable anomaly. The higher crime of assault second is one in which a defendant may be held strictly responsible for an injury without proof of intent to injure; the lesser crime, attempted assault second, under the People's theory, becomes a crime which requires proof of intent to injure--an element not required for the higher crime.

Id. 532 N.E.2d at 88-89.

Likewise, a charge of attempted child enticement predicated on the defendant's error in believing a person was underage requires proof of an element, the defendant's belief concerning the "victim's" age, that is entirely missing from the completed crime. Thus the "attempt" really is a new species of offense from the completed crime--a species never enacted by the legislature and therefore unenforceable in the courts. It is an "unacceptable

anomaly" to create the crime of attempt and impose criminal liability based on the defendant's belief regarding a person's age when the legislature has mandated that "[c]riminal intent does not require proof of knowledge of the age of a minor . . . ." Wis. Stat. §939.23(6).

The state's rewriting of the statute to require proof of knowledge of age will result in consequences the legislature intended to avoid. Under the state's interpretation of §948.07 the state must prove the newly-created knowledge element whenever attempted child enticement is alleged. For example, if an adult was arrested on his way to a motel room with a fourteen-year-old girl with whom he intended to have sex, the state would have to prove his knowledge or belief that the girl was under 16. Such a requirement is clearly contrary to the statute and the legislature's intent, but would be a consequence of interpreting "attempt to cause" as including an erroneous belief that a person is a minor.

Another problem with the charge against Robins is that it really alleges an attempt to attempt to commit a crime and attempted attempts are not recognized under Wisconsin law. First, Robins is charged with attempt for his incomplete effort to cause the officer to enter a secluded place. Second, attempt also is charged because no child was involved, but Robins allegedly believed the officer was a

child. The word "attempt" in the child enticement statute modifies "to cause," thereby indicating that allegations of attempted child enticement under Wis. Stat. §948.07 are limited to the first type of attempt. The attempted child enticement charge must be dismissed because even if the state may charge an attempt for an erroneous belief that the "victim" was a child, the state still may not charge an "attempt to attempt" or two distinct types of attempt in the same charge.

In *State v. DeRango,* 229 Wis. 2d 1, 599 N.W.2d 27, 41 (Ct. App. 1999), *aff'd*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, the court held that there is no crime of attempted child enticement in Wisconsin because the child enticement statute itself includes attempts to cause a child to go into designated places. The general attempt statute cannot be applied to Wis. Stat. §948.07 "because, quite simply one cannot 'attempt to attempt to cause.'" *Id.* This holding is in accord with the generally recognized principle that the law does not recognize as a crime the attempt to attempt a crime. *E.g.*, *State v. Davis*, 229 A.2d 842, 845 (N.H. 1967), *overruled on other grounds*, *State v. Ayer*, 136 N.H. 191, 612 A.2d 923 (1992). *Cf.* LaFave & Scott, 2 SUBSTANTIVE CRIMINAL LAW §6.2 at 21-22 (1986) ("where a certain crime is actually defined in terms of either

doing or attempting a certain crime, then the argument that there is no crime of attempting this attempt is persuasive"). Since the complaint alleges that Robins attempted to cause a person to enter a designated place, and since that person was not actually a child, the allegation against him essentially is an attempt to attempt to cause a child to enter a designated place with the intent to have sexual contact. Because *DeRango* recognized that no such offense exists, the charge must be dismissed.

As noted above, *Kordas* does not control this case because the legislature in enacting the child enticement statute determined that the defendant's belief regarding the victim's age is irrelevant. Thus, unlike *Kordas*, this attempt charge requires the Court to create a new element not enacted by the legislature. For that reason, and also because attempts are not recognized as to strict liability elements, this case should be dismissed. In addition, however, it also may be appropriate for this Court to overrule *Kordas* and recognize that the legal impossibility defense remains viable in Wisconsin, at least until the legislature otherwise provides.

As this Court found in *Smith*, it is "legally impossible" for an accused to commit child enticement with an adult. *Smith*, 549 N.W.2d at 233. While *Kordas* suggests that the "legal impossibility"

defense has limited, if any, application in Wisconsin, the legislature never has abolished the defense. Nor has Wisconsin enacted language such as that contained in the Model Penal Code, which permits conviction for an attempt if the defendant "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be." Model Penal Code § 5.01(1)(a) (1962).

The defense of legal impossibility is explained in *United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973). There the Court distinguished factual impossibility from legal impossibility in attempt cases. Factual impossibility occurs where factual circumstances preclude the commission of the intended crime — the pickpocket who is charged with attempted theft even though the victim's pocket was empty. Legal impossibility occurs:

> where the intended acts, even if completed, would not amount to a crime. Thus, legal impossibility would apply to those circumstances where (1) the motive, desire and expectation is to perform an act in violation of the law; (2) there is intention to perform a physical act; (3) there is a performance of the intended physical act; and (4) the consequence resulting from the intended act does not amount to a crime.

Berrigan, 482 F.2d at 188.

Robins' conduct fits squarely within the *Berrigan* analysis

because Robins intended to perform an act that he believed violated the law, but his intended acts, even if completed, would not constitute a crime because the recipient of his sexual overtures was an adult. "Simply stated, attempting to do that which is not a crime is not attempting to commit a crime." *Berrigan*, 482 F.2d at 190.

In *Kordas*, the court erroneously equated factual impossibility and legal impossibility. The court relied heavily on this Court's decision in *State v. Damms*, 9 Wis. 2d 183, 190-191, 100 N.W.2d 592, 596 (1960), in which this Court upheld a conviction for attempted murder where the defendant fired a gun intending to commit murder, but unbeknownst to him the gun was not loaded. *Damms*, however, involves factual impossibility. If Damms had completed the acts he intended to carry out, he would have committed murder. Here, by contrast, if Robins completed the acts he allegedly intended to carry out, taking Benjm13 to a room intending to have sex, no crime would have been committed because Benjm13 is an adult.

In *Commonwealth v. Henley*, 474 A.2d 1115 (Pa. 1984), the court noted that legal impossibility had been recognized in many jurisdictions as a defense to attempt charges. The court, however, also noted that many states had abrogated the defense through

legislative modifications of the criminal code. *Id.* at 1116-1117. In particular, many states had adopted language along the lines of that contained in the Model Penal Code specifically precluding the impossibility defense. In *Henley*, the Pennsylvania Supreme Court held that Pennsylvania's revised criminal code also eliminated the defense of legal impossibility.

Despite abrogating the defense of legal impossibility, *Henley* recognized that a person's intent to commit an act which is not a crime could not be the basis of a criminal charge and conviction even though the actor believes or misapprehends the intended act to be proscribed by the criminal laws. The court explained,

> [a]n example of this is where a fisherman believes he is committing an offense in fishing on a certain lake without a license when a fishing license is, in fact, not required in the subject jurisdiction. Since the conduct here would be perfectly legal, the actor could not be held accountable for any attempted crime.

Henley, 474 A.2d at 1119.

Robins' conduct is analogous to the example of non-criminal conduct provided in *Henley*. Thus, regardless of whether the label "legal impossibility" applies, Robins' conduct simply is not a criminal attempt.

Further, unlike Pennsylvania and the other jurisdictions identified by *Henley*, 474 A.2d at 1117 n.2, Wisconsin has not legislatively acted to eliminate the defense of legal impossibility. To the contrary, Wis. Stat. §939.10 provides that the "common-law rules of criminal law not in conflict with Chs. 939 to 951 are preserved." Because there is nothing within the Wisconsin Criminal Code that conflicts with the defense of legal impossibility, the defense should be recognized until such time as the legislature declares otherwise.

C. *State v. Koenck* Was Wrongly Decided and Must Be Overruled.

The above discussion demonstrates why this Court should overrule *State v. Koenck*, 2001 WI App. 93, 242 Wis. 2d 693, 626 N.W.2d 359, in which the court held that the "victim" of a child enticement need not be below the requisite age in cases alleging attempt. There simply is no crime committed when a person seeks to entice an adult posing as a child.

Notably, the arguments raised above by Robins were not addressed in *Koenck*. For example, *Koenck* did not consider: (1) the specific legislative directives which render the accused's belief concerning the "victim's" age irrelevant; (2) whether adding an element to the offense that was not created by the legislature over-

steps the authority of the prosecutor and the courts; and (3) whether Wisconsin recognizes attempts to commit a strict liability crime or attempts to attempt a crime. *Koenck* also overlooked *Smith*, 549 N.W.2d at 233, in which this Court recognized that it is "legally impossible" for a defendant to commit child enticement under Wis. Stat. §948.07 (which includes the completed offense and the attempt) if the alleged victim is not underage. Since none of these arguments were raised in *Koenck*, that decision provides little assistance in resolving whether child enticement can be committed by acts directed solely at an adult.

Further, in *Koenck* the court of appeals emphasized that the appellant-defendant failed to support certain arguments with any discussion of authority or legislative history. *Koenck*, 2000 WI App 93, ¶¶18, 23. The court of appeals thus did not have the advantage of complete briefing on the important issues raised by the appeal.

It also is apparent from the court of appeals' decision that Koenck relied primarily on *DeRango*, asserting that that decision held that an actual child was the intended victim. *Id.* at ¶¶ 11-16. While Robins believes that *DeRango* supports his position, he agrees with the court of appeals that *DeRango* never addressed whether an actual child must be the intended victim of a child enticement charge. *Id.*

at ¶12.

Consequently, Robins finds it difficult to address *Koenck* because the court's discussion is directed at arguments not raised by Robins and it fails to address the points that Robins believes compel dismissal of the charge against him. In any event, *Koenck* does not offer any persuasive reason for concluding that the legislature intended to allow prosecutions under the child enticement statute for acts directed at an adult.

III.

THE EVIDENCE PRESENTED IN THE COMPLAINT AND AT THE PRELIMINARY HEARING FAILED TO ESTABLISH PROBABLE CAUSE THAT ROBINS "ATTEMPTED TO CAUSE" ANYONE TO ENTER A ROOM OR OTHER DESIGNATED PLACE.

Even assuming that one may be convicted of child enticement based on a mistaken belief that an adult is a child, the facts alleged in this complaint and presented at the preliminary hearing fail to supply probable cause. While these facts may provide probable cause that Robins intended to commit the offense, as a matter of law he did not engage in acts sufficient to constitute an attempt. Where the principal facts are undisputed and the controversy centers on ultimate conclusions of law, the appellate court examines the record *ab initio* and decides as a matter of law whether

the evidence constitutes probable cause. *See State v. Fry*, 129 Wis. 2d 301, 385 N.W.2d 196, 199 (Ct. App. 1985).

To constitute an "attempt," an actor must not only "have an intent to perform acts and obtain a result which, if accomplished, would constitute such crime," but also must commit "acts towards the commission of the crime which demonstrate unequivocally,[10] under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." Wis. Stat. §939.32. It is well-established that the law does not punish guilty intentions. Nor does the "mere preparation" to commit a crime establish an attempt. Rather, the determination of whether an attempt has been committed "'necessitates a determination whether under all the circumstances it was too late for the person to have repented and withdrawn.'" *State v. Stewart*, 143 Wis. 2d 28, 420 N.W.2d 44, 47 (1988) (quoting *State v. Berry*, 90 Wis. 2d 316, 327, 280 N.W.2d 204 (1979)).

It was not too late for Robins to have repented and withdrawn upon his arrival at the Burger King. For any number of rea-

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[10] "Unequivocally," as defined in Wis. JI-Criminal 580 (1995) "means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances."

sons, Robins still may have changed his mind at that point and not attempted to cause a child to enter a secluded place. As just one example, the reality of encountering a thirteen-year-old boy in person rather than through the fantasy world of the Internet may well have prompted a change of heart. When arrested, Robins only had prepared to commit a crime or perhaps set an appointment to commit one.

The attempt to meet at the Burger King is not an offense because Robins' request that Benjm13 meet him there was not with the intent to have sexual contact in the restaurant. Robins made no attempt to cause Benjm13 to enter any particular place to have sex. No arrangements had been made to go to a particular place, no motel reservations had been made, and Robins never was in a position to actually invite Benjm13 to enter a vehicle, building, or room at a time when that objective could be accomplished. The core purpose of the child enticement statute is to protect against removal of the child from the general public to a secluded place in order to facilitate certain illegal conduct. *See DeRango*, 599 N.W.2d at 34. The attempt only would be complete if Robins, upon meeting Benjm13, sought to have him come to some place for sex. While in some cases an attempt might be made without a personal meeting, here it

could not. Accordingly, Robins' acts were not sufficient to demonstrate unequivocally that he would have committed the crime.

Further, the Court must look only to the alleged acts of Robins, and not to any post-arrest statements he may have made, in determining whether an attempt probably was committed. "[T]here must be a determination, under all the facts and circumstances, of whether the actions of the accused led to no other reasonable conclusion than that he intended to 'attain a result which, if accomplished, would constitute' the crime." *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639, 645 (1979) (citation omitted). Or, in other words:

> "If the example may be permitted, it is as though a cinematograph film, which has so far depicted merely, the accused person's acts without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done enough." J.W.C. Turner, *Attempts to Commit Crime*, 5 Cambridge L.J. 120, 237-38 (1934).

Id., 285 N.W.2d at 645 n.4.

The above principles are illustrated by *State v. Henthorn*, 218 Wis. 2d 526, 581 N.W.2d 544 (Ct. App. 1998), in which this

Court found the evidence insufficient to establish that Henthorn attempted to fraudulently acquire a controlled substance. There, Henthorn's doctor gave her a prescription that allowed for one refill, but when Henthorn presented the prescription to the pharmacist the "1" had been altered to authorize "11" refills. The pharmacist alerted the police. Relying on *Hamiel*, this Court concluded that Henthorn's alleged actions did not constitute an attempt since she had not yet presented the prescription for the additional refills that were authorized by the phoney prescription:

> In this case, if we were to stop the film at the point where Henthorn presented the altered prescription to the pharmacist to obtain the first two vials of Tylenol 3 that had properly been prescribed for her, it is possible that she might return once, and then once again to obtain the refill to which she was not entitled. We cannot say, however, that is the only "reasonably possible answer." *Hamiel*, 92 Wis. 2d at 665 n.4, 285 N.W.2d at 645. It is also reasonably possible that she might, in the intervening time, decide not to commit an offense which, as she told the police officer, she knew would result in the loss of her nursing license.

581 N.W.2d at 547.

United States v. Harper, 33 F.3d 1143 (9th Cir. 1994), *cert. denied,* 513 U.S. 1118 (1995), also illustrates the distinction between "mere preparation" and an attempt. In *Harper*, the defen-

dants were arrested at night in a bank parking lot in the possession of several weapons, duct tape, and latex surgical gloves. Earlier they had been photographed by the ATM machine at the bank setting a "bill trap" by leaving a $20 bill in the machine. One of the defendants who previously worked for an ATM service company knew that the bill trap would cause an ATM service technician to come to the machine at which time the defendants intended to commit the robbery. Despite the defendants' clear intent to commit bank robbery, the court reversed the attempted bank robbery convictions because the evidence was insufficient to establish that the defendants engaged in conduct constituting a 'substantial step'[11] toward the commission of the crime. The court emphasized that "[m]aking an appointment with a potential victim is not of itself such a commitment to an intended crime as to constitute an attempt, even though it may make a later attempt possible." *Id.* at 1148. *See also United States v. Still*, 850 F.2d 607 (9th Cir. 1988), *cert. denied,* 489 U.S. 1060 (1989) (reversing attempted bank robbery conviction of

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[11] The less stringent federal requirement for establishing an attempt requires proof of (1) an intent to engage in criminal conduct, and (2) conduct constituting a "substantial step" toward the commission of the substantive offense which strongly corroborates the actor's criminal intent. *See Harper*, 33 F.3d at 1147.

defendant who admitted that he was about to rob a bank when he was arrested in a van 200 feet from the bank putting on a wig and in possession of a fake bomb and a note demanding money).

Similarly, even if Robins went to the Burger King intending to persuade Benjm13 to come to a room for sexual contact, his "appointment" to commit the crime is insufficient to constitute an attempt. At best, the state's evidence suggests that he intended to make an attempt, but as of the time of his arrest he had not tried to cause anyone to enter a room to have sex.

For the above reasons, the evidence failed to establish probable cause that Mr. Robins committed the charged offense and the prosecution against him must be dismissed.

CONCLUSION

When the legislature first enacted the child enticement statute, it presumably envisioned cases such as an adult trying to lure a child into his vehicle with a piece of candy. Indisputably the child enticement statute is constitutional and appropriately applied to that type of conduct, but the state is simply trying to mash a square peg into a round hole by applying the statute to essentially anonymous communications over the Internet. The statute does not apply to Robins' conduct at all--he never had contact with a child and his acts

did not go far enough to constitute an attempt. While it is within the state's power to criminalize conduct such as that alleged against Robins, and the legislature is free to enact a statute that clearly addresses this type of conduct, penal statutes cannot be judicially broadened whenever a new technology creates previously unforeseen and undesirable results. The present child enticement statute is inapplicable to Robins' conduct.

If the statute does encompass conduct such as that alleged against Robins, then the statute is unconstitutional as applied because knowledge of the victim's minority is not required under the statute. The constitutional problem arises because the state is attempting to stretch the statute's application far beyond its intended scope. When the statute is extended to criminalize Internet communications, knowledge of age is a constitutionally required element because the Internet provides no effective means of verifying the identity or age of the person receiving the communication. As a result, the enforcement of the child enticement statute may chill expression because "those intending to take advantage of the internet to distribute constitutionally protected materials to adults will refrain from doing so in fear of prosecution under the statute." *See Weidner*, 2000 WI 52, ¶15.

Accordingly, this Court should reverse the orders of the trial court and order the child enticement charge against Mr. Robins dismissed.

Dated at Milwaukee, Wisconsin, October 12, 2001.

Respectfully submitted,

BRIAN D. ROBINS, Defendant-Appellant

GLYNN, FITZGERALD & ALBEE, S.C.

Craig W. Albee
State Bar No. 1015752

P.O. ADDRESS:

222 East Mason Street
Milwaukee, WI 53202
Telephone: 414-221-9600
Facsimile: 414-221-0600

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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

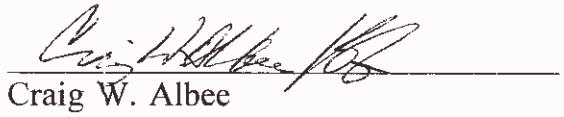
v.

BRIAN D. ROBINS,

Defendant-Appellant.

RULE 809.50(4) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.50(1) & (4) for a brief produced with a proportional serif font. The brief is 9,075 words.



Craig W. Albee

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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 00-2841-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant-Petitioner.

APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

Record No.	Description	App.
28	Written Order Denying Motion to Dismiss Count 1: Unconstitutionality of Wis. Stat. §948.07	1
38	Written Order Denying Motion to Dismiss Complaint and Motion to Dismiss: Insufficient Evidence for Bindover	2
27	Decision on Motion to Dismiss Count 1 And Order	3-10

STATE OF WISCONSIN : CIRCUIT COURT : OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

BRIAN D. ROBINS,

Defendant.

Case No. 00-CF-53

OUTAGAMIE COUNTY
FILED
OCT 0 2 2000
RUTH H. JANSSEN
CLERK OF COURTS

ORDER

For the reasons stated in this Court's decision on Motion to Dismiss Count 1 filed September 8, 2000,

IT IS HEREBY ORDERED that the defendant's Motion to Dismiss Count 1: Unconstitutionality of Wis. Stat. §948.07 is denied.

Dated at Appleton, Wisconsin, this 29 day of September, 2000.

BY THE COURT:

Honorable Michael W. Gage

STATE OF WISCONSIN : CIRCUIT COURT : OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff, Case No. 00-CF-53

v.

BRIAN D. ROBINS,

Defendant.

OUTAGAMIE COUNTY
FILED
OCT 0 8 2000
RUTH H. JANSSEN
CLERK OF COURTS

ORDER

IT IS HEREBY ORDERED that the defendant's Motion to Dismiss Complaint and Motion to Dismiss: Insufficient Evidence for Bindover are denied.

Dated at Appleton, Wisconsin, this 29 day of September, 2000.

BY THE COURT:

Honorable Michael W. Gage

STATE OF WISCONSIN CIRCUIT COURT BRANCH V OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

BRIAN D. ROBINS,

Defendant.

Case No. 00 CF 53

OUTAGAMIE COUNTY
FILED
RUTH H. JANSSEN
CLERK OF COURTS

DECISION ON MOTION TO DISMISS COUNT 1 AND ORDER

Defendant is charged with one count (Count 1) of attempted child enticement with the intent to have sexual contact, contrary to §948.07(1), Wis. Stats. He was also charged with five counts (Counts 2 - 6) of attempted transfer of harmful material to a child, contrary to §§948.11(2)(a) and 939.32(1). Counts 2 through 6 have been dismissed. The defendant moves to dismiss Count 1, on the grounds that §948.07 is unconstitutional when the offense does not involve any face-to-face contact between the defendant and the child.

I

Material facts for motion purposes are disclosed in the Complaint and preliminary hearing record. They are taken as established for motion purposes.

Special Agent Fassbender, Wisconsin Department of Justice, Division of Criminal Investigation, acting in an undercover capacity, communicated with the defendant via the Internet. Fassbender used the screen name of "Benjm13" and the defendant used the screen name of "Wi4Kink." On January 31, 2000, the defendant made contact with Special Agent

Fassbender in his undercover capacity as "Benjm13" and engaged him in a sexual discussion. He asked "Benjm13" his age and Fassbender responded that he was 13.

The Internet discussion between the two pertained to oral sex, masturbation and other sexual matters. The defendant suggested that he and "Benjm13" meet so that they could rent a motel room for the purpose of engaging in sexual activity. He stated that his name was Brian and that he knew that this activity was not legal. On February 1, 2000, the defendant again contacted "Benjm13" and provided a photograph of himself, as well as pornographic photographs, via the Internet to "Benjm13." He again suggested that the two of them meet on the weekend, discussing the location of their meeting and that he did not want "Benjm13's" mother to know about it.

On February 4, there was further communication between the defendant and "Benjm13" in which they discussed the potential meeting, as well as sexual matters. On February 5, they again discussed the meeting, which involved renting a room in which they would spend time together, and agreed that there would be a telephone communication between the two to make the final arrangements. Special Agent Fassbender arranged for the telephone conversation to be conducted between Officer Ray Lee posing as "Benjm13" and the defendant. During the telephone conversation, the defendant stated that he would be traveling to the Burger King restaurant in Little Chute, Outagamie County, Wisconsin to meet with "Benjm13."

Surveillance conducted at the defendant's residence in Wauwatosa indicates that shortly after his telephone conversation with "Benjm13," he was observed leaving his residence and traveling to the Burger King restaurant in Little Chute on May 5, 2000. Previously, defendant had e-mailed a photograph of himself to "Benjm13" and advised that he drove a white Acura automobile and would be wearing a brown jacket. At approximately 12:23 p.m. on May 5, the defendant entered the Burger

King parking lot in Little Chute, parked his vehicle and walked toward the restaurant where he was to meet "Benjm13." He was then arrested by Special Agent Fassbender.

II

The defendant seeks dismissal of Count 1, attempted child enticement with the intent to have sexual contact, arguing that §948.07, Wis. Stats., is unconstitutional in cases which do not involve any face-to-face contact between the defendant and the alleged victim because it violates First Amendment rights of expression and association. The state is required to show that the defendant had reason to believe he was communicating with a minor to show the defendant's intent. Defendant contends that the knowledge of age requirement renders §948.07 unconstitutional as applied here, because of the difficulties in effectively verifying the age and identity of persons in Internet communications. Assertedly, this chills expression and association rights protected by the First Amendment by forcing Internet users to choose between foregoing communications of a sexual nature or risking a violation of the statute. Defendant points out that while it is generally or historically reasonable to place the burden on the defendant to ascertain the other person's age before causing or attempting to cause the person to enter a room with the intent to have sexual contact; it is unreasonable to do so when there is no personal meeting between the parties, or at least when the only "meeting" is by non-pictorial or by written Internet messages and telephone.

In support of his position, the defendant cites State v. Zarnke, 224 Wis. 2d 116, 589 N.W.2d 370 (1999) and State v. Weidner, 235 Wis. 2d 306, 611 N.W.2d 684 (2000). In Zarnke, the Supreme Court held that Wis. Stat. §948.05, prohibiting the sexual exploitation of a child, is unconstitutional because it does not require the State to prove that a distributor of sexually explicit materials had knowledge of the minority of the person depicted in the materials. Section 948.05 prohibits, among

other things, the reproduction and/or distribution of photographs, electronically stored images, and other pictorial reproductions of a child engaging in sexually explicit conduct. It provides an affirmative defense, allocating to the defendant the burden to prove lack of knowledge of the minority of the person depicted in the materials. The Supreme Court held the pertinent statute unconstitutional as it applies to the distribution of sexually explicit material depicting minors, as well as to the other prohibited conduct which does not entail a personal interaction between the accused and the victim.

In Weidner, the Supreme Court held Wis. Stat. §948.11(2), which prohibits the dissemination of harmful material to minors, unconstitutional in the context of the Internet and other situations that do not involve face-to-face contact between the minor and the accused. The Court determined that the statute impermissibly shifts to the defendant the burden of proving knowledge of the victim's age and infringes on protected First Amendment expression. Under §948.11(2), like §948.05, lack of knowledge of the juvenile's minority stands as an affirmative defense that the defendant must prove to avoid criminal liability.

The State in turn contends that the instant case is distinguishable from Weidner and Zarnke because the statute involved here, §948.07, by its terms, proscribes conduct--and not speech. In addition, unlike the statutes in Weidner and Zarnke, proof of age is not an affirmative defense under §948.07 and thus there is no shifting of the burden of proof on that element to the defendant. The State contends thus that there is no First Amendment right implicated in §948.07. Consistent with this position, the State argues that the focus of §948.07 is the defendant's intent to commit a crime with a child and his actions taken in furtherance of separating the child from the presence or view of others to commit one of the enumerated crimes against a child.

The State contends that the focus in Weidner is the statute's lack of a scienter element regarding the age of the person receiving the materials and that age is the critical element separating illegal conduct from legal conduct. Here, on the other hand, the critical element is said to be the defendant's intent -- along with acts which further that intent. The State further contends that the crimes in Weidner and Zarnke, providing harmful materials to a child and distribution of child pornography, can be committed entirely by actions constituting expression or speech. On the other hand, a violation of §948.07 involves some elements of speech with regard to evidence of intent, but the crime itself involves the non-speech actions of taking affirmative steps to physically get a child into a secluded location. The State contends that since §948.07 requires speech plus action, it is not subject to the same First Amendment scrutiny.

III

Statutes generally enjoy a presumption of constitutionality. In most circumstances, those challenging the constitutionality of a statute have the burden to prove that the statute is unconstitutional beyond a reasonable doubt. State v. Zarnke, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999). However, when a statute infringes on rights afforded by the First Amendment, the State carries the burden of proving the statute constitutional. State v. Weidner, 235 Wis.2d 306, 312, 611 N.W.2d 684 (2000).

The child enticement statute, section 948.07, provides in relevant part:

> **948.07 Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

Since speech or expression constitutes the crime itself in §§948.05 and 948.11(2), the First Amendment is clearly implicated. However, the crime of attempted child enticement entails conduct coupled with a particular purpose-- not speech. Written communication via the Internet, and a phone call, is relevant to show intent when there is no face-to-face contact between the defendant and a child victim; but that does not transform child enticement into a speech-based crime. Child enticement requires that: 1) the defendant caused or attempted to cause the child to go into a secluded place; 2) the defendant did this for the purpose of engaging in illegal sexual conduct; and 3) the child has not attained 18 years of age. It is the Court's conclusion that First Amendment free speech rights are not implicated, or implicated only incidently.

The statutes at issue in Weidner and Zarnke provide an affirmative defense which requires the defendant to prove his lack of knowledge of the victim's minority status. The defendant must prove reasonable cause to believe that the victim has attained 18 years of age and that the victim exhibited some "official or apparently official" document to verify the victim's age. Section 948.07 does not provide such an affirmative defense. The State bears the burden of proof as to all of the elements of the offense; specifically, the State carries the burden of proof with regard to the potential victim's age.

Section 948.07 requires that the defendant had the intent to commit a crime with a child, that he believed that he was dealing with a child, and that he engaged in conduct supportive of that intent. Zarnke involved the distribution of sexually explicit materials depicting minors; the Court found §948.05 unconstitutional with respect to distributors who never had any direct contact with the child and, therefore, there was virtually no possibility to establish the affirmative defense. In Weidner,

which involved exposing a child to harmful material, the Court found §948.11 unconstitutional with regard to Internet contact which did not entail face-to-face contact: therefore, it was impossible for the defendants, as Internet users, to meet the burden imposed by the affirmative defense. Here, there is no affirmative defense regarding the age of the child under any circumstances.

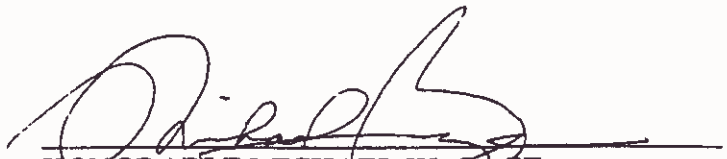
The statutes at issue in Zarnke and Weidner ban certain types of expression involving children--§948.05 prohibits sexual exploitation of a child and §948.11 prohibits exposing a child to harmful material. In the instant case, §948.07 does not ban expression, but a particular type of conduct involving children that may or may not flow from protected speech. Unlike those statutes, there is no shifting burden on proof of age by way of affirmative defense: the State must prove every element, including that the defendant reasonably believed that he was communicating with a child under the age of 16. Circumstantial evidence, other than face-to-face contact, may give rise to an inference concerning age. Written e-mail messages certainly can be circumstantial evidence. Multiple communications including a phone call, on various occasions, in various contexts, may provide indicia of minority status of an adolescent--just as a picture or a face-to-face meeting might. In any event, the expression over the Internet and telephone involved here is not a violation of §948.07, unless it is acted upon in attempting to cause the child to enter a secluded place for an illegal sexual purpose.

The decisions in Zarnke and Weidner are inapposite because the statutes involved in those cases do explicitly ban certain types of expression with respect to minors. Further, §948.07 does not provide an affirmative defense requiring the defendant to prove lack of knowledge about minority status. Therefore, this Court finds that §948.07 is constitutional as applied to the facts of this case.

The defendant's Motion to Dismiss Count 1 is hereby ordered DENIED.

Dated at Appleton, Wisconsin this 8th day of September, 2000.

BY THE COURT:



HONORABLE MICHAEL W. GAGE
CIRCUIT COURT JUDGE, BRANCH V
OUTAGAMIE COUNTY

Distribution:
ADA M. Cathleen Huber
Attorney Craig W. Albee

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 00-2841-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

ON APPEAL FROM NONFINAL ORDERS ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL W. GAGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JAMES E. DOYLE
Attorney General

JENNIFER E. NASHOLD
Assistant Attorney General
State Bar No. 1023575

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340

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OTHER AUTHORITIES

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 00-2841-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

ON APPEAL FROM NONFINAL ORDERS ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL W. GAGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

1. Does Wisconsin's child enticement statute, Wis. Stat. § 948.07, require that the intended victim of an attempted enticement be an actual child?

The trial court denied the defendant's motion to dismiss on this ground.

2. Do the allegations of the criminal complaint and the evidence at the preliminary hearing, which establish that the defendant arranged a sexual encounter with a person he met over the Internet whom he believed to be a child and traveled to the agreed upon meeting place at the agreed upon meeting time, demonstrate

probable cause that the defendant attempted to entice a child?

The trial court denied the defendant's motion to dismiss for lack of probable cause.

3. Is the child enticement statute unconstitutional as applied to a defendant who did not have face-to-face contact with his intended victim?

The trial court held that the statute is not unconstitutional as applied to such conduct.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

ARGUMENT

Defendant-appellant Brian Robins has appealed from orders denying his motions to dismiss the criminal complaint and information filed against him charging him with attempted child enticement, in violation of Wis. Stat. § 948.07.[1] Robins asserts that the child enticement statute is unconstitutional as applied to his conduct because it does not require proof that he knew his intended victim was a child, contending that such proof is necessary in cases in which the defendant has not had face-to-face

[1]The crime of child enticement includes both the attempted and completed crime – it encompasses both causing and attempting to cause a child to enter a secluded place with the intent of committing illegal conduct. *See* Wis. Stat. § 948.07; *State v. Koenck*, 2001 WI App 93, ¶¶14-15, 242 Wis. 2d 693, 626 N.W.2d 359. The state uses the convenient, but technically imprecise, term of "attempted child enticement" to refer to a charge of enticement based on the defendant's attempt to cause a child to enter a prohibited place for a prohibited purpose.

contact with his intended victim. He also argues that the charge must be dismissed on two nonconstitutional grounds: first, because the enticement statute is not violated by an attempted enticement of an adult whom the defendant believes is a child; and second, because his conduct did not demonstrate unequivocally that he would have committed the crime of child enticement.

The state will respond to Robins' arguments in reverse order, addressing his nonconstitutional arguments first. It does so for two reasons. First, as general rule, courts do not decide constitutional questions if a case can be resolved on other grounds. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997). Thus, if the court agrees with Robins that the offense of attempted child enticement requires an actual child or that the evidence was insufficient to support bindover, it need not reach Robins' challenge to constitutionality of the statute. Second, the state's constitutional argument is based on its understanding of the elements needed to prove an attempted enticement when the intended victim is not an actual child. Accordingly, the state will first explain why Robins' statutory interpretation is incorrect and why the allegations of the criminal complaint and the evidence at the preliminary hearing establish probable cause that he committed the crime of attempted child enticement, and will then discuss why the statute may be constitutionally applied to Robins' conduct.

I. THE CRIME OF ATTEMPTED CHILD ENTICEMENT HAS BEEN COMMITTED WHEN THE DEFENDANT ATTEMPTS TO ENTICE A PERSON HE BELIEVES TO BE A CHILD EVEN IF THE INTENDED VICTIM IS ACTUALLY AN ADULT.

A. The court of appeals determined in *State v. Koenck* that the intended victim of an attempted child enticement need not be an actual child.

Robins contends that the enticement statute is not violated by the attempted enticement of an adult whom the defendant believes is a child. The court of appeals rejected that argument earlier this year in *State v. Koenck*, 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359. Because the state believes that *Koenck* correctly applied the principles of attempt law to the child enticement statute under facts indistinguishable from this case, the state will discuss the *Koenck* decision in some detail.

Koenck, like this case, involved a charge of attempted child enticement arising from the defendant's attempt to meet and have sexual contact with a fictitious child he met over the Internet. The defendant in *Koenck* communicated over the Internet with "Teddie" and "Georgie," whom he believed to be twin twelve-year-old girls but who were actually an adult woman. *Koenck* at ¶¶2-3. During those online communications, Koenck expressed interest in having sexual intercourse and sexual contact with the girls. *See id.* at ¶3. Koenck eventually arranged to meet the girls at a fast-food restaurant in Brookfield; he said that he had rented a hotel room in Waukesha County for the purpose of having sexual intercourse and contact with them. *See id* at ¶¶3-5. Koenck drove to the restaurant parking lot and was

arrested when he exited his vehicle and began walking to the restaurant. *See id.* at ¶6.

Koenck argued that the child enticement charges should be dismissed because his intended victim was an adult. The court of appeals rejected that argument, holding that the "fictitiousness of the girls constitutes an extraneous factor beyond Koenck's control that prevented successful enticement while not excusing the attempt to entice." *Id.* at ¶29.

The court explained why, under well-established principles of attempt law, Koenck's conduct constituted attempted enticement, notwithstanding the fact that his intended victim, unbeknownst to him, was actually an adult. The attempt statute, Wis. Stat. § 939.32(3), defines an attempt as follows:

> An attempt to commit a crime requires that the actor have an intent to perform certain acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

The court held that under Wis. Stat. § 939.32(3), an attempt has two components: "(1) intent to commit a specific crime and (2) evidence that the accused has committed sufficient acts to 'demonstrate unequivocally that it was improbable the accused would desist of his or her own free will.'" *Koenck*, at ¶24 (quoting *State v. Stewart*, 143 Wis. 2d 28, 31, 420 N.W.2d 44 (1988)). An attempt is complete, therefore, when the defendant, with intent to commit a crime, takes action in furtherance of such intent and the failure to accomplish the crime is due to a factor beyond his or her control or one unknown to him or her. *See id.* (citing *Boyles v. State*, 46 Wis. 2d 473, 476, 175 N.W.2d 277 (1970)). Stated another way, the attempt statute "requires that the person have the requisite criminal intent and that he or she perform 'acts toward the

commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed the intent and would commit the crime except for the intervention of another person or some other extraneous factor.'" *Id.* at ¶25 (quoting *Berry v. State*, 90 Wis. 2d 316, 326, 280 N.W.2d 204 (1979)).

The conduct element of the attempt statute is satisfied, the court held, when the defendant has "gone far enough toward completion of the crime to make it improbable that he would change his mind and desist," that is, when he has "engage[d] in conduct which demonstrates that only a circumstance beyond the accused's control would prevent the crime, whether or not such a circumstance actually occurs." *Id.* at ¶26 (quoting *Stewart*, 143 Wis. 2d at 41-42). The attempt statute thus "requires a judgment in each case that the accused has committed sufficient acts that it is unlikely that he would have voluntarily desisted from commission of the crime." *Id.*

The court held that the allegations of the criminal complaint filed against Koenck satisfied that standard. *See id.* at ¶¶27-28. Koenck arranged to meet two persons he met on the Internet whom he believed to be twelve-year-old girls. He checked into a hotel and traveled to the prearranged meeting place to meet the girls, and he admitted that he intended to have sex with both of them. *See id.* at ¶27. That the girls were fictitious was an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the purpose of sexual intercourse or contact. *See id.* at ¶28. Because Koenck "did everything necessary to insure the commission of the crime intended," the court held, his conduct was "not excused because of the fortuitous circumstance rendering it impossible to effectuate the intended result." *Id.*

Under *Koenck*, the state has to prove the following elements to prove attempted child enticement under these circumstances: first, that the defendant attempted to cause

his intended victim to go into a room or other secluded place; second, that the defendant attempted to cause his intended victim to go into that location with intent to have sexual contact or for another prohibited purpose; and third, that the defendant reasonably believed that his intended victim was a child. For the reasons that follow, the *Koenck* decision was a correct application of the principles of attempt to the child enticement statute.

B. The state's interpretation of the child enticement statute, as articulated in *Koenck,* is consistent with the language of the statute and established principles of attempt liability.

The state's interpretation of the enticement statute is supported not only by the *Koenck* decision but by other Wisconsin authority. First, it is consistent with the language of the child enticement statute, which provides, in relevant part:

> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 [sexual assault of a child] . . .

Wis. Stat. § 948.07.[2] Consistent with that statutory language, the criminal complaint alleges that Robins committed the crime of child enticement because he "attempt[ed] to cause a[] child" to go into a prohibited place with the intent of having sexual contact with the child (3:1).

[2]Where the charged conduct involves the intent to have sexual contact or intercourse, the victim must be under the age of sixteen. *See* Wis. Stat. §§ 948.07(1) and 948.02.

Robins asserts that the word "attempts" in Wis. Stat. § 948.07 modifies only the phrase "to cause," whereas the state's position is that "attempt" refers to the entire phrase "to cause any child . . . to go into any vehicle, building, room or secluded place" for the purpose of committing the statutorily enumerated acts. Thus, if a person attempts to cause a child to go into a prohibited place with the intent to commit the acts delineated in Wis. Stat. § 948.07, he is guilty of the charge of child enticement, even if his attempt to cause a child to go to those places is thwarted by the fact that, contrary to his belief, the person he attempts to entice is not a child. Notwithstanding Robins' assertion, the interpretation applying attempt to the entire phrase does not entail any "rewriting" of the statute. *See* Robins' brief at 25-26.

Robins also relies on the pattern jury instruction for child enticement, Wis. JI-Criminal 2134, in support of his contention that in any attempted child enticement case, the state must always prove that the subject of the intended enticement is in fact a minor. *See* Robins' brief at 17-19, 24. However, a trial court's instructions do not have to conform to the standard jury instructions. *See State v. Foster,* 191 Wis. 2d 14, 26, 528 N.W.2d 22 (Ct. App. 1995). "Because the standard instructions are not infallible, it is appropriate for a trial court to modify them when necessary to fully and fairly state the law." *Id.* at 27. Thus, while the pattern jury instruction may be appropriate where a real child is involved, a modified version of that instruction would be used where the attempt is based on the fact, that, contrary to the defendant's belief, the person he intended to entice was not a real child.

Robins also asserts that the state's position in this case is contrary to the holding in *State v. DeRango*, 229 Wis. 2d 1, 29, 599 N.W.2d 27 (Ct. App. 1999), *aff'd,* 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833 that "one cannot 'attempt to attempt to cause.'" Robins' brief at 27-28. A similar argument was made by the defendant in *Koenck* (*see* Koenck's brief-in-chief at 7), but the court, in

distinguishing *DeRango*, was clearly not persuaded by this argument, *see Koenck* at ¶12, and rightly so. Robins suggests that because his attempt to commit child enticement was thwarted in two ways – *i.e.*, because there was no actual child involved and because he was never able to cause a child to go into one of the statutorily designated places, the charge in this case somehow constitutes an "attempt to attempt to cause," prohibited by *DeRango*. The situations here and in *DeRango* are not comparable. The issue in *DeRango* was whether the defendant was entitled to a lesser-included offense instruction of attempted child enticement using both the general attempt statute, Wis. Stat. § 939.32(3), and the child enticement statute. *DeRango*, 229 Wis. 2d at 29. Because the child enticement statute includes both the attempted and completed acts, the court of appeals concluded that the trial court could not instruct on the lesser-included act under the general attempt statute because one cannot "attempt to attempt to cause." *Id.* *DeRango* in no way prohibits a charge of attempted child enticement, employing only the child enticement statute, simply because the attempt was thwarted in more than one manner.

The state's interpretation of the child enticement statute is also firmly rooted in Wisconsin precedent interpreting the general attempt statute, Wis. Stat. § 939.32(3). In *Kordas*, the court of appeals held that an attempt to receive stolen property may be committed even where the property is not in fact stolen, but the defendant believed it was. In so ruling, the court declined to reach the issue of whether legal impossibility is ever a viable defense under Wisconsin law, instead concluding that "[u]nder the statutes and well-settled authorities, the amended complaint in this case clearly alleged a legally possible crime." *State v. Kordas*, 191 Wis. 2d 124, 128, 528 N.W.2d 483 (Ct. App. 1995). The court stated that although the crime of receiving stolen property cannot be committed unless the property received was actually stolen, that "does not preclude the charge of attempt to receive stolen property." *Id.* The court also relied upon

the "'[s]ound public policy'" which supports the view that:

> "impossibility not apparent to the actor should not absolve him from the offense of attempt to commit the crime he intended. . . . In so far as the actor knows, he has done everything necessary to insure the commission of the crime intended, and he should not escape punishment because of the fortuitous circumstance that by reason of some fact unknown to him it was impossible to effectuate the intended result."

Id. at 129 (quoting *State v. Damms*, 9 Wis. 2d 183, 190-91, 100 N.W.2d 592 (1960)). In rejecting the trial court's determination that there was no intervention of an extraneous factor, as required under the general attempt statute, the court concluded the intervening extraneous factor which was "beyond Kordas' knowledge or control" was that the property was not stolen. *Id.* at 130. "But for that factor," the court stated, "Kordas allegedly would have committed the crime of receiving stolen property. Because of that factor, Kordas allegedly committed only the attempt to receive stolen property." *Id.*

Similarly, in the instant case, "[b]ut for th[e] factor" that the person Robins attempted to entice was not actually a child, as Robins believed, Robins "allegedly would have committed" the crime of completed child enticement. *Id.* at 130. "Because of that factor, [Robins] allegedly committed only the attempt" to entice a child. *Id.* Further, as *Kordas* makes clear, simply because the crime of completed enticement cannot be committed unless the allegations actually involve a child, that "does not preclude the charge of attempt" to entice. *Id.* at 128.

Just as the property need not have been stolen for the defendant in *Kordas* to have *attempted* to receive stolen property, here, the child need not have been an actual child for the defendant to have *attempted* to entice a child to a secluded place with the intent to have sexual contact with him. As in *Kordas* and *Damms*, the "'impossibility not apparent to [the defendant] should not

absolve him from the offense of attempt to commit the crime he intended.'" *Kordas*, 191 Wis. 2d at 130 (quoting *Damms*, 9 Wis. 2d at 190-91).

Robins argues that *Kordas* does not control this case because the completed crime of receiving stolen property requires the state to prove that the defendant "knew or believed" that the property was stolen property, whereas the defendant's state of mind is irrelevant to the completed crime of child enticement. *See* Robins' brief at 24. Relying on *State v. Smith*, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), he asserts that because knowledge or belief about the intended victim's age is irrelevant to the completed crime of enticement, a charge of attempted child enticement under the circumstances in this case is barred. *See* Robins' brief at 17-32.

The defendant in *Smith* was initially charged with second-degree sexual assault of a sixteen-year-old girl but, pursuant to a plea agreement, entered an *Alford* plea to a charge of child enticement. *See Smith*, 202 Wis. 2d at 23-24. This court held the defendant was entitled to withdraw that plea because there was no factual basis for the crime. The enticement charge alleged that the defendant intended to have sexual contact with a child in violation of Wis. Stat. § 948.02(2), which prohibits sexual contact with a child under sixteen, and it was undisputed that the victim was sixteen years old. *See id.* at 26 n.3, 28.

Smith is inapposite because it did not discuss liability for *attempted* enticement. There is nothing in the *Smith* decision to suggest that the enticement charge was based on an allegation that the defendant had attempted to cause a person under sixteen to enter a secluded place; there is no indication that the defendant believed that the girl was not yet sixteen. Rather, the charge appears to be based on the completed act of causing the sixteen-year-old to enter a secluded place. The state does not dispute that a defendant cannot be liable under the enticement statute for the completed act of causing a child to enter a secluded place if the victim is not a child. However, as *Koenck*

correctly recognizes, the fact that the completed act would not have constituted a crime does not preclude attempt liability. *See Kordas*, 191 Wis. 2d. at 128 (affirming conviction for attempted receipt of stolen property even though the property the defendant received was not stolen); *see also State v. Cooper*, 127 Wis. 2d 429, 380 N.W.2d 383 (Ct. App. 1985) (affirming conviction for attempted delivery of a controlled substance even though the substance the defendant delivered was not a controlled substance).[3]

Robins further argues that *Kordas* should be overruled and that this court should recognize that the legal impossibility defense is viable in Wisconsin. *Kordas* should not be overruled because it was correctly decided. However, even if legal impossibility were a defense in this state, this is not a case of legal impossibility.

"Legal impossibility is the situation in which the defendant did everything he intended to do but yet had not committed the completed crime." 2 Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law* § 6.3, at p. 38 (1986 & Supp. 2000). "Factual impossibility," in contrast, exists "if what the defendant intends to accomplish is proscribed by the criminal law, but he is unable to bring about that result because of some circumstances unknown to him when he engaged in the attempt. . . ." *Id.*, § 6.3(a)(2), at p. 42.

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[3]Robins also argues that Wisconsin does not recognize attempts to commit strict liability crimes such as child enticement. *See* Robins' brief at 21-26. Child enticement is not a strict liability crime. It requires that the defendant act with the intent to commit various enumerated crimes, which themselves have intent element. (Sexual contact with a child, for example, requires intentional touching for the purpose of sexually arousing or gratifying the defendant. *See* Wis. Stat. § 948.02(2).) Moreover, the child enticement statute itself recognizes attempt as a mode of committing the crime of enticement. *See* Wis. Stat. § 948.07 ("Whoever . . . causes or attempts to cause. . . ."). Finally, as argued throughout the state's brief, there is no "strict liability" as to age in the context of non-face-to-face attempted child enticement: the defendant's belief that the intended victim is a child is an element the state has to prove.

According to LaFave and Scott, "[a]ll courts are in agreement" that factual impossibility "is no defense to a charge of attempt." *Id.*; *see also State v. Logan*, 656 P.2d 777, 778 (Kan. 1983) ("Our research has not revealed an instance where an American court has ever recognized factual impossibility as a defense to an attempt charge.") Some jurisdictions, however, have recognized legal impossibility as a defense. *See* LaFave & Scott, § 6.3(a)(3), at pp. 44-49.

Robins characterizes this case as one of legal impossibility. *See* Robins' brief at 28-32. However, in the most recent supplement to their treatise, LaFave and Scott describe the situation in which "the defendant attempted sexual exploitation of a minor by communicating via the Internet with a person he mistakenly believed was under age" as constituting a *factual* impossibility scenario. *See* LaFave and Scott, § 6.3(a)(2), at p. 7 (Supp. 2000).

If that characterization is correct, then Robins' impossibility argument fails as a result of his implicit acknowledgement that factual impossibility is not a defense in Wisconsin. The state believes that this case is indeed properly characterized as one of factual impossibility, because what Robins intended to accomplish is proscribed by the criminal law, and he was unable to accomplish that result because of the circumstance unknown to him that the person with whom he was attempting to have sexual contact was not a child.

The state recognizes that it is sometimes difficult to categorize a particular fact pattern as fitting neatly into the category of "factual impossibility" or "legal impossibility." *See* Jeffrey F. Ghent, Annotation, *Impossibility of Consummation of Substantive Crime as Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime*, 37 A.L.R. 3d 375, § 2(a) at p. 381 (1971). But even if this case were better characterized as one of legal impossibility, that would not mandate dismissal of the charge, because legal

impossibility has not been recognized as a viable defense in this state. *See Kordas*, 191 Wis. 2d at 128.

"[T]he modern trend in most jurisdictions is to reject *both* factual and legal impossibility as a defense." 1 Thomas J. Hammer and Robert D. Donohoo, *Substantive Criminal Law in Wisconsin* § 91, at p. 53 (1988) (emphasis in original). A survey by a Florida appellate court revealed that by 1982 at least thirty-three jurisdictions, including its own, had expressly abolished the defense of legal impossibility either by statute or judicial decision. *See State v. Rios*, 409 So. 2d 241, 244-45 (Fla. Ct. App. 1982) (collecting authorities); *see also Logan*, 656 P.2d at 780 ("The overwhelming trend in recent years has been the abolition of legal impossibility as a defense."). As LaFave and Scott explain, "the modern and better view" is not to frame the issue in terms of legal or factual impossibility. *See* LaFave and Scott, § 6.3 at p. 39. Rather, they suggest that "impossibility is not a defense when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by the law." *Id.* at p. 39.

That approach, which focuses on the defendant's intent to commit a crime, is consistent with the approach that the court of appeals took in *Koenck* and *Kordas*, and that this court took in *Damms*. Moreover, authority from other jurisdictions, discussed below, soundly rejects the defense of impossibility under fact patterns legally indistinguishable from this case.

C. Courts in other jurisdictions uniformly have concluded that a defendant may be liable for attempting to commit a sex crime against a child even when the intended victim is not actually a child.

The court of appeals' decision in *Koenck* was not an anomaly – numerous other courts have reached the same conclusion. In *Van Bell v. State*, 775 P.2d 1273 (Nev. 1989), for example, the defendant was convicted of attempted sexual assault after he paid an undercover officer to procure a child for sexual intercourse and drove to the place where he believed that he would have sex with a young girl. *See id.* at 1274-75. Declining to distinguish between physical and legal impossibility and focusing instead on the specific intent to commit the substantive offense, the Nevada Supreme Court rejected the defendant's argument that the fact that there was no child barred his conviction for attempted sexual assault. *See id.* at 1274. The court held that "the fact that no child was available does not, in itself, bar appellant's conviction for attempted sexual assault. Rather, appellant stipulated that he intended to commit sexual assault upon the five or six-year-old girl whose photograph he selected." *Id.* Like our court of appeals in *Koenck*, the *Van Bell* court relied on precedent involving receipt of stolen firearms which had lost their "stolen" status when the police recaptured them. *See id.* at 1274 n.1, *citing Darnell v. State*, 558 P.2d 624, 626 (Nev. 1976).

Cases from other states are in accord. In a recent "Internet sting" case, the Texas Court of Criminal Appeals affirmed the defendant's conviction for attempting to induce a child to engage in sexual conduct. *See Chen v. State*, 42 S.W.3d 926 (Tex. Crim. App. 2001). The defendant in *Chen* had communicated by e-mail with an undercover officer posing as a thirteen-year-old girl. *See id.* at 927. The court held that the factual impossibility of

completing the offense did not preclude liability. *See id.* at 929-30.

The Florida District Court of Appeals reached a similar conclusion when it affirmed a conviction for an attempted lewd and lascivious act in *Hudson v. State*, 745 So. 2d 997 (Fla. Dist. Ct. App. 1999). The intended victim in that case was a detective who represented himself as a fourteen-year-old boy when he responded to a magazine advertisement placed by the defendant. *See id.* at 999. The Florida court rejected the defendant's argument that it was legally impossible for him to commit the crime of an attempted lewd and lascivious act because no actual child under the age of sixteen was involved. *See id.* at 1000-01. The issue, the court held, was "not the legal impossibility of the offense, but whether [the defendant] possessed the requisite intent and committed sufficient overt acts to effectuate that intent." *Id.* at 1001.

In *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 461-62 (Ct. App. 2000), the defendant moved to dismiss an information charging him with eighteen counts of attempted seduction of a minor and one count of attempting a lewd act on a minor under the age of fourteen, among other charges. As in the instant case, the charges arose from the defendant's Internet communication with an adult posing as two underage girls. *See id.* at 460.

On appeal, the defendant argued that all of the charges of attempted seduction of a minor should have been dismissed because the prosecution could not establish an essential element of the offense, namely, that the victims were under the age of eighteen years. *See id.* at 465. He further contended that the charge of lewd act on a minor should have been dismissed because the state could not prove that the victim was under the age of fourteen. *See id.*

The court disagreed, stating that "Hatch is not charged with violating" the sexual seduction or lewd act

on a minor statutes; "instead, he is charged with attempting to violate those sections." *Id.* The court held that a defendant "is guilty of an attempt when he harbors a specific intent to commit the target crime and does a direct, although perhaps ineffectual, act toward its commission." *Id.* Thus, the court held,

> [t]he fact the prosecution cannot show that Hatch's intended victims were in fact under 14 years of age is irrelevant to his culpability for attempting the charged crimes. If Hatch had the specific intent to complete the target crimes, the impossibility of completing the crimes does not exonerate him from attempting those offenses.

Id. The court noted that "'The courts of this state have not concerned themselves with the niceties of distinction between physical and legal impossibility, but have focused their attention on the question of the specific intent to commit the substantive offense.'" *Id.* (quoted source omitted). The California court, like the Nevada and Florida courts, relied in part upon precedent holding that a defendant may be found guilty of attempted receipt of stolen property although the property is in fact not stolen. *See id.*

Federal authority also supports the decision in *Koenck*. In a recently released decision, the Fifth Circuit, in a case whose facts are indistinguishable from those of this case and *Koenck*, upheld the defendant's conviction for violating a federal statute that prohibits the use of interstate commerce to attempt to persuade a minor to engage in sexual activity. *See United States v. Farner*, 251 F.3d 510 (5th Cir. 2001). The defendant in *Farner* met someone he believed to be a fourteen-year-old girl, but who was actually an FBI agent, through the Internet and arranged to meet her to engage in sexual activity. *See id.* at 511. As the court did in *Koenck*, the Fifth Circuit rejected the defendant's argument that it was legally impossible for him to have committed the crime because the minor was actually an adult. *See id.* at 512-13.

Similarly, in *United States v. Crow*, 164 F.3d 229, 231 (5th Cir. 1999), an undercover detective conducted a child sexual abuse and pornography investigation by logging onto various chat rooms, representing himself to be a thirteen-year-old girl named StephieFL. The detective encountered the defendant in a preteen chat room. *See id.* As a result of the communications which ensued, a grand jury returned an indictment charging Crow with attempted sexual exploitation of a minor. *See id.*

Crow's challenge to the sufficiency of the indictment "focuse[d] on the indictment's phrase 'a person whom the defendant believed was a 13 year old female,'" asserting "that the statute requires that the individual exploited or that the defendant attempted to exploit had to actually be a minor." *Id.* He contended that it was insufficient if the individual involved was "merely a person believed to be a minor female." *Id.* The court rejected those arguments, holding that "'factual impossibility is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be.'" *Id.* (quoting *United States v. Contreras*, 950 F.2d 232, 237 (5th Cir. 1991)). The court held that "Crow was properly convicted of attempt because he undoubtedly believed that the person he was corresponding [with] via the Internet was a minor." *Id.* at 236. The court similarly rejected the defendant's argument that "the government was required to show that he actually 'knew' that StephieFL was a minor, rather than instructing the jury that it was permitted to convict him if they found he simply 'believed' that StephieFL was a minor." *Id.* at 236.

The language of the statutes at issue in these other jurisdictions is similar to Wisconsin's child enticement statute in that the completed crimes appear to require that the victim be a minor. Nonetheless, the courts in other jurisdictions uniformly have held that the absence of an actual child victim does not preclude liability for attempting to commit the crime.

That conclusion is consistent with the rationale underlying the law of attempt. As noted by Professors LaFave and Scott:

> "[T]he law of attempts exists because there is just as much need to stop, deter and reform a person who has unsuccessfully attempted or is attempting to commit a crime than one who has already committed such an offense."
>
> Thus, one important function served by the crime of attempt is to provide a basis whereby law enforcement officers may intervene in time to prevent a completed crime.

LaFave and Scott, *supra*, at 22 (citations omitted). Robins, like the defendants in these cases, intended to – and by his own admission would have – enticed a child with the intent to have sexual contact. What prevented him from doing so was the fact that, contrary to his belief and intent, his intended victim was not a child. Allowing the state to prosecute for attempted child enticement under the facts of this case prevents a completed crime, involving a real child, from occurring in the future. Sound public policy, embodied in the attempt statute, supports identifying those who would inflict such harm on children and preventing them from doing so rather than waiting for real children to be victimized.

II. THE COMPLAINT AND THE EVIDENCE ADDUCED AT THE PRELIMINARY HEARING ESTABLISHED PROBABLE CAUSE THAT THE DEFENDANT VIOLATED THE CHILD ENTICEMENT STATUTE.

Robins also argues that the criminal complaint and the evidence at the preliminary hearing failed to establish probable cause that he attempted to entice a child. He concedes that there is probable cause that he intended to commit that offense, *see* Robins' brief at 34, but argues that he had not yet engaged in acts sufficient to constitute

an attempt. At the time he was arrested, he contends, he had only prepared to commit a crime but had not yet attempted to commit it.

Koenck demonstrates why that argument is incorrect. The court held in *Koenck* that the complaint sufficiently demonstrated not only the defendant's intent, but also that his acts were sufficient to "'demonstrate unequivocally that it was improbable the accused would desist of his or her own free will.'" *Koenck* at ¶24 (quoting *State v. Stewart*, 143 Wis. 2d 28, 31, 420 N.W.2d 44 (1988)). The facts of this case are not materially different from those in *Koenck*. Compare the following summary of Koenck's conduct with Robins' conduct in this case:

> Koenck communicated via the Internet with "Teddie" and "Georgie," persons he believed to be twelve-year-old girls. During these communications, Koenck expressed a desire to have sexual intercourse with "Teddie" and "Georgie." When "Teddie" and "Georgie" informed Koenck of their plans to visit Wisconsin, Koenck immediately expressed an interest in meeting them. He made reservations at an area hotel. He arranged to meet "Teddie" and "Georgie." He drove from his home in Iowa, checked into a hotel and then traveled to the prearranged meeting place in order to meet "Teddie" and "Georgie." Koenck admitted that he intended to have sex with both "Teddie" and "Georgie."

Id. at ¶27.

Robins communicated on the Internet with an individual who called himself "Ben," a person he believed to be a thirteen-year-old boy (31:Exhibit 1, p. 5, Exhibit 7; 32:5-9). During those conversations, Robins expressed a desire to engage in sexual contact with Ben (31:Exhibits 1, 2; 32:9-13). He suggested that the two of them get a motel room together the following weekend for that purpose (32:13-14). He arranged to meet Ben at a restaurant in Little Chute, where Ben said he lived (32:26). At the agreed-upon time, Robins drove from his home in Wauwatosa to the restaurant (3:2; 32:26-28). He

was arrested when he exited his car and began walking toward the restaurant (3:2-3; 32:29-30). Robins admitted to the police that his purpose in going to the restaurant that day was to have sexual contact with Ben, whom he believed to be a thirteen-year-old boy (32:29). He had a condom and sexual lubricant in his vehicle at the time of his arrest, though he told the police that he keeps those items in his vehicle at all times and did not specifically place them in his car for his meeting with Ben (32:30).

The only difference between the facts of this case and those of *Koenck* is that there is no evidence that Robins had yet booked a motel room. While Robins apparently finds that significant, *see* Robins' brief at 36, that fact, if true, hardly precludes a finding that Robins was attempting to entice Ben. The enticement statute does not require an attempt to cause a child to enter a room or building – it also encompasses attempts to cause a child to enter a vehicle for a prohibited purpose. *See* Wis. Stat. § 948.07(1). Robins drove his car to the meeting place, and his attempt to cause Ben to get into his vehicle with the intent of engaging in sexual contact would be sufficient to constitute enticement. Moreover, when he spoke with Ben by telephone to finalize arrangements, Robins said that they would find a motel when he arrived (32:44). An inference can be drawn from that fact that Robins was attempting to cause Ben to enter a room for purposes of having sexual contact.

The facts alleged in the criminal complaint and adduced at the preliminary hearing establish probable cause that Robins attempted to cause a thirteen-year-old child to go into a vehicle, building or room for the purpose of engaging in sexual contact. Robins, like the defendant in *Koenck*, "did everything necessary to insure the commission of the crime intended." *Koenck* at ¶28.

Rather than attempting to distinguish this case factually from *Koenck*, Robins compares the facts of this case to those of *State v. Henthorn*, 218 Wis. 2d 526, 581 N.W.2d 544 (Ct. App. 1998). In *Henthorn*, the defendant

was charged with attempted fraudulent acquisition of a controlled substance when she changed the notation for "1" refill on a codeine-containing prescription to an "11" and presented the altered prescription to a pharmacist. *Id.* at 529. The court of appeals held, over a dissent, that the defendant's conduct was insufficient to show that she probably would not have desisted from obtaining a refill to which she was not entitled. The court noted that when the defendant presented the altered prescription to the pharmacist, she was attempting to obtain the first of two vials of medicine that she was legally entitled to receive. *See id.* at 533. Before she could have unlawfully obtained a controlled substance, the court observed, the defendant would have had to return to the pharmacy twice – the first time to get the physician-authorized refill and a second time to obtain the refill that had not been prescribed. *See id.* at 533-34. Although it was possible that the defendant would have returned twice to obtain refills, the court concluded, it was "also reasonably possible that she might, in the intervening time, decide not to commit an offense which, as she told a police officer, she knew would result in the loss of her nursing license." *Id.* at 534.

Robins committed acts that went beyond what the defendant did in *Henthorn*. His conduct would be comparable to that of the defendant in *Henthorn* if she had been arrested on her third visit to the pharmacy, about to pick up the unlawful second refill. Robins had not merely determined Ben's interest in having sexual contact. Nor had he merely obtained Ben's agreement to get together for sexual purposes at some time in the future. Instead, he obtained Ben's agreement to meet at a particular time and place for the purpose of having sexual contact and was just steps away from the planned meeting when he was arrested.

That Robins was unlikely to have voluntarily ceased and desisted from his intended conduct is confirmed by his post-arrest statement to the police, in which Robins admitted that when he drove to the restaurant in Little Chute, it was for the purpose of having

sexual contact with Ben (31:Exhibit 11, p. 6; 32:29). Robins contends that his post-arrest statements must be ignored when determining whether there was probable cause that he was attempting to entice Ben. He relies on the following passage from a law review article quoted in a footnote in *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639 (1979), for that proposition:

> "If the example may be permitted, it is as though a cinematograph film, which has so far depicted merely the accused person's acts without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an "attempt" to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done enough."

Id. at 665 n.4 (quoting J.W.C. Turner, *Attempts to Commit Crimes*, 5 Cambridge L.J. 120, 237-38 (1934)).

That passage describes a test to be applied when the accused has not stated his intention. It does not state that if the accused has given such a statement that statement must be ignored. Indeed, Wisconsin courts have looked to post-arrest statements to determine whether the defendant's conduct constituted an attempt. In *Koenck*, for example, the court cited the defendant's admissions to the police that he had traveled to his planned meeting with the girls with the intent of having intercourse with them. *See Koenck*, at ¶¶6, 27. Likewise, the *Henthorn* court cited the defendant's statement to the police that she knew she could lose her nursing license if she committed the offense in support of its conclusion that the evidence was insufficient to satisfy the conduct requirement under the attempt statute. *See Henthorn*, 218 Wis. 2d at 534.

Even without Robins' statement to the police, there was ample evidence adduced at the preliminary hearing to establish probable cause. The content of Robins' communications with Ben and the fact that he traveled

from Wauwatosa to Little Chute at the appointed time establish probable cause that Robins would not have desisted if not for the intervention of the fortuitous circumstance that there was no thirteen-year-old boy waiting for him at the restaurant.

Robins' brief cites two Ninth Circuit cases involving charges of attempted bank robbery in support of his argument that his acts constituted mere preparation rather than an attempt. *See* Robins' brief at 38-40. If this court were to look at cases from other jurisdictions for guidance, however, it will find numerous cases involving defendants charged with attempting to commit sex crimes against fictitious children that are more instructive because the facts of those cases more closely parallel the facts of this case than do attempted bank robbery cases.[4]

The Fifth Circuit, in a decision cited in the discussion of impossibility earlier in this brief, upheld the defendant's conviction for attempting to violate a federal statute that prohibits the use of interstate commerce to attempt to persuade a minor to engage in sexual activity. *See United States v. Farner*, *supra*. The defendant in *Farner* met fourteen-year-old "Cindy" – who was actually an adult FBI agent – through the Internet. The defendant and Cindy exchanged e-mails and had telephone conversations in which the defendant attempted to persuade Cindy to have sexual relations with him. *See Farner*, 251 F.3d at 511. They eventually agreed to meet at a restaurant. After checking into a hotel, the defendant drove to the parking lot of the restaurant, where he was arrested. *See id.* The court held that the trial court, which tried the case on stipulated evidence, "correctly concluded from the stipulated evidence, beyond a reasonable doubt, that [the defendant] intended to engage in sexual acts with

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[4]The state notes, moreover, that the Seventh Circuit has not been as demanding as the Ninth Circuit in the type of acts required to constitute a substantial step toward the commission of a bank robbery. *See, e.g., United States v. Schramm*, 715 F.2d 1253 (7th Cir. 1983).

a 14-year-old girl and that he took substantial steps toward committing the crime." *Id.* at 513.

In another recent decision, the Texas Court of Criminal Appeals held in an "Internet sting" case that the evidence was sufficient to convict the defendant of attempting to induce a child to engage in sexual conduct. *See Chen v. State*, *supra*. The defendant in *Chen* communicated by e-mail with an undercover officer posing as a thirteen-year-old girl whom he had met through an America Online bulletin board. *See Chen*, 42 S.W.3d at 927. The defendant and the girl discussed their interest in having sexual contact with each other and arranged to meet at a motel. *See id.* at 927-28. The defendant drove to the motel, entered the lobby and returned to his car after two minutes, at which point he was arrested. *See id.* at 928. He had a package of condoms and a tube of lubricant in his vehicle when he was arrested, and subsequently gave a statement to the police admitting that he was going to show a girl how to have sex. *See id.* The court held that the evidence was sufficient because the defendant's conduct amounted to more than mere preparation to commit the offense. *See id.* at 930.

Cases from other states are in accord. In *People v. Patterson*, 734 N.E.2d 462 (Ill. App. Ct. 2000), *appeal denied*, 742 N.E.2d 332 (Ill. 2000), the Illinois appellate court held that the evidence was sufficient to convict the defendant of attempted aggravated criminal sexual abuse when he arranged a meeting with a fictitious child with whom he had communicated over the Internet; as in many of these case, the defendant was arrested in the parking lot of the restaurant at the agreed-upon meeting time.

> [W]e conclude that defendant had completed every step and action that he possibly could have and, therefore, defendant's conduct constituted a substantial step towards the offense of aggravated criminal sexual abuse. Defendant had agreed to perform oral sex on Yacoo that day. He had arranged to meet Yacoo at a specific place and time

> and informed Yacoo what clothes he would wear and what car he would drive. Defendant sent a picture of himself to aid Yacoo further in identifying defendant. Defendant also traveled to the rendezvous at the appointed time and admitted that he was waiting for 15-year-old Rob at the time he was questioned by [the police officer]. Given that Yacoo/Rob did not actually exist, defendant had taken every possible step he could have taken in order to commit the offense of aggravated criminal sexual abuse. Accordingly, we hold that defendant's conduct constituted a substantial step and determine that there was sufficient evidence from which the trial court could conclude that defendant committed the crime of attempt.

Id. at 470.

In *Van Bell v. State*, *supra*, the defendant was convicted of attempted sexual assault after he offered an undercover officer $150 to procure a child for sexual intercourse. The defendant had chosen a young girl, represented to be five or six years old, from a collection of photographs supplied by the undercover officer, had arranged for a room, and had purchased a lubricant for use in sexual intercourse. *See id.* at 1274-75. He was arrested as he was driving to that room, where he believed the girl was waiting. *See id.*

The Nevada Supreme Court rejected the defendant's contention that his actions demonstrated mere preparation to commit a crime rather than an attempt to commit one. *See id.* at 1275. The court noted that, from the defendant's perspective, he was "both physically and temporally close to committing sexual assault on the young girl" as he had begun driving to the apartment where he believed he would engage in sex with her. *See id.* In addition, the court held, there is an inverse relationship between the defendant's intent to commit the crime and the performance of an overt act toward the commission of the crime: when the defendant's intent to commit the crime is clearly shown, slight acts in furtherance of that crime constitute an attempt. *See id.* In this case, the court concluded, there was clear evidence of

the defendant's intent to assault the young girl – he had admitted that was his intent – so the "acts of driving toward the apartment where the girl was allegedly waiting and purchasing vaseline to use as a lubricant sufficed for attempt liability." *Id.*

The Florida appellate court reached a similar conclusion when it affirmed a conviction for an attempted lewd and lascivious act in *Hudson v. State*, *supra*. In *Hudson*, a detective representing himself as a fourteen-year-old boy named "Larry" responded to a magazine advertisement placed by the defendant. *See id. Hudson v. State*, 745 So. 2d at 999. After exchanging letters in which the defendant graphically described the sexual acts he would like to perform on the boy, the defendant mailed a plane ticket to Larry and arranged for Larry to be transported from the airport to his house by taxi. *See id.* On the day Larry was to arrive, an undercover deputy sheriff drove a taxi to the defendant's apartment, while another deputy sheriff sat in the back seat posing as the boy. *See id.* When the taxi arrived at the defendant's home at the arranged time, the defendant walked to the taxi and was arrested. *See id.*

The court agreed with the defendant that he was "merely in the preparatory stages of the crime when he purchased the advertisement and wrote his initial correspondence to Larry." *Id.* at 1000. The court held, however, that the defendant's subsequent acts crossed the line from preparation to overt act:

> [T]hereafter [the defendant] wrote numerous letters, mailed Larry a plane ticket and money for travel, arranged for a taxi to bring Larry to his house, and then approached the taxi in order to greet Larry. We conclude that under these circumstances the trial court correctly decided the information charged a crime supported by an overt act.

Id.

The court observed that Florida had never expressly chosen between the various analytical approaches to what constitutes an attempt, but concluded that it need not do so in that case because the defendant's conduct would constitute an attempt under any of the available approaches, including the equivocality standard:

> In this case, we conclude that a jury could find that Mr. Hudson fulfilled the proximity approach by his efforts to transport an intended victim to his home. A jury could decide that he satisfied the probable desistance approach or the equivocality approach because the evidence of his intended acts is so strongly supported by his own correspondence.

Id. at 1000 n.3.

Robins' acts were no more equivocal than those of the defendant in *Hudson*. The messages he sent to Ben could not have expressed his intent any more clearly or strongly. When he arranged to meet Ben at the restaurant and went to the restaurant at the agreed-upon meeting time, he committed sufficient acts to demonstrate that it was "unlikely that he would have voluntarily desisted from commission of the crime." *Stewart*, 143 Wis. 2d at 42.

The court's role at the preliminary hearing stage is limited to determining whether the facts and the reasonable inferences drawn from those facts support the conclusion that the defendant probably committed a felony. *See State v. Dunn*, 121 Wis. 2d 389, 397-98, 359 N.W.2d 151 (1984). The preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant. *See id.* at 398. "Simply stated, probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony." *Id.*

The evidence in this case satisfies that standard. The complaint and the record of the preliminary hearing

established probable cause not only of Robins' intent, but also of the fact that, but for the intervention of the extraneous factor that there was no child, Robins would have caused a child to enter a secluded place for purposes of having sexual contact – that Robins, like the defendant in *Koenck*, "did everything necessary to insure the commission of the crime intended." *Koenck*, at ¶28. Accordingly, the trial court properly denied Robins' motion to dismiss the complaint for lack of probable cause.

III. THE CHILD ENTICEMENT STATUTE IS CONSTITUTIONAL AS APPLIED TO THE DEFENDANT'S CONDUCT.

Relying on two recent decisions of this court, *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, and *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999), Robins asserts that the child enticement statute is unconstitutional as applied to his conduct. He argues that because his conduct consists of speech that would be constitutionally protected if directed at an adult, and because he had no face-to-face contact with his intended victim that would have allowed him to determine the victim's age, the enticement statute may not be constitutionally applied to his conduct because the state does not have to prove his knowledge of his intended victim's age. *See* Robins' brief at 6-15.

Weidner and *Zarnke* both involved as-applied constitutional challenges to chapter 948 crimes in which the defendant had no face-to-face contact with the child victim. In *Weidner*, the defendant was charged with violating Wis. Stat. § 948.11, which prohibits exposing a child to harmful material, after he sent sexually explicit photographs over the Internet to a sixteen-year-old girl whom he had never met. *See Weidner*, 235 Wis. 2d at 310-11. The court held that the statute was

unconstitutional in the context of the Internet and other situations that do not involve face-to-face contact between the minor and the defendant because the state was not required to prove that the defendant knew the victim's age. *See id.* at 310.

The court characterized Wis. Stat. § 948.11 as a "variable obscenity statute" that prohibits a person from exhibiting to children materials that are deemed obscene when shown to minors but not obscene when shown to adults. *See id.* at 313. Thus, the age of the recipient is the critical element that separates illegal conduct from legal, constitutionally protected conduct. To avoid "significant constitutional dilemmas," the court held that under *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), "some form of scienter must be implied in a statute imposing criminal liability based on age." *Weidner,* 235 Wis. 2d. at 314. While the statute at issue included a scienter element as to the nature of the materials deemed harmful to children, the court noted, it did not contain a scienter element with regard to the age of the victim; instead, it provided an affirmative defense that the defendant reasonably believed the victim was an adult. *See id.* at 313-14.

The court acknowledged that *X-Citement Video* had recognized a potential exception to the scienter requirement when there has been a personal, face-to-face meeting between the defendant and the victim that gives the defendant the ability to ascertain the age of the victim. *See id.* at 315-19. However, the court found that persons sending sexually explicit materials over the Internet were not sufficiently able to determine the age of the recipient of those materials. *See id.* at 319-21. The court concluded, therefore, that by requiring an Internet user "to prove lack of knowledge regarding the age of the person exposed to material deemed harmful to a child, the statute effectively chills protected internet communication to adults." *Id.* at 32.

Weidner relied on this court's earlier opinion in *Zarnke*, in which the court held that the child sexual exploitation statute, Wis. Stat. § 948.05, was unconstitutional as applied to distributors of child pornography. Like the statute at issue in *Weidner*, the age of the child-victim is what distinguished illegal conduct from legal, constitutionally protected conduct in *Zarnke*, because non-obscene, sexually explicit materials involving adults are protected by the First Amendment. *See Zarnke*, 224 Wis. 2d at 131. Also like the statute at issue in *Weidner*, the sexual exploitation statute did not require the state to prove a defendant's knowledge of the age of the minor depicted in the child pornography, but instead provided an affirmative defense similar to that provided in the exhibiting harmful materials statute. *See id.* at 122.

The *Zarnke* court concluded that it was a "practical impossibility" for a distributor of sexually explicit material, who might be many steps removed from the production of that material, to prove the affirmative defense. *See id.* at 126, 132. Thus, the court held, the statute effectively imposed strict liability on distributors and impermissibly infringed on their First Amendment rights. *See id.* Consequently, the *Zarnke* court invalidated the statute as applied to distributors of child pornography because it did not require the state to prove the essential element of scienter when the accused's conduct did not entail a "personal meeting" with the minor depicted in the pornographic material. *See id.* at 133.

Robins contends that the child enticement statute suffers from the same constitutional infirmity when applied to his conduct, which also involved no personal meetings with his intended victim. There is a crucial distinction, however, between the attempted child enticement statute at issue in this case and the statutes at issue in *Weidner* and *Zarnke*. In cases of attempted enticement in which the defendant has not had a personal meeting with the intended victim, it does not matter whether the intended victim is actually a minor. Rather,

what matters is whether the defendant intended to cause a child to enter a prohibited place, such as a vehicle or a room, for a prohibited purpose. *See Koenck*, at ¶¶22-28.

Unlike the statutes at issue in *Weidner* and *Zarnke*, therefore, in a case of attempted child enticement the actual age of the person with whom the defendant is communicating over the Internet is *not* the fact that distinguishes lawful conduct from unlawful conduct. As explained in section I of this brief, an individual may be liable for attempted enticement when the intended victim is an adult posing as a child as well as when the intended victim is a child who truthfully discloses his or her age. Conversely, an individual who, while communicating over the Internet with a child who represents himself or herself to be an adult, arranges a meeting for the purpose of engaging in sexual activity and travels to the agreed-upon meeting place, has committed no offense (assuming that he desists after meeting the child), because he lacked intent to cause a child to enter a prohibit place for a prohibited purpose. The critical fact in this type of attempted enticement case is not the actual age of the unseen person at the other end of the Internet communication but the stated age of that person, for it is the stated age that determines the defendant's intent.

Accordingly, to the extent that the state is constitutionally required to prove scienter in cases of attempted enticement involving an intended victim with whom the defendant has had no face-to-face contact, scienter is established by the requirement that the state prove the defendant's intent. To prove that the defendant intended to cause a child to enter a prohibited place for a prohibited purpose, the state necessarily will have to prove the defendant's knowledge of the victim's stated age. *See United States v. Kufrovich*, 997 F. Supp. 246, 256 (D. Conn. 1997) ("In order to have the purpose to engage in a sexual act with a minor, a person must know that the object of the plan is indeed a minor."). To prove that Robins intended to cause a child to enter a vehicle, building or room for the purpose of engaging in sexual

contact, the state will have to prove that Robins knew that Ben purported to be thirteen years old. That is the scienter element that Robins claims is missing from this case.

This case differs from *Weidner* and *Zarnke* in another important way. The statutes at issue in those cases directly regulate speech and expressive conduct – displaying sexually explicit materials to another person (*Weidner*) and distributing sexually explicit materials (*Zarnke*). The child enticement statute, in contrast, regulates non-protected behavior – causing or attempting to cause a child to go to a secluded place to facilitate some illegal conduct. *See Koenck*, at ¶9. The child enticement statute does not regulate the content of speech, but simply criminalizes conduct that incidentally involves speech. *See Kufrovich*, 997 F. Supp. at 254 (rejecting First Amendment challenge to federal charges of using the Internet to persuade a minor to engage in a sexual act and traveling in interstate commerce for the purpose of engaging in a sexual act with a minor); *United States v. Powell*, 1 F. Supp. 2d. 1419, 1422 (N.D. Ala. 1998), *aff'd*, 177 F.3d 982 (11th Cir. 1999) (rejecting First Amendment challenge to federal charge of using the Internet to persuade a minor to engage in a sexual act; also rejecting impossibility defense). As the Sixth Circuit explained when it rejected a First Amendment challenge to a charge of using the Internet to persuade a minor to engage in an illegal sexual act:

> The statute only applies to those who "knowingly" persuade or entice, or attempt to persuade or entice, minors. Thus, it only affects those who intend to target minors: it does not punish those who inadvertently speak with minors or who, as in *Reno* [*v. American Civil Liberties Union*, 521 U.S. 844 (1997)], post messages for all internet users, either adults or children, to seek out and read at their discretion. Any limited or incidental effect on speech does not infringe on any constitutionally protected rights of adults. Put another way, Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sexual acts.

United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1737 (2001).

The same rationale applies here. Under *Koenck*, in cases that do not involve a face-to-face meeting with the intended victim, the state must prove that the defendant intended to entice a child; that, in turn, requires proof that the defendant knew that he was communicating with someone who claimed to be a child. Thus, contrary to Robins' contention, an adult using the Internet to arrange a sexual liaison does not "risk[] [a] violation of the statute if it turns out that the person on the other end of the Internet conversation is a minor." Robins' brief at 10.[5] The statute can be applied to attempts to entice over the Internet (or in other circumstances not involving face-to-face contact) only when the defendant knows that he is communicating with – and attempting to entice – someone he believes to be a child. Individuals do not have a First Amendment right to attempt to cause a child to go to a secluded place to facilitate their commission of an illegal act.

Robins is not, as he contends, being charged "solely as a result of sexually-charged communications." Robins' brief at 13. He did not stop with his "sexually charged communications" with Ben; rather, he traveled to the agreed-upon meeting place where, it can reasonably be inferred, he would have taken Ben in his vehicle to a motel room to engage in illegal sexual contact. Robins' communications with Ben are, to be sure, evidence of his unlawful intent, but the First Amendment does not preclude the use of Robins' communications as evidence of his intent. *See Dressler v. McCaughtry*, 238 F.3d 908, 915 (7th Cir. 2001).

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[5]Robins does not contend, nor could he, that he unwittingly violated the law because it "turned out" that he was conversing with someone whom he did not know was a minor. When Ben told Robins that he was nervous about meeting, Robins responded, "ok I understand well I am a little to[o] this isn't legal you know" (31:Exhibit 1, p. 4).

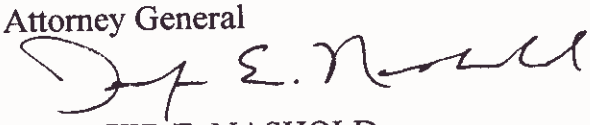
Because the child enticement statute does not directly regulate protected expression, but prohibits the act of causing or attempting to cause a child to enter a secluded place to facilitate illegal conduct, the scienter requirement of *Weidner* and *Zarnke* does not apply in this case. Even if the state were constitutionally required to prove scienter, however, that requirement is satisfied in this case because the state must prove Robins' knowledge of the victim's purported age in order to prove that Robins was attempting to entice a child. Accordingly, the court should reject Robins' contention that the child enticement statute cannot be constitutionally applied to his conduct.

CONCLUSION

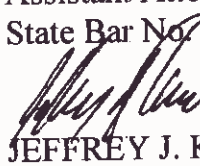
For the reasons stated above, the court should affirm the trial court's orders denying the defendant's motion to dismiss the child enticement charge and remand for further proceedings on that charge.

Dated this 19th day of November, 2001.

JAMES E. DOYLE
Attorney General



JENNIFER E. NASHOLD
Assistant Attorney General
State Bar No. 1023575



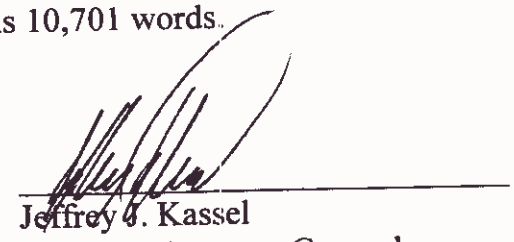
JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,701 words.



Jeffrey J. Kassel
Assistant Attorney General

Office of the Clerk
SUPREME COURT
110 E. MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.courts.state.wi.us

September 12, 2001

To:

Hon. Michael W. Gage
Outagamie County Courthouse
320 S. Walnut Street
Appleton, WI 54911

Ruth H. Janssen
Outagamie County Clerk of Courts
320 S. Walnut Street
Appleton, WI 54911

Jeffrey J. Kassel
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Vincent R. Biskupic
Outagamie County District Attorney
320 S. Walnut Street
Appleton, WI 54911-5990

Craig Albee
Glynn, Fitzgerald & Albee, SC
222 East Mason Street
Milwaukee, WI 53202-3668

You are hereby notified that the Court has entered the following order:

No. 00-2841-CR State v. Robins L.C. #00CF53

A joint motion to establish briefing schedule having been filed on behalf of defendant-appellant, Brian D. Robins, and plaintiff-respondent, State of Wisconsin;

IT IS ORDERED that the motion is granted. The parties may file new briefs in this court that fully address the court of appeals' decisions in State v. Koenck 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359 and State v. Kordas, 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995) as well as all issues raised by defendant-appellant on appeal. The briefing schedule shall be as follows: Within 30 days after the date of this order the defendant-appellant shall file his brief; within 20 days thereafter the plaintiff-respondent must file its brief; within 10 days thereafter the defendant-appellant must file either a reply brief or a statement that no reply brief will be filed.

Cornelia G. Clark
Clerk of Supreme Court

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

Appeal From The Non-Final Orders Entered In
The Circuit Court For Outagamie County,
The Honorable Michael W. Gage, Circuit Judge, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

CRAIG W. ALBEE
State Bar No. 1015752
GLYNN, FITZGERALD & ALBEE, S.C.
526 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4503

Counsel for Defendant-Appellant

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

I.

ROBINS' ALLEGED ENTICEMENT OF AN ADULT POSING AS A CHILD IS NOT A CRIME BECAUSE THE LEGISLATURE HAS DETERMINED THAT KNOWLEDGE REGARDING THE AGE OF THE ALLEGED VICTIM IS IRRELEVANT IN CHILD SEXUAL ABUSE PROSECUTIONS.

By constitutional fiat and by statute, the legislature has the exclusive authority to declare what conduct is criminal. No matter how repugnant a prosecutor, a court, or the public finds a person's conduct,

criminal sanctions may not be imposed if the conduct does not violate a previously enacted penal statute. Robins cannot be prosecuted under the facts alleged here because his conduct was directed at an adult, rather than a child, and the child enticement statute does not prohibit such conduct. While the legislature is free to enact a statute criminalizing overtures directed at an adult posing as a child, to date it has not. Under current Wisconsin law, the accuser's belief as to the victim's age is irrelevant and therefore Robins' alleged actions were not criminal.

The state's interpretation impermissibly treads on the legislature's authority by creating an entirely new offense containing an element of knowledge that the legislature intentionally omitted. While the state protests that its interpretation does not rewrite the statute, it concedes that at trial it would have to prove a new element – "that the defendant reasonably believed that his intended victim was a child." Plaintiff-Respondent's Brief at 7. Moreover, the prosecution acknowledges it "necessarily will have to prove the defendant's knowledge of the victim's *stated age*." *Id.* at 32.

These manufactured elements are nowhere to be found in Wis. Stat. §948.07. The result desired by the state can be achieved only

by rewriting the statute. One consequence of the state's interpretation is that the state would have to prove knowledge even when the victim actually is a child – a result clearly in conflict with legislative intent. The state's interpretation thus ultimately may offer children less protection because offenders may claim they did not know the victim was underage. *See* Plaintiff-Respondent's Brief at 32 (concluding that a person who arranges a sexual meeting with a child who represents himself as an adult over the Internet cannot be prosecuted because there is no intent to cause a child to enter a prohibited place for a prohibited purpose).

Further, the state's interpretation is contrary to *State v. Smith*, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), which recognized that criminal liability turns on whether in fact the victim was underage. While the state complains that *Smith* did not specifically discuss liability for attempted enticement, this Court did not need to do so because a child enticement charge includes both completed and attempted acts of enticement. *See State v. DeRango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. The fact that this Court failed to make the distinction desired by the state demonstrates not that it overlooked

the proffered distinction, but that the "attempt-completed" distinction had no effect on the Court's conclusion regarding impossibility.

The state's argument also fails because it requires the Court to rewrite the law of attempt in this state. The age of the victim is a strict liability element under the statute that requires no knowledge or intent on the part of the accused.[1] Therefore, an attempt allegation cannot be predicated on this element. Attempted strict liability offenses are impermissible because they engraft a new element not required for the commission of the completed crime.

The state relies on *State v. Kordas*, 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995), but ignores the critical distinction between the type of attempt alleged in that case and here. Under the receiving stolen property statute, which is not a strict liability offense, the state has to prove that the accused knew or believed the property received was stolen whether he is charged with the completed offense or an attempt. No new mental element has to be read into the statute

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[1] It is irrelevant that child enticement is not a strict liability offense with respect to elements other than the age of the victim. *See* Plaintiff-Respondent's Brief at 12 n.3. The attempt alleged against Robins relates to the strict liability element. *See People v. Campbell*, 72 N.Y.2d 602, 532 N.E.2d 86, 88-89 (1988) (holding that attempt could not be charged as to the strict liability element of the crime of causing injury to an officer while intending to prevent him from performing his lawful duty).

because the completed offense requires proof of knowledge. By contrast, as charged here, attempted child enticement requires proof of an element missing entirely from the completed offense.[2]

This case also differs from *Kordas* in that it alleges an attempt to attempt a crime. Kordas completed all acts and satisfied all elements necessary to the completed crime of receiving stolen property save one, whereas Robins' acts were insufficient on two fronts. When multiple attempts or attempts to attempt a crime must be alleged, the conduct simply is too attenuated from a completed crime to warrant the imposition of criminal liability. The law does not recognize attempts to attempt because of the risk that criminal liability will be imposed based on the person's thoughts rather than his deeds. Wisconsin should continue to disallow attempt charges where the accused was two steps removed from completing the crime, rather than one as contemplated by the statute.

The state cites cases from other jurisdictions that superficially support its position that Robins may be convicted for acts

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[2] Contrary to the state's suggestion, this case does involve legal impossibility. If Robins had enticed Fassbender into a room as contemplated, no crime legally would have been committed. While Robins prevails if this Court recognizes legal impossibility as a defense, the remainder of his arguments are not dependent on the recognition of that defense.

directed at an adult posing as a child. Robins never has disputed that a statute could be constitutionally drafted to allow such a result and perhaps these other jurisdictions have done so, but Wisconsin has not. Robins' arguments are based on Wisconsin law and, in particular, the legislature's clear directive that the accused's knowledge and belief as to age are not to be considered in determining criminal liability. The cases cited by the state do not consider many of the arguments raised by Robins such as whether an attempt is proper with respect to strict liability elements of a crime and whether to recognize attempts to attempt a crime. Finally, regardless of the actions of these others courts, Robins asks this Court to follow the rule of law and to abstain from treading on the legislature's exclusive authority to declare what conduct is criminal.

This Court is not bound by *State v. Koenck*, 2001 WI App. 93, 242 Wis. 2d 693, 626 N.W.2d 359, and it certainly should not be persuaded by it. The majority of Robins' arguments were not developed by the defendant in *Koenck* and were not addressed by the Court of Appeals in its decision. For the reasons set forth above and in Robins' opening brief, the child enticement statute, as written, requires

proof that the victim actually was a child. Accordingly, the charge against Robins must be dismissed.

II.

THE CHILD ENTICEMENT STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE INTERNET BECAUSE IT DOES NOT REQUIRE PROOF THAT THE ACCUSED KNEW THE CHILD WAS A MINOR.

The state acknowledges that the child enticement statute, like the statutes at issue in *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, and *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999), does not require proof that the defendant knew the victim was a minor. The state even asserts that it would be impermissible to prosecute a person for child enticement or attempted child enticement if his communications over the Internet were to a child who represents himself as an adult (though the statute on its face does not bar such a prosecution). Plaintiff-Respondent's Brief at 32. The state claims, however, that this case is distinguishable from *Weidner* and *Zarnke* because the state has alleged an attempt and attempts require proof that the defendant intended to commit the crime. This intent supplies the critical element of scienter that is missing from the completed crime, according to the state.

The constitutional problem is not cured merely by alleging an attempt. If knowledge is not a required element of the completed crime, then it also is not an element of the attempt. An attempt requires proof that the defendant intended to commit the crime charged, and that he had the requisite *mens rea* necessary for conviction of the completed crime, but it does not alter the *mens rea*.

An unconstitutional penal statute that fails to include a element of scienter cannot be resurrected simply by alleging an attempt and reading in elements that never were enacted by the legislature. Otherwise, the state frequently could allege an attempt to save an unconstitutional statute. In *Weidner*, for example, the defendant was alleged to have distributed sexually explicit photos over the Internet to a girl who told the defendant she was seventeen. Under the state's theory, the state could charge Weidner with attempting to distribute harmful materials to a child because the attempt allegation would supply the essential scienter element lacking in the completed crime.

The state has provided no authority whatsoever supporting this novel method for preserving unconstitutional statutes. "'An unconstitutional law is void, and is as no law.'" *G. Heileman Brewing Co., Inc. v. City of LaCrosse*, 105 Wis. 2d 152, 312 N.W.2d 875, 880

(Ct. App. 1981) (quoting *Ex Parte Siebold*, 100 U.S. 371, 376 (1879)). If a criminal statute is void because it is constitutionally defective, it follows that an attempt to violate the same statute also is void.

The state's interpretation of the statute also leads to absurd results. The state asserts that an individual communicating over the Internet with a child "who represents himself or herself to be an adult, arranges a meeting for the purpose of engaging in sexual activity and travels to the agreed-upon meeting place, has committed no offense (assuming that he desists after meeting the child). . . ." Plaintiff-Respondent's Brief at 32. Thus, according to the state, the crime of attempted child enticement has a shifting *mens rea* in the Internet context. Initially, during the Internet conversations, the statute requires proof that the defendant knew the child's stated age and therefore mistake is a defense if a child misrepresented himself as an adult. However, at some point after the defendant meets the child, strict liability applies for continuing to entice the child no matter how reasonable his belief that the victim is an adult. The state does not identify any statutory or legislative support for this creative recrafting of the statute. Nor does the state identify the precise point at which the *mens rea* shifts to strict liability. This construction leads to the absurd

result that despite the legislature's expressed intent that child enticement is a strict liability offense with respect to the age of the victim, the statute applies to adults posing as children, but not to actual children who are silent about their age.

The state's second argument, that the child enticement statute does not even implicate the First Amendment, also is without merit. First, the state fails to appreciate that Robins' challenge is to the statute *as applied* to his conduct. While in some cases the statute may only incidentally impact the right of free speech, here Robins' alleged acts of child enticement all constituted speech. Robins' conduct in driving alone from Wauwatosa to Little Chute arguably provided Robins with an opportunity to commit child enticement, but the drive itself did not entice the alleged victim. It was only Robins' Internet messages that were directed at encouraging the alleged victim to enter a particular place for a particular unlawful purpose. Thus, in this instance the statute does directly impact protected expression, just as in *Weidner* and *Zarnke*.

Second, Robins is not claiming that he has a First Amendment right to use speech to entice minors, as the state misleadingly suggests. Rather, Robins argues that this statute is unconstitutional as

applied to his conduct because it does not require proof that he knew the person receiving the communications was a child. Under Wis. Stat. §948.07, "[k]nowledge of [the victim's] age by the defendant is not required and mistake regarding [the victim's] age is not a defense." Wis. JI-Criminal 2134 (1998). The federal cases cited by the state, such as *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1737 (2001), are inapposite because the federal statutes specifically require proof that the defendant "knowingly" persuaded or enticed or attempted to persuade or entice a minor. Because proof of knowledge is not required by Wisconsin's child enticement statute, the state cannot meet its burden of proving beyond a reasonable doubt that the statute is constitutional as applied to anonymous Internet communications. *E.g.*, *Zarnke*, 589 N.W.2d at 373.

III.

THE EVIDENCE PRESENTED IN THE COMPLAINT AND AT THE PRELIMINARY HEARING FAILED TO ESTABLISH PROBABLE CAUSE THAT ROBINS "ATTEMPTED TO CAUSE" ANYONE TO ENTER A ROOM OR OTHER DESIGNATED PLACE.

According to the state, *Koenck* holds that the complaint there "'demonstrate[d] unequivocally that it was improbable the accused would desist of his or her own free will.'" Plaintiff-Respondent's Brief

at 7. It does not. The sole issue in *Koenck* was whether the state must prove that the victim was a minor. *Koenck*, at ¶7. Any remarks in *Koenck* regarding the sufficiency of the evidence are mere dicta.

The state also is flat wrong in its claim that the "stop the film" test set forth in *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639 (1979), only applies when the defendant has not stated his intention. Plaintiff-Respondent's Brief at 11. To prove an attempt, the state must establish: (1) an intent to commit the crime charged; and (2) sufficient acts in furtherance of the criminal intent to demonstrate unequivocally that the actor formed that intent and would commit the crime. Wis. Stat. §939.32; *Hamiel*, 285 N.W.2d at 645. Robins' post-arrest statements regarding his intent plainly establish probable cause for the intent element and may be used for that purpose. However, in making the separate determination as to whether his acts went far enough to constitute an attempt, only the acts themselves are examined without considering post-arrest statements about intent. Professors LaFave and Scott have recognized that under the "equivocality theory" underlying Wisconsin's attempt statute post-arrest statements may not be used to determine whether an attempt has been committed. 2 Wayne R. LaFave and Austin W. Scott, Jr., SUBSTANTIVE CRIMINAL LAW §6.2(3) 36

(1986) ("Statements of intent made prior to equivocal acts or a confession of intent made subsequent thereto give no assurance of that firmness of purpose which manifests the actor's dangerousness").

Hamiel demands that post-arrest statements about intent not be considered because the second element requires that the acts themselves demonstrate unequivocally that the accused would commit the crime. The inquiries regarding intent and conduct are distinct because there is an incubation period during which the defendant may have the requisite intent, but has not committed sufficient acts to commit an attempt. *See State v. Stewart*, 143 Wis. 2d 28, 420 N.W.2d 44, 51 (1988). The purpose of the "stop the film" test is to determine whether the defendant's conduct went so far that it was too late for him to have repented and withdrawn. *Id.*, 420 N.W.2d at 49-50.

The state's argument appears to be that evidence is sufficient if it appears likely that the defendant will attempt enticement, even when, as here, he has not already done so. But, the issue is not whether he likely would have *attempted* to cause "Benjm13" to enter a room for sex, but whether his acts show unequivocally that he would have *succeeded* but for some extraneous factor. It is not enough, as the state sought to establish here, that the defendant attempted to attempt a

crime. *E.g.*, *State v. DeRango*, 229 Wis. 2d 1, 599 N.W.2d 27, 41 Ct. App. 1999, *aff'd.* 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833.

In Robins' case it was not too late for him to repent and withdraw from his intended liaison with the fictitious child. The conscience may be at its strongest in those final moments before a person takes the last necessary steps to attempt a crime. Robins may have desisted upon realizing the seriousness of the situation upon meeting in a public place. Going to a secluded room remained merely a contingent possibility at the time of arrest. Further action would have been required on his part after meeting "Benjm13" in order to remove these contingencies sufficiently for his actions to constitute an attempt. While Robins' intent was established, his acts did not go beyond the "mere preparation" or incubation stage. Accordingly, under Wisconsin attempt law, including most recently *State v. Henthorn*, 218 Wis. 2d 526, 581 N.W. 544 (Ct. App. 1998), the state failed to establish probable cause that Robins engaged in attempted child enticement.

CONCLUSION

For the reasons stated above, this Court should reverse the orders of the trial court and order the child enticement charge against Mr. Robins dismissed.

Dated at Milwaukee, Wisconsin, December 14, 2001.

Respectfully submitted,

BRIAN D. ROBINS, Defendant-Appellant

GLYNN, FITZGERALD & ALBEE, S.C.

Craig W. Albee
State Bar No. 1015752

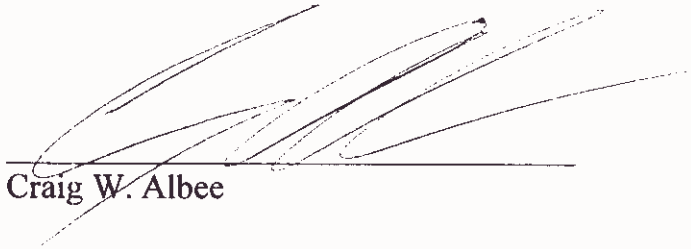
P.O. ADDRESS:

526 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone: 414-221-9600
Facsimile: 414-221-0600

ReplyBr.rpb

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the includable portions of this reply brief is 2,883 words.



Craig W. Albee

00-2841

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

Appeal From The Non-Final Orders Entered In
The Circuit Court For Outagamie County,
The Honorable Michael W. Gage, Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CRAIG W. ALBEE
State Bar No. 1015752
GLYNN, FITZGERALD & ALBEE, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 221-9600

Counsel for Defendant-Appellant

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STATEMENT OF ISSUES

1. Whether the child enticement statute is unconstitutional as applied to Internet communications where there was no face-to-face contact between the accused and the alleged child, in light of *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, which found the exposing children to harmful materials statute unconstitutional as applied to the Internet context because it chills the First Amendment rights of adults, who have no effective means of verifying the identity and age of the persons receiving their Internet communications.

The circuit court held that Wis. Stat. §948.07 is not unconstitutional as applied.

2. Whether the child enticement statute is violated by an attempted enticement of an adult whom the defendant believes is a child, given that the statute on its face requires proof of the "victim's" minority and the legislature's determination that a defendant's belief as to the "child's" age is irrelevant in prosecutions for child enticement.

The circuit court denied Robins' motion to dismiss on this ground.

3. Whether Robins' alleged conduct in setting up a sexual

liaison over the Internet with a person he believed to be a child and driving to the intended meeting point "demonstrate[s] unequivocally" that he would have committed the crime of child enticement, as is required to prove attempt.

The circuit court denied Robins' motion to dismiss on this ground.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication is appropriate under Wis. Stat. (Rule) 809.23. The issues presented are recurring with frequency as law enforcement agencies and courts struggle with the application of out-dated statutes to new computer technology. The Court's opinion will decide a case of substantial and continuing public interest, and likely enunciate a new rule of law. Wis. Stat. §809.23(1)(a)1. & 5.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Brian D. Robins appeals from the non-final orders entered October 2, 2000, in the Circuit Court for Outagamie County, the Honorable Michael W. Gage, presiding, in which the court denied Robins' pretrial motions to dismiss (R28; R38; App. 1-2).[1] This

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[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page (continued...)

appeal is filed pursuant to Wis. Stat. §808.03(2) and Wis. Stat. (Rule) 809.50.

STATEMENT OF THE CASE

By criminal complaint filed on February 8, 2000, the state charged Brian Robins with one count of child enticement, contrary to Wis. Stat. §948.07(1) (R3). Following Robins' bindover at the preliminary hearing on March 31, 2000, the state filed an Information charging Robins with the single count of child enticement as well as five counts of attempting to transfer harmful materials to a child (R6). These five counts later were dismissed by the trial court and are not at issue in this appeal. The material facts, for purposes of review of the issues raised, are disclosed in the criminal complaint and the preliminary hearing record.

From January 31 through February 5, 2000, Agent Thomas Fassbender of the Wisconsin Department of Justice, Division of Criminal Investigation, had a series of Internet Instant Message conversations on the Wisconsin M4M chat room with a person using

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[1](...continued)
number of the document. Where the referenced material is contained in the Appendix, it will be further referenced by Appendix page number as App. __.

the screen name "Wi4Kink."[2] During these conversations Fassbender used the screen name "Benjm13" and represented himself as a thirteen-year-old boy (R32:7, 9). Benjm13 and Wi4Kink had several sexually oriented communications in which they discussed oral sex, past sexual experiences, masturbation, ejaculation, and penis size (R32:9-17). Wi4Kink also transmitted sexually explicit photos to Benjm13 (R32:18-20).

Ultimately, Wi4Kink suggested that the two get a motel room together the following weekend to engage in sexual conduct (R32:13-14). Wi4Kink acknowledged that he knew that what was occurring was not legal (R32:15-16). Following that conversation, there were additional Internet communications in which Fassbender suggested meeting at a Burger King in Little Chute, which is where Benjm13 said he lived (R32:21-22). On the morning of February 5, final arrangements for the meeting at Burger King were made during a telephone conversation (R32:26, 43-44). Another officer, Officer Ray Lee, posed as Benjm13 for this telephone conversation (R32:43).

Having determined through America On Line that the

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[2] "Wisconsin M4M" means Wisconsin male-for-male or Wisconsin men-for-men (R32:33). Fassbender claimed that he did not target the chat room for any particular reason and he acknowledged that he had no reason to believe the communications in this chat room related to children (R32:33-34).

screen name Wi4Kink was assigned to Brian Robins, the police set up surveillance at his Wauwatosa home on February 5 (R3).[3] Shortly after the telephone conversation with Lee, officers observed Robins drive from his home to the Burger King in Little Chute (R3). When Robins exited his car and began walking toward the restaurant, he was arrested by Fassbender (R32:29-30). Following his arrest, Robins admitted that he had been the person communicating on the Internet with Benjm13, that he did drive to the Burger King to meet Ben, that Ben had told him he was thirteen, and that his intent was to have sexual contact with Ben (R32:29-30; Exhibit 11).

Fassbender testified at the preliminary hearing that he was the person using the screen name Benjm13 and that he was actually forty-two years old (R32:31). To Fassbender's knowledge, neither Mr. Robins nor Wi4Kink had any sexually explicit conversations with anyone who was under the age of sixteen at any time during the course of the investigation (R32:31). Fassbender agreed that it is not uncommon for people to make misrepresentations regarding age on the Internet and that people frequently present themselves as

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[3] There was no testimony at the preliminary hearing concerning police surveillance, but Robins' written statement (Exhibit 11) indicated that he was from Wauwatosa as did his chat room conversations with Benjm13.

something they are not on the Internet (R32:48).

Based on these facts, Robins was bound over for trial (R32:52-53). Robins filed written motions challenging the criminal complaint, the evidence in support of bindover,[4] and the constitutionality of Wis. Stat. §948.07 (R4; R10; R17; R25; R32:4). On September 8, 2000, Judge Gage issued a written decision and order on the motion challenging the constitutionality of the child enticement statute (R27; App. 3-10), but he vacated the order on September 15, 2000, so that Robins could seek interlocutory review from the denial of all the motions at the same time (R34:5-6). On October 2, the court filed written orders denying all three of Robins' motions (R28; R38; App. 1-2). Judge Gage did not explain the basis for denying the motions challenging the complaint and the bindover. His decision finding Wis. Stat. §948.07 constitutional is contained in the Appendix and summarized in the argument below.

This Court granted Robins' petition for leave to appeal Judge Gage's non-final orders (R29). Trial court proceedings have been stayed while Robins pursues this appeal.

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[4] The facts set forth in the complaint are not materially different from the facts testified to by Fassbender at the preliminary hearing. The challenges to the sufficiency of the complaint and to the sufficiency of the evidence for bindover rely on the same arguments.

ARGUMENT

I.

THE CHILD ENTICEMENT STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE INTERNET BECAUSE IT DOES NOT REQUIRE PROOF THAT THE ACCUSED KNEW THE CHILD WAS A MINOR.

In *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, the state charged Weidner with violating Wis. Stat. §948.11, which prohibits the dissemination of harmful materials to minors, for sending sexually explicit and nude photos over the Internet to a sixteen-year-old girl who had informed Weidner that she was under eighteen. Weidner never communicated with the girl except through the Internet and they did not have any face-to-face contact. The circuit court dismissed the case, finding that the statute unconstitutionally failed to require the state to prove the defendant's knowledge of the victim's minority status.

The Wisconsin Supreme Court agreed, finding the harmful to minors statute unconstitutional as applied to the Internet and other situations where there is no face-to-face contact between the defendant and the child. *Weidner* explained that,

> Because age represents the critical element separating illegal conduct from that which remains protected, to avert significant constitutional

> dilemmas some form of scienter must be implied in a statute imposing criminal liability based on age ... Indeed, scienter constitutes the rule in our criminal jurisprudence and is generally presumed even absent express statutory reference.

Weidner, 2000 WI 52, ¶11.

The court rejected the state's claim that the statute passed constitutional muster because it contained an affirmative defense that allowed the defendant to escape criminal liability by proving that he had reasonable cause to believe the victim was 18 or older and had taken steps to verify the victim's age. *Weidner* emphasized that the *state* must bear the burden of proving scienter in order for the statute to be constitutionally valid. *Weidner*, 2000 WI 52, ¶¶33, 39. The court also stressed the difficulties of verifying age over the Internet in finding the statute unconstitutional:

> The holding in *Zarnke* was premised on the inability of distributors of child pornography to ascertain reliably and conveniently the age of child victims. We believe the same holds true for persons using the internet to distribute materials deemed harmful to minors.
>
> * * *
>
> The internet provides no effective means to gauge the identity and age of persons who access material through use of this continuously evolving technology... . Participants in chat rooms often assume pseudonyms and do not divulge truthful personal data. Requiring the

> transmission of documentation constitutes an encroachment into the personal lives of those who use the Internet precisely because it affords anonymity.
>
> * * *
>
> The state's proposal that those recipients send proof of age via regular mail also fails to recognize that the delay adversely affects the dissemination of ideas and images that enjoy First Amendment protection. Moreover, sending documents via internet or mail does not obviate the uncertainty as to whether the documentation corresponds to the recipient's personal data. The lack of face-to-face interaction, which impairs the ability to ascertain reliably the age of the recipient, effectively serves to chill speech.

Weidner, 2000 WI 52, ¶¶27-31.

The court's decision in *Weidner* logically flowed from *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999), in which the court held that Wis. Stat. §948.05, prohibiting the sexual exploitation of a child, unconstitutionally failed to require the state to prove that a distributor of sexually explicit materials had knowledge of the minority of the person depicted in the materials. *Id.*, 589 N.W.2d at 371-72. The court held that, as a constitutional matter, the legislature may not define a statute in which the defendant's knowledge of minority is not an element of the offense where there is no personal meeting between the accused and the child victim. *Id.*

at 374-376. *Zarnke* recognized that strict liability regarding minority status would inhibit the freedom of expression by making persons more reluctant to use it, noting that "'[t]he opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor or receiver.'" *Id.* at 376 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994)).

The constitutionality of a statute is a question of law that this Court reviews *de novo*. *E.g., Zarnke*, 589 N.W.2d at 373. While in most cases the party challenging the constitutionality of a statute bears the burden of proving its unconstitutionality, where, as here, the statute implicates First Amendment rights, the state must prove beyond a reasonable doubt that the statute is constitutional. *Id.*

Section 948.07, Wis. Stats.,[5] the child enticement statute, as applied here, suffers from the same constitutional defect as the

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[5] **948.07 Child Enticement** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

* * *

statutes at issue in *Weidner* and *Zarnke*. Under Wis. Stat. §948.07, "[k]nowledge of [the victim's] age by the defendant is not required and mistake regarding [the victim's] age is not a defense." Wis. JI-Criminal 2134 (1998). *Weidner* and *Zarnke* make clear that knowledge as to minority must be proven where there is no personal meeting between the accused and the child such as where all communication takes place over the Internet.

Notably, the conduct that forms the basis for the enticement claim in this case, that Robins had sexually explicit Internet communications with a person he never met and made arrangements to meet that person to have sexual contact, is lawful, constitutionally protected communication if it takes place between adults. The constitutional problem is that Wis. Stat. §948.07, like §§948.11 and 948.05, does not require the state to prove that the defendant knew that the person he was communicating with was a child and in situations where there is no personal meeting between the two, such as over the Internet, there is no way to effectively verify the age and the identity of the other person. Thus, the child enticement statute impermissibly forces adults to choose between not exercising their First Amendment rights or risking an unknowing violation of the statute if it turns out that the person on the other end of the Internet

conversation is a minor.

While in the usual case it is reasonable and constitutional to place the burden on the defendant of ascertaining the other person's age before engaging in sexual contact or before causing or attempting to cause the person to enter a room with the intent of having sexual contact, that rationale does not hold true when there is no personal meeting between the parties. *See X-Citement Video*, 513 U.S. at 72 n.2; *State v. Kevin L.C.*, 216 Wis. 2d 166, 576 N.W.2d 62, 72 (Ct. App. 1997). Absent face-to-face contact, the statute simply goes too far by forcing persons to act at their own peril when they choose to use the Internet for arranging consensual sexual encounters.

Judge Gage found, however, that Wis. Stat. §948.07 is constitutional, even as applied, for two reasons. First, the court concluded that the statute did not implicate the First Amendment because it regulates conduct, rather than speech. Second, the court held that *Weidner* and *Zarnke* are distinguishable because in those cases there was an affirmative defense which shifted the burden to the defendant to prove lack of knowledge, whereas under the child enticement statute there is no affirmative defense. Neither of the circuit court's points rationally supports its finding.

Judge Gage found that the First Amendment was clearly

implicated in *Zarnke* and *Weidner* because "speech or expression constitutes the crime in itself in §§948.05 and 948.11(2)." R27:6. The same is true under the child enticement statute as applied to Robins, however, because his alleged actions all were expressive in nature. The state's theory in this case is that Robins' "speech," his Internet communications and telephone call, constituted an attempt to commit child enticement. The focus of this "as applied" challenge is on whether Robins' alleged actions involved speech, not on whether the offense may be committed in other ways that do not implicate First Amendment concerns. In determining whether Robins' actions constitute speech or conduct, the question is "whether [Robins'] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . . ." *Spence v. Washington*, 418 U.S. 405, 409 (1974). Judge Gage erroneously considered the statute on its face rather than as applied to the specific conduct alleged against Robins.

The child enticement statute prohibits persons from causing or attempting to cause a child to enter a secluded place with the intent to have sexual contact. The causing or attempting to cause can be accomplished physically or by solicitation through speech as alleged here. The circuit court's view that the child enticement

statute regulates only conduct and not speech is demonstrably false with respect to Robins, who is being charged solely as a result of sexually-charged communications. Because Robins' alleged enticement consists only of speech that is protected if directed at an adult, the burden falls squarely on the state to prove the constitutionality of the statute as applied. As the court held in *Zarnke*:

> The First Amendment is implicated in this question because the "age of the performers is the crucial element separating legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S.Ct. 464, 130 L.Ed.2d 372. "[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment," *Id.* at 72, 115 S.Ct. 464 while nonobscene, sexually explicit materials involving persons under the age of 18 are not.

Zarnke, 589 N.W.2d at 373 n.2. Under the child enticement statute as well, age is the crucial element separating legal innocence from wrongful conduct. Robins' communications are protected if directed to an adult, but illegal if knowingly directed to a child. The statute, however, does not require proof of knowledge.

Judge Gage's second major point is based on a misunderstanding of *Weidner* and *Zarnke*. The underlying constitutional problem in those cases, as here, is that the state is not required to prove knowledge regarding the victim's minority even in situations

where there is no personal interaction between the accused and the victim. Further, in each instance, the legislature has directed expressly by statute that the lack of such knowledge is not a defense.

In *Weidner* and *Zarnke* the defendant at least had an opportunity to prove the reasonableness of his belief that the victim was an adult, but the statutes nevertheless were deemed constitutionally repugnant because the state did not have to prove knowledge. That problem is more acute under the child enticement statute, which imposes strict liability as to age, because the defendant is not even allowed to defend himself by affirmatively establishing the reasonableness of his belief that his communications were to an adult. *Compare Zarnke*, 589 N.W.2d at 376 (noting that a strict liability offense is one which affords an individual no opportunity to prove a lack of knowledge and finding that "§948.05, as it applies to distributors, is indistinguishable from a strict liability statute, since it is virtually impossible for a defendant as a distributor to meet his or her [affirmative defense]"). In either situation, the state is impermissibly relieved of its burden of proving the defendant's knowledge regarding the victim's age.

As applied to Robins' conduct, the child enticement statute is materially indistinguishable from the statutes at issue in *Weidner*

and *Zarnke* which were held unconstitutional for failing to require proof of knowledge of the victim's minority in cases where there has been no face-to-face contact. Accordingly, this Court should find the child enticement statute unconstitutional as applied to situations where there is no face-to-face contact such as over the Internet.

II.

ROBINS' ALLEGED CONDUCT IN ARRANGING A SEXUAL LIAISON WITH AN ADULT POLICE OFFICER DOES NOT CONSTITUTE CHILD ENTICEMENT.

The Information alleges that Robins did "with the intent to have sexual contact with a child, attempt to cause the child to go into a vehicle, building or room contrary to Wis. Stats. §948.07(1)." (R6). The state has not alleged a violation of the general attempt statute, Wis. Stat. §939.32. It is undisputed that Robins' only acts of enticement were directed at an adult police officer rather than a child under the age of 16.

These circumstances give rise to several significant questions about whether the statute may be applied to these facts. First, may a defendant be convicted for child enticement for acts directed at an adult given the plain language of the statute (and the jury instruction) requiring the alleged victim to be a minor. Second,

given that "attempt," as used in the statute, modifies "to cause," does a charge under §948.07 also include attempts based on the accused's erroneous belief that the person is a minor. Third, in view of the legislature's express indication that the accused's belief concerning the age of the person enticed is irrelevant, does this prosecution violate the principle that the legislature has exclusive authority to declare what conduct is criminal. Fourth, is attempt properly alleged as to a strict liability element in light of Wisconsin law that one cannot attempt to commit a crime which does not include an element of specific intent. Fifth, given that the state has charged an "attempt" based both on Robins' alleged erroneous belief that Fassbender was a child and based on his failure to succeed in getting Fassbender to enter a room, does the allegation here amount to an impermissible charge of attempting to attempt a crime. Unless the state can successfully run this entire gauntlet of issues, the child enticement charge must be dismissed for lack of jurisdiction.

A court does not have subject matter jurisdiction over a non-existent offense. *State v. Christensen*, 110 Wis. 2d 538, 542, 329 N.W.2d 382, 383 (1983). Criminal subject matter jurisdiction, conferred by law, is the power of the court to inquire into the charged crime, to apply the applicable law and to declare the

punishment. *State v. Cvorovic*, 158 Wis. 2d 630, 462 N.W.2d 897, 898 (Ct. App. 1990). Whether attempted child enticement is a prosecutable offense under the circumstances alleged here is a matter of statutory interpretation. Statutory interpretation presents a question of law which this court reviews *de novo*. *Id.*

An examination of Wis. Stat. §948.07 and its accompanying jury instruction, Wis. JI-Criminal 2134 (1998), reveals that the state must prove that "the victim had not attained the age of 16 years."[6] The instruction itself emphasizes that proof of knowledge of the victim's age is not required and that mistake as to age is not a defense. *See also* Wis. Stat. §§939.23(6) & 939.43(2). Thus, as to the age element, child enticement is a strict liability offense and the legislature has expressly provided that the defendant's belief as to the victim's age is irrelevant and may not be considered. Consequently, if the other elements are proved, child enticement is committed if the "victim" is under age sixteen regardless of the knowledge or belief of the enticer and no crime at all is committed if the person enticed is sixteen or older regardless of the knowledge or belief of the

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[6] If the objective of the enticement is sexual contact or intercourse, then the state must prove that the child has not attained the age of 16, rather than 18, which is the applicable age if the defendant is alleged to have intended one of the other prohibited acts. *See* Wis. JI-Criminal 2134 n.2.

enticer.

This interpretation is confirmed by *State v. Smith*, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), in which the Wisconsin Supreme Court recognized that it is "legally impossible" for a defendant to commit child enticement if the alleged victim has attained sixteen years of age. There the defendant pled to child enticement for engaging in sexual relations with a sixteen-year-old girl in exchange for dismissal of sexual assault charges. The court held that the defendant was entitled to withdraw his *Alford* plea to the child enticement charge because it was legally impossible for him to have committed the offense. Likewise, it was legally impossible for Robins to have committed this offense with Fassbender because Fassbender was at least sixteen.

Attempted child enticement, when applied to the enticement of an adult posing as a child, also is unenforceable because the legislature has not created any such crime. To recognize the crime of attempted child enticement under these facts would be tantamount to enforcing a common-law crime. The legislature not only has not enacted such a crime, but has expressly provided that the defendant's belief regarding the age of the "victim" is irrelevant to whether a crime has been committed. *See* Wis. Stat. §939.23(6) ("[c]riminal

intent does not require proof of knowledge of the age of a minor"); Wis. Stat. §939.43(2) ("A mistake as to the age of a minor . . . is not a defense"); Wis. JI-Criminal 2134.

Despite the legislature's decision not to include a *scienter* requirement with respect to age, the attempted child enticement charge against Robins necessarily incorporates an element, proof that the defendant believed the person was underage, that does not exist in the child enticement statute. The state thus has created an entirely new offense in violation of Wis. Stat. §939.10 and the legislature's exclusive authority to proscribe what conduct is criminal.

Section 939.10, Wis. Stats., provides:

> **Common-law crimes abolished; common-law rules preserved.** Common-law crimes are abolished. The common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved.

By abolishing common-law crimes, the legislature prevented courts from criminalizing acts that our legislature has not made illegal by statute. *See Cvorovic*, 462 N.W.2d at 899 ("'[o]nly a legislature can denounce crimes ... . Nowhere in this country can a man be condemned for a nonexistent crime'") (quoting *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982)); *Wray v. State*, 87 Wis. 2d 367, 275 N.W.2d 731, 734 (Ct.

App. 1978) ("criminal offenses are exclusively statutory"); *State v. Genova*, 77 Wis. 2d 141, 252 N.W.2d 380, 383 1977) ("We must look to the Wisconsin legislature's definition of a crime, not the common-law definition"). *Cf. Stockbridge School District v. DPI Boundary Appeal Bd.*, 202 Wis. 2d 214, 550 N.W.2d 97, 102 (1996) ("Modifications of the statute, if it works badly or in undesirable ways . . . must be obtained through legislative, not judicial action.").

If mistake in age is not a defense, it also cannot be an offense. Wisconsin law imposes strict liability if certain acts, otherwise lawful with adults, are performed with a child regardless of the defendant's knowledge that the person is underage.[7] These

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[7] As a result, an adult who has sexual contact with a young-looking girl without concern for her age commits a felony if she happens to be a day younger than sixteen years of age and no crime at all if she happens to be a couple days older. No one supposes that the crime of attempted sexual assault of a child is committed in the second instance if the adult mistakenly believed that the girl's sixteenth birthday was not until the following week. The Missouri Supreme Court pondered this same hypothetical in *State v. Taylor*, 345 Mo. 325, 133 S.W.2d 336, 340-41 (1939) (citations omitted):

> So, also, in the case of a prosecution under the statute of this state, which makes it rape in the second degree for a man to perpetrate an act of sexual intercourse with a female not his wife under the age of 18 years. There could be no conviction if it was established upon the trial that the female was in fact over the age of 18 years, although the defendant believed her to be younger and intended to commit the crime. No matter how reprehensible would be his act in morals, it would not be the act forbidden by this

(continued...)

statutes, including the child enticement statute, do not purport to extend to acts committed with persons the actor "believes to be" or "appears to be" a child. *Compare* 18 U.S.C. §2423(b) (criminalizing the crossing of state lines with the *intent* to engage in sexual act with a juvenile); 18 U.S.C. §2256(8)(B) (criminalizing a visual depiction that "is, or appears to be" of a minor engaging in sexually explicit conduct).[8] If the legislature desires to extend criminal liability to situations like this one, it must amend the statute. As written, the statute draws a clear line between lawful and unlawful conduct that does not turn on intent. The strict liability element regarding age requires a high standard of care when dealing with persons who may possibly be underage, but by the same token the statute does not penalize those who act with disregard for a young person's age if the

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[7](...continued)
particular statute.

[8] In *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), the court held that those provisions of the Child Pornography Prevention Act of 1996 which prohibit visual depictions that "appear to be" of minors engaging in sexual conduct violate the First Amendment. Computer imaging technology allows child pornographers to now create visual depictions that are virtually indistinguishable from real child pornography. The court held that while child pornography may be criminalized, there was not a sufficiently compelling basis for criminalizing depictions that "do not involve any human victim in their creation or presentation" and "censorship through the enactment of criminal laws intended to control an evil idea" cannot satisfy the constitution.

person happens to be an adult.

This prosecution also must be dismissed pursuant to the general principle that attempts only apply to crimes or elements of crimes that require proof of intent and not to crimes of recklessness or strict liability. In *State v. Briggs*, 218 Wis. 2d 61, 579 N.W.2d 783, 785-786 (Ct. App. 1998), for example, this Court held that there is no crime of attempted felony murder because felony murder does not require intent and therefore, "'is not reconcilable with the concept of attempt.'" (quoting *State v. Carter*, 44 Wis. 2d 151, 170 N.W.2d 681, 683 (1969)). *Briggs* emphasized that "under Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent." *Briggs*, 579 N.W.2d at 785. *See also Carter*, 170 N.W.2d at 683 (holding that crimes of attempted second degree murder, attempted third degree murder, and attempted manslaughter did not exist under former Wisconsin law because intent "is not an element of any of these crimes" and the language of the statutes "is not reconcilable with the concept of attempt"); *State v. Melvin*, 49 Wis. 2d 246, 181 N.W.2d 490, 492 (1970) ("Homicide by reckless conduct does not require any intent to attain a result which if accomplished would constitute a crime; and consequently, one cannot attempt to commit a crime which only requires reckless

conduct and not a specific intent"); *compare State v. Seifert*, 155 Wis. 2d 53, 454 N.W.2d 346, 351 (1990) ("Because imperfect self-defense manslaughter is a crime requiring a showing of intent, there is a crime of attempted imperfect self-defense manslaughter").

This case is distinguishable from *State v. Kordas*, 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995), in which the court held that a person may be convicted of attempting to receive stolen property where he receives property that he believes is stolen, but which, in fact, is not. In *Kordas* the completed crime of receiving stolen property requires the state to prove that the defendant "knew or believed" that the property received was stolen property and therefore it is a defense to the completed crime that the defendant did not know that the property was stolen. *See* Wis. JI-Criminal 1481 (1992). The defendant's state of mind is irrelevant, however, to the completed crime of child enticement. The state need not prove that the defendant knew the person was a child and the defendant's mistake regarding the child's age is not a defense no matter how reasonable that mistake may have been. *See* Wis. Stat. §§939.23(6) and 939.43(2); Wis. JI-Criminal 2134. A guilty mind is not required

in contrast to the statute at issue in *Kordas*.[9]

In *People v. Campbell*, 72 N.Y.2d 602, 532 N.E.2d 86, 88-89 (1988), New York's highest court held that attempted second degree assault, which requires that the defendant caused injury to an officer while intending to prevent him from performing his lawful duty, is a legal impossibility because the statute imposes criminal responsibility for an unintended injury and one cannot be convicted for attempting to cause an unintended result. The court further held that attempt could not be charged because:

> It engrafts . . . an element of intent that the main crime lacks. The result is an unacceptable anomaly. The higher crime of assault second is one in which a defendant may be held strictly responsible for an injury without proof of intent to injure; the lesser crime, attempted assault second, under the People's theory, becomes a crime which requires proof of intent to injure--an element not required for the higher crime.

Id. 532 N.E.2d at 88-89.

Likewise, a charge of attempted child enticement predicated on the defendant's error in believing a person was underage requires proof of an element, the defendant's belief concerning the

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[9] Moreover, *Kordas* did not allege an "attempt to attempt" to receive stolen property. The property that Kordas believed to be stolen had actually been received by him.

"victim's" age, that is entirely missing from the completed crime. Thus the "attempt" really is a new species of offense from the completed crime--a species never enacted by the legislature and therefore unenforceable in the courts. It is an "unacceptable anomaly" to create the crime of attempt and impose criminal liability based on the defendant's belief regarding a person's age when the legislature has mandated that "[c]riminal intent does not require proof of knowledge of the age of a minor . . . ." Wis. Stat. §939.23(6).

Further, under the state's interpretation of §948.07 the state must prove the newly-created knowledge element whenever attempted child enticement is alleged. For example, if an adult was arrested on his way to a motel room with a fourteen-year-old girl with whom he intended to have sex, the state would have to prove his knowledge or belief that the girl was under 16. Such a requirement is clearly contrary to the statute and the legislature's intent, but would be a consequence of interpreting "attempt to cause" as including an erroneous belief that a person is a minor.

Another problem with the charge against Robins is that it really alleges an attempt to attempt to commit a crime and attempted attempts are not recognized under Wisconsin law. First, Robins is charged with attempt for his incomplete effort to cause the officer to

enter a secluded place. Second, attempt also is charged because no child was involved, but Robins allegedly believed the officer was a child. The word "attempt" in the child enticement statute modifies "to cause," thereby indicating that allegations of attempted child enticement under Wis. Stat. §948.07 are limited to the first type of attempt. The attempted child enticement charge must be dismissed because even if the state may charge an attempt for an erroneous belief that the "victim" was a child, the state still may not charge an "attempt to attempt" or two distinct types of attempt in the same charge.

In *State v. DeRango*, 229 Wis. 2d 1, 599 N.W.2d 27, 41 (Ct. App. 1999), *aff'd*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, the court held that there is no crime of attempted child enticement in Wisconsin because the child enticement statute itself includes attempts to cause a child to go into designated places. The general attempt statute cannot be applied to Wis. Stat. §948.07 "because, quite simply one cannot 'attempt to attempt to cause.'" *Id.* This holding is in accord with the generally recognized principle that the law does not recognize as a crime the attempt to attempt a crime. *E.g.*, *State v. Davis*, 229 A.2d 842, 845 (N.H. 1967), *overruled on other grounds*, *State v. Ayer*, 136 N.H. 191, 612 A.2d 923 (1992).

Cf. LaFave & Scott, 2 SUBSTANTIVE CRIMINAL LAW §6.2 at 21-22 (1986) ("where a certain crime is actually defined in terms of either doing or attempting a certain crime, then the argument that there is no crime of attempting this attempt is persuasive"). Since the complaint alleges that Robins attempted to cause a person to enter a designated place, and since that person was not actually a child, the allegation against him essentially is an attempt to attempt to cause a child to enter a designated place with the intent to have sexual contact. Because *DeRango* recognized that no such offense exists, the charge must be dismissed.

For all the above reasons, Count 1 of the Information must be dismissed. Under no circumstances does the statute permit conviction for attempting to entice an adult.

III.

THE EVIDENCE PRESENTED IN THE COMPLAINT AND AT THE PRELIMINARY HEARING FAILED TO ESTABLISH PROBABLE CAUSE THAT ROBINS "ATTEMPTED TO CAUSE" ANYONE TO ENTER A ROOM OR OTHER DESIGNATED PLACE.

Even assuming that one may be convicted of child enticement based on a mistaken belief that an adult is a child, the facts alleged in this complaint and presented at the preliminary hearing fail to supply probable cause. While these facts may provide

probable cause that Robins intended to commit the offense, as a matter of law he did not engage in acts sufficient to constitute an attempt. Where the principal facts are undisputed and the controversy centers on ultimate conclusions of law, the appellate court examines the record *ab initio* and decides as a matter of law whether the evidence constitutes probable cause. *See State v. Fry*, 129 Wis. 2d 301, 385 N.W.2d 196, 199 (Ct. App. 1985).

To constitute an "attempt," an actor must not only "have an intent to perform acts and obtain a result which, if accomplished, would constitute such crime," but also must commit "acts towards the commission of the crime which demonstrate unequivocally,[10] under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." Wis. Stat. §939.32. It is well-established that the law does not punish guilty intentions. Nor does the "mere preparation" to commit a crime establish an attempt. Rather, the determination of whether an attempt has been committed "'necessitates a determination whether under all the circumstances it

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[10] "Unequivocally," as defined in Wis. JI-Criminal 580 (1995) "means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances."

was too late for the person to have repented and withdrawn.'" *State v. Stewart*, 143 Wis. 2d 28, 420 N.W.2d 44, 47 (1988) (quoting *State v. Berry*, 90 Wis. 2d 316, 327, 280 N.W.2d 204 (1979)).

It was not too late for Robins to have repented and withdrawn upon his arrival at the Burger King. For any number of reasons, Robins still may have changed his mind at that point and not attempted to cause a child to enter a secluded place. As just one example, the reality of encountering a thirteen-year-old boy in person rather than through the fantasy world of the Internet may well have prompted a change of heart. When arrested, Robins only had prepared to commit a crime or perhaps set an appointment to commit one.

The attempt to meet at the Burger King plainly is not an offense because his attempt to cause Benjm13 to go there was not with the intent to have sexual contact. No arrangements had been made to go to a particular place, no motel reservations had been made, and Robins never was in a position to actually invite Benjm13 to enter a vehicle, building, or room at a time when that objective could be accomplished. The core purpose of the child enticement statute is removal of the child from the general public to a secluded place in order to facilitate certain illegal conduct. *See DeRango*, 599

N.W.2d at 34. The attempt only would be complete if Robins, upon meeting Benjm13, sought to have him come to some place for sex. While in some cases an attempt might be made without a personal meeting, here it could not. Accordingly, Robins' acts were not sufficient to demonstrate unequivocally that he would have committed the crime.

Further, the Court must look only to the alleged acts of Robins, and not to any post-arrest statements he may have made, in determining whether an attempt probably was committed. "[T]here must be a determination, under all the facts and circumstances, of whether the actions of the accused led to no other reasonable conclusion than that he intended to 'attain a result which, if accomplished, would constitute' the crime." *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639, 645 (1979) (citation omitted). Or, in other words:

> "If the example may be permitted, it is as though a cinematograph film, which has so far depicted merely, the accused person's acts without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done

> enough." J.W.C. Turner, *Attempts to Commit Crime*, 5 Cambridge L.J. 120, 237-38 (1934).

Id., 285 N.W.2d at 645 n.4.

The above principles are illustrated by *State v. Henthorn*, 218 Wis. 2d 526, 581 N.W.2d 544 (Ct. App. 1998), in which this Court found the evidence insufficient to establish that Henthorn attempted to fraudulently acquire a controlled substance. There, Henthorn's doctor gave her a prescription that allowed for one refill, but when Henthorn presented the prescription to the pharmacist the "1" had been altered to authorize "11" refills. The pharmacist alerted the police. Relying on *Hamiel*, this Court concluded that Henthorn's alleged actions did not constitute an attempt since she had not yet presented the prescription for the additional refills that were authorized by the phoney prescription:

> In this case, if we were to stop the film at the point where Henthorn presented the altered prescription to the pharmacist to obtain the first two vials of Tylenol 3 that had properly been prescribed for her, it is possible that she might return once, and then once again to obtain the refill to which she was not entitled. We cannot say, however, that is the only "reasonably possible answer." *Hamiel*, 92 Wis. 2d at 665 n.4, 285 N.W.2d at 645. It is also reasonably possible that she might, in the intervening time, decide not to commit an offense which, as she told the police officer, she knew would result in the loss of her nursing license.

581 N.W.2d at 547.

United States v. Harper, 33 F.3d 1143 (9th Cir. 1994), *cert. denied*, 513 U.S. 1118 (1995), also demonstrates that Robins' acts constituted mere preparation rather than an attempt. In *Harper*, the defendants were arrested at night in a bank parking lot in the possession of several weapons, duct tape, and latex surgical gloves. Earlier they had been photographed by the ATM machine at the bank setting a "bill trap" by leaving a $20 bill in the machine. One of the defendants who previously worked for an ATM service company knew that the bill trap would cause an ATM service technician to come to the machine at which time the defendants intended to commit the robbery. Despite the defendants' clear intent to commit bank robbery, the court reversed the attempted bank robbery convictions because the evidence was insufficient to establish that the defendants engaged in conduct constituting a 'substantial step'[11] toward the commission of the crime. The court emphasized that "[m]aking an appointment with a potential victim is not of itself such a commitment to an intended crime as to constitute an attempt, even

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[11] The less stringent federal requirement for establishing an attempt requires proof of (1) an intent to engage in criminal conduct, and (2) conduct constituting a "substantial step" toward the commission of the substantive offense which strongly corroborates the actor's criminal intent. *See Harper*, 33 F.3d at 1147.

though it may make a later attempt possible." *Id.* at 1148. *See also United States v. Still*, 850 F.2d 607 (9th Cir. 1988), *cert. denied*, 489 U.S. 1060 (1989) (reversing attempted bank robbery conviction of defendant who admitted that he was about to rob a bank when he was arrested in a van 200 feet from the bank putting on a wig and in possession of a fake bomb and a note demanding money). Similarly, even if Robins went to the Burger King intending to persuade Benjm13 to come to a room for sexual contact, his "appointment" to commit the crime is insufficient to constitute an attempt.

For the above reasons, the evidence failed to establish probable cause that Mr. Robins committed the charged offense and the prosecution against him must be dismissed.

CONCLUSION

When the legislature first enacted the child enticement statute, it presumably envisioned cases such as an adult trying to lure a child into his vehicle with a piece of candy. Indisputably the child enticement statute is constitutional and appropriately applied to that type of conduct, but the state is simply trying to mash a square peg into a round hole by applying the statute to essentially anonymous communications over the Internet. The statute does not apply to Robins' conduct at all--he never had contact with a child and his acts

did not go far enough to constitute an attempt. While it is within the state's power to criminalize conduct such as that alleged against Robins, and the legislature is free to enact a statute that clearly addresses this type of conduct, penal statutes cannot be judicially broadened whenever a new technology creates previously unforeseen and undesirable results. The present child enticement statute is inapplicable to Robins' conduct.

If the statute does encompass conduct such as that alleged against Robins, then the statute is unconstitutional as applied because knowledge of the victim's minority is not required under the statute. The constitutional problem arises because the state is attempting to stretch the statute's application far beyond its intended scope. When the statute is extended to criminalize Internet communications, knowledge of age is a constitutionally required element because the Internet provides no effective means of verifying the identity or age of the person receiving the communication. As a result, the enforcement of the child enticement statute may chill expression because "those intending to take advantage of the internet to distribute constitutionally protected materials to adults will refrain from doing so in fear of prosecution under the statute." *See Weidner*, 2000 WI 52, ¶15.

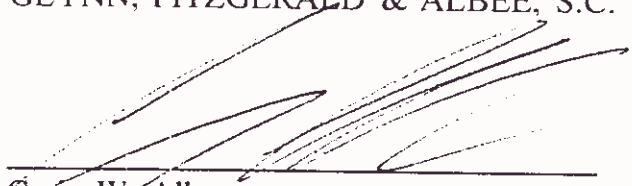
Accordingly, this Court should reverse the orders of the trial court and order the child enticement charge against Mr. Robins dismissed.

Dated at Milwaukee, Wisconsin, February 15, 2001.

Respectfully submitted,

BRIAN D. ROBINS, Defendant-Appellant

GLYNN, FITZGERALD & ALBEE, S.C.



Craig W. Albee
State Bar No. 1015752

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 221-9600

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,419 words.

Craig W. Albee

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

Record No.	Description	App.
28	Written Order Denying Motion to Dismiss Count 1: Unconstitutionality of Wis. Stat. §948.07	1
38	Written Order Denying Motion to Dismiss Complaint and Motion to Dismiss: Insufficient Evidence for Bindover	2
27	Decision on Motion to Dismiss Count 1 And Order	3-10

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STATE OF WISCONSIN : CIRCUIT COURT : OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 00-CF-53

v.

BRIAN D. ROBINS,

Defendant.

OUTAGAMIE COUNTY
FILED
OCT 0 2 2000
RUTH H. JANSSEN
CLERK OF COURTS

ORDER

For the reasons stated in this Court's decision on Motion to Dismiss Count 1 filed September 8, 2000,

IT IS HEREBY ORDERED that the defendant's Motion to Dismiss Count 1: Unconstitutionality of Wis. Stat. §948.07 is denied.

Dated at Appleton, Wisconsin, this 29 day of September, 2000.

BY THE COURT:

Honorable Michael W. Gage

STATE OF WISCONSIN : CIRCUIT COURT : OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 00-CF-53

v.

BRIAN D. ROBINS,

Defendant.

OUTAGAMIE COUNTY
FILED
OCT 0 2 2000
RUTH H. JANSSEN
CLERK OF COURTS

ORDER

IT IS HEREBY ORDERED that the defendant's Motion to Dismiss Complaint and Motion to Dismiss: Insufficient Evidence for Bindover are denied.

Dated at Appleton, Wisconsin, this 29 day of September, 2000.

BY THE COURT:

Honorable Michael W. Gage

STATE OF WISCONSIN CIRCUIT COURT BRANCH V OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

OUTAGAMIE COUNTY
FILED
SEP 0 0 2000
RUTH H. JANSSEN
CLERK OF COURTS

v. Case No. 00 CF 53

BRIAN D. ROBINS,

Defendant.

DECISION ON MOTION TO DISMISS COUNT 1 AND ORDER

Defendant is charged with one count (Count 1) of attempted child enticement with the intent to have sexual contact, contrary to §948.07(1), Wis. Stats. He was also charged with five counts (Counts 2 - 6) of attempted transfer of harmful material to a child, contrary to §§948.11(2)(a) and 939.32(1). Counts 2 through 6 have been dismissed. The defendant moves to dismiss Count 1, on the grounds that §948.07 is unconstitutional when the offense does not involve any face-to-face contact between the defendant and the child.

I

Material facts for motion purposes are disclosed in the Complaint and preliminary hearing record. They are taken as established for motion purposes.

Special Agent Fassbender, Wisconsin Department of Justice, Division of Criminal Investigation, acting in an undercover capacity, communicated with the defendant via the Internet. Fassbender used the screen name of "Benjm13" and the defendant used the screen name of "Wi4Kink." On January 31, 2000, the defendant made contact with Special Agent

Fassbender in his undercover capacity as "Benjm13" and engaged him in a sexual discussion. He asked "Benjm13" his age and Fassbender responded that he was 13.

The Internet discussion between the two pertained to oral sex, masturbation and other sexual matters. The defendant suggested that he and "Benjm13" meet so that they could rent a motel room for the purpose of engaging in sexual activity. He stated that his name was Brian and that he knew that this activity was not legal. On February 1, 2000, the defendant again contacted "Benjm13" and provided a photograph of himself, as well as pornographic photographs, via the Internet to "Benjm13." He again suggested that the two of them meet on the weekend, discussing the location of their meeting and that he did not want "Benjm13's" mother to know about it.

On February 4, there was further communication between the defendant and "Benjm13" in which they discussed the potential meeting, as well as sexual matters. On February 5, they again discussed the meeting, which involved renting a room in which they would spend time together, and agreed that there would be a telephone communication between the two to make the final arrangements. Special Agent Fassbender arranged for the telephone conversation to be conducted between Officer Ray Lee posing as "Benjm13" and the defendant. During the telephone conversation, the defendant stated that he would be traveling to the Burger King restaurant in Little Chute, Outagamie County, Wisconsin to meet with "Benjm13."

Surveillance conducted at the defendant's residence in Wauwatosa indicates that shortly after his telephone conversation with "Benjm13," he was observed leaving his residence and traveling to the Burger King restaurant in Little Chute on May 5, 2000. Previously, defendant had e-mailed a photograph of himself to "Benjm13" and advised that he drove a white Acura automobile and would be wearing a brown jacket. At approximately 12:23 p.m. on May 5, the defendant entered the Burger

King parking lot in Little Chute, parked his vehicle and walked toward the restaurant where he was to meet "Benjm13." He was then arrested by Special Agent Fassbender.

II

The defendant seeks dismissal of Count 1, attempted child enticement with the intent to have sexual contact, arguing that §948.07, Wis. Stats., is unconstitutional in cases which do not involve any face-to-face contact between the defendant and the alleged victim because it violates First Amendment rights of expression and association. The state is required to show that the defendant had reason to believe he was communicating with a minor to show the defendant's intent. Defendant contends that the knowledge of age requirement renders §948.07 unconstitutional as applied here, because of the difficulties in effectively verifying the age and identity of persons in Internet communications. Assertedly, this chills expression and association rights protected by the First Amendment by forcing Internet users to choose between foregoing communications of a sexual nature or risking a violation of the statute. Defendant points out that while it is generally or historically reasonable to place the burden on the defendant to ascertain the other person's age before causing or attempting to cause the person to enter a room with the intent to have sexual contact; it is unreasonable to do so when there is no personal meeting between the parties, or at least when the only "meeting" is by non-pictorial or by written Internet messages and telephone.

In support of his position, the defendant cites State v. Zarnke, 224 Wis. 2d 116, 589 N.W.2d 370 (1999) and State v. Weidner, 235 Wis. 2d 306, 611 N.W.2d 684 (2000). In Zarnke, the Supreme Court held that Wis. Stat. §948.05, prohibiting the sexual exploitation of a child, is unconstitutional because it does not require the State to prove that a distributor of sexually explicit materials had knowledge of the minority of the person depicted in the materials. Section 948.05 prohibits, among

other things, the reproduction and/or distribution of photographs, electronically stored images, and other pictorial reproductions of a child engaging in sexually explicit conduct. It provides an affirmative defense, allocating to the defendant the burden to prove lack of knowledge of the minority of the person depicted in the materials. The Supreme Court held the pertinent statute unconstitutional as it applies to the distribution of sexually explicit material depicting minors, as well as to the other prohibited conduct which does not entail a personal interaction between the accused and the victim.

In Weidner, the Supreme Court held Wis. Stat. §948.11(2), which prohibits the dissemination of harmful material to minors, unconstitutional in the context of the Internet and other situations that do not involve face-to-face contact between the minor and the accused. The Court determined that the statute impermissibly shifts to the defendant the burden of proving knowledge of the victim's age and infringes on protected First Amendment expression. Under §948.11(2), like §948.05, lack of knowledge of the juvenile's minority stands as an affirmative defense that the defendant must prove to avoid criminal liability.

The State in turn contends that the instant case is distinguishable from Weidner and Zarnke because the statute involved here, §948.07, by its terms, proscribes conduct--and not speech. In addition, unlike the statutes in Weidner and Zarnke, proof of age is not an affirmative defense under §948.07 and thus there is no shifting of the burden of proof on that element to the defendant. The State contends thus that there is no First Amendment right implicated in §948.07. Consistent with this position, the State argues that the focus of §948.07 is the defendant's intent to commit a crime with a child and his actions taken in furtherance of separating the child from the presence or view of others to commit one of the enumerated crimes against a child.

The State contends that the focus in Weidner is the statute's lack of a scienter element regarding the age of the person receiving the materials and that age is the critical element separating illegal conduct from legal conduct. Here, on the other hand, the critical element is said to be the defendant's intent -- along with acts which further that intent. The State further contends that the crimes in Weidner and Zarnke, providing harmful materials to a child and distribution of child pornography, can be committed entirely by actions constituting expression or speech. On the other hand, a violation of §948.07 involves some elements of speech with regard to evidence of intent, but the crime itself involves the non-speech actions of taking affirmative steps to physically get a child into a secluded location. The State contends that since §948.07 requires speech plus action, it is not subject to the same First Amendment scrutiny.

III

Statutes generally enjoy a presumption of constitutionality. In most circumstances, those challenging the constitutionality of a statute have the burden to prove that the statute is unconstitutional beyond a reasonable doubt. State v. Zarnke, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999). However, when a statute infringes on rights afforded by the First Amendment, the State carries the burden of proving the statute constitutional. State v. Weidner, 235 Wis.2d 306, 312, 611 N.W.2d 684 (2000).

The child enticement statute, section 948.07, provides in relevant part:

> **948.07 Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

Since speech or expression constitutes the crime itself in §§948.05 and 948.11(2), the First Amendment is clearly implicated. However, the crime of attempted child enticement entails conduct coupled with a particular purpose-- not speech. Written communication via the Internet, and a phone call, is relevant to show intent when there is no face-to-face contact between the defendant and a child victim; but that does not transform child enticement into a speech-based crime. Child enticement requires that: 1) the defendant caused or attempted to cause the child to go into a secluded place; 2) the defendant did this for the purpose of engaging in illegal sexual conduct; and 3) the child has not attained 18 years of age. It is the Court's conclusion that First Amendment free speech rights are not implicated, or implicated only incidently.

The statutes at issue in Weidner and Zarnke provide an affirmative defense which requires the defendant to prove his lack of knowledge of the victim's minority status. The defendant must prove reasonable cause to believe that the victim has attained 18 years of age and that the victim exhibited some "official or apparently official" document to verify the victim's age. Section 948.07 does not provide such an affirmative defense. The State bears the burden of proof as to all of the elements of the offense; specifically, the State carries the burden of proof with regard to the potential victim's age.

Section 948.07 requires that the defendant had the intent to commit a crime with a child, that he believed that he was dealing with a child, and that he engaged in conduct supportive of that intent. Zarnke involved the distribution of sexually explicit materials depicting minors; the Court found §948.05 unconstitutional with respect to distributors who never had any direct contact with the child and, therefore, there was virtually no possibility to establish the affirmative defense. In Weidner,

which involved exposing a child to harmful material, the Court found §948.11 unconstitutional with regard to Internet contact which did not entail face-to-face contact: therefore, it was impossible for the defendants, as Internet users, to meet the burden imposed by the affirmative defense. Here, there is no affirmative defense regarding the age of the child under any circumstances.

The statutes at issue in Zarnke and Weidner ban certain types of expression involving children--§948.05 prohibits sexual exploitation of a child and §948.11 prohibits exposing a child to harmful material. In the instant case, §948.07 does not ban expression, but a particular type of conduct involving children that may or may not flow from protected speech. Unlike those statutes, there is no shifting burden on proof of age by way of affirmative defense: the State must prove every element, including that the defendant reasonably believed that he was communicating with a child under the age of 16. Circumstantial evidence, other than face-to-face contact, may give rise to an inference concerning age. Written e-mail messages certainly can be circumstantial evidence. Multiple communications including a phone call, on various occasions, in various contexts, may provide indicia of minority status of an adolescent--just as a picture or a face-to-face meeting might. In any event, the expression over the Internet and telephone involved here is not a violation of §948.07, unless it is acted upon in attempting to cause the child to enter a secluded place for an illegal sexual purpose.

The decisions in Zarnke and Weidner are inapposite because the statutes involved in those cases do explicitly ban certain types of expression with respect to minors. Further, §948.07 does not provide an affirmative defense requiring the defendant to prove lack of knowledge about minority status. Therefore, this Court finds that §948.07 is constitutional as applied to the facts of this case.

The defendant's Motion to Dismiss Count 1 is hereby ordered DENIED.

Dated at Appleton, Wisconsin this 8th day of September, 2000.

BY THE COURT:

HONORABLE MICHAEL W. GAGE
CIRCUIT COURT JUDGE, BRANCH V
OUTAGAMIE COUNTY

Distribution:
ADA M. Cathleen Huber
Attorney Craig W. Albee

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 00-2841-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

ON APPEAL FROM NONFINAL ORDERS ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL W. GAGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JAMES E. DOYLE
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 00-2841-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

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ON APPEAL FROM NONFINAL ORDERS ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL W. GAGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the issues raised in this appeal are adequately addressed by the parties' briefs. Publication of the court's decision is warranted, however, because the constitutional issue raised by the defendant in this case has been raised in a number of other pending cases statewide. In that regard, the state notes that the same constitutional issue is also before the court of appeals in at least four other cases: *State v. Earl Richards*, No. 00-3170-CR; *State v. Chad C.*

Britton, No. 00-3368-CR; *State v. John Furdek*, No. 00-3369-CR; and *State v. Steven Beck*, No. 00-3370-CR.[1]

ARGUMENT

Defendant-appellant Brian Robins appeals from orders denying his motions to dismiss the criminal complaint and information filed against him charging him with attempted child enticement, in violation of Wis. Stat. § 948.07.[2] The charging documents allege that Robins, with the intent to have sexual contact with a child, attempted to cause the child to go into a vehicle, building or room (3:1; 6:1). Robins argues that the charge must be dismissed on two nonconstitutional grounds: first, because the enticement statute is not violated by an attempted enticement of an adult whom the defendant believes is a child; and second, because his conduct did not demonstrate unequivocally that he would have committed the crime of child enticement. He also argues that the child enticement statute is unconstitutional as applied to his conduct because it does not require proof that he knew his intended victim was a child. He contends that such proof is necessary in cases in which the defendant has not had face-to-face contact with his intended victim.

---

[1]The court has consolidated the *Richards*, *Furdek* and *Britton* appeals for purposes of briefing and has stayed briefing in *Beck* pending the decision in *Richards*, *Furdek* and *Britton*.

[2]Wisconsin Statute § 948.07 provides in relevant part:

> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 [sexual assault of a child] or 948.095 [sexual assault of student by school instructional staff person].

Shortly after Robins filed his appellate brief, this court issued its decision in *State v. Koenck*, 2001 WI App 93, __ Wis. 2d __, __ N.W.2d __. The *Koenck* decision squarely resolves Robins' contention that a charge of attempted child enticement will not lie when the intended victim is an adult whom the defendant believes is a child. In addition, the court's reasoning in *Koenck* demonstrates why Robins' other two issues also lack merit. Accordingly, the court should affirm the trial court's orders denying Robins' motions to dismiss the criminal complaint and remand the case for further proceedings.

I. THE CRIME OF ATTEMPTED CHILD ENTICEMENT HAS BEEN COMMITTED WHEN THE DEFENDANT ATTEMPTS TO ENTICE A PERSON HE BELIEVES TO BE A CHILD EVEN IF THE INTENDED VICTIM IS ACTUALLY AN ADULT.

Although the state could respond to Robins' contention that the offense of attempted child enticement requires that the intended victim actually be a child with a simple citation to *Koenck*'s holding, the court's discussion in *Koenck* of the principles of attempt liability demonstrates why Robins' other two issues also lack merit. Accordingly, the state will discuss the *Koenck* decision in some detail.

Koenck, like this case, involved a charge of attempted child enticement arising from the defendant's attempt to meet and have sexual contact with a fictitious child he met over the Internet. The defendant in *Koenck* communicated over the Internet with "Teddie" and "Georgie," whom he believed to be twin twelve-year-old girls but who were actually an adult woman. *Koenck* at ¶¶2-3. During those on-line communications, Koenck expressed interest in having sexual intercourse and sexual contact with the girls. *See id.* at ¶3. Koenck eventually

arranged to meet the girls at a fast-food restaurant in Brookfield; he said that he had rented a hotel room in Waukesha County for the purpose of having sexual intercourse and contact with them. *See id* at ¶¶3-5. Koenck drove to the restaurant parking lot and was arrested when he exited his vehicle and began walking to the restaurant. *See id.* at ¶6.

Koenck argued, as Robins argues here, that the child enticement charges should be dismissed because his intended victim was an adult. The court rejected that argument, holding that the "fictitiousness of the girls constitutes an extraneous factor beyond Koenck's control that prevented successful enticement while not excusing the attempt to entice." *Id.* at ¶29.

Koenck raised a number of arguments in support of his position, some of which are also advanced by Robins. The court first addressed Koenck's argument that *State v. DeRango*, 229 Wis. 2d 1, 16, 599 N.W.2d 27 (Ct. App. 1999), *aff'd,* 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, requires that the state must prove that an actual child, not an agent posing as a child, was the intended victim. The court rejected that argument because *DeRango* never addressed the issue of whether an actual child, as opposed to a fictional child, must be the intended victim. *See Koenck* at ¶12.

The court next addressed Koenck's contention that *DeRango* established that the crime of attempted child enticement no longer exists because the attempted and completed crimes of child enticement have been merged into one statute. The court held that, to the contrary, *DeRango* made it clear that the child enticement statute includes both the attempted and the completed crime. *See id.* at ¶14. The statute "delineates one crime, the crime of child enticement, with alternate modes of commission." *Id.* at ¶15.

The court also rejected Koenck's argument that the principle that impossibility is not a defense to an attempt

charge, as articulated in *State v. Kordas*, 191 Wis. 2d 124, 129, 528 N.W.2d 483 (Ct. App. 1995), does not apply to the child enticement statute. The court concluded that the legislative history of the enticement and attempt statutes demonstrated that the legislature, "by enclosing the attempted and completed act in the same statute, did not intend to eliminate the crime of attempted child enticement, but determined that the attempted act of child enticement was as egregious as the completed act and thus each warranted the same penalty." *Koenck* at ¶20. The court therefore concluded that merging the completed and the attempted crime of enticement into one statute did not render the principles of attempt inapplicable to cases of attempted enticement. *See id.*

The court then explained why, under the principles of attempt law, Koenck's conduct constituted attempted enticement, notwithstanding the fact that his intended victim, unbeknownst to him, was actually an adult. The attempt statute, Wis. Stat. § 939.32(3), defines an attempt as follows:

> An attempt to commit a crime requires that the actor have an intent to perform certain acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

See Koenck at ¶22. The court held that under Wis. Stat. § 939.32(3), an attempt has two components: "(1) intent to commit a specific crime and (2) evidence that the accused has committed sufficient acts to 'demonstrate unequivocally that it was improbable the accused would desist of his or her own free will.'" *Koenck*, at ¶24 (quoting *State v. Stewart*, 143 Wis. 2d 28, 31, 420 N.W.2d 44 (1988)). An attempt is complete, therefore, when the defendant, with intent to commit a crime, takes action in furtherance of such intent and the failure to accomplish the crime is due to a factor beyond his or her control or

one unknown to him or her. *See id.* (citing *Boyles v. State*, 46 Wis. 2d 473, 476, 175 N.W.2d 277 (1970)). Stated another way, the attempt statute "requires that the person have the requisite criminal intent and that he or she perform 'acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed the intent and would commit the crime except for the intervention of another person or some other extraneous factor.'" *Id.* at ¶25 (quoting *Berry v. State*, 90 Wis. 2d 316, 326, 280 N.W.2d 204 (1979)).

The conduct element of the attempt statute is satisfied, the court held, when the defendant has "gone far enough toward completion of the crime to make it improbable that he would change his mind and desist," that is, when he has "engage[d] in conduct which demonstrates that only a circumstance beyond the accused's control would prevent the crime, whether or not such a circumstance actually occurs." *Id.* at ¶26 (quoting *Stewart*, 143 Wis. 2d at 41-42). The attempt statute thus "requires a judgment in each case that the accused has committed sufficient acts that it is unlikely that he would have voluntarily desisted from commission of the crime." *Id.*

The court held that the allegations of the criminal complaint filed against Koenck satisfied that standard. *See id.* at ¶¶27-28. Koenck arranged to meet two persons he met on the Internet whom he believed to be twelve-year-old girls. He checked into a hotel and traveled to the prearranged meeting place to meet the girls, and he admitted that he intended to have sex with both of them. *See id.* at ¶27. That the girls were fictitious was an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the purpose of sexual intercourse or contact. *See id.* at ¶28. Because Koenck "did everything necessary to insure the commission of the crime intended," the court held, his conduct was "not excused because of the fortuitous circumstance rendering it impossible to effectuate the intended result." *Id.*

Robins' argument that the child enticement statute does not apply to acts directed at an adult whom the defendant believes to be a child is foreclosed by the court's decision in *Koenck*. While some of the specific arguments that Robins makes in his appellate brief as to why he believes the enticement statute does not apply in such circumstances were not addressed in *Koenck*, that decision nevertheless squarely rejected Robins' contention that a charge of attempted child enticement requires an actual child as the intended victim. This court is bound by that decision. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246, 255-56 (1997). Accordingly, the court should hold, pursuant to *Koenck*, that the fact that Robins' intended victim was actually an adult does not preclude a charge of attempted child enticement.

II. THE COMPLAINT AND THE EVIDENCE ADDUCED AT THE PRELIMINARY HEARING ESTABLISHED PROBABLE CAUSE THAT THE DEFENDANT VIOLATED THE CHILD ENTICEMENT STATUTE.

Robins also argues that the criminal complaint and the evidence at the preliminary hearing failed to establish probable cause that he attempted to entice a child. He concedes that there is probable cause that he intended to commit that offense, *see* Appellant's brief-in-chief at 27-28, but argues that he had not yet engaged in acts sufficient to constitute an attempt. At the time he was arrested, he contends, he had only prepared to commit a crime but had not yet attempted to commit it.

Koenck demonstrates why that argument is incorrect. The court held in *Koenck* that the complaint sufficiently demonstrated not only the defendant's intent, but also that his acts were sufficient to "'demonstrate unequivocally that it was improbable the accused would desist of his or her own free will.'" *Koenck* at ¶24

(quoting *State v. Stewart*, 143 Wis. 2d 28, 31, 420 N.W.2d 44 (1988)). The facts of this case are not materially different from those in *Koenck*. Compare the following summary of Koenck's conduct with Robins' conduct in this case:

> Koenck communicated via the Internet with "Teddie" and "Georgie," persons he believed to be twelve-year-old girls. During these communications, Koenck expressed a desire to have sexual intercourse with "Teddie" and "Georgie." When "Teddie" and "Georgie" informed Koenck of their plans to visit Wisconsin, Koenck immediately expressed an interest in meeting them. He made reservations at an area hotel. He arranged to meet "Teddie" and "Georgie." He drove from his home in Iowa, checked into a hotel and then traveled to the prearranged meeting place in order to meet "Teddie" and "Georgie." Koenck admitted that he intended to have sex with both "Teddie" and "Georgie."

Id. at ¶27.

Robins communicated on the Internet with an individual who called himself "Ben," a person he believed to be a thirteen-year-old boy (31:Exhibit 1, p. 5, Exhibit 7; 32:5-9). During those conversations, Robins expressed a desire to engage in sexual contact with Ben (31:Exhibits 1, 2; 32:9-13). He suggested that the two of them get a motel room together the following weekend for that purpose (32:13-14). He arranged to meet Ben at a restaurant in Little Chute, where Ben said he lived (32:26). At the agreed-upon time, Robins drove from his home in Wauwatosa to the restaurant (3:2; 32:26-28). He was arrested when he exited his car and began walking toward the restaurant (3:2-3; 32:29-30). Robins had a condom and sexual lubricant in his vehicle at the time of his arrest, though he told the police that he keeps those items in his vehicle at all times and did not specifically place them in his car for his meeting with Ben (32:30).

The only difference between the facts of this case and those of *Koenck* is that there is no evidence that Robins had yet booked a motel room. While Robins

apparently finds that significant, *see* Appellant's brief-in-chief at 29, that fact, if true, hardly precludes a finding that Robins was attempting to entice Ben. The enticement statute does not require an attempt to cause a child to enter a room or building – it also encompasses attempts to cause a child to enter a vehicle for a prohibited purpose. *See* Wis. Stat. § 948.07(1). Robins drove his car to the meeting place, and his attempt to cause Ben to get into his vehicle with the intent of engaging in sexual contact would be sufficient to constitute enticement. Moreover, when he spoke with Ben by telephone to finalize arrangements, Robins said that they would find a motel when he arrived (32:44). An inference can be drawn from that fact that Robins was attempting to cause Ben to enter a room for purposes of having sexual contact.

The facts alleged in the criminal complaint and adduced at the preliminary hearing establish probable cause that Robins attempted to cause a thirteen-year-old child to go into a vehicle, building or room for the purpose of engaging in sexual contact. Robins, like the defendant in *Koenck*, "did everything necessary to insure the commission of the crime intended." *Koenck* at ¶28.

Robins did not have the benefit of the *Koenck* decision when he prepared his brief. He instead compares the facts of this case to those of *State v. Henthorn*, 218 Wis. 2d 526, 581 N.W.2d 544 (Ct. App. 1998). In *Henthorn*, the defendant was charged with attempted fraudulent acquisition of a controlled substance when she changed the notation for "1" refill on a codeine-containing prescription to an "11" and presented the altered prescription to a pharmacist. *Id.* at 529. This court held, over a dissent, that the defendant's conduct was insufficient to show that she probably would not have desisted from obtaining a refill to which she was not entitled. The court noted that when the defendant presented the altered prescription to the pharmacist, she was attempting to obtain the first of two vials of medicine that she was legally entitled to receive. *See id.* at 533. Before she could have unlawfully obtained a controlled

substance, the court observed, the defendant would have had to return to the pharmacy twice – the first time to get the physician-authorized refill and a second time to obtain the refill that had not been prescribed. *See id.* at 533-34. Although it was possible that the defendant would have returned twice to obtain refills, the court concluded, it was "also reasonably possible that she might, in the intervening time, decide not to commit an offense which, as she told a police officer, she knew would result in the loss of her nursing license." *Id.* at 534.

In dissent, Judge Dykman argued that the defendant's conduct demonstrated that she was unlikely to have voluntarily ceased and desisted from completion of the criminal act. *See id.* at 536-37 (Dykman, J., dissenting). The difficult part of committing the crime, Judge Dykman contended, was presenting the altered prescription to the pharmacist; purchasing the third bottle would have been the easy part. *See id.* A reasonable jury could have concluded, therefore, that the defendant was unlikely to have voluntarily ceased and desisted from getting the second and then the third bottle of the controlled substance. *See id.* at 537.

Robins committed acts that went beyond what the defendant did in *Henthorn*. His conduct would be comparable to that of the defendant in *Henthorn* if she had been arrested on her third visit to the pharmacy, about to pick up the unlawful second refill. Robins had not merely determined Ben's interest in having sexual contact. Nor had he merely obtained Ben's agreement to get together for sexual purposes at some time in the future. Instead, he obtained Ben's agreement to meet at a particular time and place for the purpose of having sexual contact and was just steps away from the planned meeting when he was arrested.

That Robins was unlikely to have voluntarily ceased and desisted from his intended conduct is confirmed by his post-arrest statement to the police, in which Robins admitted that when he drove to the

restaurant in Little Chute, it was for the purpose of having sexual contact with Ben (31:Exhibit 11, p. 6; 32:29). Robins contends that his post-arrest statements must be ignored when determining whether there was probable cause that he was attempting to entice Ben. He relies on the following passage from a law review article quoted in a footnote in *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639 (1979), for that proposition:

> "If the example may be permitted, it is as though a cinematograph film, which has so far depicted merely the accused person's acts without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an "attempt" to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done enough."

Id. at 665 n.4 (quoting J.W.C. Turner, *Attempts to Commit Crimes*, 5 Cambridge L.J. 120, 237-38 (1934)).

That passage describes a test to be applied when the accused has not stated his intention. It does not state that if the accused has given such a statement that statement must be ignored. Indeed, this court has looked to post-arrest statements to determine whether the defendant's conduct constituted an attempt. In *Koenck*, for example, the court cited the defendant's admissions to the police that he had traveled to his planned meeting with the girls with the intent of having intercourse with them. *See Koenck*, at ¶¶6, 27. Likewise, the *Henthorn* court cited the defendant's statement to the police that she knew she could lose her nursing license if she committed the offense in support of its conclusion that the evidence was insufficient to satisfy the conduct requirement under the attempt statute. *See Henthorn*, 218 Wis. 2d at 534.

Even without Robins' statement to the police, there was ample evidence adduced at the preliminary hearing to establish probable cause. The content of Robins' communications with Ben and the fact that he traveled

from Wauwatosa to Little Chute at the appointed time establish probable cause that Robins would not have desisted if not for the intervention of the fortuitous circumstance that there was no thirteen-year-old boy waiting for him at the restaurant.

Robins' brief cites two Ninth Circuit cases involving charges of attempted bank robbery in support of his argument that his acts constituted mere preparation rather than an attempt. *See* Appellant's brief-in-chief at 32-33. If this court were to look at cases from other jurisdictions for guidance, however, it will find numerous cases involving defendants charged with attempting to commit sex crimes against fictitious children that are more instructive because the facts of those cases more closely parallel the facts of this case than do attempted bank robbery cases.[3]

In a decision released subsequent to the filing of Robins' brief, the Fifth Circuit, in a case whose facts are indistinguishable from those of this case and *Koenck*, upheld the defendant's conviction for violating a federal statute that prohibits the use of interstate commerce to attempt to persuade a minor to engage in sexual activity. *United States v. Farner*, ___ F.3d ___, 2001 WL 514426 (5th Cir. May 14, 2001). The defendant in *Farner* met 14-year-old "Cindy" – who was actually an adult FBI agent – through the Internet. The defendant and Cindy exchanged e-mails and had telephone conversations in which the defendant attempted to persuade Cindy to have sexual relations with him. *See id.*, 2001 WL 514426 at *1. They eventually agreed to meet at a restaurant. After checking into a hotel, the defendant drove to the parking lot of the restaurant, where he was arrested. *See id.*

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[3]The state notes, moreover, that the Seventh Circuit has not been as demanding as the Ninth Circuit in the type of acts required to constitute a substantial step toward the commission of a bank robbery. *See, e.g., United States v. Schramm*, 715 F.2d 1253 (7th Cir. 1983).

As this court did in *Koenck*, the Fifth Circuit rejected the defendant's argument that it was legally impossible for him to have committed the crime because the minor was actually an adult. *See id.* at *1-2. In addition, the court held that the trial court, which tried the case on stipulated evidence, "correctly concluded from the stipulated evidence, beyond a reasonable doubt, that [the defendant] intended to engage in sexual acts with a 14-year-old girl and that he took substantial steps toward committing the crime." *Id.* at *2.

In another decision released after Robins filed his appellate brief, the Texas Court of Criminal Appeals held in another "Internet sting" case that the evidence was sufficient to convict the defendant of attempting to induce a child to engage in sexual conduct. *Chen v. State*, ___ S.W.2d ___, 2001 WL 356256 (Tex. Crim. App. April 11, 2001). The defendant in *Chen* communicated by e-mail with an undercover officer posing as a 13-year-old girl whom he had met through an America Online bulletin board. *See id.* at *1. The defendant and the girl discussed their interest in having sexual contact with each other and arranged to meet at a motel. *See id.* at *1-2. The defendant drove to the motel, entered the lobby and returned to his car after two minutes, at which point he was arrested. *See id.* at *2. He had a package of condoms and a tube of lubricant in his vehicle when he was arrested, and subsequently gave a statement to the police admitting that he was going to show a girl how to have sex. *See id.* The court rejected the defendant's impossibility argument, concluding that the factual impossibility of completing the offense did not preclude liability. *See id.* at *4. The court also held that the evidence was sufficient because the defendant's conduct amounted to more than mere preparation to commit the offense. *See id.*

Cases from other states are in accord. In *People v. Patterson*, 734 N.E.2d 462 (Ill. App. Ct. 2000), *appeal denied*, 742 N.E.2d 332 (Ill. 2000), the Illinois appellate court held that the evidence was sufficient to convict the

defendant of attempted aggravated criminal sexual abuse when he arranged a meeting with a fictitious child with whom he had communicated over the Internet; as in many of these case, the defendant was arrested in the parking lot of the restaurant at the agreed-upon meeting time.

> [W]e conclude that defendant had completed every step and action that he possibly could have and, therefore, defendant's conduct constituted a substantial step towards the offense of aggravated criminal sexual abuse. Defendant had agreed to perform oral sex on Yacoo that day. He had arranged to meet Yacoo at a specific place and time and informed Yacoo what clothes he would wear and what car he would drive. Defendant sent a picture of himself to aid Yacoo further in identifying defendant. Defendant also traveled to the rendezvous at the appointed time and admitted that he was waiting for 15-year-old Rob at the time he was questioned by [the police officer]. Given that Yacoo/Rob did not actually exist, defendant had taken every possible step he could have taken in order to commit the offense of aggravated criminal sexual abuse. Accordingly, we hold that defendant's conduct constituted a substantial step and determine that there was sufficient evidence from which the trial court could conclude that defendant committed the crime of attempt.

Id. at 470.

In *Van Bell v. State*, 775 P.2d 1273 (Nev. 1989), the defendant was convicted of attempted sexual assault after he offered an undercover officer $150 to procure a child for sexual intercourse. The defendant had chosen a young girl, represented to be five or six years old, from a collection of photographs supplied by the undercover officer, had arranged for a room, and had purchased a lubricant for use in sexual intercourse. *See id.* at 1274-75. He was arrested as he was driving to that room, where he believed the girl was waiting. *See id.* The Nevada Supreme Court first rejected the defendant's argument that the fact that there was no child barred his conviction for attempted sexual assault. *See id.* at 1274. The court held that, for purposes of the attempt statute, it was sufficient

that the defendant intended to commit sexual assault on the young girl whose photograph he had selected and performed some act with the intent to commit the crime. *See id.*

The court then addressed, and rejected, the defendant's contention that his actions demonstrated mere preparation to commit a crime rather than an attempt to commit one. *See id.* at 1275. The court noted that, from the defendant's perspective, he was "both physically and temporally close to committing sexual assault on the young girl" as he had begun driving to the apartment where he believed he would engage in sex with her. *See id.* In addition, the court held, there is an inverse relationship between the defendant's intent to commit the crime and the performance of an overt act toward the commission of the crime: when the defendant's intent to commit the crime is clearly shown, slight acts in furtherance of that crime constitute an attempt. *See id.* In this case, the court concluded, there was clear evidence of the defendant's intent to assault the young girl -- he had admitted that was his intent -- so the "acts of driving toward the apartment where the girl was allegedly waiting and purchasing vaseline to use as a lubricant sufficed for attempt liability." *Id.*

The Florida District Court of Appeal reached a similar conclusion when it affirmed a conviction for an attempted lewd and lascivious act in *Hudson v. State*, 745 So. 2d 997 (Fla. Dist. Ct. App. 1999). In *Hudson*, a detective representing himself as a fourteen-year-old boy named "Larry" responded to a magazine advertisement placed by the defendant. *See id.* at 999. After exchanging letters in which the defendant graphically described the sexual acts he would like to perform on the boy, the defendant mailed a plane ticket to Larry and arranged for Larry to be transported from the airport to his house by taxi. *See id.* On the day Larry was to arrive, an undercover deputy sheriff drove a taxi to the defendant's apartment, while another deputy sheriff sat in the back seat posing as the boy. *See id.* When the taxi arrived at

the defendant's home at the arranged time, the defendant walked to the taxi and was arrested. *See id.*

The Florida court rejected the defendant's argument that it was legally impossible for him to commit the crime of an attempted lewd and lascivious act because no actual child under the age of 16 was involved. *See id.* at 1000-01. The issue, the court held, was "not the legal impossibility of the offense, but whether [the defendant] possessed the requisite intent and committed sufficient overt acts to effectuate that intent." *Id.* at 1001. The court agreed with the defendant that he was "merely in the preparatory stages of the crime when he purchased the advertisement and wrote his initial correspondence to Larry." *Id.* at 1000. The court held, however, that the defendant's subsequent acts crossed the line from preparation to overt act:

> [T]hereafter [the defendant] wrote numerous letters, mailed Larry a plane ticket and money for travel, arranged for a taxi to bring Larry to his house, and then approached the taxi in order to greet Larry. We conclude that under these circumstances the trial court correctly decided the information charged a crime supported by an overt act.

Id.

The court observed that Florida had never expressly chosen between the various analytical approaches to what constitutes an attempt, but concluded that it need not do so in that case because the defendant's conduct would constitute an attempt under any of the available approaches:

> In this case, we conclude that a jury could find that Mr. Hudson fulfilled the proximity approach by his efforts to transport an intended victim to his home. A jury could decide that he satisfied the probable desistance approach or the equivocality approach because the evidence of his intended acts is so strongly supported by his own correspondence.

Id. at 1000 n.3.

Robins' acts were no more equivocal than those of the defendant in *Hudson*. The messages he sent to Ben could not have expressed his intent any more clearly or strongly. When he arranged to meet Ben at the restaurant and went to the restaurant at the agreed-upon meeting time, he committed sufficient acts to demonstrate that it was "unlikely that he would have voluntarily desisted from commission of the crime." *Stewart*, 143 Wis. 2d at 42.

The court's role at the preliminary hearing stage is limited to determining whether the facts and the reasonable inferences drawn from those facts support the conclusion that the defendant probably committed a felony. *See State v. Dunn*, 121 Wis. 2d 389, 397-98, 359 N.W.2d 151 (1984). The preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant. *See id.* at 398. "Simply stated, probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony." *Id.*

The evidence in this case satisfies that standard. The complaint and the record of the preliminary hearing established probable cause not only of Robins' intent, but also of the fact that, but for the intervention of the extraneous factor that there was no child, Robins would have caused a child to enter a secluded place for purposes of having sexual contact – that Robins, like the defendant in *Koenck*, "did everything necessary to insure the commission of the crime intended." *Koenck*, at ¶28. Accordingly, the trial court properly denied Robins' motion to dismiss the complaint for lack of probable cause.

III. THE CHILD ENTICEMENT STATUTE IS CONSTITUTIONAL AS APPLIED TO THE DEFENDANT'S CONDUCT.

Relying on two recent supreme court decisions, *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, and *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999), Robins asserts that the child enticement statute is unconstitutional as applied to his conduct. He argues that because his conduct consists of speech that would be constitutionally protected if directed at an adult, and because he had no face-to-face contact with his intended victim that would have allowed him to determine the victim's age, the enticement statute may not be constitutionally applied to his conduct because the state does not have to prove his knowledge of his intended victim's age.

Weidner and *Zarnke* both involved as-applied constitutional challenges to chapter 948 crimes in which the defendant had no face-to-face contact with the child victim. In *Weidner*, the defendant was charged with violating Wis. Stat. § 948.11, which prohibits exposing a child to harmful material, after he sent sexually explicit photographs over the Internet to a sixteen-year-old girl whom he had never met. *See Weidner*, 235 Wis. 2d at 310-11. The supreme court held that the statute was unconstitutional in the context of the Internet and other situations that do not involve face-to-face contact between the minor and the defendant because the state was not required to prove that the defendant knew the victim's age. *See id.* at 310.

The court characterized Wis. Stat. § 948.11 as a "variable obscenity statute" that prohibits a person from exhibiting to children materials that are deemed obscene when shown to minors but not obscene when shown to adults. *See id.* at 313. Thus, the age of the recipient is the critical element that separates illegal conduct from legal,

constitutionally protected conduct. To avoid "significant constitutional dilemmas," the court held that under *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), "some form of scienter must be implied in a statute imposing criminal liability based on age." *Weidner,* 235 Wis. 2d. at 314. While the statute at issue included a scienter element as to the nature of the materials deemed harmful to children, the court noted, it did not contain a scienter element with regard to the age of the victim; instead, it provided an affirmative defense that the defendant reasonably believed the victim was an adult. *See id.* at 313-14.

The court acknowledged that *X-Citement Video* had recognized a potential exception to the scienter requirement when there has been a personal, face-to-face meeting between the defendant and the victim that gives the defendant the ability to ascertain the age of the victim. *See id.* at 315-19. However, the court found that persons sending sexually explicit materials over the Internet were not sufficiently able to determine the age of the recipient of those materials. *See id.* at 319-21. The court concluded, therefore, that by requiring an Internet user "to prove lack of knowledge regarding the age of the person exposed to material deemed harmful to a child, the statute effectively chills protected internet communication to adults." *Id.* at 32.

Weidner relied on the supreme court's earlier opinion in *Zarnke*, in which the court held that the child sexual exploitation statute, Wis. Stat. § 948.05, was unconstitutional as applied to distributors of child pornography. Like the statute at issue in *Weidner*, the age of the child-victim is what distinguished illegal conduct from legal, constitutionally protected conduct in *Zarnke*, because non-obscene, sexually explicit materials involving adults are protected by the First Amendment. *See Zarnke*, 224 Wis. 2d at 131. And, also like the statute at issue in *Weidner*, the sexual exploitation statute did not require the state to prove a defendant's knowledge of the age of the minor depicted in the child pornography, but

instead provided an affirmative defense similar to that provided in the exhibiting harmful materials statute. *See id.* at 122.

The *Zarnke* court concluded that it was a "practical impossibility" for a distributor of sexually explicit material, who might be many steps removed from the production of that material, to prove the affirmative defense. *See id.* at 126, 132. Thus, the court held, the statute effectively imposed strict liability on distributors and impermissibly infringed on their First Amendment rights. *See id.* Consequently, the *Zarnke* court invalidated the statute as applied to distributors of child pornography because it did not require the state to prove the essential element of scienter when the accused's conduct did not entail a "personal meeting" with the minor depicted in the pornographic material. *See id.* at 133.

Robins contends that the child enticement statute suffers from the same constitutional infirmity when applied to his conduct, which also involved no personal meetings with his intended victim. There is a crucial distinction, however, between the attempted child enticement statute at issue this case and the statutes at issue in *Weidner* and *Zarnke*. *Koenck* establishes that in cases of attempted enticement in which the defendant has not had a personal meeting with the intended victim, it does not matter whether the intended victim is actually a minor. Rather, what matters is whether the defendant intended to cause a child to enter a prohibited place, such as a vehicle or a room, for a prohibited purpose. *See Koenck*, at ¶¶22-28.

Unlike the statutes at issue in *Weidner* and *Zarnke*, therefore, in a case of attempted child enticement the actual age of the person with whom the defendant is communicating over the Internet is *not* the fact that distinguishes lawful conduct from unlawful conduct. As *Koenck* demonstrates, an individual may be liable for attempted enticement when the intended victim is an adult posing as a child as well as when the intended victim is a

child who truthfully discloses his or her age. Conversely, an individual who, while communicating over the Internet with a child who represents himself or herself to be an adult, arranges a meeting for the purpose of engaging in sexual activity and travels to the agreed-upon meeting place, has committed no offense (assuming that he desists after meeting the child), because he lacked intent to cause a child to enter a prohibit place for a prohibited purpose. The critical fact in this type of attempted enticement case is not the actual age of the unseen person at the other end of the Internet communication but the stated age of that person, for it is the stated age that determines the defendant's intent.

Accordingly, to the extent that the state is constitutionally required to prove scienter in cases of attempted enticement involving an intended victim with whom the defendant has had no face-to-face contact, scienter is established by the requirement that the state prove the defendant's intent. To prove that the defendant intended to cause a child to enter a prohibited place for a prohibited purpose, the state necessarily will have to prove the defendant's knowledge of the victim's stated age. *See United States v. Kufrovich*, 997 F.Supp. 246, 256 (D. Conn. 1997) ("In order to have the purpose to engage in a sexual act with a minor, a person must know that the object of the plan is indeed a minor."). To prove that Robins intended to cause a child to enter a vehicle, building or room for the purpose of engaging in sexual contact, the state will have to prove that Robins knew that Ben purported to be thirteen years old. That is the scienter element that Robins claims is missing from this case.

This case differs from *Weidner* and *Zarnke* in another important way. The statutes at issue in those cases directly regulate speech and expressive conduct – displaying sexually explicit materials to another person (*Weidner*) and distributing sexually explicit materials (*Zarnke*). The child enticement statute, in contrast, regulates non-protected behavior – causing or attempting to cause a child to go to a secluded place to facilitate some

illegal conduct. *See Koenck*, at ¶9. The child enticement statute does not regulate the content of speech, but simply criminalizes conduct that incidentally involves speech. *See Kufrovich*, 997 F.Supp. at 254 (rejecting First Amendment challenge to federal charges of using the Internet to persuade a minor to engage in a sexual act and traveling in interstate commerce for the purpose of engaging in a sexual act with a minor); *United States v. Powell*, 1 F. Supp. 2d. 1419, 1422 (N.D. Ala. 1998), *aff'd*, 177 F.3d 982 (11th Cir. 1999) (rejecting First Amendment challenge to federal charge of using the Internet to persuade a minor to engage in a sexual act; also rejecting impossibility defense). As the Sixth Circuit explained when it rejected a First Amendment challenge to a charge of using the Internet to persuade a minor to engage in an illegal sexual act:

> The statute only applies to those who "knowingly" persuade or entice, or attempt to persuade or entice, minors. Thus, it only affects those who intend to target minors: it does not punish those who inadvertently speak with minors or who, as in *Reno* [*v. American Civil Liberties Union*, 521 U.S. 844 (1997)], post messages for all internet users, either adults or children, to seek out and read at their discretion. Any limited or incidental effect on speech does not infringe on any constitutionally protected rights of adults. Put another way, Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sexual acts.

United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1737 (2001).

The same rationale applies here. Under *Koenck*, in cases that do not involve a face-to-face meeting with the intended victim, the state must prove that the defendant intended to entice a child; that, in turn, requires proof that the defendant knew that he was communicating with someone who claimed to be a child. Thus, contrary to Robins' contention, an adult using the Internet to arrange a sexual liaison does not "risk[] an unknowing violation" of the child enticement statute. Appellant's brief-in-chief

at 10.[4] The statute can be applied to attempts to entice over the Internet (or in other circumstances not involving face-to-face contact) only when the defendant knows that he is communicating with – and attempting to entice – someone he believes to be a child. Individuals do not have a First Amendment right to attempt to cause a child to go to a secluded place to facilitate their commission of an illegal act.

Robins is not, as he contends, being charged "solely as a result of sexually-charged communications." Appellant's brief-in-chief at 13. He did not stop with his "sexually charged communications" with Ben; rather, he traveled to the agreed-upon meeting place where, it can reasonably be inferred, he would have taken Ben in his vehicle to a motel room to engage in illegal sexual contact. Robins' communications with Ben are, to be sure, evidence of his unlawful intent, but the First Amendment does not preclude the use of Robins' communications as evidence of his intent. *See Dressler v. McCaughtry*, 238 F.3d 908, 915 (7th Cir. 2001).

Because the child enticement statute does not directly regulate protected expression, but prohibits the act of causing or attempting to cause a child to enter a secluded place to facilitate illegal conduct, the scienter requirement of *Weidner* and *Zarnke* does not apply in this case. Even if the state were constitutionally required prove scienter, however, that requirement is satisfied in this case because the state must prove Robins' knowledge of the victim's purported age in order to prove that Robins was attempting to entice a child. Accordingly, the court should reject Robins' contention that the child enticement statute cannot be constitutionally applied to his conduct.

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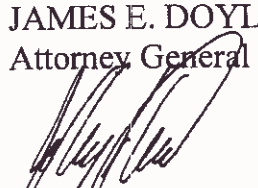
[4]There was nothing unknowing about Robins' violation of the law in this case, of course. When Ben told Robins that he was nervous about meeting, Robins responded, "ok I understand well I am a little to[o] this isn't legal you know" (31:Exhibit 1, p. 4).

CONCLUSION

For the reasons stated above, the court should affirm the trial court's orders denying the defendant's motion to dismiss the child enticement charge and remand for further proceedings on that charge.

Dated this 25th day of May, 2001.

JAMES E. DOYLE
Attorney General



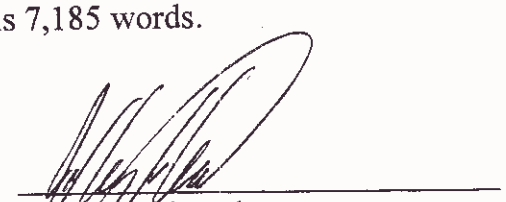
JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,185 words.



Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

Appeal From The Non-Final Orders Entered In
The Circuit Court For Outagamie County,
The Honorable Michael W. Gage, Circuit Judge, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

CRAIG W. ALBEE
State Bar No. 1015752
GLYNN, FITZGERALD & ALBEE, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 221-9600

Counsel for Defendant-Appellant

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 00-2841-CR
Outagamie County Case No. 00-CF-53

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN D. ROBINS,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

I.

ROBINS' ALLEGED ENTICEMENT OF AN ADULT WHOM HE BELIEVED TO BE A CHILD IS NOT A CRIME BECAUSE THE LEGISLATURE HAS DETERMINED THAT KNOWLEDGE REGARDING THE AGE OF THE ALLEGED VICTIM IS IRRELEVANT IN CHILD SEXUAL ABUSE PROSECUTIONS.

In *State v. Koenck*, 2001 WI App. 93, 242 Wis. 2d 693, 626 N.W.2d 359, the court rejected the defendant's claim that under Wis.

Stat. §948.07 the state must prove that the intended victim was an actual child and not an adult posing as a child. *Koenck* apparently overlooked *State v. Smith*, 202 Wis. 2d 21, 549 N.W.2d 232 (1996), in which the Wisconsin Supreme Court recognized that it is "legally impossible" for a defendant to commit child enticement under Wis. Stat. §948.07 (which includes the completed offense and the attempt) if the alleged victim is not underage. Because *Koenck* conflicts with the controlling decision in *Smith*, this Court must follow *Smith* and hold that it is legally impossible to violate Wis. Stat. §948.07 where the alleged victim is not a minor. *See Madison Reprographics v. Cook's Reprographics*, 203 Wis. 2d 226, 552 N.W.2d 440, 446 (Ct. App. 1996) ("When a court of appeals decision conflicts with a supreme court opinion, we must follow the supreme court opinion").

This Court also should consider the meritorious challenges that Robins makes to the application of the child enticement statute that were not raised in *Koenck*. First, *Koenck* did not consider whether the state's novel interpretation of the child enticement statute violates the prohibition against enforcing common-law crimes. In enacting the child sexual abuse statutes, the Wisconsin legislature imposed strict liability upon anyone who engages in sexual conduct with a minor. That is, no matter how reasonable or understandable the

actor's belief that a person was an adult, he cannot assert mistake as a defense. Wis. JI-Criminal 2134 (1998); Wis. Stat. §§939.23(6) & 939.43(2). The legislature chose to make the defendant's knowledge regarding age irrelevant under those statutes, including the child enticement statute. Thus, the crime of child enticement does not require proof that the defendant knew that the person enticed was a child.

The state's interpretation of the statute is totally at odds with the criminal offense created by the legislature. The state suggests that in light of *Koenck* the gravamen of attempted child enticement "is whether the defendant *intended* to cause a child to enter a prohibited place . . . for a prohibited purpose." Plaintiff-Respondent's Brief at 20 (emphasis added). The state goes so far as to claim that the critical element in an attempted enticement case is not the actual age of the person, but his or her "stated age." Plaintiff-Respondent's Brief at 21. This interpretation creates an entirely new offense by adding an element that the legislature intentionally omitted, thereby violating the principle that the legislature has exclusive authority to declare what conduct is criminal.

Under its interpretation, "the state necessarily will have to prove the defendant's knowledge of the victim's stated age." Plaintiff-

Respondent's Brief at 21. As a consequence, the state must prove knowledge even when the victim actually is a child--a result clearly in conflict with the legislative intent expressed in Wis. Stat. §§939.23(6) and 939.43(2). The state's interpretation thus ultimately may offer children less protection because offenders will claim they did not know the victim was underage. *See* Plaintiff-Respondent's Brief at 21 (concluding that a person who arranges a sexual meeting with a child who represents himself as an adult over the Internet cannot be prosecuted because there is no intent to cause a child to enter a prohibited place for a prohibited purpose).

The state's theory, that child enticement requires proof of knowledge of the victim's "stated age," also is problematic given the realities of the Internet. Under the state's interpretation a defendant may be convicted for enticing communications with an adult who claims to be a minor, but not for enticing communications with a child who makes no representation about age. This result fails to consider the court's observation in *State v. Weidner*, 2000 WI 52, ¶29, 235 Wis. 2d 306, 611 N.W.2d 684: "The internet provides no effective means to gauge the identity and age of persons who access material" and "[p]articipants in chat rooms often assume pseudonyms and do not divulge truthful personal data."

Koenck also did not consider two other compelling arguments that Robins raised in his opening brief that warrant a different result. First, one cannot attempt to attempt a crime, *see State v. DeRango*, 229 Wis. 2d 1, 599 N.W.2d 27, 41 (Ct. App. 1999), *aff'd*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833; *See generally* Defendant-Appellant's Brief at 25-27. Robins' alleged conduct was an attempt to attempt child enticement because he failed in two respects: he did not succeed in causing a person to enter a prohibited place and the person who was the subject of the attempted enticement was not a child.

Second, "one cannot attempt to commit a crime which does not itself include an element of specific intent." *State v. Briggs*, 218 Wis. 2d 61, 579 N.W.2d 783, 785-86 (Ct. App. 1998); *See generally* Defendant-Appellant's Brief at 22-25. As is shown in the following section, statutes which do not include an element of specific intent are "not reconcilable with the concept of attempt." *Briggs*, 579 N.W.2d at 785-86.

For the above reasons, and those contained in Robins' opening brief, this Court should hold that the allegations against Robins fail to establish the crime of attempted child enticement.

II.

THE CHILD ENTICEMENT STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE INTERNET BECAUSE IT DOES NOT REQUIRE PROOF THAT THE ACCUSED KNEW THE CHILD WAS A MINOR.

The state concedes that the child enticement statute, like the statutes at issue in *Weidner*, 2000 WI 52, and *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999), fails to require proof that the defendant knew the victim was a minor. Plaintiff-Respondent's Brief at 18-21. The state even concedes that it would be impermissible to prosecute a person for child enticement or attempted child enticement if his communications over the Internet were to a child who represents himself as an adult (though the statute on its face does not bar such a prosecution). Plaintiff-Respondent's Brief at 21. The state claims, however, that this case is distinguishable from *Weidner* and *Zarnke* because the state has alleged an attempt and attempts require proof that the defendant intended to commit the crime. This intent supplies the critical element of *scienter* that is missing from the completed crime, according to the state.

The constitutional problem is not cured merely by alleging an attempt. If knowledge is not a required element of the completed crime, then it also is not an element of the attempt. An attempt

requires proof that the defendant intended to commit the crime charged, and that he had the requisite mens rea necessary for conviction of the completed crime, but it does not alter the mens rea.

An unconstitutional penal statute that fails to include a scienter element cannot be resurrected simply by alleging an attempt and reading in elements that never were enacted by the legislature. Otherwise, the state frequently could allege an attempt to save an unconstitutional statute. In *Weidner*, for example, the defendant was alleged to have distributed sexually explicit photos over the Internet to a girl who told the defendant she was seventeen. Under the state's theory, the state could charge Weidner with attempting to distribute harmful materials to a child because the attempt allegation would supply the essential scienter element lacking in the completed crime.

The state has provided no authority whatsoever supporting this novel method for preserving unconstitutional statutes. "'An unconstitutional law is void, and is as no law.'" *G. Heileman Brewing Co., Inc. v. City of LaCrosse*, 105 Wis. 2d 152, 312 N.W.2d 875, 880 (Ct. App. 1981) (quoting *Ex Parte Siebold*, 100 U.S. 371, 376 (1879)). If a criminal statute is void because it is constitutionally defective, it follows that an attempt to violate the same statute also is void.

The state's interpretation of the statute also leads to absurd

results. The state asserts that an individual communicating over the Internet with a child "who represents himself or herself to be an adult, arranges a meeting for the purpose of engaging in sexual activity and travels to the agreed-upon meeting place, has committed no offense (assuming that he desists after meeting the child). . . ." Plaintiff-Respondent's Brief at 21. Thus, according to the state, the crime of attempted child enticement has a shifting mens rea in the Internet context. Initially, during the Internet conversations, the statute requires proof that the defendant knew the child's stated age and therefore mistake is a defense if a child misrepresented himself as an adult. However, at some point after the defendant meets the child, strict liability applies for continuing to entice the child no matter how reasonable his belief that the victim is an adult. The state does not identify any statutory or legislative support for this creative recrafting of the statute. Nor does the state identify the precise point at which the mens rea shifts to strict liability. This construction leads to the absurd result that despite the legislature's expressed intent that child enticement is a strict liability offense with respect to the age of the victim, the statute applies to adults posing as children, but not to actual children who are silent about their age.

For the above reasons, the state cannot meet its burden of

proving beyond a reasonable doubt that the statute is constitutional. *E.g.*, *Zarnke*, 589 N.W.2d at 373.

The state's second argument, that the child enticement statute does not even implicate the First Amendment, also is without merit. First, the state fails to appreciate that Robins' challenge is to the statute *as applied* to his conduct. While in some cases the statute may only incidentally impact the right of free speech, here Robins' alleged acts of child enticement all constituted speech. Robins' conduct in driving alone from Wauwatosa to Little Chute arguably provided Robins with an opportunity to commit child enticement, but the drive itself did not entice the alleged victim. It was only Robins' Internet messages that were directed at encouraging the alleged victim to enter a particular place for a particular unlawful purpose. Thus, in this instance the statute does directly impact protected expression, just as in *Weidner* and *Zarnke*.

Second, Robins is not claiming that he has a First Amendment right to use speech to entice minors, as the state misleadingly suggests. Rather, Robins argues that this statute is unconstitutional as applied to his conduct because it does not require proof that he knew the person receiving the communications was a child. Under Wis. Stat. §948.07, "[k]nowledge of [the victim's] age by the

defendant is not required and mistake regarding [the victim's] age is not a defense." Wis. JI-Criminal 2134 (1998). The federal cases cited by the state, such as *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1737 (2001), are inapposite because the federal statutes specifically require proof that the defendant "knowingly" persuaded or enticed or attempted to persuade or entice a minor. Because proof of knowledge is not required by Wisconsin's child enticement statute, the statute is unconstitutional as applied to anonymous Internet communications.

III.

THE EVIDENCE PRESENTED IN THE COMPLAINT AND AT THE PRELIMINARY HEARING FAILED TO ESTABLISH PROBABLE CAUSE THAT ROBINS "ATTEMPTED TO CAUSE" ANYONE TO ENTER A ROOM OR OTHER DESIGNATED PLACE.

According to the state, *Koenck* holds that the complaint there "'demonstrate[d] unequivocally that it was improbable the accused would desist of his or her own free will.'" Plaintiff-Respondent's Brief at 7. It does not. The sole issue in *Koenck* was whether the state must prove that the victim was a minor. *Koenck* at ¶7. Any remarks in *Koenck* regarding the sufficiency of the evidence are mere dicta.

The state also is flat wrong in its claim that the "stop the film"

test set forth in *Hamiel v. State*, 92 Wis. 2d 656, 285 N.W.2d 639 (1979), only applies when the defendant has not stated his intention. Plaintiff-Respondent's Brief at 11. To prove an attempt, the state must establish: (1) an intent to commit the crime charged; and (2) sufficient acts in furtherance of the criminal intent to demonstrate unequivocally that the actor formed that intent and would commit the crime. Wis. Stat. §939.32; *Hamiel*, 285 N.W.2d at 645. Robins' post-arrest statements regarding his intent plainly establish probable cause for the intent element and may be used for that purpose. However, in making the separate determination as to whether his acts went far enough to constitute an attempt, only the acts themselves are examined without considering post-arrest statements about intent.

Hamiel demands that post-arrest statements about intent not be considered because the second element requires that the acts themselves demonstrate unequivocally that the accused would commit the crime. The inquiries regarding intent and conduct are distinct because there is an incubation period during which the defendant may have the requisite intent, but has not committed sufficient acts to commit the offense of attempt. *See State v. Stewart*, 143 Wis. 2d 28, 420 N.W.2d 44, 51 (1988). The purpose of the "stop the film" test is to determine whether the defendant's conduct went so far that it

was too late for him to have repented and withdrawn. *Id.*, 420 N.W.2d at 49-50.

In Robins' case it was not too late for him to repent and withdraw from his intended liaison with the fictitious child. The conscience may be at its strongest in those final moments before a person takes the last necessary steps to attempt a crime. While Robins' intent was established, his acts did not go beyond the "mere preparation" or incubation stage. Accordingly, under Wisconsin attempt law, including most recently *State v. Henthorn*, 218 Wis. 2d 526, 581 N.W. 544 (Ct. App. 1998), the state failed to establish probable cause that Robins engaged in attempted child enticement.

CONCLUSION

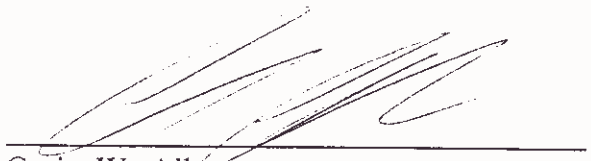
For the reasons stated above, this Court should reverse the orders of the trial court and order the child enticement charge against Mr. Robins dismissed.

Dated at Milwaukee, Wisconsin, July 2, 2001.

Respectfully submitted,

BRIAN D. ROBINS, Defendant-Appellant

GLYNN, FITZGERALD & ALBEE, S.C.



Craig W. Albee
State Bar No. 1015752

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
Telephone: 414-221-9600
Facsimile: 414-221-0600

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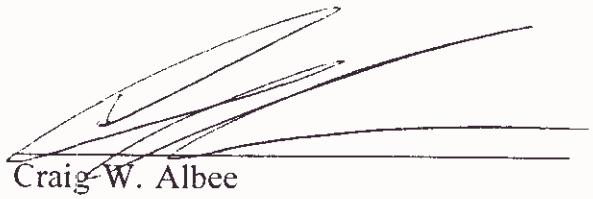
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the includable portions of this reply brief is 2,364 words.



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