

STATE OF WISCONSIN

-vs-

Plaintiff,

DA Case No.: 2009BR000558  
Assigned DA/ADA: Dana J. Johnson  
Agency Case No.: ADPS09931  
Court Case No.: 2009CF

Brian J Gierczak  
2802 Viking Drive #2A  
Green Bay, WI 54304  
DOB: 12/31/1978  
Sex/Race: M/W  
Eye Color: Brown  
Hair Color: Brown  
Height: 6 ft 0 in  
Weight: 200 lbs

**CRIMINAL COMPLAINT**

Defendant,

Complainant, an Assistant District Attorney, being first duly sworn on oath, deposes and says that:

**Count 1: POSSESSION OF CHILD PORNOGRAPHY**

The above-named defendant on or about Thursday, January 22, 2009, in the Village of Ashwaubenon, Brown County, Wisconsin, did, having attained the age of 18, knowingly possess a recording of a child engaging in sexually explicit conduct, and reasonably should have known that the child was under the age of 18, contrary to sec. 948.12(1m)&(3)(a) Wis. Stats., a Class D Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars (\$100,000), or imprisoned not more than twenty five (25) years, or both.

And furthermore, invoking the provisions of Wisconsin Statute 973.042(2), upon conviction for a crime under 948.05 or 948.12 and the defendant is at least 18 years of age at the time of the commission of the crime, the Court shall impose a surcharge of \$500.00 for each image or each copy of an image, as defined in 973.042(1), associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.

And furthermore, invoking the provisions of Wisconsin Statute Section 939.617, upon conviction the Court shall impose a bifurcated sentence including a term of initial confinement for at least three years. The Court may impose a sentence less than three years or place the person on probation upon a finding on the record that the Court finds the lesser sentence is in the best interests of the community and the public will not be harmed.

## **Count 2: POSSESSION OF CHILD PORNOGRAPHY**

The above-named defendant on or about Thursday, January 22, 2009, in the Village of Ashwaubenon, Brown County, Wisconsin, did, having attained the age of 18, knowingly possess a recording of a child engaging in sexually explicit conduct, and reasonably should have known that the child was under the age of 18, contrary to sec. 948.12(1m)&(3)(a) Wis. Stats., a Class D Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars (\$100,000), or imprisoned not more than twenty five (25) years, or both.

And furthermore, invoking the provisions of Wisconsin Statute 973.042(2), upon conviction for a crime under 948.05 or 948.12 and the defendant is at least 18 years of age at the time of the commission of the crime, the Court shall impose a surcharge of \$500.00 for each image or each copy of an image, as defined in 973.042(1), associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.

And furthermore, invoking the provisions of Wisconsin Statute Section 939.617, upon conviction the Court shall impose a bifurcated sentence including a term of initial confinement for at least three years. The Court may impose a sentence less than three years or place the person on probation upon a finding on the record that the Court finds the lesser sentence is in the best interests of the community and the public will not be harmed.

## **Count 3: POSSESSION OF CHILD PORNOGRAPHY**

The above-named defendant on or about Thursday, January 22, 2009, in the Village of Ashwaubenon, Brown County, Wisconsin, did, having attained the age of 18, knowingly possess a recording of a child engaging in sexually explicit conduct, and reasonably should have known that the child was under the age of 18, contrary to sec. 948.12(1m)&(3)(a) Wis. Stats., a Class D Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars (\$100,000), or imprisoned not more than twenty five (25) years, or both.

And furthermore, invoking the provisions of Wisconsin Statute 973.042(2), upon conviction for a crime under 948.05 or 948.12 and the defendant is at least 18 years of age at the time of the commission of the crime, the Court shall impose a surcharge of \$500.00 for each image or each copy of an image, as defined in 973.042(1), associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.

And furthermore, invoking the provisions of Wisconsin Statute Section 939.617, upon conviction the Court shall impose a bifurcated sentence including a term of initial confinement for at least three years. The Court may impose a sentence less than three years or place the person on probation upon a finding on the record that the Court finds

the lesser sentence is in the best interests of the community and the public will not be harmed.

Complainant is an Assistant District Attorney with the Brown County District Attorney's Office and knows of the above offense on information and belief based upon:

**PROBABLE CAUSE:**

1. Complainant's review of the details of Special Agent Joseph Kapitany of the State of Wisconsin, Department of Justice, Division of Criminal Investigation, which indicates that on January 22, 2009, he assisted in executing a search warrant at the residence of the defendant, Brian J. Gierczak, dob 12-31-78, located at 2802 Viking Drive, Apt. 2A, Ashwaubenon, Brown County, Wisconsin. Special Agent Gierczak indicated that officers of the Ashwaubenon Department of Public Safety assisted in the search. Upon arrival at Mr. Gierczak's residence, the defendant, Brian J. Gierczak, was the only individual present at the residence. The defendant admitted to living there by himself. During the search, Computer Forensic Analyst Andrew Schoeneck of the Division of Criminal Investigation conducted a preview of the main computer hard drive located on the defendant's computer inside his apartment. Analyst Schoeneck created a forensic preview disk of some of the videos that were contained on the main computer hard drive. Analyst Schoeneck created a preview disk which captured 26 of the videos and recorded them on a series of disks.
2. Special Agent Kapitany indicated he reviewed partially 3 of the 26 videos that were suspected of containing child pornography. Special Agent Kapitany indicated that in one of the videos there were portions of a video that depicted 2 young females. The girls were pre-pubescent. The girls did not have pubic hair or breast development. The two girls were performing oral sex on an adult male's penis. The adult male engaged in vaginal and anal intercourse with one of the young girls.
3. Agent Kapitany indicated in a review of a second video there was depicted a young female who was approximately 13 years of age with very minimal breast development and some pubic hair in a bathtub. The young girl was rubbing soap on her breasts and vagina and was not wearing any clothing. Agent Kapitany indicated the girl in the video was instructed to do so by someone who was taping the film. The girl then inserted what appeared to be a hot dog into her vagina.
4. Sergeant Kapitany reviewed a third video that depicted a young girl, approximately 9 to 10 years of age, taking her clothes off. The girl was rubbing her nude body with her hands. The girl was pre-pubescent and did not have any pubic hair or breast development. It appeared the girl was receiving some instruction from someone who was recording the video.
5. Special Agent Kapitany was assisted by Special Agent John Spallees also of the Division of Criminal Investigation regarding an interview of the defendant, Brian J. Gierczak, dob 12-31-78. Special Agent Kapitany indicated during the interview the

defendant admitted to knowing that he downloaded child pornographic videos. The defendant stated he separated them into a folder on his hard drive of his computer. The defendant stated that his hard drive was partitioned into 3 separate sub drives and there was a folder located on his E drive titled, "Incomplete." The defendant stated this is where he stored the child pornographic videos. The defendant stated he did this because he did not have an interest in them and wanted them on his computer so he did not "re-download" the same videos. The defendant estimated over the last 8 years since he has been downloading music, movies, and adult pornography, he had acquired at least 30 of these videos in the incomplete folder where the child pornographic videos are located. The defendant stated he would occasionally go in and look at them in order to determine the disk space on his hard drive. The defendant admitted to deleting other adult pornographic videos or other files to obtain hard drive space. The defendant stated he generally would not delete any of the child pornographic videos. The defendant again stated he did this because he didn't want his machine to re-download them. Special Agent Kapitany questioned the defendant as to why he could not simply look at the properties of these videos to determine their size and not have to re-access them to watch them. The defendant stated he could have done it that way, however, he did not. The defendant stated there would be several of the child pornographic videos that he did access more then 2 or 3 times within the last 4 months. The defendant admitted to knowing the child pornographic videos and images were illegal to possess. The defendant stated he did not take sexual pleasure in the videos and was not interested in them. The defendant was questioned why he simply did not delete the videos. The defendant again stated he saved them in several folders so they would not be re-downloaded accidentally.

Complainant believes the details of Special Agent Kapitany of the Division of Criminal Investigation because they are kept in the ordinary course of his job duties as a special agent with the Division of Criminal Investigation. Based on the foregoing, the complainant believes this complaint to be true and correct.

Subscribed and sworn to before me,  
and approved for filing on:

This 23rd day of January, 2009.

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Complainant

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(Assistant) District Attorney