

**FILED**  
**12-01-2020**  
**Clerk of Circuit Court**  
**Kenosha County**  
**2020CF000983**

---

**STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY**

---

State of Wisconsin, Plaintiff

-vs-

Kyle H. Rittenhouse, Defendant

**NOTICE OF MOTION  
AND MOTION TO  
DISMISS COUNTS SIX  
AND TWO**

Case No. 20 CF 983

---

**NOTICE OF MOTION**

---

PLEASE TAKE NOTICE that the above-named defendant, by and through his attorneys, RICHARDS & DIMMER, S.C., will appear before the Honorable Loren Keating, Court Commissioner, Kenosha County Courthouse, 912 56th St., Kenosha, WI 53144 on the 3rd date of December, 2020 at 10:15 a.m., or as soon as counsel may be heard, and seek the relief set forth in the simultaneously filed Motion to Dismiss Counts Six and Two.

Respectfully Submitted,

Signed On: December 1, 2020

s/Mark D. Richards

Mark D. Richards, #1006324

RICHARDS & DIMMER, S.C.

209 Eighth St.

Racine, WI 53403

262-632-2200 (P)

262-632-3388 (F)

[mdr@racinedefense.com](mailto:mdr@racinedefense.com)

[beth@racinedefense.com](mailto:beth@racinedefense.com)

FILED  
12-01-2020  
Clerk of Circuit Court  
Kenosha County  
2020CF000983

---

**STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY**

---

State of Wisconsin, Plaintiff

-vs-

Kyle H. Rittenhouse, Defendant

**NOTICE OF MOTION  
AND MOTION TO  
DISMISS COUNTS SIX  
AND TWO**

Case No. 20 CF 983

---

**MOTION TO DISMISS COUNTS TWO AND SIX**

---

NOW COMES THE DEFENDANT, Kyle H. Rittenhouse, by and through his attorneys and reserving the right to challenge the court's jurisdiction, moves the court for an order dismissing Count 6: Possession of a Dangerous Weapon by a Person Under 18, in violation of Wis. Stat. § 948.60(2)(a); and Count 2: First Degree Recklessly Endangering Safety, Use of a Dangerous Weapon, in violation of Wis. Stat. §§941.30(1) and 939.63(1)(b), as alleged in the criminal complaint. Defendant brings this motion pursuant to Wis. Stat. § 971.31(2) and (5) on the grounds that the court lacks jurisdiction over the defendant because of defects in the charging document, in violation of the rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 1, 8, and 11 of the Wisconsin Constitution; *State v. Chagnon*, 2015 WI App. 66, ¶7, 364 Wis. 2d 719, 870 N.W.2d 27, *State v. Smaxwell*, 2000 WI App 112, ¶5, 235 Wis. 2d 230, 612 N.W.2d 756; and *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020 (2010). Specifically, the Complaint fails to set forth essential facts from which it could be inferred that Defendant committed the offenses charged in Counts 6 and 2.

The basis for this motion is contained in the attached Memorandum of Law.

Respectfully Submitted,

Signed On: December 1, 2020

s/Mark D. Richards

Mark D. Richards, #1006324

RICHARDS & DIMMER, S.C.

209 Eighth St.

Racine, WI 53403

262-632-2200 (P)

262-632-3388 (F)

[mdr@racinedefense.com](mailto:mdr@racinedefense.com)

[beth@racinedefense.com](mailto:beth@racinedefense.com)

**FILED**  
**12-01-2020**  
**Clerk of Circuit Court**  
**Kenosha County**  
**2020CF000983**

---

**STATE OF WISCONSIN, CIRCUIT COURT, KENOSHA COUNTY**

---

State of Wisconsin, Plaintiff

-vs-

Kyle H. Rittenhouse, Defendant

**NOTICE OF MOTION  
AND MOTION TO  
DISMISS COUNTS SIX  
AND TWO**

Case No. 20 CF 983

---

**MEMORANDUM OF LAW**

---

**INTRODUCTION**

Defendant, Kyle H. Rittenhouse, has been charged in a six-count Criminal complaint with various offenses related to the shooting death of two adult men and the wounding of another during civil unrest on the evening of August 25, 2020 in the City of Kenosha. Here, the criminal complaint fails to allege facts within its four corners which could allow a reasonable person to conclude that Rittenhouse: (1) committed a violation of section 948.60(2)(a)- Possession of a Dangerous Weapon by a Person Under 18; and (2) committed a violation of 941.30(1)- First Degree Recklessly Endangering Safety, Use of a Dangerous Weapon, as to Richard McGinnis. Section 948.60(3)(c) provides exemption for the prosecution of minors in possession of rifles or shotguns unless at least one of two conditions are satisfied. As neither condition is satisfied in this instance, the criminal complaint is insufficient and Count 6 should be dismissed. Further, conviction for violation of 941.30(1) requires a finding that an individual's safety was endangered by the conduct of the defendant. As there are no facts in the criminal complaint exhibiting how Richard McGinnis' safety was endangered by Rittenhouse, the complaint fails to allege facts which could allow a reasonable person to conclude that a crime was committed. Accordingly, Count 2 should also be dismissed.

## **I. Governing Legal Principles**

To be legally sufficient, a criminal complaint “must set forth facts within its four corners that, together with reasonable inferences from those facts, would allow a reasonable person to conclude that a crime had been committed and that the defendant was probably the person who committed it.” *State v. Chagnon*, 2015 WI App. 66, ¶7, 364 Wis. 2d 719, 870 N.W.2d 27. When weighing a complaint for sufficiency, it is evaluated “in a common sense, rather than a hypertechnical manner.” *Id.*; see also *State v. Smaxwell*, 2000 WI App 112, ¶5, 235 Wis. 2d 230, 612 N.W.2d 756 (“The test for determining the sufficiency of a complaint is common sense.”).

## **II. The defendant is exempt from prosecution as to Count 6 due to the clear meaning of section 948.60(3)(c).**

Section 948.60(2)(a) of the Wisconsin Statutes establishes that “Any person under 18 years of age who possesses or goes armed with a dangerous weapon is guilty of a Class A misdemeanor.” Section 948.60(3)(c), however, conditionally exempts possession of rifles and shotguns from criminal penalty and inclusion under section 948.60. Wis. Stat. § 948.60(3)(c) specifically provides that 948.60(2)(a) “applies *only* to a person under 18 years of age who possesses or is armed with a rifle or shotgun *if* the person is in violation of s. 941.28 *or* is not in compliance with 29.304 and 29.593.” (emphasis added). Accordingly, it is only criminal for a person under 18 years old to possess a rifle or shot gun if: (1) that person is in violation of 941.28; or (2) that person is not in compliance with 29.304 and 29.593.

The criminal complaint fails to state a legally sufficient violation of section 948.60(2)(c) for two reasons. First, the complaint fails to present facts establishing that Rittenhouse was in violation of sec. 941.28 on August 25, 2020. Section 941.28, in relevant part, criminalizes possession of short-barreled rifles. Wis. Stat. § 941.28(2). A short-barreled rifle is defined as “a rifle having one or more barrels having a length of less than 16 inches measured from closed breech

or bolt face to muzzle or a rifle having an overall length of less than 26 inches.” Wis. Stat. § 941.28(1)(b). The criminal complaint fails to allege any facts to support a conclusion that the rifle in Rittenhouse’s possession was a short-barreled rifle. To the contrary, the complaint calls the rifle a “*long gun*.” (Cmpl. at 3) (emphasis added). It further provides that law enforcement identified the rifle as “a smith & Wesson AR-15 style .223 rifle” without an allegation that it was modified or had anything but a typical barrel of at least 16 inches. (Cmpl. at 3). Thus, the reasonable common-sense reasoning of the criminal complaint leads to a conclusion that Rittenhouse did not violate section 941.28.

Second, the complaint similarly fails to allege that Rittenhouse had not complied with sections 29.304 *and* 29.593. Section 29.304 regulates hunting and the use of firearms for persons *under 16 years of age*. Wis. Stat. § 29.304. Rittenhouse could not have been out of compliance with section 29.304 because he was not under 16 years of age on the date of the incident. The criminal complaint provides that Rittenhouse was born on January 3, 2003, making him 17-years old on August 25, 2020. (Cmpl. at 3). Thus, section 29.304 can not apply. Yet, even if it did apply and the complaint contained sufficient facts to alleged a violation, the criminal complaint would *also* have to provide facts supporting a legally sufficient violation of section 29.593. *See* Wis. Stat. § 948.60(3)(c) (requiring, in relevant part, non-compliance with section 29.304 *and* section 29.593) (emphasis added). Section 29.593, however, is also inapplicable in this instance. That section generally requires a person to obtain a certificate of accomplishment from an approved hunter education program before obtaining approval to hunt. Wis. Stat. § 29.593. Again, there are no facts provided in the criminal complaint supporting a reasonable conclusion that Rittenhouse violated section 29.593 by obtaining approval to hunt without completing a hunter education program.

The State may argue that the *spirit* of s. 948.60 is to prohibit minors from possessing rifles except for hunting. However, the court should not even entertain such an argument. As discussed above, the statutory language of 948.60(3)(c) is clear and does not apply to a 16 or 17-year-old in possession of a rifle, whether or not that individual is hunting at the time of possession. *See Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659 (“If the meaning of the statute is plain, we ordinarily stop the inquiry.”) Moreover, when the legislature previously expanded 948.60 to include more than just pistols, the legislative notes make it clear that the focus of the expansion was to include short-barreled firearms and other non-firearm dangerous weapons under the statute—not rifles:

[1987 Act 332] [r]evises the current crime prohibiting possession of a pistol by a minor [s. 941.22] to:

1. Expand the scope of the prohibitions in current s. 941.22 to apply to other dangerous weapons, in addition to pistols. The bill prohibits a child to go armed with, or a person to furnish a child with: 1) any firearm having a barrel less than 12 inches long [the definition of “pistol” in current s. 941.22]; 2) any electric weapon, as defined in s. 941.295(4); 3) metallic knuckles; or 4) certain martial arts weapons described in the bill (e.g., a nunchaku or a throwing star)....

1987 Wis. Act 332, § 55, note to § 948.60. Thus, the court should reject any attempt to stretch the plain language of 948.60 beyond its common and ordinary meaning.

In sum, the criminal complaint fails to adequately allege a violation of section 948.60(2)(a) because subsection (3)(c) exempts rifles and shotguns from criminal prosecution and penalty under the statute, unless at least one of two conditions are satisfied—neither of which is applicable or alleged in this case.

**III. The criminal complaint lacks information supporting a reasonable conclusion that the defendant endangered the safety of Richard McGinnis.**

Section 941.30(1) of the Wisconsin Statutes establishes that “Whoever recklessly endangers another’s safety under circumstances which show utter disregard for human life is guilty of a Class F Felony.” WI JI 1345 further provides that in order to sustain a conviction under 941.30(1), three elements must be proven: (1) The defendant endangered the safety of another human being; (2) The defendant endangered the safety of another by criminally reckless conduct; and (3) The circumstances of the defendant’s conduct showed utter disregard for human life. Accordingly, in order for a complaint alleging a violation of 941.30(1) to be legally sufficient, it must contain facts within its four corners which could support each required element. In this case, the criminal complaint is deficient as to Count 2, as it provides no facts indicating *how* Richard McGinnis’s safety was specifically endangered by Rittenhouse’s conduct on August 25, 2020.

The complaint provides two sources of information regarding McGinnis’ presence at the scene of Joseph Rosenbaum’s shooting: video evidence and statements provided by McGinnis to law enforcement. However, neither source can support a reasonable conclusion that McGinnis’ safety was endangered *by* Rittenhouse. In the narrative description of the video evidence, McGinnis is mentioned only twice. First, as “trailing behind the defendant and Rosenbaum” immediately prior to the shooting; and second, as providing aid to Rosenbaum after he was shot. (Cmpl. at 3). There is no mention of how close McGinnis was to Rosenbaum and Rittenhouse at the time. There are no additional facts provided in the description of the video evidence indicating that McGinnis’ safety was in any way jeopardized at the time the incident occurred.

The complaint also provides a summary of McGinnis’ statements after the shooting. According to McGinnis, Rittenhouse fired approximately three shots at Rosenbaum. (Cmpl. at 4) He stated that the first round was grounded, and “when the second shot went off, the defendant

actually had the gun aimed at Rosenbaum.” (Cmpl. at 4). The complaint provides no facts alleging that Rittenhouse ever had his weapon aimed at McGinnis or that the first round was grounded anywhere near him. Accordingly, there are no facts in the criminal complaint derived from McGinnis’ statements which could support a reasonable conclusion that Rittenhouse’s actions endangered McGinnis’ safety on August 25, 2020.

The State may argue that McGinnis was “in the line of fire,” (Cmpl. at 4) at the time Rosenbaum was shot, however, this is a conclusion unsupported by the facts provided. McGinnis is alleged to have been “behind and slightly to the right” of Rosenbaum during the shooting; however, that does not mean McGinnis was “in the line of fire” or that his safety was legitimately endangered. (Cmpl. at 4). As mentioned previously, McGinnis stated that Rittenhouse’s weapon was aimed directly at Rosenbaum when he was shot—not “behind and slightly to the right.” The complaint provides that McGinnis “felt something on his leg” after the first round was fired but fails to identify what that something was. (Cmpl. at 4) (emphasis added). Furthermore, it is irrelevant whether in the heat of the moment McGinnis was in fear of getting shot. There is no mention in WI JI 1345 that a person must fear, or even be aware of, a defendant’s conduct in order to sustain a conviction for First Degree Recklessly Endangering Safety. Accordingly, the court should reject any challenge to the defendant’s motion to dismiss Count 2 on such grounds.

Simply put, WI JI 1345 requires a jury to find that a defendant “endangered the safety of another human being” in order to sustain a conviction. Thus, a complaint alleging violation of 941.30(1) must contain facts which allege that a specific person’s safety was actually endangered by the actions of the defendant. If there are no facts provided establishing how and why the defendant’s conduct jeopardized McGinnis’ safety, common sense precludes a finding that his safety was endangered. As this is a necessary finding to sustain a conviction for First Degree

Recklessly Endangering Safety as alleged in Count 2, no reasonable person could find that this crime was ever committed. Thus, the criminal complaint is defective and Count 2 should be dismissed.

### CONCLUSION

For the reasons stated above, the Court should dismiss Counts Six and Two of the Criminal Complaint.

Respectfully Submitted,

Signed On: December 1, 2020

s/Mark D. Richards

Mark D. Richards, #1006324

RICHARDS & DIMMER, S.C.

209 Eighth St.

Racine, WI 53403

262-632-2200 (P)

262-632-3388 (F)

[mdr@racinedefense.com](mailto:mdr@racinedefense.com)

[beth@racinedefense.com](mailto:beth@racinedefense.com)