STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2009AP1643-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

WILLIAM DINKINS, SR.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN DODGE COUNTY CIRCUIT COURT,
THE HONORABLE ANDREW P. BISSONNETTE,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication may be warranted, however, on the question of how the sex-offender registration requirements of Wis. Stat. § 301.45 apply to a convicted sex offender who claims not to have had an "address" to provide to the Wisconsin Department of Corrections ("DOC") upon release from prison at the expiration of his sentence. This novel question is apt to recur.

STATEMENT OF THE CASE

Basis for conviction.

By complaint filed July 17, 2008, in Dodge County Case No. 2008-CF-233, Defendant William Dinkins, Sr. was charged with violating the sex-offender registration requirement that no later than ten days before being released from prison at the expiration of his sentence for conviction of an enumerated "sex offense," he provide the DOC with "the address at which [he] is or will be residing," contrary to Wis. Stat. §§ 301.45(2)(a)5. 301.45(2)(d), 301.45(2)(e)4., 301.45(3)(a)2m., and 301.45(6)(a)1. (*see* 3). An amended complaint, reiterating the charge, was filed July 22, 2008 (*see* 5).

At the end of a preliminary hearing on July 31, 2008, Dinkins was bound over for trial (20:63-64). The next day, the State filed an information repeating the charge set forth in the amended complaint (13).

On November 18, 2008, Dinkins proceeded to a court trial at which the parties agreed to use the record and exhibits of the preliminary hearing as the evidentiary record of trial (31:4-5, 17-18). At the conclusion of trial, Judge Andrew P. Bissonnette found Dinkins guilty of violating the "address" reporting requirement of the sex-offender registration law (31:18-19).

After trial, Judge Bissonnette proceeded directly to sentencing, withholding sentence in favor of placing Dinkins on a thirty-month term of probation, conditioned in part on a ninety-day jail term (31:35-36). Judgment of conviction was filed November 24, 2008 (27).

Postconviction motion and appeal.

By postconviction motion filed May 7, 2009, pursuant to Wis. Stat. § (Rule) 809.30(2)(h), Dinkins sought vacation of his conviction and dismissal of the underlying charge with prejudice or, alternatively, a new

trial (32). For reasons set forth on the record of a hearing on June 9, 2009, Judge Bissonnette denied the post-conviction motion (39:21-23). A formal order to that effect was filed June 15, 2009 (35).

By notice of appeal filed June 18, 2009, Dinkins now appeals from the judgment of conviction and the postconviction order (36).

STATEMENT OF FACTS

To avoid undue repetition, the State addresses the relevant facts in the course of its Argument, which follows.

ARGUMENT

I. SUFFICIENT EVIDENCE WAS ADDUCED TO ENABLE THE TRIAL COURT TO FIND DINKINS GUILTY BEYOND A REASONABLE DOUBT OF VIOLATING THE "ADDRESS" REPORTING REQUIREMENT OF THE SEX-OFFENDER REGISTRATION LAW.

A. Introduction.

Dinkins' argument. For reasons set forth in Arguments I. and II. of his brief, Dinkins seeks vacation of his conviction of violating the "address" reporting requirement of the sex-offender registration law, and dismissal of the charge with prejudice, on grounds of insufficient evidence. He alleges:

- *"actual knowledge" element* – that the charged crime of violating the "address" reporting requirement of the sex-offender registration law requires the State to

prove beyond a reasonable doubt that the defendant actually knew where he would be residing after release from custody (an "actual knowledge" element) (Dinkins' brief at 9-17, 20-24);

- *constitutionality* – that unless the crime of violating the "address" reporting requirement contains such an "actual knowledge" element, the sex-offender registration law, as applied to him, would: (a) violate substantive due process; and (b) be void for vagueness (Dinkins' brief at 17-20); and

- *sufficient evidence* – that in the present case, the State failed to prove beyond a reasonable doubt the purported "actual knowledge" element – that is, that Dinkins actually knew where he would be residing upon release from prison at the expiration of his sentence (Dinkins' brief at 25-30).

Summary of State's position. For reasons summarized here and developed in the subsections that follow, the State respectfully disagrees with Dinkins' argument.

First, as the pattern jury instructions correctly elucidate, the crime of failing to comply with the "address" reporting requirement of the sex-offender registration law does *not* require *the State* to prove that Dinkins actually knew where he expected to live and sleep upon release into the community. Instead, the sex-offender registration law reasonably assumes that because everyone has to live and sleep somewhere – even if descriptively "homeless" – a soon-to-be-released sex offender, like Dinkins, necessarily knows that he will be living and sleeping somewhere upon leaving prison – whether by reference to an actual or a neighboring street address. The statute plainly requires the sex offender to make that decision and to provide that information to DOC no later than ten days before release into the community. If it were otherwise, sex offenders could

circumvent the "address" reporting requirement with impunity. *See* Argument I.B.

Second, the "address" reporting requirement of the sex-offender registration law comports with due process – both substantively and procedurally – without requiring *the State* to prove that Dinkins actually knew where he expected to live and sleep upon release into the community. *See* Argument I.C.

Third, the State adduced sufficient evidence to enable a reasonable jurist to find Dinkins guilty of violating the "address" reporting requirement of the sex-offender registration law. Dinkins actually knew he would be living and sleeping somewhere upon leaving prison – whether in a house, in a motel, at a shelter, or on a park bench, all capable of reference to an actual or a neighboring street address. And Dinkins knew he had to provide that information to the DOC no later than ten days before his release, but failed to do so. *See* Argument I.D.

B. The crime of failing to comply with the "address" reporting requirement of the sex-offender registration law does *not* require *the State* to prove that Dinkins actually knew where he expected to live and sleep upon release into the community.

1. The three essential elements of the charged crime.

As the pattern jury instructions elucidate, to convict Dinkins of failing to comply with the "address" reporting requirement of the sex-offender registration law, the State had to prove the following three essential elements beyond a reasonable doubt:

- that Dinkins "was required to provide information" to the DOC under Wis. Stat. § 301.45(1g)(a);

- that Dinkins failed to comply with Wis. Stat. §§ 301.45(2)(a)5., (2)(d), and (2)(e)4., which together required him – no later than ten days before being released from prison at the expiration of his sentence – to provide the DOC with "the address at which [he] . . . will be residing" upon release (quoting Wis. Stat. § 301.45(2)(a)5.); and

- that Dinkins "knowingly failed" to provide this required information.

(Quoting Wis. JI-Criminal 2198 (2009) unless otherwise indicated). According to the Jury Instructions Committee, the third element "requires that the defendant knew that (he) (she) was required to provide the information." *Id.* [1]

2. As a matter of statutory interpretation, the charged crime does *not* require *the State* to prove that Dinkins actually knew where he expected to live and sleep upon release into the community.

a. Principles of statutory interpretation.

Dinkins' argument about the elements of the charged crime presents a threshold question of statutory interpretation.

[1]For grammatical ease, the State uses only the male pronoun "he" when generically referring to a "sex offender" in the remainder of this brief.

In Wisconsin, all crimes are statutory – that is, creations of the legislature. *See* Wis. Stat. § 939.10; *In re Felony Sentencing Guidelines*, 113 Wis. 2d 689, 695, 335 N.W.2d 868 (1983). Thus, to determine the essential elements of a crime, the court must interpret the statute proscribing the act or omission. *See State v. McAllister*, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982).

"[T]he purpose of statutory interpretation is to determine what a statute means so that it may be given the full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110.

Statutory interpretation "'begins with the language of the statute.'" *Id.*, ¶ 45 (citation omitted). Statutory language "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* Further:

> [S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id., ¶ 46. Consequently, "scope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute" so long as they are "ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Id.*, ¶ 48.

If the meaning of the statute is plain, "'the statute is applied according to this ascertainment of its [plain] meaning.'" *Id.*, ¶¶ 45-46 (citations omitted).

Conversely, a statute is ambiguous "if it is capable of being understood by reasonably well-informed persons in two or more senses," . . . that is, "'whether the statutory . . . language *reasonably* gives rise to different meanings.'" *Id.*, ¶ 47 (citation omitted; emphasis in

original). Thus, ambiguity "can be found in the words of the statutory provision itself, or by the words of the provision as they interact with and relate to other provisions in the statute and to other statutes." *State v. Sweat*, 208 Wis. 2d 409, 416, 561 N.W.2d 695 (1997).

If statutory language is ambiguous, the reviewing court "may consult extrinsic sources, such as legislative history," to divine statutory meaning. *Donaldson v. Board of Commissioners of Rock-Koshkonong Lake District*, 2004 WI 67, ¶ 19, 272 Wis. 2d 146, 680 N.W.2d 762; *Kalal*, 271 Wis. 2d 633, ¶ 51.

Ultimately, "statutory interpretation is a question of law" that each level of reviewing court determines independently. *Donaldson*, 272 Wis. 2d 146, ¶ 19.

b. Application.

Dinkins asserts that the Jury Instructions Committee "has incorrectly construed" the crime of failing to comply with the sex-offender registration law (Dinkins' brief at 10). He argues that the third element outlined above – that the sex offender "knowingly failed" to provide the required information – should be broken down into a third and a fourth element. He writes that "[t]he [S]tate must prove not only that the offender knew he was required to *provide* the information in question, but also that he [actually] knew the *information* that he was required to provide" – in effect, that the crime necessarily includes an "actual knowledge" element (Dinkins' brief at 10; emphasis in original; brackets added).

"Knowingly." Dinkins first invokes logic to support his statutory-construction argument about the meaning of "knowingly" failing to comply with a sex-offender reporting requirement. Dinkins reasons:

> Ignorance of the required information makes its reporting truly impossible, and presumably, less culpable than if the offender had withheld known

> information. The legislature, by limiting criminal liability to "knowing" noncompliance, obviously intended *not* to punish those whose failure to report required information was attributable to mere lack of knowledge.

(Dinkins' brief at 11; emphasis in original.)

Respectfully, Dinkins' reasoning is unpersuasive. It rests upon the faulty premise that a sex offender about to be released from custody might not know where he will live and sleep upon release into the community. Not only is that proposition inherently dubious, but to place a burden on *the State* to show beyond a reasonable doubt that the sex offender actually knew where he was going to live and sleep would be unworkable and contrary to the legislative intent.

First, the proposition that a sex offender might not know where he expects to live and sleep upon release into the community is inherently dubious. Everyone physically has to live and sleep somewhere. Even if a convicted sex offender has been unable to establish a typical residential-type living arrangement upon release from custody, he still must choose to go somewhere to live and sleep. Subject to Wis. Stat. § 301.48 and any community restrictions, he is free to choose where he will live and sleep, depending on his financial means and other factors peculiar to his background and family situation.

Importantly, nothing in the plain language of Wis. Stat. § 301.45 exempts soon-to-be-released sex offenders who are unable to establish a typical residential-type living arrangement from providing the DOC with information about where they expect to live. Every location, even a park bench or a car, can be identified by reference to an actual or a neighboring street address:

> [T]he sex offender registration statutes operate on the premise that everyone does, at all times, have an "address" of some sort, even if it is a homeless shelter, a location under a bridge or some similar place. In the event that we were to accept the

> argument that "drifters" such as Defendant have no "address," as defined by [statute], then such individuals would be effectively immune from the registration requirements found in current law as long as they continued to "drift." The adoption of such an understanding of the relevant statutory provisions would completely thwart the efforts of "law enforcement agencies and the public [to know] the whereabouts of sex offenders and [to locate] them when necessary."

State v. Worley, 679 S.E.2d 857, 864 (N.C. Ct. App. 2009) (citation omitted; first brackets added; remaining brackets in original).

Second, to place a burden on *the State* to show that the sex offender actually knew where he was going to live and sleep upon release into the community would be unworkable and contrary to legislative intent.

Because it is within the peculiar knowledge of every soon-to-be-released sex offender as to where he expects to live and sleep upon release from custody, the burden properly remains with the sex offender to provide such information to the DOC, rather than to require *the State* to prove that the sex offender actually knew such information when he failed to report it.

In other contexts, for example, criminal statutes place the burden of persuasion on *the defendant* when the defendant is best situated to know or to discover what must be proven in support of an affirmative defense. *See, e.g.,* Wis. Stat. § 948.22(6) (placing on the defendant the burden of proving by a preponderance of the evidence an "inability to pay" defense to a charge of failing to provide child support); Wis. Stat. § 940.09(2) (placing on the defendant the burden of proving by a preponderance of the evidence the defenses of "inevitable fatality" or "valid prescription" to a charge of homicide by intoxicated use of a vehicle); Wis. Stat. § 971.15(3) (placing on the defendant the burden of proving by the greater weight of

the credible evidence the defense of not guilty by reason of mental disease or defect).

"The purposes of Wis. Stat. § 301.45 are protection of the public and assistance to law enforcement." *State v. Smith*, 2009 WI App 16, ¶ 11, 316 Wis. 2d 165, 762 N.W.2d 856. The "Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act," codified at 42 U.S.C. § 14071 (1994), requires all states to enact a program mandating that designated offenders register with state or local authorities or risk losing federal anti-crime funding. All fifty states have some type of sex offender registration and notification laws in effect. *See State v. Bollig*, 2000 WI 6, ¶ 19, 232 Wis. 2d 561, 605 N.W.2d 199. The "Adam Walsh Act," codified at 42 U.S.C. § 16913 et seq. (2006) and amended in 18 U.S.C. § 2250 (2006), requires all sex offenders to register and keep the registration current in each jurisdiction where the offender resides.

While Wis. Stat. § 301.45(2)(a) enumerates ten items of information that a soon-to-be-released sex offender must provide to the DOC (*see* Dinkins' brief at 12-13), the quintessential item is the *location* where the sex offender expects to live and sleep – something every soon-to-be-released sex offender necessarily must know, even if only by reference to a neighboring street address in cases of purported homelessness.

Other enumerated items in § 301.45(2)(a) are readily distinguishable from the "address" reporting requirement. Unlike the fact that a soon-to-be-released sex offender must live and sleep somewhere upon release so that it is always possible for the sex offender to report such expected location, there is nothing more that a sex offender can possibly report under § 301.45(2)(a)8. if he will be unemployed when released, or under § 301.45(2)(a)9., if he will not be enrolled in school (*see* Dinkins' brief at 14). All of the remaining items listed in § 301.45(2)(a) are either known to the sex offender (such as name, aliases, birth date, gender, race, height, weight,

and hair and eye color), or readily capable of discovery from the offender's DOC file or with the assistance of a circuit court or the Department of Health Services, as provided in § 301.45(2)(d) (such as statute, date, and county or state of conviction, adjudication, or commitment; and information about any supervising agency) (*see* Dinkins' brief at 15).

Also, contrary to Dinkins' intimation at page 16 of his brief, § 301.45(2)(f) does not "provide[] an alternative method" for a sex offender to satisfy the "address" reporting requirement. Rather, subd. (2)(f) simply authorizes the DOC to require a sex offender to provide such *additional* identifying information as "fingerprints, a recent photograph of the person, and any other information required under par. (a) that the person has not previously provided." It does not excuse noncompliance with the "address" reporting requirement.

In short, as the Jury Instructions Committee reasonably concluded, before a sex offender will be held to have "knowingly" failed to comply with a reporting requirement, the sex offender only must have known of *the reporting requirement* – whether independently or by virtue of the notice provisions of Wis. Stat. § 301.45(3)(b)2.-4. [2]

The "address" reporting requirement of the sex-offender registration law reasonably assumes that every

[2]Under Wis. Stat. § 301.45(3)(b)4., it is not a defense to criminal liability that the sex offender did not receive notice of the particular reporting requirement from an enumerated person or agency charged with providing such notice. Nor, according to this provision, is it a defense to criminal liability that the sex offender did not receive or sign a notification form that is supposed to be provided to the sex offender. In the present case, the record reflects that Dinkins received such notification (5:6, 18-20; 9; 20:22-29, 36-37, 42-44, 48-49). Indeed, both Dinkins' institutional social worker and his probation-parole officer tried, unsuccessfully, to help him secure a residential-type living arrangement, preferably with his daughter (8; 20:28-32, 51-58).

soon-to-be-released sex offender knows where he expects to live and sleep upon his release from custody – even if it is a location other than a typical residential-type living arrangement and can be referenced only by a neighboring street address.

The State agrees with Dinkins that use of the adverb "knowingly" in the penalty section of Wis. Stat. § 301.45(6)(a) signals a legislative intent to include a *mens rea* element in the crime of "knowingly" failing to provide required information to the DOC. For purposes of Chapters 939 to 951 of the Wisconsin Criminal Code, the verb "[k]now" is defined as "requir[ing] only that the actor believes that the specified fact exists." Wis. Stat. § 939.23(2). If that definition were applied to the use of "knowingly" in Wis. Stat. § 301.45(6)(a), then knowledge of "the specified fact" would mean knowledge of the reporting requirement. *Cf. United States v. Stevens*, 598 F.Supp.2d 133, 151 (D.R.I. 2009) (concluding that the language "knowingly fails to register" under 18 U.S.C. § 2250(a)(3) of the federal sex-offender registration law "only requires that the defendant knew he is not registering").

"Address." As noted, Wis. Stat. § 301.45(2)(a)5. requires the sex offender to report "the address at which [he] . . . will be residing" upon release into the community.

The statute does not define "address." In such instances, the legislature is presumed to have used the word "address" according to its natural and ordinary meaning, as found in a standard dictionary definition. *See*

Wis. Stat. § 990.01; *State v. Hahn*, 221 Wis. 2d 670, 678, 586 N.W.2d 5 (Ct. App. 1998).[3]

The noun "address" has been defined by dictionaries as follows:

- "the designation of a place . . . where a person or organization may be found or communicated with." *Webster's Third New International Dictionary* at 24-25 (1986);

- "[a] description of the location of a person. . . . [t]he location at which a particular organization or person may be found or reached." *The American Heritage Dictionary of the English Language* at 20 (4th ed. 2000);

- "the particulars of the place where someone lives." *The New Oxford American Dictionary* at 18 (2d ed. 2005).

According to Wis. Admin. Code § Jus 8.04(2)(c) (Sept. 2009), the sex-offender registrant is to provide the DOC with the "[p]recise, current street address or rural location of the registrant's place of residence."

The gist of Dinkins' statutory-construction argument is that a soon-to-be-released sex offender who is unable to establish a residential-type living arrangement as

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[3]Under 42 U.S.C. § 16914(a)(3) of the federal sex-offender registration law, a sex offender "shall provide . . . to the appropriate official . . . [t]he address of each residence at which the sex offender resides or will reside." The federal statute apparently does not define "address," but does define "resides" to mean "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). According to the Attorney General Guidelines, the sex offender must register "[i]n any jurisdiction in which he habitually lives (even if he has no home or fixed address in the jurisdiction, or no home anywhere)." Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030-01, 2008 WL 2594934 at 38061-62 (July 2, 2009) (parentheses in original).

the location where he will live and sleep upon release into the community cannot possibly satisfy the requirement of reporting to the DOC "the address at which [he] . . . will be residing." Wis. Stat. § 301.45(2)(a)5. If a soon-to-be-released sex offender claims not to know where he will live upon release so that he cannot report it to the DOC, then, logically, the sex offender must be claiming "homelessness." In effect, Dinkins' argument implies that a sex offender's expectation of being "homeless" obviates the "address" reporting requirement.[4]

This concern about "homeless" sex offenders has divided state courts. Some courts have concluded that if the sex-offender registration statute does not expressly address the situation of homelessness, the sex offender cannot be culpable for failing to report an "address" or "residence." *See, e.g., People v. North*, 5 Cal.Rptr.3d 337, 347-48 (Cal. Ct. App. 2003); *Santos v. State*, 668 S.E.2d 676, 679 (Ga. 2008); *Twine v. State*, 910 A.2d 1132, 1138-40 (Md. Ct. App. 2006); *People v. Dowdy*, 769 N.W.2d 648, 649-51 (Mich. 2009) (Kelly, C.J., concurring); *Commonwealth v. Wilgus*, 975 A.2d 1183, 1187-88 (Pa. 2009); *State v. Pickett*, 975 P.2d 584, 586-87 (Wash. Ct. App. 1999).

Other courts have found no exemption for alleged homelessness – even if the "address" reporting requirement of the sex-offender registration statute is silent on the question. *See, e.g., State v. Winer*, 963 A.2d 89, 93 (Conn. App. Ct. 2009) ("residence address" means "wherever [the sex offender] [i]s dwelling, no matter how temporary a situation"); *Tobar v. Commonwealth*, 284 S.W.2d 133, 136 (Ky. 2009) ("[a]ll sex offenders, regard-

[4]As Dinkins catalogues at pages 21-23 of his brief, some states have enacted statutory language in sex-offender registration laws that expressly applies to erstwhile "homeless" sex offenders. Although Dinkins acknowledges at pages 23-24 of his brief that sex-offender registration laws can apply to homeless offenders, he apparently maintains that Wis. Stat. § 301.45(2)(a)5. cannot do so without a legislative fix. For the reasons that follow in the text, the State respectfully disagrees.

less of their socioeconomic status, must register[,] . . . [e]ven if a sex offender becomes homeless"); *Commonwealth v. Scipione*, 870 N.E.2d 108, 109 (Mass. App. Ct. 2007) ("[w]here a sex offender lives does not control the requirement of registering under the statute," so that failure of a registration statute to address the situation of a "homeless" sex offender does not exempt him from complying with the statute); *State v. Abshire*, 677 S.E.2d 444, 451 (N.C. 2009) ("address" means "the actual place of abode where [the sex offender] lives, whether permanent or temporary"); *State v. Ohmer*, 832 N.E.2d 1243, 1245 (Ohio Ct. App. 2005) ("'[t]o allow a homeless defense to the registration provision would frustrate the legislative intent'" (citation omitted)); *cf. State v. Iverson*, 664 N.W.2d 346, 353 (Minn. 2003) ("[c]ompliance is required, even for homeless offenders, if they live somewhere where mail can be received and they can provide five days' notice").

For multiple reasons, Wisconsin's sex-offender registration statute is reasonably construed as requiring *every* soon-to-be-released sex offender to report the "address" where he expects to live and sleep – whether by reference to an actual street address or to a neighboring street address when the sex offender, like Dinkins, ostensibly claims he may be "homeless" due to a professed inability to make other living arrangements.

- As discussed, every soon-to-be-released sex offender necessarily knows that he will be living and sleeping at some location upon release, capable of reference to an actual or a neighboring street address.

- There is no exemption for purported homelessness expressed in Wis. Stat. § 301.45.

- Many released sex offenders, like Dinkins, are subject to GPS ("global positioning system") monitoring, which requires establishment of a primary "inclusion zone" from which the offender is prohibited from leaving. Wis. Stat. § 301.48.

- Allowing for a homelessness exemption would undermine the statutory notification provisions of Wis. Stat. § 301.46. *See Bollig*, 232 Wis. 2d 561, ¶ 24.

- Finally, allowing for a homelessness exemption would enable, if not encourage, soon-to-be-released sex offenders to circumvent the essential "address" reporting requirement with impunity. As one court observes:

> Allowing sex offenders to circumvent the registration process by physically leaving one residence [e.g., prison] without technically acquiring a new residence would permit the offender to "slip through the cracks," disappear from law enforcement view and thus thwart the purpose for which this law was enacted.

State v. Rubey, 611 N.W.2d 888, 892 (N.D. 2000) (brackets added); *see also Winer*, 963 A.2d at 93 (to excuse homeless and temporarily housed offenders from compliance with the sex-offender registration law would "frustat[e] the intent of the statute to maintain records of the offenders' locations for the purpose of public safety").

Requiring every soon-to-be-released sex offender to report an "address" to the DOC does not criminalize homelessness; rather, it holds every soon-to-be-released sex offender to the *same* reporting standard. It also avoids the unwieldy question of how to determine whether a particular sex offender has or has not exercised due diligence in attempting to establish a post-release living arrangement and whether a third party, such as an institutional social worker or probation-parole officer, has made a sufficient good-faith effort to assist the soon-to-be-released sex offender in finding a living arrangement. *See* also Argument II. below.

C. The "address" reporting requirement of the sex-offender registration law comports with due process – without requiring *the State* to prove that Dinkins actually knew where he expected to live and sleep upon release into the community.

1. Introduction.

As an adjunct to his statutory-construction argument, Dinkins maintains that "[u]nless § 301.45 is construed to require proof of the person's actual knowledge of the [address] information he failed to report, the statute would be unconstitutional" (Dinkins' brief at 17; brackets added). Dinkins formulates both "substantive due process" and "procedural due process" (void for vagueness) challenges (Dinkins' brief at 17-20).

Although it appears uncertain whether Dinkins' constitutional challenges are to the facial validity of Wis. Stat. § 301.45 or "as applied" to Dinkins (or both), the constitutional challenges are unpersuasive for the reasons that follow.

2. General principles.

Statutes are presumed to be constitutional, and "'[e]very presumption must be indulged to sustain the law if at all possible.'" *Smith*, 316 Wis. 2d 165, ¶ 4 (citation omitted). Thus, "courts attempt to avoid an interpretation that creates constitutional infirmities." *Panzer v. Doyle*, 2004 WI 52, ¶ 65, 271 Wis. 2d 295, 680 N.W.2d 666.

In the absence of a First Amendment challenge to a statute, "the party challenging a statute must demonstrate that it is unconstitutional beyond a reasonable doubt." *Smith*, 316 Wis. 2d 165, ¶ 4.

Similarly, a party making an as-applied challenge to a statute must "prove, beyond a reasonable doubt, that as applied to him the statute is unconstitutional." *State v. Joseph E.G.*, 2001 WI App 29, ¶ 5, 240 Wis. 2d 481, 623 N.W.2d 137.

Whether a statute is unconstitutional – either facially or as applied – presents a question of law subject to independent review. *See Smith*, 316 Wis. 2d 165, ¶ 4.

3. Substantive due process.

a. Principles.

Substantive due process protects against governmental action that either """shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty."""" *Id.*, ¶ 5 (citations omitted). If a fundamental liberty interest is at stake in a challenged statute, substantive due process dictates strict scrutiny of the statute, which requires the statute to be "narrowly tailored to meet a compelling state interest." *Id.*

b. Application.

In the parlance of the test for substantive due process, the "address" reporting requirement of Wis. Stat. § 301.45(2)(a)5. is "narrowly tailored to meet a compelling state interest." *Smith*, 316 Wis. 2d 165, ¶ 5.

Compelling state interest. There should be no question that "the federal [and State] government "has a compelling interest in preventing sexual offenses by alerting citizens and law enforcement officers of the whereabouts of [serious] sex offenders." *United States v. Shenandoah*, 572 F.Supp.2d 566, 586 (M.D.Pa. 2008) (brackets added). Indeed, the fact that the federal government and all fifty states have enacted sex-offender reporting statutes should be proof enough of this proposition. *See also Doe v. Tandeske*, 361 F.3d 594, 597

(9th Cir. 2004) ("[p]ersons who have been convicted of serious sex offenses do not have a fundamental right to be free from . . . registration and notification requirements"); *Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir. 2003) (the sex-offender registration statute does not impair the fundamental right to a presumption of innocence).

Narrowly tailored. The requirement of Wis. Stat. § 301.45(2)(a)5. that a soon-to-be-released sex offender must report to the DOC the "address at which [he] . . . will be residing" applies to *every* sex offender who has committed a qualifying "sex offense." It is not an "'arbitrary, wrong, or oppressive'" requirement. *Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶ 39, 293 Wis. 2d 530, 716 N.W.2d 845 (citation omitted).

Requiring *both* sex offenders who have mailing addresses *and* those who are homeless to register with the DOC serves the compelling state interest of the sex-offender registration statute – to facilitate monitoring of those offenders by law enforcement and, thereby, to protect the public. *See Smith*, 316 Wis. 2d 165, ¶ 11.

Although requiring soon-to-be-released sex offenders to provide "address" notification to the DOC impacts the rights to privacy and to travel, it is the quintessential element – location, location, location – for effectuating the State's compelling interest to prevent future sex offenses. *See Paul P. v. Verniero*, 170 F.3d 396, 405 (3rd Cir. 1999). More precisely:

> The fact that released sex offenders have a high rate of recidivism demands that steps be taken to protect members of the public against those most likely to reoffend. . . . Registration allows local law enforcement to collect and maintain a bank of information on offenders. This enables law enforcement to monitor offenders, thereby lowering recidivism. Notification provisions allow dissemination of relevant information to the public for its protection.

State v. Cook, 700 N.E.2d 570, 584 (Ohio 1998) (brackets added).

As applied. Dinkins argues that unless the crime of knowingly failing to comply with the "address" requirement of Wis. Stat. § 301.45(2)(a)5. includes an element requiring the State to prove that the soon-to-be-released sex offender actually knew where he expected to live and sleep upon release into the community, the statute, as applied, would violate substantive due process, because "'one cannot be criminally liable for failing to do an act which he is physically incapable of performing'" (Dinkins' brief at 17; citation omitted).

Dinkins' argument lacks merit, because, as discussed, *every* soon-to-be-released sex offender is inherently capable of telling the DOC where he will live and sleep upon release into the community – whether in a house, in a motel, at a shelter, or on a park bench. And every location, even a park bench, can be identified by reference to an actual or a neighboring street address.

While it also is true that "'one cannot be said to have a duty to report something of which he has no knowledge'" (Dinkins' brief at 18; citation omitted), a sex offender, like Dinkins, will have actual knowledge of *the duty to report his address to the DOC* if the sex offender is given notice of this duty in accordance with Wis. Stat. § 301.45(3)(b)2.-3m. As discussed in Argument I.D. below, Dinkins received such notice. As the pattern jury instructions correctly elucidate, this is the only "knowledge" element that the State must prove. *See* Wis. JI-Criminal 2198.

For these reasons, too, Dinkins' reliance on *Lambert v. California*, 355 U.S. 225 (1957), and *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), is misplaced (Dinkins' brief at 18). In *Lambert*, 355 U.S. at 229, the ordinance in question violated due process as applied, because unlike the present case, the defendant had no actual knowledge of the registration requirement (that felons register with police), and because unlike the present case, "circumstances which might move one to inquire as to the necessity of [such] registration [we]re

completely lacking." In *Dalton*, 960 F.2d at 124, unlike the present case, *the law* prevented the defendant from complying with the registration requirement for firearms. In the present case, the statute provides for notice of the registration requirements to be given to the sex-offender, and *no* soon-to-be-released sex offender is incapable of reporting an actual or a neighboring street address.

Properly construing the "address" reporting requirement of the sex-offender registration law as applicable to soon-to-be-released offenders who, like Dinkins, profess to be unable to provide an address where they will live and sleep (*i.e.*, "homeless") comports with substantive due process. It neither """shocks the conscience . . . [n]or interferes with rights implicit in the concept of ordered liberty."""" *Smith*, 316 Wis. 2d 165, ¶ 5 (citations omitted).

4. Procedural due process.

a. Principles.

A "vagueness" challenge to a statute concerns procedural due process. *See State v. Nelson*, 2006 WI App 124, ¶ 35, 294 Wis. 2d 578, 718 N.W.2d 168. A criminal statute is unconstitutionally vague "'if it either fails to afford proper notice of the conduct it seeks to proscribe, or fails to provide an objective standard for enforcement.'" *Id.* (citation omitted).

With respect to the requirement of proper notice to survive a vagueness challenge, a criminal statute must "'sufficiently warn people who wish to obey the law that their conduct comes near the proscribed area.'" *Id.*, ¶ 36 (citation omitted). However, the challenged statute """need not define with absolute clarity and precision what is and what is not unlawful conduct."""" *Id.* (citations omitted).

Because "'few words possess the precision of mathematical symbols, [and] most statutes must deal with untold and unforeseen variations in factual situations, . . . no more than a reasonable degree of certainty can be demanded'" for a penal statute to withstand a vagueness challenge. *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976) (citation omitted). A statute will not be voided for vagueness "merely by showing that the boundaries of prescribed conduct are somewhat hazy." *State v. Barman*, 183 Wis. 2d 180, 198, 515 N.W.2d 493 (Ct. App. 1994).

With respect to the requirement of an objective enforcement standard, a penal statute must be sufficiently definite in its terms to enable "those who must enforce and apply the law [to] do so without creating or applying their own standards." *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

"If, by the ordinary process of statutory construction, [a reviewing court] can give a practical or sensible meaning to the statute, a criminal statute is not void for vagueness." *Hahn*, 221 Wis. 2d at 677.

b. Application.

In the parlance of the test for procedural due process, the "address" reporting requirement of the sex-offender registration law both "'afford[s] proper notice of the conduct it seeks to proscribe [and] . . . provide[s] an objective standard for enforcement.'" *Nelson*, 294 Wis. 2d 578, ¶ 35.

Proper notice. Section 301.45 affords proper notice that, to avoid criminal liability, every soon-to-be-released sex offender must report to the DOC the "address at which [he] . . . will be residing. Wis. Stat. § 301.45(2)(a)5.

As discussed, § 301.45(3)(b)2.-3. requires the DOC and the Department of Health Services to notify such offenders of "the need to comply" with the reporting requirements, and subd. 3m. directs the departmental official to provide a notification form that the offenders must sign.

All citizens "are presumptively charged with knowledge of the law," *Atkins v. Parker*, 472 U.S. 115, 130 (1985), and "[g]enerally a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982).

As discussed, the "address" reporting requirement of § 301.45(2)(a)5. is articulated in straightforward language, and even those sex offenders who purport not to know where they will be residing upon release nevertheless know that they will have to live and sleep somewhere and must provide such location to the DOC by reference to an actual or a neighboring street address. There is no statutory exemption for purported "homelessness." *See, e.g., Tobar*, 284 S.W.3d at 136 (upholding a similar "address" requirement as not void for vagueness as applied to "homeless" sex offenders); *cf. State v. Samples*, 198 P.3d 803, 806-07 (Mont. 2008) (upholding a "changes residence" requirement as not void for vagueness as applied to "homeless" sex offenders).

There is a substantial difference between unconstitutional vagueness of a statutory provision and simple statutory ambiguity:

> "A statute . . . is not void for vagueness because in some instances certain conduct may create a question about its impact under the statute. . . ., or because "'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'"

Nelson, 294 Wis. 2d 578, ¶ 36 (citations omitted).

Moreover, it would be a simple proposition for a soon-to-be-released sex offender who purports not to know where he will be residing upon release simply to ask the departmental official about the "address" requirement when the notification is given – rather than simply ignoring it or assuming he has an exemption.

Objective standard of enforcement. Because the "address" reporting requirement does not allow for a "homelessness" exemption, it does *not* "encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). Rather, as discussed, it applies across-the-board to *every* soon-to-be-released sex offender.

The onus is on every soon-to-be-released sex offender to provide the DOC with the offender's expected location by reference to an actual or a neighboring street address. Reporting "I don't know" or "To be determined" plainly says nothing about the offender's location upon release. Similarly, a sex-offender's broad reference to becoming located in a city or in a zip code would not refer to an actual or a neighboring street address (*see* Dinkins' brief at 19) – and, in any event, Dinkins did not even provide that type of information to the DOC.[5]

The "address" reporting requirement of the sex-offender registration law comports with due process – both substantively and procedurally – without requiring *the State* to prove that Dinkins actually knew where he expected to live and sleep upon release into the community.

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[5]Although the Georgia Supreme Court found the Georgia sex-offender registration statutes unconstitutionally vague as applied to "homeless" sex offenders (see Dinkins' brief at 20), the Georgia statutes defined "address" as "'the street or route address of the sex offender's residence,'" and the statutes specifically stated that "'homeless does not constitute an address.'" *Santos*, 668 S.E.2d at 678 (quoting the registration statutes).

D. The State adduced sufficient evidence to enable a reasonable jurist to find Dinkins guilty of violating the "address" reporting requirement of the sex-offender registration law.

1. Governing principles.

In the present case, as noted, Dinkins proceeded to a court trial at which the parties agreed to use the record and exhibits of the preliminary hearing as the evidentiary record of trial (31:4-5, 17-18). The following principles govern the sufficiency of the evidence for conviction.

For a criminal conviction to satisfy due process, the State must prove each essential element of a charged crime beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990); *Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979). On review of a "sufficiency" challenge:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Poellinger, 153 Wis. 2d at 507 (citation omitted).

Although the trier of fact must be convinced that the evidence is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence, this is *not* the test on appeal. *Id.* at 503. Rather:

> In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Id. at 507-08.

In effect, review of a "sufficiency" challenge is "very narrow," and the reviewing court must "give great deference to the determination of the trier of fact." *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203. In fact, the reviewing court "must examine the record to find facts that *support*" the guilty verdict. *Id.* (emphasis added).

Consequently, a reviewing court will not substitute its judgment for that of the trier of fact unless the fact-finder relied on evidence that was "inherently or patently incredible." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

"If more than one inference can reasonably be drawn from the historical facts presented at the trial, [the appellate court] accept[s] the inference drawn by the fact-finder." *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530.

This deferential standard of review "'is the same whether the fact-finder is the court or a jury.'" *Id.* (citation omitted).

2. Application.

Dinkins apparently does not dispute that if the charged crime of failing to comply with the "address" reporting requirement of the sex-offender registration law contains only the three elements set forth in the pattern jury instructions, then sufficient evidence was adduced to

support his conviction. To be clear, those three essential elements were satisfied at trial as follows:

First element. As the Dodge County Clerk of Circuit Court testified, Dinkins was convicted on February 4, 1999, in Dodge County Circuit Court of first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1) (*see* 20:14-15). As a result of that conviction, he "was required to provide information" to the DOC under Wis. Stat. § 301.45(1g)(a) (quoting Wis. JI-Criminal 2198).

Second and third elements. Dinkins failed to comply with Wis. Stat. §§ 301.45(2)(a)5., (2)(d), and (2)(e)4., which together required him – no later than ten days before being released from prison at the expiration of his sentence – to provide the DOC with "the address at which [he] . . . will be residing" upon release (quoting Wis. Stat. § 301.45(2)(a)5.). And Dinkins "knowingly" failed to provide the required "address" information (quoting Wis. JI-Criminal 2198).

Dinkins received a ten-year prison sentence (20:17) and was required to serve his sentence to the maximum discharge date of July 20, 2008 (5:5, 8).

In February or March of 2008, Dinkins was given a "Reintegration Plan" form to complete (20:20, 34-35), and on May 28, 2008, he returned the form, refusing to indicate where he would live upon release (20:21, 47). Dinkins told Myra Smith, his social worker at Oshkosh Correctional Institution (20:18), that he would not provide that information, professing that the State could no longer control him after his maximum discharge date (20:21, 36).

On June 2, 2008, social worker Smith arranged a phone call between Dinkins and his probation-parole officer, Lisa Gallitz, to impress upon Dinkins that the sex-offender registration law required him to determine where he would live upon release and to report that determination to the DOC (8:1; 20:22-23).

On June 4, 2008, social worker Smith gave Dinkins the sex-offender registration form that Dinkins was required to fill out and submit to the DOC no later than ten days before his discharge from prison (9; 20:24-25, 36-37) – in effect, by July 10, 2008. Smith told Dinkins that he would be in violation of the law if he failed to provide an address (20:42-43), and Gallitz told Dinkins that he could be criminally charged (20:48). Both Smith and Gallitz also told Dinkins of the GPS requirement (20:43-44, 48).

Dinkins told Smith that he had hoped to live with his daughter upon release from prison, that he had written to her several times without reply, and that when he tried to phone his daughter, he learned that the daughter's phone number had been disconnected (20:23-24). Dinkins said he also tried, unsuccessfully, to phone his ex-wife and his daughter's boyfriend (20:24, 31).

Because Dinkins had been unable to report an address where he would be living upon release, Smith said she wrote the words "To be determined by Agent" for Dinkins' address on the sex-offender registration form (9:1; 20:28, 40-41).

Smith said Dinkins declined her offer on June 10, 2008, to help him find a living arrangement (20:30), and that between June 17 and July 20, 2008, she weekly reminded Dinkins of the need to find a living arrangement (20:31-32). Both Smith and Gallwitz tried to located Dinkins' daughter (20:28-29, 54-55), and when they finally did, the daughter said Dinkins could not live with her, because she had a small child and her fiancé was against it (20:58).

Because Dinkins never provided any address to the DOC by July 10, 2008, the DOC requested prosecution (3:3), which was commenced by complaint filed July 17, 2008 (*see* 3:1).

The purported fourth ("actual knowledge") element. Dinkins' sufficiency challenge rests entirely on his argument that the State had to prove beyond a reasonable doubt a fourth ("actual knowledge") element – that is, that Dinkins actually knew where he would be residing upon release from prison at the expiration of his sentence (Dinkins' brief at 25-30).

For the reasons discussed, the State was not required to prove such an "actual knowledge" element. Moreover, Dinkins actually knew he would be living and sleeping somewhere upon leaving prison – whether in a house, in a motel, at a shelter, or on a park bench, all capable of reference to an actual or a neighboring street address. Dinkins knew he had to provide that information to the DOC no later than ten days before his release, but failed to do so.

Contrary to the implication of Dinkins' argument at pages 26-30 of his brief, the State did not prosecute and convict Dinkins for the status of being "homeless." Rather, Dinkins was properly prosecuted and convicted for failing to provide the DOC with the address where he would be living and sleeping upon release from custody. Once Dinkins exits the prison gates, he necessarily has to go somewhere to live and sleep. Subject to Wis. Stat. § 301.48 and any community restrictions, Dinkins is free to choose that location, and the sex-offender registration statute reasonably requires him to make that choice in advance of his release and to report it to the DOC by reference to an actual or a neighboring street address. If it were otherwise, sex offenders could circumvent the "address" reporting requirement with impunity.[6]

[6]Because sex offenders may face *legal* obstacles to residency – such as § 301.48 or community ordinances – a sex offender who reports an address to the DOC that proves to be *legally* impossible to maintain presumably cannot and should not be subject to prosecution. *Cf. Dalton*, 960 F.2d at 124. That proposition is distinct, however, from Dinkins' argument based on the false premise that, factually, he could not report an "address," because he did not know where he would live and sleep.

II. A NEW TRIAL IS NOT WARRANTED IN THE INTEREST OF JUSTICE.

Introduction. Alternatively, in Argument III. of his brief, Dinkins requests a new trial in the interest of justice on grounds that the real controversy was not fully tried (Dinkins' brief at 30). Dinkins asserts that the real controversy was not fully tried, because the pattern jury instructions failed to advise the trial court, as fact-finder, of the purported fourth ("actual knowledge") element – that is, that Dinkins actually knew where he would be residing upon release from prison at the expiration of his sentence. For additional reasons that follow, this court also should reject Dinkins' request for a new trial.

Analysis. Under Wis. Stat. § 752.35, the court of appeals may exercise discretion to determine whether reversal is warranted in the interest of justice in either of two situations: when the real controversy has not been fully tried, or when it is probable that justice has for any reason miscarried. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The principal difference between these two standards is that in the "real controversy" situation, unlike the "miscarriage of justice" situation, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." *Vollmer*, 156 Wis. 2d at 19.

Application of the "real controversy" prong of the interest-of-justice test has been limited, however, to evidentiary errors, where either: (1) "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case;" or (2) "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

Dinkins' does not assert any evidentiary error in the present case, and in any event, his reliance on *State v.*

Perkins, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762, is misplaced. The vitality of *Perkins* is doubtful in the wake of *State v. Gordon*, 2003 WI 69, ¶ 40, 262 Wis. 2d 380, 663 N.W.2d 765, in which the Wisconsin Supreme Court followed the United States Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), and held that omission of instruction on an element *can* be harmless error where the element was never in dispute.

Lastly, one undercurrent of Dinkins' argument warrants mention. The fact that Dinkins' institutional social worker and probation-parole officer apparently were unable to assist Dinkins in finding a typical residential-type living arrangement cannot be relevant, lest a sex-offender's culpability would depend on the conduct of a third party. Likewise, nothing in Wis. Stat. § 301.45 recognizes an affirmative defense based on due diligence or factual circumstances when the sex offender knew of the "address" reporting requirement. As discussed, every soon-to-be-released sex offender is capable of reporting an "address" where he will live and sleep by reference to an actual or a neighboring street address.[7]

Only if an affirmative defense like that described in federal law somehow were read into Wis. Stat. § 301.45 would remand for a new trial be appropriate to enable Dinkins a chance to proffer such a defense. Neither the statute nor Wisconsin's common law identifies such an affirmative defense to this "general intent" crime, and Dinkins does not present such an argument.

[7]Under 18 U.S.C. § 2250(b) of the federal sex-offender registration law, it is an affirmative defense to knowingly failing to register or update a registration upon establishing three elements: "(1) uncontrollable circumstances prevented the individual from complying; (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) the individual complied as soon as such circumstances ceased to exist."

CONCLUSION

For the reasons set forth, this court should affirm the judgment of conviction and the postconviction order.

Dated at Madison, Wisconsin: October 29, 2009.

Respectfully submitted,

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BRIEF CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 8,576 words.

_____
JAMES M. FREIMUTH

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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Dated this 29th day of October, 2009.

_____
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