STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP1643-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

WILLIAM DINKINS, SR.,

Defendant-Appellant.

ON REVIEW OF A COURT OF APPEALS' DECISION
REVERSING A JUDGMENT OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN DODGE COUNTY CIRCUIT COURT,
THE HONORABLE ANDREW P. BISSONNETTE,
PRESIDING

BRIEF-IN-CHIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

Page

Page

Page

Page

STATUTES CITED

Page

OTHER AUTHORITIES

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP1643-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

WILLIAM DINKINS, SR.,

Defendant-Appellant.

ON REVIEW OF A COURT OF APPEALS' DECISION
REVERSING A JUDGMENT OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN DODGE COUNTY CIRCUIT COURT,
THE HONORABLE ANDREW P. BISSONNETTE,
PRESIDING

BRIEF-IN-CHIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for Wisconsin Supreme Court review, both oral argument and publication appear warranted.

ISSUE PRESENTED

IS A CONVICTED SEX OFFENDER EXEMPT FROM COMPLYING WITH THE "ADDRESS" REPORTING REQUIREMENT OF WISCONSIN'S SEX-OFFENDER REGISTRATION LAW ON GROUNDS THAT THE SEX OFFENDER CLAIMS TO BE "HOMELESS?"

Introduction. After a court trial, Defendant William Dinkins, Sr. stands convicted of failing to provide the Department of Corrections (DOC) with "the address at which [he] . . . will be residing" at least ten days before his release from prison, pursuant to Wis. Stat. §§ 301.45(2)(a)5., (2)(d), (2)(e)4., (3)(a)2m., and (6)(a)1. (*see* 3; 5; 13; 20; 27; 31) (hereafter referred to in shorthand form as the "address" reporting requirement of Wisconsin's sex-offender registration law, set forth in Wis. Stat. § 301.45).[1]

On the basis of statutory construction and due process, Dinkins maintains that he cannot be convicted of violating the "address" reporting requirement of the sex-offender registration law, because he could not find post-release housing – in effect, Dinkins claims that he would have been "homeless" upon his release from prison. *See State v. Dinkins*, 2010 WI App 163, ¶¶ 2, 16 & ns. 6, 7, ___ Wis. 2d ___, 794 N.W.2d 236 (Pet-Ap. 101-117).

Trial court's ruling. The trial court rejected all of Dinkins' arguments for dismissing the charge and vacating the conviction – before trial (20:1-12; Pet-Ap. 118-129; 23:1-5; Pet-Ap. 130-134); at the conclusion of a court trial (31:1, 18-19); Pet-Ap. 135-137); and on postconviction review (39:1, 21-23; Pet-Ap. 138-141).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Court of appeals' ruling. In a published decision, the court of appeals concluded that the "address" reporting requirement of Wisconsin's sex-offender registration law does not apply to a convicted sex offender who claims to be "homeless." *See Dinkins*, 794 N.W.2d 236, ¶¶ 2-3, 24, 26 (Pet-Ap. 102-103, 115, 117).[2]

STATEMENT OF THE CASE

Underlying charge.

By complaint filed July 17, 2008, in Dodge County Case No. 2008-CF-233, Dinkins 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] . . . will be residing," contrary to Wis. Stat. §§ 301.45(2)(a)5., (2)(d), (2)(e)4., (3)(a)2m., and (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).

Pretrial motions to dismiss.

By three pretrial motions, Dinkins sought to dismiss the charge with prejudice (16 to 18). Dinkins argued that the "address" reporting requirement, as applied to him, was unconstitutional due to vagueness,

[2] As discussed in the Argument section of this brief, an important threshold question is how to characterize the court of appeals' holding. The court of appeals appears to be holding that the State failed to provide sufficient proof of one or more elements of the charged crime, as a matter of law, rather than that "homelessness" is an affirmative defense that either Dinkins proved or the State failed to disprove.

overbreadth, or as a violation of equal protection or selective prosecution, and that, in any event, he was bound over for trial on insufficient probable cause (*id.*). By decision and order filed September 25, 2008, Judge Andrew P. Bissonnette denied the pretrial motions in all respects (23; Pet-Ap. 130-134; *see also* 20:1-12; Pet-Ap. 118-129).

Court trial and sentencing.

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; Pet-Ap. 135-137).

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 again 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 postconviction motion (39:21-23; Pet-Ap. 139-141). A formal order to that effect was filed June 15, 2009 (35).

On appeal, Dinkins argued that unless the crime of violating the "address" reporting requirement obliges the State to prove that Dinkins actually knew where he would reside upon release from prison, the statute, as applied to him, would violate both substantive due process ("shocks the conscience") and procedural due process ("void for

vagueness"). *See Dinkins*, 794 N.W.2d 236, ¶ 9 (Pet-Ap. 105). In conjunction, he argued that the State failed to prove such an "actual knowledge" element. *Id.* Alternatively, he sought a new trial in the interest of justice. *Id.*

As discussed more fully in the Argument section of this brief, the court of appeals concluded – as a matter of statutory interpretation – that the "address" reporting requirement of Wisconsin's sex-offender registration law does not apply to a convicted sex offender who, like Dinkins, claims to be "homeless." *Id.*, ¶¶ 16-26 (Pet-Ap. 110-117). The court of appeals, therefore, reversed the judgment of conviction and the postconviction order. *Id.*, ¶ 26.

By order of March 16, 2011, this court granted the State's petition for review.

STATEMENT OF FACTS

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). Following is a summary of relevant evidence.

Predicate sex-offender conviction. 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 sex-offender conviction, Dinkins "was required to provide information" to the DOC under Wis. Stat. § 301.45(1g)(a) (quoting Wis. JI-Criminal 2198). Specifically, he was obliged – no later than ten days before release from prison at the expiration of his sentence – to provide the DOC with "the address at which [he] . . . will be residing" upon release, pursuant to Wis. Stat. §§ 301.45(2)(a)5., (2)(d), and (2)(e)4.

For his conviction of first-degree child sexual assault, 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).

Non-compliance with the "address" reporting requirement of sex-offender registration. In February or March of 2008, several months before his discharge date, Dinkins was given a "Reintegration Plan" form to complete (20:20, 34-35). On May 28, 2008, he returned the form to Myra Smith, his social worker at Oshkosh Correctional Institution (20:18), refusing to indicate where he would live upon release (20:21, 47). Dinkins told Smith 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 that he would be subject to GPS ("global positioning system") monitoring (20:43-44, 48).

Dinkins told social worker 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 failed to report to the DOC an address where he would be living upon release from prison, social worker 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 social worker Smith and probation-parole officer Gallwitz tried to locate 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 an 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). At the conclusion of the court trial, Judge Bissonnette found Dinkins guilty of violating the "address" reporting requirement of the sex-offender registration law (31:18-19; Pet-Ap. 135-137).

ARGUMENT

A CONVICTED SEX OFFENDER IS NOT EXEMPT FROM COMPLYING WITH THE "ADDRESS" REPORTING REQUIREMENT OF WISCONSIN'S SEX-OFFENDER REGISTRATION LAW ON GROUNDS THAT THE SEX OFFENDER CLAIMS TO BE "HOMELESS," AND THE TRIAL COURT CORRECTLY FOUND DINKINS GUILTY OF VIOLATING THE "ADDRESS" REPORTING REQUIREMENT.

A. Introduction.

The court of appeals' holding and Dinkins' argument. An important threshold question in the present case is how to characterize the court of appeals' holding and Dinkins' statutory argument. The court of appeals appears to articulate its holding in the following two ways:

> [Dinkins] could not be convicted of failing to provide his post-release address as required under WIS. STAT. § 301.45(2)(a)5. because he could not locate post-release housing, and thus did not have an "address at which [he] . . . w[ould] be residing" that he could provide to the department.

Dinkins, 794 N.W.2d 236, ¶ 2 (agreeing in ¶ 3 with this construction of Dinkins' argument) (Pet-Ap. 102). And:

> Because it is undisputed that Dinkins lacked an address at which he could have reasonably predicted he would have been able to "reside," [meaning to "live in a location for an extended period of time," *id.*, ¶ 20], we therefore conclude that he could not be convicted of failing to comply with the address reporting requirement.

Id., ¶ 24 (brackets added.) (Pet-Ap. 115). The court of appeals reprises this statement in its concluding paragraph and "reverse[s] the judgment of conviction and the order

denying postconviction relief." *Id.*, ¶ 26 (Pet-Ap. 117). In a footnote, the court of appeals further explains its holding as follows:

> We note that Dinkins frames his appeal as a challenge to the sufficiency of the evidence, contending that the crime of failure to provide information to the sex offender registry requires proof that the defendant had actual knowledge of the information not provided, and that the State did not submit proof of this fact. However, this is not a classic sufficiency-of-evidence case, and is instead more akin to *State v. Perry*, 215 Wis. 2d 696, 707, 573 N.W.2d 876 (Ct. App. 1997), where the facts were undisputed and the conviction turned on the trial court's interpretation of the statute. . . . As in *Perry*, our task here is to interpret the statute.

Id., ¶ 16 n.6 (Pet-Ap. 110).[3]

From the foregoing passages, the court of appeals appears to be holding that the State failed to prove one or more elements of the charged crime, as a matter of law. Similarly, Dinkins has maintained that he cannot be convicted of the charged crime, because he allegedly lacked knowledge of any "address" at which he would be "residing" upon release from prison. *See Dinkins*, 794 N.W.2d 236, ¶¶ 2, 16 (Pet-Ap. 102, 110).

Both Dinkins' assertion and the court of appeals' decision, therefore, raise the fundamental question of what the State had to prove to convict Dinkins of violating the "address" reporting requirement of the sex-offender registration law. Implicitly at least, both Dinkins' assertion and the court of appeals' decision also raise the

[3] As discussed below in the text of this brief, the State disputes the proposition that Dinkins lacked an "address" to report to the DOC. Unless "homelessness" is recognized as an affirmative defense to the charged crime, then for reasons discussed below, it is irrelevant what specific efforts Dinkins may have undertaken to find an "address" or location where, in the words of the court of appeals, he could "live . . . for an extended period of time." *Dinkins*, 794 N.W.2d 236, ¶ 20 (Pet-Ap. 112).

specter of whether "homelessness" should be recognized as an affirmative defense (that either Dinkins proved or the State failed to disprove).[4]

Summary of State's position. Respectfully, for the reasons that follow, this court should conclude that the State proved Dinkins guilty of the charged crime, because the court of appeals has mistakenly construed the "address" reporting requirement of Wis. Stat. § 301.45(2)(a)5. Stated another way, "homelessness" is not an exemption from, or an affirmative defense to, violating the "address" reporting requirement. *See* Argument B. below.

Finally, as applied to Dinkins, the "address" reporting requirement of the sex-offender registration law comports with due process – an issue that the court of appeals did not reach. *See* Argument C. below.

B. The State proved Dinkins guilty of the charged crime, because the court of appeals has mistakenly construed the "address" reporting requirement of Wis. Stat. § 301.45(2)(a)5.

1. Governing principles.

a. Sufficiency of the evidence.

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.*

[4] In his response to the State's petition for review, Dinkins asserts, however, that "this case does not involve a 'homeless defense' or 'homeless exemption' to the ['address'] reporting requirement" (Dinkins' petition response at 5; brackets added).

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.

Poellinger, 153 Wis. 2d at 507.

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).

"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).

"However, whether the evidence viewed most favorably to the verdict *satisfies the legal elements* of the crime constitutes a question of law, which [the reviewing court] review[s] *de novo*." *Id.* (emphasis added); *see also State v. Moore*, 2006 WI App 61, ¶ 9 n.7, 292 Wis. 2d 101, 713 N.W.2d 131 (appellate review of a sufficiency-of-the-evidence challenge is *de novo* when the defendant is "actually challenging the trial court's interpretation of a statute and its application to largely undisputed facts").

b. Statutory construction.

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 statu-

tory . . . language reasonably gives rise to different meanings.'" *Id.*, ¶ 47 (citation and emphasis omitted). 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.

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

2. Application to the present case.

a. The 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), except as otherwise indicated).

In the subsections that follow, the State addresses the foregoing three elements slightly out of order for purposes of the present case – specifically, flip-flopping elements two and three, which tend to overlap in discussing the "address" reporting requirement at issue. For each element, the State first outlines the meaning of the element and then applies it to the present case.

b. 1st element: sex-offender status.

(1) Meaning.

Under Wis. Stat. § 301.45(1g)(a), sex-offender registration is required for a person who has been "convicted or adjudicated delinquent on or after December 25, 1993, for a sex offense." Under Wis. Stat. § 301.45(1d)(b), "[s]ex offense" includes a violation of Wis. Stat. § 948.02(1).

(2) Applied.

In the present case, the State proved this status element beyond a reasonable doubt with respect to Dinkins. The Dodge County Clerk of Circuit Court testified that 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, Dinkins "was required to provide information" to the DOC under Wis. Stat. § 301.45(1g)(a) (quoting Wis. JI-Criminal 2198).

c. 3rd element: the "knowledge" requirement.

(1) Meaning.

According to the Wisconsin Criminal Jury Instructions Committee, the third element of the charged crime of violating the sex-offender registration law – the *mens rea* element – "requires that the defendant knew that (he) (she) *was required to provide the information*." Wis. JI-Criminal 2198 (emphasis added).

Under Wis. Stat. § 939.23(2), the verb "[k]now" is defined as "requir[ing] only that the actor believes that the specified fact exists." Thus, with respect to the use of "knowingly" in Wis. Stat. § 301.45(6)(a) of the sex-offender registration law, knowledge of "the specified fact" means knowledge of the "address" reporting requirement – which is precisely what the jury instructions state. *Compare, e.g., United States v. Stevens*, 598 F.Supp.2d 133, 151 (D.R.I. 2009) (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").

Under Wis. Stat. § 301.45(3)(b)4. of the sex-offender registration law, "[i]t is not a defense to liability" that no State agent gave notice of the reporting requirements to the soon-to-be-released sex offender or that the sex offender was not given a form containing the reporting requirements. Nevertheless, to convict the sex offender of violating a reporting requirement, the State still must prove the sex offender's knowledge of the reporting requirement – an incentive for providing advance notice of the reporting requirements.

(2) Applied.

In the present case, the State proved this "knowledge" element beyond a reasonable doubt with respect to Dinkins, because the DOC gave Dinkins sufficient advance notice of the "address" reporting requirement of the sex-offender registration law to enable Dinkins to comply with that requirement.

In February or March of 2008, several months before his discharge date of July 20, 2008, Dinkins was given a "Reintegration Plan" form to complete (20:20, 34-35). 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).

In short, well before his release date of July 20, 2008, Dinkins was fully aware that he was required to provide the DOC, by July 10, 2008, with the "address" at which he expected to be living upon release from prison.

For purposes of applying the "knowledge" element to the "address" reporting requirement at issue in the present case, the legislature correctly 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 – and, thus, is inherently capable of providing that information before release. This discussion follows.

d. 2nd element: the "address" reporting requirement.

(1) Meaning.

The statutory language. In the present case, the court of appeals' decision focuses on the second element of the charged crime of violating the sex-offender registration law – the *actus reus* element – namely, the allegation that Dinkins failed to provide the DOC with "the address at which [he] . . . will be residing" upon release from prison, as required by Wis. Stat. § 301.45(2)(a)5. Neither the term "address" nor the term "residing" are defined in the sex-offender registration law.

"Residing." According to the court of appeals, the term "residing" as used in this "address" reporting requirement "plainly does not encompass a park bench . . . or a heating grate, bush, highway underpass, or other similar on-the-street location." *Dinkins*, 794 N.W.2d 236, ¶ 3; *see also* ¶ 20 (Pet-Ap. 102, 112).

Although the court of appeals selected certain dictionary definitions of "reside" to mean "live in a location for an *extended* period of time," *id.*, ¶¶ 19-20 (Pet-Ap. 111-112) (emphasis added), other dictionary definitions define "reside" or "residence" more broadly to mean, *e.g.*, "'any place of abode or dwelling place,

however temporary it may be.'" *State v. Winer*, 963 A.2d 89, 93 (Conn. App. Ct. 2009) (quoting *Ballentine's Law Dictionary* and suggesting that this broader definition better fits the statutory intent to keep track of sex offenders to reduce recidivism). Similarly, *Black's Law Dictionary* at 1335 (8th ed. 2004) defines "residence" in part as: "The place where one actually lives, as distinguished from a domicile . . . . *Residence* usu[ally] just means bodily presence as an inhabitant in a given place."

Some jurisdictions include definitions of "reside" or "residence" within their sex-offender registration statutes and interpret them so as to encompass purportedly "homeless" sex offenders. For example:

- The federal sex-offender registration law defines "resides" to mean "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). The U.S. Department of Justice's "National Guidelines for Sex Offender Registration and Notification" elaborate on this definition: "Requiring registration only where a sex offender has a residence or home in the sense of a fixed abode would be too narrow to achieve [the] objective of 'comprehensive' registration of sex offenders." 73 Fed. Reg. 38030, 38061 (July 2, 2008). Thus, under federal law, a sex offender must register "in any jurisdiction in which he habitually lives (even if he has no home or fixed address in the jurisdiction, or no home anywhere)." *Id.* (parentheses in original). The guidelines further explain:

> [S]ome more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives—e.g., information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations himself during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants, libraries, or other establishments that the sex offender frequents. Having this type of location

> information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite residence addresses.

Id. at 38055-56.[5]

- Under Arizona Revised Statutes § 13-3822D.3. (2008), "residence" means "the person's dwelling place, whether permanent or *temporary*," and under § 13-3821I., a sex offender "shall provide a description and physical location of any *temporary* residence").

- Under California Penal Code § 290.011(g) (2008), "residence" is defined as "one or more addresses at which a person regularly resides, *regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address*, including, but not limited to houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles."

- Under Iowa Code § 692A.101.24 (2009), "residence" is defined as "each dwelling or other place where a sex offender resides, sleeps, or habitually lives, or will reside, sleep, or habitually live, including a shelter or group home. If a sex offender does not reside, sleep, or habitually live in a fixed place, 'residence' means *a description of the locations where the offender is stationed regularly, including any mobile or transitory living quarters*."

---

[5] 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. Every state has 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. A registration violation can be a federal offense, for example, if interstate travel is involved.

- Under Kentucky Revised Statute § 17.500(7) (2009), "residence" means "*any place where a person sleeps*."

- Under New Hampshire Revised Statute § 651-B:1-XIII., "residence" includes "a place where a person is living or *temporarily staying* for more than a total of 5 days during a one-month period, such as a shelter or structure that can be located by a street address."

"Address." Additionally, by focusing on the term "residing" in Wis. Stat. § 301.45(2)(a)5., the court of appeals ignores the word "address" that also is used in that provision and that acquires meaning from the following exemplary dictionary definitions:

- "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).

In view of competing definitions of the terms "residing" and "address" in Wis. Stat. § 301.45(2)(a)5., as applied to purportedly "homeless" sex offenders, extrinsic sources and public policy are properly considered.

Policy considerations and "homelessness." The question of how to apply the "address" reporting requirement to sex offenders who claim to be homeless has divided courts in jurisdictions, like Wisconsin, where the statute does not expressly address the situation.

As the court of appeals has catalogued, *see Dinkins*, 794 N.W.2d, ¶ 23 (Pet-Ap. 114-115), some courts have concluded that the purportedly "homeless" sex offender cannot be culpable for failing to report an "address" or "residence." *See, e.g., Santos v. State*, 668 S.E.2d 676, 679 (Ga. 2008) (statute subsequently amended); *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. *See, e.g., Winer*, 963 A.2d at 93 (construing "residence address" under Connecticut statute to mean "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, regardless 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) (construing "address" to mean "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 purpose" (citation omitted)).[6]

[6] Some states require purportedly "homeless" sex offenders to report their locations to local law enforcement authorities every specified number of days. *See, e.g.*, Fla. Stat. § 943.0435(4)(b) (2010); Ga. Code § 42-1-12(f)(2.1) (2010); Ind. Code § 11-8-8-12(c) (2010); Minn. Stat. § 243.166(3a)(e) (2010); Wash. Rev. Code § 9A.44.130(6)(a) (2010).

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

- First, respectfully, the court of appeals' definition of "residence" as a location at which the sex offender expects to live and sleep for an "extended period of time," *Dinkins*, 794 N.W.2d 236, ¶ 20 (Pet-Ap. 112) (emphasis added), appears impractical.

What does "extended" mean? A week? A month? Longer? The interjection of such an imprecise additional requirement into the statute would make it difficult, if not impossible, to know whether a sex offender is complying with the "address" reporting requirement. Statutory language is to be interpreted "to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

Additionally, by effectively recognizing a "homelessness" exemption, the court of appeals' decision tends to discourage sex offenders from actively seeking and choosing an available community living arrangement. Would a sex offender be absolved from criminal liability by simply providing evidence of one unsuccessful attempt at finding a "permanent" residence, regardless of how feeble the attempt?

- Second, the foregoing concerns are avoidable by construing the "address" reporting requirement as applying to *every* sex offender.

The proposition that a sex offender might not know where he or she 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 or she still must choose to go somewhere to live and sleep, capable of 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).

Moreover, the requirement in Wisconsin of *advance* reporting of an *expected* address does not unfairly penalize a soon-to-be-released sex offender who, for whatever reason, allegedly cannot find the permanent type of living arrangement that the court of appeals would require for the "address" reporting requirement to apply.

Like Wisconsin, other jurisdictions require such advance reporting of an expected address. Under the federal Adam Walsh Act, a sex offender "shall initially register . . . *before* completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 42 U.S.C. § 16913(b)(1) (2006); *see also, e.g.*, Alaska Statute § 12.63.010(a)(1) (2008) (a sex offender "shall register . . . within the 30-day period *before* release from an in-state correctional facility"); New York [Sex Offender Registration] Law § 168-e.1. (McKinney 2003) (any sex offender being released into the community must indicate ten days in advance "the

address where the sex offender *expects* to reside"); North Dakota Criminal Code § 12.1-32-15(5) (2009) ("[t]he official in charge of the place of confinement, or the department [of corrections], shall obtain the address where the individual *expects* to reside . . . upon discharge, parole, or release" and "shall send three copies [of the form] to the attorney general no later than forty-five days *before* the scheduled release of that individual"); *id.* at § 12.1-32-15(7) (2009) (a sex offender shall inform the relevant law enforcement authority of a change in residence address "at least ten days *before* the change"); Wyoming Statute 7-19-302(c)(8) (2011) (a sex offender in custody of the department "shall register *prior to* the release from custody").

- Third, in Wis. Stat. § 301.45, the legislature has not provided any exemption or affirmative defense for purported "homelessness." Moreover, the legislature presumably would know how to do so, as it has done, for example, in Wis. Stat. § 948.22(6), by providing an affirmative defense of "inability to pay" for the crime of failure to pay child support, with the burden on the defendant to prove the affirmative defense. *See State v. Duprey*, 149 Wis. 2d 655, 659-61, 439 N.W.2d 837 (Ct. App. 1989) (addressing the forerunner nonsupport statute, Wis. Stat. § 940.27 (1985-86)).

"An affirmative defense is defined as a matter which, assuming the charge to be true, constitutes a defense to it." *State v. Modory*, 204 Wis. 2d 538, 541, 555 N.W.2d 399 (Ct. App. 1996). "Thus, an affirmative defense does not directly challenge an element of the offense" that the State must prove for conviction. *Modory*, 204 Wis. 2d at 541. Otherwise stated, "an affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it[.]" 21 Am. Jur. 2d Criminal Law § 217 at 281 (1998).

However, "[n]ot every reason offered as justification or excuse for the commission of an act is accepted[,] and the right to present a defense is subject to the

requirement that the defense be one that the law recognizes." *Id.* In particular:

> A state legislature is free to define a criminal offense and a state may bar consideration of a particular defense so long as the result does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

State v. Jadowski, 2004 WI 68, ¶ 45, 272 Wis. 2d 418, 680 N.W.2d 810, citing *Montana v. Eglehoff*, 518 U.S. 37, 43 (1996).

Also, if a state legislature or court does recognize an affirmative defense to a particular crime, it "'may constitutionally place a burden of proof upon [the] defendant with respect to a question of fact so long as the defense is affirmative and does not attack an element of the crime.'" *State v. LaPlante*, 186 Wis. 2d 427, 435, 521 N.W.2d 448 (Ct. App. 1994) (citation omitted); *see also Patterson v. New York*, 432 U.S. 197, 206-07 (1977); *State v. McGee*, 2005 WI App 97, ¶ 16 & n.4, 281 Wis. 2d 756, 698 N.W.2d 850.

Allocating burdens on an affirmative defense in a criminal case depends, in part, on which party is best situated to know the pertinent facts. For example, in requiring the defendant to prove the affirmative defense of "inability to pay" child support set forth in Wis. Stat. § 948.22(6), the court of appeals cited the following rationale:

> "To place upon the state the burden of proving that the defendant is able to pay is unreasonable. Much of the information which the state would need to prove such ability to pay is either protected by privacy laws or protected by [the defendant's] Fifth Amendment right against [compelled] self-incrimination. The [defendant] himself has knowledge of where and when he worked, how much he earned, the extent of his property, and what other expenses he had. He can

> fairly be required to adduce such evidence to support an affirmative defense of lack of ability to pay."

Duprey, 149 Wis. 2d at 659-60 (citation omitted). If "homelessness" were recognized as an affirmative defense to the "address" reporting requirement of Wisconsin's sex-offender registration law, a similar rationale would apply to a soon-to-be-released sex-offender's residency decision. The defendant sex offender is best positioned to know his or her resources and where he or she expects to live upon release from prison, subject to GPS requirements and any local ordinance restrictions on sex-offender residency.

Given the relative newness of sex-offender registration laws, the common law is only beginning to develop in this area and, as noted, Dinkins asserted in his petition response that he is *not* advocating for an affirmative defense of "homelessness" to the "address" reporting requirement of Wisconsin's sex-offender registration law.[7]

- Fourth, in any event, requiring *every* sex offender to report an "address" to the DOC does not criminalize homelessness; rather, it holds every sex offender to the *same* reporting standard. It also avoids the unwieldy questions 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

[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." However, under federal law, as noted, sex offenders must provide authorities with *temporary* residence locations, suggesting that "homelessness" would not qualify as an affirmative defense.

made a sufficient good-faith effort to assist a soon-to-be-released sex offender in finding a community living arrangement.

Conversely, requiring the State to prove that a sex offender "actually knew" where he would live and sleep upon release into the community, as Dinkins has argued, makes little practical sense. *See Dinkins*, 794 N.W.2d 236, ¶ 9 (Pet-Ap. 105). If that were an element of the crime, then the State ostensibly could prove that element by showing, for example, that the sex offender could have reported as an "address" any homeless shelter, motel, or park bench that would permit sex offenders.

- Fifth, 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. *See* Wis. Stat. § 301.48. This requirement helps to explain why registered sex offenders in the community may report a change-of-address ten days *after the fact* under Wis. Stat. § 301.45(4)(a), while those leaving prison must register ten days *in advance* under Wis. Stat. § 301.45(2)(e)4., and those on parole or extended supervision likewise must report a change-of-address *in advance* under Wis. Stat. § 301.45(4)(b) if they know the address will be changing. *See Dinkins*, 794 N.W.2d 236, ¶ 22 (Pet-Ap. 113-114).

- Sixth, reading a "homelessness" exemption into the "address" reporting requirement also would undermine the statutory notification provisions of Wis. Stat. § 301.46 that enable law enforcement and specified crime victims to reasonably track the whereabouts of sex offenders in the community. *See Bollig*, 232 Wis. 2d 561, ¶ 24.

- Seventh, to reemphasize, reading a "homeless-ness" exemption into the essential "address" reporting requirement would enable any so-inclined sex offender to circumvent the requirement with impunity. As one court has observed:

> 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").

Whether a convicted sex offender who claims to be "homeless" must comply with the "address" reporting requirement goes to the heart of the legislative intent – to facilitate the monitoring of sex offenders by law enforcement and, thereby, to protect the public from future sex offenses. *See State v. Smith*, 2009 WI App 16, ¶ 11, 316 Wis. 2d 165, 762 N.W.2d 856.

Subject to GPS restrictions and possibly local ordinances, it is peculiarly up to the sex offender to decide where he or she will live and sleep upon release into the community. While residency restrictions may encourage sex offenders to claim "homelessness," requiring "address" reporting from purported "transient" sex offenders (coupled with GPS monitoring) nevertheless is valuable, because homelessness can "increase the risk of recidivism." Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 Drexel L. Rev. 175, 195 (2009).

- Lastly, and respectfully, the court of appeals is unpersuasive in suggesting that "the number of prisoners like Dinkins subject to the registration law who will not be on supervision upon release (and cannot locate post-release housing) is relatively small." *Dinkins*, 794 N.W.2d 236, ¶ 25 (Pet-Ap. 115) (parentheses in original).

As the court of appeals acknowledges, however, *every* qualifying sex offender is subject to the "address" reporting requirement whenever changing his or her address or residence – whether or not leaving State supervision. *Id.*, ¶ 25 n.12 (Pet-Ap. 116). Thus, *every* sex offender could, if so inclined, evade the "address" reporting requirement (and avoid the risk of prosecution for such evasion) by simply claiming "homelessness."[8]

(2) Applied.

To complete the sufficiency-of-the-evidence analysis in the present case, the State also proved beyond a reasonable doubt the second element of the charged crime – the *actus reus* element – namely, that Dinkins failed to provide the DOC with "the address at which [he] . . . will be residing" upon release from prison by July 10, 2008, ten days before his discharge date of July 20, 2008.

Social worker Smith testified that after Dinkins allegedly was unable to arrange to stay with his daughter or ex-wife upon release from prison (20:23-24, 31), Dinkins declined the social worker's offer on June 10, 2008, to help him find a living arrangement (20:30). Smith said that between June 17 and July 20, 2008, she weekly reminded Dinkins of the need to find a living arrangement (20:31-32). When Dinkins failed to report to the DOC an address where he would be living upon release from prison, social worker Smith wrote the words "To be determined by Agent" for Dinkins' address on the sex-offender registration form (9:1; 20:28, 40-41). Dinkins' conduct plainly does not comport with the "address" reporting requirement.

[8] As of November 18, 2010, Wisconsin had 21,637 registered sex offenders, including 5,712 in state prisons. *See* http://www.jsonline.com/news/wisconsin/109080534.html (last viewed 12/06/2010).

C. As applied to Dinkins, the "address" reporting requirement of the sex-offender registration law comports with due process – an issue that the court of appeals did not reach.

1. Introduction and general principles.

The court of appeals chose not to address Dinkins' substantive and procedural due process challenges to the "address" reporting requirement of the sex-offender registration law. Anticipating that Dinkins will resurrect those challenges in this court, the State herein addresses them. Although it is uncertain whether Dinkins is challenging, or will challenge, the facial validity of Wis. Stat. § 301.45, or the application of the "address" reporting requirement to him, or both, such constitutional challenges are unpersuasive for the reasons that follow. The following general principles apply.

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.

2. No substantive due process violation.

The test. Substantive due process protects against governmental action that either "'"shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty."'" *Smith*, 316 Wis. 2d 165, ¶ 5 (citations omitted).

Because no fundamental liberty interest or suspect class is at stake in the "address" reporting requirement of the sex-offender registration law, *cf. Kreimer v. Bureau of Police*, 958 F.2d 1241, 1269 n.36 (3d Cir. 1992) (being "homeless" is not a suspect class); *Joel v. City of Orlando*, 232 F.3d, 135, 1357 (11th Cir. 2000) (same), only a rational basis for the means chosen to effectuate the legislative purpose is necessary. *See Smith*, 316 Wis. 2d 165, ¶ 8. If, however, a fundamental liberty interest were at stake, substantive due process would dictate strict scrutiny and require the statute to be "narrowly tailored to meet a compelling state interest." *Id.*, ¶ 5.

Regardless of which standard applies, requiring Dinkins to comply with the "address" reporting requirement does not violate his right to substantive due process.

State interest. There should be no question that the 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).

Rational basis; 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 [the sex offender] . . . 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).

To reiterate, requiring *every* sex offender to register his or her "address" 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 – 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. As discussed, *every* soon-to-be-released sex offender, like Dinkins, 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.

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 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).

3. No procedural due process violation.

The test. 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." *State v. Hahn*, 221 Wis. 2d 670, 677, 586 N.W.2d 5 (Ct. App. 1998).

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 [the sex offender] . . . will be residing." Wis. Stat. § 301.45(2)(a)5.

As discussed, Wis. Stat. § 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). "[I]gnorance of the law is no defense to a violation thereof." *State v. Hurd*, 135 Wis. 2d 266, 276, 400 N.W.2d 42 (Ct. App. 1986). Thus, "[a] mistake as to the . . . constitutionality of the [statutory] section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense." Wis. Stat. § 939.43(2).

The "address" reporting requirement of Wis. Stat. § 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 or she 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. While one cannot report something of which he or she lacks knowledge, a sex offender, like Dinkins, will have actual knowledge of *the duty to report his or her 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.

In the present case, as discussed in Argument Section B., Dinkins had such notice, and the State respectfully refers this court to that discussion.

Objective standard of enforcement. Lastly, 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, 56 (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" says nothing about the offender's location upon release. Similarly, a sex offender's broad reference to becoming located in a city or zip code would not refer to an actual or a neighboring street address – and, in any event, Dinkins did not provide even that type of information to the DOC.

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.

CONCLUSION

For the reasons set forth, the State respectfully asks this court to reverse the decision of the court of appeals and reinstate Dinkins' conviction of violating the "address" reporting requirement of the sex-offender registration law.

Dated at Madison, Wisconsin: April 12, 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

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 9,151 words.

_____
JAMES M. FREIMUTH

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Madison, Wisconsin: April 12, 2011.

_____
JAMES M. FREIMUTH
Assistant Attorney General