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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP001643-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

WILLIAM DINKINS, SR.,

Defendant-Appellant.

Review of a Court of Appeals Decision Reversing a Judgment of Conviction and a Postconviction Order Entered in the Dodge County Circuit Court, the Honorable Andrew P. Bissonnette, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

The court having granted the state's petition for review, counsel assumes that oral argument will assist the court in reaching its decision, and that publication of the court's decision will be warranted.

ISSUE PRESENTED

For reasons which are explained below, Dinkins disagrees with the state's framing of the issue presented. Dinkins believes the issue to be properly stated as follows:

Does a prison inmate who does not know the address at which he will reside upon his release from prison violate the sex offender registration law by failing to report that address ten days before his release?

The trial court answered this question, "Yes."

The court of appeals ruled that one does not violate the statute if he is unable to reasonably predict the location of his future residence.

STATEMENT OF THE CASE

Following a bench trial conducted pursuant to the parties' stipulation, and based solely on evidence adduced at Dinkins' preliminary hearing, Dodge County Circuit Judge Andrew P. Bissonnette found William Dinkins, Sr., guilty of

violating Wis. Stat. § 301.45 (2007-08), Wisconsin's sex offender registration law.[1] (31:18-19).

Pursuant to Wis. Stat. (Rule) § 809.30, Dinkins filed a postconviction motion challenging his conviction. (32). The trial court denied that motion. (35; 39:21-23). Dinkins renewed his arguments in the court of appeals, which reversed the conviction and postconviction order. (The decision is included in Dinkins' Appendix at 101-17). This court granted the state's petition for review of the court of appeals decision.

The facts pertinent to this appeal were adduced at the preliminary hearing. Dinkins was convicted of sexual assault in Dodge County in February, 1999. (20:14-15). Because of that conviction, Dinkins was required to comply with the registration law. Wis. Stat. § 301.45(1g)(a). Under this law, sex offenders must provide the Department of Corrections with certain information concerning their whereabouts and activities and must update that information as the statute specifies.

Dinkins had been sentenced to ten years in prison for the sexual assault. (20:16-17). The record suggests that Dinkins had been continuously incarcerated since his initial appearance for this crime on July 21, 1998. (20:16, 50-51). In any event, he was to have remained confined until his maximum discharge date of July 20, 2008, and he was to be released from the Oshkosh Correctional Institution on that date. (9:1; 20:21). Dinkins' imminent release triggered one of the statutory reporting requirements: that he provide ten days before his release from prison "the address at which [he]

[1] For the court's convenience, the entire text of Wis. Stat. § 301.45 is reprinted in the Defendant-Appellant's Appendix at 118-23.

. . . will be residing" upon that release. Wis. Stat. § 301.45(2)(a)5., (2)(d), and (2)(e)4.

On June 2, 2008, Lisa Gallitz, a parole agent who was assigned the task of notifying law enforcement agencies of Dinkins' impending release from prison, phoned Dinkins to inform him that under the Sex Offender Registration Program, he was required to provide his future address to the department before his release from prison. (20:22-23, 46-49).

Upon receiving this information, Dinkins told Gallitz that he planned to live with his daughter upon his release, but that he didn't know her current address and the phone number he had for her had been disconnected. (20:48). Gallitz's notes of the phone conversation reveal that Dinkins promised Gallitz that he would "continue to try to locate [his daughter] and or secure other housing." (8:1). After this conversation, Dinkins reiterated to his social worker, Myra Smith, that he wished to reside with his daughter, but that his letters to her had gone unanswered. (20:23). With Smith's help, Dinkins phoned the daughter the following day, but the phone was disconnected. (20:24). Dinkins tried calling his daughter's boyfriend, but was told that he had the wrong number. *Id*. He tried calling his ex-wife several times from the social worker's office, but received a busy signal. *Id*.

On the following day, June 4, 2008, Smith presented Dinkins with the department's standardized registration form. (20:24-25, 36; 9:1). Smith completed most of the form, obtaining necessary information from department records, and Dinkins signed the form that day. (20:25-26; 9:1). Due to the uncertainty concerning Dinkins' future living arrangements, Smith wrote on the form that the address of Dinkins' "residence" was "To be determined by agent," just as she had done before when an inmate did not have an

approved residence. (20:28; 9:1). Smith testified that on such occasions, when a residence was found, the form would be updated. (20:28). Smith testified that she was relying on the agent to determine and approve Dinkins' residence, "essentially throwing the ball into their [sic] court." (20:41).

On June 10, 2008, Smith offered to help Dinkins by making phone calls in his behalf, but Dinkins declined the offer. (20:30). One week later, however, Dinkins asked Smith to help him call his ex-wife, but again, her line was busy. (20:30-31). Thereafter, Smith had contact with Dinkins on at least a weekly basis. When asked where he would be living upon his release, Dinkins always stated that he was waiting for a reply from his daughter, and that he could not imagine why she hadn't contacted him. (20:31). According to Smith, Dinkins was never able to provide "a specific street address, including a municipality, as to where he was going to live." (20:31-32). However, Smith conceded that between receiving the registration form and the projected release date, there was "some continued effort on [Dinkins'] part to try to find a residence." (20:40). As late as July 1, 2008, Dinkins was still seeking Smith's and Gallitz's assistance in attempting to reach his daughter by telephone. (8:3).

Lisa Gallitz did not speak directly with Dinkins after their June 2nd telephone conversation. (20:57, 59). Gallitz attempted to find Dinkins's daughter, Brianna Dinkins, by consulting CCAP, the white pages of the telephone directory, and police department records. (20:54-55). Another agent investigated several addresses in Fitchburg and Madison, and Gallitz left her business cards at two addresses in Sun Prairie, asking Brianna to contact her. But Gallitz did not receive a response to these communications. (20:55; 8:2). Gallitz obtained Brianna's phone number from Brianna's brother,

and left messages for her at that number, but again received no response. (8:3). On July 7, 2008, Gallitz finally received another number for Brianna from Brianna's mother, who informed Gallitz that it was not feasible for Dinkins to live with Brianna because she had a three-year-old daughter. *Id*. On July 18, 2008, one day after Dinkins was charged with this offense, Brianna Dinkins finally called Gallitz, telling her that while she would like to have her father live with her, her fiancé did not agree to that arrangement, she had a three-year-old daughter, and their landlord would not let Dinkins live there. (20:58; 8:4).

While Gallitz discussed with her supervisor the possibility of Dinkins living at a homeless shelter in Madison or Dodge County, she didn't convey this suggestion or any other option to either Smith or Dinkins. (20:57, 59-60). Gallitz testified that she was not aware of any other options. (20:60). While the department had the responsibility to transport Dinkins to his residence upon his release from prison and to wait until a GPS monitor was hooked up, Gallitz believed that the department lacked the authority to do anything further because Dinkins would not be on supervision after his release from prison. (20:60-61). Although she had discussed the situation with her supervisor, the department's Regional Chief, and even the Secretary of the Department of Corrections, "nobody ever mentioned finding him housing." (20:61-62). Gallitz confirmed that "the onus was put on [Dinkins] to come up with a residence." (20:60).

Dinkins never amended the registration form to provide the department with any specific information concerning his future residence. (20:28). Three days before his scheduled release date, the state filed a criminal complaint charging him with violating Wis. Stat. § 301.45, for having failed to provide the address at which he would be residing

upon his release from prison. (3). On July 18, 2008, Dinkins was transported directly from the Oshkosh Correctional Institution to the Dodge County Jail for his initial appearance on this charge. (1).

After reviewing the evidence adduced at the preliminary hearing, the trial court found Dinkins guilty as charged. (31:18-19). The court withheld sentence and placed Dinkins on probation for 30 months, with the condition that he serve 90 days in the county jail. (27; 31:34-37)

In his postconviction motion, Dinkins argued that Wis. Stat. § 301.45 required the state to prove that Dinkins knew the information that he was required to provide, in other words, that he knew where he would reside upon his release. (32). Dinkins contended that because the state did not prove this fact, the evidence was insufficient to support his conviction. *Id*. The trial court denied the motion. While conceding that Dinkins "has some pretty good arguments," the court ultimately decided, "I am going to side with the DOC saying, if you're a sex offender, you've got to find a place [to live]." (31:23).

The court of appeals reversed the trial court's ruling. Rejecting the state's argument that Dinkins, like every soon-to-be-released sex offender, could have complied with the statute by providing the nearest address of any place where he planned to sleep, including a park bench, the court held that the term "residing" in § 301.45 "plainly does not encompass a park bench—or a heating grate, bush, highway underpass, or other similar on-the-street location." Slip op. at ¶¶ 2-3, 18.

Because "residing" was not defined in Wis. Stat. ch. 301, the court resorted to recognized dictionaries to give the term its ordinary meaning. ¶ 19. The court concluded that the term, as used in the statute, "means to live in a

location for an extended period of time," and that the "on-the-street" locations typically occupied by homeless persons do not satisfy that definition. ¶ 20.

Furthermore, the court concluded that when the term is read in conjunction with the requirement that the address be provided ten days in advance of the inmate's release from prison, "it is plain that the address provided by a soon-to-be-released prisoner like Dinkins must be one at which the prisoner can *reasonably predict* he will be able to reside." ¶ 21 (emphasis in original). The court declared, "Because it is undisputed that Dinkins lacked an address at which he could have reasonably predicted he would have been able to 'reside,' we therefore conclude that he could not be convicted of failing to comply with the address reporting requirement." ¶ 24.

ARGUMENT

Because Dinkins Did Not Know Where He Would Reside Upon His Release from Prison, He Did Not Violate the Sex Offender Registration Law When He Failed to Report the Address of His Future Residence Ten Days Before His Release.

Introduction and Summary of Argument

Contrary to the state's argument, there is no need for this court to decide whether homeless sex offenders are generally "exempt" from complying with the sex offender registration law or its reporting requirements. The court of appeals did not adopt such an "exemption," nor can one reasonably interpret its decision as producing that result. Likewise, Dinkins has never advocated the recognition of a "homeless exemption," and does not do so now.

By speaking in broad terms about a "homeless exemption" or a "homeless affirmative defense," the state implicitly asks this court to interpret the law in a manner that will cover *all* homeless sex offenders, regardless of their situation. "Homeless sex offenders," however, do not comprise a homogeneous group. "[N]ot all homeless people suffer from the same degree of instability in their living situation." ***State v. Iverson***, 664 N.W. 2d 346, 353 (Minn. 2003). Each person who might be characterized as a "homeless sex offender" does not face identical obstacles in complying with the registration and reporting requirements. For example, some persons who might consider themselves to be "homeless," or who might be described by others as such, are able to live in a homeless shelter, in a motel, or with friends or relatives, even if only temporarily. Such persons *do* have a "residence" in the ordinary sense of the word, and *are* able to provide an address for that residence.

Two critical factors distinguish Dinkins from nearly all other sex offenders required to comply with the statute's reporting requirements. First, unlike those who are merely required to report where they are *currently* living, or those who have moved and are given a grace period for reporting when their address has changed, Dinkins was required to report ten days *in advance* where he *would be residing* upon his release from prison. Second, unlike those already in the community, who are likely more familiar with local residency restrictions and with local law enforcement's policies toward transients, and are able to investigate the locations at which sex offenders might potentially live, Dinkins, at the time he was required to report his future address, was still in prison—where he had been confined for the previous ten years. His confinement certainly curtailed not only his ability to secure a residence, but his ability to even learn where he might *potentially* live.

Thus, this case involves a rather unique fact situation, one which the state attempts to gloss over. The issue here is not whether *all* homeless sex offenders are to be "exempted" from the reporting requirements. The issue is much more narrow: whether this *particular* homeless sex offender, William Dinkins. Sr., violated § 301.45, when he failed to report ten days in advance of his release from prison where he would be residing upon that release, when it is undisputed that he hadn't yet secured a residence, and did not know where he would reside.

Well-settled principles of statutory construction support Dinkins' argument that a person in his unique position cannot be convicted of violating this statute by failing to report the address at which he will be residing without evidence that he knew, at the time he was required to make that report, where that residence would be. That is, the registrant's knowledge of the location of his future residence is a necessary element of this crime.

The state's arguments are based on three faulty assumptions. First, the state argues that because every person must live and sleep *somewhere*, every sex offender who is about to be released from prison is "inherently capable" of reporting in advance precisely *where* he will live and sleep. State's brief at 17, 33. While the premise is undoubtedly true, the conclusion doesn't logically follow from it. Many offenders likely do know in advance where they will live, but those—like Dinkins—who have been unable to secure a more conventional living arrangement, and are forced to seek an "on-the-street residence" certainly do not *inherently* know in advance where they will be able to live and sleep. Just as some people "don't know where their next meal is coming from," some don't know where their next home will be.

Second, the state argues that one who does not know where he will live nonetheless "must choose to go somewhere to live and sleep," and because they must make that choice, policy considerations demand that the choice be reported ten days in advance. State's brief at 22-23. Dinkins will demonstrate that forcing an offender to essentially guess where he might eventually reside will actually undermine the statute's objectives.

Third, the state argues that a decision in Dinkins' favor will necessarily encourage other sex offenders to claim homelessness, thereby thwarting the laudable policy objectives promoted by the statute. State's brief at 22-28. Dinkins will demonstrate that the current statute, even if it is construed as Dinkins argues it should be, still enables law enforcement to track the location of an offender released from the prison into the community. To the extent that the current statute is regarded as deficient in this respect, the legislature can easily remove any perceived deficiency by enacting remedial measures which are specifically designed to effectuate the monitoring of homeless sex offenders, just like the measures enacted by many other state legislatures.

The evidence in this case is undisputed. The state failed to prove that Dinkins knew the location of his future residence at the time he was required to report that information to the department. His conviction must therefore be reversed.

A. Standard of review.

The issue in this case involves the construction of the sex offender registration statute and its application to a particular set of facts. The issue presents a question of law which this court reviews *de novo*. ***Minutemen, Inc. v. Alexander,*** 147 Wis. 2d 842, 853, 434 N.W. 2d 773 (1989).

A conviction will be reversed on insufficient evidence only if "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

B. The registrant must have knowledge of the information he is required to provide before he may be convicted of failing to provide that information.

1. The plain language of the statute.

"Knowingly."

With certain exceptions not relevant to this appeal, Wis. Stat. § 301.45(6)(a)1 provides, "Whoever knowingly fails to comply with any requirement to provide information under subs. (2) to (4) is … guilty of a Class H felony."

It is readily apparent that not all failures to provide information needed for the sex offender registry result in the commission of a crime. Only those who *knowingly* fail to provide the required information are culpable. The term "knowingly," however, is not defined in Chapter 301. Thus, the fundamental question in this appeal is, what does an offender need to "know" to make his failure to comply with the statute criminal?

The Jury Instructions Committee construes this statute to include three elements: (1) "The defendant was a person who was required to provide information under section 301.45;" (2) "The defendant failed to provide information as required;" and (3) "The defendant knowingly failed to

provide the information." Wis JI-Criminal 2198 (2009). With respect to the latter element, the pattern instruction states, "This requires that the defendant knew that (he) (she) was required to provide the information." *Id*. The comments to the instruction do not explain how the Committee reached the determination concerning the third element, that the defendant need only know that he "was required to provide the information."

The Jury Instructions Committee is not infallible, and this court is therefore not required to accept its statutory interpretations. ***State v. Beets,*** 124 Wis. 2d 372, 383 n.7, 369 N.W.2d 382 (1985); ***State v. Harvey***, 2006 WI App 26, ¶ 13, 289 Wis. 2d 222, 234, 710 N.W.2d 482. With all due respect to the Committee, it has incorrectly construed this statute. The state must prove not only that the offender knew he was required to *provide* the information, but also that he knew the *information* that he was required to provide.

The state argues that the Committee has correctly interpreted the statute, because Wis. Stat. § 939.23(2) provides, "'Know' requires only that the actor believes that the specified fact exists." However, § 939.23 applies "only to crimes defined in chs. 939 to 951." Wis. Stat. § 939.20. This offense is not such a crime.

Even if one applies § 939.23(2), however, the Committee's construction is erroneous. In ***State v. Lossman***, 118 Wis. 2d 526, 348 N.W.2d 159 (1984), this court faced a similar issue of statutory construction. Lossman was charged with resisting or obstructing an officer, which was defined as "Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority." Rejecting the court of appeals' determination that the statute on its face required knowledge

only that one was resisting or obstructing an officer, this court concluded that the statute was unambiguous, and that the accused must also know both that the officer was acting in his official capacity and that he was acting with lawful authority. 118 Wis. 2d at 532-40. The court reasoned, "The belief requirement applies to all the specific facts which follow 'knowingly' in the statute." 118 Wis. 2d at 536. Applying the same reasoning here, "knowingly" requires knowledge of "the information" that the registrant must be "provide."

There is no logical reason for requiring knowledge of the *duty* to provide information, but not requiring knowledge of the *information* that must be provided. Ignorance of the required information makes its reporting truly impossible, and presumably, less culpable than if the offender had withheld information in his possession. 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. But as the Jury Instructions Committee has construed this statute, that is exactly what the legislature has done: one's ignorance of the information he was required to provide would not excuse his failure to report that information. This construction is simply illogical.

A cardinal rule of statutory construction is that statutes must be construed "reasonably, to avoid absurd or unreasonable results." ***State ex rel. Kalal v. Circuit Court for Dane County,*** 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110. It would be absurd to convict a person of a Class H felony, which carries a maximum punishment of six years in prison, for failing to provide information which he doesn't have or which may not even exist. Yet, the Jury Instructions Committee's construction of this statute permits exactly that result, not only with respect to one's prospective

address, but with respect to other facts which a registrant might not know as well.

Paragraph (2)(a) of the statute lists the information that a registrant must provide. In addition to the address at which the person "is or will be residing," the registrant must report a variety of facts relating to his conviction, his confinement, his supervision, and his most recent updating of the registry. A registrant might not know such information. Under the Committee's interpretation, such a person could be prosecuted for failing to provide it.

More analogous to this case, and even more troubling, perhaps, is the following scenario. Under subdiv. 8. of paragraph (2)(a), the registrant must provide the "name and address of the place at which the person is or will be employed." Registrants like Dinkins, who are about to be released from prison after completing their entire sentence, must provide the employment information at least ten days in advance of their release. Subdiv. (2)(e)4. Under the Committee's interpretation, if the person had not yet secured employment, or if he did not even intend to seek employment upon his release from prison, he could *still* be prosecuted for failing to provide the employment information. The employment information, of course, would not even *exist* under this scenario, but nonetheless, the offender would have to provide it, or suffer a felony conviction.

These are indeed absurd results, but no more absurd than prosecuting a person for failing to provide at least ten days in advance the address of a residence which has not yet been established or which the offender does not even know. Notably, subdivisions 5 (pertaining to one's address) and 8 (pertaining to one's employment) are stated in identical terms: "is or will be residing" and "is or will be employed."

Dinkins indicated on the registration form that he was "unemployed." (9:1). The state's failure to charge him with having failed to report the name and address of his employer suggests that it recognized the absurdity of requiring Dinkins to provide information which either did not exist or of which he had no knowledge. Unfortunately, it did not employ that same reasoning when it charged Dinkins for failing to provide the address of his non-existent residence. Dinkins did not have a residence waiting for him any more than he had a job lined up.

"Reside" and "Address."

Because the term "reside" is not defined by the statute, the court of appeals relied on three dictionary definitions to determine its ordinary meaning, and concluded that it "means to live in allocation for an extended period of time." Slip op. at ¶¶ 19-20. The state disputes those definitions. State's brief at 17-20. No less an authority than the United States Supreme Court has observed, however, that the term "residence" "generally requires both physical presence and an intention to remain." ***Martinez v. Bynum***, 461 U.S. 321, 330 (1983). Thus, "the ordinary meanings of 'residence' and 'address' connote some degree of permanence or intent to return to a place." ***Twine v. State***, 395 Md. 539, 910 A.2d 1132, 1138 (2006); ***State v. Pickett***, 95 Wn. App. 475, 975 P.2d 584, 586-87 (1999); ***Commonwealth v. Wilgu***s, 975 A.2d 1183, 1187 (Pa. Super. 2009), *appeal granted*, 605 Pa. 313, 989 A.2d 340 (Pa. 2010). Definitions of "residence" appearing elsewhere in the Wisconsin statutes likewise require an "intent to remain in a place of fixed habitation." *See, e.g.*, Wis. Stat. §§ 46.27(1)(d); 49.001(6); 51.01(14); 55.01(6t); 252.16(1)(e).

When read in their entirety, the definitions of "residence" appearing in the legal dictionaries cited by the state do not support its position. One actually requires "living in a given place *for some time*," consistent with the court of appeals' construction. BLACK'S LAW DICTIONARY at 1335 (8th ed. 2004). The other indicates that "residence" "[s]ometimes [means] a temporary, at other times an actual or permanent, abiding place." BALLENTINE'S LAW DICTIONARY at 1102 (3rd ed. 1969). The mere fact that Congress and some state legislatures, apparently attempting to directly address the problem presented by homeless sex offenders, have specifically expanded their statutory definitions of "reside" (state's brief at 18-20), does not mean that such definitions represent the *ordinary* meaning of the word in the *absence* of a statutory definition. It is also worth noting that some of the statutory definitions the state cites actually require that the offender "habitually" or "regularly" live at a particular location, a requirement that again appears to be consistent with the court of appeals' definition.

As for the term "address," the definitions cited by the state refer to the designation of a place where a person may be "reached" or "found" or "communicated with." State's brief at 20. Verification of the information provided by the registrant appears to be an integral component of the statutory scheme. If the registrant's information cannot be verified, it won't be reliable, and it will be of little use to the public or to law enforcement. The statute accordingly enables the department to "send [a registrant] a notice or other communication requesting the person to verify the accuracy of any information contained in the registry." Wis. Stat. § 301.45(2)(g). The department can apparently seek such verification as often as it desires. The registrant has no more than ten days after receiving the notice or other communication to provide verification in the form and

manner directed by the department. *Id*. In addition, the department must regularly notify each registrant of his duty to update the registry, once every 90 days in the case of those subject to lifetime registration, and once every calendar year for other registrants. Wis. Stat. § 301.45(3)(b).

To the extent the state is suggesting that a person without an established residence should be required to list the address of an on-the-street location, such a requirement would actually undermine verification of the registrant's location. Mail verification—the preferred method under the statute—would not be practical, for one presumably cannot receive mail at a park bench, a heating grate, a freeway underpass, or other similar locations. Law enforcement officers would not be able to question a landlord or an owner of the premises to obtain verification of the registrant's residency, as these public locations lack any on-the-scene person of authority who could provide such verification. Officers could personally visit the location to determine whether the registrant was there. But what if they did not find him on a particular day or at a particular time? Must he remain at the specified location 24 hours per day? Such a requirement would be impractical. If the person vacated the location even temporarily, however, he would likely take with him all his personal effects, and as a result, there would be no evidence that he had ever "resided" at the location. Nor would the person be entitled to reclaim the vacated spot if someone else occupied it before he returned. Would that person then be subject to prosecution, either for providing false information, or for failing to notify the authorities of his current address? Would he acquire a new "address" every time he moved from one park bench to another?

It is problems like these which caused the California Court of Appeal to observe, "The utility of obtaining

registrations for places slept in only for a night or two, and perhaps never returned to, is so questionable as to cast serious doubt the Legislature intended such fleetingly relevant and rapidly accumulating information to be part of the registration scheme, . . . In many cases, the information would be obsolete before it was received." ***People v. North***, 112 Cal. App. 4th 621, 5 Cal. Rptr. 3d 337, 345 (2003).

Although Dinkins agrees with the court of appeals' construction of "reside," and disagrees with the state's arguments that "reside" and "address" must be given broader than ordinary meaning, the resolution of this debate is not necessary to the resolution of this appeal. It does not matter to Dinkins how broadly or narrowly the words "reside" or "address" are defined, for even if one can be said to "reside" at on-the-street locations such as a park bench, a heating grate, the area underneath a freeway overpass, a bus stop, an underground steam tunnel, or similar places typically occupied by homeless persons, the simple fact is that at the time he was required to register, Dinkins was still in prison, and therefore did not *know* where these places were, did not *know* whether he would be allowed to occupy them, and did not *know* if they would be occupied by others if and when he arrived there.

It is this lack of knowledge which is determinative of Dinkins' culpability. The court of appeals based its decision on Dinkins' inability to "reasonably predict" where he will be able to reside. Slip op. at ¶ 21. The court thus added an objective component to the "knowledge" requirement, essentially requiring the state to prove that the registrant "knew *or reasonably should have known*" the location of his future residence. While Dinkins would not complain if the statute were construed this way—for he could not have reasonably predicted where he would live—he prefers to

track the statutory language, which merely proscribes the "knowing" failure to provide required information.

2. Construing the registration law as a whole.

Another rule of statutory construction is that statutory language must be "interpreted in the context in which it is used; not in isolation but as part of a whole; [and] in relation to the language of surrounding or closely-related statutes." ***Kalal****, supra*, 271 Wis. 2d at 663, ¶ 46. It is noteworthy that § 301.45 contains several provisions which reveal that the legislature expected there to be instances where an offender would be unable to provide required information. Significantly, the legislature sought to deal with these situations without imposing criminal liability.

For example, paragraph (2)(d) of § 301.45, which places the duty on an unsupervised registrant to report the required information, provides that when the registrant "is unable to provide an item of information specified in par. (a), the department of corrections may request assistance from a circuit court or the department of health services in obtaining that information," and both the court and DHS are required to provide that assistance upon request.

Likewise, paragraph (2)(f), which will be discussed in more detail below, provides an alternative method for obtaining information which the person has not previously provided. That paragraph, like paragraph (2)(d), anticipates that the registrant will occasionally be unable to provide the required information. The legislature did not intend criminal prosecution to automatically occur whenever the offender fails to provide all the information that he is required to provide. Consistent with that notion, the legislature did not intend that those who lack actual knowledge of the

information they are required to provide would be guilty of this offense.

3. Constitutional considerations.

Courts must "interpret statutes to be constitutional if possible." ***Kenosha County Department of Human Services v. Jodie W. (In re Termination of Parental Rights to Max G.W.),*** 2006 WI 93, ¶ 50, 293 Wis. 2d 530, 560, 716 N.W.2d 845; ***State v. Weidner***, 2000 WI 52, ¶ 41, 235 Wis. 2d 306, 323-24, 611 N.W.2d 684. Unless § 301.45 is construed to require proof of Dinkins' actual knowledge of the information he failed to report, a conviction under the statute would violate his constitutional rights.

"Substantive due process rights are rooted in the Fourteenth Amendment of the United States Constitution, and Article I, Sections 1 and 8 of the Wisconsin Constitution." ***Jodie W.,*** 293 Wis. 2d 530, ¶ 39. "The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair." *Id*.

A statute which criminalizes the failure to perform an act which the actor is incapable of performing is arbitrary and oppressive, and thereby deprives the actor of substantive due process. As a leading authority on criminal law observes, "Just as one cannot be criminally liable on account of a bodily movement which is involuntary, so one cannot be criminally liable for failing to do an act which he is physically incapable of performing." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 6.2(c) at 445 (2d ed. 2003).

That the source of this principle is the substantive due process doctrine is demonstrated by ***Lambert v. California***, 355 U.S. 225 (1957), where a municipal ordinance required

all convicted felons living in the city of Los Angeles to register with the police. The Supreme Court struck down Lambert's conviction for failing to register on due process grounds, noting that the circumstances rendered it highly improbable that Lambert was aware of her obligation to register, and that she was accordingly afforded "the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it." 355 U.S. at 229.

United States v. Dalton, 960 F.2d 121 (10th Cir. 1992) provides another example of a conviction being overturned on due process grounds where the defendant was incapable of performing an act the law required him to perform. Dalton was convicted of possessing and transferring an unregistered firearm, even though the law prevented him from registering the firearm in question. Sustaining Dalton's due process challenge, the court concluded, "Because the crimes of which Dalton was convicted thus have as an essential element his failure to do an act that he is incapable of performing, his fundamental fairness argument is persuasive." 960 F.2d at 124.

Furthermore, in the civil context, this court has concluded that the termination of one's parental rights based solely on her failure to meet conditions that were impossible for her to meet violated the parent's substantive due process rights. ***Kenosha County Department of Human Services v. Jodie W. (In re Termination of Parental Rights to Max G.W.)*****,** 2006 WI 93, 293 Wis. 2d 530, 560, 716 N.W.2d 845. As a condition for returning Jodie's child to her custody, the trial court had ordered Jodie to obtain and maintain a suitable residence. 293 Wis. 2d 530, ¶7. Because she was incarcerated, it was impossible for Jodie to comply with this condition. ¶¶ 8-10. The trial court's finding that Jodie was

an unfit parent was solely based on her non-compliance with the condition. ¶ 11. This court concluded that because it was impossible for Jodie to comply with the conditions for the return of her child, the termination of her parental rights violated her substantive due process rights, and the statute authorizing that termination was unconstitutional as applied to her. ¶¶ 47-56.

Applying this principle to Dinkins' situation, it is certainly "impossible" for a person to report a fact to the requisite authorities if he has no knowledge of that fact. Accordingly, Professor LaFave has observed that "one cannot be said to have a duty to report something of which he has no knowledge." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 6.2(b) at 443-44 (2d ed. 2003). The state even concedes at page 36 of its brief that "one cannot report something of which he or she lacks knowledge." It nonetheless argues that "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." *Id*. (emphasis in original). The argument misses the point: the fact which Dinkins was required to report was his *future address*, and it was *that* fact of which he lacked knowledge. Thus, when the state concedes that "one cannot report something of which he or she lacks knowledge," it necessarily concedes that a person who, like Dinkins, lacks knowledge of his future address cannot possibly report that address to DOC.

Ignorance of the fact to be reported negates not only one's *duty* to report it, but the *ability* to do so. If § 301.45 is construed to require a person to provide information of which he has no knowledge, that person's compliance with the

statute would be impossible, and as applied to him, the statute would violate his right to substantive due process.

There is another constitutional principle implicated by the construction of § 301.45. Unless the statute is interpreted in the manner suggested by the defendant, it also violates due process because it is impermissibly vague. As the United States Supreme Court declared in ***City of Chicago v. Morales***, 527 U.S. 41, 55 (1999):

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

A person subject to the statute's reporting requirements who, like Dinkins, expects to be homeless upon his imminent release from prison, is not given adequate notice of what conduct is required of him. More particularly, such a person must guess as to how to comply with the statute's reporting requirements. A person in Dinkins's position might reasonably ask, "what address should I report, if I do not know where I will live upon my release?" Moreover, in this situation, the statute fails to provide clear guidelines to authorities charged with its enforcement regarding what specific information the offender is required to report. In other words, is it sufficient to report that the address is "to be determined," or that the person merely anticipates living in a particular municipality or within a particular zip code?

Construing a similar sex offender registration statute, the Georgia Supreme Court has ruled that its statute is unconstitutionally vague when applied to a homeless person who was required to give notice of his new address 72 hours

prior to leaving his former residence. ***Santos v. State,*** 284 Ga. 514, 516, 668 S.E.2d 676 (2008). The court concluded that the statute "contains no objective standard or guidelines that would put homeless sexual offenders without a street or route address on notice of what conduct is required of them, thus leaving them to guess as to how to achieve compliance with the statute's reporting provisions." 668 S.E. 2d at 678. Rejecting the state's argument that offenders could merely provide the "geographic location at which they may be located or a more general description of their temporary residence," the court also held that the statute "fails to provide clear guidelines to authorities charged with its enforcement regarding what specific information the offender is required to report." 668 S.E. 2d at 680.

In denying Dinkins' postconviction motion, the trial court ruled, "I'm going to side with the DOC saying, if you're a sex offender, you've got to find a place." (39:23). To the extent that the statute is construed as requiring a person like Dinkins to actually *establish* a residence at least ten days before being released from prison, and to saddle him with a class H felony if he failed to do so, it would criminalize the inmate's prospective homelessness.

In ***Robinson v. California***, 370 U.S. 660, 667 (1962), the United States Supreme Court ruled that a state law which made it a crime "to be addicted to the use of narcotics" was unconstitutional, as it "inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." The court reasoned that narcotic addiction was a mere status, an illness "which may be contracted innocently or involuntarily." Though not an illness, "homelessness" too is a status, and one which usually is acquired both innocently and involuntarily. Using the criminal law to punish this status

would inflict cruel and unusual punishment in violation of the Fourteenth Amendment.

Under facts nearly identical to those in this case, the Alabama Court of Criminal Appeals recently concluded that an Alabama statute requiring an inmate to provide the Alabama Department of Corrections at least 45 days prior to his release from prison "the actual address at which he or she will reside or live upon release," was unconstitutional as applied to an inmate who could not secure housing before his release. ***State v. Adams***, No. CR-08-1728, 2010 Ala. Crim. App. LEXIS 104 (Ala. Crim. App., Nov. 5, 2010). Like Dinkins, Adams was charged with failing to report his future address before even being released from prison, and like Dinkins, had attempted to find housing, but was unable to do so. *Id*., at *2, *5-7. The court found that the statute "punishes the defendant solely for his status of being homeless and, thus, violates the prohibition against cruel and unusual punishment." *Id*., at *34. The court reasoned that Adams' failure to provide an address in advance of his release was "involuntary conduct that was inseparable from his status of homelessness and, thus, as applied to this defendant, [the statute] constitutes cruel and unusual punishment." *Id*., at *80.

The court also held that the statute, as applied to Adams, violated his right to equal protection. *Id*., at *34-51. The court reasoned that "an unintended consequence of the legislation is that indigent homeless sex offenders are treated differently from nonindigent homeless sex offenders," and that the former group could remain imprisoned indefinitely after having served their prison sentences "because they have no funds with which to secure lodging and to obtain an address upon release from prison." *Id*. at *35. The court concluded that while the law on its face applied equally to all

sex offenders, it was discriminatory in its application, and it deprived Adams of a fundamental right based on his poverty. *Id*. at *42-51.

All of these potential constitutional implications can be avoided if the sex offender registration law is construed to require proof that Dinkins knew the address at which he would be residing ten days before his release from prison.

4. The current version of the statute already provides a mechanism for monitoring homeless registrants and discouraging false claims of homelessness.

As mentioned earlier in this brief, paragraph (2)(f) of the statute provides a method for obtaining information from registrants who are unable to provide the information as promptly as the statute requires. That paragraph provides:

> (f) The department may require a person covered under sub. (1g) to provide the department with his or her fingerprints, a recent photograph of the person and any other information required under par. (a) that the person has not previously provided. The department may require the person to report to a place designated by the department, including an office or station of a law enforcement agency, for the purpose of obtaining the person's fingerprints, the photograph or other information.

Thus, the department could have required Dinkins to report to a police station or sheriff's office immediately upon his release from prison. It could have demanded that he then provide the information which he had not previously provided, in other words, the address at which he would reside. If Dinkins were unable to do so, the department could have required him to continue reporting to the local

authorities on a daily basis, until an address *could* be provided. In the meantime, it could require him to identify where he had typically been staying, sleeping or eating.

Had the department exercised its authority under this paragraph, it could have effectively monitored Dinkins' whereabouts in the community. It would not have needed to charge and arrest him before he was ever released from prison. More importantly, the existence of this provision, coupled with the department's threat to employ it, would discourage registrants who were about to be released from prison from falsely claiming to be homeless, and in fact, encourage them to diligently search for housing before their release.

5. The state's position, if adopted by this court, would actually undermine the statute's objectives.

It is unclear how the state believes Dinkins could have complied with the statute's requirement that he report the address of his future residence, other than to merely *guess* as to the on-the-street location where he might eventually sleep on the first night after his release from prison.

If, as the state contends and Dinkins concedes, the goal of the sex offender registration law is to enable local law enforcement to monitor sex offenders so that their recidivism can be reduced, the information in the registry must be reliable. Requiring a person like Dinkins to essentially guess where he might end up, when there is little to no likelihood that the guess may prove to be accurate, hardly serves the legislative purpose. That guess is likely to be little more valuable to law enforcement than randomly selecting an address from the phone book, or simply leaving the question blank.

Even more troubling is the likely practical effect of adopting the state's position. If a person like Dinkins is forced to guess the location of his future residence in order to satisfy the reporting requirement, he will be motivated to list *some* address, without any assurance that the location will be available to him. If the registrant, upon his release from prison, went to the reported location and discovered that it was not available to him, he would naturally go somewhere else. However, at that point, the registrant would then have *ten days* to notify the department that his residence had changed. Wis. Stat. § 301.45(4)(a).[2] Thus, a registrant in Dinkins' position could, if he were so motivated, prevent the state from monitoring his whereabouts for at least ten days after his release from prison by initially reporting an address at which he had little chance of residing.

If adopted, the state's position would thereby undermine the objectives of the statute. The court should accordingly refrain from construing the statute so as to force inmates who are about to be released from prison to guess where they might reside.

6. Caselaw from other jurisdictions.

The state cites a number of cases from other jurisdictions in which the courts "have found no exemption for alleged homelessness." State's brief at 21, 23, 28, 35. Aside from the fact that Dinkins is not advocating the adoption of such an exemption, the cases are inapposite to the instant appeal.

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[2] If the person were on parole or extended supervision when his residence changed, he would have to notify the department sometime before the change occurred, unless the change were unexpected, in which case, the person would have 24 hours after the change to provide that information. Wis. Stat. § 301.45(4)(b).

One of the cases upon which the state relies rejected the argument that a person had no obligation to register because he had no "residence" or "address" he could report. ***State v. Winer***, 963 A.2d 89 (Conn. App. 2009). Two other courts disagreed. ***Commonwealth v. Wilgus***, 975 A.2d 1183 (Pa. Super. 2009), *appeal granted*, 605 Pa. 313, 989 A.2d 340 (Pa. 2010); ***State v. Pickett***, 95 Wn. App. 475, 975 P.2d 584 (1999). Another of the cases cited by the state rejected the dubious contention that homeless persons *not* living in homeless shelters were not required to report their address at all, because only homeless persons *living* in homeless shelters were required by statute to report personally every 90 days. ***Commonwealth v. Scipione***, 870 N.E. 2d 108 (Mass. App. 2007). These cases all involved persons who, unlike Dinkins, were actually living in the community, and were merely required to report *where they had been living*. They were not required to *predict* where they would be residing.

Other cases upon which the state relies involved persons who had left an established residence and then become homeless. The courts held that the offender was required to report a *change* in residence, regardless of whether he had acquired a new residence. ***Commonwealth v. Tobar***, 284 S.W. 2d 133 (Ky. 2009); ***State v. Ohmer***, 162 Ohio App. 3d 150, 832 N.E. 2d 1243 (2005); ***State v. Samples***, 347 Mont. 292, 198 P.3d 803 (2008); ***State v. Worley***, 198 N.C. App. 329, 679 S.E. 2d 857 (2009). Among the courts concluding otherwise are ***Twine v. State***, 395 Md. 539, 910 A.2d 1132 (2006); ***Jeandell v. State***, 395 Md. 556, 910 A.2d 1141 (2006); and ***People v. Dowdy***, 287 Mich. App. 278, 787 N.W.2d 131 (2006). Other similar cases involved the failure to report a change in residence where the offender was not really homeless. ***State v. Rubey***, 611 N.W.2d 888 (N.D. 2000) (offender had acquired new mailing address); ***State v. Abshire***, 363 N.C. 322, 677 S.E. 2d 444 (2009)

(offender contended that she was still living at reported address). Again, these cases involved the failure to report an event which had already occurred (the abandonment of the previous residence), rather than the offender's failure to predict where he *would be residing*.

As the state points out, some other states, like Wisconsin, have statutes requiring an inmate who is about to be released from prison to report in advance where he will reside upon his release. But the state cites not a single case where a court has upheld a conviction of one who failed to report his future residence because he claimed he did not know where he would reside. As discussed above, two courts have held that on constitutional grounds that one *cannot* be convicted under such circumstances. ***Adams**, supra; **Santos**, supra.* Of similar import are ***State v. Iverson,*** 664 N.W.2d 346, 352-53 (Minn. 2003), (offender could not be required to report a change in residence five days in advance, unless the new residence was one at which the offender knew he would live at least five days in advance, and at which he could receive mail); ***Commonwealth v. Rosado***, 450 Mass. 657, 881 N.E. 2d 112, 117 (2008) (homeless person could not report change of residence ten days in advance because he had little control over where he would be allowed to live); and ***State v. Ascoine***, No. 2003CA00001, 2003 Ohio 4145, 2003 Ohio App. LEXIS 3689 (Ohio App. July 28, 2003) (offender suddenly expelled from established residence could not be required to report address of new residence twenty days in advance).

It is noteworthy that three of the cases cited by the state even suggest that an offender who abandons his reported residence, while required to report a *change* in his residence, cannot be required to report *a new address* until he actually establishes a new residence. ***Tobar***, 284 S.W. 2d at 135 (had

offender merely reported that he had left previous residence, he might have been able to assert impossibility defense to reporting new address based on lack of new permanent residence); ***Ohmer***, 832 N.E. 2d at 1246 (offender unable to predict where he would live could comply with statute by listing new address as "homeless" until residence is found); ***Samples***, 198 P. 3d at 807 (had offender notified authorities that he had abandoned his previous residence, his lack of a new residence might have given him a valid vagueness challenge to his conviction).

In sum, existing caselaw only supports Dinkins' position that the state must prove that he knew where he would live before it can convict him for failing to report the address at which he will reside.

C. Adopting Dinkins' construction of the statute will not thwart the monitoring of homeless sex offenders.

The state predicts dire consequences if the statute is construed as Dinkins argues it should be. The state's concerns are greatly exaggerated.

First, requiring proof of the offender's knowledge of his residence will affect very few prosecutions under this statute, simply because in most contexts, it will be clear that the offender *did* have such knowledge. Those who respond to requests for verification, or who have been given the statutory grace period for reporting a change in residence, will certainly know the location of their current residence. Of those who are released from prison, the vast majority are likely to be on parole or extended supervision. An approved residence is a standard requirement of supervision for all sex offenders. The Department of Corrections will attempt to locate suitable housing for those supervisees who cannot

secure it themselves. *See, e.g.,* ***State ex rel. Olson v. Litscher*****,** 233 Wis. 2d 685, 608 N.W.2d 425. Indeed, in this case, it was the fact that Dinkins would *not* be on supervision upon his release that prevented the department from finding a residence for him. (20:60). Of those relatively few inmates who, like Dinkins, are released from prison without supervision, many will be able to establish living arrangements with friends or relatives prior to their release, and will likely know of those arrangements ten days in advance. Only in cases like Dinkins', where the registrant must report his address in advance of his release even though he doesn't know where he will live, will the registrant's knowledge of his future residence likely be at issue.

Second, proof of such knowledge is unlikely to be any more difficult than in any other criminal case where the defendant's "knowledge" is a necessary element. It could be proven circumstantially, or through the registrant's own statements. If, as the state insists, every soon-to-be-released offender *inherently* knows where he will reside, persuading a fact-finder to find this element should not be difficult at all.

Third, it is very unlikely that a decision in Dinkins' favor will either encourage offenders to feign homelessness or discourage them from actively seeking a conventional residence. Those inmates who are required to report their residence in advance of their release have every motivation to demonstrate stability in their future living arrangements, so as to prevent heightened scrutiny from a supervising agent or even to stave off a potential commitment under Chapter 980.

Fourth, as noted earlier, the current statute already provides the department with a method by which it could require persons like Dinkins to personally report to the local authorities immediately upon their release from prison, and

regularly thereafter, so that the authorities may track their whereabouts. Inmates would likely view this reporting requirement to be more onerous and intrusive than providing a residential address in the first instance, and would thereby be motivated to actively seek a conventional residence. Those who intended to evade registration or surveillance would likely find it easier to simply list a false address, or merely leave the residence they have listed without notice.

Finally, even if the court views the current statute, or Dinkins' construction of it, as providing some sort of loophole for homeless registrants, the loophole could easily be closed by remedial legislation.

Courts and legislatures throughout the country have already addressed the problem presented by homeless or transient sex offenders, and the solutions they have adopted could easily be adopted in this state.

Courts have consistently recognized that "the inherently transitory nature of homelessness makes it difficult to apply to homeless sex offenders the same considerations of residence applied to offenders who are not homeless," ***Commonwealth v. Bolling***, 72 Mass App. 618, 893 N.E.2d 371, 378 (2008). Some state legislatures have accordingly chosen to establish special rules for persons who identify themselves as transient or homeless, and have tailored their reporting requirements to encompass those without a true residence.

At least eight states have enacted comprehensive provisions pertaining to homeless offenders. These provisions generally require those registrants who lack a fixed residence to report to a law enforcement agency in person and on a more frequent and regular basis than other registrants, and to provide an account of where the registrant has been

sleeping or staying in the interim. See, Wash. Rev. Code § 9A.44.130 (6) (b) (2010); 730 Ill. Comp. Stat. 150/3 (a)(2)(ii) (2010); Minn Stat. § 243.166(3a)(e) (2010); Cal. Penal Code § 290.011 (2010); Ind. Code § 11-8-8-12(c) (2010); Ga. Code § 42-1-12(f)(2.1) (2010); Fla. Stat. § 943.0435(4)(b) (2010); Mass. Gen. Laws ch. 6, §§ 178F 1/2 (2010).

As noted in the state's brief at 19-20, other states have made it easier for some homeless persons to register by expanding the definition of "residence" or permitting other locations to be reported when a fixed residence is unavailable.

Thus, many states have been able to cope with the unique problem presented by homeless sex offenders, so as to retain their ability to monitor those offenders. Dinkins has never suggested, and is not suggesting now, that sex offender registration laws can never apply to homeless offenders. Indeed, the experience in other states proves otherwise. This court need not fear that adoption of Dinkins' argument will ultimately result in homeless offenders being able to evade sex offender registration laws with impunity, or that it will undermine community notification provisions.

It is important to emphasize, however, that the approaches listed above are *legislative* solutions to the problem. To the extent that § 301.45 fails to account for any problems presented by homeless sex offenders in general, or by persons like Dinkins in particular, it is the *legislature's* responsibility to solve those problems. As the California Court of Appeal has recognized, "We leave the weighing of alternative solutions for the legislature. It is uniquely within the legislative province to collect information and ideas for developing a more comprehensive registration system for transient sex offenders." ***North***, 5 Cal. Rptr. 3d at 348.

This court must interpret the statute as it is written. Wisconsin's sex offender registration statute requires that a person "knowingly" fail to comply with the reporting requirements before he may be convicted of violating the statute. The only reasonable construction of this statute is that a person must not only know of his *duty* to provide specified information, but he must actually know the information that he failed to provide before he may be convicted of failing to provide it.

D. The evidence was insufficient to support Dinkins' conviction.

The evidence in this case was undisputed. Even when viewed in a light most favorable to the verdict, that evidence failed to establish that Dinkins knew where he would be living upon his release from prison.

In denying one of Dinkins' pretrial motions, the trial court specifically found that "the evidence adduced at the preliminary examination seems to indicate that Defendant attempted to comply with the statute, but has been unable to find housing for himself upon release." (23:1). The finding is not clearly erroneous, as it finds ample support in the record.

When he was charged with this offense, Dinkins had been continuously confined for ten years. It is hardly surprising that the record fails to suggest that Dinkins' former residence, wherever that might have been, was still available to him. There is no indication that Dinkins had managed to purchase a home or rent an apartment while he was in prison. It is certainly doubtful that any landlord would have rented an apartment, sight unseen, to an unemployed sex offender who had been incarcerated for the past ten years, and who therefore had no recent residential or credit history. Dinkins

was no more likely to have been able to reserve a room at a hotel or motel. Due to his long-term confinement, one can only assume that he lacked a credit card, or any other method of prepayment. While one might view a homeless shelter was an option, Dinkins faced several obstacles in this regard. Homeless shelters do not operate like hotels: one cannot reserve a bed at a homeless shelter ten days in advance, or be guaranteed that there will be space available on a date certain. Moreover, some homeless shelters do not even accept sex offenders.

When Dinkins first learned of his registration obligation, he expressed the hope that he could live with his daughter, and he continued to cling to that hope until his release date. Unfortunately, it is clear from the record that living with his daughter was never a viable option. There is no indication in the record that Dinkins had arranged to live with any other family member, or that living with another relative was even a possibility. As Agent Gallitz conceded in an email to SORP Specialist Erich Wuerslin, "he really does not have much for family." (8:3). Nor does the record contain any evidence that Dinkins had planned to live with a friend or acquaintance, or that such persons had offered their assistance.

Even if one broadens the definitions of "residence" and "address" to include on-the-street locations such as park benches, heating grates, freeway underpasses and the like, Dinkins could not have known where these locations were or whether they would be available to him when he arrived there. There is nothing to suggest that he had access to an accurate and up-to-date catalogue listing either the general locations of such places or the street addresses that could be associated with them, nor is there any reason to believe that Dinkins had independent knowledge of this information,

especially given his confinement over the previous ten years. Dinkins could not have known ten days in advance of his release whether any one of these locations would be a suitable "residence," *i.e.*, whether it would protect him from the elements, whether local ordinances or law enforcement officers would prohibit him from occupying the space, whether he would be harassed or chased away by someone who found his presence to be inconvenient or offensive, or whether the space would be occupied by another homeless person.

While the state suggests that it would "be a simple proposition" for a person in Dinkins' position to merely ask a departmental official about how he was to comply with the reporting requirement, the record reveals that in this case, the departmental officials were of little assistance either in helping Dinkins find a residence before his release from prison, or in advising him on how to comply with the reporting requirements given his expected homelessness.

The evidence adduced at the preliminary hearing, and reintroduced at the abbreviated bench trial, supports only one conclusion: that as of July 10, 2008, when he was required to report the address at which he would reside upon his release from prison, William Dinkins had not found a place to live, not even on a temporary basis. He clearly lacked knowledge of the address at which he would reside. No reasonable fact-finder could conclude that this evidence established beyond a reasonable doubt that Dinkins knew where he would be living, but chose to withhold that fact from the department. Therefore, the evidence was insufficient to support the defendant's conviction, and the conviction must be reversed. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 152 (1990).

CONCLUSION

For the reasons set forth in this brief, William Dinkins, Sr., respectfully urges the court to affirm the decision of the court of appeals, and to reverse the judgment of conviction and the order denying postconviction relief.

Dated this 29th day of April, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 10,581 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 29th day of April, 2011.

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