STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2015AP002256-CR

vs.

JEFF C. HILGERS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT BY
DANE COUNTY CIRCUIT COURT, BRANCH 1,
JUDGE JOHN W. MARKSON, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT JEFF C. HILGERS

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ARGUMENT

In this strict liability criminal case, the State would have the Court of Appeals expand the exclusive statutory list of what constitutes a "correctional institution" in order to secure a conviction. Recognizing that no law states that the Home Detention Program is a correctional institution, the State has come up with a variety of theories as to how the program is similar to a jail, and characterizes the Program as a "constructive" jail. For four main reasons, the State's position should be rejected. First, the statute's plain language does not permit the conclusion that the Home Detention Program is a jail. Second, the State's constructive jail theory deprives the defendant of "fair warning" of the crime, which is barred by due process, the rule of lenity and the vagueness doctrine. Third, the State's theory is improperly based on custody, not confinement. Fourth, because there were no written rules confining "Jane" to her home, the State failed to prove that Jane's confinement constituted a statutory Home Detention Program.

I. The statute's plain language does not permit the conclusion that a home or the Home Detention Program is a jail.

The State contends that because Jane was a jail prisoner in the Home Detention Program in the custody of the sheriff, her home transformed into a "constructive" correctional institution. (Response Brief, at 8.) The enumerated places that constitute correctional institutions cannot be constructively expanded. *See State v. Terrell*, 2006 WI App 166, ¶ 12, 295 Wis. 2d 619, 721 N.W.2d 527.

The statutory language is limited, and it is clear: A correctional institution is a "jail or correctional facility." § 940.225(5)(acm). Jail or correctional facility "means" a Type 1 prison, a jail, a Huber Facility, a work camp, a house of correction, or a lockup facility. § 961.01(12m). A "jail" includes a municipal prison and a rehabilitation facility. § 302.30. A person in a Home Detention Program is not confined in any of these places. The person is detained at her "place of residence." Wis. Stat. § 302.425(3). A place of residence is "not subject to requirements for jails." § 302.425(5)(b). A place that is not subject to any jail requirements is not a jail.

The enumerated places must be "given their common, ordinary, and accepted meaning unless they are technical or defined in the statute." *State ex rel. Kalal v. Circuit Court for Dane Cnty*., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Courts are "not at liberty to disregard the plain, clear words of the statute." *Id*. (citing *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)).

Recognizing these limitations, the Court of Appeals in *Terrell* refused to exceed the plain language of the statute, and held that a sheriff deputy who worked in the courthouse was not a "correctional staff member" and dismissed the charge against him. *State v. Terrell*, 2006 WI App 166, ¶ 12, 295 Wis. 2d 619, 721 N.W.2d 527; *and see* § 940.225(5)(ad) (defining correctional staff member as "an individual who works at a correctional institution, including a volunteer.")

In *Terrell*, the sheriff deputy's responsibilities included transporting jail prisoners from a justice facility staging area to court. *Id*. at ¶ 2. The deputy had sex with a prisoner after he brought her to the courthouse while she remained in custody. *Id.* The Court of Appeals dismissed the sexual assault charge against him because, under the statute's "plain language," he did not work "within the walls of a correctional institution." *Id.* at ¶ 12.

The courthouse cell in *Terrell* had jail attributes. The prisoner was confined. Terrell was a deputy. The deputy was responsible for the prisoner's custody. Yet Terrell was not deemed a "constructive" jailer because that would have exceeded the statute's plain language. *See id*.

There are obvious policy reasons why the legislature might wish to include within the scope of coverage sheriff deputies like Terrell, but the legislature chose not to. The "plain language" of the statute governed, and prohibited expansion of the statutorily designated employment place. For the same reason *Terrell* prohibits any expansion of the statutorily designated employment place, there can be no judicial expansion of the statutorily designated *confinement* place.

Nevertheless, the state pushes for an expansion. It asserts that a home in a Home Detention Program has certain features that resemble a jail. (*See* Response Brief, at 7-12.) However, if the Home Detention Program was a statutory correctional institution, that would have been written directly into § 961.01(12m). As *Terrell* dictates, looking beyond the places enumerated in the plain language of

the statute is not an option. The choice of words of the legislature control and cannot be ignored. A home is simply not one of the covered facilities.

To the extent that the State would have the court add to the list of facilities, under the well-established canon of *expressio unius est exclusio alterius*, it cannot. *See* e.g., *State v. Delaney*, 2003 WI 9, ¶ 22, 259 Wis. 2d 77, 88, 658 N.W.2d 416, 421 (The canon means, "the expression of one thing excludes another"). The State has not articulated any reason why the legislature's expressed meaning should be expanded to include unexpressed places.

If the Home Detention Program was a correctional institution, the Home Detention Program would have said so itself. There are statutes governing confinement programs which explicitly define themselves as "correctional institutions." For example, § 301.046(1) concerns Community Residential Confinement Programs. That statute, which allows the State Department of Corrections to confine state prisoners to their residences, explicitly provides that the program is a "correctional institution" and the institution is a "state prison." § 301.046(1). Conversely, the county-operated Home Detention Program statute has no such language. § 302.425. This is strong evidence that if the legislature intended for the Home Detention Program to be a correctional institution, it would have said so. "When a statute with respect to one subject contains a given provision, 'the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.'"

Kimberly-Clark Corp. v. Pub. Serv. Comm'n of Wisconsin, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983) (quoting *State v. Welkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961)). Therefore, the Home Detention Program should not be classified as a jail or correctional institution.

II. The State's constructive jail theory deprives the defendant of "fair warning" of the crime, which is barred by due process, the rule of lenity, and the vagueness doctrine.

The State's constructive jail theory would, without warning, make Mr. Hilgers' and Jane's consensual relationship a crime, after the fact, which the due process clauses of the United States and Wisconsin Constitutions forbid.[1] "Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266-67, 117 S. Ct. 1219, 1225 (1997).[2] (Citations omitted.) "[T]he principle on which the [ex post facto] Clause is based - the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties - is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191-92, 97 S. Ct. 990, 992-93 (1977) (citations omitted). "Permitting retroactive application of expanded criminal laws as a general proposition threatens the liberty interests of

[1] There are no common law crimes in Wisconsin; criminal offenses are exclusively statutory. *Wray v. State*, 87 Wis. 2d 367, 374, 275 N.W.2d 731, 734 (Ct. App. 1978) (citing § 939.10.)

[2] Courts "should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation." *Krulewitch v. United States*, 336 U.S. 440, 457, 69 S. Ct. 716, 725 (1949) (J. Jackson, concurring opinion).

everyone within a free and open society. *State v. Picotte*, 2003 WI 42, ¶ 53, 261 Wis. 2d 249, 276, 661 N.W.2d 381, 394.

The State's proposed constructive jail theory creates an ambiguity in the definition of confinement in a correctional institution, which must be rejected under the rule of lenity. The Maryland Supreme Court reached this very result in *Deville*:

> The rule of lenity requires us to limit the breadth of § 286 in this instance. Where the legislature has not specifically instructed the courts of Maryland to expand the scope of a penal statute, the rule of lenity dictates that we limit such laws to that which can be construed clearly from the statute. As a result, we cannot read § 286(d) to include home detention within the definition of "confinement . . . in a correctional institution.

Deville v. State, 383 Md. 217, 231-32, 858 A. 2d 484, 492 (2004).

The State's construction of "jail" should be rejected for vagueness. (*See* Response Brief, at 11-12). If the State's position were correct, that the term "jail" stands unlimited and left wide open for judicial construction, then the sexual assault law would suffer from a constitution vagueness deficiency. *See State v. Jadowski*, 2004 WI 68, ¶ 35, 272 Wis. 2d 418, 436, 680 N.W.2d 810, 819 ("In examining a legislative act for vagueness, [courts] determine whether the statute is sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judges and juries of standards for the determination of guilt.") The State's definition of jail is boundless and unclear. Deviating from the statute's plain language makes it impossible to know which consensual relationships are legal and which are not.

III. The State's theory is improperly based on custody, not confinement.

The State suggests that anyone in the custody of the sheriff must be "confined in a correctional institution." (*See* Response Brief, at 7-9.) This is false. Custody is much broader than confinement. A person can be in custody without physical control. *State v. Scott*, 191 Wis. 2d 146, 151, 528 N.W.2d 46 (Ct. App. 1995). If the legislature intended for simply "custody of inmates" to be touchstone of coverage under the sexual assault law, as opposed to confinement, it would have said so.

There are a number of places where a person may be in the sheriff's custody without being confined in a correctional institution. For example, Type 1 prisons are correctional institutions, Wis. Stat. §§ 961.01(12m) and 301.01(5), but Type 2 prisons are not. *See* §§ 961.01(12m) and 301.01(6). A Type 2 prison is a state prison which operates the intensive sanction program. § 301.01(6). Participants are prisoners in custody who may be put on electronic monitoring. *Id*. Since it is Type 2, it is not a "jail or correctional facility" under § 961.01(12m). Since it is not a jail or correctional facility under § 961.01(12m), it is not a correctional institution for purposes of the sexual assault statute. § 940.225(2)(h).

The statutes contain other examples. Section 302.19 provides that the department of corrections may use any of its facilities for the temporary detention of persons in its custody. § 302.19. Section 303.07 creates county reforestation camps for convicted inmates. Section 938.207 provides regulations for non-secure

juvenile detention at the home. *See* § 938.02(10p) and (10r). None of these custodial places are correctional institutions under the sexual assault statute. *See* § 961.01(12m). Even a person under arrest is in the custody of the sheriff, § 968.07 and 968.08, but a squad car is not a correctional institution. *See id*. The courthouse may also be used for the custody of jail prisoners. *See Terrell*. The point is that just being in custody does not determine whether the place of confinement is a correctional institution.

A person in a Home Detention Program is not even in the actual custody of a correctional institution:

> It is undisputed that Swadley was not in the actual custody of an institution. Home detention is not the constructive custody of prisoners temporarily outside the institution for the purpose of work, school, medical care or furlough.

State v. Swadley, 190 Wis. 2d 139, 143-44, 526 N.W.2d 778, 780 (Ct. App. 1994) (emphasis added) (citing 302.425) (modified on other grounds, *State v. Magnuson*, 2000 WI 19, ¶ 25, 231 Wis. 2d 40, 606 N.W. 2d 536, defining custody for sentence credit purposes to include any time the defendant faces an Escape charge).

The State also relies on the Escape statute apparently to show that Home Detention Program prisoners are in constructive custody. (Response Brief, at 9.) *See* § 946.42(1)(f). Escape charges are based on custody. Custody is broader than confinement. Escaping from custody does not mean that the person escaped confinement or that the place escaped from was a correctional institution.

The State maintains that there is a power imbalance between a person in the Home Detention Program and jailer such that the legislature would have an interest in preventing sexual relations. (Reply Brief, at 9.) However, there is a power imbalance in each of the confinement places identified above, including the courthouse cell in *Terrell*, which do not constitute correctional institutions. Surely there are reasons why the legislature might wish to enact laws which afford persons in the sheriff's custody the same protections afforded to prisoners confined in correctional institutions. *See Terrell*. But that is for legislative consideration.

In addition, the State argues that the Home Detention Statute is not subject to the requirements for jails and, therefore, the home is a constructive jail. (Response Brief, at 10.) That argument is illogical. If the place is not subject to ***any*** jail requirements, then it is nothing like a jail. After all, it's a home. A home is not a county, municipal or state facility. It does not have armed guards. The security differences are highly material:

> [T]he superior court was wrong to instruct Bridge's jury that the Northstar Center was a 'correctional facility' simply because it housed defendants who were placed there by the Department of Corrections pending their trial or sentencing. The Northstar Center's status as a 'correctional facility' hinged on an additional question of fact: whether prisoners' residence at the Center was forcibly maintained by corrections officers or by other guards or staff members acting as agents of the Department of Corrections (either formally or de facto).

Bridge v. State, 258 P.3d 923, 930 (Alaska Ct. App. 2011).

In *Chamberlain v. Unemployment Comp. Bd. of Review*, the Pennsylvania court explained that "it would grossly distort the language used by the legislature if we were to conclude that the term 'imprisonment' means merely 'staying at home.' The plain and ordinary meaning of imprisonment is confinement in a correctional or similar rehabilitative institution, not staying at home." *Chamberlain v. Unemployment Comp. Bd. of Review*, 114 A.3d 385, 388 (Pa. 2015) (citing *Commonwealth v. Kriston*, 527 Pa. 90, 588 A.2d 898, 899 (Pa. 1991) (emphasis omitted)) The court went on to explain that the court in *Kriston* "reasoned that the 'qualitative differences' between one confined in an institution and one confined in his home 'are too numerous and obvious to require elaboration,' and that the General Assembly would not have intended for the term 'imprisonment' to be 'so diluted in effect as to encompass home monitoring programs.' *Id.* at 397 (citing *Kriston*, at 900).

IV. Because there were no written rules confining Jane to her home, the State failed to prove that Jane's detention constituted a statutory Home Detention Program.

Jane was detained at her home pursuant to the verbal terms of a Dane County Jail Diversion Agreement. The Agreement had similarities to a statutory Home Detention Program, but, at its core, it differed. A true Home Detention Program requires written rules which prevent prisoners from leaving the home. § 302.425 (3) and (6). The written rules of the Dane County Jail Diversion Program to which Jane was subjected did not. In response, the State seems to

concede the lack of written home confinement rules, and instead argues that the omission is immaterial since there were boundaries of which Jane was aware. (*See* Response Brief, at 13-14.)

The omission of written terms of home detention matters. It fundamentally alters the nature of the program. If the need to stay home was too inconsequential for mention in the mandatory detention rules, then the program lacked the essential statutory feature of a Home Detention Program.

Furthermore, Jane testified that there were limits, but she was allowed to walk around outside part of the block without a problem. The only way she knew the limits was either by testing them or asking.

The program the sheriff administered should not have been considered anything more than a jail diversion program. Without any instruction to the jury explaining what a Home Detention Program is, the jury was left to improperly speculate.

The jury's need to speculate would not have been much different from Mr. Hilgers'. There was literally no law or document that would have given Mr. Hilgers notice that his consensual relationship with his future wife was criminal. The State cannot point to any language in the jail statute, the correctional institution statute, the sexual assault statute, the Home Detention Program statute, or any other statute, or the written rules, that would make Jane's personal

residence a jail. The State's characterization of the home as a statutory correctional institution cannot be sustained.

CONCLUSION

The Court of Appeals should vacate the judgment of the trial court based on erroneous jury instructions and insufficient evidence, and award Mr. Hilgers the costs of this appeal.

Dated: May 2, 2016.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b) and (c) for a Reply Brief produced with a proportional serif font. The length of this brief is 2,904 words.

Dated this 2nd day of May, 2016.

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CERTIFICATE OF SERVICE

Defendant-Appellant, Jeff C. Hilgers, by his Attorneys, Axley Brynelson, LLP, by Attorney Brian C. Hough, hereby certifies that the Reply Brief of Defendant-Appellant, Jeff C. Hilgers, was served electronically on the Court and the Plaintiff-Respondent State of Wisconsin by ECF on May 2, 2016.

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