STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2020AP1213-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

COREY T. RECTOR,

Defendant-Appellant-Cross-Respondent.

AN APPEAL FROM POSTCONVICTION ORDERS ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE JASON A. ROSSELL, PRESIDING

COMBINED BRIEF AND APPENDIX OF RESPONDENT AND CROSS-APPELLANT

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STATEMENT OF THE ISSUES[1]

1. Under Wis. Stat. § 301.45(5)(b)l., a defendant with convictions for sex offenses on "2 or more separate occasions" must register as a sex offender for life. Precedent interpreting the phrase "separate occasions" in the habitual criminality statute explain that each conviction is a separate occasion. Here, Corey Rector was convicted in a single case of five separate sex offenses for possession of child pornography. But the circuit court did not order lifetime registration.

Did the circuit court err when it failed to order lifetime sex offender registration?

This Court should answer: yes.

2. The circuit court has discretionary authority to grant or deny eligibility to participate in an earned release substance abuse program. Here, Rector alerted the court postconviction to a sentencing error and moved for admittance into the program. The court corrected the legal error. Then, it exercised discretion and denied the motion because Rector's crimes were unrelated to substance abuse.

Did the circuit court reasonably exercise discretion when it denied Rector's postconviction motion seeking earned release eligibility to participate in the program?

This Court should answer: yes.

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[1] The State does not separate the cross-appellant portion of this combined brief by a blank blue cover. Here, the first issue is the issue of the State's cross-appeal, whereas the second issue is the issue of Rector's appeal. Under Wis. Stat. § (Rule) 809.19(6)(b)2., "the cross-appellant portion of the combined brief shall be preceded by a blank blue cover." But an appendix to a Wisconsin Supreme Court order explains that "requirements pertaining to . . . brief covers may be eliminated" to an appeal in an electronic filing pilot project. Order No. 19–02 (Apr. 15, 2019). Under this order, the State omits the blank blue cover.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication and does not request oral argument. Publication is appropriate under Wis. Stat. § (Rule) 809.23(1)(a)1. and 5. to enunciate the meaning of the phrase "2 or more separate occasions" in Wis. Stat. § 301.45(5)(b)l., thereby deciding a case of substantial and continuing public interest as to the meaning of this phrase in the sex offender registration statute. Oral argument is unnecessary under Wis. Stat. § (Rule) 809.22(2)(b).

STATEMENT OF THE CASE

Introduction. Rector pleaded guilty to five counts of possession of child pornography with five additional counts dismissed at the plea hearing. (R. 26; 66:12.) At the sentencing hearing, the circuit court ordered sex offender registration for 15 years and ordered Rector ineligible to participate in an earned release substance abuse program. (R. 69:18–19.) The court revisited the duration of the sex offender registration postconviction and denied a request for lifetime registration. (R. 31; 51; 73.) It also revisited and denied a request for eligibility to participate in the earned release substance abuse program. (R. 39; 46; 70.) Rector filed a notice of appeal following the court's order denying earned release eligibility. (R. 47.) The State filed a notice of cross-appeal following the court's order denying lifetime sex offender registration. (R. 52.)

Criminal complaint and information. The State charged Rector with ten counts of possession of child pornography, contrary to Wis. Stat. § 948.12(1m). (R. 1.) The charges originated from an investigation and execution of a search warrant at Rector's residence. (R. 1:5.) The National Center for Missing and Exploited Children had reported a cyber tip to law enforcement that Rector used an account and address linked to video files of suspected child pornography.

(R. 1:5.) A special agent reviewed files recovered from numerous electronic devices located in Rector's residence. (R. 1:5.) Each of the ten counts related to different video files possessed by Rector that law enforcement recovered at his residence on August 2, 2018. (R. 1.)

The ten videos contained graphic and disturbing recordings of child pornography, including: (1) an adult male having anal intercourse with a prepubescent female; (2) an adult male having sexual intercourse with a prepubescent female; (3) an adult male appearing to perform oral sex on a female toddler; (4) an adult male performing oral sex on a prepubescent female's anus and the child performing oral sex on the adult; (5) a bondage recording of a naked prepubescent female performing oral sex on an adult male with the child bound in rope and wearing a leather collar; (6) a prepubescent female performing oral sex on an adult male with the child spitting out ejaculation fluid; (7) a prepubescent female performing oral sex on an adult male with the adult ejaculating onto the child's mouth and chin; (8) a nude prepubescent female rubbing her vagina with a toothbrush before inserting it in her anus; (9) a prepubescent female child masturbating her vaginal and anus area; and (10) a pubescent female exposing her breasts, vagina, and anus to the camera. (R. 1:6–7.)

The State filed an information (R. 7), after Rector waived his preliminary hearing (R. 6; 63). The information charged the same ten counts of possession of child pornography contained in the criminal complaint. (R. 7.)

Plea and sentencing. Rector entered a guilty plea to five of the ten counts of possession of child pornography. (R. 21; 66:11–12.) The court dismissed the remaining five counts. (R. 26; 66:12.) The court accepted Rector's pleas and found him guilty of five counts for possession of child pornography. (R. 66:12.) The court ordered a presentence investigation (PSI) and adjourned the case for sentencing. (R. 66:12–13.)

At the sentencing hearing, the State described the investigation that had led to charging Rector with possession of child pornography. (R. 69:3.) Law enforcement discovered that Rector accessed the child pornography through a Dropbox account. (R. 69:3.) On August 13, 2017, Rector added two standalone video files to this account with each having an "explicit title." (R. 69:3.) The next day, on August 14, Rector added a folder named "kids" and, shortly thereafter, added a second folder named "vids(3)." (R. 69:3.) Several days later, on August 20, Rector added a third folder named "videos cp." (R. 69:3.) The folders collectively contained "close to 1,500 total files." (R. 69:3.) The investigation also revealed that Rector had child pornography on a cellphone and accessed internet sites associated with pornography and incest. (R. 69:5.) The State had agreed to resolve the case and not issue more charges for the additional video images recovered during the investigation. (R. 66:3.)

The State argued at the sentencing hearing that each of the five counts "should be treated as an independent violation." (R. 69:7.) The State characterized the resolution and sentence as "light given the upwards of a thousand images that were taken here and seized." (R. 69:8.)

Rector and his attorney argued for concurrent sentences on the five counts. (R. 69:9, 11, 13.) Rector acknowledged that viewing the pornography revictimized and exploited the children. (R. 69:12.) His attorney acknowledged "these items are evil," but "there has been no indication that he has ever followed up on any of this particular fantasy life of his." (R. 69:9–10.)

The court imposed concurrent sentences of eight years initial confinement followed by ten years extended supervision on each of the five counts. (R. 22:1.) During the sentencing hearing, the court described Rector's conduct as a "crime of a sexual nature." (R. 69:15.)

At the sentencing hearing, the circuit court ordered sex offender registration for 15 years. (R. 69:18.) The court expressed a lack of knowledge about sex offender registration requirements at the hearing: "Is this a case that has sex offender registry? I can't recall." (R. 69:18.) The court added: "Let me find out. Yeah, according to the PSI it is a 15 year registry offense." (R. 69:18.)

The court turned to Rector's eligibility to participate in the earned release program, concluding that Rector was "[n]ot eligible for Substance Abuse because it's not[ ] a substance abuse crime."[2] (R. 69:19.) The court continued: "They're indicating on the PSI that he's not statutorily eligible and I can't find it's a substance-based offense." (R. 69:19.) The court entered a judgment of conviction accordingly. (R. 22.)

Postconviction. The Department of Corrections (DOC) wrote to the circuit court, asking the court to revisit the duration of the sex offender reporting. (R. 31.) The Department stated it was "under a statutory direction to require Mr. Rector to register as a sex offender for the duration required by law." (R. 31:1.) It explained "because Mr. Rector has more than two sex offense convictions, it is the Department's opinion that he is required to register as a sex offender for life pursuant to Wis. Stat. § 301.45(5)(b)l." (R. 31:1.) The Department respectfully asked the court to amend the judgment of conviction. (R. 31:1.)

The State agreed with the Department's interpretation and asked the circuit court to modify the judgment of conviction. (R. 73:3.) The State explained that Rector's multiple convictions necessitated lifetime sex offender registration. (R. 73:3.)

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[2] The circuit court noted a scribers error in the transcript where "notice" should have been "not." (R. 70:3.) The State identifies this correction through the use of "not[ ]" in its quotation.

Rector objected to the Department's request (R. 36), but asked the court to amend the judgment of conviction on an alternate ground (R. 39; 70:2–3). He sought "an order modifying his judgment of conviction to reflect eligibility for the Substance Abuse Program." (R. 39:1.) Rector stated he was statutorily eligible for earned release to participate in the program because "the Department of Corrections has identified Mr. Rector as having a need for alcohol treatment." (R. 39:1.)

The State took no position on Rector's postconviction motion. (R. 70:3.) The State explained that eligibility to participate in the earned release substance abuse program was not part of the plea negotiations. (R. 70:3.) The State left the eligibility determination to the court. (R. 70:3.)

The circuit court denied the requests to amend the judgment of conviction. As to earned release eligibility, the court stated substance abuse was not a criminogenic factor that caused or contributed to Rector's crimes. (R. 70:5.) The court explained it only authorizes eligibility to participate in the earned release substance abuse program "when it directly goes to the criminogenic factor that caused the crime." (R. 70:4–5.) As to sex offender reporting, the court acknowledged Rector's convictions on multiple counts of child pornography possession, but found Wis. Stat. § 301.45(5)(b)l. "does not apply and that the 15 years is the appropriate one." (R. 73:10.) The court added that "the Court of Appeals or Supreme Court is going to look at this with fresh eyes anyway" and "let the Court of Appeals figure everything else out." (R. 73:10.) The court then entered orders declining amendment of the judgment. (R. 46; 51.)

Rector filed a notice of appeal following the circuit court's denial of eligibility to participate in the earned release substance abuse program and the State filed a notice of cross-appeal following the court's denial of lifetime sex offender registration. (R. 47; 52.)

STANDARD OF REVIEW

Lifetime sex offender registration. This Court reviews de novo whether the sex offender registration statute requires lifetime registration following multiple convictions for possession of child pornography. The present dispute arises from the Legislature's use of the phrase "2 or more separate occasions" in Wis. Stat. § 301.45(5)(b)l. The interpretation of a statute is a question of law reviewed de novo. *State v. Wittrock*, 119 Wis. 2d 664, 669, 350 N.W.2d 647 (1984).

Eligibility to participate in earned release. This Court reviews a circuit court's decision about a defendant's eligibility to participate in the earned release substance abuse program under the erroneous exercise of discretion standard of review. *State v. Owens*, 2006 WI App 75, ¶¶ 5–7, 291 Wis. 2d 229, 713 N.W.2d 187. Such a "discretionary decision will be affirmed if it is made based upon the facts of record and in reliance on the appropriate law." *Id*. ¶ 7.

ARGUMENT

I. This Court should reverse the circuit court's postconviction order that denied lifetime sex offender reporting and remand with instruction to amend the judgment to lifetime reporting.

A. This Court should apply statutory interpretation principles in alignment with precedent to interpret the statutory phrase "2 or more separate occasions."

The issue before this Court requires it to interpret the phrase "2 or more separate occasions" in Wis. Stat. § 301.45(5)(b)1. Interpreting this statutory phrase requires understanding "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." *State ex rel. Kalal v.*

Circuit Court for Dane Cty., 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. So the review begins by understanding the sex offender registration structure in Wis. Stat. § 301.45.

A person convicted of a sex offense must comply with reporting requirements.[3] Wis. Stat. § 301.45(1g)(a). The sex offender registration statute defines "sex offense" to mean "a violation, or the solicitation, conspiracy, or attempt to commit a violation, of s. . . . 948.12." Wis. Stat. § 301.45(1d)(b). Possession of child pornography is a crime under Wis. Stat. § 948.12. So child pornography possession is unequivocally a sex offense under the registration statute.

One of the statutory registration requirements relates to duration; that is, how long a person must register as a sex offender. Wis. Stat. § 301.45(5). The statute prescribes that a defendant convicted of a sex offense reports for either 15 years or a lifetime. Wis. Stat. § 301.45(5)(a)–(b). A defendant convicted on one occasion reports for 15 years. Wis. Stat. § 301.45(5)(a)1. And a defendant convicted on "2 or more separate occasions" reports for a lifetime under Wis. Stat. § 301.45(5)(b)1.

Here, the issue on appeal is whether multiple possession of child pornography convictions—even when arising from a single criminal complaint—constitute "2 or more separate occasions" that require lifetime registration under Wis. Stat. § 301.45(5)(b)1. So this Court must interpret this statutory phrase to resolve this matter.

The Legislature has used the phrase "separate occasions" several times in the statutes, notably in statutes relating to sex offenders and habitual offenders. *See e.g.* Wis.

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[3] There are two exceptions to complying with reporting requirements, but neither is applicable to this appeal. *See* Wis. Stat. § 301.45(1m) (underage sexual activity exception); *id.* § 301.45(1p) (exception for privacy-related offenses)

Stat. §§ 301.45 (sex offender registration), 301.46 (sex offender information), 939.62 (habitual criminality). The Wisconsin Supreme Court has twice interpreted the phrase's meaning in the habitual criminality statute. *State v. Hopkins*, 168 Wis. 2d 802, 484 N.W.2d 549 (1992); *Wittrock*, 119 Wis. 2d 664. The Wisconsin Attorney General has also interpreted the use of the phrase in a sex offender statute. Opinion of the Attorney General, OAG–02–17 (Sept. 1, 2017), *available at* https://docs.legis.wisconsin.gov/misc/oag/recent/oag_2_17.pdf (interpreting the phrase in Wis. Stat. § 301.46).

The precedent provides a framework for this Court's review of the meaning of "separate occasions" in Wis. Stat. § 301.45(5)(b)1. In *Wittrock*, the court already determined the plain meaning of the phrase "separate occasions" is ambiguous. *Wittrock*, 119 Wis. 2d at 670–71. In *Hopkins*, the court determined that "separate occasions" must be interpreted in an "equitable way" that avoids "confusion and discrimination among defendants." *Hopkins*, 168 Wis. 2d at 810; *see also Matter of Ralph Holmquist Tr.*, 120 Wis. 2d 588, 590, 357 N.W.2d 7 (Ct. App. 1984) (court must construe ambiguous phrase to avoid absurd result).

This Court should interpret the phrase "reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 46. This Court may "look to the legislative intent, which is to be found in the language of the statute in relation to its scope, history, context, subject matter, and object intended to be accomplished.". *Wittrock*, 119 Wis. 2d at 671 (quoting *Wisconsin's Envtl. Decade, Inc v. Pub. Serv. Comm'n*, 81 Wis. 2d 344, 350, 260 N.W.2d 712 (1978)).

B. This Court should interpret "2 or more separate occasions" to mean two or more convictions for a qualifying sex offense with each conviction a separate occasion.

This Court should interpret the phrase "2 or more separate occasions" as referring to the number of convictions. This Court should conclude that each conviction is a separate occasion, "regardless whether they were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint." OAG–02–17, ¶ 18 (interpreting the phrase in Wis. Stat. § 301.46(2m)(am)) Such an interpretation fulfills the legislative objective underlying the sex offender reporting statute. And this interpretation has fidelity to principles of statutory construction and precedent.

Wisconsin created Wis. Stat. § 301.45(5)(b) through the enactment of 1995 Wisconsin Act 440 ("Act 440"). Enacted on June 24, 1996, the paragraph created a lifetime sex offender reporting requirement for people convicted of qualifying crimes on "2 or more separate occasions." 1995 Wis. Act 440, § 72, *available at* https://docs.legis.wisconsin.gov /1995/related/acts/440.pdf. Wisconsin had created the 15-year reporting requirement a few years earlier. 1993 Wis. Act 98, § 116, *available at* https://docs.legis.wisconsin.gov /1993/related/acts/98 (creating Wis. Stat. § 175.45), *see* 1995 Wis. Act 440, § 43 (Wis. Stat. § 175.45(5) renumbered Wis. Stat. § 301.45(5)(a)). Act 440 restructured and amended the sex offender reporting statute so that the 15-year period applied to offenders convicted on one occasion and lifetime reporting applied to offenders convicted on two or more occasions.

Act 440 created a related statute that also used the phrase "2 or more separate occasions." 1995 Wis. Act 440, § 75 (creating Wis. Stat. § 301.46). The related statute requires law enforcement agencies to be notified about the change in confinement status of certain sex offenders convicted on "2 or

more separate occasions." Wis. Stat. § 301.46(2m)(am). DOC and the Department of Health Services must send a "bulletin to local law enforcement officials if the agency is going to place or release into a community a person who is subject to the sex offender registration requirements and who has committed crimes covered by the bill on 2 or more occasions." 1995 Sen. Bill 182, *available at* https://docs.legis.wisconsin.gov/1995/related/proposals/sb182.pdf (enacted as 1995 Wis. Act 440).

"[T]he legislative intent behind the creation of Wis. Stat. §§ 301.45 and 301.46 can be gleaned from a proposal found in the Legislative Reference Bureau's drafting file for 1995 Wis. Act 440." *State ex rel. Kaminski v. Schwarz*, 2001 WI 94, ¶ 53, 245 Wis. 2d 310, 630 N.W.2d 164. The *Kaminski* court explained the drafting file includes a report prepared by a DOC workgroup entitled "Sex Offender Community Notification Proposed Program Components, Executive Summary and Final Report (1994)." *Id*. The DOC report "made recommendations and laid out a framework for the new sex offender registration and notification law." *Id*.

The DOC report is highly indicative of legislative intent because of its direct nexus to the creation of Act 440. A workgroup created the DOC report "in response to recent inquiries by Senator Darling and Representative Schneiders who had announced that they were planning to introduce legislation related to sex offender community notification during this next legislative session." Wis. Dep't of Corr., *Sex Offender Community Notification: Proposed Program Components* 1 (Dec. 15, 1994) (available in drafting file for 1995 Wis. Act 440, Wis. Legis. Reference Bureau, Madison, Wis.). The DOC report is addressed to Sen. Darling and Rep. Schneiders on its cover page. *Id*. The drafting file contains a handwritten note on Sen. Darling letterhead that states the DOC report contains "the recommendations for a notification law" they "would like to include into the draft" legislation.

Handwritten Note (available in drafting file for 1995 Wis. Act 440, Wis. Legis. Reference Bureau, Madison, Wis.) Shortly thereafter, Sen. Darling introduced and Rep. Schneiders cosponsored the legislation later enacted as Act 440. 1995 Sen. Bill 182.

The Wisconsin Supreme Court has relied on the DOC report on multiple occasions to determine the legislative intent behind Act 440. *Kaminski*, 245 Wis. 2d 310, ¶ 53 (citing *State v. Bollig*, 2000 WI 6, ¶ 22, 232 Wis. 2d 561, 605 N.W.2d 199). This Court should do the same here.

The DOC report recommended "lifetime registration requirements for any person convicted, or found not guilty of mental disease or defect, of two (2) or more sexual offenses – repeat sex offenders." Wis. Dep't of Corr., *Sex Offender Community Notification: Proposed Program Components* 6. The report explained that "[s]ex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is a paramount governmental interest." *Id.* at i. It recommended extending "registration requirements for repeat sex offenders (2 or more separate convictions) for life." *Id.* at ii.

The legislative drafting file shows an intent to establish different rules for habitual sex offenders as compared to an offender convicted of a single sex crime. The Legislature had previously used the phrase "separate occasion" when it established an increased penalty for habitual offenders in Wis. Stat. § 939.62(2). As explained previously in section I.A., the *Hopkins* and *Wittrock* courts already have defined the phrase in the habitual criminality statute. The legislation's drafter then used the phrase "separate occasions" in the sex offender statute to effectuate the Legislature's intent for lifetime reporting for people convicted of two or more sex offenses.

In *Hopkins*, the court concluded that "separate occasions" means separate convictions, regardless of when the crimes were committed. *Hopkins*, 168 Wis. 2d at 810. The defendant in *Hopkins* had argued that two or more convictions arising out of a single course of conduct were not "separate occasions." *Id.* at 805. The Wisconsin Supreme Court disagreed with that interpretation. The court concluded that each conviction constitutes a "separate occasion." *Id.* The court explained: "The 'occasion' referred to in the statute is the occasion of conviction for each of the . . . crimes" such that "all that is required by the statute is that a defendant be convicted" of multiple crimes regardless of whether crimes arose out of a single course of conduct. *Id.*

In *Wittrock*, the Wisconsin Supreme Court already had explained that "separate occasions" did not mean different cases. *Wittrock*, 119 Wis. 2d at 666. The defendant in *Wittrock* had argued that convictions arising out of a single court appearance were not "separate occasions." *Id.* at 667. The Wisconsin Supreme Court disagreed, noting that the statute focuses on the "quantity of crimes" rather than the "time of conviction." *Id.* at 674.

This Court should follow the *Hopkins* and *Wittrock* courts' definition of "separate occasions" for five reasons: (1) that interpretation serves the legislative intent; (2) the Legislature had the benefit of the *Hopkins* and *Wittrock* opinions when it decided to use the phrase in Act 440; (3) a phrase used multiple times in closely related statutes serving a similar objective should have the same meaning; (4) the *Hopkins* and *Wittrock* interpretation avoids absurd and unreasonable results; and (5) an attorney general opinion has already persuasively interpreted "separate occasions" in another sex offender statute in alignment with the *Hopkins* and *Wittrock* courts' interpretation.

First, interpreting "separate occasions" in alignment with *Hopkins* and *Wittrock* serves the legislative intent of Act

440. The DOC report in the drafting file establishes that "occasion" refers to the occasion of conviction. *See* Wis. Dep't of Corr., *Sex Offender Community Notification: Proposed Program Components* 6 ("lifetime registration requirements for any person convicted . . . of two (2) or more sexual offenses"). *Hopkins* reached the same conclusion. 168 Wis. 2d at 805. *Hopkins* also explained that counting each conviction as a separate occasion creates a clear and equitable delineation between repeat and nonrepeat offenders, *id*. at 810, which was the intent behind Act 440. This Court should serve the legislative objective and similarly interpret the phrase in this clear and equitable manner.

Second, this Court generally "presume[s] that the legislature acts with full knowledge of existing statutes and how the courts have interpreted these statutes." *State v. Victory Fireworks, Inc.*, 230 Wis. 2d 721, 727, 602 N.W.2d 128 (Ct. App. 1999). The *Hopkins* and *Wittrock* courts had already interpreted the phrase "separate occasions" before the legislature added that phrase to the sex offender reporting statute in 1996. Thus, this Court should follow the statutory construction principle it stated in *Victory Fireworks, Inc*., and assume the Legislature intended the phrase to be interpreted the same way it was in *Hopkins* and *Wittrock*.

Third, the Wisconsin Supreme Court explained that it "generally hold[s] that when the legislature uses the same word multiple times in a statute the word has the same meaning each time." *State v. Matasek*, 2014 WI 27, ¶ 36, 353 Wis. 2d 601, 846 N.W.2d 811. While it is true the habitual criminality statute using the phrase "separate occasions" is in a different chapter than the sex offender reporting statute, both statutes pursue the same objective to identify repeat offenders. So this Court should follow the principle of statutory construction identified in *Matasek* and interpret the phrase the same way in the sex offender and habitual criminality statutes.

Fourth, deviating from statutory construction and precedential principles results in absurd and unreasonable results. Rector's conduct in this case exemplifies the absurdity to break from the rationale of the *Hopkins* and *Wittrock* courts. Here, Rector downloaded two video files on August 13, two folders on August 14, and a third folder on August 20. (R. 69:3.) The folders collectively contained nearly 1,500 video files. (R. 69:3.) Now suppose a defendant such as Rector had downloaded two video files on different days. And let's assume he downloaded the files in different counties resulting in each county charging and convicting him of one count for possessing child pornography at separate court hearings. Even the defendants in *Hopkins* and *Wittrock* would concede each conviction was a separate occasion, thereby triggering lifetime sex offender registration. But now assume a defendant such as Rector had downloaded one folder containing hundreds of video files of child pornography. And let's assume the State charged ten counts and the defendant pleaded guilty to five counts, as occurred here. Rector argues that does not constitute separate occasions. (R. 73:3–4.) In these examples, one defendant never possessed more than two files and the second defendant possessed hundreds of files. It is absurd that the defendant convicted for possessing the two files is subject to lifetime sex offender registration and another defendant convicted of five counts relating to possessing hundreds of video files is subject only to 15 years of registration. This Court should avoid such an absurd and unreasonable interpretation.

Fifth, "[a] well-reasoned attorney general's opinion interpreting a statute is, according to the court's rules of statutory interpretation, of persuasive value." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 126, 327 Wis. 2d 572, 786 N.W.2d 177. Here, such an opinion interpreted the phrase "2 or more separate occasions" in the companion sex offender statute relating to bulletins to law enforcement

agencies. OAG–02–17 (interpreting the phrase in Wis. Stat. § 301.46(2m)(am)). The attorney general opined that "the language referring to convictions 'on 2 or more separate occasions' refers to the number of convictions, including multiple convictions imposed at the same time and based on the same complaint." *Id.* ¶ 2. The attorney general concluded that each conviction is a separate occasion, "regardless whether they were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint." *Id.* ¶ 18. The attorney general noted that this interpretation was "consistent with the supreme court's interpretation of the repeater statute in *Wittrock* and *Hopkins*." *Id.* ¶ 12.

This Court should conclude that each conviction is a "separate occasion." *See Hopkins*, 168 Wis. 2d at 805. So the phrase "2 or more separate occasions" in Wis. Stat. § 301.45(5)(b)1. means two or more convictions for a qualifying sex offense. The date of the offense does not define "occasion" as it used in the statute. *Id.* This Court should conclude that multiple convictions are "separate occasions" even where they arose out of a single course of conduct.

C. This Court should conclude the circuit court erred when it imposed only 15 years of reporting and declined to amend the judgment to require lifetime reporting.

The circuit court erred when it ordered Rector to comply with sex offender reporting for only 15 years and it perpetuated its mistake when it entered a postconviction order denying lifetime registration. This Court now is tasked with correcting the error in the judgment of conviction.

Here, the initial error at the sentencing hearing, though avoidable, was understandable. The court did not recall at the sentencing hearing whether possession of child pornography was a crime necessitating sex offender registration. (R. 69:18.)

The court reviewed the PSI, but the PSI contained an error, incorrectly identifying the registration period as 15 years. (R. 69:18; 19:27.) Following the PSI, the court ordered 15 years of sex offender reporting and entered that period in the judgment of conviction. (R. 22; 69:18.)

The error placed DOC in a difficult position. On the one hand, it had a court order stating Rector must register for only 15 years. (R. 22.) On the other hand, the Department is required by the sex offender registration statute to comply with its requirements. The Department must maintain a sex offender registry of all people required to report. Wis. Stat. § 301.45(2)(a); 301.45(7)(a). The Department attempted to resolve the issue by writing to the court. (R. 31.) The Department explained it had "no desire to thwart the will of the Court and/or the parties in this matter," but that it "is under a statutory direction to require Mr. Rector to register as a sex offender for the duration required by law." (R. 31:1.) The Department asked the court to amend the judgment of conviction "so that it is consistent with the sex offender registration requirements outlined in Wis. Stat. § 301.45(5)(b)l." (R. 31:1.)

Having discovered the error postconviction, the State asked the circuit court to "modify the judgment of conviction . . . in accordance with what the Department is recommending."[4] (R. 73:3.) The State agreed with the Department that Rector's multiple convictions required lifetime sex offender registration. (R. 73:3.)

Unsurprisingly, Rector asked the circuit court to retain the 15-year sex offender period. (R. 73:3–4.) But he did not make a particularly strenuous argument. (R. 73:3–4.) He

[4] The Wisconsin Supreme Court recently explained that a contemporaneous objection is not required for sentencing errors. *State v. Coffee*, 2020 WI 1, ¶ 26, 389 Wis. 2d 627, 937 N.W.2d 579. Such errors may be raised and resolved postconviction. *Id.*

merely noted there was no binding precedent specifically interpreting the phrase "2 or more separate occasions." (R. 36:1.) Rector asked the court to wait for such precedent. (R. 36:2.)

The circuit court declined to amend the judgment of conviction. (R. 51.) The court was dismissive of the attorney general opinion and attempted to distinguish *Hopkins* and *Whittrock*. (R. 73:5–9.) The court anticipated that "the Court of Appeals or Supreme Court is going to look at this with fresh eyes anyway." (R. 73:10.)

This Court should conclude that the duration of sex offender registration is statutorily prescribed under Wis. Stat. § 301.45(5). It is non-discretionary for Rector's possession of child pornography convictions. *See* Wis. Stat. § 301.45(1d)(b) (defining "sex offense" to include possession of child pornography); 301.45(1g)(a) (defendant convicted of sex offense shall comply with reporting requirements). The duration is non-discretionary; a single conviction requires 15 years of registration, whereas multiple convictions require lifetime registration. *See supra* I.B. This Court should find the circuit court erred when it imposed sex offender reporting for only 15 years and then declined to amend the judgment to lifetime sex offender registration.

II. This Court should affirm the circuit court's postconviction order that denied eligibility to participate in the earned release substance abuse program.

A. This Court should review whether the circuit court erroneously exercised its discretion when it found that Rector was not eligible to participate in the program.

2003 Wisconsin Act 33 granted circuit courts discretionary authority to make defendants eligible to participate in earned release through a DOC substance abuse

program. 2003 Wis. Act 33, §§ 2505, 2749, 2751 *available at* https://docs.legis.wisconsin.gov/2003/related/acts/33.pdf (creating Wis. Stat. §§ 302.05(3) and 973.01(3g), (8)(ag)).

When the court imposes a sentence, it must, "as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible" to participate in the earned release substance abuse program. Wis. Stat. § 973.01(3g); *see also id.*, § 302.05(3)(a)1. (sentencing court eligibility determination).

Determining eligibility is a multi-step process. First, the defendant cannot have a disqualifying conviction. The statutes prohibit eligibility for convictions of crimes under Wis. Stat. ch. 940 and some crimes in Wis. Stat. ch. 948. *See* Wis. Stat. §§ 302.05(3)(a)1.; 973.01(3g). Second, the circuit court decides whether to grant eligibility to a defendant who does not have a disqualifying conviction. Wis. Stat. §§ 302.05(3)(a)2. and 973.01(3g).

Possession of child pornography in Wis. Stat. § 948.12 is not a disqualifying conviction such that a circuit court must move to the second step and exercise its discretion as to eligibility. Wis. Stat. §§ 302.05(3)(a)1.; 973.01(3g) (child pornography not a disqualifying crime).

To fulfill the statutory obligations, a circuit court "must state whether the defendant is eligible or ineligible for the program," but the statute does not "require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the [earned release] determination." *Owens*, 291 Wis. 2d 229, ¶ 9. One factor a court necessarily considers is whether the defendant has an alcohol or drug addiction. *State v. Johnson*, 2007 WI App 41, ¶ 16, 299 Wis. 2d 785, 730 N.W.2d 661.

When a defendant seeks appellate review of a circuit court's discretionary eligibility determination, this Court presumes the circuit court acted reasonably. *Owens*, 291

Wis. 2d 229 ¶ 7. An appellate court is mindful of the "strong public policy against interfering with the trial court's sentencing." *Id*. It must affirm when the circuit court relied on appropriate law and the decision was based upon the facts in the record. *Id*.

B. This Court should conclude the circuit court reasonably exercised its discretion postconviction after it corrected an error at the sentencing hearing as to eligibility.

The circuit court did not err when it issued a postconviction order denying Rector's request for earned release in a substance abuse program. The court corrected an error that had occurred during the sentencing hearing and used the postconviction proceeding to explain its discretionary decision to deny participation in the earned release substance abuse program.

Here, Rector's alcohol use had not been a predominate concern during the sentencing hearing. The PSI identified Rector's alcohol use at a frequency around once per week to about twice a month. (R. 19:7, 20.) Although Rector's wife had identified concerns with his alcohol consumption, (R. 19:7), and the PSI suggested "he may have substance abuse problems and may benefit from substance abuse treatment intervention of some kind," (R. 19:20), the PSI concluded he "does not appear to be in need of case planning and programming services to address needs pertaining to substance abuse," (R. 19:26). Neither Rector nor his counsel identified alcohol use as a concern during their sentencing arguments. (R. 69:8–13.)

The circuit court then made an error at the sentencing hearing that it later corrected postconviction. At the sentencing hearing, the circuit court had thought Rector's child pornography convictions were a disqualifying offense for earned release eligibility. (R. 69:19.) The court stated that the

PSI had identified Rector as ineligible for the earned release substance abuse program. (R. 69:19.) The PSI had incorrectly identified Rector as ineligible for the program. (R. 19:2.) The court made an error of law as a result. (R. 69:19.) But the court remedied the error postconviction.

After the sentencing hearing, Rector filed a postconviction motion seeking earned release eligibility for the program. (R. 39.) He identified the error of law contained within the PSI. (R. 39:2.) Rector asked the circuit court to correct the error, and find him eligible to participate in the earned release substance abuse program. (R. 39.)

Having been alerted to the legal error in the PSI, the circuit court corrected the legal error in its postconviction ruling. (R. 70:3–4.) It then proceeded to the discretionary question of whether to grant earned release eligibility to participate in the substance abuse program. (R. 70:4–5.) The court explained that it grants eligibility when there is a nexus between the crime and substance abuse: "I only authorize the Substance Abuse Program when it directly goes to the criminogenic factor that caused the crime." (R. 70:4.) The court concluded that in Rector's case substance abuse "doesn't address the criminogenic factors and therefore the Court is not gonna grant the relief and will deny the motion." (R. 70:5.) The court entered a postconviction order denying Rector's motion that had sought earned release eligibility in the substance abuse program. (R. 46.)

The *Owens* decision is very instructive for this Court's review due to its legal and factual similarities to Rector's case. *Owens*, 291 Wis. 2d 229. Both *Owens* and this appeal involve circuit courts making a misstatement of law at the sentencing hearing. In *Owens*, the court had stated the defendant was ineligible for the earned release program because of his age even though the statute contains no age requirement. *Id*. ¶ 3. Here, the court incorrectly identified Rector as statutorily ineligible as incorrectly stated in the PSI. (R. 19:2; 69:19.). In

both cases, the defendants pursued postconviction relief and each circuit court exercised discretion denying eligibility to participate after correcting a legal error that had occurred during the sentencing. In *Owens*, the circuit court was aware of the defendant's substance abuse history, but found the gravity of the offense and need for public protection more compelling sentencing factors than earned release, especially because the defendant had not addressed his substance abuse problems in the past. *Owens*, 291 Wis. 2d 229, ¶¶ 10–11. Here, Rector had some, though not extensive, substance abuse issues. (R. 19:20, 26.) The circuit court's greater concern at sentencing was Rector's revictimization of children through his possession of pornography and it structured a sentence to deter such crimes. (R. 69:14, 17.)

This Court should affirm the circuit court order denying Rector's postconviction motion. In *Owens*, this Court affirmed the circuit court's discretionary denial of earned release eligibility in the substance abuse program. *Owens*, 291 Wis. 2d 229, ¶ 11. It should do the same here.

C. This Court should conclude the circuit court did not have a preconceived sentencing policy to deny earned release eligibility in the substance abuse program.

The circuit court did not impose a preconceived sentencing policy in denying Rector's eligibility to participate in the earned substance abuse program. Rector misconstrues the court's statements, alleging such statements reflect a prohibitive preconceived policy barring program eligibility participation for possession of child pornography crimes. (Rector's Br. 3–5.) He argues that the court's statements ran afoul of *State v. Ogden*, 199 Wis. 2d 566, 544 N.W.2d 574 (1996). (Rector's Br. 4–5.) Rector is wrong.

In *Ogden*, the Wisconsin Supreme Court concluded that a circuit court fails to properly exercise its discretion when it

applies a preconceived sentencing policy. *Ogden*, 199 Wis. 2d at 568–71. Rector inaccurately asserts that *Ogden* applies here, alleging the circuit court prohibited participation in the earned release substance abuse program under a policy to exclude eligibility for crimes of child pornography possession. (Rector's Br. 3–5.) But the circuit court never made such a statement.

The circuit court explained that it authorizes earned release eligibility to the program when there is a nexus between substance abuse and "the criminogenic factor that caused the crime." (R. 70:4.) The court observed that such a direct link exists in crimes such as operating while intoxicated. (R. 70:4.) But the court continued that it did not limit eligibility participation to crimes where substance use was an element of the offense. The court offered crimes of domestic violence as an example where eligibility participation may be granted depending on the underlying facts of the case. (R. 70:4.) The court found that in Rector's case substance abuse was not linked to the criminogenic factors that contributed to his crime. (R. 70:5.)

In the circuit court, Rector did not allege substance abuse contributed to his possession of child pornography. At the sentencing hearing, defense counsel focused his argument on how Rector may have possessed child pornography, but "there has been no indication that he has ever followed up on any of this particular fantasy life of his." (R. 69:9.) Even when program eligibility was the focus of a postconviction hearing, Rector's counsel offered little more than the conclusory statement that "Mr. Rector has informed me that he has a substance abuse disorder and needs for treatment and he's . . . going to get treatment of some sort." (R. 70:3.) He offered essentially the same general statement in his postconviction motion that the "Department of Corrections has identified Mr. Rector as having a need for alcohol treatment." (R. 39:1.)

Now on appeal, Rector offers no greater specificity than he offered in the circuit court. He makes a conclusory statement to this Court that "there is ample reason to believe he has an alcohol problem that contributes to his criminal risk." (Rector's Br. 3–4.) But he cites to pages in the PSI that only identified "some kind" of a "probable" substance abuse concern that had resulted in one prior operating while intoxicated (OWI) arrest at some unidentified date in the past. (R. 19:20, 24.) While Rector's wife had expressed concern about his alcohol use, she could only provide an example of it presenting a problem in his OWI arrest. (R. 19:7.) The PSI reflected that Rector had reduced alcohol use to around once a week to about twice a month. (R. 19:7, 20.)

The circuit court reasonably exercised its discretion denying eligibility participation in the earned release substance abuse program. Rector's position lacks fidelity to the sentencing discretion of circuit courts. He essentially argues that if he can establish the presence of some concern with his alcohol use, then the circuit court should have authorized eligibility participation in the earned release substance abuse program. But such a standard removes precisely the discretionary decision-making left to the circuit court.

This Court should affirm the circuit court's postconviction order denying Rector's motion. The court did not have a preconceived sentencing policy to exclude defendants convicted of possession of child pornography from participating in the earned release substance abuse program. But if this Court concludes the circuit court did erroneously exercise is discretion, the correct course of action is to reverse the postconviction order and remand so the circuit court may properly exercise its discretion. *King v. King*, 224 Wis. 2d 235, 254, 590 N.W.2d 480 (1999). But on this issue a remand is unnecessary because the circuit court properly exercised its discretion.

CONCLUSION

This Court should reverse in part and affirm in part. It should reverse the postconviction order that denied lifetime sex offender registration. It should affirm the postconviction order that denied Rector's motion for eligibility to participate in the earned release substance abuse program. This Court's should remand with instruction for the circuit court to order lifetime registration as required by law.

Dated this 8th day of December 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,855 words.

Dated this 8th day of December 2020.

Electronically signed by:

s/ Winn S. Collins
WINN S. COLLINS

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 8th day of December 2020.

Electronically signed by:

s/ Winn S. Collins
WINN S. COLLINS

Index to the Appendix
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Case No. 2020AP1213-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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