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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT

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ARGUMENT[1]

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 State explained that interpreting "2 or more separate occasion" in Wis. Stat. § 301.45(5)(b) to mean two or more convictions aligns with statutory interpretation principles. (State's Br. 10–16.) Rector in response presents four reasons against such an interpretation. (Rector's Br. 1–19.) But Rector's argument conflicts with long-standing statutory interpretation principles. Here, the State returns to these well-established principles and binding precedent to address each of Rector's four claims.

1. This Court should abide by *Wittrock* that concluded "separate occasions" was ambiguous and then resolved that ambiguity as to its meaning.

This Court is "bound by the precedents established by the supreme court of this state, even if [it] disagree[s] with a particular precedent." *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 221, 369 N.W.2d 743 (Ct. App. 1985). In contrast, this Court isn't bound by decisions from other states. *Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, ¶ 29, 279 Wis. 2d 335, 693 N.W.2d 756. This Court also isn't bound by

[1] This argument pertains only to the single issue of the cross-appeal: whether the circuit court erred when it failed to order lifetime registration.

decisions from the federal courts of appeals or district courts. *State v. Mechtel*, 176 Wis. 2d 87, 94–95, 499 N.W.2d 662 (1993).

Reviewing the use of the phrase "separate occasions" in the habitual criminality statute, the supreme court concluded that "the term 'occasion' may be interpreted in two different ways by well-informed persons." *State v. Wittrock*, 119 Wis. 2d 664, 671, 350 N.W.2d 647 (1984). The court "conclude[d] that an ambiguity exists within the statute" because "occasion" is a statutorily undefined term that may be interpreted multiple ways, including the occasion of committing a crime or the occasion of conviction. *Id.* at 670–71.

Rector's plain language argument is fundamentally flawed because it squarely conflicts with *Wittrock*'s conclusion that the term "occasion" is ambiguous. Rector asserts that "the concept of something occurring 'on 2 or more separate occasions' is not mysterious: it has a plain and universally-understood meaning." (Rector's Br. 6.) He claims that "'[s]eparate' and 'occasion' are not obscure terms; everyone knows what they mean." (Rector's Br. 3.) But he cannot reconcile that assertion with *Wittrock's* conclusion.

Rector avoids any citation to *Wittrock* in this section of his brief. Not surprisingly, as it cannot be reconciled with his incorrect assertion that "separate occasions" has a plain and universally understood meaning. (Rector's Br. 2–7 (section B).) Instead, he cites to literature from foreign authors and nonbinding federal decisions and opinions from other states.[2] Notably absent from Rector's argument is any recognition that *Wittrock* already concluded "occasion" is ambiguous.

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[2] This Court may take judicial notice that Bram Stoker was an Irish author and P.G. Wodehouse was an English author. *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667 (judicial notice).

This Court should abide by the *Wittrock* precedent where the supreme court concluded the term "separate occasions" was ambiguous and then resolved that ambiguity. Such an approach aligns with *State v. Hopkins* that again reviewed the term and its meaning in the habitual criminality statute. *See generally State v. Hopkins,* 168 Wis. 2d 802, 807–08, 484 N.W.2d 549 (1992) (embracing the *Wittrock* analysis). *Hopkins* resolved that "separate occasions" means separate convictions, regardless of when the crimes were committed. 168 Wis. 2d at 810.

2. This Court should conclude that *Wittrock* and *Hopkins* are instructive and a DOC report is determinative of legislative intent and policy.

a. The *Wittrock* and *Hopkins* precedent provide an instructive framework for this Court.

The significance to *Wittrock* and *Hopkins* is heightened here because this Court presumes the legislature acts with knowledge of existing statutes and court interpretations of the statutes. (State' Br. 14 (citing *Victory Fireworks, Inc.*, 230 Wis. 2d 721, 602 N.W.2d 128).) 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. (State' Br. 14.) 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*.

Rector is dismissive of this doctrinal principle, as he argues "it is merely that: a presumption." (Rector' Br. 16.) He doesn't explain how he overcomes the presumption beyond generally re-endorsing his flawed argument as to the meaning of the phrase that ignores the *Wittrock* precedent. (Rector's

Br. 16.) Rector's only additional argument here cites to 1993 Wis. Act 194, creating Wis. Stat. § 973.0135. But Rector neglects to recognize that this statute involves "one separate occasion" related to "any time *preceding* the serious felony for which he or she is being sentenced." Wis. Stat. § 973.0135(1)(a)1. The use of "preceding" doesn't exist in the sex offender reporting statute in Wis. Stat. § 301.45(5)(b). Rector fails to present a compelling argument for this Court to dismiss this doctrinal presumption.

Rector concedes his "argument is clearly in tension with some of the discussion in *Wittrock* and *Hopkins*." (Rector's Br. 7.) Rather than resolve the tension, Rector suggests this binding supreme court precedent is "in tension with the modern approach to statutory construction." (Rector's Br. 8.) He provides no authority—because there is none—that this Court may ignore binding supreme court precedent because it's old and not part of a "modern approach." (Rector's Br. 8.)

Rector then attempts to distinguish the punitive habitual criminality statute analyzed in *Wittrock* and *Hopkins* from the nonpunitive public protection purpose of the sex offender reporting statute. (Rector Br. 12–13, 18.) In so doing, Rector fails to recognize that *Wittrock* and *Hopkins* present an instructive framework to resolve the statutory interpretation issue before this Court.

This Court should abide by the *Wittrock* and *Hopkins* precedent, which provides a framework for reviewing the meaning of "separate occasions" in the sex offender reporting statute. After the supreme court concluded in *Wittrock* that the term is ambiguous, it articulated in *Hopkins* the lens through which to focus the ambiguous term: "this court's primary purpose in interpreting an ambiguous statute is to determine the legislative intent and the policy behind the statute." *Hopkins,* 168 Wis. 2d at 815. This Court should do the same; it should determine the legislative intent and policy.

b. A DOC report in the legislative drafting file is determinative of legislative intent and policy.

Precedent explains how this Court may determine the legislative intent and policy in the sex offender reporting statute. The supreme court explained that "the 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 noted that the drafting file includes a DOC report highly determinative of the legislative intent and policy. *Id.* The 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).

Rector argues that the DOC report offers "almost no guidance." (Rector's Br. 8–9.) But Rector makes a significant error: he conflates a statement in the executive summary with another in the report. He is correct that the executive summary recommends extending "registration requirements for repeat sex offenders (2 or more separate convictions) for life." Wis. Dep't of Corr., *Sex Offender Community Notification: Proposed Program Components* ii (Dec. 15, 1994) (available in drafting file for 1995 Wis. Act 440, Wis. Legis. Reference Bureau, Madison, Wis.). But he fails to recognize the complete recommendation contained within the report several pages later.

The report identifies its intent to "[r]evise the initial timeframe for registration requirements, from the current 15 years" to "lifetime registration requirements for any person convicted, or found not guilty of a mental disease or defect, of two (2) or more sexual offenses - repeat sex offenders." *Id.* at 6. The report identifies that "repeat sex offenders" mean "any

person convicted . . . of two (2) or more sexual offenses." *Id.* There is no limitation that the convictions be separated in any manner. It is simply the presence of multiple convictions that distinguishes the person as subject to "lifetime registration requirements." *Id.*

This Court should conclude that the DOC report is instructive as to the legislative intent and policy, as the supreme court precedent of *Kaminski* and *Bollig* has so found. *Kaminski,* 245 Wis. 2d 310, ¶¶ 53–65; *Bollig,* 232 Wis. 2d 561, ¶¶ 22–27. Rector ignores this precedent. He never cites to *Kaminski* and relies on *Bollig* only once to observe the registry is nonpunitive. (Rector's Br. 12.) This Court should abide by the *Kaminski* and *Bollig* precedent and conclude the report is determinative.

3. This Court should interpret the statutory phrase "2 or more separate occasions" reasonably to avoid absurd or unreasonable results.

This Court should interpret the sex offender reporting statute reasonably to avoid absurd results. *See State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. It should interpret "separate occasions" in an "equitable way" to avoid "confusion and discrimination among defendants." *Hopkins*, 168 Wis. 2d at 810.

The State explained in its brief-in-chief that it would be absurd for a defendant convicted of five qualifying sex crimes like Rector to face a shorter reporting period than a defendant convicted of two qualifying sex crimes. (State's Br. 15.)

Rector responds by arguing the "state's hypothetical stacks the deck." (Rector's Br. 10.) But Rector ignores that, far from a hypothetical, the State presented an example drawn heavily from the facts in his case. The only notable difference was that Rector accumulated his child pornography on separate occasions on August 13, 14, and 20, 2017 (R. 69:3),

whereas the example assumed a single point of collection. (State's Br. 15) Perhaps Rector took issue with the State's other example of a person convicted in two counties, one count in each county, on different dates. But many defendants have criminal convictions in multiple counties. The State used the example to demonstrate the absurdity in Rector's position, not to argue the specific incident was present here.

Rector effectively concedes his interpretation may lead to an absurd result though he attempts to divert attention away by alleging "[*a*]*ny* simple rule can lead to arguably inequitable treatment in a particular case." (Rector's Br. 10.) Rector then offers his own hypothetical. (Rector's Br. 10–11.) But Rector's analysis is flawed. He offers a defendant "charged only with two counts of exposing a child to harmful material" to suggest this "defendant would be required to register for life." (Rector's Br. 11.) Rector is mistaken in his conclusion because he only offers the defendant facing two *charges*—not two *convictions*. Using convictions rather than charges is an important distinction because the presumption of innocence no longer exists upon conviction. *See State v. Nash*, 2020 WI 85, ¶ 32, 394 Wis. 2d 238, 951 N.W.2d 404 (presumption of innocence).

Rector then makes a tactical error when he relies on actuarial instruments such as the Static-99R to support his argument. (Rector's Br. 13–14) The supreme court has recently cautioned against reliance on social science in appellate practice. *State v. Roberson*, 2019 WI 102, ¶¶ 37–44, 389 Wis. 2d 190, 935 N.W.2d 813. It is particularly problematic on an issue of statutory interpretation because this Court is tasked with interpreting what the legislature intended—not what it ought to have intended based upon an extraneous instrument of social science. Rector inviting this Court to reinterpret what the statute ought to mean strays far from statutory interpretation principles and the *Roberson* precedent.

This Court should of course avoid absurd results in its interpretation of the sex offender reporting statute. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 46. But it isn't absurd to distinguish a twice convicted sex offender from a defendant convicted of a single crime. The presumption of innocence no longer applying at conviction reasonably distinguishes the former from the latter.

4. This Court should abide by statutory interpretation doctrine.

This Court should abide by two additional relevant doctrinal principles. First, the State explained that the Court should apply the principle that the same words used multiple times should have the same meaning. (State's Br. 14 (citing *State v. Matasek*, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811).) Second, the State explained an attorney general opinion interpreting a statute is accorded persuasive value. (State Br. 15 (citing *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177).)

Rector misrepresents the State's position as to the first principle. He falsely alleges that the State "doesn't acknowledge . . . that there's no such presumption concerning *different* statutes." (Rector's Br. 17.) The State had acknowledged that "it is true the habitual criminality statute using the phrase 'separate occasions' is in a different chapter than the sex offender reporting statute." (State's Br. 14.) The State hadn't argued the doctrinal principle was binding; rather, the State argued this Court should follow the *Matasek* principle given the similar aim of each statute to identify repeat offenders. (State's Br. 14.)

Rector minimizes the persuasive value of the attorney general opinion in responding to the second principle. (Rector's Br. 18–19.) Notably, Rector doesn't argue the relevant attorney general opinion is unpersuasive; rather, he essentially argues the State's brief subsumed the opinion.

Rector offers no legal authority for his subsumption argument. This Court shouldn't embrace Rector's claim because "[a]rguments unsupported by references to legal authority will not be considered." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

This Court should abide by statutory interpretation doctrine. Though not binding, it should apply the *Matasek* principle here. And it should accord persuasive value to the attorney general opinion. *Schill*, 327 Wis. 2d 572, ¶ 126.

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.

The State, operating within the executive branch here, respects that "[i]t is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning." *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 44. The State doesn't argue what the phrase ought to mean, just as it doesn't argue what it wants the phrase to mean. The State explained how fidelity to the judiciary's statutory interpretation precedent and the legislature's intent and policy results in interpreting "2 or more separate occasions" to mean two or more convictions for a qualifying sex offense regardless whether the convictions arise out of the same or different proceedings. (State's Br. 7–16.)

Rector's alternative approach requires this Court to jettison relevant and important conclusions from precedent. His argument as to statutory surplusage, (Rector's Br. 6–7), betrays the supreme court's surplusage analysis in *Hopkins*, 168 Wis. 2d at 813–14. Rector briefly claims that his interpretation aligns with *Wittrock* and *Hopkins*. (Rector's Br. 14–15.) But Rector's short embrace of *Wittrock* and *Hopkins* undermines his infidelity to this precedent exhibited

elsewhere in his brief. He concedes earlier that his "argument is clearly in tension with some of the discussion in *Wittrock* and *Hopkins*." (Rector's Br. 7.) That is a modest understatement. Rector completely ignores relevant and important conclusions from *Wittrock* and *Hopkins*.

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. The *Hopkins* 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." *Hopkins,* 168 Wis. 2d at 805. The sex offender reporting statute has the same statutory structure as the habituality criminality statute interpreted in *Wittrock* and *Hopkins*. The occasion referred to in the sex offender reporting statute also is the occasion of having been convicted: "The person has, on 2 or more separate occasions, been convicted . . . for a sex offense." Wis. Stat. § 301.45(5)(b). This interpretation remains faithful to judicial precedent and legislative intent.

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 State explained in its brief the circuit court's error in imposing only 15 years of reporting. (State's Br. 16–18.) Rector never argues the circuit court's analysis was correct; he only makes a single conclusory statement that "the circuit court correctly construed the provision . . . that he register for 15 years." (Rector's Br. 19.) By failing to respond to the State's argument, Rector concedes the error in the circuit court's order. *See State v. Chu*, 2002 WI App 98, ¶ 41, 253 Wis. 2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted."); *see also Pettit*, 171 Wis. 2d at 646–47 (conclusory statement not a developed argument). As a case subject to de

novo review, Rector isn't required to defend the circuit court's reasoning or analysis. But Rector's silence is notable.

CONCLUSION

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.

Dated this 12th day of April 2021.

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 3,000 words.

Dated this 12th day of April 2021.

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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 12th day of April 2021.

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