STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1213-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

COREY T. RECTOR,

Defendant-Appellant-Cross-Respondent.

ON CERTIFICATION FROM THE WISCONSIN COURT OF APPEALS, DISTRICT II, FROM AN APPEAL OF POSTCONVICTION ORDERS ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE JASON A. ROSSELL, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

Attorneys for Plaintiff-Respondent-Cross-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6203
(608) 294-2907 (Fax)
collinsws@doj.state.wi.us

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STATEMENT OF THE ISSUE

Under Wis. Stat. § 301.45(5)(b)1., a defendant convicted 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 explains that each conviction is a separate occasion. Here, Corey Rector was convicted of five separate sex offenses for child pornography possession. But the circuit court didn't order lifetime registration. Did the court err by failing to order lifetime registration?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication, pursuant to Wis. Stat. §§ (Rule) 809.22 and 809.23.

STATEMENT OF THE CASE

Nature of the case. This Court granted certification from the court of appeals, accepting for consideration all issues raised in the appellate court. Each party presented one issue in the court of appeals. The State, as Cross-Appellant, presented an issue of statutory interpretation as to the meaning of the phrase "2 or more separate occasions" in the sex offender registration statute in Wis. Stat. § 301.45(5)(b)1. Rector, as the Appellant, presented an issue in response to the circuit court's denial of eligibility to participate in an earned release substance abuse program. The issue presented by Rector is the subject of further briefing. Only the statutory interpretation issue presented by the State is the subject of this brief.

The crimes. 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.)

The investigation revealed that Rector amassed a large collection of child pornography accessed through a Dropbox account in August 2017. (R. 69:3.) On August 13, Rector added two standalone video files to this account. (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.) Collectively, Rector had "close to 1,500 total files." (R. 69:3.)

The State charged ten counts for ten separate 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 with multiple sexual assaults of children, 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.)

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 State agreed to not issue more charges for the additional video images recovered during the investigation based upon the five separate guilty pleas. (R. 66:3.) The court accepted Rector's pleas and found him guilty of five counts of possession of child pornography. (R. 66:12.) The court ordered a presentence investigation (PSI) and adjourned the case for sentencing. (R. 66:12–13.) The court dismissed the remaining five counts. (R. 26; 66:12.)

The State argued at the sentencing hearing that each of the five separate counts "should be treated as an independent violation." (R. 69:7.) The State characterized the resolution and recommended 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 separate 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."[1] (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 proceedings. The Department of Corrections (DOC) wrote to the circuit court, asking the court to revisit the duration of sex offender reporting. (R. 31.) DOC 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 that due to Rector's multiple 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)1." (R. 31:1.) DOC asked the court to amend the Judgment of Conviction. (R. 31:1.)

The State agreed with DOC'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.)

Rector objected to DOC'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

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[1] The circuit court noted a scrivener's 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.

eligible to participate in the earned release 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)1. "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." (R. 73:10.) The court then entered orders declining to amend the Judgment of Conviction. (R. 46; 51.)

Appeal, cross-appeal, and certification. Rector filed a Notice of Appeal following the circuit court's denial of eligibility to participate in the earned release substance abuse program, (R. 47), and the State filed a Notice of Cross-Appeal following the court's denial of lifetime sex offender registration, (R. 52). The court of appeals certified the appeal to this Court for its review and determination. This Court issued an order granting the certification.

STANDARD OF REVIEW

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)1. 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).

ARGUMENT

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 require lifetime reporting.

A. This Court should apply statutory interpretation principles in alignment with precedent to interpret a statute.

1. This Court presumes the Legislature acts with full knowledge of existing statutes and case law.

Courts "presume that the legislature acts with full knowledge of existing statutes and how the courts have interpreted them." *Mallow v. Angove*, 148 Wis. 2d 324, 330, 434 N.W.2d 839 (Ct. App. 1988). This presumption operates within the canons of statutory construction. *State ex rel. Campbell v. Twp. of Delavan*, 210 Wis. 2d 239, 255–56, 565 N.W.2d 209 (Ct. App. 1997). The presumption applies whether interpreting a new legislative enactment or a statutory amendment. *Murphy v. LIRC*, 183 Wis. 2d 205, 218, 515 N.W.2d 487 (Ct. App. 1994).

The presumption aligns with the principle that the Legislature does not intend to create statutory conflict. *H.F. v. T.F.*, 168 Wis. 2d 62, 69 n.5, 483 N.W.2d 803 (1992). The presumption "lies in the principle that the legislature is aware of the state's existing laws, and that it adopts new legislation against that backdrop, leaving the present law undisturbed except so far as necessary to make room for the new." *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 62, 373 Wis. 2d 543, 892 N.W.2d 233. A statute must be interpreted within law existing at the time of its enactment. *State v. A.A.*, 2020 WI App 11, ¶ 15, 391 Wis. 2d 416, 941 N.W.2d 260. The presumption comports with the "cardinal principle of statutory construction . . . to save and not to destroy." *Town of Madison v. City of Madison*, 269 Wis. 609, 614, 70 N.W.2d 249 (1955).

The presumption that the Legislature acts with full knowledge of law is a long-held principle of our jurisprudence. *See, e.g., Loose v. State*, 120 Wis. 115, 130, 97 N.W. 526 (1903) (Legislature presumably has full knowledge of case law). An attorney, Abraham Lincoln, relied on the principle to advise Beloit residents in a land dispute that required interpreting an 1838 Congressional enactment.[2] Lincoln pointed to an 1835 attorney general opinion interpreting an earlier legislative enactment, noting that Congress was well aware of the opinion and prior enactments.[3]

This Court continues to recognize this fundamental proposition, *State ex rel. McDonald v. Circuit Court for Douglas Cty.*, 100 Wis. 2d 569, 578, 302 N.W.2d 462 (1981), having recently and repeatedly relied upon it. *See, e.g., State*

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[2] Steven M. Biskupic, *A Fight Over Beloit Land Rights: Lincoln Versus Carpenter*, Wis. Law, Apr. 2021, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?ArticleID=28332.

[3] *Id.*

v. Yakich, 2022 WI 8, ¶ 35 (describing the presumption as "well accepted"); *United Am., LLC v. DOT*, 2021 WI 44, ¶ 14, 397 Wis. 2d 42, 959 N.W.2d 317 (invoking the presumption).

The presumption has long served the principle that statutes exist in harmony with one another and established law. *See Town of Madison*, 269 Wis. at 614 (statutes are part of a "uniform system of jurisprudence"). Legislation does not exist in a vacuum. *State v. Cole*, 2003 WI 112, ¶ 17, 264 Wis. 2d 520, 665 N.W.2d 328. It exists in harmony and connection with existing law; the interpretation of a statute's meaning and effect is part of an entire system of law. *Town of Madison*, 269 Wis. at 614.

A party advocating for disharmony in the law must overcome this presumption. A party cannot be dismissive of the presumption or selective in reliance upon it: "It is pure sophistry to suggest that this presumed legislative awareness exists in the one situation but not in the other, and we decline to perpetuate a ratio decidendi embracing that notion." *McDonald*, 100 Wis. 2d at 578. To overcome this presumption, a party must establish that the legislative context or history requires a different interpretation. *See Campenni v. Walrath*, 180 Wis. 2d 548, 557, 509 N.W.2d 725, *opinion supplemented on denial of reconsideration*, 180 Wis. 2d 548, 513 N.W.2d 602 (1994) (identifying when a different result is warranted).

2. This Court interprets a statute with an obligation to give the statute the full and proper effect intended by the Legislature.

The foundation of statutory interpretation in Wisconsin is grounded in "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 v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The judiciary defers

"to the policy choices enacted into law by the legislature." *Id.* Thus, "the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *Id.*

"[S]tatutory interpretation 'begins with the language of the statute.'" *Id.* ¶ 45 (citation omitted). The focus is primarily on the statutory language with the assumption that the language of the statute expresses the legislative intent. *Id.* ¶ 44. Courts "generally give words their common, everyday meaning, 'but [courts] give legal terms of art their accepted legal meaning.'" *State v. Matthews*, 2021 WI 42, ¶ 9, 397 Wis. 2d 1, 959 N.W.2d 640 (quoting *Estate of Matteson v. Matteson*, 2008 WI 48, ¶ 22, 309 Wis. 2d 311, 749 N.W.2d 557).

A legal term of art in a statute receives its accepted legal meaning. *City of Milwaukee v. Washington*, 2007 WI 104, ¶ 32, 304 Wis. 2d 98, 735 N.W.2d 111. A legal term of art may derive from common law, caselaw, or a statutory definition. *Matthews*, 397 Wis. 2d 1, ¶ 9 (defined in common law); *State v. Rocha-Mayo*, 2014 WI 57, ¶ 53, 355 Wis. 2d 85, 848 N.W.2d 832 (Abrahamson, C.J., dissenting) (defined by statute); *cf. Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d 626, 634, 157 N.W.2d 648 (1968) (legislative acquiescence to caselaw). Terms "specifically defined in a statute are accorded the definition the legislature has provided." *Bosco v. LIRC*, 2004 WI 77, ¶ 23, 272 Wis. 2d 586, 681 N.W.2d 157. But when legal terms of art are not defined in statutes, one looks to "case law and closely related statutes to determine their accepted legal meanings." *State v. Stanley*, 2014 WI App 89, ¶ 17, 356 Wis. 2d 268, 853 N.W.2d 600.

Interpreting a statutory term 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." *Kalal*, 271 Wis. 2d 633, ¶ 46. A statute's purpose, scope, and context are valid considerations under the

plain-meaning rule of statutory interpretation, even when there is no ambiguity. *Id.* ¶ 49. But, "as a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language." *Id.* ¶ 51. "Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry." *Id.* ¶ 44.

A statute must be interpreted "reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. Words may have multiple meanings, *id.* ¶ 49, such that they are "capable of being understood by reasonably well-informed persons in two or more senses," *id.* ¶ 47. A court may rely on the persuasive value of a "well-reasoned attorney general's opinion interpreting a statute." *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 126, 327 Wis. 2d 572, 786 N.W.2d 177. The court's ultimate purpose is to interpret a statute reasonably to give it its intended effect. *Kalal*, 271 Wis. 2d 633, ¶¶ 44, 46.

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

1. This Court should conclude that context and history strengthen the presumption that the Legislature acted with full knowledge of the law.

A court presumes "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). Here, the presumption is strengthened because context and history support interpreting the phrase "separate occasions" in Wis. Stat. § 301.45(5)(b)1. in harmony with this Court's interpretations of the term in an existing statute.

a. Context demonstrates the Legislature added "separate occasions" to the sex offender registration statute knowing the term's use in existing law.

Context guides statutory interpretation because a statute must be interpreted within the law existing at the time of its enactment. *See State v. A.A.*, 391 Wis. 2d 416, ¶¶ 14–15 (statutory interpretation principles). Here, the issue before this Court requires it to interpret the phrase "separate occasions" in Wis. Stat. § 301.45(5)(b)1. The statute requires lifetime sex offender registration when the "person has, on 2 or more *separate occasions*, been convicted" of a qualifying sex offense. Wis. Stat. § 301.45(5)(b)1. Before using the phrase "separate occasions" in the sex offender registration statute, the Legislature had already used that phrase in the habitual criminality enhancement statute in Wis. Stat. § 939.62. That statute increases the penalty for a person when the person "was convicted of a misdemeanor on 3 *separate occasions* during" the five-year period preceding the crime. Wis. Stat. § 939.62(2).

Shortly before the Legislature's use of "separate occasions" in the sex offender registration statute, this Court had twice examined the meaning of the phrase "separate occasions" in the habitual criminality statute. *State v. Hopkins*, 168 Wis. 2d 802, 484 N.W.2d 549 (1992); *Wittrock*, 119 Wis. 2d 664. In *Wittrock*, this Court determined the plain meaning of the phrase "separate occasions" is ambiguous. 119 Wis. 2d at 670–71. In *Hopkins*, this 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.

This Court determined that each conviction constitutes a "separate occasion." *Hopkins*, 168 Wis. 2d at 805. The defendant in *Wittrock* argued that convictions arising out of a single court appearance were not "separate occasions." 119 Wis. 2d at 667. The defendant in *Hopkins* argued that convictions arising out of "a single course of conduct are not committed on 'separate occasions.'" 168 Wis. 2d at 805. This Court disagreed with the defendants. It first noted that the statute focuses on the "quantity of crimes" rather than the "time of conviction." *Wittrock*, 119 Wis. 2d at 674. This Court then agreed with the State that "it is the number of convictions that is important rather than when the crimes were committed." *Hopkins*, 168 Wis. 2d at 805.

After this Court's interpretation that each conviction was a separate occasion, the Legislature used that term during its creation of legislation and amendment to statutes. After *Wittrock* and *Hopkins*, the Legislature created a domestic abuse repeater for a "person who was convicted, on 2 *separate occasions*." 2011 Wis. Act 277 (creating Wis. Stat. § 939.621(1)(b)). And, relevant here, the Legislature added the term "separate occasions" when amending the sex offender registration statute and creating a related statute for access to information concerning sex offenders. 1995 Wis. Act 440, §§ 72, 75 (creating Wis. Stat. §§ 301.45(5)(b)1., 301.46(2m)(am)).

The presumption that the term "separate occasions" operates in harmony with the statutes identified above is strengthened by two statutory principles.

First, the Legislature has amended the habitual criminality statute at least a dozen and a half times since the *Wittrock-Hopkins* interpretation.[4] The Legislature has not disturbed this Court's interpretation of "separate occasions" in this statute during any of the legislative amendments. *Compare* Wis. Stat. § 939.62(2) (2019–20), *with* Wis. Stat. § 939.62(2) (1991–92), *and* Wis. Stat. § 939.62(2) (1983–84) (no substantive change in the term). The presumption that the Legislature adopted or ratified this Court's interpretation of "separate occasions" in the habitual criminality statute is strengthened by the Legislature having made amendments to this statute and having not amended or corrected this court's interpretation. *York v. Nat'l Cont'l Ins. Co.*, 158 Wis. 2d 486, 497, 463 N.W.2d 364 (Ct. App. 1990).

Second, the Legislature added the term "separate occasions" to the sex offender registration statute shortly after this Court's interpretation of the term in *Wittrock* and *Hopkins*. This Court decided *Wittrock,* 119 Wis. 2d 664, in June 1984, followed by *Hopkins*, 168 Wis. 2d 802, in June 1992. The Legislature introduced 1995 Senate Bill 182 in May 1995,[5] culminating in its enactment as 1995 Wisconsin Act

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[4] *See* 2021 Wis. Act 76 (enacted Aug. 6, 2021); 2017 Wis. Act 128 (enacted Dec. 8, 2017); 2015 Wis. Act 366 (enacted Apr. 19, 2016); 2007 Wis. Act 116 (enacted Mar. 19, 2008); 2005 Wis. Act 14 (enacted June 7, 2005); 2001 Wis. Act 109 (enacted July 26, 2002); 1999 Wis. Act 188 (enacted May 17, 2000); 1999 Wis. Act 85 (enacted Apr. 21, 2000); 1997 Wis. Act 326 (enacted July 1, 1998); 1997 Wis. Act 295 (enacted June 16, 1998); 1997 Wis. Act 283 (enacted June 15, 1998); 1997 Wis. Act 219 (enacted Apr. 29, 1998); 1995 Wis. Act 448 (enacted June 24, 1996); 1995 Wis. Act 77 (enacted Nov. 17, 1995); 1993 Wis. Act 486 (enacted May 27, 1994); 1993 Wis. Act 483 (enacted May 27, 1994); 1993 Wis. Act 289 (enacted Apr. 13, 1994); 1989 Wis. Act 85 (enacted Dec. 5, 1989).

[5] 1995 Wis. S.B. 182, https://docs.legis.wisconsin.gov/1995/related/proposals/sb182.pdf.

440 ("Act 440") in June 1996.[6] Fewer than three years separated this Court's opinion in *Hopkins* from the introduction of legislation to add "separate occasions" as part of amendments to the sex offender registration statute. A legislative amendment shortly after a relevant interpretation by this Court is significant under the presumption that the Legislature acts with full knowledge of existing statutes and case law. *Novell v. Migliaccio*, 2010 WI App 67, ¶ 11, 325 Wis. 2d 230, 783 N.W.2d 897.

This Court should conclude that context strengthens the presumption that the Legislature added the term "separate occasions" to the sex offender registration statute with full knowledge of that term's use in the habitual criminality enhancement statute and this Court's interpretation of that term in *Wittrock* and *Hopkins*.

b. History demonstrates that the Legislature added "separate occasions" to the sex offender registration statute with the intent for harmony in the law.

History guides statutory interpretation because the presumption dictates a uniform interpretation unless history or context requires a different result. *Campenni*, 180 Wis. 2d at 557. Understanding the history requires knowing the structure of the sex offender registration statute before and after enactment of Act 440.

Wisconsin created the sex offender registration statute a few years prior to its later amendments in Act 440. *See* 1993 Wis. Act 98, § 116 (creating Wis. Stat. § 175.45).[7] Under the

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[6] 1995 Wis. Act 440, https://docs.legis.wisconsin.gov/1995/related/acts/440.pdf.

[7] 1993 Wis. Act 98, https://docs.legis.wisconsin.gov/1993/related/acts/98.

original enactment, the Legislature created a single 15-year sex offender registration and reporting requirement. *Id.* (creating Wis. Stat. § 175.45(5)). The legislation did not distinguish by convictions because all sex offenders had a 15-year registration requirement.

Act 440 created a bifurcated registration requirement. 1995 Wis. Act 440, §§ 43, 72.[8] One of the statutory registration requirements after enactment relates to duration; that is, how long a person must register as a sex offender.[9] 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.[10] 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 before this Court requires it to interpret the phrase "separate occasions" created in Act 440. This Court has relied on multiple occasions upon a DOC report in the legislative drafting file to understand the legislative history and intent behind Act 440. *State ex rel. Kaminski v. Schwarz*, 2001 WI 94, ¶ 53, 245 Wis. 2d 310, 630 N.W.2d 164 (citing

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[8] The legislation created the bifurcation registration requirement by renumbering Wis. Stat. § 175.45(5) as Wis. Stat. § 301.45(5)(a) and creating Wis. Stat. § 301.45(5)(b).

[9] 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).

[10] A circuit court may order lifetime registration. Wis. Stat. § 973.048(4). But this statutory provision to extend a 15-year reporting requirement to a lifetime is beyond the scope of the issue before this Court. So the State does not address it further beyond acknowledging it here in the interest of completeness.

State v. Bollig, 2000 WI 6, ¶ 22, 232 Wis. 2d 561, 605 N.W.2d 199). This Court should do the same here.

"[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." *Kaminski*, 245 Wis. 2d 310, ¶ 53. In *Kaminski*, this 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 Senator Darling and Representative Schneiders on its cover page. The drafting file contains a handwritten note on Senator Darling's stationery that states the DOC report contains "the recommendations for a notification law" they "would like to include . . . into the draft" legislation. Note from Senator Alberta Darling's office (available in drafting file for 1995 Wis. Act 440, Wis. Legis. Reference Bureau, Madison, Wis.) Shortly thereafter, Senator Darling introduced and Representative Schneiders cosponsored the legislation later enacted as Act 440. 1995 Wis. S.B. 182.

The 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., *supra*, at 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 history demonstrates that the Legislature intended to bifurcate sex offender registration and reporting by the quantity of crimes. *See id.* at ii, 6 (identifying the number of convictions as dispositive). In selecting a term to make such a distinction, the Legislature had full knowledge of the use and interpretation of the term "separate occasions." *See Victory Fireworks, Inc.*, 230 Wis. 2d at 727 (presumption). The Legislature used "separate occasions" to fulfill its intent. *See* 1995 Wis. S.B. 182, §§ 59, 61 (use of "separate occasions" in the legislation).

The legislative history strengthens the presumption that each conviction constitutes a separate occasion in the sex offender registration legislation. After introduction of the bill, the Legislature received fiscal estimates preserved within the drafting file. A fiscal estimate states that the legislation "expands registration time frames" where those "individuals with two or more separate sexual assault *convictions* will be required to register for life." Wis. Dep't of Corr., *Fiscal Estimate — 1995 Session for 1995 Wis. S.B. 182* (May 25, 1995) (available in drafting file for 1995 Wis. Act 440, Wis. Legis. Reference Bureau, Madison, Wis.) The history demonstrates that the legislature used occasions to denote convictions, just as this Court had interpreted the phrase in

Wittrock and *Hopkins*. The term was retained throughout the legislative process and enacted into law. *See* 1995 Wis. Act 440, §§ 72, 75 (use of "separate occasions" in the act).

This Court should conclude that history strengthens the presumption that the legislature added the term "separate occasions" to the sex offender registration statute with the intent to harmonize its use with the habitual criminality statute and this Court's interpretation of the term.

* * * * *

This Court should conclude that context and history strengthen the presumption that the Legislature acted with full knowledge of the habitual criminality statute and how this Court had interpreted the phrase "separate occasions." The context and history demonstrate that the Legislature sought statutory harmonization when it added the phrase "separate occasions" to the sex offender registration statute. A party cannot overcome this presumption because the context and history demonstrates that the Legislature had not intended to create disharmony in the law.

2. This Court should conclude that interpreting "2 or more separate occasions" to mean two or more convictions comports with statutory interpretation principles.

This Court's solemn obligation is to determine the legislative meaning of the term "separate occasions" in the sex offender registration statute. *See Kalal*, 271 Wis. 2d 633, ¶ 44 (court's role in statutory interpretation). To fulfill this obligation, interpretation begins with the statutory language. *Id.* ¶ 45. A legal term of art in a statute receives its accepted legal meaning. *Washington*, 304 Wis. 2d 98, ¶ 32. This Court considers the meaning of the term "separate occasions" within the context of the sex offender registration statute, reasonably

interpreting the term to avoid an absurd or unreasonable result. *Kalal*, 271 Wis. 2d 633, ¶ 46.

The phrase "separate occasions" is a legal term of art, in accord with statutory interpretation principles. This Court explained that "when the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of legislative intent is correct." *Zimmerman*, 38 Wis. 2d at 634. This principle is strengthened by the Legislature having made amendments to the habitual criminality statute and having not amended or corrected this court's interpretation of the term "separate occasions." *York*, 158 Wis. 2d at 497. "This being so, however, the courts are henceforth constrained not to alter their construction; having correctly determined legislative intent, they have fulfilled their function." *Zimmerman*, 38 Wis. 2d at 634.

Under this canon of statutory construction, "separate occasions" receives its accepted legal meaning under the *Wittrock-Hopkins* interpretation. But, assuming arguendo that "separate occasions" is not a legal term of art, its meaning does not change here. Prior to becoming a legal term of art, this Court had concluded that the phrase "separate occasions" is ambiguous. *Wittrock*, 119 Wis. 2d at 670–71. Interpreting an ambiguous statute requires turning to context and history to determine its meaning. *Kalal*, 271 Wis. 2d 633, ¶ 48. As explained above, *see supra* Section B.1., context and history supports interpreting "separate occasions" in the sex offender registration statute in accord with the *Wittrock-Hopkins* interpretation.

Interpreting "2 or more separate occasions" in the sex offender registration statute to mean two or more convictions is reasonable. In *Hopkins*, this Court explained that interpreting the phrase "in terms of the quantity of crimes" is "the only equitable way to deal with the application" of the statute. 168 Wis. 2d at 810. In contrast, "focusing on the time

of commission of the offense opens the door to confusion and discrimination among defendants" where two defendants with the same number of convictions may receive different treatment, depending upon whether the convictions occurred at the same time. *Id.* This Court elected for a more reasonable and equitable interpretation. *Id.* It should do the same here.

This Court should avoid an absurd or unreasonable interpretation. *Kalal*, 271 Wis. 2d 633, ¶ 46. Deviating from statutory construction and precedential principles results in an absurd and unreasonable result. Rector's conduct in this case exemplifies the absurdity to break from the *Wittrock-Hopkins* rationale. Here, Rector downloaded two video files on August 13, two folders on August 14, and a third folder on August 20. (R. 69:3.) Rector had amassed about 1,500 total files during his separate downloads, (R. 69:3), resulting in five separate convictions for child pornography possession, (R. 22:1). Now suppose another person downloaded child pornography to his home computer in County X and later that same day to his cellphone while in County Y. Under this scenario, the State may charge this other person in two counties that may result in convictions in different courts on different days. It is absurd that the two defendants face such differing periods of sex offender registration and reporting.

In support of a reasonable interpretation in harmony with existing law, this Court may find a relevant attorney general opinion persuasive. *Schill*, 327 Wis. 2d 572, ¶ 126. The Wisconsin Attorney General interpreted the phrase "2 or more separate occasions" in a companion sex offender statute relating to bulletins to law enforcement agencies. OAG–02–17 (Sept. 1, 2017) (interpreting the phrase in Wis. Stat. § 301.46).[11] The attorney general opined that "the language

[11] OAG–02–17 (Sept. 1, 2017), https://docs.legis.wisconsin.gov/misc/oag/recent/oag_2_17.pdf.

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 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 interpret the phrase "2 or more separate occasions" in the sex offender registration statute 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.

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

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.

A person convicted of a sex offense must comply with reporting requirements. Wis. Stat. § 301.45(1g)(a). The sex offender registration statute defines "[s]ex 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 clearly a sex offense under the registration statute.

The circuit court erred when it ordered sex offender reporting for only 15 years, and it perpetuated its mistake when it entered a postconviction order denying lifetime registration.

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

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, DOC is required by the sex offender registration statute to comply with its requirements. DOC must maintain a sex offender registry of all people required to report. Wis. Stat. § 301.45(2)(a), (7)(a). DOC attempted to resolve the issue by writing to the court. (R. 31.) DOC 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.) DOC 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)1." (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."[12] (R. 73:3.) The State agreed with DOC that Rector's separate convictions required lifetime sex offender registration. (R. 73:3.)

Unsurprisingly, Rector asked the circuit court to retain the 15-year registration period. (R. 73:3–4.) But he did not make a particularly strenuous argument. (R. 73:3–4.) He merely noted there was no binding precedent specifically interpreting the phrase "2 or more separate occasions" in the sex offender registration statute. (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 anticipated that "the Court of Appeals or Supreme Court is going to look at this with fresh eyes anyway." (R. 73:10.) This Court is now tasked with correcting the error in the Judgment of Conviction.

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 convictions for possession of child pornography. *See* Wis. Stat. § 301.45(1d)(b) (defining "[s]ex offense" to include possession of child pornography), (1g)(a) (defendant convicted of a sex offense shall comply with reporting requirements). A single conviction requires 15 years of registration, whereas multiple convictions require lifetime registration. *See supra* Section 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 of Conviction to lifetime sex offender registration.

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[12] This 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.*

CONCLUSION

This Court should reverse the postconviction order that denied lifetime sex offender registration and remand with instruction to order lifetime registration as required by law.

Dated this 16th day of March 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

Attorneys for Plaintiff-
Respondent-Cross-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6203
(608) 294-2907 (Fax)
collinsws@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6545 words.

Dated this 16th day of March 2022.

WINN S. COLLINS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

I further certify that:

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

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

Dated this 16th day of March 2022.

WINN S. COLLINS
Assistant Attorney General