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SUPREME COURT

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 of an appeal of a decision and order entered in the Kenosha County Circuit Court, the Honorable Jason A. Rossell, presiding

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RESPONSE BRIEF OF DEFENDANT-APPELLANT-CROSS-RESPONDENT

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ISSUE PRESENTED

> Corey Rector pleaded guilty to five counts of possession of child pornography in a single case at a single hearing. Did his convictions occur "on 2 or more separate occasions" such that he must register as a sex offender until his death?

The circuit court held that lifetime registration is not mandatory and ordered Rector to register for 15 years after completion of his sentence. The court of appeals certified the case to this Court. This Court should affirm the circuit court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication of opinions are customary for this Court.

ARGUMENT

I. Summary of argument and standard of review

In a single hearing, Rector entered five identical pleas to five identical counts of possessing child pornography. (7; 66:11-12). Immediately after Rector said "guilty" for the fifth time, the court said it accepted the pleas, and thus found him "guilty … in Counts 1 through 5." (66:12). By the circuit court's pronouncement, Rector was convicted of five sex offenses. The question before this Court is

whether this pronouncement constituted "2 or more separate occasions" of conviction for Rector, which would trigger mandatory lifetime registration under Wis. Stat. § 301.45(5)(b)1.

It did not. Convictions that occur at the same time do not satisfy the statute's plain requirement of convictions "on 2 or more separate occasions." Though the state of course does not agree with Rector that the statute's words compel this conclusion, it doesn't offer *any* argument about how—as a matter of plain English—it could be otherwise. Nowhere in its brief does the state suggest that Rector has misread the statute's language, and nowhere does it claim that the statute's words have a different plain meaning. In fact, the state does not advance some other reading as even linguistically plausible, such that the statute would be ambiguous. (Perhaps it recognizes that there is no reasonable argument to be made that "on 2 or more separate occasions" actually means "on one singular occasion.") The state elects, in this statutory-construction case, not to talk about the words of the statute.

Instead, the state makes a series of arguments urging this Court to *reject* the plain meaning of the phrase. It posits that the everyday phrase "separate occasions" is a technical "term of art" that means something different in the Wisconsin Statutes than elsewhere in the English-speaking world. It submits that a DOC-generated report proves that the legislature didn't mean the words it enacted. And finally, it claims that if the legislature determined that

only true *repeat* offenders—those who reoffend after having been caught, punished, and given a shot at rehabilitation—should be subject to mandatory lifetime reporting, such a policy would be "absurd."

This Court should reject all the state's arguments, save one: the state is correct that whether the statutes mandate[1] lifetime registration in this case is a question of law for this Court's *de novo* review.

II. The plain meaning of events occurring on "2 or more separate occasions" is that they did not occur at the same time.

This Court has "repeatedly held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

The state, however, conspicuously does *not* begin by looking to the plain language of Wis. Stat. § 301.45(5)(b)1. It offers no argument—none at all—that its reading of the statute (whereby "on 2 or more separate occasions" means "at the same time") is more natural than the one Rector has suggested.

[1] A court ordering registration always has the discretion to order it for life. Wis. Stat. § 973.048(4). The dispute in this case is whether lifetime registration is *mandatory*—that is, whether the circuit court's discretion is curtailed—where multiple convictions are entered on the same occasion.

In fact, the state doesn't suggest that the words of the statute may have some other "sense" that would render them ambiguous: "capable of being understood by reasonably well-informed persons in two or more senses." *Kalal*, 271 Wis. 2d 633, ¶47. There's no claim that "well-informed persons *should have* become confused" about what the words of the statute mean. *Id.* (emphasis in original). Perhaps the state has recognized that there is no good argument that, as a matter of standard English, things that happen at the same time happen "on 2 occasions," let alone on "2 *separate* occasions."

We can see this from the dictionary: "separate" means "set or kept apart." Merriam-Webster.com/dictionary/separate, *last accessed* April 4, 2022. An "occasion" is "a time at which something happens." Merriam-Webster.com/dictionary/occasion, *last accessed* April 4, 2022. So, something that happens on two "separate occasions" happens at two times apart from one another—not, as here, at the same time.

But while the dictionary definitions are clear, they're not really necessary here. "Separate" and "occasion" are not obscure terms; everyone knows what they mean. As the court of appeals plainly put it in its certification to this Court, "[t]he ordinary meaning of 'separate occasions' would seem to require that the convictions occur at different times." *State v. Rector*, No. 2020AP1213-CR, unpublished slip op. at 1-2. (WI App. Nov. 24, 2021). Someone who went to the supermarket, picked up two apples, and paid for them

at the checkout counter would not claim he or she had obtained the apples on "two separate occasions." Asked if that were the case, he or she would deny it: "no, I bought them at the same time."

Many writings confirm this universally-understood meaning of the phrase "separate occasions." Consider this: "Fifty years ago a series of great fires took place, which made terrible havoc on five separate occasions." Bram Stoker, Dracula p. 3 (Doubleday 1897). Plainly, the "terrible havoc" did not happen all at once; that is what "five separate occasions" conveys. Or this: "Vincent Jopp … was one of those men who marry early and often. On three separate occasions before I joined his service he had jumped off the dock, to scramble back to shore again later by means of the Divorce Court lifebelt." P.G. Wodehouse, The Clicking of Cuthbert p. 182 (1922). We all understand that Mr. Jopp was not thrice married on the same day.

Many, many cases use the phrase as well. "[T]he petitioner's blood pressure was taken 11 times on two separate occasions." *Seitz v. Suffolk Cty. Dep't of Civ. Serv.*, 536 N.Y.S.2d 536, 537 (1989). "Mr. Nwabuoku signed his name five times, on three separate occasions." *Y & N Furniture, Inc. v. Nwabuoku*, 734 N.Y.S.2d 382, 388 (Civ. Ct. 2001); "[A]n undercover agent with the CTPD purchased crack cocaine four times on three separate occasions from a bartender at Cracker Jacks." *J.D.D., Inc. v. Clinton Twp.*, No. 12-10396, 2013 WL 6474120, at *2 (E.D. Mich. Dec. 10, 2013). In each instance, the

phrase "separate occasions" denotes two or more discrete periods of time: that is why it's possible to separate multiple instances of blood-pressure readings, signatures, and cocaine sales into meaningfully distinct groups.

Courts have also construed "separate occasions" and related phrases in statutes. *State v. LaPointe*, 404 P.3d 610, 616 (Wash. App. 2017) noted that "separate occasions" means "independent, different, and distinct occurrences or incidents." *Woods v. State*, 176 S.W.3d 711, 712 (Mo. 2005) held that an enhancer requiring conviction on "two separate occasions" was not satisfied by two guilty pleas on the same date in the same court. And in *Lett v. State*, 445 A.2d 1050, 1057 (Md. App. 1982), the court said "the term 'two separate occasions' has a plain meaning and is not fairly susceptible of an interpretation other than that of two unconnected, distinct, or unique times."

The Supreme Court of the United States has recently spoken on the matter as well. In *Wooden v. United States*, __ U.S. __, 142 S. Ct. 1063 (2022), it considered the meaning of the statutory term "occasion" in the federal Armed Career Criminal Act. ACCA applies increased penalties where a defendant has been convicted of certain offenses "committed on occasions different from one another," while the statute at issue here looks to whether the defendant was "convicted" "on 2 or more separate occasions." But the linguistic question was the same in *Wooden* as it is here: what does it mean for two events (whether offenses as in ACCA or convictions as in Wisconsin's

statute) to occur on "different" or "separate" occasions?[2] All nine Justices agreed on an answer: things that happen all at once—or even things that happen sequentially in the same place around the same time—don't happen on different "occasions."

The defendant in *Wooden* had broken into ten adjoining storage units, one after another. 142 S. Ct. at 1067. The government contended that each of these break-ins was different "occasion" of burglary. *Id.* at 1069.

The Court disagreed, pointing to the common understanding of the term "occasion":

> Consider first how an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe Wooden's ten burglaries—and how she would not. The observer might say: "On one occasion, Wooden burglarized ten units in a storage facility." By contrast, she would never say: "On ten occasions, Wooden burglarized a unit in the facility." …. She would, using language in its normal way, group his entries into the storage units, even though not simultaneous, all together—as happening on a single occasion, rather than on ten "occasions different from one another."

Id.

To regard events that occur in close succession in the same time and place as different "occasions,"

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[2] "Different" is a synonym of "separate" Webster.com/dictionary/separate, *last accessed* April 3, 2022.

said the Court, would be to "leave[] ordinary language behind." [3] It would also, the Court observed, render the statutory language requiring different "occasions" almost superfluous. *Id.* at 1070.

Obviously, the federal Supreme Court's interpretation of a phrase in a federal statute doesn't bind this Court in applying a Wisconsin Statute. What *Wooden* shows, though—along with all the other material cited above—is that the concept of something occurring "on 2 or more separate occasions" is not mysterious. To hold, as the state urges, that it includes simultaneous events would be to "leave[] ordinary language behind."

The state's reasoning would also, even more than in *Wooden*, drain a statutory phrase of any meaning. If the legislature had intended to say that

[3] The question raised by *Wooden* had long percolated in the federal appellate courts. The circuits were divided on just how "different" different occasions needed to be. *See* James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951, 1970-1978 (1991). But *no* circuit held that offenses occurring simultaneously occur on "different occasions." As the Seventh Circuit said, "the term 'occasion' incorporates a temporal distinction, *i.e.*, one occasion cannot be simultaneous with another occasion.… [A] plain reading of the statutory language … supports the conclusion that Congress intended the … predicate offenses to be distinct in time."). *United States v. Hudspeth*, 42 F.3d 1015, 1023 (7th Cir. 1994), overruled on other grounds by *Shepard v. United States*, 544 U.S. 13 (2005).

any two convictions—even two convictions entered at the same time—would mandate lifetime registration, that would have been easy to do. The statute could simply read "2 or more convictions," rather than requiring "separate occasions." To say that any two convictions qualify, even if they are simultaneous, is to render the phrase "on 2 or more separate occasions" surplusage—something this Court avoids "where possible." *Kalal*, 271 Wis. 2d 633, ¶46. If the state were correct, then the phrase "on 2 or more separate occasions" would have "no work to do." *See Wooden*, 142 S. Ct. at 1070.

In sum, there is ample textual reason to reject the state's offered meaning (or absence of meaning) for the phrase "on 2 or more separate occasions." And, as has already been noted, the state's brief offers no textual arguments to this Court.

The state did offer one textual argument in the court below. Relying on *Hopkins*, it suggested that the statute might make sense if one construed "separate occasions" to refer "to the number of convictions, including multiple convictions imposed at the same time and based on the same complaint." Resp. Br. 16.

First, this argument doesn't make "separate occasions" any less superfluous: just as described above, it could be removed from the statute without changing the statute's meaning. This is, of course, what "superfluous" means.

But the "conviction = occasion" notion doesn't just make a statutory phrase meaningless: it also ignores the statute's syntax and thereby renders it nonsensical. The statute requires convictions *on* two separate occasions; grammatically it simply does not say that the convictions *are* the two separate occasions. What's more, if "occasion" actually means "conviction" then what the statute prescribes is mandatory lifetime registration for a person who "has, on two or more separate [convictions], been convicted" of a sex offense. How can one be convicted on a conviction?

To return to the example of the supermarket trip, if a person said that two apples bought at the same time were purchased "on separate occasions," he or she would be wrong. He or she would not become any less wrong by asserting that the apples *themselves* were "separate occasions."

This Court should reject the state's construction of the statute—that is, avoid cutting words and avoid introducing syntactical nonsense—and instead give the phrase "2 or more occasions" it's plain and obvious meaning. Convictions entered simultaneously are *not* convictions entered on two or more occasions.

III. Nothing the state has said should persuade this Court to abandon the plain meaning of the statute.

The state has offered nothing to gainsay all that Rector has just said about the clear meaning of the phrase "on 2 or more separate occasions." Instead, the state makes a series of non-textual arguments, beginning with one depending on two cases: *State v. Wittrock*, 119 Wis. 2d 664, 350 N.W.2d 647 (1984), and *State v. Hopkins*, 168 Wis. 2d 802, 484 N.W.2d 549 (1992).

The state does not contend that either *Wittrock* or *Hopkins* control the decision here, though, and they don't. First, the two cases interpreted a different statute; second, they relied on legislative history peculiar to that statute—not the one at issue here—to reach conclusions about the meaning of "separate occasions" *in that statute*.

The state argues, though, that *Wittrock* and *Hopkins*—despite interpreting only that single statute—transformed the phrase "separate occasions" from an ordinary term, understood by everyone, into a "term of art." Resp. 25-26. So, per the state, after *Wittrock* was decided in 1984, "separate" (which appears hundreds of times in the statutes) and "occasions" (which appears dozens of times) might still have meaning. But combine them into the phrase "separate occasions," and they become a "term of art" which—curiously for a term of art—can simply be

ignored where it appears, because it conveys no meaning at all.

The state reads too much into *Wittrock* and *Hopkins*. The legislature is indeed presumed to know the law: it would know that these cases relied on the particular legislative history of the statute they were construing. It would also know that they made no pretense to define "on 2 or more separate occasions" outside of that context; still less did they purport to assign this phrase a new definition in the statutes as a whole—a definition radically different from the common understanding of these words.

The state offers a few other arguments as well—that a couple of ambiguous phrases in the legislative history support its interpretation, that giving the statutory language its plain meaning will lead to "absurd results," and finally that the Attorney General's opinion should be given deference by this Court. None of the state's contentions have merit.

A. *Wittrock* and *Hopkins* do not require the Court to rewrite the statute in the way the state suggests.

Again, *Wittrock* and *Hopkins* don't govern here; the state hasn't suggested they do. But it's important to examine those cases, both for how they reached their results and for what they actually said about the phrase they construed.

Both *Wittrock* and *Hopkins* preceded, by more than a decade, this Court's articulation of its modern, textually-focused approach to statutory construction: *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. *Kalal* has been called "a watershed decision in the modern history of the Wisconsin Supreme Court"; it embraced a plain-meaning approach this Court has called "the bedrock of the judiciary's methodology." Daniel R. Suhr, *Interpreting Wisconsin Statutes*, 100 Marq. L. Rev. 969 (2017); *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶18, 373 Wis. 2d 543, 892 N.W.2d 233.

Kalal outlined two approaches to statutory construction: one aimed at determining the "legislative intent" behind a statute; the other focused on "statutory meaning." 271 Wis. 2d 633, ¶¶38-42. The opinion allowed that "Wisconsin's statutory interpretation case law has evolved in something of a combination fashion, generating some analytical confusion." *Id.*, ¶43. "The typical statutory interpretation case will declare that the purpose of statutory interpretation is to discern and give effect to the intent of the legislature, but will proceed to recite principles of interpretation that are more readily associated with a determination of statutory meaning rather than legislative intent—most notably, the plain-meaning rule." *Id.* Ultimately, while it recognized a role for the discernment of "legislative intent"—namely, where a strictly textual approach fails to yield an unambiguous answer—*Kalal* embraced the "plain meaning" approach. It directed

courts to "assume that the legislature's intent is expressed in the statutory language." *Id.*, ¶44.

And this assumption was to be a strong one. While reserving a place for extrinsic sources (like legislative history) in cases of textual ambiguity, the *Kalal* Court made clear that "ambiguity" was not to be lightly discovered:

> The test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. It is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute to determine whether well-informed persons *should have* become confused, that is, whether the statutory ... language *reasonably* gives rise to different meanings. Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.

Id., ¶47 (emphasis in original; quotations and citations omitted).

Again, *Wittrock* and *Hopkins* came before *Kalal*. Though this case presents no challenge to their *results*—as the state notes, the legislature seems to have acquiesced in their construction of the misdemeanor repeater statute, Resp. 20—their analyses didn't purport to define "separate occasions" for all purposes, and their reasoning should not

persuade this Court to depart from a textually-focused analysis here.

Wittrock was the first case to address the phrase "3 or more separate occasions" in Wis. Stat. § 939.62(2), the misdemeanor repeater statute. That provision levies enhanced penalties against one who "was convicted of a misdemeanor on 3 separate occasions" in a particular time period. The *Wittrock* opinion laid out the positions of the parties, and it recited the relevant legal principles. It then embarked on its analysis of the statutory language. The entirety of that analysis is as follows:

> We observe that the term "occasion" is not specifically defined in section 939.62. Webster's New Collegiate Dictionary 794 (1977) defines "occasion" as "happening, incident" or "a time at which something happens." This meaning provides little insight into whether the legislature intended occasion to mean the "incident" at which the misdemeanor occurred or, in other words, the commission of the crime, or whether it was intended to relate to the "incident" of the conviction, in other words, the court appearance. Also, the location of the term "occasion" in the statute provides little insight into what the legislature intended by the use of the term. As we noted above, a defendant qualifies as a repeater if he or she "was convicted of a misdemeanor on three separate occasions." Once again, it is not clear whether occasion refers to the time of conviction or time of the crime's commission.

> We conclude that an ambiguity exists within the statute, since the term "occasion" may be interpreted in two different ways by well-informed persons.

119 Wis. 2d at 670-71.

Two things are notable here. First, the opinion asserts that the phrase "on 3 or more separate occasions" can reasonably be read to modify either "convicted" or "misdemeanor." Syntactically this assertion is odd. But it is the only basis the *Wittrock* opinion gives for its conclusion that the statute is ambiguous. That is, the opinion makes only a passing attempt at "the ascertainment of meaning." *See Kalal*, 271 Wis. 2d 633, ¶47.

More important, though, is what the *Wittrock* Court did not say. It did *not* say that the phrase "on 3 or more separate occasions" was *itself* unclear. *Wittrock* instead found ambiguity about *what* had to occur on "separate occasions": crimes or convictions. That was the dispute between the parties, and that was the question the Court addressed, deciding that it was the crimes that had to happen on "separate occasions." So, it's incorrect to say—as the state does, Resp. 18—that the *Wittrock* Court "determined the plain meaning of the phrase 'separate occasions' is ambiguous." It didn't.

Next came *Hopkins*. That opinion begins its discussion with a quote of *Wittrock*, establishing that the earlier case had found ambiguity in the statute. *Hopkins*, 168 Wis. 2d at 807. Without further

examining the statutory language, the *Hopkins* opinion says that the *Wittrock* discussion of "legislative history and purpose" of the repeater statute "supports the conclusion that each conviction of a misdemeanor constitutes a separate occasion for purposes of sec. 939.62." *Id.* at 808-09.

Again, two things to note. First, *Hopkins* contains no textual analysis at all; the opinion does not even gesture toward an attempt at the "ascertainment of meaning" of the relevant statutory text. It instead assumes ambiguity, and turns briefly to legislative history before discussing, at some length, the way the Court said the statute *should* work: "the only equitable way to deal with the application of the repeater statute." *Id.* at 810, 812-13. Second, again, it's important to note what *Hopkins* does *not* say: that something having occurred "on 3 or more separate occasions" simply means that there are three of that thing. Rather, *Hopkins* held that the legislative history *of the misdemeanor repeater statute* supported the conclusion that any three convictions, simultaneous or not, should suffice.

The point of this discussion is not to challenge *Wittrock*'s and *Hopkins*'s validity as applied to the misdemeanor repeater statute. As has already been noted, that question isn't before the Court, and as the state points out the legislature has accepted the *Wittrock* and *Hopkins* construction of *that statute* over many emendations. Resp. at 20.

Rather, the point is that *Wittrock* and *Hopkins* are unsteady ground from which to make the leap the state asks this Court to make now: a holding that the two cases established a legal "term of art" by which "on 2 or more separate occasions"—always and everywhere in our legal code—simply means that there are two of something.

Neither case makes such a blanket statement about the meaning of the phrase. Together, *Wittrock* and *Hopkins* say that the legislative history and the equities *of the misdemeanor repeater statute* justify treating any three misdemeanors as supporting the enhancement. They certainly do not make any broad claims about the general meaning of the term "separate occasions."

Much less do they hold that "separate occasions" is meaningless. Such a holding would be odd indeed, as each word in the phrase— "separate" and "occasion"—clearly *does* have meaning in the statutes. By a search of the legislature's database, "separate" occurs 323 times in the statutes (and annotations). Wisconsin Stat. § 134.71(9), for example, establishes the conditions under which the owner of a premises may obtain a flea market license. Sub. (a)1. specifies that each dealer within such premises must occupy "a separate sales location." Surely the word "separate" has meaning here, and two or more dealers aren't to occupy the same sales location. For its part, "occasion" occurs 68 times. In Wis. Stat. § 125.04(3)(g)5., it lends its meaning to the phrase "3 successive occasions"—the number of (and temporal relation between) times

a notice of an application for a liquor license must be published in a daily newspaper. No one would consider the statute satisfied if the notice were published three times in the same issue. Yet, per the state, if we replace "successive" with "separate"—another adjective expressing difference—then "occasions" loses all meaning, and simultaneous notices would suffice.

Wisconsin Stat. § 990.01(1) instructs the courts, including this one, about the meaning of the legislature's words. It provides that "[a]ll words and phrases shall be construed according to common and approved usage." It also provides an exception: "technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning." The state's claim here is, then, that "separate occasions" is not an ordinary phrase but instead a "technical" one; or at least, that it has a "peculiar meaning in the law."

This claim is untenable. To be sure, legal usage may endow technical phrases with meaning. But it's another thing to say that this Court's interpretations of particular statutes incidentally drain simple phrases of their common meanings. *See, e.g.*, *State v. Grady*, 175 Wis. 2d 553, 558–59, 499 N.W.2d 285 (Ct. App. 1993) ("The word 'into' is not a technical term of art and does not have a 'peculiar meaning in the law.") "Our laws are written in a common language having meaning and significance apart from and independent of the legislature's use of it." *State v. Ehlenfeldt*, 94 Wis. 2d 347, 356, 288 N.W.2d 786 (1980). This Court has rejected the notion the state is

advancing here: that any common word or phrase, once entangled in legality, loses its civilian life. "A quick check of the Wisconsin Statutes shows that these terms ["discharge," "dispersal," "release," and "escape"] are used in many situations completely unrelated to the environment, including criminal law. *Citing a multitude of criminal justice statutes that use these common terms would not transform the terms into criminal justice terms of art.*" *Peace ex rel. Lerner v. Nw. Nat. Ins. Co.*, 228 Wis. 2d 106, 144, 596 N.W.2d 429 (1999) (emphasis added).

Nor, as the state suggests, is reading "separate occasions" out of existence necessary to avoid "destoy[ing]" the functioning of our statutes. Resp. 14. There is no danger of rendering the statute unworkable or of creating conflicts within the law. Despite the state's claims, it's not true that the sex-offender registry statute is "closely related" to the misdemeanor repeater statute. The registry is non-punitive and intended to protect the public. *State v. Bollig*, 2000 WI 6, ¶20, 232 Wis. 2d 561, 605 N.W.2d 199. The misdemeanor repeater statute—which has nothing in particular to do with sex offenses or the registry—is part of the criminal code and expressly deals with punishment. "The same term may have different meanings when it is used in different statutes." *Lang v. Lang*, 161 Wis. 2d 210, 218–19, 467 N.W.2d 772 (1991). "[T]here surely is no rule of construction requiring the same meaning to be given to the same word, used in different connection in different statutes." *Rupp v. Swineford*, 40 Wis. 28, 31 (1876).

B. The legislative history the state cites is irrelevant because the statutory language is plain; it is also unpersuasive.

As noted above, the state has not asserted that its proposed non-meaning of "separate occasions" is plain from the language of the statute. And the state has not even argued that its reading is one of two reasonable textual readings—which would make the statute ambiguous. Because the statute is not ambiguous, legislative history does not enter the picture. *Kalal*, 271 Wis. 2d 633, ¶46.

But even if recourse to legislative history were appropriate here, the documents the state offers gives little support to its claims. The state points to a report prepared by the Department of Corrections proposing changes to the registry law. A single state senator's staff wrote to a drafter at the Legislative Reference Bureau that "[w]e would like to include these into the draft" of what would eventually become 1995 Wis. Act 440, which created the lifetime-registry requirement for those convicted of sex offenses "on 2 or more separate occasions." Resp. 23.

Even if the report were crystal clear about the DOC's intended meaning of "2 or more separate occasions," it would be a poor guide to the intentions of the legislature as a whole. "[C]ommittee reports … are drafted by committee staff and are not voted on (and rarely even read) by the committee members, much less by the full house. And there is little reason to believe that the members of the committee reporting

the bill hold views representative of the full chamber." Antonin Scalia and Bryan A. Garner, Reading Law 376 (2011).

But the report is not crystal clear. Though the state's argument on the point covers several pages, it turns out that it is relying wholly on a single phrase from the DOC document: the recommendation for lifetime registration for those convicted "of two (2) or more sexual offenses." Resp. 10-13. But the very same report—in fact, the same sentence—clarifies that it is describing "*repeat* sex offenders"; it later specifies that the requirement would apply to those with "2 or more *separate* convictions" (emphasis added). These three short phrases—which for the most part simply mirror the statutory language—do not come close to substantiating the state's claim that the legislature intended the phrase "2 or more separate occasions" to have no meaning. Nor does the fiscal estimate the state cites shed any more light: it simply says the lifetime-registry mandate applies to those "with two or more *separate* sexual assault convictions." Resp. App. 34.

C. Respecting the plain meaning that convictions must occur on "2 or more separate occasions" does not generate absurd results.

The state contends that giving effect to the legislative requirement of "separate occasions" of conviction would lead to absurd results. It observes that Rector was alleged to have possessed thousands

of unlawful files (though he was only charged with possessing ten and pleaded to possessing five). It then constructs a hypothetical in which a defendant who possessed only two images of child pornography pleads in two cases in two different counties. How, the state asks, can it be that this hypothetical defendant is required to register for life as a sex offender, while Rector is not? Resp. 27.

The first answer is that Rector *could have been* ordered to register as a sex offender for life. This is allowed, in the circuit court's discretion, any time registration is required. Wis. Stat. § 973.048(4). So even the state's hypothetical defendant is not necessarily treated as more dangerous than Rector. If the sentencing court had found it warranted, it could have ordered Rector to register for life. It did not, perhaps because it did not believe that Rector was among those defendants who pose the most severe risk to the public. He'd never been charged with a crime before this case; there was no allegation that he'd ever committed or attempted to commit a hands-on offense; and at any rate, the 15-year requirement will keep him on the registry until at least 33 years have passed since his arrest: the year will be 2051, and Rector will be 67 years old.

But more basically, the only thing the state's hypothetical demonstrates is the obvious fact that counting to two—two of anything—is a crude tool for differentiating the dangerousness of offenders. *Any* such simple rule can lead to arguably inequitable treatment in a particular case.

The state's simple rule has the same problem. Imagine two defendants, each of whom is accused of grooming a 15-year-old over the internet and attempting to arrange a meeting in a hotel room. The first ends up convicted of child enticement, a Class D felony with a 25-year maximum sentence. Wis. Stat. § 948.07(1). The second defendant—who has a viable defense, or perhaps is only 19 and is thus viewed as less culpable—is charged only with two counts of exposing a child to harmful material, Class I felonies with a total of 7 years' possible imprisonment. Wis. Stat. § 948.11(2)(a)1. Under the state's rule, only the second defendant would be required to register for life; the first would not. Wis. Stat. §§ 301.45(5)(b)1.

The disparate outcomes generated by the state's rule are most likely to show up in cases like this one, involving the possession of child pornography. This offense has a mandatory minimum of three years of initial confinement and a maximum of 25 years imprisonment. Wis. Stat. §§ 948.12(3)(a); 939.617(1). It's also the nature of the offense that it's comparatively rare to find a defendant who could be charged with just *one* count of possessing child pornography: possession of dozens, hundreds or even thousands of images is typical. *See State v. Hoppe*, 2009 WI 41, ¶10, 317 Wis. 2d 161, 765 N.W.2d 794; *State v. Gant*, 2015 WI App 83, ¶7, 365 Wis. 2d 510, 872 N.W.2d 137; *State v. Van Buren*, 2008 WI App 26, ¶4, 307 Wis. 2d 447, 746 N.W.2d 545.

For these reasons, it's not common for the state to charge a defendant for each and every image: it's unnecessary, as just a handful of images carry enough time to impose an effective life sentence, and just one count is all that's needed to impose a much longer sentence than is typical in these cases. Rector, for example, was charged with 10 counts and pleaded to 5; the circuit court could have given him up to 75 years of initial confinement but gave him 8. The court could have given him this same sentence if he'd pleaded to only one count (as is also common in multi-count cases). He wouldn't be any more or less dangerous; but even the state would have to concede he wouldn't face mandatory lifetime sex-offender registration.

So, the state's reading of the statute generates at least as much "absurdity" as it seeks to avoid. But the state's absurdity argument has a deeper failing too: it fails to consider the purpose of the registry. A construction of a statute isn't "absurd" if it serves the purpose of the enactment. Giving force to the requirement that convictions happen on "separate occasions" *does* advance the goals of the sex-offender registry, in a way that the state's proposed rule does not.

The purpose of the sex-offender registry is, of course, to protect the public from convicted sex offenders. *State v. Smith*, 2010 WI 16, ¶26, 323 Wis. 2d 377, 780 N.W.2d 90. And the reason for this protection is, as the state notes, the perception (justified or not) that those who have been convicted of sex offenses are very likely to commit more of them.

Resp. 24. Likewise, the purpose of the mandatory lifetime requirement for some sex offenders is to provide still more protection against a subgroup of those offenders deemed more dangerous. *Id.*

As the discussion above shows, the simple *number* of eligible offenses for which a conviction has been entered in one case—besides failing to comport with the "separate occasions" language—is a suspect means to decide which offenders are in this high-danger category. But there is—both in research on sex-offender recidivism, and in the case law—better reason to rely on the number of convictions actually entered on "separate occasions."

This is the commonsense notion that a person who has offended, been punished, and offended again has demonstrated that he or she was not deterred or reformed by the efforts of the legal system. Common sense turns out to be accurate in this instance. Civil commitment schemes like our own state's ch. 980 have generated a great deal of research on what characteristics and factors are predictive of recidivism. And it turns out that prior opportunities to "learn a lesson"—when those opportunities are foregone—are a key sign of danger. For this reason, actuarial instruments like the Static-99R count multiple prior *sentencing dates* as a risk factor for future offenses. They also count the number of total sex offenses—but in so doing, they *exclude* the most recent offense, meaning that only those who have been convicted on two or more separate occasions are regarded as particularly risky. *See*, *e.g.*,

R. Karl Hanson and David Thornton, Notes on the Development of Static-2002,[4] (noting that research showed "the number of index offences" was unrelated to recidivism, whereas number of prior sentencings was most strongly correlated with reoffense).

This Court also relied on this justification for the results in both *Wittrock* and *Hopkins*. In *Wittrock*, it said that the more severe punishment for repeat offenders was merited for "those persons who do not learn their lesson or profit by the lesser punishment given for their prior violations of criminal laws." 119 Wis. 2d at 664. In *Hopkins*, it said that a person who had previously been convicted of three misdemeanors—even if all convictions happened at once—would be guaranteed "one more chance to learn their lessons and profit from the lesser punishment given for their prior violations of the law. Receiving at least one opportunity to reflect on prior punishment is consistent with the rehabilitative purpose of the statute."[5] 168 Wis. 2d at 813.

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[4] *Available at* https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/nts-dvlpmnt-sttc/nts-dvlpmnt-sttc-eng.pdf.

[5] It is, of course, possible, as in the state's multi-county hypothetical, for a person to be convicted on a second separate occasion even though all the conduct occurred before he or she was convicted on the first occasion. This does not mean, though, that the "separate occasions" rule is without basis; it just means it's an imperfect rule, as any counting rule would be.

Under the state's rule—unlike the one adopted in *Wittrock* and *Hopkins*—this purpose is jettisoned. A person like Rector—who had no criminal charges of any sort before this case—would be adjudged among the most dangerous offenders regardless of whether he ever committed another crime. He'd be placed in this category despite the fact that we have no reason to think he will not reform his behavior in response to the stiff sanction he has received. Putting Rector in this category solely because of the number of counts to which he happened to plead—a number that is, in child pornography cases particularly, often tenuously related to the severity of the offense or the severity of the punishment—is at least as absurd as any hypothetical the state can construct.

So, the state's "absurdity" argument fails. The legislature was well within its rights to distinguish between those who've been arrested and convicted in one proceeding, on the one hand, and those who have been arrested and convicted on multiple occasions, on the other. The legislature has broad authority to make these judgment calls, and it's not for this Court to second-guess them. "An unpalatable result is not the same as an absurd result." *Anderson v. Aul*, 2015 WI 19, ¶114, 361 Wis. 2d 63, 862 N.W.2d 304 (Ziegler, J., concurring). There's nothing absurd about recognizing that "separate occasions" means just what it says here.

D. The Attorney General's opinion adds little to nothing to the Attorney General's argument.

The state—which is, of course, represented by the Department of Justice, headed by the Attorney General—finally points to a 2017 Attorney General opinion on the meaning of "separate occasions" in a different statute, Wis. Stat. § 301.46(2m)(am). Resp. 27-28. Naturally, that rather recent opinion advances the same position that the Attorney General now urges on this Court. It does so using a truncated version of the same analysis the state puts forth here.

Attorney General opinions don't bind this Court, and are persuasive only to the extent they are "well-reasoned." *Town of Vernon v. Waukesha Cty.*, 102 Wis. 2d 686, 692, 307 N.W.2d 227 (1981). If this Court finds the argument offered in the state's brief convincing, it will have no need to look to the recent opinion the brief recapitulates. If, on the other hand, the Court disagrees with the state's argument—that is, doesn't find it well-reasoned—then the fact that the state recently memorialized the argument elsewhere adds nothing to its case.

CONCLUSION

Because the circuit court correctly construed the provision that mandates lifetime registry only where convictions occurred on "2 or more separate occasions," Corey Rector respectfully requests that this Court affirm its order that he register for 15 years after the end of his sentence.

Dated this 6th day of April, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,837 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 6th day of April, 2022.

Signed:

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