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

REPLY BRIEF 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
collinsws@doj.state.wi.us

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

A. Under a well-established presumption, this Court should harmonize the meaning of "separate occasions" in the sex offender registration and habitual criminality statutes.

The statutory analysis "begins with the presumption that the legislature knew the case law in existence at the time it changed the statutes." *Blazekovic v. City of Milwaukee*, 225 Wis. 2d 837, 845, 593 N.W.2d 809 (Ct. App. 1999), *aff'd*, 2000 WI 41, 234 Wis. 2d 587, 610 N.W.2d 467. Under this principle, a court construes a statute "in connection with and in harmony with the existing law," *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 62 n.44, 373 Wis. 2d 543, 892 N.W.2d 233 (quoting *Town of Madison v. City of Madison*, 269 Wis. 609, 614, 70 N.W.2d 249 (1955)), unless the legislative context or history requires a different interpretation. *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).

Rector commits a fatal error by neglecting this well-established presumption. A party may overcome the presumption. *See, e.g., Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 19, 33, 324 Wis. 2d 325, 782 N.W.2d 682 (defining hit-and-run differently in the criminal context from the civil insurance context). But Rector never tries; he simply ignores the presumption beyond a single cursory acknowledgment that the Legislature "is indeed presumed to know the law." (Rector's Br. 19.) By not disputing the State's argument, Rector concedes application of the presumption. *See State v.*

Chu, 2002 WI App 98, ¶ 41, 253 Wis. 2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted.").

This Court should conclude the presumption prevails and harmonize the meaning of the term "separate occasions" in the sex offender registration and habitual criminality statutes. This Court has recognized this presumption for over a century; our forebearers have relied on this principle since at least the time of Abraham Lincoln. (State's Br. 14.) Lincoln's principle for knowledge of and unity in the law governs here because the context and history support its application. (State's Br. 17–25.)

B. Interpreting each conviction as a separate occasion is in accord with statutory interpretation principles and precedent.

1. This Court should conclude plain language principles support such an interpretation.

a. The phrase "separate occasions" was ambiguous under a plain meaning interpretation until precedent provided the meaning.

This Court should abide by *State v. Wittrock* that applied plain meaning analysis, looking to the statutory language itself to conclude the term "separate occasions" was ambiguous. 119 Wis. 2d 664, 670–71, 350 N.W.2d 647 (1984). This Court concluded that "the term 'occasion' may be interpreted in two different ways by well-informed persons." *Id.* at 671. It concluded 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. In *State v. Hopkins*, this Court again reviewed the term

and embraced the *Wittrock* analysis. 168 Wis. 2d 802, 807–08, 484 N.W.2d 549 (1992).

A court is constrained not to alter the *Wittrock-Hopkins* interpretation. *Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d 626, 634, 157 N.W.2d 648 (1968). "This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. But this Court is not 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 is not bound by 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).

Rector's plain language argument is fundamentally flawed because it squarely conflicts with *Wittrock*'s conclusion that the phrase "separate occasions" is ambiguous.

Rector asserts that "the concept of something occurring 'on 2 or more separate occasions' is not mysterious," claiming it has a "plain and obvious meaning." (Rector's Br. 15, 17.) He claims that "'[s]eparate' and 'occasion' are not obscure terms; everyone knows what they mean." (Rector's Br. 11.) These assertions avoid any citation to *Wittrock* in this section of Rector's brief. (Rector's Br. 10–17 (Section II).) Not surprisingly, as *Wittrock* cannot be reconciled with Rector's flawed assertion that "separate occasions" has a plain and universally understood meaning.

Instead, Rector cites to literature from foreign authors and nonbinding federal decisions and opinions from other

states.[1] Notably absent from Rector's argument is any recognition that *Wittrock* already concluded the phrase "separate occasions" is ambiguous.

Rector does not discuss *Wittrock* until a later section—18 pages into his brief (Rector's Br. 18 (citing 119 Wis. 2d 664))—to suggest *Wittrock* predates the "modern" approach to statutory interpretation later articulated in *State ex rel. Kalal v. Cir. Ct. for Dane Cty.* (Rector's Br. 20 (citing 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110)). But Rector's attempt to subvert *Wittrock* contorts *Kalal*. Rector presents the ambiguity test from *Kalal* in a misleading blockquote that omits the quotations and citations from earlier cases. (Rector's Br. 21 (quotations and citations omitted) (quoting 271 Wis. 2d 633, ¶ 47).)

In *Kalal*, this Court did not change the test for ambiguity; it relied on prior doctrine to articulate the test. 271 Wis. 2d 633, ¶ 47 (citing *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 19, 260 Wis. 2d 633, 660 N.W.2d 656; *State v. Martin*, 162 Wis. 2d 883, 894, 470 N.W.2d 900 (1991)). *Kalal* certainly is a significant case, providing clarification to previous analytic confusion on the use of extrinsic sources. *Id.* ¶¶ 43–44. But it did not change the test for ambiguity. *Id.* ¶ 47.

The ambiguity test remains unchanged. In *Kalal*, this Court stated: "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." *Id.* ¶ 47. In *Wittrock*, this Court had made the same pronouncement that a court "will

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[1] 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).

look to the language of the statute itself to determine whether well-informed persons should become confused as to a term's meaning" where a "statutory term is deemed ambiguous if reasonable persons could disagree as to its meaning." 119 Wis. 2d at 669–70.

The phrase "separate occasions" is ambiguous under a plain meaning interpretation. *Id.* at 670–71. *Wittrock* and *Hopkins* analyzed the ambiguous phrase and provided meaning to the term.

b. The phrase "separate occasions" has a legally understood meaning.

When "the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal*, 271 Wis. 2d 633, ¶ 45 (quoting *Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659). Under this framework, a legal term of art receives its accepted legal meaning. *In re Commitment of Matthews*, 2021 WI 42, ¶ 9, 397 Wis. 2d 1, 959 N.W.2d 640. The ambiguous phrase "separate occasions" became a legally understood term. (State's Br. 16 (citing *Zimmerman*, 38 Wis. 2d at 634).) So "separate occasions" should be given its legally understood meaning.

Rector cannot credibly dispute that a legal term of art receives its accepted legal meaning, so he pursues an alternative strategy. He argues "separate occasions" is not a legally understood term. (Rector's Br. 25.) Rector makes a partial concession, acknowledging that "the legislature seems to have acquiesced in their construction of the misdemeanor repeater statute." (Rector's Br. 21.) Rector's approach is that "separate occasions" should have contradictory meanings when counting prior convictions in the sex offender registration and habitual criminality statutes.

The flaw in Rector's argument is that the structure of the statute itself is part of plain meaning analysis; structure is important to meaning. *Kalal*, 271 Wis. 2d 633, ¶ 46.

Here, the habitual criminality and sex offender registration statutes both have the same operative structure. The habitual criminality statute states: "The actor is a repeater ... if the actor was convicted of a misdemeanor on 3 *separate occasions*." Wis. Stat. § 939.62(2). The sex offender registration statute similarly states: "A person ... shall continue to comply with the requirements of this section until his or her death if ... [t]he person has, on 2 or more *separate occasions*, been convicted ... for a sex offense." Wis. Stat. § 301.45(5)(b) and (b)1.

Hopkins resolved that "separate occasions" means separate convictions, regardless of when the crimes were committed. 168 Wis. 2d at 810. *Hopkins* made such a pronouncement in a statute with the same operative structure of counting prior convictions as exists in the sex offender registration statute. The phrase "separate occasions" has a legally understood meaning in such a context.

This Court should apply plain meaning principles to interpret the term "separate occasions" under its legally understood meaning because the statutory structure supports adherence to precedent.

2. This Court should abide by the principle that context is important to meaning.

"Context is important to meaning." *Kalal*, 271 Wis. 2d 633, ¶ 46. "It is certainly not inconsistent with the plain-meaning rule to consider the intrinsic context in which statutory language is used; a plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose." *Id.* ¶ 49.

Rector's failure to appreciate context results in his misguided reliance on *Wooden v. United States*, 142 S. Ct. 1063 (2022). Understanding the context of Congress' use of the phrase "occasions different from one another" in the Armed Career Criminal Act (ACCA) illuminates the flaw in Rector's argument.

The ACCA mandates a 15-year minimum sentence for unlawful firearm possession when a defendant has three or more qualifying prior convictions. *Wooden*, 142 S. Ct. at 1067. The ACCA originally designated a defendant as a career criminal when the defendant had "three previous convictions":

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for robbery or burglary, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years ....

Pub. L. No. 99–308, § 104, 100 Stat. 449, 458 (1986) (to be codified at 18 U.S.C. § 924(e)(1)). Congress later amended the ACCA,[2] making clear that a career criminal under the act had to have "three previous convictions ... committed on occasions different from one another":

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years ....

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[2] Congress made some amendments not relevant to the issue before this Court. *See, e.g.*, Pub. L. 99–570, § 1402, 100 Stat. 3207 (1986) (replacing "robbery or burglary" with "violent felony or a serious drug offense"); Pub. L. 107–273, § 4002, 116 Stat. 1758 (2002) (replacing "not more than $25,000" with "under this title").

18 U.S.C. § 924(e)(1) (*see* Pub. L. No. 100–690, § 7056, 102 Stat. 4181, 4402 (1988) (amending 18 U.S.C. § 924(e)(1))).

"Congress added the occasions clause only after a court applied ACCA to an offender … convicted of multiple counts of robbery arising from a single criminal episode." *Wooden*, 142 S. Ct. at 1072. Congress made a deliberate choice—after a court interpretation—to amend the ACCA so that three simultaneous convictions did not result in a career criminal designation. *Id.* at 1073.

By failing to understand the context behind Congress' amendment to the ACCA, Rector misapplies the decision. The ACCA already contained the phrase *three previous convictions* before Congress later amended it to add the additional phrase *committed on occasions different from one another*. *Id.* at 1072. So, the occasions clause had to have an additional limitation beyond the number of prior convictions.

In contrast, the context behind the Wisconsin Legislature's use of the phrase "separate occasions" in the habitual criminality and sex offender registration statutes presents the opposite situation from Congress' amendment to the ACCA. *Hopkins* explained that occasion referred to the occasion of each conviction. 168 Wis. 2d at 805. Our Legislature acquiesced to this Court's interpretation of "separate occasions" by not amending the habitual criminality statute. *See Zimmerman*, 38 Wis. 2d at 634 (legislative acquiescence). But it did more. The Legislature began using the term "separate occasions" in new legislative enactments, *e.g.* 2011 Wis. Act 277 (creating Wis. Stat. § 939.621(1)(b)), including when it amended the sex offender registration statute, 1995 Wis. Act 440, § 72 (creating Wis. Stat. § 301.45(5)(b)1.).

This Court should abide by the principle that context is important to meaning. *Kalal*, 271 Wis. 2d 633, ¶ 46. Congress took action to amend the ACCA when it disagreed with a

court's interpretation. That is a very different context from the Legislature's embracement of this Court's interpretation. This Court should exercise proper constraint and not alter the meaning of the phrase "separate occasions." *Zimmerman*, 38 Wis. 2d at 634.

3. This Court may rely on legislative history and an attorney general opinion under established limits in statutory interpretation principles.

Legislative history and an attorney general opinion are relevant sources under statutory interpretation principles. A court looks to history when considering the presumption that the Legislature acts with full knowledge of the law, *supra* Section A. (citing *Campenni*, 180 Wis. 2d at 557). Extrinsic sources of interpretation are appropriate to confirm or verify a plain meaning interpretation or resolve ambiguity in the statutory language. *Kalal*, 271 Wis. 2d 633, ¶ 51. The State properly limited its reliance on the history and opinion to acceptable purposes. (State's Br. 15, 17–26.)

This Court should conclude that the legislative history and attorney general opinion confirm the meaning of "separate occasions" in the sex offender registration statute. Rector is dismissive of the legislative history and attorney general opinion. (Rector's Br. 28–29, 36.) He asserts the Department of Corrections's report in the drafting file "is not crystal clear." (Rector's Br. 29.) But the report does add clarity; it identifies "repeat sex offenders" subject to lifetime registration as "any person convicted, or found not guilty of mental disease or defect, of two (2) or more sexual offenses" without any temporal requirement. (State's Br. 24 (quoting Wis. Dep't of Corr., *Sex Offender Community Notification: Proposed Program Components* 6 (Dec. 15, 1994)).)

4. This Court should interpret the sex offender registration statute reasonably to avoid absurd results.

This Court should interpret the sex offender registration statute reasonably to avoid absurd results. *See Kalal*, 271 Wis. 2d 633, ¶ 46. It should interpret "separate occasions" in an "equitable way" to avoid "confusion and discrimination among defendants." *Hopkins*, 168 Wis. 2d at 810.

Rector effectively concedes his interpretation leads to an absurd result, though he attempts to divert attention away by alleging "[*a*]*ny* such simple rule can lead to arguably inequitable treatment in a particular case." (Rector's Br. 30.)

Rector makes a tactical error when he relies on the Static-99R, an actuarial instrument. (Rector's Br. 33–34.) This 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 here because this Court is tasked with interpreting what the Legislature meant—not what it ought to have intended based upon an outside social science instrument created after the legislative enactment.[3]

This Court should of course avoid absurd results in its interpretation of a statute. *Kalal*, 271 Wis. 2d 633, ¶ 46. It is not 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. *See State v. Nash*, 2020 WI 85, ¶ 32, 394 Wis. 2d 238, 951 N.W.2d 404 (presumption of innocence).

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[3] The Static-99R derives from an actuarial tool created in 1999. *Commonwealth v. George*, 76 N.E.3d 217, 221 n.2 (2016).

C. This Court should conclude that the circuit court erred in imposing only 15 years of registration and declining to amend the judgment to require lifetime registration.

The State explained the circuit court's error in imposing only 15 years of registration. (State's Br. 28–30.) Rector never argues why the circuit court's analysis was correct and offers only a conclusory statement that "the circuit court correctly construed the provision ... that he register for 15 years." (Rector's Br. 37.) By failing to adequately respond, Rector concedes the error in the circuit court's order. *Chu*, 253 Wis. 2d 666, ¶ 41. As a case subject to de novo review, Rector is not required to defend the circuit court's reasoning or analysis. But his silence is revealing.

* * * * *

The State 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." *Kalal*, 271 Wis. 2d 633, ¶ 44. Rector need not register as a sex offender any longer than the Legislature required. Canons of statutory interpretation and fidelity to the legislative enactment and judicial precedent require that he must register for life.

CONCLUSION

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

Dated this 20th Day of April 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 2988 words.

Dated this 20th day of April 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 20th day of April 2022.

WINN S. COLLINS
Assistant Attorney General