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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2020AP001213-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.

AMICUS CURIAE BRIEF OF
WISCONSIN STATE PUBLIC DEFENDER

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. The phrase “on 2 or more separate occasions” in the registration statute should be interpreted, based upon its plain language, to mean convictions occurring at different times, as litigants have interpreted it for years.	1
A. Litigants, courts, and DOC relied upon the plain language of “on 2 or more separate occasions” in determining whether lifetime registration was required, until an Attorney General opinion reinterpreted the statute.	2
B. Prosecutorial discretion, not public protection, would determine lifetime registration with the state’s interpretation.	5
C. Reinterpreting “on 2 or more separate occasions” in the registration statute retroactively – and without notice – imposes severe and uninformed consequences.	7
1. The consequences of registration and GPS monitoring are significant.	7

2. The reinterpretation prompted retroactive consequences, thwarting negotiated resolutions, and limiting future negotiation options. 13

CONCLUSION..... 15

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 132 F. Supp. 3d 1085 (E.D. Wis. 2015),
rev'd on other grounds, 811 F.3d 929 12

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Wis. Admin. Code DOC § 332.20.....	12
Green Bay Wis. Code 1984 § 27.621 (2022).....	9

ARGUMENT

- I. The phrase “on 2 or more separate occasions” in the registration statute should be interpreted, based upon its plain language, to mean convictions occurring at different times, as litigants have interpreted it for years.**

For decades, litigants, courts, and the Department of Corrections (DOC) have interpreted “on 2 or more separate occasions” in the registration statute to mean what it says: a person convicted of two or more sex offenses at different times – *i.e.*, separate occasions – must register for life. Despite its plain language, a 2017 Attorney General opinion reinterpreted this commonly understood phrase in the registration statute to mean two convictions, even if the convictions stem from the same incident and same complaint, rendering “separate” and “occasions” meaningless.

This interpretation defies both the language of the statute and the spirit of the law which creates additional public protections when an individual is a *repeat* offender. A person convicted at one time for conduct stemming from a single incident is not a *repeat* offender. Unlike the repeater provisions relied upon by the state, this reinterpretation does not increase public protection when a person “does it again.” Instead, it arbitrarily adds restrictions based

upon the number of convictions the state charges for a single incident or single resolution.

It is important to remember that circuit courts – irrespective of this Court’s decision here – can still exercise discretion in individual cases and order lifetime registration when needed. Wis. Stat. § 939.615. The issue, here, involves *mandatory* lifetime registration – *i.e.*, where the court has *no* discretion to evaluate the need for registration based upon the facts and circumstances of an individual case.

The State Public Defender has many former and current clients that will be impacted by this Court’s decision. This brief will not repeat the statutory construction arguments developed by the parties. Instead, it will focus on the practical implications of interpreting a statute based upon factors other than – and contrary to – its plain language.

A. Litigants, courts, and DOC relied upon the plain language of “on 2 or more separate occasions” in determining whether lifetime registration was required, until an Attorney General opinion reinterpreted the statute.

In 1996, the Legislature enacted the provision of the registration statute at issue here, Wis. Stat. § 301.45(5)(b)1. 1995 Wis. Act 440. For decades after enactment, in reliance on the plain language of the statute, litigants have negotiated plea agreements to multiple non-mandatory registration charges in order

to avoid lifetime registration. Sex offender registration is often a key component – or even the primary component – of negotiating a resolution. Information about registration is also essential to properly advising clients who are weighing the risks and benefits of going to trial versus entering a plea. As will be explained below, this is because sex offender registration – although considered a “collateral consequence” – can often result in more significant and long-lasting consequences than punishment.

The same is true for GPS monitoring, which will also be impacted by this Court’s decision. Lifetime GPS is required when a person is released from “confinement in a state correctional institution” and has “on 2 or more separate occasions, been convicted ... for a sex offense.” Wis. Stat. §§ 301.48(2)(a)7., 301.46(2m)(am)1. This provision has been interpreted consistently with the registration statute.

In 2017, the goal posts were moved. The Attorney General issued an opinion discussing whether “a statute governing law enforcement bulletins for sex offenders with multiple criminal convictions applies when the convictions occur at the same time or stem from the same criminal complaint.”¹ The opinion concluded that “on 2 more

¹ OAG-02-17 (Sept. 1, 2017), found at <https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/2017/OAG-02-17.pdf>.

separate occasions” referred to the number of convictions even when the convictions were imposed at the same time and were based upon the same complaint. It rendered “separate” and “occasions” meaningless.

Prior to this opinion, DOC had been using the common, ordinary, and accepted meaning of “on 2 or more separate occasions,” and therefore, had not required those convicted of multiple sex offenses at the same time to register or wear a GPS monitor for life.² DOC changed course after the opinion and sent hundreds of letters to people retroactively informing them that *for the rest of their lives* they had to: (1) register as a sex offender and/or (2) wear a GPS monitor.

Many of the people receiving these letters had already completed their sentences, had not committed new offenses, and had moved on productively with their lives. The personal impact of this reinterpretation was described in a recent article in the Capital Times.³ It described an individual who was convicted in 2000 of two counts of second-degree sexual assault of a child, had completed his sentence, and was “finally pulling his life together” when he

² Nicholas Garton & Jessie Opoien, *Sex Offenders Placed on Lifetime GPS Tracking Fight Reinterpretation of Wisconsin Law*, The Capital Times (Apr. 20, 2022), https://captimes.com/news/sex-offenders-placed-on-lifetime-gps-tracking-fight-reinterpretation-of-wisconsin-law/article_48187b6c-1b40-5a2c-91f7-d3e20a66c69d.html.

³ *Id.*

received the letter from DOC telling him that he had to wear a GPS monitor for the rest of his life, despite DOC already assessing his risk and determining GPS was not required. This is just one example.

This illustrates why reinterpreting a statute – decades after enactment and contrary to its plain language – is inherently problematic. It creates a moving target. That is why focusing on the language of the statute is paramount. Courts “attempt ‘to give reasonable effect to every word, in order to avoid surplusage’ and apply the fundamental canon of statutory construction that ‘nothing is to be added to what the text states or reasonably implies.’” *State v. Hinkle*, 2019 WI 96, ¶18, 389 Wis. 2d, 935 N.W.2d 271 (citing *State ex. rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 100 and Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 93 (2012)). “[W]e interpret the words the legislature actually enacted into law.” *Id.* (citation omitted). The decades-long reliance on the plain language of s. 301.45(5)(b)1., supports the common, ordinary and accepted meaning used by the circuit court here.

B. Prosecutorial discretion, not public protection, would determine lifetime registration with the state’s interpretation.

The state often charges people with multiple offenses for a single act or single course of conduct. *State v. Davison*, 2003 WI 89, 263 Wis. 2d 145, 666

N.W.2d 1. “A single *act* may be an offense against two statutes.” *State v. Davison*, 2003 WI 89, ¶35, 263 Wis. 2d 145, 666 N.W.2d 1 (emphasis in original). Charges are multiplicitous only when they are “identical in law and fact” and the legislature has not authorized cumulative punishments for the same offense. *Id.* at ¶¶35-37.

Sex offenses are no exception. Consider child enticement. Wis. Stat. § 948.07. It can be charged as a second count for a *single* act with: (1) sexual assault of a child, (2) soliciting a child for prostitution, (3) trafficking a child, (4) child pornography, (5) sexual exploitation of a child, and (6) use of a computer to facilitate a child sex crime. All are considered “sex offense[s]” for registration purposes, yet multiple convictions could result from a *single* act, rather than *repeat* conduct. The state’s ability to charge multiple counts for a single incident does not provide insight about a person’s risk. Instead, it is an illustration of the broad discretion afforded prosecutors.

That is why the language “on 2 or more separate occasions” makes sense. It increases public protection by requiring lifetime registration or GPS monitoring for *repeat* behavior. The person is more dangerous, warranting heightened restrictions, because they did it again.⁴

⁴ DOC found “when specifically examining sexual recidivism, the research literature predominantly shows very low rates for sex offenders (particularly in comparison to general recidivism), even at long follow-up periods (up to 15 years later).” Joseph R. Tatar II & Anthony Streveler, Wis.

- C. Reinterpreting “on 2 or more separate occasions” in the registration statute retroactively – and without notice – imposes severe and uninformed consequences.
1. The consequences of registration and GPS monitoring are significant.

It is well-established that sex offender registration and GPS monitoring have significant real-life consequences, even though they are considered “collateral consequences.” Those deemed sex offenders have suffered “vandalism, loss of employment, and community harassment.” *State v. Bollig*, 2000 WI 6, ¶26, 232 Wis. 2d 561, 605 N.W.2d 199. Constant ostracism can lead to “stress, isolation, shame, and hopelessness,” which takes a psychological toll on the registered individual. Jill S. Levenson & Leo P. Cotter, *The Effect of Megan’s Law on Sex Offender Reintegration*, 21 *Journal Contemp. Crim. Just.* 49 (2005). The physical safety of those on the registry can also be threatened. Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 *N.Y.U. Rev. L. & Soc. Change* 727, 760 (2013).

Dep’t Just., *Sex Offender Recidivism after Release from Prison*, p. 4 (2015), available at <https://doc.wi.gov/DataResearch/RecidivismReincarceration/SexualOffenderRecidivismReport.pdf>.

Individuals on the registry also face tremendous hurdles when seeking suitable and stable housing. Registrants in Wisconsin cited housing exclusions and restrictions as the most prominent issue they face; 83% of respondents said they had been excluded from residences due to their registration status.⁵ Over 150 Wisconsin municipalities have residency restrictions.⁶ These restrictions have a devastating impact on a registered person's ability to find housing. For example, the Village of Pleasant Prairie recently passed an ordinance restricting sex offenders from residing within 3000 feet of certain "prohibited location[s]" as well as within 500 feet of another registered sex offender. *See Hoffman v. Vill. of Pleasant Prairie*, 249 F. Supp. 3d 951 (E.D. Wis. 2017). These restrictions barred sex offenders from residing in over 90% of the city, with the remaining 10% being largely non-residential areas. *Id.*

After a challenge to the ordinance in federal court, Pleasant Prairie adjusted its ordinance to

⁵ Richard G. Zevitz & Mary Ann Farkas, U.S. Dep't. of Just., *Sex Offender Community Notification: Assessing the Impact in Wisconsin*, p. 10 (2000), available at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/sex-offender-community-notification-assessing-impact-wisconsin>.

⁶ Riley Vetterkind, *Homeless offenders create gaps in Wisconsin's GPS monitoring system*, Milwaukee Journal Sentinel (Mar. 8, 2018), available at <https://www.jsonline.com/story/opinion/contributors/2018/03/08/homeless-offenders-create-gaps-wisconsin-gps-monitoring-system/395703002/>.

allow sex offenders to reside in roughly one quarter of the village's residential spaces. *Id.* Prior to a similar ordinance revision, Brookfield allowed those on the registry to reside in just 7% of its city limits.⁷ And, Green Bay's proximity restriction leaves most of the city off-limits to those on the registry. Green Bay, Wis. Code 1984 § 27.621 (2022).⁸

As is the case across the country, this layering of state and local residency restrictions has effectively "legislated [registered sex offenders] into homelessness." Jill S. Levenson, *Hidden Challenges: Sex Offenders Legislated into Homelessness*, 18 J. Soc. Work 348, 348 (2018); *see also State v. Dinkins*, 2012 WI 24, 339 Wis. 2d 78, 810 N.W.2d 787 (individual charged for failing to comply with the registration statute because he could not find appropriate housing and intended to be homeless upon release from custody).

Wearing a GPS monitor compounds these issues while causing problems of their own. Wisconsin's ankle monitors are approximately 2.3 x 3.5 x 1.5 inches and are always visible when an individual is wearing shorts or is sitting while wearing pants. *State v. Muldrow*, 2018 WI 52, ¶22, 381 Wis. 2d 492, 504, 912 N.W.2d 74, 81. Even when

⁷ Corrinne Hess, *Communities Continue to Rethink Sex Offender Residency Rules*, Wisconsin Public Radio (Jan. 28, 2019, 4:00 PM), available at <https://www.wpr.org /communities-continue-rethink-sex-offender-residency-rules>.

⁸ *See infra* fn 6, Vetterkind, *Homeless offenders create gaps in Wisconsin's GPS monitoring system*.

standing, the monitor creates an obvious bulge in the bottom of the wearer's pant leg. *Id.* This prominent monitor thus serves as a beacon for others in the community to “infer that the wearer is a sex offender.” *Muldrow*, 377 Wis. 2d 223, ¶6, *aff'd*, 381 Wis. 2d 492. The monitor also has an audio speaker that plays messages from DOC personnel at random intervals and is loud enough to be heard by anyone “within earshot of the offender.” *Muldrow*, 381 Wis. 2d 492, ¶23.

GPS monitors further restrict housing options, especially in rural areas. All monitors must have cellular reception to the DOC's Electronic Monitoring Center located in Madison.⁹ If reception is lost, law enforcement can detain the individual, even if they were found in an approved location. These policies mean housing options are limited to areas with a strong cellular reception to the DOC's monitoring center.¹⁰

For example, a Monroe County man had to move out of his family's home because the house's poor cellular reception led to multiple arrests that cost him his job. This case is not unique; many individuals struggle to find housing that both abide

⁹ Riley Vetterkind, *Wisconsin Doubles GPS Monitoring Despite Five years of Malfunctions, Unnecessary Jailings, Wisconsin Watch* (Mar. 4, 2018), available at <https://wisconsinwatch.org/2018/03/wisconsin-doubles-gps-monitoring-despite-fiveyears-of-malfunctions-unnecessary-jailings/>.

¹⁰ *Id.*

by the residency restrictions and maintain a strong cellular connection for their monitor.¹¹ This helps explain a 2018 DOC report stating that over 10% of sex offenders on GPS monitoring in Wisconsin lacked a permanent place to live.¹²

The use of GPS monitors also creates challenges that inhibit reintegration. The most concerning problem stems from the monitor's unreliability. Wisconsin's monitors have a long history of frequently malfunctioning or easily losing their cellular connection. A one-month review of Wisconsin DOC monitors found the monitoring center "lost cell connection 56,853 times amongst 896 offenders."¹³

When the DOC monitoring center loses connection, local law enforcement is often alerted to investigate the issue. Wis. Stat. § 301.48(3)(a)3. Law enforcement is then permitted to take the individual into custody for up to 72 hours while they investigate the violation. Wis. Admin. Code DOC § 328.27(6). Therefore, the monitor's frequent malfunctions and lost connections cause offenders to cycle in and out of county jail and inflicts "psychological torture" on those forced to wear the monitors.¹⁴ "Even short

¹¹ *Id.*

¹² See *infra* fn 6, Vetterkind, *Homeless offenders create gaps in Wisconsin's GPS monitoring system.*

¹³ See *infra* fn 9, Vetterkind, *Wisconsin Doubles GPS Monitoring.*

¹⁴ Mario Koran, *Lost Signals, Disconnected Lives*, Wisconsin Watch (Mar. 24, 2013), available at

periods of jail are highly disruptive and can cause a person to lose his job, be unable to care for children, or even lose stable housing.”¹⁵

There are also physical and financial costs associated with GPS monitors. They are attached with a neoprene rubber strap, which can cause frequent blistering, rawness, scabs, and other skin irritations. *Muldrow*, 381 Wis. 2d 492, ¶21. While the monitors may not cause serious or life-threatening injuries, this chronic irritation and pain is cited as a major complaint amongst individuals who wear the monitor.¹⁶

Those on the registry must also pay a monthly tracking fee that is determined by the person’s income. Wis. Admin. Code DOC § 332.20. This can be a substantial financial burden for individuals attempting to reintegrate back into society, especially in light of the “overwhelming prevalence of homelessness, unemployment, and poverty among formerly incarcerated people.”¹⁷

<https://wisconsinwatch.org/2013/03/lost-signals-disconnected-lives/>.

¹⁵ See *infra* fn 9, Vetterkind, *Wisconsin Doubles GPS Monitoring*.

¹⁶ See *infra* fn 9, Vetterkind, *Wisconsin Doubles GPS Monitoring*; *Belleau v. Wall*, 132 F. Supp. 3d 1085 (E.D. Wis. 2015), *rev’d on other grounds*, 811 F.3d 929.

¹⁷ *Recidivism and Reentry: What Makes People More or Less Likely to Succeed Upon Release*, Prison Policy Initiative,

2. The reinterpretation prompted retroactive consequences, thwarting negotiated resolutions, and limiting future negotiation options.

Lifetime registration and GPS monitoring often becomes the focus of plea negotiations due to the significant consequences, especially with mitigated conduct likely to result in less severe punishment. Consider this common resolution: plead to two less serious charges in exchange for dismissing a more serious count that would require lifetime registration. For example, if a 19-year-old has sexual contact with a 15-year-old they will be charged with sexual assault of a child under Wis. Stat. § 948.02(2), which requires lifetime registration. Wis. Stat. § 301.45(5)(b)1m. Since he is 19 years old, the exception for underage conduct would not apply. Wis. Stat. § 301.45(1m).

However, at 19 there is significant opportunity for brain development and maturation. The punishment may be relatively short, but registration would be for life. In this situation, for decades, litigants have relied upon the plain language of s. 301.45(5)(b)1. to negotiate resolutions with two lesser sex offenses to avoid unnecessary lifetime registration. After issuance of the Attorney General opinion, that person would have received a letter – possibly after the sentence was complete – indicating

available at

https://www.prisonpolicy.org/research/recidivism_and_reentry/.

lifetime registration was required. And, if the person received a short prison sentence, that person would also have to wear a GPS monitor for life. Wis. Stat. §§ 301.48(2)(a)7., 301.46(2m)(am)1. This significant change in consequences is contrary to: (1) the language of the statute, (2) the goal of the negotiated resolution, and (3) information provided to the individual when waiving his constitutional rights.

However, retroactively effectuating the intent of the negotiations is unlikely because the convictions could be years or decades old. Wis. Stat. § 974.06 (custody is a prerequisite to filing a collateral postconviction motion). This problem exists because the plain language of the statute was relied upon in negotiating, but is now being ignored.

This new interpretation will also limit future negotiating options. Avoiding mandatory lifetime registration and/or GPS monitoring will continue to be a priority given the lifelong consequences. Consider possession of child pornography cases where rarely one count is charged. If the state seeks more than one conviction, but only seeks the presumptive minimum of three years initial confinement, concurrent, negotiations may stall because lifetime registration and lifetime GPS monitoring will be mandated. A young person, who is less culpable, and will have a long life after release, may not agree to multiple counts if that means he must register and wear a GPS monitor for upwards of 50 years. Mandating this outcome is contrary to the statute.

CONCLUSION

This Court should rely on the plain language of “on 2 or more separate occasions, been convicted” in the registration statute and conclude lifetime registration is not required when two sex offense convictions are imposed at the same time.

Dated this 20th day of June, 2022.

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,983 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 20th day of June, 2022.

Signed:

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