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Mr. Jon E. Litscher
Secretary
Wisconsin Department of Corrections
3099 East Washington Avenue
Post Office Box 7925
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Dear Secretary Litscher:

¶ 1. You ask if 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. Your question concerns Wis. Stat. § 301.46(2m)(am), which is triggered by convictions, or findings of not guilty by reason of mental disease or defect, "on 2 or more separate occasions."[1] When triggered, the statute requires an agency releasing a sex offender into the community to send a bulletin to local law enforcement.

¶ 2. I conclude that the language 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.[2] The Wisconsin Supreme Court has interpreted the "separate occasions" language in an analogous sentencing statute and concluded that the term refers to the number of convictions. I reach the same conclusion here.

[1] The statute applies both to convictions and to findings of not guilty by reason of mental disease or defect. The remainder of this opinion only discusses the statute in terms of convictions, but the analysis holds true for findings of not guilty for reason of mental disease or defect.

[2] You pose your question in two ways: whether it matters if convictions occur at the same time, and whether it matters if the convictions stem from counts in the same complaint. The discussion that follows applies equally to both questions.

¶ 3. The meaning of "separate occasions" is a question of statutory interpretation. "[S]tatutory language is interpreted in 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; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "The legislature is presumed to act with full knowledge of existing case law when it enacts a statute," so statutes are interpreted in light of the law at the time of their enactment. *Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 694 N.W.2d 296.

¶ 4. The statutory language you ask about appears in Wis. Stat. § 301.46(2m)(am). The section was created by 1995 Wis. Act 440, which revised some existing sex offender registration and notification regulations and also created new ones, including section 301.46(2m)(am). *See* 1995 Wis. Act 440, § 75; *State ex rel. Kaminski v. Schwarz*, 2001 WI 94, ¶ 52, 245 Wis. 2d 310, 630 N.W.2d 164 (describing the statutory changes). The resulting sex offender statutes "reflect an 'intent to protect the public and assist law enforcement' and are 'related to community protection.'" *Kaminski*, 245 Wis. 2d 310, ¶ 41 (quoting *State v. Bollig*, 2000 WI 6, ¶¶ 21–22, 232 Wis. 2d 561, 605 N.W.2d 199).

¶ 5. For example, Act 440 created subsections in Wis. Stat. § 301.45 that govern sex offender registration by requiring sex offenders to provide information, including their current residence and other data. It also created Wis. Stat. § 301.46, which complements Wis. Stat. § 301.45. Section 301.46 includes provisions for accessing or distributing sex offender information, including law enforcement access, notification for victims, and public access to some registry information. *See*, *e.g.*, Wis. Stat. § 301.46(2)–(3), (5)–(5n).

¶ 6. In addition to general law enforcement access to information, Wis. Stat. § 301.46 includes a bulletin provision. When certain sex offenders are released into the community, the agency with jurisdiction over the offender may be required to send a bulletin to local law enforcement. *See* Wis. Stat. § 301.46(2m). The bulletins include the registrant's identifying information, residence, offense history, and other information that may be useful to law enforcement. Wis. Stat. § 301.46(2m)(b).

¶ 7. The bulletins are either optional or mandatory depending on the offender's circumstances. The non-mandatory provision applies if the offender has a conviction "on one occasion only." *See* Wis. Stat. § 301.46(2m)(a)1. In that instance,

the agency may issue a bulletin if "such notification is necessary to protect the public." Wis. Stat. § 301.46(2m)(a)1.–2. (using "may" instead of "shall").

¶ 8. In contrast, the mandatory provision, Wis. Stat. § 301.46(2m)(am), applies to offenders with sex offense convictions "on 2 or more separate occasions":

> If an agency with jurisdiction confines a person under s. 301.046, provides a person entering the intensive sanctions program under s. 301.048 with a sanction other than a placement in a Type 1 prison or a jail, or releases a person from confinement in a state correctional institution or institutional care, and the person has been found to be a sexually violent person under ch. 980 or has, *on 2 or more separate occasions*, been convicted or found not guilty or not responsible by reason of mental disease or defect for a sex offense or for a violation of a law of this state that is comparable to a sex offense, the agency with jurisdiction *shall notify* the police chief of any community and the sheriff of any county in which the person will be residing, employed, or attending school and through or to which the person will be regularly traveling.

Wis. Stat. § 301.46(2m)(am)1. (emphasis added); *see also* § 301.46(2m)(am)2. (applying the same language to offenders who have moved from another state). Thus, whether a bulletin is mandatory turns on whether the offender has been convicted of a sex offense on two or more "separate occasions." The term "separate occasions" is not defined in the statute.

¶ 9. You ask whether "separate occasions" means the quantity of convictions regardless whether the convictions occur at the same time and stem from counts in the same criminal complaint. While no case has squarely analyzed the term "separate occasions" in section 301.46(2m)(am),[3] the Wisconsin Supreme Court has interpreted "separate occasions" in an analogous sentencing statute. *See State v. Wittrock*, 119 Wis. 2d 664, 350 N.W.2d 647 (1984); *State v. Hopkins*, 168 Wis. 2d 802, 484 N.W.2d 549 (1992). Both *Wittrock* and *Hopkins* addressed the repeat offender statute, Wis. Stat. § 939.62(2), which applies if an offender has been convicted of a misdemeanor on three "separate occasions." *Wittrock*, 119 Wis. 2d at 666; *Hopkins*, 168 Wis. 2d at 805. Those cases held that "separate occasions" refers to the quantity of convictions, regardless whether they occurred at the same time in one court proceeding or arose from a single course of criminal conduct.

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[3] Although the Wisconsin Supreme Court has noted that Wis. Stat. § 301.46(2m)(am) refers to someone who "has been convicted of two or more sex offenses," the court has not specifically analyzed the meaning of "separate occasions" in the provision. *See Kaminski*, 245 Wis. 2d 310, ¶ 33 n.8.

¶ 10. In *Wittrock*, the defendant argued that "3 separate occasions" meant three separate court appearances. He contended that the repeater statute did not apply to him because his three convictions occurred in only two appearances. 119 Wis. 2d at 667. The State argued that the statute did apply because the defendant had been "previously convicted of three separate offenses of disorderly conduct." *Id.* The supreme court held that "separate occasions" was ambiguous, permitting resort to legislative history. *Id.* at 670–71, 674. Looking at that history, the court noted a focus on "quantity of crimes" rather than "time of conviction." *Id.* at 674. The court also reasoned that it would make little sense for sentencing enhancement to turn on whether someone happened to plead to more than one offense in one court appearance. *Id.* at 674–75. The court concluded that "separate occasions" referred to the number of offenses, not the number of court appearances. *Id.*

¶ 11. In *Hopkins*, the supreme court confirmed *Wittrock*'s holding and addressed a question left open by the earlier case. The defendant in *Hopkins* argued that "separate occasions" meant separate incidents of crime, not multiple convictions stemming from a single course of conduct. 168 Wis. 2d at 805. The supreme court disagreed, holding that each conviction is a "separate occasion" for purposes of the statute. *Id.* Thus, the statute is triggered when a defendant is convicted of three qualifying crimes, regardless whether they were committed on separate occasions and "regardless of the number of court proceedings." *Id.* at 805, 808–09. The court focused on the fact of additional criminal activity because that was what the Legislature intended the repeater provision to address. *Id.* at 810, 813. The *Hopkins* court made clear that "the quantity of the crimes" was the critical factor and that convictions imposed in the same proceeding could each be counted. *Id.* at 808–10.

¶ 12. I conclude that "separate occasions" in Wis. Stat. § 301.46(2m)(am) should be interpreted as referring to the number of convictions, consistent with the supreme court's interpretation of the repeater statute in *Wittrock* and *Hopkins*. In both statutes, the term is used in a similar way: to count convictions either as a measure of criminality or potential dangerousness to the community. It is the fact of additional criminality, as measured by multiple convictions, that matters.

¶ 13. The timing of the legislation that created the sex offender bulletin law supports this view. The legislation, 1995 Wis. Act 440, postdates *Wittrock* and *Hopkins*. This is notable because courts "presume that 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). "The legislature is presumed to act with full knowledge of existing case law when it enacts a statute. A statute must be interpreted in light of the

common law and the scheme of jurisprudence existing at the time of its enactment." *Strenke*, 279 Wis. 2d 52, ¶ 28 (citing *Czapinski v. St. Francis Hosp.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120, and *State v. Hansen*, 2001 WI 53, ¶ 19, 243 Wis. 2d 328, 627 N.W.2d 195). When the Legislature chose to use "separate occasions" to count convictions in section 301.46(2m)(am), it did so against the backdrop of clear precedent interpreting that term to mean the quantity of convictions, not the number of proceedings or criminal incidents. It should be presumed that the Legislature intended "separate occasions" would have the same meaning in section 301.46(2m)(am).

¶ 14. Further, terms are read in the context of surrounding statutory provisions. *Kalal*, 271 Wis. 2d 633, ¶ 46. Wisconsin Stat. § 301.46 reflects the Legislature's concern with offenders' potential danger to the public. The number of convictions, not court proceedings, best measures that risk.

¶ 15. For example, offenders convicted "on one occasion only" are not automatically subject to a bulletin. However, a bulletin may still issue if "necessary to protect the public." Wis. Stat. § 301.46(2m)(a)1.–2. For one conviction, the statute does not require a bulletin because it recognizes that onetime offenders typically are not among the most dangerous. Yet it recognizes that the proxy may not always be accurate, and so provides discretion to issue a bulletin when an individual poses special dangers to the public. In contrast, for offenders with convictions on two or more occasions, the bulletin is mandatory. Wis. Stat. § 301.46(2m)(am)1.–2. The statute assumes that a bulletin for these offenders is needed to protect the public. The link between offenses and danger makes sense only if the provision refers to the number of convictions, not the number of court appearances, as a single proceeding may address multiple crimes.

¶ 16. Also telling is that mandatory bulletins are required for offenders released from civil commitment under Wis. Stat. ch. 980, i.e., "sexually violent persons." Wis. Stat. § 301.46(2m)(am); *see also* Wis. Stat. § 980.01(6)–(7) (defining "sexually violent person"). Like multiple convictions, that status serves as a proxy for heightened danger to the public. The presumption is that the individual adjudicated a sexually violent person and subject to mandatory institutionalization remains more dangerous than a typical offender. This again demonstrates that the Legislature's focus was on dangerousness, not court proceedings.

¶ 17. Further, the policies underlying the sex offender law are best served by this interpretation. The sex offender registration and notification laws, Wis. Stat. §§ 301.45 and 301.46, "reflect an 'intent to protect the public and assist law

enforcement' and are 'related to community protection.'" *Kaminski*, 245 Wis. 2d 310, ¶ 41 (citing *Bollig*, 232 Wis. 2d 561, ¶¶ 21–22). As the U.S. Supreme Court has recognized, these kinds of policy goals are properly part of sex offender regulations, and those regulations may properly treat offenders "as a class" based on dangerousness. *Smith v. Doe*, 538 U.S. 84, 103 (2003) (generally discussing sex offender regulations). These goals, including the goal of assisting law enforcement, are served by applying section 301.46(2m)(am) to require mandatory law enforcement bulletins when an offender has multiple convictions.

¶ 18. I conclude that convictions on "separate occasions" in Wis. Stat. § 301.46(2m)(am) refers to multiple convictions, regardless whether they were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint.

Very truly yours,

BRAD D. SCHIMEL
Wisconsin Attorney General

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