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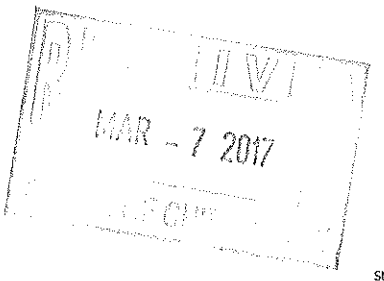

Hon. Judge Francis Wasielewski
Milwaukee County Circuit Court

Subj: In Re: Inquest Into The Death of Terrill Thomas

Dear Judge Wasielewski:

Please accept for filing the enclosed State's Motion to Construe Section 946.29 of Wisconsin Statutes.

Respectfully submitted,

Kurt Benkley
Assistant District Attorney

enclosure

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

IN RE: INQUEST INTO THE DEATH
OF TERRILL THOMAS Case No. 2017JD000003

STATE'S MOTION TO CONSTRUE SECTION 946.29 OF WISCONSIN STATUTE

To: Hon. Judge Francis Wasielewski
Milwaukee County Circuit Court

Motion

The State moves the court for an order determining the *mens rea* element of the crime of Abuse of Resident of Penal Facilities, §940.29, Wis. Stats. This statute states the potential crime relevant to the inquest.

Discussion

The statutory language of the offense of Abuse of Residents of Penal Facilities, §940.29, Wis. Stats., provides for strict criminal liability for a jailor who directly abuses, neglects, or ill-treats an inmate. The crime is defined by statute as follows:

> Any person in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects or ill-treats any person confined in or a resident of any such institution or place or who knowingly permits another person to do so is guilty of a Class I felony.

The statute provides both direct and indirect criminal liability: 1) a defendant directly "abuses, neglects, or ill-treats" a prisoner, and 2) a defendant "knowingly permits another person to do so..." The term "knowingly" only applies to the second clause.

Confusion arises because the official jury instruction defining the crime conflicts with the plain language of the statute. The jury instruction lists the following elements.

> ...[T]he State must prove by evidence which satisfies you beyond reasonable doubt that the following four elements were present:
>
> 1. The defendant was (in charge of) (employed in) a facility.

2. (Name of victim) was (a resident of) (confined in) a facility.

3. The facility was a [(penal) (correctional) institution] [place of confinement].

4. The defendant **(did knowingly)** (knowingly permitted another person to) abuse, neglect, or ill-treat (name of victim). (Emphasis added.)

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The jury instruction adds an element of *did knowingly* abuse, neglect, or ill-treat to the crime. This added language conflicts with the statute.

Case law provides limited guidance in reconciling the conflict. *State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984)*, cited in the jury instruction commentary, discusses the factual sufficiency of a prosecution under §940.29. In *Serebin*, a nursing home director was prosecuted under an earlier version of the statute that also covered nursing home residents. Staff repeatedly warned the director that his staffing and funding cuts were resulting in malnutrition, bedsores, and other patient ailments. Several residents ultimately died from this neglect. At trial, the jury was instructed that "the state must prove beyond reasonable doubt that the defendant knowingly permitted the personnel to abuse, neglect or ill-treat the residents at Glendale [nursing home]." *Id. at 854.* The appellate court found the facts were sufficient to sustain the conviction. The director "was made aware of these problems by staff, yet permitted this neglect to continue by enforcing the staffing and feeding policies he had adopted." *Id. at 853.*

While *Serebin* illustrates facts that constitute "knowingly" permitting neglect, the opinion does not define the term. Moreover, the defendant in *Serebin* was charged with knowingly permitting neglect rather than direct neglect. Consequently, the case does not speak to the *mens rea* element for direct neglect.

Section 939.23(1), Wis. Stats., addresses the issue of determining the *mens rea* standard in a criminal statute.

> When criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by the term "intentionally", the phrase "with intent to", the phrase "with intent that", or some form of the verbs "know" or "believe".

As noted above, the crime of directly abusing, neglecting, or ill-treating a prisoner, under §940.29, Wis. Stats., contains no such *mens rea* language.

The sentence structure of §940.29, Wis. Stats., further indicates the legislature intended the "knowing" element not to apply to the crime of direct abuse, neglect, or ill-treatment of prisoners. In the first clause (direct criminal liability) of the statute, the legislature *omitted* the term "knowingly."

> Any person in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects or ill-treats any person confined in or a resident of any such institution or place...

In the second clause (indirect criminal liability), the legislature *included* "knowingly."

> ...or who knowingly permits another person to do so is guilty of a Class I felony.

In drafting the statute in this manner, the legislature demonstrated its awareness of the *mens rea* element of the crime. It applied the term "knowingly" to the second clause, but not to the first clause. The omission was intentional.

Canons of statutory construction support such a reading of the statute. In the federal context, the Supreme Court finds that Congress' inclusion of a term in one statutory section, and exclusion from another, must be viewed as intentional.

> It is well settled that " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Duncan v. Walker*, 533 U.S. 167, 173, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001), *quoting*, *Bates v. United States,* 522 U.S. 23, 29–30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997)

The same analysis applies to §940.29, Wis. Stats. The Wisconsin legislature chose to omit the term "knowingly" when criminalizing direct abuse, neglect or ill-treatment of prisoners, but include the term in second clause of the statute.

In some instances, courts may impute a *mens rea* element to criminal statutes whose language does not specify such a requirement. *Morissette v. United States, 342 U.S. 246, 261-262, 72 S.Ct. 240, 96 L.Ed. 288 (1952)* held that, as a matter of statutory

construction, the Court would read in a criminal intent requirement to a federal larceny statute.

> We hold that mere omission from s 641 [federal larceny statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced. *Id.*, 342 U.S. 246, 263, 72 S. Ct. 240, 250, 96 L. Ed. 288.

The Court explained that, historically, the concept of larceny included an element of intentional wrongdoing. *Id.* *Mens rea* is inherent to many categories of criminal conduct. *Id.* At the same time, the Court acknowledged a class of "public welfare offense" that require no criminal intent. *Id.*, 342 U.S. 246, 255, 72 S. Ct. 240, 246, 96 L. Ed. 288.

Abuse of Residents of Penal Facilities is akin to a public welfare offense where legislatures intend no *mens rea*. Courts will not graft on a "knowing," "intentional," or "willful" element to this class of strict liability offenses. *Morissette* explains as follows:

> This [legislating criminal penalties for public health, welfare and safety violations] has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called **'public welfare offenses.'** These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but **are in the nature of neglect where the law requires care**, or inaction where it imposes a duty. *Id.*, 342 U.S. 246, 255, 72 S. Ct. 240, 246, 96 L. Ed. 288 (emphasis added.)

and,

> ...**[L]egislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.** The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. *Id.*, 342 U.S. 246, 256, 72 S. Ct. 240, 247, 96 L. Ed. 288 (emphasis added).

Applying a simple neglect standard to Abuse of Residents of Penal Facilities seems consistent with the above rationale. *See, also, State v. Collova,* 79 Wis. 2d 473, 480,

255 N.W.2d 581, 585 (1977) (acknowledging "the propriety of legislative definitions of crime that omit any element respecting mental state beyond the requirement that the accused intended to do the act which is made a crime.").

Where the legislature's intent is plainly stated in the statutory language, and where the crime itself is a "public welfare offense," the judiciary should not impute a "knowing" element into the statute. The courts must accept the legislature's express intent. Directly abusing, neglecting, or ill-treating a prisoner, under §940.29, Wis. Stats., is a strict liability crime.

This determination is consistent with sound public policy. Section 940.29, Wis. Stats., should hold jailors to a simple neglect standard. Inmates are at the mercy of their jailors for basic life-sustaining necessities like water, food, and medical care. When a mentally ill inmate, like Mr. Thomas, is locked in solitary confinement without access to water, his life is totally in his jailors' hands. The law must strictly require jailors to safeguard lives which are so completely entrusted to their care. Stupidity, thoughtlessness, indifference, and incompetence are not morally sufficient excuses nor valid legal defenses.

Conclusion

For the above stated reasons, the State prays the court find the legal standard for the crime of direct abuse, neglect or ill-treatment of a prisoner, under section 940.29, Wis. Stats., is simple neglect rather than knowing neglect.

Dated at Milwaukee, Wisconsin, this 7th day of March, 2017.

Respectfully submitted,

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