No. _____

In the Supreme Court of the United States

PATRICK J. WERNER,
Petitioner,
v.
EDWARD F. WALL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state prison officials are entitled to immunity from suit for incarcerating sex offenders beyond their mandatory release date when they cannot find suitable permanent housing through no fault of their own.

PARTIES TO THE PROCEEDING

Petitioner Patrick J. Werner was the plaintiff and appellant in the proceedings below.

Respondents Edward Wall, Rose Snyder-Spaar, Denise Symdon, Tom Wickeham, Lori Richgels, Amanda Martin, Erin Murto, and Robert Fusfeld were the defendants and appellees in the proceedings below. During the case, Edward Wall succeeded Gary Hamblin as Secretary of the Wisconsin Department of Corrections, and therefore Mr. Wall became a party in the district court pursuant to Federal Rule of Civil Procedure 25(d).

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PETITION FOR A WRIT OF CERTIORARI

Patrick J. Werner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 836 F.3d 751. Pet. App. 1-40. The summary judgment opinion of the United States District Court for the Eastern District of Wisconsin is unreported but available at 2014 WL 1271760. Pet. App. 43-62. The screening order of the United States District Court for the Eastern District of Wisconsin is unreported. Pet. App. 65-82.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 2016. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 20, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

In a divided decision the Seventh Circuit held that clearly established law does not forbid Wisconsin prison officials from incarcerating a sex offender 378 days beyond his mandatory release date for failing—through no fault of his own—to find an acceptable permanent residence. And this despite the fact that three Wisconsin appellate decisions previously had held precisely the opposite.

To get around those decisions, the majority adopted what even it characterized to be an "aggressive reading" of a Wisconsin Supreme Court decision that, as the dissent noted, not only "took care to distinguish its decision from cases like Werner's," Pet. App. 32, but expressly approved the line of lower court cases condemning the very conduct at issue here. Indeed, the majority's reading was not just "aggressive," it was wrong and obviously so. For "[Wisconsin] courts had squarely rejected the solution of keeping offenders like Werner in custody past their mandatory release dates." *Id*. at 33-34.

The majority's reading of the caselaw represents a flawed approach to qualified immunity that this Court has repeatedly rejected, including in a case decided just this term: defining clearly established law "at a high level of generality," *White v. Pauly*, No. 16-67, 2017 WL 69170, slip op. at 6 (Jan. 9, 2017) (per curiam), and relying on cases that do not "squarely govern[]," *Mullenix v. Luna*, 136 S. Ct. 305, 308-11 (2015) (per curiam) (internal quotation marks omitted). Usually, when lower courts define the governing law too broadly, it is to the detriment of the government officials who have been sued. Here, when the Seventh

Circuit defined the governing law too broadly, it was to the undeserved *benefit* of the government officials who were sued. In the first case, government officials receive too little protection for their actions; in the second, officials receive too much protection for their actions. Either way, it is error just the same. For in articulating the qualified immunity standard, the Court made clear that its test "provide[s] no license to lawless conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Determining whether a state official is entitled to qualified immunity from suit is an objective inquiry that turns on the particular facts at issue, not generalizations derived from readily distinguishable cases and situations. This Court has recently and summarily reversed lower courts for failing to adhere to this fundamental precept of qualified immunity. *See*, *e.g.*, *White*, slip op. at 6 (per curiam); *Mullenix*, 136 S. Ct. 305 (per curiam); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Stanton v. Sims,* 134 S. Ct. 3 (2013) (per curiam); *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). The Court should consider doing the same here.

As the dissent recognized, "[t]his case presents an extreme version of a pervasive problem in the criminal justice system." Pet. App. 31. State and local governments throughout the country have enacted a variety of restrictions on the activities, employment, and housing of sex offenders. While well-intentioned, "[t]hose restrictions can make it difficult, and in some cases literally impossible, for released offenders to live and work in compliance with all the laws that apply to

them." *Id*. As a result, sex offenders like Mr. Werner face punishment, including re-incarceration for extended periods of time, for circumstances beyond their control. Mr. Werner has argued his re-incarceration violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, arguments the dissent accepted and the majority did not reject, debating only which constitutional provision is more apt. Although this Court need not decide the constitutional question, reversal and remand on the qualified immunity question would require the Seventh Circuit to do so, and thereby put state and local officials throughout the circuit on clear notice that sex offenders cannot be incarcerated simply for being homeless.

STATEMENT OF THE CASE

1. Mr. Werner is currently serving a 20-year sentence in Wisconsin state prison for committing two sex crimes. As such, he is considered a "Special Bulletin Notification" (or SBN) sex offender by the Wisconsin Department of Corrections (DOC). *See* Wis. Stat. § 301.46(2m)(am).

As an SBN sex offender, Mr. Werner is subject to several restrictions upon his release from prison. First, the DOC must notify community law enforcement when Mr. Werner is to be released. Pet. App. 9, 89. Second, the Wisconsin Department of Community Corrections (DCC), a division of the DOC, can only release Mr. Werner to the county where he resided at the time of the offense, the county where he was convicted (in each case, Brown County), or a sex offender treatment facility. Wis. Stat. § 301.03(20)(a); Pet. App. 3. Third, Mr. Werner must adhere to the Rules of Community

Supervision and Standard Sex Offender Rules. Pet. App. 5. Finally, and most relevant here, at the time of Mr. Werner's mandatory release on parole in 2010, DOC Administrative Directive #02-10 (AD 02-10), *id.* at 85-91, required SBN offenders to secure an approved permanent residence, *id.* at 4-5, 7, 86.

Under AD 02-10, if an SBN offender failed to secure a suitable residence by his mandatory release date, he would have until the end of that day to do so. If the SBN offender's initial search failed, "and the department ha[d] no alternative housing resources in the community of release," he could be detained in the county jail. *Id.* at 7-8, 86-87 (emphasis omitted).

The primary purpose of AD 02-10 was public safety. *Id.* at 51. According to DCC officials, SBN offenders cannot be homeless because they are considered likely to reoffend. They must comply with exacting rules of supervision that include strict parameters for potential contact with children and victims. *Id.* at 4, 58. Part of the supervision of SBN offenders is done through GPS monitoring, which at the time of Mr. Werner's mandatory release in 2010, required, at least according to the State, a landline telephone to operate.[1] *Id.* at 49.

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[1] There is some question about whether the State's claim in this regard is actually true. The State "repeatedly" made the same claim in *State v. Dinkins*, 810 N.W.2d 787 (Wis. 2012), a case involving a sex offender who was due to be released in 2008, some two years before Mr. Werner reached his mandatory release date. After oral argument in that case, however, "the State submitted a letter advising the court that in the case of a sex offender who lacks a fixed address, the DOC uses cellular GPS trackers that do *not* require a land line but need to be charged every day." *Id*. at 791 n.6 (emphasis added).

When Mr. Werner was due to be released, Brown County had approximately 14 sex offender ordinances. These ordinances placed severe restrictions on where Mr. Werner could live. Making matters still more difficult, local landlords renting the few properties that met all county ordinance requirements were reluctant to rent to sex offenders. *Id.* at 31-32, 46-47.

In September 2009, Mr. Werner began preparing for his mandatory release, but even with the help of his parole agents, he could not find housing. Mr. Werner asked to live in Milwaukee at a Temporary Living Program (TLP), but the DOC/DCC Administrator at the time denied his request. *Id.* at 47. Mr. Werner subsequently asked to move to a TLP in Green Bay, but his request was denied by the city's Sex Offender Residence Board. *Id.* at 47-48. Mr. Werner and others also investigated several additional residences but none met the necessary requirements for SBN offender housing. By the time the DOC released Mr. Werner in Brown County on March 16, 2010, Mr. Werner still had not secured suitable housing. *Id.* at 10, 50. So, pursuant to AD 02-10, on the day of his release, prison officials permitted him to conduct a search for a residence with a chaperone. After that search proved unsuccessful, he was taken to the Brown County Jail to be booked for the night. *Id.* at 50. This went on day after day for over a year.

The only condition that distinguished Mr. Werner's detention in the Brown County Jail from ordinary incarceration was his release on weekdays for four hours a day to search for a suitable residence. *Id.* at 51, 69. When the four hours were up, he was re-booked into jail. During the booking process, he was

handcuffed and patted down. *See id.* at 51; E.D. Wis. Dkt. 91-1, at 33-35. And during his incarceration, he was prohibited from possessing certain common items, including a bowl, a spoon, and paperclips, as they were considered contraband. E.D. Wis. Dkts. 91, ¶ 31; 91-1, at 34; 91-12, at 1-2.

Mr. Werner mainly spent his four hours of release time at the DCC offices, where he received a notepad, pen, information on community resources, ordinance information, and the locations of places that he was to avoid, such as daycares, schools, and parks. E.D. Wis. Dkts. 89, ¶¶ 24, 68; 91, ¶ 24; 93, ¶ 20; 94, ¶ 20. While Mr. Werner could wear street clothes when released, he was accompanied by a chaperone that drove him around to investigate potential leads and supervised him while he made calls to landlords at the DCC offices. Pet. App. 51-52. Chaperones also "took offenders to medical appointments, to haircuts, to funerals, to the job center, to fill prescriptions, to the Goodwill, to appointments with social security, to social services for food stamps or Medicaid cards, to the bank to open bank accounts, or to the Department of Motor Vehicles (DMV) to get state identification cards." E.D. Wis. Dkts. 89, ¶ 27; 93, ¶ 23; 94, ¶ 23. Activities not related to securing suitable housing, however, were discouraged. Upon his release, for example, Mr. Werner occasionally visited his mother's house with a chaperone, but a parole agent later amended the terms of his supervision to suspend these visits. Pet. App. 52; E.D. Wis. Dkt. 91-1, at 69-70.

Mr. Werner finally secured suitable housing in Bellevue, Wisconsin on June 1, 2011. Pet. App. 11, 53. By the time Mr. Werner's parole agent approved the

residence and arranged community notification, GPS, telephone, and monthly rent assistance (allowing him to move in), a month had passed. Pet. App. 11, 54. In all, Mr. Werner was incarcerated 378 days beyond his mandatory release date.

2. Mr. Werner filed a prisoner complaint pro se under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Wisconsin on January 31, 2012. Pet. App. 12. In a screening order, the district court concluded that Mr. Werner had alleged Eighth Amendment and procedural due process claims based on his continued detention beyond his mandatory release date. The district court also concluded that he had pled official capacity claims for injunctive relief against all of the named defendants based on Mr. Werner's allegation that AD 02-10 violated the Due Process and Ex Post Facto Clauses of the U.S. Constitution. Pet. App. 74-78. This claim became moot, however, when the DOC replaced AD 02-10 with an administrative directive that prohibited further incarceration of sex offenders for being homeless after their mandatory release date. *See infra*, 28-29; Pet. App. 14, 59, 99-106.

3. On March 27, 2014, the district court granted the defendants' motion for summary judgment, holding that they were entitled to qualified immunity from suit. Pet. App. 14, 57-58. According to the court, AD 02-10 was an attempt to avoid violating Mr. Werner's rights while at the same time respecting Brown County ordinances. The defendants followed AD 02-10, and thus they were entitled to immunity. *Id.* at 57-58.

4. Mr. Werner timely filed his notice of appeal on April 7, 2014. A divided panel of the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's judgment on September 1, 2016. The Seventh Circuit's opinion hinged on the perceived disparity between (1) two cases cited by Mr. Werner, *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. Ct. App. 2000) and *Allen v. Guerrero*, 688 N.W.2d 673 (Wis. Ct. App. 2004), and (2) a third case, *State ex. rel. Riesch v. Schwarz*, 692 N.W.2d 219 (Wis. 2005), which the Seventh Circuit believed "had not placed the precise situation . . . beyond debate." Pet. App. 28 (internal quotation marks omitted).

In *Olson* and *Guerrero*, sex offenders were transferred from the department of corrections to minimum security facilities upon reaching their mandatory release date after failing to secure suitable permanent housing. In each case, the Wisconsin Court of Appeals held that continued detention was impermissible. The Seventh Circuit agreed that both cases stood for the proposition that a sex offender's inability to find housing was not a constitutionally permissible basis for prolonging a sex offender's incarceration. Pet. App. 24-26.

In *Riesch*, however, the Seventh Circuit majority identified what it thought was a critical exception to the rule in *Olson* and *Guerrero*. In that case, the Wisconsin Supreme Court held that prison officials acted properly by incarcerating a sex offender beyond his mandatory release date after the offender refused to abide by the conditions of his parole before his release. The court in *Riesch* reasoned that there was no practical difference between holding a prisoner beyond

his release date and releasing him only to be immediately re-incarcerated. *Id.* at 29-30. The fact that *Riesch* acknowledged that there is a situation in which it is possible to legally hold an offender past his mandatory release date—a situation in which the offender "stubbornly refuse[s]" to comply with his rules of supervision, 692 N.W.2d at 224—confirmed to the majority that Mr. Werner's alleged constitutional violation was not "clearly established" for purposes of qualified immunity. Pet. App. at 29-30. The majority acknowledged that its holding was "a fairly aggressive reading of *Riesch*," but given what the majority perceived to be a "lack of clarity with respect to *Riesch*'s outer limits," the court concluded the defendants did not act unreasonably. Pet. App. 30.

Judge David Hamilton dissented. He concluded that the practical difficulties the defendants faced in finding suitable housing for Mr. Werner did not excuse complying with *Olson* and *Guerrero—Riesch* notwithstanding. To the contrary, said Judge Hamilton, *Riesch*'s outer limits are quite clear because the court in that case had expressly distinguished its holding from *Olson* and another Wisconsin appellate decision that reached the same holding, *State ex rel. Woods v. Morgan*, 591 N.W.2d 922 (Wis. Ct. App. 1999). Outside of the specific situation in which the offender is in willful violation of the conditions of his parole upon his mandatory release date—a situation unquestionably not present here—Wisconsin officials cannot detain a sex offender past his release date for failure to find a residence. Pet. App. 36-40.

5. On October 6, 2016, after obtaining an extension of time, Mr. Werner timely filed a petition for rehearing

and a suggestion for rehearing en banc. On October 20, 2016, the court denied the petition. *Id.* at 83-84. The mandate issued on October 28, 2016.

REASONS FOR GRANTING THE PETITION

In *White v. Pauly*, decided just this term, the Court summarily reversed the Tenth Circuit Court of Appeals, holding that in determining whether defendants are entitled to qualified immunity for their unconstitutional actions, lower courts may not define clearly established law "'at a high level of generality'" or fail to "'particularize[]'" that law "to the facts of the case." No. 16-67, 2017 WL 69170, slip op. at 6 (Jan. 9, 2017) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) and *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). A little over a year earlier, in *Mullenix v. Luna*, this Court summarily reversed the Fifth Circuit on qualified immunity grounds for relying on cases that did not "squarely govern." 136 S. Ct. 305, 310 (2015) (per curiam). According to the Court, qualified immunity turns on "whether the violative nature of *particular* conduct is clearly established . . . in light of the *specific context of the case* . . . ." *Id.* at 308 (citations omitted and second emphasis added). Although the Seventh Circuit majority cited this rule in boilerplate, Pet. App. 22 (quoting *Mullenix*, 136 S. Ct. at 308), the court did not follow its command.

Between 1999 and 2004, the Wisconsin Court of Appeals held in three separate cases that incarcerating sex offenders beyond their mandatory release date for failure to find suitable housing is illegal. *State ex rel. Woods v. Morgan*, 591 N.W.2d 922 (Wis. Ct. App. 1999); *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. Ct. App. 2000); *Allen v. Guerrero*, 688 N.W.2d 673 (Wis. Ct.

App. 2004). As Judge Hamilton observed in his dissent, "[q]ualified immunity doctrine often indulges in the legal fiction of assuming that official defendants are aware of applicable court decisions." Pet. App. 36. But here "there was no fiction at all," *id*.; the very first page of AD 02-10 cites *Woods* and *Olson*, which, as the policy acknowledged, "require that prisoners be released upon reaching mandatory release, whether or not an approved residence has been found," Pet. App. 86. The applicable law therefore was clearly established, and the defendants knew it.

The only way around civil liability for the violations of Mr. Werner's constitutional rights was for the Seventh Circuit to look past the three appellate decisions that directly prohibit the "particular conduct" here in favor of what the majority itself acknowledged to be "a fairly aggressive reading" of a case that, objectively viewed, does not "squarely govern" this case. Pet. App. 30. Indeed, as Judge Hamilton wrote, *Riesch*—the case on which the majority's opinion rests—"expressly agreed with *Woods* and *Olson* and took care to distinguish Riesch's case on grounds that apply directly here." Pet. App. 37.

In fact, so clear is the majority's deviation from this Court's precedent that the Court may wish to consider summarily reversing the lower court's decision. Doing so would make clear to lower courts that, just as they may not deprive state officials of qualified immunity absent caselaw that "squarely governs" the particular factual situation at hand, *e.g.*, *Mullenix*, 136 S. Ct. at 310, neither may courts immunize official misconduct by relying on "aggressive reading[s]" of state court

decisions that do not address—and indeed expressly distinguish—the factual situation at hand.

I. The Court Of Appeals' Decision Directly Conflicts With Recent Decisions Of This Court.

Qualified immunity "turns on the 'objective legal reasonableness' of the [allegedly unlawful official] action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal citations omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). When describing the alleged misconduct, and the law that governs it, the Supreme Court has repeatedly told lower courts not to rely on high-level generalizations. *E.g.*, *White*, slip op. at 6. "The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 136 S. Ct. at 308 (citations omitted); *accord White*, slip op. at 6.

1. Every year for the last several years, the Court has summarily reversed lower courts for the purpose of "reiterat[ing] the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White*, slip op. at 6 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)); *Mullenix*, 136 S. Ct. 305 (per curiam); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Stanton v. Sims,* 134 S. Ct. 3 (2013) (per curiam); *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). In *al-Kidd*, the Court made the same point, noting that "general proposition[s] . . . [are]

of little help in determining whether the violative nature of particular conduct is clearly established." 563 U.S. at 742.

In other words, the specific facts of each case are crucial; in fact, they are often dispositive. In *Anderson*, the Court reversed the Eighth Circuit for holding that the right to be free from warrantless searches absent exigent circumstances meant that it could refuse to consider whether an FBI agent could have reasonably believed that conducting a warrantless search of an innocent third-party's home for a fugitive violated the Fourth Amendment. 483 U.S. at 637-41. In *al-Kidd*, the Court reversed the Ninth Circuit, in part, for holding that the Fourth Amendment's historical purpose of ending the use of general warrants implied that the U.S. Attorney General should have known that all pretextual warrants were unconstitutional. 563 U.S. at 742-43. In *Mullenix*, the Court summarily reversed the Fifth Circuit for denying qualified immunity to officers who shot at the car of a fleeing, intoxicated suspect when "none of [the Court's] precedents 'squarely govern[ed]' the facts [in the case]," and because all of the cases cited by the Fifth Circuit were "too factually distinct to speak clearly to the specific circumstances [of the case]." 136 S. Ct. at 309, 310-312 (quoting *Brosseau*, 543 U.S. at 201). And most recently, in *White v. Pauly*, the Court reversed—again summarily—the Tenth Circuit for "misunderst[anding] the 'clearly established' analysis" to hold that officers who arrive late to a scene must second-guess the protocols taken by fellow officers before using deadly force. Slip op. at 6-8.

In each instance, in the words of *Mullenix*, the lower appellate court had:

- defined the qualified immunity inquiry at too "high [a] level of generality,"
- relied on cases that did not "squarely govern" the "particular conduct" at issue, and
- failed to objectively analyze the "specific context" in which the plaintiff's allegations arose.

136 S. Ct. at 308-12.[2]

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[2] *See also Carroll v. Carman*, 135 S. Ct. 348, 351 (2014) (per curiam) (summarily reversing the lower court for relying on a single Third Circuit decision that was "wholly different from" the case at hand); *Stanton v. Sims*, 134 S. Ct. 3, 6-7 (2013) (per curiam) (summarily reversing the lower court for reading a prior Ninth Circuit opinion and an opinion of this Court "far too broadly"); *Ryburn v. Huff*, 132 S. Ct. 987, 991 (2012) (per curiam) (summarily reversing the lower court for analyzing the string of events leading to arrest "in isolation" without looking at the whole context); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (summarily reversing the lower court for relying on cases "cast at a high level of generality" without analyzing the particular facts at issue).

The lower appellate courts—including the Seventh Circuit—have similarly disapproved of relying on generalizations to resolve qualified immunity questions. *See*, *e.g.*, *Stamps v. Town of Framingham*, 813 F.3d 27, 39 (1st Cir. 2016) (stating that the courts should "'not . . . define clearly established law at a high level of generality'" (quoting *Mullenix*, 136 S. Ct. at 308)); *Barton v. Taber*, 820 F.3d 958, 966 (8th Cir. 2016) (stating that qualified immunity is "context-specific, for we do not 'define clearly established law at a high level of generality'" (quoting *Mullenix*, 136 S. Ct. at 308)); *Zimmerman v. Doran*, 807 F.3d 178, 182 (7th

This Court's directive to pay close attention to the specific facts of each case usually benefits government officials seeking qualified immunity. Indeed, most of the decisions in which this Court has summarily reversed lower courts on qualified immunity grounds have held that qualified immunity was wrongly withheld. *E.g.*, *White*, slip op. at 6; *Mullenix*, 136 S. Ct. at 308-12; *Carroll*, 135 S. Ct. at 351; *Stanton*, 134 S. Ct. at 6-7; *Ryburn*, 132 S. Ct. at 990; *Brosseau*, 543 U.S. at 198.

But the directive is not a one-way street. In *Harlow*, this Court took subjectivity out of the qualified immunity equation, and it made the relevant analysis entirely legal and entirely objective. 457 U.S. at 815-19; *see also* Pet. App. 37 (Hamilton, J., dissenting) ("A qualified immunity defense is supposed to be based upon objectively reasonable interpretations of existing law."). Bare allegations of subjective malice do not suffice to subject government officials to suit. Rather, government officials generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 817-18. But in articulating this test, the Court was careful to note that its decision "provide[d] no license to lawless conduct." *Id.* at 819. "The public interest in deterrence of unlawful conduct and in compensation of victims remains protected . . . ," the Court said. *Id.*

Cir. 2015) ("The Supreme Court has repeatedly cautioned against defining clearly established law at a high level of generality.").

The Court enforces the objective nature of the qualified immunity test by focusing on the appropriate level of specificity when describing the governing law. *See Anderson*, 483 U.S. at 639-41 (stating that the analysis is "objective (albeit fact-specific)"). Without this focus, and without the lower appellate courts' willingness to police the boundaries of "clearly established law," defendants could extrapolate general rules from specific cases that do not "squarely govern," effectively transforming a rule of qualified immunity into one of virtually *un*qualified immunity. *Cf. id.*; *cf. also Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250-51 (2d Cir. 2001) ("Characterizing the right [at issue] too narrowly to the facts of the case might permit government actors to escape personal liability, while doing so too broadly risks permitting unwarranted imposition of monetary liability."). That is what happened here.

2. The Seventh Circuit lost its focus on the "particular conduct" at issue. It took a Wisconsin Supreme Court case that did not "squarely govern" and derived from it a general rule that the Wisconsin Supreme Court did not adopt.

By 2004, the Wisconsin Court of Appeals had clearly ruled out homelessness as a basis for detaining paroled sex offenders beyond their mandatory release date. In the 12 years since, the Wisconsin Supreme Court has not so much as hinted that the law is otherwise. Quite the contrary. In the very case the majority relies on to reach its result, the Wisconsin Supreme Court affirmed that the Wisconsin Court of Appeals caselaw on this topic *is* the law in situations where, as here, a sex

offender cannot find suitable housing through no fault of his own. *Riesch*, 692 N.W.2d at 224.

2.a. Since 1999, Wisconsin has prohibited the practice of incarcerating sex offenders beyond their release date merely because they are homeless. First, in *State ex rel. Woods v. Morgan*, 591 N.W.2d 922 (Wis. Ct. App. 1999), the Wisconsin Court of Appeals granted a writ of habeas corpus to a sex offender detained beyond his mandatory release date. In so doing, the court rejected the State's argument that it could not "'release [Woods] onto the street without a proper arrangement for an accommodation.'" *Id.* at 924-25 (quoting the State) (alternation in original).

A year later, in *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. Ct. App. 2000), the Wisconsin Court of Appeals again granted a writ of habeas corpus in favor of a sex offender detained beyond his mandatory release date. The court held that, "[w]hether or not a place has been found for an inmate, he or she must be released on his or her mandatory release date." *Id.* at 428. The court acknowledged that "it is difficult for the DOC to find a neighborhood that will accept a paroled sex offender in its midst," but the court nonetheless said that "there is no gray area in the [mandatory release] statute—it is crystal clear." *Id.* at 427. So clear was the law, in fact, that the State conceded "there is nothing in either the administrative code or the statutes that authorizes it to detain [sex offenders] beyond [their] mandatory release date." *Id.*

Finally, in *Allen v. Guerrero*, 688 N.W.2d 673 (Wis. Ct. App. 2004), the Wisconsin Court of Appeals once more addressed the claims of a jailed sex offender who could not find a suitable home, only this time in the

context of a Section 1983 case like this one. *Id.* at 675-76. The offender's parole agents argued they were entitled to qualified immunity, but the court rejected their claim, stating that "no reasonable public official could have believed that . . . continued detention" beyond a prisoner's mandatory release date "was constitutionally permissible." *Id.* at 679-81.

2.b. This was the legal landscape as of 2010, and it remains so to this day. The Wisconsin Supreme Court's decision in *State ex rel. Riesch v. Schwarz*, 692 N.W.2d 219 (Wis. 2005), the case on which the Seventh Circuit majority relied so heavily, only serves to reinforce that *Woods*, *Olson*, and *Allen* articulated the relevant law at the relevant time.

Riesch was a sex offender who made clear before his mandatory release date that he was "'totally rejecting active supervision.'" *Id.* at 224 (quoting administrative decision). Given his "stubborn contempt for the parole supervision process," the DOC had little choice but to continue to detain him. *Id.* Undeterred, *Riesch* petitioned for a writ of habeas corpus, arguing that under *Woods* and *Olson* he was entitled to be released. *Id.* at 221, 223. The Wisconsin Supreme Court quite sensibly rejected his claim. *Id.* at 223-26. "Unlike the inmates in *Woods* and *Olson*," the court noted, "Riesch engaged in conduct that warranted custody at the time of his mandatory release date." *Id.* at 224. "Specifically"—and this is critical—"he committed the first of the violations underlying his parole by refusing to cooperate with his social worker at the [correctional institution where he was housed] in arranging a suitable residence plan upon his release." *Id.* This took place simultaneous to the date of his mandatory

release. *Id.* It therefore would have been a "'charade'" to release Riesch only to turn around and immediately put him behind bars again. *Id.* at 225 (quoting the State at oral argument). The court accordingly held, in the context of Riesch's "particular conduct," that "[w]here inmates violate the[ir release] terms immediately and simultaneously with their scheduled mandatory release dates, the DOC should be able to maintain continuous custody . . . ." *Id.* at 225-26.

In the very same breath—and this is also critical—the court made clear that this rule does *not* apply to cooperative sex offenders like Mr. Werner. "[W]e are mindful," the court wrote, "that the DOC is not free to hold inmates indefinitely for such problems as failure to find suitable housing on its part." *Id.* at 225 (citing *Olson*, 608 N.W.2d at 425). Only those individuals who "refus[e] to cooperate . . . in arranging a suitable residence plan" or otherwise with their rules of supervision may be held past their mandatory release date. *Id.* at 224. Inmates who "d[o] nothing to warrant their continued detention at the time of their mandatory release date"—inmates like those in *Woods* and *Olson*, *id*. at 223, and like Mr. Werner here—must be set free.

2.c. Wisconsin thus has two distinct rules for two distinct situations. Uncooperative inmates who refuse to arrange for suitable housing need not be released on their mandatory release date. Cooperative inmates who attempt to arrange for suitable housing but are unsuccessful in doing so through no fault of their own must be released on their mandatory release date. There is no dispute this case presents the latter factual

scenario, not the former. So release was required here. This was the clearly established law as of 2010.

3. The Seventh Circuit majority nevertheless extrapolated from *Riesch* a rule that would allow prison officials to escape civil liability for detaining sex offenders who, like Mr. Werner, cooperate with prison officials but nonetheless cannot find suitable housing. According to the Seventh Circuit, Mr. Werner's "inability to make practical arrangements for the implementation" of supervised release was a "probation violation" that, when objectively viewed, justified his continued incarceration. Pet. App. 29.

That is not a fair reading of *Riesch*, let alone *Woods* and *Olson*, which *Riesch* not only expressly distinguished but expressly approved. The "particular conduct" at issue in *Riesch* simply is not the same as the "particular conduct" at issue here. The *Riesch* court could not have been clearer about this. It took great pains to describe "specifically" the kind of conduct that justifies continued incarceration. 692 N.W.2d at 224. *Riesch* involved an offender who openly "refused to cooperate . . . in arranging a suitable residence plan on his release." *Id.* In contrast, this case, like *Woods*, *Olson*, and *Allen* before it, involves an offender who wanted to find a suitable residence but couldn't. "It is no surprise" then, as Judge Hamilton noted in dissent, "that neither the district court nor the defendants, in their brief to this court or in letters to plaintiff, relied on *Riesch* to justify qualified immunity." Pet. App. 37.

The Seventh Circuit thus plainly overgeneralized from a case that was "simply too factually distinct to speak clearly to the specific circumstances here." *Mullenix*, 136 S. Ct. at 312. This is precisely the kind

of fundamental error that the Supreme Court has "repeatedly" cautioned the lower courts not to make. *Id.* at 308. Summary reversal is therefore appropriate.

II. This Case Is Emblematic Of A Larger National Problem Of Constitutional Significance.

Mr. Werner's plight is unfortunately anything but unique. As Judge Hamilton noted, local residency restrictions enacted in cities and towns across the country "make it difficult, and in some cases literally impossible, for released offenders to live and work in compliance with all the laws that apply to them." Pet. App. 31. Other courts have catalogued the draconian residency restrictions imposed upon sex offenders.[3] And although not directly applicable in this case, State Sex

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[3] *See*, *e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696, 697 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016) (discussing Michigan law and stating "what began in 1994 as a non-public registry maintained solely for law enforcement use has grown into a byzantine code governing in minute detail the lives of the state's sex offenders" (citations omitted)); *In re Taylor*, 343 P.3d 867, 880 (Cal. 2015) (discussing California's residency restrictions and stating they "effectively barred petitioners access to approximately 97 percent of the multifamily rental housing units in San Diego . . . [and] the small percentage of remaining compliant housing was not necessarily available to paroled sex offenders due to a variety of factors, including low vacancy rates, high prices, and the unwillingness of some landlords to rent to them"); *Commonwealth v. Canadyan*, 944 N.E.2d 93, 96 (Mass. 2010) (discussing Massachusetts's residency and GPS restrictions, noting that "[w]hile these laws plainly serve a public purpose, they also affect the ability of former sex offenders to reintegrate into the work force and into the community. One of the consequences has been an increase in homelessness among such persons.").

Offender Registry Programs or Acts (SORPs or SORAs) have similar effects.

Contrary to what many believed decades ago, local residency restrictions and registration programs can do harm as well as good.[4] The presumption underlying these laws—that sex offenders are more likely to reoffend than other convicted felons—has been called into question. *See Snyder*, 834 F.3d at 704-05 (citing authorities and stating that sex offenders "are actually *less* likely to recidivate than other sorts of criminals").[5]

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[4] *See* Gina Puls, Note, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C.J.L. & SOC. JUST. 319, 336-44 (2016); Emily Donaher, Note, *Sex Offender Registration Laws for the Homeless: Safeguarding Society or Punishing Sexually Dangerous Individuals for Being Homeless?*, 91 N.D. L. REV. 375, 390 (2015); Brian Griggs, Note, *Homeless Is Not an Address: States Need to Explore Housing Options for Sex Offenders*, 79 UMKC L. REV. 757, 766-68 (2011); Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH. L. REV. 1235, 1246 (2009); Jacob Frumkin, Note & Comment, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J.L. & POL'Y 313, 320-21 (2008).

[5] *See also* Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 PSYCHOL. PUB. POL'Y & L. 414 (2016) (establishing a decline in recidivism among juvenile sex offenders and noting that this corresponds to a decline of recidivism among adult sex offenders); WISCONSIN DEPARTMENT OF CORRECTIONS, SEX OFFENDER RECIDIVISM AFTER RELEASE FROM PRISON (2015), *available at* http://doc.wi.gov/Documents/WEB/ABOUT/DATARESEARCH/NOTABLESTATISTICS/Sexual%20Offender%20Recidivism%20Report%209.22.2015%20FINAL.pdf (finding that "when specifically examining sexual recidivism, the research literature predominately shows very low rates for sex offenders (particularly in comparison to general recidivism rates), even at

And some have now argued that restrictive registration and notification requirements—present in many SORPs—actually *increase* recidivism among registered sex offenders.[6]

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long follow-up periods (up to 15 years later)"); Stephanie N.K. Robbins, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 219-21 (2010) (stating that "studies examining whether sex offenders are more likely to reoffend than other offenders are inconclusive"); Hal Arkowitz & Scott O. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe not.*, SCIENTIFIC AMERICAN (2008), *available at* https://www.scientificamerican.com/article/misunderstood-crimes/; Frumkin, *supra* note 4, at 350-51.

[6] J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 192 (2011) (finding that sex offender registries deter nonregistered individuals but actually encourage recidivism among registered offenders). "A number of scholars have established the financial, physical, and psychological damage to registered sex offenders and their families." *Id.* (citing authorities); *see also Snyder*, 834 F.3d at 704-05 (citing authorities); Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1111 (2012) (discussing the effect of increasingly harsh registration, notification, and residency laws; and stating that the introduction of such restrictions "have affected offenders' ability to integrate into communities, find stable homes, and obtain steady employment"); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 211-13 (2011) (summarizing authorities and discussing the negative impact of sex offender registries, including the reintegration costs of "[l]ower property values near offenders, instances of vigilante justice . . . sex offenders . . . fired from their jobs or expelled from their homes because of their status as registered sex offenders"); Robbins, *supra* note 5, at 221-24 (noting the collateral consequences of residency and notification requirements are

In Mr. Werner's case, these restrictions left him homeless. But if this were the only problem with these restrictions, it would be a matter for the political branches to resolve, not the courts. It is not the only problem with these restrictions, however. As this case well illustrates, sex-offender residency restrictions give rise to legal issues of constitutional dimension.

The California Supreme Court, for example, recently held that residency restrictions, as applied to certain sex offenders in San Diego County, violated the Due Process Clause of the Fourteenth Amendment. *In re Taylor*, 343 P.3d 867 (Cal. 2015). The restrictions at issue effectively barred access to approximately 97% of multifamily rental housing units. *Id.* at 880. And of the small number of housing options that remained, even they were not necessarily available to paroled sex

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"problematic because they may aggravate risk factors for recidivism such as lifestyle instability, negative moods, and lack of positive social support" (internal quotation marks omitted)); Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step from Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 175 (2005) ("[H]ousing restrictions increased isolation, created financial and emotional hardship, and led to decreased stability. The data further suggested that offenders do not perceive residence restrictions as helpful in risk management. Although this study did not measure risk or recidivism, the findings appear to confirm prior speculation that proximity rules [such as residency restrictions] might increase the types of stressors that can trigger re-offense."); *cf. Doe v. Miami-Dade Cty.*, 838 F.3d 1050, 1054 (11th Cir. 2016) (reversing district court's dismissal of complaint alleging ex post facto clause violations and holding that plaintiffs' complaint sufficiently alleged that the residency requirement imposed a "direct restraint on [plaintiffs'] freedom" and "drastically exacerbat[ed] transience and homelessness").

offenders due to a variety of factors, including low vacancy rates, high prices, and the unwillingness of some landlords to rent to them. *Id.* These conditions forced many sex offenders out into the streets. *Id.* at 881. This in turn hampered efforts to monitor, supervise, and rehabilitate them. *Id.* at 881-82. As such, the court held, the restrictions bore "no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators." *Id.*

Mr. Werner faced similarly draconian residency restrictions. Brown County, Wisconsin alone had approximately 14 different sex offender ordinances in 2010, Pet. App. 31-32, placing severe limits on where Mr. Werner could live. Unfortunately, the defendants responded by prolonging Mr. Werner's incarceration in the name of public safety, a practice echoing the laws against vagrancy that were declared unconstitutional long ago. *See*, *e.g.*, *Alegata v. Commonwealth*, 231 N.E.2d 201, 207 (Mass. 1967) ("Idleness and poverty should not be treated as a criminal offense."); *Parker v. Mun. Judge of City of Las Vegas*, 427 P.2d 642, 643 (Nev. 1967) ("It is our judgment that it is unconstitutional . . . to make the status of poverty a crime . . . ."); *Headley v. Selkowitz*, 171 So.2d 368, 370 (Fla. 1965) ("Innocent victims of misfortune ostensibly appearing to be vagrants, but who are not such either by choice or intentional conduct should not be charged with vagrancy.").

Whatever the unintended (or intended) consequences of sex offender residency restrictions, prolonged incarceration is not a lawful solution. Indeed, as discussed above, Wisconsin courts have condemned incarceration past an offender's mandatory

release date for failure to find a suitable residence. And as Mr. Werner's case shows, what officials may intend to be a temporary solution to a short-term problem may turn into an ongoing constitutional violation in the form of long-term re-incarceration.

2. Thankfully, Wisconsin has recently changed its policy—which is precisely what one would expect from state officials who knew their conduct was unconstitutional. AD 02-10 had always stated that state prison officials must release prisoners on their mandatory release date, "whether or not an approved residence has been found." Pet. App. 86. But in early 2015, the DOC issued Administrative Directive 15-12, finally putting into practice what AD 02-10 said and what the Wisconsin Court of Appeals had made clear over 15 years ago—that state prison officials must release from custody sex offenders who are entitled to be released, period. *Id.* at 99-106. Though AD 15-12 still requires offenders to "provide a specific, verifiable address prior to release," it more effectively accommodates homeless parolees by allowing them to "call and speak with the [parole] agent every seven calendar days . . . to report 'homeless' status and the location(s) in the city and state where he/she has been frequenting and sleeping for the previous seven days and plans for the next seven days." *Id.* at 103-04. It also requires that they "report the addresses or nearest locations where he/she has frequented and slept, and their anticipated residence plan for the upcoming week." *Id.* at 104. The definition of "residence" is broad and includes "[e]ach dwelling or location where a sex offender habitually lives, resides or sleeps regardless of whether the sex offender declares or characterizes such place as his residence." *Id.* at 100. AD 15-12 goes on to

explain that a "[r]esidence may include [a] shelter, group home, treatment center, county jail, [or] federal or other state[] prison[]." *Id.*

All of which just shows that Wisconsin prison officials had other tools to monitor Mr. Werner all along, despite the fact that he was homeless. They did not have to re-incarcerate him. And at all events, the law at the time clearly established that they could not re-incarcerate him.

III. This Is An Ideal Vehicle To Address The Question Presented And Provide Further Guidance On The Constitutional Treatment Of Homeless Sex Offenders.

This case provides an ideal vehicle to address the important issue of the treatment and monitoring of homeless sex offenders. The key facts are undisputed. The Seventh Circuit expressly ruled on whether the relevant law was clearly established. Pet. App. 29-30. And Judge Hamilton wrote a thorough dissent from the majority's opinion. *Id*. at 31-40. What's more, the Wisconsin cases on which this case turns are clear, making plain that cooperative offenders are entitled to be freed on their mandatory release date, whether they are homeless or not.

Indeed, as discussed above and as mentioned by Judge Hamilton in dissent, *id.* at 31, this case in particular is emblematic of "a pervasive problem in the criminal justice system." Sex offenders throughout the country find it difficult, if not impossible sometimes, to find a residence that complies with local laws. States and localities therefore must find creative ways—ways that are constitutional and humane—to deal with

homeless sex offenders. No one should be jailed for being homeless. And courts should not award qualified immunity to state officials who disregard controlling law forbidding precisely that. For "[e]xecutive branch officials are not authorized to lock people up indefinitely without prior court authorization." Pet. App. 33 (Hamilton, J., dissenting).

This case also provides the perfect opportunity to confirm that the Court's mandate to avoid over-generalizing from cases not directly on point applies to the benefit of plaintiffs and defendants alike. The qualified immunity analysis is an objective inquiry that turns on the clear application of cases that "squarely govern," not those that are patently distinguishable. *Mullenix*, 136 S. Ct. at 310.

Finally, there are no jurisdictional issues, as there is no question Mr. Werner timely appealed from a final judgment and presented arguments that had been preserved below. Nor is there any question that Mr. Werner timely sought rehearing.

This case is therefore a worthy vehicle for the Court to provide guidance to the courts of appeals on the important issue of dealing with homeless sex offenders—sex offenders who cannot find a place to live through no fault of their own.

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal. In the alternative, the Court should set the case for briefing and oral argument.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14 1746

[Filed September 1, 2016]

PATRICK J. WERNER,
Plaintiff-Appellant,

v.

EDWARD F. WALL, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 2:12-cv-00096-CNC —
Charles N. Clevert, Jr., *Judge*.

ARGUED APRIL 6, 2016 — DECIDED SEPTEMBER 1, 2016

Before FLAUM, RIPPLE, AND HAMILTON, *Circuit Judges*.

RIPPLE, *Circuit Judge*. In 1999, Patrick Werner was convicted of multiple sex offenses in Wisconsin state court. The state trial court sentenced him to ten years of imprisonment and to ten consecutive years of probation. Because Mr. Werner had been convicted of

more than one sex offense, he was a Special Bulletin Notification ("SBN") sex offender under Wisconsin law. After a denial of parole in late 2009, Mr. Werner's release was deferred until his mandatory release date of March 21, 2010. At that time, Mr. Werner and his probation agents were unable to secure an approved residence as required by his rules of supervision. Consequently, the Wisconsin Department of Corrections ("DOC") Division of Community Corrections detained him pursuant to Administrative Directive No. 02-10 ("AD 02-10" or "the directive"), which set out a procedure addressing release eligible SBN sex offenders who lacked an approved residence. Under AD 02-10, persons who had reached their mandatory release date but could not secure housing that was approved under their rules of supervision were detained in the county jail during the night but permitted to seek appropriate housing during certain hours of the day. Authorities employed this arrangement to prevent a violation of the rules of supervision. Officials detained Mr. Werner under this arrangement sporadically between March 16, 2010, and July 1, 2011, when he finally located and moved into an approved residence.

Mr. Werner brought this action pro se in the district court under 42 U.S.C. § 1983. He claimed that his continued detention beyond his mandatory release date was unlawful and named as defendants various DOC officials and several of his probation agents. In an initial screening order, the district court permitted Mr. Werner to proceed on the individual-capacity claims under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. It also permitted him to maintain an official-capacity claim for

injunctive relief on the ground that AD 02-10 violated the Due Process and Ex Post Facto Clauses. The district court ultimately granted summary judgment in favor of the defendants on all of Mr. Werner's claims. It concluded that his Eighth and Fourteenth Amendment claims were barred by qualified immunity and that his official capacity challenge to the directive as a policy was moot. Mr. Werner timely appealed the district court's decision with respect to his individual-capacity claims. In due course, we recruited counsel and requested additional briefing.

After the benefit of briefing and oral argument, we agree with the district court that the defendants in this case are entitled to qualified immunity. We therefore affirm the district court's judgment with respect to each of Mr. Werner's claims.

I

BACKGROUND

A.

In 1999, the Circuit Court of Brown County, Wisconsin, convicted Mr. Werner of second degree sexual assault of a child and of attempted child enticement. The court sentenced him to ten years in prison with ten consecutive years of probation. After his parole was denied in late 2009, Mr. Werner's release was deferred until his mandatory release date of March 21, 2010. Wisconsin law requires that any person convicted of a sex offense and then released to parole or extended supervision be placed initially in the county where the person resided on the date of the offense, the county where the person was convicted, or a sex offender treatment facility. Wis. Stat.

§ 301.03(20)(a). Mr. Werner was convicted in Brown County, and the Division of Community Corrections sought to place him there.[1] Because of Mr. Werner's multiple sex offense convictions, he also was designated an SBN sex offender. This designation required the Division of Community Corrections to provide notice of his placement in Brown County to law enforcement officials in that community. *See id.* § 301.46(2m)(am).

Wisconsin law provided still more restrictions. At the time of Mr. Werner's mandatory release date in 2010, the rules of supervision for all sex offenders required them to obtain and to maintain an approved residence; they were not permitted to be homeless because of the risk of recidivism. Mr. Werner's Standard Sex Offender Rules consequently provided, in relevant part:

> 5. You shall not reside nor "stay" overnight in any place other than a pre approved residence without prior agent approval. "Overnight" is defined as the daily period of time between the hours of 8 p.m. and 8 a.m. unless redefined by your agent in advance.
> …

[1] Although the statute provides multiple placement options, *see* Wis. Stat. § 301.03(20)(a), the record indicates, and the district court found, that the Division of Community Corrections *had to* place Mr. Werner in Brown County, the county of his conviction. It is not clear why this was the case. However, Mr. Werner does not argue that he could have been released somewhere other than Brown County.

> 11. You shall fully comply with all sex offender registry requirements as applicable and directed by your agent and/or required by statute.[2]

SBN sex offenders in particular were required to "provide a specific, verifiable address prior to release from a correctional institution … subject to the department's approval."[3] In determining whether to approve a proposed residence, agents were required to consider, among other things, the "[p]roximity to the SBN offender's victim(s), elementary or secondary schools, parks and licensed or certified day care providers."[4]

There were still more restrictions, imposed by a combination of department rules and community ordinances. Among the thirty nine Rules of Community Supervision, the first stated:

> 1. You shall avoid all conduct which is in violation of federal or state statute, municipal or county ordinances, tribal law or which is not in the best interest of the public welfare or your rehabilitation.[5]

Brown County had over a dozen ordinances in place that restricted where registered sex offenders could

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[2] R.90-3.

[3] R.93-2 at 1.

[4] *Id.*

[5] R.90-2 at 1.

reside.[6] Both the Standard Sex Offender Rules and the Rules of Community Supervision provided that a violation of any rule would subject the offender to possible revocation of his or her probation, parole, or extended supervision. Therefore, residing in any place forbidden by local ordinance constituted a violation of these rules and subjected Mr. Werner to possible revocation of his probation.

Wisconsin authorities had wrestled with the problem created by the confluence of these provisions for quite a while before Mr. Werner's situation came to the fore. In 2002, nearly a decade before Mr. Werner's mandatory release date, the Division of Community Corrections had fashioned an administrative scheme to address this dilemma in releasing convicted sex offenders to communities with restrictive sex offender ordinances. Responding to several Wisconsin Court of Appeals decisions requiring that sex offenders be released on their mandatory release date regardless of whether they had approved housing, the Division of Community Corrections promulgated AD 02-10, which detailed the department's "Procedures for SBN Offenders Lacking Approved Residences."[7] Relying explicitly on the DOC's existing authority to "take[] into custody and detain[]" an offender on supervised release "[t]o prevent a possible violation," Wis. Admin.

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[6] During the summary judgment stage in the district court, the defendants submitted a document containing a very general description of these ordinances. *See* R.93-1.

[7] R.93-2 at 1.

Code DOC § 328.22(2)(d) (2002),[8] AD 02–10 set out the following:

> Approved Residence Requirement
>
> An approved residence is a standard requirement of supervision for all sex offenders. Special Bulletin Notification (SBN) offenders must provide a specific, verifiable address prior to release from a correctional institution. The proposed residence is subject to the department's approval. …
> …
>
> Lack of Approved Residence After Release
>
> Wisconsin law requires the Department of Corrections to release offenders on their mandatory release dates. The decisions of the Court of Appeals in *State ex rel. Woods v. Morgan*, 224 Wis 2d, 534, 591 N.W.2d 922 (Ct. App. 1999) and *State ex rel. Olson v. Litscher*, 233 Wis.2d 685, 608, N.W.2d 425 (Ct. App. 2000) require that prisoners be released upon reaching mandatory release, whether or not an approved residence has been found.
>
> If, upon release, a SBN offender does not have a residence, which the department has approved, the offender shall be directed to secure an approved residence by the end of the workday.

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[8] This provision is now located at Wisconsin Administrative Code DOC § 328.27(2)(d).

The SBN offender shall be permitted to conduct an "unfettered" search for housing. This means the SBN offender shall be permitted to leave the presence of DOC staff to search for housing. In order to accomplish this, the agent shall require the SBN offender to be accompanied by an approved chaperone. The SBN offender shall also be required to provide an itinerary, prior to leaving the agent's presence, and to keep a log of movements, appointments and personal contacts. The SBN offender shall wear an [electromagnetic pulse ("EMP")] transmitter at all times. The chaperone shall be provided with a cellular phone and an EMP "scanner."

The SBN offender is not required to remain in the physical presence of the chaperone at all times during the search for housing. However, the SBN offender will be required to remain within range of the EMP scanner. The chaperone must also be provided a copy of the SBN offender's rules and must agree to neither assist nor encourage the SBN offender to violate any rule. The chaperone will have no authority to detain or impede the SBN offender.

If the SBN offender does not secure an approved residence by 5:00 p.m. **and the department has no alternative housing resources in the community of release,** the SBN offender may be detained in the county jail, to prevent a violation, pursuant to Wis. Admin. Code DOC 328.22(2)(d). The SBN offender shall be released from custody the next workday, to continue to

> search for an approved residence. The requirements for the search remain the same: EMP, provide a written itinerary, keep a log of movements and be accompanied by an approved chaperone. If any requirement is unmet, the SBN offender shall remain in custody, until all requirements can be met.
> …
>
> Procedures Upon Locating Residence
>
> When an appropriate residence has been located, the agent will notify local law enforcement, who shall have the opportunity to notify the community before the SBN offender establishes residence.[9]

B.

Mr. Werner was assigned three different probation agents during the time period he was under the supervision of the Division of Community Corrections. Although he was still incarcerated, Agent Amanda Martin received Mr. Werner's file on November 12, 2009, the day before his parole was denied and his release deferred. On December 1, 2009, Agent Martin discussed with Mr. Werner his housing and employment options. She described Brown County's sex offender ordinances, the procedures set out in AD 02-10 should he be unable to secure an approved residence before his mandatory release date, and the global positioning satellite ("GPS") tracker that Mr. Werner would be required to carry on release. Over the next

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[9] R.93-2 at 1–2 (emphases in original).

several months, while Mr. Werner still was incarcerated, Agent Martin investigated numerous potential residences proposed by Mr. Werner, his social worker, and his mother; however, she determined that she could not approve any of these proposed residences. Agent Martin also arranged a chaperone, pursuant to AD 02-10, with whom Mr. Werner could search for housing for four hours per weekday.

On March 4, 2010, Agent Martin and her supervisor, Lori Richgels, met with law enforcement officials to discuss Mr. Werner's release plan and to determine the appropriate level of community notification. On March 16, 2010, five days before his mandatory release date, Mr. Werner was transferred from a state penitentiary to the Division of Community Corrections office in Green Bay. Agent Martin completed the intake process with Mr. Werner, which included reviewing the process for mandatory GPS monitoring, the sex offender registry requirements, and the procedure for sex offender housing searches. Mr. Werner reviewed and signed his Rules of Community Supervision and Standard Sex Offender Rules, as well as paperwork concerning the chaperone service. Because Mr. Werner had not secured an approved residence and the department had no alternative housing resources in the community, AD 02-10 applied and Mr. Werner was booked into the Brown County Jail to prevent a probation violation. For the next several months, Mr. Werner, with the assistance of Agent Martin, sought appropriate housing under the procedures outlined in AD 02-10.

In October 2010, Mr. Werner violated his supervision rules by possessing contraband and

making threatening comments to his pod mates at the Brown County Jail. He agreed to an Alternative to Revocation ("ATR"), under which he would spend ninety days at a state penitentiary; he began serving the ATR on December 1, 2010. Soon after, Agent Robert Fusfeld replaced Agent Martin as Mr. Werner's probation agent. Mr. Werner was released back to the Division of Community Corrections office in Green Bay on March 1, 2011. For the next several months, he continued to search for approvable housing under AD 02-10. On June 1, 2011, Mr. Werner located a tentative residence in Bellevue, Wisconsin. Agent Fusfeld investigated the residence, approved it, and began arrangements for Mr. Werner's release.

On June 22, 2011, Agent Erin Murto replaced Agent Fusfeld; she continued to arrange for Mr. Werner to move into the residence in Bellevue that Agent Fusfeld had approved. Mr. Werner moved into the residence on July 1, 2011. However, in November 2011, Mr. Werner again violated the terms of his supervision. His probation was revoked on April 23, 2012, and he was ordered by an Administrative Law Judge ("ALJ") to return to prison for two years, four months, and three days.[10]

On November 16, 2012, Mr. Werner again was released, this time to a transitional living program in Green Bay.[11] On February 15, 2013, however, Mr.

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[10] *See* Wis. Admin. Code HA § 2.05 (outlining Wisconsin's revocation process).

[11] According to the record, Mr. Werner had requested initially that he be placed at the transitional living program in Green Bay upon

Werner violated the rules of his supervision by, among other things, sending a sexually explicit message to a sixteen year old girl. According to the State, Mr. Werner's probation was revoked, and he is currently incarcerated at a state penitentiary. The parties also inform us that AD 02-10 was replaced in March 2015 by AD 15-12, under which SBN sex offenders lacking approved residences are no longer held in jail until they can secure an approved residence.

C.

On January 31, 2012, Mr. Werner brought this action pro se in the United States District Court for the Eastern District of Wisconsin under 42 U.S.C. § 1983, alleging that he was unlawfully detained from March 16, 2010, until July 1, 2011.[12] Mr. Werner sought

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his mandatory release date in March 2010. At the time, however, the transitional living program was too close to a park under the applicable sex offender ordinance. Mr. Werner requested an exemption from the Green Bay Sex Offender Residence Board but was denied. In August 2012, Green Bay revised its ordinance to permit sex offenders to move directly to a transitional living program without the Board's prior approval. This cleared the way for Mr. Werner to be placed there in November 2012, which took him out of the purview of AD 02-10.

[12] As our recitation of the facts makes clear, large portions of Mr. Werner's detention over this period of time were authorized independently of AD 02-10. For example, when Mr. Werner violated his terms of supervision in October 2010, the DOC's authority to detain him would have derived either from Wisconsin Administrative Code DOC § 328.22(2)(a), which permits detention "[f]or investigation of an alleged violation," or from DOC § 328.22(2)(b), which permits detention "[a]fter an alleged violation … to determine whether to commence revocation proceedings." Mr.

monetary damages and injunctive relief. He named as individual defendants: DOC Secretary Gary Hamblin; Division of Community Corrections Regional Chief Rose Snyder-Spaar; Division of Community Corrections Administrator Denise Symdon; Division of Community Corrections Field Supervisors Thomas Wickeham and Lori Richgels; and Agents Martin, Fusfeld, and Murto (collectively, "the defendants").

In a screening order, the district court allowed Mr. Werner's Eighth Amendment and due process claims, based on his continued detention beyond his mandatory release date, to proceed against Agents Martin, Fusfeld, and Murto, and Supervisors Wickeham and Richgels. The district court also allowed him to go forward with official capacity claims for injunctive relief against all of the named defendants[13] on the ground that AD 02-10 violated the Due Process and Ex Post Facto Clauses of the Constitution. The defendants moved for summary judgment on each of these claims. Mr. Werner also moved for summary judgment, but the district court denied his motion on procedural grounds. Several months later, Mr. Werner filed a number of documents that the court ultimately construed as a

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Werner also served a ninety-day Alternative to Revocation sentence from December 1, 2010, until March 1, 2011. Because we hold that the defendants in this case are shielded from civil liability, we need not determine precisely the time period that Mr. Werner was held under the challenged directive.

[13] On October 27, 2012, Edward Wall succeeded Hamblin as DOC Secretary. Because Mr. Werner had sued Hamblin, a public officer, in his official capacity, the district court granted the defendants' motion to substitute Secretary Wall as a party under Federal Rule of Civil Procedure 25(d). R.119 at 1.

motion for summary judgment and a response in opposition to the defendants' motion.

On March 27, 2014, the district court granted summary judgment in favor of the defendants. The court concluded that Mr. Werner's Eighth Amendment and due process claims for damages against the individual defendants were barred by qualified immunity because it was not clearly established at the time that AD 02-10 violated the constitutional rights of SBN sex offenders. It further held that Mr. Werner's official-capacity claims that AD 02-10 was unconstitutional were moot because he no longer was subject to the directive.

Acting pro se, Mr. Werner timely appealed the court's judgment, and we recruited counsel to assist him.[14] We ordered the parties to address at least the following issues:

> (1) Do the facts alleged by Werner (including his detention in county jail beyond his release date) state a claim under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment?
>
> (2) If Werner has stated a constitutional claim for damages, are the defendants entitled to qualified immunity for detaining Werner in county jail after his release date?[15]

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[14] The court expresses its appreciation to counsel and his law firm for their excellent representation of their client.

[15] Dkt.52.

II

DISCUSSION

The district court granted summary judgment on Mr. Werner's Eighth Amendment[16] and due process claims because it concluded that the defendants were entitled to the protections of qualified immunity.[17] "We review a district court's grant of summary judgment based on qualified immunity *de novo*, accepting all facts and inferences in the light most favorable to the non-moving party." *Zimmerman v. Doran*, 807 F.3d 178, 182 (7th Cir. 2015). Qualified immunity shields government officials from civil "liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Purvis v. Oest*, 614 F.3d 713, 720 (7th Cir. 2010) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In determining whether qualified immunity applies, "we must address two questions: [1] whether the plaintiff's allegations make out a deprivation of a constitutional right, and [2] whether the right was clearly established at the time of defendant's alleged misconduct." *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010).

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[16] The Eighth Amendment applies here to Wisconsin through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

[17] Mr. Werner concedes that his official-capacity claims for injunctive relief on the ground that AD 02-10 as a policy is unconstitutional are now moot because the directive is no longer in effect. We therefore do not address them. Mr. Werner's individual claims for damages, of course, are not affected by this development.

At one time, the Supreme Court required categorically that we conduct these two inquiries sequentially in order to avoid stagnation in the development of constitutional law. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under this framework, we had to determine "first if the alleged facts described a legal violation, and only if they did, mov[e] on to the question whether the law was clearly established." *Mordi v. Zeigler*, 770 F.3d 1161, 1165 (7th Cir. 2014). The Court relaxed this "rigid order of battle" in *Pearson v. Callahan*, 555 U.S. 223 (2009). It held that "the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236.[18]

In some situations, adherence to the traditional two-step approach is appropriate. *See id.* (recognizing that it is "often beneficial" to follow "the *Saucier* protocol"). Nevertheless, the circumstances of the present case make it advisable to avail ourselves of the latitude now afforded us. *Id.* at 241 ("Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable." (alteration omitted) (internal quotation

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[18] *See also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (exercising this discretion); *City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1775 (2015) (same); *Mordi v. Zeigler*, 770 F.3d 1161, 1165 (7th Cir. 2014) (same).

marks omitted)).[19] Indeed, there are several reasons that counsel that we not address definitively the constitutional issue. First, the underlying administrative directive is no longer operable. Secondly, the appropriate analysis for claims of detained individuals not subject to sentences of incarceration is a difficult question, and it is easy for an intermediate appellate tribunal to lose its footing on the shifting sands of present-day case authority. For a long time, we have recognized that the treatment of a detained person not serving a sentence of incarceration is governed by the Due Process Clause,[20] but we often have borrowed Eighth Amendment standards as a rule of decision.[21] We also have recognized, of course, that a person serving a sentence of probation or parole has a

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[19] *See also Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) ("[*Pearson*'s] approach comports with our usual reluctance to decide constitutional questions unnecessarily.").

[20] *See Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 664 (7th Cir. 2012) (holding that "[b]ecause Rice was a pretrial detainee, it is the due process clause of the Fourteenth Amendment rather than the Eighth Amendment's proscription against cruel and unusual punishment which is the source of [his] right"); *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[C]onditions or restrictions of pretrial detention … implicate only the protection against deprivation of liberty without due process of law.").

[21] *See Rice*, 675 F.3d at 664 (noting that "courts still look to Eighth Amendment case law in addressing the claims of pretrial detainees, given that the protections of the Fourteenth Amendment's due process clause are at least as broad as those that the Eighth Amendment affords to convicted prisoners, and the Supreme Court has not yet determined just how much additional protection the Fourteenth Amendment gives to pretrial detainees" (citations omitted)).

limited liberty interest in his freedom that cannot be curtailed without the procedural protections of notice and hearing. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Yet, when confronted with the failure to release a person because of an error in the computation of his sentence, we have relied on the principles of the Eighth Amendment. *See Campbell v. Peters*, 256 F.3d 695 (7th Cir. 2001);[22] *Burke v. Johnston*, 452 F.3d 665 (7th Cir. 2006).[23] *But cf. Armato v. Grounds*, 766 F.3d 713 (7th

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[22] In *Campbell v. Peters*, 256 F.3d 695 (7th Cir. 2001), Campbell had been convicted of residential burglary and sentenced to a prison term and a consecutive term of mandatory supervised release ("MSR"). *Id.* at 697. While serving the MSR term, Campbell was arrested and convicted of unlawful use of a weapon by a felon and sentenced to a two-year prison term; his burglary MSR was revoked. *Id.* Upon returning to prison, Campbell committed several offenses that resulted in revocation of the good conduct credits he had earned while serving his burglary prison term. *Id.* at 697–98. When Campbell eventually was released, he filed a § 1983 action claiming that his good conduct credits had been revoked improperly under Illinois law, and, therefore, that he had been wrongfully detained beyond his proper release date in violation of the Eighth and Fourteenth Amendments. *Id.* at 699. As a general matter, we agreed with Campbell's premise that, "if through deliberate indifference to the requirements of state law the correctional officials kept him imprisoned too long, his Eighth Amendment rights were violated." *Id.* at 700. Nevertheless, we held that the defendants were entitled to qualified immunity because "it was not apparent [at the time] that this kind of state law mistake rose to the level of an Eighth Amendment violation." *Id*. at 701. We did not consider the merits of Campbell's due process claim. *Id.* at 702.

[23] In *Burke v. Johnston*, 452 F.3d 665 (7th Cir. 2006), Burke, who was incarcerated, brought a § 1983 action claiming that Wisconsin's deliberate indifference to his requests for credit for

Cir. 2014) (analyzing a similar problem under both Eighth Amendment and procedural due process principles).[24] Other circuits have employed a variety of

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time he had spent in jail resulted in an unconstitutional prolonging of his incarceration. *Id.* at 668. Relying on *Campbell*, "we agree[d] that incarceration after the time specified in a sentence has expired violates the Eighth Amendment if it is the product of deliberate indifference." *Id.* at 669. Ultimately, however, we remanded the case without deciding whether Burke had prevailed on such a claim. *Id.* at 670.

[24] In *Armato v. Grounds*, 766 F.3d 713 (7th Cir. 2014), we rejected a constitutional challenge brought under circumstances that were somewhat similar to the present case. At issue in *Armato* was Illinois' "turnaround practice" of walking parole-eligible inmates who lacked approved housing to the prison gate, turning them around, and returning them to custody. *See Crayton v. Duncan*, No. 15-CV-399-NJR, 2015 WL 2207191, at *4 n.2 (S.D. Ill. May 8, 2015) (describing turnaround practice); *Brown v. Randle*, No. 11 C 50193, 2014 WL 2533213, at *1 (N.D. Ill. June 5, 2014); *Murdock v. Walker*, No. 08 C 1142, 2014 WL 916992, at *3–4 (N.D. Ill. Mar. 10, 2014). Armato had been convicted of a sex offense in Illinois and sentenced to a prison term but not to a term of MSR. 766 F.3d at 716. When he became eligible for release, the administrator in charge of his file was under the impression that state law required that his sentence include an MSR. *Id.* at 717. She further believed "that when a previously-convicted sex offender is released from custody, he is subject to strict MSR conditions such as electronic monitoring and a suitable host location approved by the IDOC." *Id.* Because no such housing could be located, the administrator decided that Armato could not be released. *Id.* She then contacted several of her superiors, who told her that "the appropriate line of action would be to 'violate [Armato] at the door,'" a reference to the turnaround practice. *Id.* at 718 & n.2 (alteration in original). In the meantime, another prison official contacted the Illinois Office of the Attorney General ("AG's Office") to request an amended sentencing order that included an MSR term. *Id.* at 718. Ultimately, the AG's Office decided not to seek an amended order, and Armato was released. *Id.* at 719.

approaches invoking Eighth Amendment and due process protections.[25] Recently, however, the Supreme Court held that the treatment of a pretrial prisoner is governed by the substantive standards of the Due

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Armato then brought an action in federal court under § 1983, claiming that his continued detention violated his Eighth Amendment and due process rights. *Id.* We held first that Armato's Eighth Amendment claim failed on the merits because he had not shown that his detention was the result of deliberate indifference. *Id.* at 721. We also rejected Armato's Fourteenth Amendment claim, which we treated as a procedural due process claim. *Id.* at 721–22. We held that such a claim failed because "the processes undertaken by the defendants were sufficient to address Armato's situation and justify his prolonged detention." *Id.* at 722. The defendants had contacted the AG's Office to pursue an amendment to Armato's sentence, and, in any event, "Armato had numerous sufficient remedies available to him in the state court including a writ of habeas corpus, a writ of mandamus … , and a claim of false imprisonment." *Id.*

[25] *See Scott v. Baldwin*, 720 F.3d 1034, 1036 (8th Cir. 2013) ("Incarceration beyond the termination of one's sentence may state a claim under the due process clause and the eighth amendment." (internal quotation marks omitted)); *Sample v. Diecks*, 885 F.2d 1099, 1107–18 (3d Cir. 1989) (analyzing under both Eighth Amendment and procedural guarantees of Fourteenth Amendment); *Haygood v. Younger*, 769 F.2d 1350, 1354–59 (9th Cir. 1985) (same). Other courts, however, have expressed a preference to analyze such claims under only the Due Process Clause. *See Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000) (holding that plaintiff had failed to state an Eighth Amendment claim because he was "complaining about the fact of his incarceration rather than its conditions," but recognizing a substantive claim under Due Process Clause); *Shorts v. Bartholomew*, 255 F.App'x 46, 51 (6th Cir. 2007) ("[W]hen a prisoner's sentence has expired, he is entitled to release. … This liberty interest is most often attributed to the Due Process Clause of the Fourteenth Amendment.").

Process Clause. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). This conclusion seems compatible with the Court's earlier holding in *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972), that the continued detention of a person beyond the expiration of their prison sentence "violates his rights under the Fourteenth Amendment." *Id.* at 246. *But cf. Baker v. McCollan*, 443 U.S. 137, 145 (1979) (holding that "a detention of three days over a New Year's weekend does not and could not amount to" a "deprivation of liberty without due process of law").

Another consideration further convinces us that we should not attempt to reconcile these governing principles here. Mr. Werner has presented the due process argument to us solely as a matter of procedural due process, but we think that *Kingsley*, *McNeil*, and *Baker* suggest that substantive due process principles are implicated here. Rather than resolve definitively that question in a case in which counsel has not squarely raised the issue, we believe the proper course is to focus on the second prong of the qualified immunity inquiry and to determine whether the contours of the right involved were clearly established at the time of the defendants' actions.[26]

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[26] In addition to his claims against those defendants personally involved in his detention, Mr. Werner contends that his individual-capacity claims against the administrators responsible for AD 02-10, Secretary Hamblin (now Secretary Wall) and Division of Community Corrections Regional Chief Snyder-Spaar, were dismissed improperly during screening. In *Childress v. Walker*, 787 F.3d 433 (7th Cir. 2015), we held that "[i]n the case of those responsible for setting policy, liability will result from the institution of a policy that, when enforced, causes a constitutional deprivation." *Id.* at 440 (internal quotation marks omitted). A

A clearly established right is one that "is sufficiently clear that any reasonable official would understand that his or her actions violate that right, meaning that existing precedent must have placed the statutory or constitutional question beyond debate." *Zimmerman*, 807 F.3d at 182 (citing *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The Supreme Court also has held that, in this context, legal rights cannot be defined at a high level of generality. *See, e.g.*, *id.* ("The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken *in light of the specific context of the case, not as a broad general proposition*." (first emphasis in original) (citation omitted) (internal quotation marks omitted)). For the reasons set forth below, we conclude that a reasonable official would not have known that detaining Mr. Werner pursuant to AD 02-10 was legally impermissible.

In conducting the clearly established inquiry, our first task is to consider controlling Supreme Court and Seventh Circuit precedent. *Abbott v. Sangamon Cty.*,

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plaintiff therefore states a claim for relief against prison administrators responsible for a policy where the plaintiff "alleges that prison administrators knew of th[e] practice and knew that th[e] practice put at least some recently released prisoners in jeopardy of losing their freedom, but nevertheless did not alter, change, or otherwise intervene to prevent the harm." *Id.* We thus consider Mr. Werner's claims as they apply to both the defendants personally involved in his detention under AD 02-10 and also those responsible for creating the directive.

705 F.3d 706, 731 (7th Cir. 2013). Our earlier discussion makes evident that the precedent of the Supreme Court and of our court certainly did not provide adequate guidance to permit the defendants to understand their responsibilities in the face of the tangle of overlapping laws and regulations that Wisconsin had created.[27] We therefore must "cast a wider net" and look to whether "all relevant case law" demonstrates "such a clear trend … that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Id.* (internal quotation marks omitted).[28] In this

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[27] *See supra* notes 20–24 and accompanying text.

[28] We are not alone in looking to trends in the decisional law of other jurisdictions once we are satisfied that controlling precedent in our own circuit does not clearly establish a particular legal right. *See, e.g.*, *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (looking to "clearly established weight of authority from other courts" (internal quotation marks omitted)); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (considering whether there is "a robust consensus of persuasive authority" (internal quotation marks omitted)); *Bame v. Dillard*, 637 F.3d 380, 384 (D.C. Cir. 2011) (looking to "cases from other courts exhibiting a consensus view" (internal quotation marks omitted)); *Wilson v. City of Bos.*, 421 F.3d 45, 56 (1st Cir. 2005) (looking to "all available case law, including both federal cases outside our own circuit, and state court decisions of the state wherein the officers operated" (citations omitted) (internal quotation marks omitted)); *Turner v. Ark. Ins. Dep't*, 297 F.3d 751, 755 (8th Cir. 2002) (taking "a broad view of the concept of clearly established law" that "look[s] to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit" (internal quotation marks omitted)); *Trulock v. Freeh*, 275 F.3d 391, 407 (4th Cir. 2001) (asking whether there is a "consensus of cases of persuasive authority from other jurisdictions") (internal quotation marks omitted)).

respect, Mr. Werner identifies a line of Wisconsin state court decisions. In *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. Ct. App. 2000), Olson was serving a prison sentence for sexual assault and reached his mandatory release date on March 2, 1999; the DOC, however, had not located a residence for him. *Id.* at 426–27. Consequently, Olson was transferred from a state penitentiary to a minimum security facility, at which point he filed a petition for habeas relief on the ground "that his continued incarceration past his statutorily mandated release date was an unlawful restraint of his personal liberty." *Id.* at 427. Acknowledging that the issue was a constitutional one dealing with personal liberty, the Wisconsin Court of Appeals concluded that the continued detention of Olson beyond his mandatory release date was not authorized: Wisconsin law provided that "each inmate is entitled to mandatory release on parole … at two thirds of the sentence." *Id.* (quoting Wis. Stat. § 302.11(1)). Although the court "realize[d] that it is difficult for the DOC to find a neighborhood that will accept a paroled sex offender in its midst," the above statutory language convinced the court that "[w]hether or not a place has been found for an inmate, he or she must be released on his or her mandatory release date." *Id.* at 427–28. The court noted in closing that there may be "a way for the state to more closely monitor sex offenders for a time between mandatory release and placement"; however, this was not the court's responsibility to determine. *Id.* at 428.[29]

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[29] *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. Ct. App. 2000), came on the heels of a very similar decision by the Wisconsin Court of Appeals in *State ex rel. Woods v. Morgan*, 591

The Wisconsin Court of Appeals again considered this issue in *Allen v. Guerrero*, 688 N.W.2d 673 (Wis. Ct. App. 2004), this time in the context of the Eighth Amendment. Allen, who had been convicted of sexual assault, reached his mandatory release date on January 4, 2000, but was unable to secure appropriate housing. *Id.* at 675–76. Instead of releasing Allen to parole as required under Wis. Stat. § 302.11(1), he was transferred to a minimum security facility and placed under the supervision of parole agents. *Id.* at 676. Several months later, the parole agents placed Allen on a "parole hold pending a parole revocation hearing," arrested him, and sent him back to the state

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N.W.2d 922 (Wis. Ct. App. 1999). Woods had been convicted of, among other crimes, sexual assault, and he was incarcerated at a state penitentiary. *Id.* at 923 & n.2. When Woods reached his mandatory release date, he was transferred from the penitentiary to a minimum security facility. *Id.* at 923. Several days later, "Woods made sexual overtures to [another] inmate." *Id.* As a result, his parole was revoked, and he was transferred back to the penitentiary. *Id.* Woods then filed a petition for a writ of habeas corpus in state court, contending that his right to due process of law had been violated. *Id.* He argued that although he had been transferred from the penitentiary to the minimum security facility at the end of his sentence, he remained a prisoner and therefore "was subject to prison inmate rules … , not probation and parole regulations." *Id.* at 924. Thus, he argued, his conduct should "have carried an administrative sanction or a loss of prison privileges, not revocation of parole." *Id.* The Wisconsin Court of Appeals granted Woods's petition, concluding that because both the penitentiary and the minimum security facility were state prisons, his status as a prisoner did not change when he was initially transferred. *Id.* at 925. Because Woods never had attained parolee status, his parole could not be revoked. *Id.*

penitentiary. *Id.*[30] An ALJ, however, concluded that Allen could not have violated his parole because he had never become a parolee. *Id.* Allen remained in custody, and the DOC initiated a second parole-revocation proceeding; again, an ALJ held that revocation was inappropriate. *Id.* Allen petitioned for habeas relief, which was granted, and he was released to parole. *Id.*

Allen then brought a § 1983 action claiming that his continued incarceration beyond his mandatory release date violated the Eighth and Fourteenth Amendments, and the defendant prison officials raised qualified immunity as an affirmative defense. *Id.* Relying in large part on our decision in *Campbell*, the Wisconsin Court of Appeals held that Allen had made out an Eighth Amendment claim because the defendant's commencement of a second parole-revocation hearing instead of releasing him on parole demonstrated "that they were deliberately indifferent to his plight." *Id.* at 678 (alterations omitted) (internal quotation marks omitted). Proceeding to the second prong of the qualified immunity analysis, the court explained that, after *Olson*, Wisconsin state law was clear that "Allen was entitled to release on parole upon reaching his [mandatory release] date." *Id.* at 679. Thus, "no reasonable public official could have believed that [Allen's] continued detention was constitutionally permissible." *Id.* at 680.

These cases, however, do not comprise a full picture of Wisconsin's legal landscape. In 2005, just one year after the Wisconsin Court of Appeals decided *Allen*, and

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[30] The court's opinion does not make clear why the agents initiated the parole hold and revocation.

long before the application of the directive here, the Wisconsin Supreme Court decided *State ex. rel. Riesch v. Schwarz*, 692 N.W.2d 219 (Wis. 2005). Riesch was serving an eight-year sentence for sexual assault; his mandatory release date was July 21, 1998. *Id.* at 220. Riesch's parole supervision rules, which he refused to sign, "required [him] to avoid unlawful activity and conduct that was not in the best interest of the public or his rehabilitation." *Id.* at 221. Riesch's parole agent also decided that, because of the nature of his offense, Riesch "needed to reside at an approved halfway house or residence"; again, Riesch refused to cooperate. *Id.* When Riesch reached his mandatory release date, the DOC initiated a parole hold and transferred him from state prison to a county jail. *Id.* A week later, Riesch's parole agent initiated a revocation proceeding, and an ALJ revoked his parole. *Id.*

Riesch then filed a petition for writ of certiorari, in which he claimed, relying on *Olson*, that the revocation of his parole was unlawful because he was not released from physical custody upon his mandatory release date and therefore was not a parolee. *Id.* at 222–23. The Wisconsin Supreme Court disagreed. It held that Riesch's case was distinguishable from *Olson* because Riesch, in refusing to cooperate, had "violated the conditions of his parole immediately and simultaneously with his mandatory release date." *Id.* at 223. Importantly, the court also wrote:

> The holding Riesch seeks today is a bright-line rule that elevates form over substance. He contends that inmates must always be released from physical custody before any revocation is commenced, regardless of whether they have

> signed parole rules, complied with parole rules, or cooperated with their agent. In essence, he is asking for a ritual where the DOC releases uncooperative inmates just outside the prison walls on their mandatory release dates before subsequently placing parole holds upon them.
> …
>
> In the end, we are mindful that the DOC is not free to hold inmates indefinitely for such problems as failure to find suitable housing on its part. *Olson*, 233 Wis.2d at 690, 608 N.W.2d 425. However, we also recognize that the DOC has substantial discretionary authority to develop the rules and conditions for release. *Macemon I*, 208 Wis.2d at 597, 561 N.W.2d 779. *Where inmates violate these terms immediately and simultaneously with their scheduled mandatory release dates, the DOC should be able to maintain continuous custody*, even though that person's status changes from prisoner serving a sentence to a parolee detained on a parole hold.

Id. at 225–26 (emphasis added) (footnote omitted).

The Wisconsin Supreme Court's reasoning in *Riesch* confirms that *Olson* and *Allen* had not put the precise situation addressed by AD 02-10 "beyond debate" in Wisconsin. *Ashcroft v. al Kidd*, 563 U.S. 731, 741 (2011). *Riesch* marked the first time that a Wisconsin court had focused on the inherent conflict between a sex offender's right to timely release to supervision and the rules and restrictions governing that release. The Wisconsin Supreme Court's treatment of this dilemma

demonstrates that "the right's contours were [not] sufficiently definite that" the defendants in this case would have been on notice that AD 02-10's procedure was unlawful. *City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (internal quotation marks omitted).

Riesch made clear that the DOC's inability to locate appropriate housing does not afford it a blank check to detain indefinitely an individual set for release from imprisonment. However, the Wisconsin Supreme Court was cognizant of the practical difficulties that can arise when release itself conflicts with the "substantial discretionary authority" that DOC has "to develop the rules and conditions for releas[ing]" a person to supervision. 692 N.W.2d at 225. Rather than prohibit absolutely the DOC from detaining individuals caught in this predicament, *Riesch* endorsed a narrow exception: "Where inmates violate these terms immediately and simultaneously with their scheduled mandatory release dates, the DOC should be able to maintain continuous custody." *Id.*

Riesch therefore can be read plausibly as acknowledging that, under Wisconsin law, the DOC may "maintain continuous custody" in the unique circumstance where release from imprisonment to a lesser level of restraint would violate the terms of release due to an inability to make practical arrangements for the implementation of that lesser restraint. *Id.* Here, although Mr. Werner's probation violation was not, in strict terms, "immediate[] and simultaneous[]," it was, as a practical matter, an imminent certainty. *Id*. And although his infraction was not, like Riesch's, the product of his recalcitrance,

releasing Mr. Werner to probation equally would have "elevate[d] form over substance" to require "a ritual where the DOC releases [noncompliant] inmates just outside the prison walls on their mandatory release dates before subsequently" detaining them. *Id*. To be sure, the length of deferral of release from imprisonment in this case may well have been a fairly aggressive reading of *Riesch*.[31] However, given the lack of clarity with respect to *Riesch*'s outer limits, "we cannot say that only someone plainly incompetent or who knowingly violate[s] the law would have … acted as [the defendants] did." *Mullenix*, 136 S. Ct. at 310 (first alteration in original) (internal quotation marks omitted).

Because clearly established law at the time would not have notified the defendants in this case that the procedures set forth in AD 02-10 were unlawful, we conclude that they are entitled to qualified immunity on Mr. Werner's claims.

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[31] We note that Mr. Werner did have at least one alternative remedy available to him throughout his detention under AD 02-10. Under Wisconsin Administrative Code DOC § 328.11 (now DOC § 328.12), Mr. Werner was allowed to seek review of any "decision which affects [him] personally." *Id.* DOC § 328.11(3). Although this review process would not have permitted Mr. Werner to challenge the lawfulness of his detention directly, *id.* DOC § 328.11(4)(b), it would have allowed him to challenge any of the housing disapprovals underlying his detention, *see Metcalf v. Donalds*, No. 10-C-0615, 2012 WL 2050823, at *6 & n.1 (E.D. Wis. June 7, 2012) (noting that the plaintiff "could have used the complaint process established by § DOC 328.11 to challenge the decisions concerning his housing options").

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

HAMILTON, *Circuit Judge*, dissenting in part. I respectfully dissent from my colleagues' decision to grant qualified immunity to the policy making defendants, Hamblin, Snyder Spaar, and Symdon. They adopted and enforced Administrative Directive 02-10. That policy was unconstitutional as applied to someone like Werner, who had reached his mandatory release date and who, through no fault of his own, was unable to find housing that satisfied both local laws and state parole officials. Pursuant to that policy, Werner spent 54 weeks in a county jail when that custody was clearly not authorized by state law. Werner was deprived of his liberty without due process of law.

This case presents an extreme version of a pervasive problem in the criminal justice system. Recidivism is a serious problem with many sex offenders. State and local governments have enacted numerous restrictions on the activities, employment, and housing of released sex offenders. Those restrictions can make it difficult, and in some cases literally impossible, for released offenders to live and work in compliance with all the laws that apply to them. See generally, e.g., *Doe v. Snyder*, — F.3d —, 2016 WL 4473231 (6th Cir. Aug. 25, 2016) (describing restrictions under Michigan law). In this case, the problem was housing. Brown County, Wisconsin, had,

we are told, about fourteen separate ordinances restricting released sex offenders.

For more than a year neither Werner nor anyone helping him could find lawful and suitable housing for him. Werner was kept in custody pursuant to the policy that the defendants adopted and enforced. That policy was unconstitutional and contrary to state law even when it was issued in 2002.

To extend qualified immunity to these defendants, though, the majority errs by relying upon a more recent decision by the Wisconsin Supreme Court, *State ex rel. Riesch v. Schwarz*, 692 N.W.2d 219 (Wis. 2005). As explained below, the state court in *Riesch* took care to distinguish its decision from cases like Werner's, in which offenders who reach their release dates are cooperative with efforts to supervise them.

Plaintiff Werner committed serious crimes and was punished severely for them. As a plaintiff, he is singularly unsympathetic. He earned his designation as a "Special Bulletin Notification" offender by committing multiple sex offenses against children. Both during and after the period in question here, he has repeatedly violated the law. He is now back in prison after another crime. Nevertheless, the legal issues in his case extend beyond Mr. Werner and his crimes.

Under the state law governing his conviction and punishment, when Werner reached his mandatory release date, he was entitled to be released from custody, subject to conditions of parole. As the majority opinion recounts, he was not released but was instead locked up in a county jail. He was kept in jail 148 out

of 168 hours each week. The remaining 20 hours he was allowed to leave the jail with a chaperone to accomplish the nearly impossible job of finding housing that would comply with all the local laws applicable to convicted sex offenders and with the state's conditions of parole. More than a year after his initial "release" to the county jail, he finally found housing that satisfied all the criteria.

Werner's continued custody in the county jail—and "custody" is the only way to describe those 148 hours per week—was not authorized by state law or by a court judgment after due process of law. He was quite simply deprived of his liberty without due process of law. Executive branch officials are not authorized to lock people up indefinitely without prior court authorization. The ability to seek a writ of habeas corpus later does not mean the initial deprivation occurs with due process of law. And even a parolee, whose liberty is conditional and constrained, cannot have his parole revoked and his liberty taken away without due process of law. *Morrissey v. Brewer*, 408 U.S. 471 (1972); see also *Atkins v. Chicago*, 631 F.3d 823, 833–34 (7th Cir. 2011) (Hamilton, J., concurring in judgment).

I recognize that the combination of local laws in Brown County and the needs of effective parole supervision placed the defendants at all levels of the Wisconsin parole system in a tough spot. If they had faced Werner's situation without guidance from state law, a defense of qualified immunity would have more merit. But the slate was not clean. Similar problems had arisen before. The state courts had squarely

rejected the solution of keeping offenders like Werner in custody past their mandatory release dates.

First came *State ex rel. Woods v. Morgan*, 591 N.W.2d 922 (Wis. App. 1999). Woods was a prisoner who reached his mandatory release date. Instead of being released, he was transferred to another correctional center. Four days later, he made sexual overtures toward an inmate at that new facility, and his parole was revoked. Woods petitioned for a writ of habeas corpus. He argued that he could not have his parole properly revoked because he had never actually been paroled. The Wisconsin Court of Appeals agreed, relying on the fact that Woods had been transferred to a different state prison. He was still deemed a prisoner, not a parolee, even though he had been held past his mandatory release date. *Id.* at 925. In other words, continued confinement in a state prison was not authorized for a parolee. There was no indication in the record why Woods had not been released on his mandatory release date.

The next year came *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. App. 2000), which is the decision most instructive for this case. Like plaintiff Werner, Olson reached his release date, but he was not released because the Department of Corrections was unable to locate a suitable residence for him on parole. He was instead transferred to another state correctional facility. The court held that the State had "no authority to hold an inmate in custody beyond his or her mandatory release date, regardless of whether departmental efforts have secured a residence for the inmate. *Id.* at 426. The court explained: "We realize that it is difficult for the DOC to find a neighborhood

that will accept a paroled sex offender in its midst. But there is no gray area in the statute—it is crystal clear. Our job is to apply the statute as it is written. *Whether or not a place has been found for an inmate, he or she must be released on his or her mandatory release date*." *Id*. at 427–28 (emphasis added).

As with Woods, "there was no indication that Olson had done anything to warrant continuous custody at that time." *Riesch*, 692 N.W.2d at 224 (summarizing *Olson*). The State even conceded that Olson had been entitled to release, and no statute or administrative rule authorized the State to detain him past that time.

Then, to bring the point even closer to this civil case for damages, in *Allen v. Guerrero*, 688 N.W.2d 673 (Wis. App. 2004), another inmate was held past his mandatory release date. The State and Allen had been unable to find suitable housing for him by his mandatory release date. Correctional officials moved Allen to a minimum security prison under the supervision of parole agents. State officials twice tried to revoke this unusual form of "parole," and twice the courts ordered his release. Allen spent all of 2000 in continuous state custody past his mandatory release date of January 4, 2000. He was not released until January 2001.

Allen then sued the state correctional officials in state court under 42 U.S.C. § 1983 alleging violation of his due process and Eighth Amendment rights. The Wisconsin Court of Appeals held not only that Allen had stated a claim for violation of his constitutional rights but that the violation was so clearly established that defendants were not entitled to qualified immunity: "We agree with Allen that *Woods* and *Olson*

clearly established" that Allen was entitled to release on parole on his mandatory release date. 688 N.W.2d at 679.

The *Allen* court then rejected a further qualified immunity argument that is echoed in this case. The argument is that because some cases found unauthorized continued custody violated the Eighth Amendment while others found it violated the Due Process Clause of the Fourteenth Amendment, the controlling law was not "clearly established." The Wisconsin Court of Appeals correctly found in *Allen* that the unlawfulness of the continued custody was clearly established in 2000 despite doctrinal arguments about whether it violated one or both amendments. The application of two basic liberties does not weaken the case. It strengthens it. The *Allen* court concluded, as we should, "that no reasonable public official could have believed that such continued detention was constitutionally permissible." *Id*. at 681.

The qualified immunity presents an unusual wrinkle here. Qualified immunity doctrine often indulges in the legal fiction of assuming that official defendants are aware of applicable court decisions. Here, there was no fiction at all. The policy making defendants issued AD 02-10 after both *Woods* and *Olson* had been decided. The policy even cited both decisions, yet purported to authorize continued custody in the teeth of those decisions.

To avoid reversing the judgment for the policy-making defendants, the majority invokes qualified immunity based on the Wisconsin Supreme Court's 2005 decision in *Riesch*, 692 N.W.2d 219, or, more precisely, based on what the majority generously calls

"a fairly aggressive reading" of *Riesch*. A qualified immunity defense is supposed to be based upon objectively reasonable interpretations of existing law. E.g., *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985); *Harrell v. Cook*, 169 F.3d 428, 431 (7th Cir. 1999). Using *Riesch* as a qualified immunity lifeline for the policy-making defendants is not objectively reasonable. The majority first overlooks the critical distinction drawn by the *Riesch* court itself and then attributes to the Wisconsin Supreme Court in *Riesch* an internal contradiction and confusion that simply are not present. In fact, *Riesch* expressly agreed with *Woods* and *Olson* and took care to distinguish Riesch's case on grounds that apply directly here. It is no surprise that neither the district court nor the defendants, in their brief to this court or in letters to plaintiff, relied on *Riesch* to justify qualified immunity.

Like Werner, Riesch was a sex offender who was nearing his mandatory release date. Unlike Werner, though, Riesch did not cooperate with the release and supervision process. He announced that he would not participate in the sex offender treatment program that was required as a condition of parole. He refused to provide medical information or his signature on his fingerprint record. His behavior was such that the assigned parole agent was unwilling to meet with him unless he were shackled, and he refused. Riesch had his parole revoked without ever actually leaving state custody. In his challenge to the revocation, he relied on *Woods* and *Olson* to argue that he had never actually been paroled, so that his parole could not be revoked and he should be released.

The Wisconsin Supreme Court affirmed the denial of relief, but on narrow grounds that distinguished both *Woods* and *Olson* on grounds that apply directly here. The *Riesch* court explained: "*Woods* and *Olson* are unlike the present case because *the inmates in those cases did nothing to warrant their continued detention at the time of their mandatory release date*. In contrast, the inmate in the *Macemon* cases, like Riesch, violated the conditions of his parole immediately and simultaneously with his mandatory release date." 692 N.W.2d at 223 (emphasis added). The *Riesch* court went on to explain the difference with *Olson*:

> In *Olson*, the inmate petitioned the court of appeals for writ of habeas corpus after he was detained past his mandatory release date. Olson had been transferred from one correctional facility to another on his release date because the DOC was unable to locate a suitable residence for him. Again [as in *Woods*], there was no indication that Olson had done anything to warrant the continuous custody at that time. Accordingly, the State conceded that he was entitled to release when he reached his mandatory release date and that no statute or administrative rule authorized the DOC to detain him past that point. The court of appeals agreed. *Olson*, 233 Wis.2d 685, ¶ 1, 608 N.W.2d 425.

692 N.W.2d at 224. The *Riesch* court continued: "Unlike the inmates in *Woods* and *Olson*, Riesch engaged in conduct that warranted custody at the time of his mandatory release date," by refusing to cooperate with his social worker in arranging for a suitable

residence. *Id*. Riesch was not entitled to relief because he had "stubbornly refused to cooperate with the department's efforts to implement a suitable supervision plan," and he was "totally rejecting active supervision." *Id*., quoting administrative decision.

The *Riesch* court concluded:

> In the end, we are mindful that the DOC is not free to hold inmates indefinitely for such problems as failure to find suitable housing on its part. *Olson*, 233 Wis.2d at 690. However, we also recognize that the DOC has substantial discretionary authority to develop the rules and conditions for release. *Macemon*. Where inmates violate these terms immediately and simultaneously with their scheduled mandatory release dates, the DOC should be able to maintain continuous custody, even though that person's status changes from a prisoner serving a sentence to a parolee detained on a parole hold.

Id. at 225. The *Riesch* court rejected a highly formalistic rule advocated by Riesch, but it did not disagree with *Woods* or *Olson*, nor did it purport to authorize the continued custody of a parolee who was not deliberately violating the terms of his parole.

Yet the defendants' policy, AD 02-10, purported to authorize exactly such continued custody. At least after *Woods*, *Olson*, and *Allen*, and certainly in light of the distinction drawn in *Riesch*, reasonable policy-making officials could not have believed that they were authorized to keep offenders like Werner in jail after their mandatory release dates. Instead, they doggedly

stuck to the policy, even telling Werner that "Case law upholds the procedures" of AD 02-10, without identifying the case law. Dkt. 113-1, at 82 (Feb. 16, 2010 letter from defendant Snyder Spaar to plaintiff Werner).

The policy-making defendants should have known that AD 02-10 would result in unconstitutional deprivations of liberty in cases like Werner's, where the parolee did not deliberately fail to comply with parole conditions. I would allow the qualified immunity defense for the local parole agents and their supervisors who had been ordered to implement AD 02-10, but we should reverse for trial on the claims against the policy-making defendants.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14-1746

[Filed September 1, 2016]

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

Before: JOEL M. FLAUM, Circuit Judge
KENNETH F. RIPPLE, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

PATRICK J. WERNER, Plaintiff - Appellant	)
v.	)
EDWARD F. WALL, et al., Defendants - Appellees	)

Originating Case Information:

District Court No: 2:12-cv-00096-CNC
Eastern District of Wisconsin
District Judge Charles N. Clevert

The judgment of the District Court is **AFFIRMED,** with costs, in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment**(form ID: **132**)

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 12-C-0096

[Filed March 27, 2014]

PATRICK JAMES WERNER,
Plaintiff,

v.

EDWARD F. WALL, AMANDA MARTIN, LORI RICHGELS, ROSE SNYDER-SPAAR, DENISE SYMDON, ERIN MURTO, TOM WICKENAM, and ROBERT FUSFELD,
Defendants.

DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. 87), DENYING PLAINTIFF'S MOTION TO ORDER PSYCHOLOGICAL EXAM (DOC. 98), DENYING AS MOOT PLAINTIFF'S MOTION FOR LEAVE TO FILE EXCESS PAGES (DOC. 100), DENYING AS MOOT DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. 103), DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO APPOINT COUNSEL (DOC. 104), DENYING AS MOOT PLAINTIFF'S MOTION FOR ORDER TO COMBINE

REQUEST FOR ADMISSION WITH MOTION FOR SUMMARY JUDGMENT (DOC. 104), DENYING AS MOOT PLAINTIFF'S MOTION FOR COURT TO REVIEW MOTIONS AND DOCKET (DOC. 107), GRANTING PLAINTIFF'S MOTION TO FILE LATE SUMMARY JUDGMENT MOTION (DOC. 108), GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (DOC. 111), GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE EXCESS PAGES (DOC. 112), GRANTING PLAINTIFF'S MOTION TO ALLOW TABLE OF CONTENTS (DOC. 114), DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DOC. 111-1), AND DISMISSING CASE

Plaintiff is proceeding pro se on the following claims: (1) Eighth Amendment claims against defendants Martin, Richgels, Fusfeld, Murto, and Wickenam that plaintiff was incarcerated after his mandatory release date; (2) due process claims against defendants Martin, Richgels, Fusfeld, Murto, and Wickenam that plaintiff was confined at the Brown County Jail without due process; and (3) a claim against each defendant in his or her official capacity that Administrative Directive #02-10 violated plaintiff's rights under the due process clause and the ex post facto clause.

The court previously issued an order resolving motions defendants filed with their motion for summary judgment and addressing the motion for summary judgment plaintiff filed in August. In the course of supplementing his motion for summary judgment and responding to defendants motion for

summary judgment, plaintiff has filed a myriad of documents. Most of the motions plaintiff filed are now moot, as is defendants' motion to strike plaintiff's response to their motion for summary judgment. However, the court has considered the documents plaintiff filed on November 20, 2013, and has construed them as a motion for summary judgment as well as a response in opposition to defendants' motion for summary judgment. Now before the court are the parties' motions for summary judgment.

SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665, 668 (7th Cir. 2011). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson*, 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an

adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

BACKGROUND

Defendants are all employees of the Wisconsin Department of Corrections (DOC) Division of Community Corrections (DCC), with the exception of defendant Edward F. Wall, who is the Secretary of the DOC.

Because plaintiff was convicted of two or more sexual assaults, he was considered a Special Bulletin Notice (SBN) sex offender, which means that the DCC must give notice to law enforcement in the community to which plaintiff was released. *See* Wis. Stat. § 301.46(2m)(am). It also means that plaintiff had to be placed in Brown County initially upon his release, because that was where he was convicted. *See* Wis. Stat. § 301.03(20)(a).

At the time of plaintiff's release, there were approximately fourteen sex offender ordinances in Brown County. These ordinances placed severe restrictions on where registered sex offenders could live which made it very difficult to find appropriate housing for sex offenders in Brown County at the time of plaintiff's release. For example, Green Bay DCC had one Transitional Living Program (TLP) which, at the time of plaintiff's release, was too close to a park, according to the ordinances. Therefore, sex offenders

had to appear before the City of Green Bay Sex Offender Appeals Board to receive an exemption or permission to live at the TLP. Offenders could sometimes rent motel rooms, but motel owners were reluctant to rent to sex offenders and many motels were not in compliance with the ordinances.

The sex offender ordinances in Brown County place a number of administrative and financial burdens on the DOC. Due to restrictions, agents and supervisors must spend extra time and money searching for ordinance-compliant housing for offenders under their supervision. The DOC also must spend extra time and money with the chaperone service that is used to help offenders search for housing.

The DOC has no interest in detaining homeless SBN sex offenders any longer than necessary because of the administrative and financial burdens of such detentions. Housing homeless SBN sex offenders in the Brown County Jail is expensive, and the DOC reimburses the jail at an annual rate.

Plaintiff was under the supervision of the DCC from November 3, 2009, until February 9, 2011. Defendant Amanda Martin began supervising plaintiff in 2009, while plaintiff was still incarcerated at Redgranite Correctional Institution (RGCI). Plaintiff's former parole agent had completed a SBN Release Plan which proposed that plaintiff reside at a TLP in the City of Milwaukee if he was released on parole. But the DOC DCC Administrator at the time denied this request.

However, plaintiff's request to move to a TLP in Green Bay also was denied by the Green Bay Sex Offender Residence Board. Sex Offenders seeking

residence in the City of Green Bay were required to obtain preapproval from the Green Bay Sex Offender Residence Board. Martin asked plaintiff to forward to her any other proposed residence plans. On November 13, 2009, plaintiff was denied release on parole, and he was deferred until his Mandatory Release date of March 21, 2010.

On November 16, 2009, Martin had an e-mail exchange with plaintiff's social worker at RGCI. Plaintiff was concerned about where he would live when he was released and requested a telephone call with Martin to address these concerns. Martin scheduled a telephone conference for December 1, 2009, and requested that plaintiff have a list of proposed residences ready to discuss and, if the residences were within Green Bay, he needed to contact the residency board for prior approval. If not, they would need to be submitted to the DOC to have a residency investigation completed. Finally, Martin advised plaintiff that, according to the DOC administrative directive, if plaintiff had no approved residence to be released to, he would be placed in custody at the Brown County Jail and thereafter released to conduct a residency search. Martin also reminded the social worker to advise plaintiff that he could always petition not to be released from the institution. Prior to the conference call, Martin met with her supervisor, Lori Richgels, to discuss the procedure for institution releases of homeless SBN sex offenders in Brown County.

On December 1, 2009, Martin held a telephone conference with plaintiff and Martin discussed the Brown County ordinances. He spoke of housing and employment possibilities and said that if plaintiff did

not have an approved residence, he would be permitted to search for housing with a chaperone during the day and required to return to the Brown County Jail at night until an approved residence was found. Martin also explained that plaintiff would be on lifetime GPS tracking.

At that time, the GPS worked through the offender's residence landline. The offender carried the GPS tracker while out and plugged the tracker into the residential landline docking station after returning, thereby notifying DCC staff that he was home. Electronic monitoring worked in much the same way and also required a landline at that time.

Prior to plaintiff's release, Martin investigated numerous potential residences proposed by plaintiff, his social worker, or mother. None was appropriate. Martin encouraged plaintiff to continue looking and proposing places thereby increasing his changes of obtaining a residence upon his release to the community. Prior to plaintiff's release, Martin secured a chaperone to assist his search for housing upon his release.

On February 11, 2010, the DCC issued the SBN and Notification Supplement to law enforcement agencies in plaintiff's planned areas of residence, employment, and/or school enrollment. Martin and Richgels had a CORE meeting with the Brown County Sheriff's Department, the Ashwaubenon Police Department, the DePere Police Department, the Green Bay Police Department, and Tom Smith from the DOC on March 4, 2010, regarding plaintiff and other SBN sex offenders who were scheduled to be released around the same time. A CORE meeting convenes with law

enforcement, victim/witness advocates, the District Attorney's office, and Probation and Parole Agents approximately one month before the release of sex offenders to discuss their cases along with their release plans and to determine the level of community notification.

On March 16, 2010, plaintiff was released from RGCI to the DCC office in Green Bay. Martin completed the intake process with plaintiff, including reviewing the process for mandatory GPS, reviewing the sex offender registry requirements, reviewing and signing the Rules of Community Supervision and Standard Sex Offender Rules, and reviewing the procedures for sex offender housing searches. A chaperone was present, and plaintiff reviewed and signed the paperwork regarding his chaperone services too.

At 2:00 p.m. on March 16, 2010, after plaintiff had spent approximately four hours at the DCC office, plaintiff was booked into the Brown County Jail. At that time, he had not secured an approved residence, and the DCC had no alternative housing resources in the community. Therefore, Martin detained plaintiff in the Brown County Jail to prevent a violation of his rules of supervision. Martin explained to plaintiff that he was being detained because he was a homeless SBN sex offender, and an approved residence was one of the requirements of his Rules of Supervision. Moreover, he advised that plaintiff needed a residence because he was required to be on lifetime GPS, which required a telephone landline. Martin also informed plaintiff that he would be detained at the Brown County Jail at

night, but that he would be released to a chaperone during the day to look for housing.

If SBN sex offenders do not have an approved residence at the time of their release from prison, agents are directed to detain them to prevent a possible violation pursuant to Wis. Admin. Code § DOC 328.22(2)(d) (Dec. 2006). Protection of the public is the primary purpose of Administrative Directive #02-10, Procedures for SBN Offenders Lacking Approved Residences.

Every weekday, plaintiff and several other homeless SBN sex offenders were released from the jail to search for housing with chaperones for four hours. Chaperones drove the offenders around to look for appropriate housing and supervised the offenders at DCC offices while the offenders made calls to potential landlords. At the end of the four hours, an agent met the offender and the chaperone at the jail to book the offender back into jail. Agents met with offenders to follow up on calls, check ordinances, and to check Mapquest and maps in the office for potential housing. If Martin had concerns about a possible density problem, she would consult the Sex Offender Registry Program (SORP) website to see the number of sex offenders in a particular zip code area. She would also drive to an area to verify the address and survey the neighborhood to address further questions. In addition, Martin often discussed plaintiff's housing proposals and progress with her supervisor.

Werner and the other sex offenders maintained a fairly high level of independence. If they were with a chaperone, they could be out in the community, searching for housing or attending to other

appointments or errands as necessary. While at the DCC offices, offenders were allowed to talk with other offenders or read magazines and newspapers during free time. Offenders were permitted to make personal calls on DCC telephones, with prior agent approval, and wear street clothes while they were released from jail during the day. Plaintiff was permitted to go to his mother's house with a chaperone to visit, to change clothes, and to obtain money and food.

While plaintiff was held as a homeless SBN sex offender, Martin continued to investigate numerous potential residences for him. However, these residences were determined to be inappropriate for plaintiff or landlords refused to rent to plaintiff after learning that he is a registered sex offender.

In October 2010, plaintiff violated the terms of his supervision. On October 19, 2010, he was provided with a Notice of Violation, Recommended Action, Statement of Hearing Rights, and Receipt. Martin indicated that between October 1, 2010, and October 4, 2010, plaintiff was in possession of contraband in the form of paperclips at the Brown County Jail and that he made threatening comments to his fellow pod mates. On October 28, 2010, plaintiff signed an Alternative to Revocation Agreement (ATR) and plaintiff agreed to stay at one of the Division of Adult Institutions facilities, Columbia Correctional Institution (CCI), for 90 days. On December 1, 2010, Martin and Sergeant Stanley transported plaintiff from the Brown County Jail to CCI to being serving his 90 day ATR.

On February 7, 2011, plaintiff's parole case was transferred to defendant agent Robert Fusfeld. In anticipation of plaintiff's release from CCI, Fusfeld

arranged for a chaperone to transport plaintiff to locate housing and to supervise him at the job center computers, which he could use for residence and job searches. On February 18, 2011, Fusfeld contacted plaintiff's prison social worker and advised her that on plaintiff's release date, he would be released to Fusfeld's custody at the DCC offices and then transported to the Brown County Jail. Fusfeld also conducted a telephone conference with plaintiff and his mother on February 22, 2011. Plaintiff could not reside with his mother because of her roommate and the size of their apartment, but she would be able to financially assist plaintiff with up to $500.00 per month for rent if a residence that satisfied the ordinance restrictions could be located.

On February 23, 2011, Fusfeld forwarded plaintiff's Rules of Supervision to his social worker and asked her to have plaintiff sign and return the rules prior to his release date. On February 24, 2011, Fusfeld had another telephone conference with plaintiff and discussed the Brown County ordinances. Fusfeld advised plaintiff that he would go to the Brown County Jail at night until he could find an approved residence.

On March 1, 2011, plaintiff was released from CCI to the DCC office in Green Bay. Fusfeld and plaintiff reviewed his plan and signed the chaperone agreement. Later that day, plaintiff was booked into the Brown County Jail because he had not secured an approved residence and the department had no alternative housing resources in the community.

On June 1, 2011, plaintiff found a tentative residence on Manitowoc Road in Bellevue, Wisconsin. Fusfeld contacted the landlord, and she agreed to have

plaintiff as a tenant. Fusfeld contacted plaintiff's mother and informed her that he had approved the residence. Fusfeld began arrangements for community notification, GPS, telephone, and monthly rent assistance. On June 23, 2011, plaintiff's supervision was transferred to another agent due to Fusfeld's retirement.

Plaintiff's new agent was defendant Erin Murto. She continued to arrange for community notifications, GPS, telephone, and rent and moving assistance. On July 1, 2011, plaintiff moved into his new residence, and he was hooked up on GPS. He subsequently found employment.

In November 2011, plaintiff violated the terms of his supervision. He was apprehended and detained at the Brown County Jail. Revocation was recommended because plaintiff admitted to engaging in conversations on a telephone chat line, establishing a casual relationship with a 21 year old female without his agent's knowledge or approval and engaging in sexual intercourse at his residence with a female he met on the chat line. A revocation hearing was held at the Brown County Jail on April 11, 2012, and plaintiff's parole was revoked.

On November 16, 2012, plaintiff was again released to community supervision and placed at the TLP in Green Bay due to his status as a homeless sex offender. As of August 25, 2012, the City of Green Bay implemented revised stipulations to their ordinances allowing for registered sex offenders, like plaintiff, to move directly to a TLP in Green Bay without prior approval from the appeals board. Plaintiff was placed on GPS, enrolled in Sex Offender Treatment, and

reported weekly to his agent's office. On February 15, 2013, plaintiff again violated the conditions of his supervision and was placed in custody at the Brown County Jail. Revocation was recommended.

If plaintiff's probation is not revoked for violating conditions of his supervision, and he is released back to probation, Administrative Directive #02-10 would not apply to him as a probationer and DCC could release him as a homeless sex offender. If plaintiff's probation is revoked and he goes back to prison and is later released to supervision, Administrative Directive #02-10 would apply to him. However, due to the recent change in the Green Bay ordinances, DCC would be able to place him at the TLP or a motel in Green Bay until permanent housing could be located.

DISCUSSION

Defendants contend that (1) they are shielded from damage liability because they are entitled to qualified immunity; (2) plaintiff's claims for injunctive relief are moot because he is no longer a homeless sex offender; (3) plaintiff should have brought this motion as a petition for a writ of habeas corpus; (4) plaintiff's due process rights were not violated when he was detained as a homeless sex offender pursuant to AD #02-10; (5) defendants did not violate plaintiff's Eighth Amendment rights, even if the Eighth Amendment applies to this case; (6) defendants did not violate plaintiff's rights under the ex post facto clause, even if it applies to this case; and (7) plaintiff is limited to only nominal damages.

In his motion for summary judgment, plaintiff makes numerous arguments. However, he has not

limited his motion to the issues in this case. He responds to the arguments in defendants' motion for summary judgment, but also presents evidence and arguments regarding jail boarding fees imposed by the Brown County Jail, the GPS registration fee, his mental health issues, a possible claim under the Americans with Disabilities Act, and a claim that defendants did not comply with the language of AD #02-10, requiring unfettered search for housing. Plaintiff also raises numerous claims against Martin, including that she failed to diligently perform her duty to assist his search for housing, she failed to follow the instructions of her supervisor, she failed to follow proper procedures after his mother submitted an e-mail complaint about her actions, and she perjured herself in her interrogatory responses. None of these issues is part of this case, which touches on the constitutionality AD #02-10.

Turning to the issue of qualified immunity, the Supreme Court of the United States has articulated a two-part test: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the defendants violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Qualified immunity is an affirmative defense. Once raised, a plaintiff must demonstrate that the constitutional right was clearly established by showing that there is "a clearly analogous case establishing a right to be free from the specific conduct at issue" or that "the conduct is so egregious that no reasonable person could have believed that it would not violate clearly established

rights. *Chelios v. Heavener*, 520 F.3d 678, 691 (7th Cir. 2008).

The Supreme Court revisited *Saucier* and held that "because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decision [that] will best facilitate the fair and efficient disposition of each case." *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 821 (2009). In this case, the court will exercise the option provided by *Pearson* and consider first whether the constitutional right plaintiff asserts was violated was clearly established at the time of the alleged violation.

The court must grant defendants' motion for summary judgment if it finds that the constitutional right defendants allegedly violated was not clearly established at the time of the purported misconduct. *Lewis v. Downey*, 581 F.3d 467, 478 (7th Cir. 2009). To remove the shield of qualified immunity from defendants, the right that they "allegedly violated must be clearly established in a particularized sense." *Id.* (omitting internal quotations). The court must assess whether, operating under the state of the law as it existed at the time of the relevant events, "a reasonable officer would have known that the particular action at issue ... was unlawful." *Id.* at 479 (quoting *Juriss v. McGowan*, 957 F.2d 345, 350 (7th Cir. 1992)).

Here, defendants were working diligently in a challenging situation. They could not, under the line of Wisconsin state cases, retain plaintiff at a DOC institution after his mandatory release date. However, the ordinances in Brown County made it extremely difficult to find appropriate housing for SBN sex

offenders. Defendants could not allow plaintiff to be homeless because that would violate his rules of supervision and subject him to revocation. The policy set forth in Administrative Directive #02-10 was an attempt to allow SBN sex offenders to be released from prison, provide them with a place to stay, and avoid violation of their rules of supervision while the offenders were searching for appropriate housing. In 2010 and 2011 there was no case law that suggested this solution violated the SBN sex offenders' constitutional rights.

In *Metcalf v. Donalds*, No. 10-C-0615, 2012 WL 2050823 (E.D. Wis. June 7, 2012), the court concluded that the question of whether due process required a hearing in addition to or in lieu of the process available under Wis. Admin. Code § DOC 328.11 was novel and therefore defendants in that case were protected by qualified immunity from liability for damages. In *Metcalf*, the court framed the due process question in terms of the statute that establishes a complaint process that may be used by any client to "review a decision which affects the client personally." Wis. Admin. Code § 328.11(3). In this case, the issue is framed as the constitutionality of AD #02-10. Nevertheless, both cases address the procedure for handling sex offenders who have not located appropriate housing by the date of their release. Plaintiff attempts to distinguish *Metcalf* with small factual differences, such as the DCC providing Metcalf with a cell phone and allowing him to call landlords from the lobby of the DCC's offices until 5:00 p.m. each day. These differences do not affect the conclusion regarding qualified immunity, which this court would have reached even without *Metcalf*.

Unlike *Metcalf*, though, plaintiff here has state-wide defendants and a facial challenge to AD #02-10. Therefore, after determining that defendants are entitled to qualified immunity on plaintiff's individual constitutional claims, the court must consider plaintiff's official capacity claims that AD #02-10 violated his rights under the due process clause and the ex post facto clause. These claims are for injunctive relief only. *See Brown v. Budz*, 398 F.3d 904, 917-18 (7th Cir. 2005).

Plaintiff's claims for injunctive relief are moot because he is no longer being housed at the Brown County Jail as a homeless SBN sex offender. *See Maddox v. Love*, 655 F.3d 709, 716 (7th Cir. 2011); *see also Ortiz v. Downey*, 561 F.3d 664, 668 (7th Cir. 2009). Plaintiff has not shown a realistic possibility that he will again be housed at the Brown County Jail as a homeless SBN sex offender. As such, "[a]ny relief that our judgment might permit would be purely speculative in nature." *See id.*

Defendants have presented evidence that even if plaintiff's probation is revoked and he is sent to prison and then released to supervision, he would not be held at the Brown County Jail because a recent change in the Green Bay ordinance allows the DCC to place plaintiff at the TLP or in a motel in Green Bay until permanent housing could be located. Plaintiff anticipated this argument and averred that he has sufficient reason to fear that the law will be applied to him in the future. He contends that since the creation of the Green Bay Sex Offender Residency Ordinance there have been various add-ons nearly every year thereby making it impossible to know "what tomorrow

will bring with this issue." (Doc. 111-1, p. 76). Plaintiff's generalized fear of the ordinance changing is not enough to overcome the evidence presented by defendants regarding how plaintiff may be treated under current law. The court cannot determine that a policy is unconstitutional based on what the law may someday be.

As a final matter, plaintiff has filed motions asking for psychological examination (Doc. 98) and seeking the appointment of counsel (Doc. 104). The central claim in this case does not involve plaintiff's mental health, and neither a psychological examination nor plaintiff's psychiatric records are required to resolve this case. There was also no need to request pro bono counsel to represent plaintiff, as his claims have been clearly stated. Even with counsel, defendants would be entitled to qualified immunity and plaintiff would not be entitled to injunctive relief. Therefore,

IT IS ORDERED that defendants' motion for summary judgment (Doc. 87) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to order psychological exam (Doc. 98) is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for leave to file excess pages (Doc. 100) is DENIED AS MOOT.

IT IS FURTHER ORDERED that defendants' motion to strike plaintiff's response to defendants' motion for summary judgment (Doc. 103) is DENIED AS MOOT.

IT IS FURTHER ORDERED that plaintiff's motion to appoint counsel (Doc. 104) is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that plaintiff's motion for order to combine request for admission with motion for summary judgment (Doc. 104) is DENIED AS MOOT.

IT IS FURTHER ORDERED that plaintiff's motion for court to review motions and docket (Doc. 107) is DENIED AS MOOT.

IT IS FURTHER ORDERED that plaintiff's motion to file late summary judgment motion (Doc. 108) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for leave to file brief in support of motion for summary judgment (Doc. 111) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for leave to file excess pages (Doc. 112) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to allow table of contents (Doc. 114) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (Doc. 111-1) is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

Dated at Milwaukee, Wisconsin, this 27th day of March, 2014.

BY THE COURT

/s/ C.N. Clevert, Jr.
C.N. CLEVERT, JR.
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 12-C-0096

[Filed March 27, 2014]

PATRICK JAMES WERNER,
Plaintiff,

v.

GARY HAMBLIN, EDWARD F. WALL, AMANDA MARTIN, LORI RICHGELS, ROSE SNYDER-SPAAR, DENISE SYMDON, ERIN MURTO, TOM WICKENAM, and ROBERT FUSFELD,
Defendants.

JUDGMENT IN A CIVIL CASE

This action came before the court, the issues have been decided and a decision has been rendered. Now, therefore,

IT IS ORDERED AND ADJUDGED that this case is DISMISSED.

APPROVED: s/ C.N. CLEVERT, JR.
C.N. CLEVERT, JR.
U.S. District Judge

JON W. SANFILIPPO
Clerk

s/ C. Fehrenbach
(By) Deputy Clerk

3/27/2014
Date

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 12-CV-0096

[Filed March 26, 2012]

PATRICK JAMES WERNER,

Plaintiff,

v.

GARY HAMBLIN, AMANDA MARTIN, LORI RICHGELS, ROSE SNYDER-SPAAR, DENISE SYMDON, ERIN MURTO, TOM WICKENAM, and ROBERT FUSFELD,

Defendants.

DECISION AND ORDER

The plaintiff, Patrick James Werner, who is incarcerated at the Brown County Jail, filed a pro se complaint under 42 U.S.C. § 1983, alleging that his civil rights were violated. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter arises under federal statutes. The case was assigned to the court according to the random assignment of civil cases pursuant to 28 U.S.C. §636(b)(1)(B) and General Local Rule 72 (E.D. Wis.),

and the plaintiff has consented to United States magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and General Local Rule 73 (E.D. Wis.). This matter comes before the court on the plaintiff's motion for leave to proceed in forma pauperis, the plaintiff's motion to appoint counsel, and for screening of the plaintiff's complaint.

The plaintiff is required to pay the statutory filing fee of $350.00 for this action. See 28 U.S.C. § 1915(b)(1). If a prisoner does not have the money to pay the filing fee, he can request leave to proceed in forma pauperis. The plaintiff has filed a certified copy of his prison trust account statement for the six -month period immediately preceding the filing of his complaint, as required under 28 U.S.C. § 1915(a)(2), and has been assessed and paid an initial partial filing fee of $24.00. The plaintiff's motion for leave to proceed in forma pauperis will be granted.

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Denton v. Hernandez, 504 U.S. 25, 31 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989); Hutchinson ex rel. Baker v. Spink, 126 F.3d 895, 900 (7th Cir. 1997). The court may, therefore, dismiss a claim as frivolous where it is

based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327. "Malicious," although sometimes treated as a synonym for "frivolous," "is more usefully construed as intended to harass." Lindell v. McCallum , 352 F.3d 1107, 1109-10 (7th Cir. 2003) (citations omitted).

To state a cognizable claim under the federal notice pleading system, the plaintiff is required to provide a "short and plain statement of the claim showing that [he] is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). It is not necessary for the plaintiff to plead specific facts and his statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, a complaint that offers "labels and conclusions" or "formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 555). To state a claim, a complaint must contain sufficient factual matter, accepted as true, "that is plausible on its face." Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). The complaint allegations "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citation omitted).

In considering whether a complaint states a claim, courts should follow the principles set forth in Twombly

by first, "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1950. Legal conclusions must be supported by factual allegations. Id. If there are well-pleaded factual allegations, the court must, second, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id.

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that: 1) he was deprived of a right secured by the Constitution or laws of the United States; and 2) the deprivation was visited upon him by a person or persons acting under color of state law. Buchanan-Moore v. County of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009) (citing Kramer v. Village of North Fond du Lac, 384 F.3d 856, 861 (7th Cir. 2004)); see also Gomez v. Toledo, 446 U.S. 635, 640 (1980). The court is obliged to give the plaintiff's pro se allegations, "however inartfully pleaded," a liberal construction. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

I. COMPLAINT AVERMENTS

The plaintiff was convicted of a crime in 1999 and sentenced to state prison. He had a mandatory release date of March 21, 2010, but he did not have an approved residence for after his release. He was informed by his parole agent, defendant Amanda Martin, that he would be housed at the Brown County Jail (the Jail) pursuant to Administrative Directive 02-10 (AD 02-10). Martin told the plaintiff that he would be let out each work day to search for a residence and employment, accompanied by a chaperone from Attic Correctional Services. Martin told

the plaintiff that being housed at the Jail was not a punishment.

On March 16, 2010, the plaintiff was released from Redgranite Correctional Institution and transported to the state office building in Green Bay. He arrived at about 10:00-10:15 a.m. to sign his rules with Martin. They had a disagreement regarding the legality of holding the plaintiff at the Jail. At about 11:00 a.m., a chaperone transported the plaintiff to the Jail to meet Martin. She placed the plaintiff in handcuffs to enter the Jail. He once again was told that he would be released for four hours a day each week day. However, on three separate occasions, when a chaperone was unavailable, the plaintiff had to be released to Martin to sit at the state office building and make phone calls.

The plaintiff had difficulty securing a residence without employment and difficulty securing employment without a residence. He also had trouble communicating with contacts regarding both searches because he did not have a way for them to leave him messages. His options were to give them his mother's number, but she worked during the day, or Martin's number, but it sometimes took her more than a week to return the calls. The plaintiff was denied a cell phone.

The plaintiff wrote a complaint to Martin's supervisor, defendant Lori Richgels, about the limitation on his time out of the Jail each day. AD 02 -10 says that individuals will be allowed an "unfettered" search. However, Richgels indicated that the plaintiff's time outside the Jail was limited by the contract with Attic Correctional Services. She also denied the plaintiff's request for a cell phone because the Wisconsin Department of Corrections (DOC) would

not pay for it. The plaintiff also talked to Richgels on the phone, and there was some confusion regarding what the DOC would pay regarding rent for the plaintiff.

In August 2010, the plaintiff's family contacted Martin and asked what they could to help the plaintiff. Martin had not previously contacted the plaintiff's family.

In October 2010, the plaintiff received a major conduct report for contraband. The plaintiff had accidentally brought two plastic paper clips into the Jail that were on rental applications. Martin came to the Jail to take the plaintiff's statement on October 4. Three weeks later, the plaintiff received a letter from Martin indicating that she planned to impose a ninety day extended supervision sanction at the Waupaca County Jail for excessive conduct reports. The plaintiff wrote to Martin and her supervisor, defendant Lori Richgels, to clarify that he was not on extended supervision because his sentence predated that law, and that this was the only conduct report he had received at the Jail. Nevertheless, the plaintiff was sent to Columbia Correctional Institution (Columbia) for ninety days.

While at Columbia, the plaintiff received a new agent assignment, defendant Robert Fusfeld. In mid-February, the plaintiff talked to Fusfeld on the phone about his March 2011 release from Columbia. Fusfeld apologized for having to return the plaintiff to the Jail when he got out again. Fusfeld was retiring in June 2011, and the plaintiff was assigned to another agent, defendant Erin Murto. During June, the plaintiff found

housing that was approved by both Fusfeld and Murto. The plaintiff moved in on July 1, 2011.

In September 2011, Murto told the plaintiff that he had to pay $250.00 per month for global positioning system and electronic monitoring. Murto warned the plaintiff that failure to pay was a revocable offense.

In November and December 2011, Murto told the plaintiff that his discharge date for his current case was approaching. Murto warned the plaintiff that he once again could be placed in the Jail until he located an approved residence.

The plaintiff wrote to Murto's supervisor, defendant Tom Wickenam, about his debt to the Jail and his residency issue. From March 16, 2010, through December 1, 2010, and from March 1, 2011, through July 1, 2011, the plaintiff was charged $20.00 per day to be housed at the Jail, plus a $30 booking fee and the cost of toiletries and medical care. Moreover, the Jail takes twenty-five percent of any money deposited in the plaintiff's account to satisfy the debt he owes. Wickenam told the plaintiff that he should take up the jail debt issue with his attorney and Brown County and that the residency issue was premature.

The plaintiff informed "all parties that [he] did nothing wrong to warrant being detained in the Brown County Jail so to be charged a booking fee and pay for stay fee would in essence be punitive versus non-punitive like I was informed by all parties named." (Complaint at 9). He received no response or was told that nothing can be done to help him.

The plaintiff seeks monetary damages: (1) compensation for being illegally detained for

sixty-four weeks, from March 16, 2010, until July 1, 2011; (2) payment of his entire Jail debt, including reimbursement for canteen money deposited that was applied to the debt; (3) reimbursement of money spent in the course of his apartment and employment searches; (4) compensation for pain, suffering, and mental anguish; (5) compensation for loss of potential wages; and (6) costs and fees associated with this case. The plaintiff also wants, as injunctive relief, better enforcement of the "unfettered" search language of AD 02-10. He also wants the ability to secure any residence outside Brown County without DOC approval, as long as the plaintiff is employed and able to obtain a residence in that area.

II. ANALYSIS

The plaintiff proposes a number of legal grounds for relief; he provides citations to the U.S. Constitution, federal and state case law, Wisconsin statutes, and the Wisconsin Administrative Code. Generally, the court will characterize the claims presented as an Eighth Amendment claim for being detained after his mandatory release date, Fourteenth Amendment due process claims challenging the policy of holding parolees in jails when suitable housing cannot be found and the application of the policy to him, and a claim that the policy is unconstitutional as an ex post facto law because it punishes him after his mandatory release date.

A. Habeas Corpus versus § 1983

Although the plaintiff was released from prison before he was placed in the Jail, "[p]arole is a form of custody." Arnett v. Kemp, 121 Fed. Appx. 658, 659 (7th

Cir. 2004) (citing Williams v. Wisconsin, 336 F.3d 576, 579-80 (7th Cir. 2003), and Drollinger v. Milligan, 552 F.2d 1220, 1225 (7th Cir. 1977)). Conditions of parole "define the perimeters of" confinement and thus challenges to particular conditions must be brought as habeas corpus petitions and not as civil suits under § 1983. Williams, 336 F.3d at 579-80 (quoting Drollinger, 552 F.2d at 1225).

"Normally, collateral attacks disguised as civil rights actions should be dismissed without - rather than with - prejudice. That resolution allows the plaintiff to decide whether to refile the action as a collateral attack after exhausting available state remedies." Williams, 336 F.3d at 580. With regard to any of the plaintiff's claims that might better be brought in a petition for a writ of habeas corpus, the court is making no decision on their ultimate merits. See Glaus v. Anderson, 408 F.3d 382, 389- 90 (7th Cir. 2005). If the plaintiff wishes to proceed on those claims, he may file a new case immediately with the proper legal label, subject to the normal rules such as those prohibiting frivolous lawsuits. Id. at 390. The court cautions the plaintiff that refiling under the proper legal label will probably have certain consequences, such as the requirement that the plaintiff exhaust his remedies in state court before filing a federal petition for a writ of habeas corpus. Id.

Here, however, based on the plaintiff's complaint and his request for damages and injunctive relief other than his release, it is difficult to draw the line between those claims that challenge the conditions of the plaintiff's confinement and the claims challenging the fact of his confinement. For the purposes of screening,

the court will consider each of the plaintiff's claims under § 1983.

B. Heck

Before analyzing plaintiff's claims, the court must consider the impact, if any, of the rule of Heck v. Humphrey, 512 U.S. 477 (1994. The rule enunciated in this case requires dismissal of a claim if success on the claim would necessarily imply the invalidity of plaintiff's conviction or sentence. Knowlin v. Thompson, 207 F.3d 907, 909 (7th Cir. 2000) (claim that "would necessarily imply the invalidity of [prisoner's] Wisconsin parole revocation . . . cannot be shown through a § 1983 suit"); Antonelli v. Foster, 104 F.3d 899 (7th Cir. 1997) (Heck barred plaintiff's claim that he had been detained unlawfully pursuant to a parole violator warrant). However, not every challenge necessarily implies the invalidity of a conviction or sentence. The court also notes that being housed at the Jail is not necessarily a condition of the plaintiff's parole. Rather, the condition of the plaintiff's parole is that the plaintiff have an approved residence. The plaintiff was only housed at the Jail because an approved residence could not be found. Accordingly, at this stage, the court will consider each of the plaintiff's claims under § 1983.

C. Eighth Amendment

In State v. Litscher, 2000 WI App 61, ¶ 1, 233 Wis.2d 685, 608 N.W.2d 425, the Wisconsin Court of Appeals granted the petitioner a writ of habeas corpus and concluded, "the DOC has no authority to hold an inmate in custody beyond his or her mandatory release date, regardless of whether departmental efforts have

secured a residence for the inmate." The court declined to dismiss the case as moot because:

> Currently, offenders for whom a suitable residence has not been found are incarcerated beyond their mandatory release dates. Not only does the problem recur, it is typically resolved pending appellate review. The question is thus one that repeats itself yet evades review. Additionally, it deals with the unlawful restraint of personal liberty - a constitutional question. See State ex rel. Hager v. Marten, 226 Wis.2d 687, 692, 594 N.W.2d 791 (1999).

Id. at ¶ 4. The plaintiff's situation here is very similar, though he was "released" and then incarcerated at the Jail instead of being retained at a DOC institution. In Litscher, the court noted:

> We realize that it is difficult for the DOC to find a neighborhood that will accept a paroled sex offender in its midst. But there is no gray area in the statute - it is crystal clear. Our job is to apply the statute as it is written. Whether or not a place has been found for an inmate, he or she must be released on his or her mandatory release date. Perhaps there is a way for the state to more closely monitor sex offenders for a time between mandatory release and placement. But when the law is so clear it is for the legislature, not the courts, to determine if and how such a procedure should be fashioned.

Id. at ¶ 5.

Incarcerating a prisoner beyond the termination of his sentence without penological justification violates

the Eight Amendment prohibition of cruel and unusual punishment when it is the product of deliberate indifference. Burke v. Johnston, 452 F.3d 665, 669 (7th Cir. 2006). The plaintiff must establish three elements to show deliberate indifference: (1) "that a prison official knew of the prisoner's problem and thus of the risk that unwarranted punishment was being inflicted"; (2) "that the official either failed to act or took only ineffectual action under the circumstances"; and (3) "that there was a causal connection between the official's response to the problem and the unjustified detention." Id. (quoting Moore v. Tartler, 986 F.2d 682, 686 (3rd Cir. 1993)). Thus, the plaintiff has stated a claim predicated on the Eighth Amendment. The plaintiff's complaint contains allegations of personal involvement by defendants Martin, Richgels, Fusfeld, Murto, and Wickenam; the court will allow the plaintiff to proceed on this claim against each of them.

D. Fourteenth Amendment

Additionally, a prisoner may establish a procedural due process violation by demonstrating that the state deprived him of a liberty or property interest created either by state law or the Due Process Clause itself. See Sandin v. Connor, 515 U.S. 472, 483- 84 (1995). "In order for due process protections to apply, there must be a protectible liberty or property interest." Thompson v. Veach, 501 F.3d 832 (7th Cir. 2007). A Wisconsin inmate has a protected liberty interest in parole after he reaches his mandatory release date. Felce v. Fiedler, 974 F.2d 1484, 1491-92 (7th Cir. 1992). In this case, plaintiff had reached his mandatory release date and thus had an expectation of not being confined. Though

he was technically released, the plaintiff remained incarcerated at the Jail. The plaintiff may proceed on a due process claim against defendants Martin, Richgels, Fusfeld, Murto, and Wickenam regarding his confinement at the Jail without due process.

E. Official Capacity Claim

The plaintiff's complaint also attacks the policy of housing individuals who have already reached their mandatory release dates in jails if the DOC is unable to find them an approved residence. This policy is identified as Administrative Directive 02 -10 (AD 02-10). The plaintiff argues that the policy is unconstitutional because it does not provide for due process before housing an individual in a jail. See Toney-El v. Franzen, 777 F.2d 1224, 1228 (7th Cir. 1985). He also challenges the policy as violating the ex post facto clause. See Garner v. Jones, 529 U.S. 244, 249-50 (2000) (In order to state an ex post facto claim, a prisoner must demonstrate that the retroactive procedural change created a sufficient risk of increasing the measure of punishment attached to the covered crimes).

These claims again st the policy itself are official capacity claims. A suit against a state official in his or her official capacity is a suit against the official's office and, as such, it is not different than a suit against the state itself. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). The plaintiff's official capacity claims against defendants are therefore claims against the state, the Eleventh Amendment bars suits for damages in federal court against unconsenting states unless Congress has exercised its power to override the immunity. Id. at 66. To the extent that plaintiff seeks

compensatory and punitive damages, his official capacity claims must be dismissed because of Eleventh Amendment immunity and also because the state is not a person suable under 42 U.S.C. § 1983. See id. at 66 -67, 71. However, the plaintiff also seeks injunctive relief, and official capacity claims seeking injunctive relief are permissible under § 1983. Id. at 71 n.10. Such claims require that the entity's policy or custom have played a part in the constitutional violation. Hafer v. Melo, 502 U.S. 21, 25 (1991).

The plaintiff will be allowed to proceed on claims against each of the named defendants in his or her official capacity that the policy (AD 02-10) of incarcerating individuals who have reached their mandatory release date but who do not have approved housing violates the due process clause and the ex post facto clause of the Constitution.

III. PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL

The plaintiff has filed a motion for appointment counsel. Although civil litigants do not have a constitutional or statutory right to appointed counsel, the court has the discretion to request attorneys to represent indigents in appropriate cases pursuant to 28 U.S.C. § 1915(e)(1). Pruitt v. Mote, 503 F.3d 647, 653 (7th Cir. 2007); Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997) (citing Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995)). As a threshold matter, litigants must make a reasonable attempt to secure private counsel on their own. Pruitt, 503 F.3d at 654; Zarnes, 64 F.3d at 288. Once this threshold burden has been met, the court must address the following question: given the difficulty of the case, does this plaintiff

appear competent to try the case himself and, if not, would the presence of counsel likely make a difference in the outcome of the case. Pruitt, 503 F.3d at 654-655 (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). In this case, the plaintiff avers that he has written over thirty letters in the past to ask for assistance when he knew what was going to happen to him. He sought counsel both in Wisconsin as well as out of state. Only one attorney was favorable to him, but the plaintiff is now unable to get a response from that attorney. Despite these averments in his motion, the plaintiff does not indicate when he contacted these attorneys or whether he has continued his search for an attorney while he prepared his complaint. More importantly, now that the court has decided that the plaintiff may proceed with his complaint, potential counsel may view this litigation in a different light and it might be advisable for plaintiff to make further attempts to secure counsel. In any event, if the plaintiff wishes to pursue the matter of appointment of an attorney, he must provide the court with detailed information regarding his attempts to obtain counsel, including who he has contacted and how, and what responses he has received, if any. At this time, the plaintiff's motion will be denied without prejudice.

IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the plaintiff's motion for leave to proceed in forma pauperis (Docket No. 2) be and hereby is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff's motion to appoint counsel (Docket No.4) be and hereby is **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being electronically sent today to the Wisconsin Department of Justice for service on the state defendants.

IT IS ALSO ORDERED that, pursuant to the informal service agreement between the Wisconsin Department of Justice and this court, the defendants shall file a responsive pleading to the complaint within sixty days of receiving electronic notice of this order.

IT IS FURTHER ORDERED that the Brown County Sheriff or his designee shall collect from the plaintiff's prison trust account the $326.00 balance of the filing fee by collecting monthly payments from the plaintiff's prison trust account in an amount equal to 20% of the preceding month's income credited to the prisoner's trust account and forwarding payments to the clerk of the court each time the amount in the account exceeds $10 in accordance with 28 U.S.C. § 1915(b)(2). The payments shall be clearly identified by the case name and number assigned to this action.

IT IS FURTHER ORDERED that copies of this order be sent to the Brown County Sheriff.

IT IS FURTHER ORDERED that the plaintiff shall submit all correspondence and legal material to:

Honorable Aaron E. Goodstein
% Office of the Clerk
United States District Court
Eastern District of Wisconsin
362 United States Courthouse
517 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202

PLEASE DO NOT MAIL ANYTHING DIRECTLY TO THE COURT'S CHAMBERS. It will only delay the processing of the matter.

The plaintiff is notified that from now on, he is required under Federal Rule of Civil Procedure 5(a) to send a copy of every paper or document with the court to the opposing party or, if the opposing party is represented by counsel, to counsel for that party. Fed. R. Civ. P. 5(b). The plaintiff should also retain a personal copy of each document. If the plaintiff does not have access to a photo copy machine, he may send out identical handwritten or typed copies of any documents. The court may disregard any papers or documents which do not indicate that a copy has been sent to the opposing party or that party's attorney, if the party is represented by an attorney.

The plaintiff is further advised that failure to make a timely submission may result in the dismissal of this action for failure to prosecute.

In addition, the parties must notify the Clerk of Court of any change of address. Failure to do so could result in orders or other information not being timely delivered, thus affecting the legal rights of the parties.

Dated at Milwaukee, Wisconsin this 26th day of March, 2012.

BY THE COURT:

/s/_____
AARON E. GOODSTEIN
United States Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 14-1746
No. 2:12-cv-00096-CNC

[Filed October 20, 2016]

PATRICK J. WERNER,
Plaintiff-Appellant,

v.

EDWARD F. WALL, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
Charles N. Clevert, Jr., *Judge*.

Before

JOEL M. FLAUM, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

O R D E R

Upon consideration of Plaintiff-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on October 6, 2016, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition.

IT IS ORDERED that the petition for rehearing with suggestion of rehearing en banc is hereby DENIED.

APPENDIX E

WISCONSIN
DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1356 (Rev. 05/96)

Administrative Directive # 02-10

EFFECTIVE DATE
July 30, 2002

X New ☐ Revision

Originated By: William J. Grosshans
Administrator

SUBJECT:

Procedures for SBN Offenders Lacking Approved Residences

DISSEMINATION
X All Staff ☐ Supervisory Staff Only

PRIORITY

X Policy /Directive ☐ Information
Discuss at Staff Meeting Read/Route/Post

Reference:	WI Stat. 301.45	WI Admin. Code DOC 328.13
	WI Stat. 301.46	WI Admin. Code DOC 328.22
WI Admin. Code DOC 302.30		DCC Admin. Directive 98-04

WI Admin. Code DOC
328.04(3)(L)

Approved Residence Requirement
An approved residence is a standard requirement of supervision for all sex offenders. Special Bulletin Notification (SBN) offenders must provide a specific, verifiable address prior to release from a correctional institution. The proposed residence is subject to the department's approval. An agent shall consider all of the following, prior to approving a SBN offender's residence:

- Proximity to the SBN offender's victim(s), elementary or secondary schools, parks and licensed or certified day care providers;
- Whether law enforcement in the community of release has had an opportunity to notify the community;
- Other factors discussed in Sex Offender Supervision: A Handbook for Agents, Chapters 6 and 9.

Lack of Approved Residence After Release
Wisconsin law requires the Department of Corrections to release offenders on their mandatory release dates. The decisions of the Court of Appeals in *State ex rel. Woods v. Morgan,* 224 Wis 2d, 534, 591 N.W. 2d 922 (Ct App. 1999) and *State ex rel. Olson v. Litscher*, 233 Wis. 2d 685, 608, N.W. 2d 425 (Ct. App. 2000) require that prisoners be released upon reaching mandatory release, whether or not an approved residence has been found.

If, upon release, a SBN offender does not have a residence, which the department has approved, the

offender shall be directed to secure an approved residence by the end of the workday.

The SBN offender shall be permitted to conduct an "unfettered" search for housing. This means the SBN offender shall be permitted to leave the presence of DOC staff to search for housing. In order to accomplish this, the agent shall require the SBN offender to be accompanied by an approved chaperone. The SBN offender shall also be required to provide an itinerary, prior to leaving the agent's presence, and to keep a log of movements, appointments and personal contacts. The SBN offender shall wear an EMP transmitter at all times. The chaperone shall be provided with a cellular phone and an EMP "scanner."

The SBN offender is not required to remain in the physical presence of the chaperone at all times during the search for housing. However, the SBN offender will be required to remain within range of the EMP scanner. The chaperone must agree to notify the agent if the SBN offender goes beyond the range of the EMP scanner. The chaperone must also be provided a copy of the SBN offender's rules and must agree to neither assist nor encourage the SBN offender to violate any rule. The chaperone will have no authority to detain or impede the SBN offender.

If the SBN offender does not secure an approved residence by 5:00 p.m. **and the department has no alternative housing resources in the community of release**, the SBN offender may be detained in the county jail, to prevent a violation, pursuant to Wis. Admin. Code DOC 328.22(2)(d). The SBN offender shall be released from custody the next workday, to continue to search for an approved residence. The requirements

for the search remain the same: EMP, provide a written itinerary, keep a log of movements and be accompanied by an approved chaperone. If any requirement is unmet, the SBN offender shall remain in custody, until all requirements can be met.

If the SBN offender **exhausts all known residence resources**, and is unable to obtain approved residence, the offender may request to voluntarily return to a correctional instirution or center for a specific period of time or until suitable residence can be located and approved. (See attached DOC-2137, Request to Return to Correctional Institution.) The DCC Administrator must approve the request.

DCC Efforts to Assist SBN Offender to Locate Residence

If a SBN offender voluntarily returns to a correctional institution, the Corrections Field Supervisor shall submit a written plan to the Regional Chief and Division Administrator, detailing the efforts that will be undertaken by DCC to assist the SBN offender's search for approved housing. The agent shall submit monthly reports to the Corrections Field Supervisor describing efforts and progress in the SBN offender's search for an approved residence. Copies of the report shall be forwarded to the Regional Chief and Division Administrator, by the tenth day of the following month.

Assisting the SBN offender's search for approved housing shall be a high priority within DCC. The SBN offender shall be given priority consideration for any of DCC's contracted residential services in the county of release. Supplemental services, which facilitate the search for approved housing, may be requested through the division's Purchase of Services program.

Procedures Upon Locating Residence

When an appropriate residence has been located, the agent will notify local law enforcement, who shall have the opportunity to notify the community before the SBN offender establishes residence. If the SBN offender has voluntarily returned to a correctional institution, a new SBN is required. The agent shall submit an amended SBN Release Plan to the Bureau of Offender Programs (BOP), Regional Chief and DCC Administrator. Upon receipt of the amended SBN Release Plan, with approved residence, the DCC Administrator may reinstate the SBN offender on parole or Extended Supervision. The reinstatement shall not take effect before law enforcement has had an opportunity to notify the community of the planned release.

_____

William J. Grosshans, Administrator

cc: DCC Administrative Directive Distribution List

DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-2137 (12/01)

WISCONSIN
Administrative Rule
Section DOC 328.132 & DOC 302.30

REQUEST TO RETURN TO CORRECTIONAL INSTITUTION

Pursuant to DOC 328.13, I hereby request to return to a correctional institution for _____ or until such time as I am able to establish a release plan approved by the department, or until the expiration of my sentence, whichever comes first. I understand that I am waiving any consideration for parole or eligibility for Mandatory Release during this time period. I also understand I will be subject to all the department's administrative rules applicable to inmates in correctional institutions. I make this request knowingly, voluntarily and intelligently. No coercion, threat, promise, consideration or other inducement has been offered to me to secure this request.

_____

OFFENDER SIGNATURE DATE SIGNED

_____

WITNESS SIGNATURE DATE SIGNED

APPROVAL

We have reviewed and discussed the request, above, and have determined that it is consistent with the goals and objectives of supervision to permit this offender to return to a correctional institution.

_____

AGENT SIGNATURE DATE SIGNED

_____

SUPERVISOR SIGNATURE DATE SIGNED

☐ APPROVED Approval does not contribute to unreasonable overcrowding or threaten institutional security and is warranted pursuant to Wisconsin Administrative Rule DOC 302.30(4)(c) and (d).

☐ DENIED

DIVISION ADMINISTRATOR SIGNATURE

DATE SIGNED

Distribution: Original - Correctional Institution or Center; Copy – CRU; Copy - Case File

APPENDIX F

WISCONSIN
DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1356 (Rev.)

Administrative Directive # 11-04

EFFECTIVE DATE
07/01/2011

X New ☐ Revision

ORIGINATED BY: ADMINISTRATOR'S OFFICE
Denise Symdon
/s/_____ 6/14/11

DISSEMINATION
X All Staff ☐ Supervisory Staff Only

PRIORITY

X Policy /Directive ☐ Information
Discuss at Staff Meeting Read/Route/Post

SUBJECT: Homeless and Transient Sex Offender Registrants, Special Bulletin Notification Offenders Lacking an Approved Residence

Policy Statement: It is the intent of the Division of Community Corrections and the Sex Offender Registry Program to monitor and track whereabouts of the sex offender registrants, provide information about the whereabouts to victims, law enforcement and the

general public. The purpose of this Administrative Directive (AD) is to define residence and outline a procedure for sex offender registrants who are without a residence, transient or homeless so as to provide the most information possible.

Reference: Wisconsin State Statute 301.45; Wisconsin Department of Corrections Administrative Directives 02-10, 05-14, and 07-14.

Definitions, Acronyms and Forms.

Sex Offender Registrant: A person required to register as noted in Wis. 301.45(1g).

Active Supervision: A person currently on probation, parole, supervised release or extended supervision with the Wisconsin Department of Corrections.

Terminated from Supervision: A person who is not supervised by the Wisconsin Department of Corrections for probation, parole or extended supervision. This includes the registrants that maximum discharge from prison and registrants that discharge form Chapter 980.

Residence: The place where one actually lives as distinguished from a domicile or place of temporary lodging. A person can have more than one residence, but only one domicile. Residence includes county jail, federal or other state's prisons.

Domicile: The place where an individual has a fixed and permanent home for legal purposes, also called "legal residence." This is the place where a person has a permanent home or principal establishment and to where, whenever absent, intend to return.

Homeless Registrant: A registrant without a residence or domicile.

Transient Registrant: A registrant with a place of temporary lodging.

OATS: Offender Active Tracking System database.

SOR: Sex Offender Registry.

Procedure:

Active Supervision Registrants:

Lacking a residence is unacceptable as a supervision strategy. Every effort must be made through existing temporary living placement contracts, regional Purchase of Service funds, or other community partnerships to assist sex offender registrants in establishing a residence if the offender is unable to propose suitable housing. A Sex Offender Residence Assessment (DOC-2110) shall be completed prior to approving a residence for a Sex Offender. Should efforts fail and registrants are homeless:

1) Registrants should inform their Probation and Parole Agent of their homeless status and where they intend to stay each night.
2) Agents should utilize enhanced supervision strategies to include an increase level of supervision/contacts and/or request discretionary GPS.
3) The Agent shall update the OATS residence screen to reflect "HOMELESS" per address entry standards in AD 05-14.

Active Special Bulletin Notification (SBN) Registrants:

SBN Offenders must provide a specific, verifiable address prior to release from confinement. Every effort must be made through existing temporary living placement contracts, regional Purchase of Service funds, or other community partnerships to assist sex offender registrants in establishing a residence if the offender is unable to propose suitable housing. The proposed residence is subject to the department's approval. DOC staff shall complete the Residence Assessment form DOC 2110 and consider the information obtained prior to approving a SBN offenders' residence. In addition, DOC staff shall consider if Law Enforcement has had the opportunity to notify the community. In the event a SBN Offender lacks an approved residence after release:

1) The Department shall release the offender from confinement as required by law whether or not an approved residence has been found.
2) When it is known the offender may not obtain a suitable residence after release, DOC staff shall meet with the county sheriff or designee prior to the SBN offender's release from prison. The purpose of this meeting would be to coordinate the placement and release and return of the offender in the county jail in the most seamless fashion possible with respect to the jail's existing procedures. This would include discussions regarding booking fees, maintaining GPS tracking, property, and staff/chaperone pick up and drop off.

3) On the day of release, the SBN offender shall be directed to secure an approved residence by the end of the workday.
4) The SBN offender shall comply with Lifetime GPS tracking if required by Wisconsin Statute 301.48. If GPS tracking is not statutorily required, the SBN offender shall be placed on discretionary active GPS tracking.
5) The SBN offender shall be permitted to conduct an "unfettered" search for housing.
6) The SBN offender shall be permitted to leave the presence of DCC staff to search for housing.
7) The Agent may require the SBN offender to be accompanied by an approved chaperone while conducting a residence search.
8) The SBN offender shall provide an itinerary prior to leaving the Agent's presence.
9) The SBN offender may be detained at the end of the workday, (no sooner than 5:00pm) in the county jail to prevent a violation, pursuant to Wis. Admin. Code DOC 328.22(2)(d).
10) The SBN offender shall be released from the county jail each day or upon request to resume the unfettered residence search.
11) The Agent shall update the OATS' residence screen to reflect the appropriate County Jail address per address entry standards in AD 05-14.
12) When an appropriate residence has been located, the agent shall notify local law enforcement. Law enforcement shall have the opportunity to notify the community before the SBN offender establishes residence.

Terminated Registrants:

Sex offender registrants who have discharged from supervision, including SBN registrants, are not required to obtain placement approval from the department prior to establishing a residence or moving to a new residence. If the registrant is unable to secure permanent residence, the registrant must do the following:

1) Inform the Sex Offender Registry within 10 days of the change in residence or residence status;
2) The Sex Offender Registry shall update the OATS' residence screen to reflect "HOMELESS" per address entry standards in AD 05-14.
3) A SOR staff member or Sex Offender Registry Specialist shall explain the following procedures to the registrant. This notification shall be documented in the registrant contact history in OATS.
4) While homeless, the sex offender registrant must call and speak with a staff member of the Sex Offender Registry or designated Registry Specialist every seven day, on a weekday, to report "homeless" status and the location(s) in the city and state where he/she has been frequenting and sleeping for the previous seven days and plans for the next seven days along with all other required registry data. If possible, the sex offender registrant must also provide an emergency contact person and telephone contact number for the purpose of contacting the registrant, if he/she fails to telephone on the weekly basis.

5) While transient, the sex offender registrant must call and speak with a staff member of the Sex Offender Registry or designated Specialist once every seven days, on a weekday.
6) The registrant must report the addresses or nearest locations where he/she has frequented and slept, and their anticipated residence plan for the upcoming week. The registrant must also update any other required registry data changes.
7) The SOR staff and/or Registry Specialist shall request the sex offender registrant to provide an emergency contact person and telephone contact number for the purposes of contacting the registrant.
8) The SOR staff member or Registry Specialist will enter the information into OATS' contact history.

Failure to Adhere to Policy:

Active supervision registrants shall be subject to gradual sanctions up to and including custody and initiation of revocation. Jail placements as described in the Active SBN registrants section are limited only to active SBN registrants.

Terminated sex offender registrants that fail to adhere to policy set herein will be considered non-compliant with the Sex Offender Registry and be subject to non-compliance prosecution.

*State ex rel. Woods v. Morgan, 224 Wis. 2d 543, 591 N.W.2d 922 (Ct. App. 1999) and State ex rel. Olson v. Litscher, 233 Wis. 2d 685, 608, N.W.2d 425 (Ct. App. 2000)

APPENDIX G

WISCONSIN
DEPARTMENT OF CORRECTIONS
Division of Community Corrections
DOC-1356 (Rev.)

Administrative Directive # 15-12
Replaces # 11-04

EFFECTIVE DATE
03/01/2015

X New ☐ Revision

ORIGINATED BY: ADMINISTRATOR'S OFFICE
Denise Symdon
/s/_____

DISSEMINATION
X All Staff ☐ Supervisory Staff Only

PRIORITY

X Policy /Directive ☐ Information
Discuss at Staff Meeting Read/Route/Post

SUBJECT: Homeless Sex Offender Registrants

Policy Statement:
It is the intent of the Division of Community Corrections and the Sex Offender Registry Program to monitor and track whereabouts of the sex offender registrants, provide information about the whereabouts to victims, law enforcement and the general public. The purpose of this Administrative Directive (AD) is to

define residence and outline a procedure for sex offender registrants who are homeless so as to provide the most information possible to victims, law enforcement and the public.

Reference:
Wisconsin State Statute 301.45

Definitions, Acronyms and Forms:

Registrant - A person required to register as noted in Sec. 301.45(1g) Wis. Stats.

Active Supervision - A person currently on probation, parole, supervised release or extended supervision with the Wisconsin Department of Corrections and currently living in Wisconsin.

Terminated from Supervision - A person who is not supervised by the Wisconsin Department of Corrections for probation, parole or extended supervision. This includes the registrants who have reached maximum discharge from prison and registrants who discharge form Chapter 980.

GPS - Active Global Position Satellite tracking of the offender.

Residence - Each dwelling or location where a sex offender habitually lives, resides or sleeps regardless of whether the sex offender declares or characterizes such place as his residence. Residence may include shelter, group home, treatment center, county jail, federal or other state's prisons.

Homeless Registrant - A registrant that does not habitually live, reside or sleep in a fixed dwelling or location.

SOR - Sex Offender Registry.

SORT - Sex Offender Registry Tool, a database used for Sex Offender Registration.

Procedure:

Active Supervision Registrants:

Every effort must be made through existing temporary living placement contracts, regional Purchase of Good and Service funds, or other community partnerships to assist sex offender registrants in establishing a residence if the offender is unable to propose suitable housing. A Sex Offender Residence Assessment (DOC-2110) shall be completed prior to approving a residence for a registrant. Should efforts fail and registrants are homeless, registrants will be placed on discretionary GPS and cooperate with the following:

1. Registrants must inform their Probation and Parole Agent of their homeless status.
2. Registrants, while in homeless status, must stay in the county of supervision, with the exception of employment, offense related programming, or for supervisor activities pre-approved by their Probation and Parole Agent.
3. Agents shall utilize supervision strategies to accommodate the offender's increased requirement to report his/her whereabouts and activities.
4. The registrant must be placed on discretionary GPS *within five working days* of becoming homeless.
5. The Agent shall update the COMPAS to reflect "HOMELESS."

6. The Agent shall request the sex offender registrant to provide an emergency contact person and telephone contact number for the purposes of contacting the registrant.
7. The Agent shall complete the DOC-2705, Sex Offender Registry Update, and email to bopadmin@wisconsin.gov with the subject line of SOR Update within one business day of reported changes.
8. The Agent shall explain the following procedures to the registrant. This notification shall be documented in COMPAS.
9. While homeless, unless meeting with the agent on a weekly basis, the sex offender registrant must call and speak with the agent once every seven days, on a weekday, to report "HOMELESS" status and the location(s) in the city where he/she has been frequenting and sleeping for the previous seven days and plans for the next seven days.
10. The registrant must report the addresses or nearest locations where he/she has frequented and slept, and his/her anticipated residence plan for the upcoming week. The registrant must also update any other required registry data changes.
11. Agents must review GPS points information, at a minimum, once every week to verify information provided by the registrant and document the review in COMPAS.
12. Once a registrant has secured approved housing, discretionary GPS tracking should be reviewed and determination made if GPS is to be continued.

Active Registrants with Special Bulletin Notice Prior to Release From Prison:

Registrants who meet the statutory requirement of a Special Bulletin Notice must provide a specific, verifiable address prior to release from confinement. Every effort must be made through existing temporary living placement contracts, regional Purchase of Offender Goods and Service funds, or other community partnerships to assist registrants in establishing a residence if the registrant is unable to propose suitable housing. The proposed residence is subject to the department's approval. DCC staff shall complete the Sex Offender Residence Assessment form DOC 2110 and consider the information obtained prior to approving the registrant's residence. In addition, DCC staff shall consider if law enforcement has had the opportunity to notify the community. In the event a registrant with a Special Bulletin Notice lacks an approved residence after release:

1. The Department shall release the registrant from confinement as required by law whether or not an approved residence has been found.
2. When it is known the registrant may not obtain a suitable residence after release, DOC staff shall meet with law enforcement specified in the Special Bulletin Notification, prior to the registrant's release from prison. The purpose of this meeting would be to coordinate the release and if applicable, discuss supervision.
3. The registrant shall comply with Lifetime GPS tracking if required by Wisconsin Statute 301.48. If GPS tracking is not statutorily required, the registrant shall be placed on

discretionary active GPS tracking on the day of his/her release from prison.

4. The Agent shall update the COMPAS to reflect "HOMELESS."
5. The Agent shall check the Sex Offender Registry database and confirm the address listed in SORT is "HOMELESS" and if not, the Agent shall complete the DOC-2705, Sex Offender Registry Update, and email to bopadmin@wisconsin.gov with the subject line of SOR Update within one business day.
6. Agents shall utilize supervision strategies to accommodate the offender's increased requirement to report his/her whereabouts and activities.
7. The Agent shall request the registrant to provide an emergency contact person and telephone contact number for the purposes of contacting the registrant.
8. The Agent shall explain the following procedures to the registrant. This notification shall be documented in COMPAS.
9. While homeless, unless meeting with the agent on a weekly basis, the registrant must call and speak with the agent every seven calendar days, on a weekday, to report "HOMELESS" status and the locations(s) in the city and state where he/she has been frequenting and sleeping for the previous seven days and plans for the next seven days.
10. The registrant must report the addresses or nearest locations where he/she has frequented and slept, and their anticipated residence plan for the upcoming week. The registrant must also update any other required registry data changes.

11. Agents must review GPS points information at a minimum once every week to verify information provided by the registrant and document the review in COMPAS.
12. Once a registrant has secured approved housing, discretionary GPS tracking should be reviewed and determination if GPS is to be continued.

Terminated Registrants:

Sex offender registrants who have discharged from supervision, including registrants with Special Bulletin Notices who are or have reached a maximum discharge date, are not required to obtain placement approval from the department prior to establishing a residence or moving to a new residence. If the registrant is unable to secure permanent residence, the registrant must cooperate with the following:

1. Inform the Sex Offender Registry within 10 days of the change in residence or residence status.
2. The SOR shall update the SORT residence screen to reflect "HOMELESS."
3. A SOR staff member or SOR Specialist shall explain the following procedures (4 through 7 below) to the registrant. This notification shall be documented in the registrant contact history in SORT.
4. While homeless, the sex offender registrant must call and speak with a staff member of the SOR or designated SOR Specialist every seven days, on a weekday, to report "HOMELESS" status and the location(s) in the city and state where he/she has been frequenting and sleeping for the previous seven days and plans for the

next seven days along with all other required registry data.

5. The registrant must report the addresses or nearest locations where he/she has frequented and slept, and his/her anticipated residence plan for the upcoming week. The registrant must also update any other required registry data changes.
6. The SOR staff and/or SOR Specialist shall request the sex offender registrant to provide an emergency contact person and telephone contact number for the purposes of contacting the registrant.
7. The SOR staff member or SOR Specialist will enter the information into SORT contact history.

Failure to Adhere to Policy:

Active supervision registrants shall be subject to appropriate sanctions up to and including custody and initiation of revocation.

Terminated sex offender registrants that fail to adhere to policy set herein will be considered non-compliant with the Sex Offender Registry and be subject to non-compliance prosecution.

Distribution List (Other than Noted Dissemination):
Agent Basic Training Director
Office of Diversity and Employee Services Director
DCC MyDOC Liason