

No. 122034

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLANT,

v.

MARC A. PEPITONE,
DEFENDANT-APPELLEE.

Appeal from the Illinois Appellate Court, Third Judicial District,
No. 3-14-0627, Hon. William Holdridge Presiding
There Heard on Appeal from the Circuit Court of Will County,
No. 13-CM-844, Hon. Carmen Goodman Presiding

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION FOR RATIONAL SEXUAL
OFFENSE LAWS
IN SUPPORT OF DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES

<u>Statement of Interest</u>	1
<u>Introduction</u>	1
<u>Argument</u>	3
I. THE RECIDIVISM RATE OF “SEX OFFENDERS” AS A CLASS IS KNOWN WITH REASONABLE CERTAINTY	3
James M. Henslin, <i>Essentials of Sociology: A Down-to-Earth Approach (8th Edition)</i> (2008)	3
A. Federal Studies	4
U.S. Department of Justice, Bureau of Justice Statistics, <i>Recidivism of Sex Offenders Released from Prison in 1994</i> (2003) ..	4
U.S. Department of Justice, Bureau of Justice Statistics, <i>Recidivism of Prisoners Released in 30 States in 2005: Pattern from 2005 to 2010, Supplemental Tables: Most Serious Commitment Offense and Types of Post-Release Arrest Charges of Prisoners Released in 30 States in 2005</i> (2016)	7
B. State Studies	7
C. Academic Studies	8
D. Effect of Longer Follow-up Periods	9
State of Wisconsin, Department of Corrections, <i>Sex Offender Recidivism after Release from Prison</i> (2015)	9
California Sex Offender Management Board, <i>An Assessment of Current Management Practices of Adult Sex Offenders in California</i> (2008)	9
California Sex Offender Management Board, <i>Recidivism of Paroled Sex Offenders – A Ten Year Study</i> (2008) ...	9
Minnesota Department of Corrections, <i>Sex Offender Recidivism in Minnesota</i> (2007)	10
E. North Carolina Information	10
N.C.G.S. § 14-212A	11
F. Conclusion	13

II. RESTRICTIONS ON SEX OFFENDERS HAVE NO DEMONSTRABLE EFFECT ON RECIDIVISM	13
A. Effect of Registration and Notification	13
Richard Tewksbury, Wesley G. Jennings, and Kristen Zgoba	
<i>Sex Offenders: Recidivism and Collateral Consequences</i> (2011) ...	14
Elizabeth J. Letourneau, Jill S. Levenson, Dipankar Bandyopadhyay, Debayoti Sinha, and Kevin S. Armstrong,	
<i>Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women</i> (2010)	14
Kristen M. Zgoba and Karen Bachar,	
<i>Sex Offender Registration and Notification: Limited Effects in New Jersey</i> (2009)	14
Kristen Zgoba, Philip Witt, Melissa Dalessandro, and Bonita Veysey,	
<i>Megan's Law: Assessing the Practical and Monetary Efficacy</i> (2008)	14
Richard G. Zevitz,	
<i>Sex Offender Community Notification: Its Role in Recidivism and Offender Registration</i> (2006)	14
Geneva Adkins, David Huff, and Paul Stageberg,	
<i>The Iowa Sex Offender Registry and Recidivism</i> (2000)	14
Donna D. Schram and Cheryl Darling Milloy,	
<i>Community Notification: A Study of Offender Characteristics and Recidivism</i> (1995)	14
Robert Barnoski,	
<i>Sex Offender Sentencing in Washington State: Has Community Notification Reduced Recidivism?</i> (2005)	14
Grant Duwe and William Donnay,	
<i>The Impact of Megan's Law on Sex Offender Recidivism: The Minnesota Experience</i> , <i>Criminology</i> , Vol. 46 (2008)	14
J.J. Prescott and Jonah E. Rockoff,	
<i>Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?</i> , 54 <i>J. Law & Econ.</i> 161 (2011)	14

B. Effect of Restrictions	15
720 ILCS 5/11-9.3	15
Matt R. Nobles, Jill S. Levenson, and Tasha J. Youstin, <i>Effectiveness of Residence Restrictions in Preventing Sex Offense Recidivism</i> , Crime and Delinquency, Vol. 58, No. 4 (2012)	15
Paul A. Zandbergen, Jill S. Levenson, and Timothy C. Hart, <i>Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism</i> , Criminal Justice and Behavior, Vol. 37, No. 5 (2010)	15
Nicole Colombino, Cynthia Calkins Mercado, and Elizabeth L. Jeglic, <i>Situational Aspects of Sexual Offending: Implications for Residence Restriction Laws</i> , Justice Research and Policy, Vol. 11 (2009)	15
Phyllis Blood, Lanette Watson, and Paul Stageberg, <i>State Legislation Monitoring Report: FY 2007</i> (2008)	15
Grant Duwe, William Donnay, and Richard Tewksbury, <i>Does Residential Proximity Matter? A Geographic Analysis of Sex Offense Recidivism</i> , Criminal Justice and Behavior, Vol. 35, No. 4 (2008)	15
2005 N.C. HB 1896	16
2007 N.C. HB 933	16
Kelly M. Socia and Jason Rydberg, <i>Sex Offender Legislation and Policy</i> , Advancing Criminology and Criminal Justice Policy (2013)	17
C. Conclusion	17
<u>Conclusion</u>	17
<u>Appendix A</u>	19

STATEMENT OF INTEREST¹

The National Association for Rational Sexual Offense Laws (“NARSOL”) is a national nonprofit organization exclusively dedicated to advocating for rational, evidence-based sexual offense prevention policies that minimize unnecessary collateral consequences while maintaining a focus on public safety. NARSOL funds and promotes research into sexual offense recidivism, maintains and aggregates data on recidivism and the efficacy of sexual offense registries, participates where appropriate in litigation related to sex offender registry law, and hosts conferences throughout the United States focusing on fact-based reform of sexual offense legislation. NARSOL’s interest in this case is to provide the Court an unbiased analysis of the facts regarding sexual offender recidivism and the effectiveness of sexual offense registries and their related restrictions in reducing such recidivism.

NARSOL submits this brief to provide empirical data for the Court’s review of whether 720 ILCS 5/11-9.41(b) is reasonably related to the State’s goal of protecting the public.

INTRODUCTION

Sex offender registry laws (including restrictions on identified sexual offenders such as 720 ILCS 5/11-9.41(b)) are based on twin suppositions: 1) that “sex offenders,” as defined under state law, are a uniquely dangerous class of

¹ This brief was written by counsel for amicus and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

offenders with recidivism rates meaningfully higher than other classes of offenders; and 2) that registration, notification, and restrictions such as banning individuals from schools, parks, and the like will enhance public safety by reducing contact between sex offenders and potential victims – particularly minors. Evaluating the appropriateness of a given sex offender statute, then, necessarily requires analysis of these suppositions and consideration of whether the statute is justified in light of the available empirical evidence.

Sex offender registries have now been in effect in every state for twenty (20) years. This has created a wealth of empirical data that allows us to observe the actual recidivism rate of registered sex offenders across numerous federal, state, and private studies. Though these studies differ in their precise methodology, they produce substantially similar results – allowing us to say with confidence that the 3-5 years recidivism rate of those persons currently subject to state registry laws is approximately 2% to 5%. We also see that the recidivism rate for “sexual offenses” is lower than that for other types of crimes.

In addition, researchers have studied the effect on recidivism of both “registration and notification” (collecting data on sex offenders and disseminating that information to the public) and “restrictions” (laws such as 720 ILCS 5/11-9.41(b)) that prohibit sex offenders from living in restricted areas, working restricted jobs, or being present in restricted areas. Studies of the effect of “registration and notification” have been mixed. While most studies do not show a statistically significant reduction in sex offense recidivism following the

implementation of registration and notification laws, there are some studies suggesting that registration alone may slightly reduce recidivism. However, studies on the effect of “restrictions” have uniformly shown that those types of restrictions do not reduce, and are actually likely to *increase*, recidivism due to their collateral effects on registrants.

The empirical evidence shows that the twin assumptions behind sex offender registry laws are false. “Sex offenders” are neither uniquely dangerous and restrictions are more likely to increase than to reduce recidivism. In light of these facts, laws based upon these assumptions cannot fairly be called “rational.”

ARGUMENT

I. THE RECIDIVISM RATE OF “SEX OFFENDERS” AS A CLASS IS KNOWN WITH REASONABLE CERTAINTY

In the context of sex offender registry laws, recidivism is appropriately understood as “the recurrence of illegal behavior [new sex offenses] after the individual experiences the legal consequences or correctional interventions imposed, at least in part, to eliminate the behavior or prevent it from recurring again.”²

The observed recidivism rate among sex offenders can vary depending on the exact population of offenders studied (sample selection), length of observation (follow-up period), criteria for declaring a recidivistic event has occurred (for

² James M. Henslin, *Essentials of Sociology: A Down-to-Earth Approach* (8th Edition) (2008).

example, counting upon arrest for a new sex offense or upon reconviction), and perhaps other, less global factors. However, despite these variances, studies of sex offender recidivism produce substantially similar results. *See* Appendix A.³ In addition, the sheer accumulation of data over twenty (20) years of sex offender registration and monitoring now allows us to study recidivism by looking at entire population of registered sex offenders.⁴

A. Federal Studies

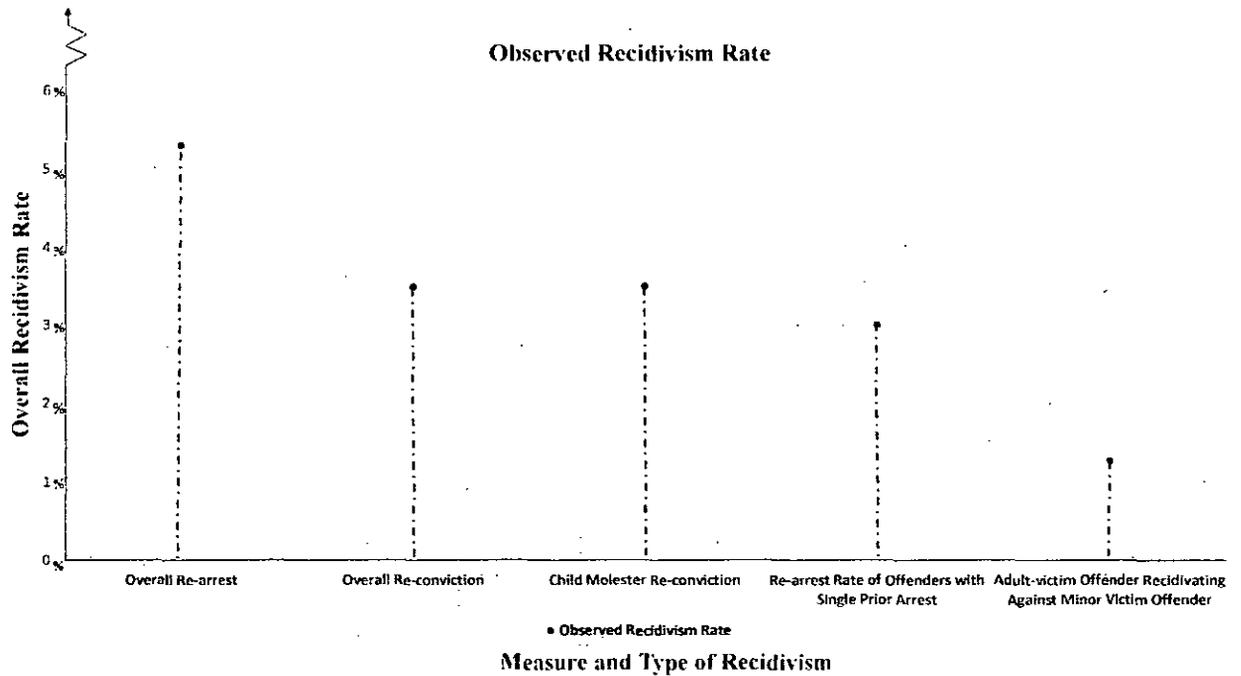
The most often cited and comprehensive federal study of sex offender recidivism is *Recidivism of Sex Offenders Released from Prison in 1994*, issued by the U.S. Department of Justice in 2003.⁵ This study followed 9,691 sex offenders released from 15 state prisons in 1994. It found the overall recidivism rate to be 5.3% (re-arrest) and 3.5% reconviction during a three-year follow-up period. For persons without a criminal record prior to the qualifying sex offense, the overall recidivism rate (re-arrest) was 3%. The recidivism rate (re-arrest) for persons originally convicted of a sex crime against a minor (under age 18) was substantially the same (3.3%); and of persons originally convicted of an offense

³ For inclusion in these statistics, a study must meet two criteria: 1) it must be a study of U.S. sex offenders and 2) the study must purport to use a random or unbiased sample of the sex offender population.

⁴ As discussed in more detail below, studies of substantially the entire sex offender population have been conducted in Michigan, North Carolina, and Wisconsin. The results of these studies are markedly similar.

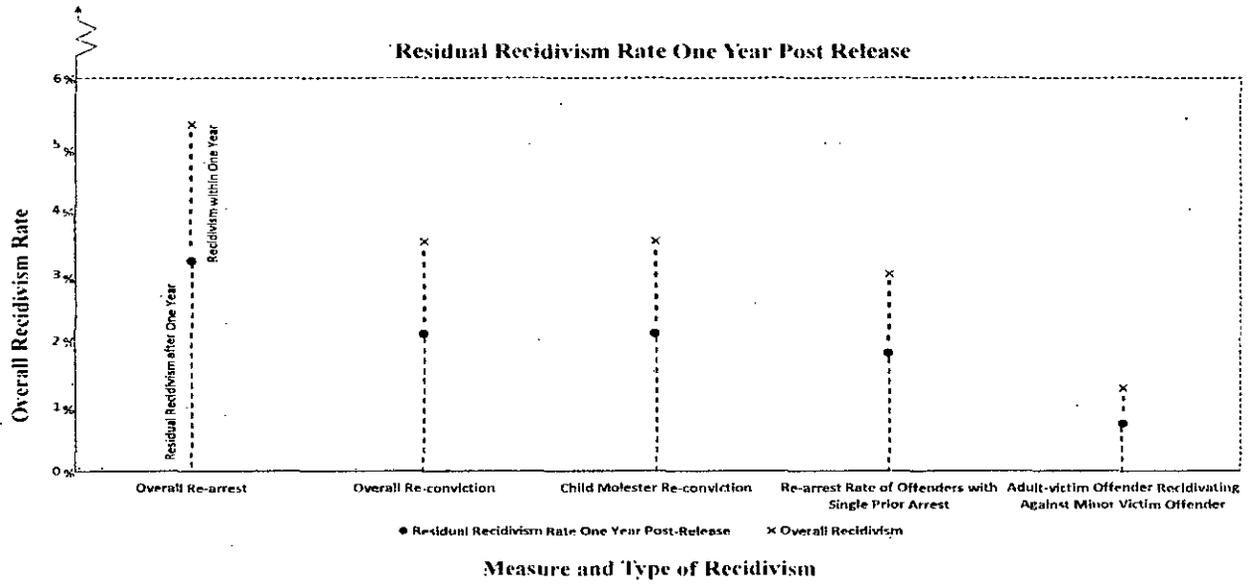
⁵ U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (2003).

against an adult, 1.3% went on to commit a recidivist crime against a minor.⁶

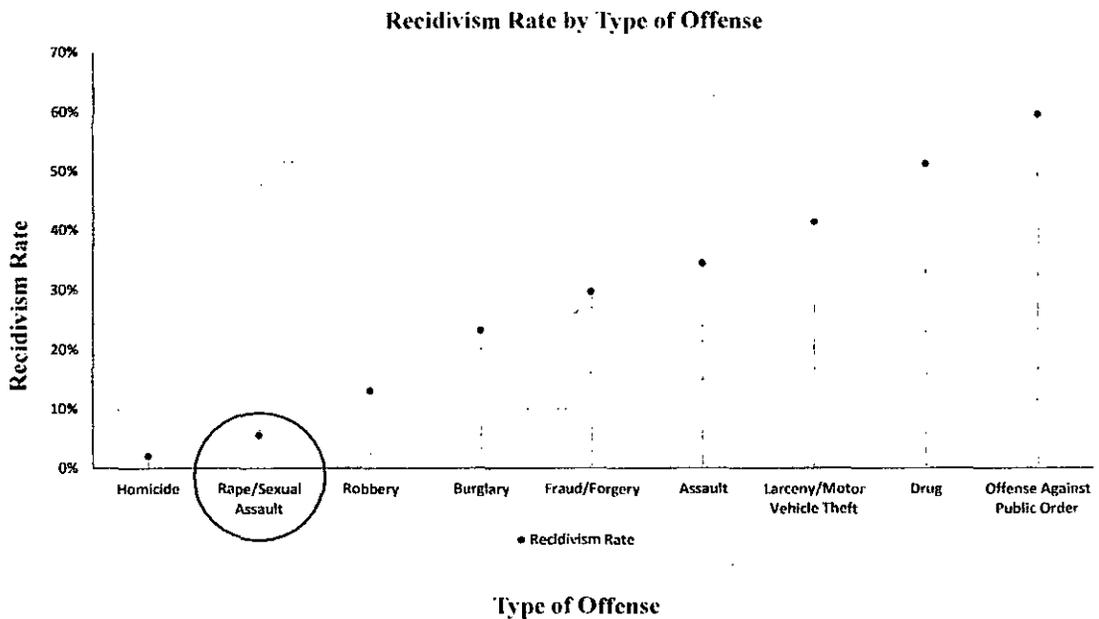


The study also notes that a large percentage of recidivism (re-arrest) occurs within the first year of release. Assuming reconviction rates following arrest are relatively uniform across offenders, the 3-5 years recidivism rate *after one year* drops significantly, with an overall re-arrest rate of 3.1% and an overall reconviction rate of 2.1%.

⁶ The study followed 9,691 men of which 4,295 were classified as “child molesters” (minor-victim offenders). The remaining 5,396 men (adult-victim offenders) collectively committed 68 offenses against a minor during the follow-up period for a recidivism rate *against minors* of 1.26%.



It is perhaps subjective whether these rates are “low” or “high,” but federal studies also find that sex offender recidivism rates are *lower* than for all other categories of offenses except homicide.



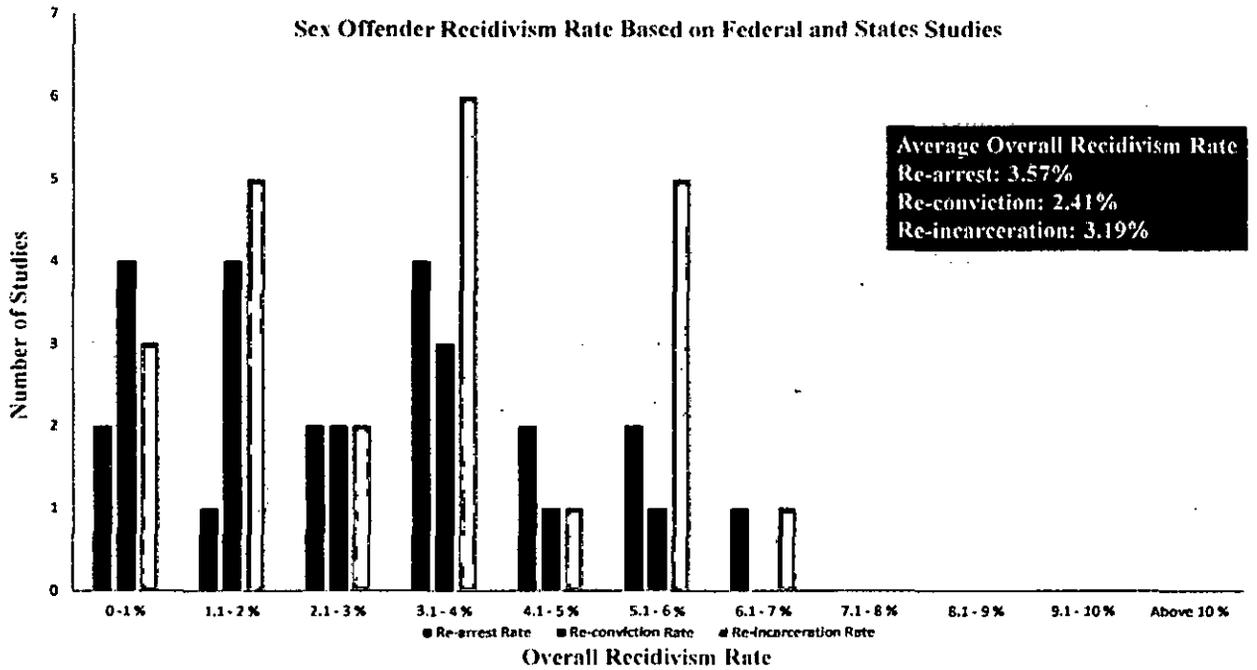
Source: U.S. DOJ, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2016)

The Department of Justice also released a study in 2014 titled *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*. While this study does not focus on sex offenders and does not contain the same detail as the 2003 Study, it does corroborate the 2003 findings – showing a five-year recidivism rate of 5.6% (re-arrest).⁷ It is also worth noting that this second study (unlike the 2003 report) looked at offenders released *after* the wide-spread adoption of registration, notification, and restrictions. The study shows no decrease in recidivism after these measures were adopted.

B. State Studies

The results of the federal studies are generally consistent with numerous state-government studies conducted both before and after the widespread implementation of restrictions on sex offenders. As shown below, state-government studies show average 3-5 years recidivism rates of 3.57% (re-arrest) and 2.41% (re-conviction). Recidivism measured by “re-incarceration” as opposed to “re-arrest” or “re-conviction” is similar.

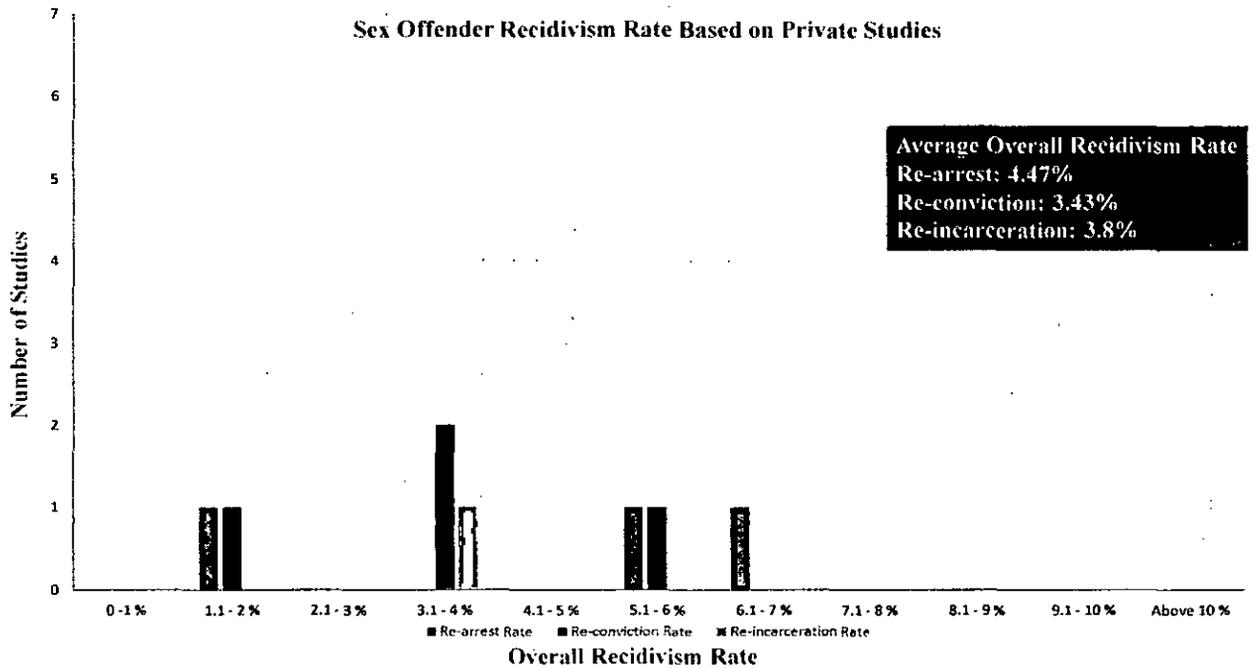
⁷ U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Pattern from 2005 to 2010, Supplemental Tables: Most Serious Commitment Offense and Types of Post-Release Arrest Charges of Prisoners Released in 30 States in 2005* (2016).



C. Academic Studies

While academic studies of sex offender recidivism tend to vary more than government studies, the overall findings are substantially similar. Looking at studies of U.S. sex offenders with unbiased sample selection,⁸ we see the following:

⁸ As noted above, these rates do not consider studies using non-random sample selection (for example, tracking only individually identified “high risk” offenders) or foreign studies of foreign populations.

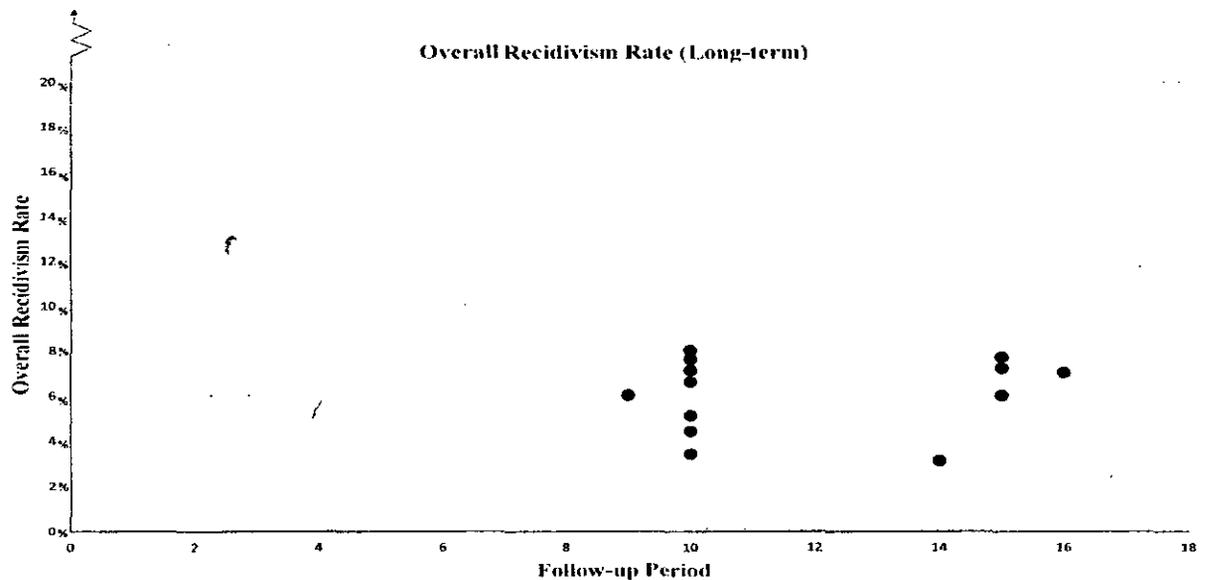


D. Effect of Longer Follow-Up Periods

While there are older studies that estimate longer-term recidivism rates (beyond the 3-5 years of the studies listed above), at this point sex offender registries have been maintained long enough to allow researchers to conduct studies on *observed* recidivism rates from 10-15 years after release. As there are significantly fewer studies across these timelines, an “average” recidivism rate is less conclusive than with the 3-5 year rates noted above. However, from the available state-sponsored studies, the average 10-year recidivism rate (re-incarceration) appears to be approximately 6%.⁹

⁹ State of Wisconsin, Department of Corrections, *Sex Offender Recidivism after Release from Prison* (2015); California Sex Offender Management Board, *An Assessment of Current Management Practices of Adult Sex Offenders in California* (2008); California Sex Offender Management Board, *Recidivism of Paroled Sex*

Wisconsin has conducted long-term follow-up of substantially all released sex offenders that allows us to compare 5- and 10-year recidivism rates. The findings, updated each year, show a 5-year recidivism average of 4.8% and a 10-year recidivism average of 6.1%. Based on these findings, Wisconsin notes that 75% of all sexual recidivism occurs within the first five years post-release. These findings are consistent with a study of all sex offenders released in Michigan which found a 14-year recidivism rate of 5%. As shown below, these results also match the observed recidivism rates of all offenders released in North Carolina.



E. North Carolina Information

The author of this brief, in coordination with NARSOL, has also examined the recidivism history of *all* sex offenders listed on the North Carolina sex offender registry. Since North Carolina publishes the offense history of all persons

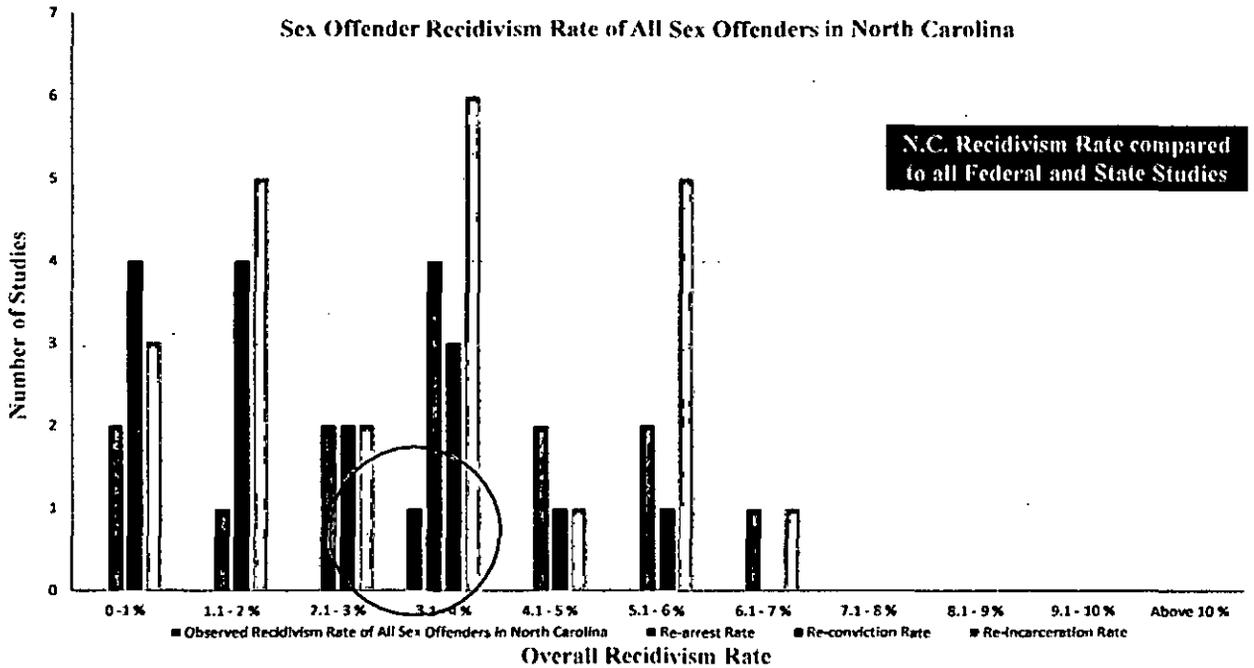
Offenders – A Ten Year Study (2008); Minnesota Department of Corrections, *Sex Offender Recidivism in Minnesota* (2007).

currently on its registry, it is possible to determine the actual recidivism rate for North Carolina sex offenders.

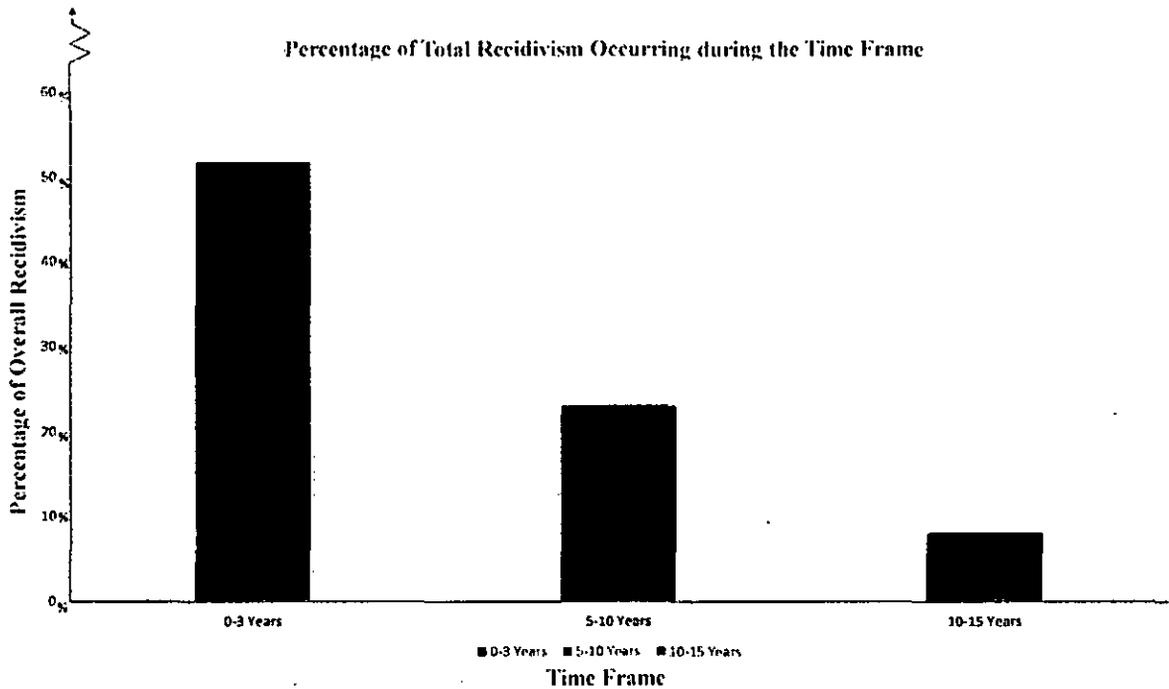
As of the date of the study [December, 2016], there were 22,735 persons on the North Carolina sex offender registry. Of these, the public records did not show sufficient data on 624 registrants to accurately determine their offense history. These registrants were excluded leaving 22,111 registrants considered. Of these, 790 were identified as actual or possible recidivists.¹⁰ This gives a recidivism rate among all North Carolina sex offenders of 3.6%. It should also be noted that North Carolina does not make information available concerning the number of persons *removed* from the registry. No such person is a recidivist as that would make them ineligible for removal or they would now reappear on the registry.¹¹ Conservatively estimating that 10% of all persons registered since 1996 have subsequently been removed from the registry, the recidivism rate for sex offenders in North Carolina is 3.2%.

¹⁰ This figure of 790 includes 655 registrants labelled recidivists by the state and an additional 135 registrants not labelled recidivists but who appear to be or are likely to be recidivists based upon examination of their individual records. Note: Of the 655 registrants labelled "recidivist" by the state, the public data does not support this label in 216 cases. However, they are included here in order to ensure that recidivism is not under-counted.

¹¹ N.C.G.S. § 14-212A (criteria for removal from the registry).



In addition, the North Carolina data also shows that about two-thirds of total recidivism occurs within the first five years – corresponding to the Wisconsin finding that about 75% of recidivism occurs in the first five years.



F. Conclusion

Despite differences in population studied, definition of recidivism, length of follow-up, and other variables, the above studies yield substantially uniform results. The average 3-5 year sex offender recidivism rate is around 3-5% (rearrest or reincarceration) or 2-3% (reconviction). Well over half of all recidivism occurs within this time frame. And these rates are generally lower than for other types of offenders. The empirical data, then, simply does not support the assumption that sex offenders, as a class, are a unique recidivism risk.

II. RESTRICTIONS ON SEX OFFENDERS HAVE NO DEMONSTRABLE EFFECT ON RECIDIVISM

In considering whether effect sex offender registry laws affect recidivism, it is important to differentiate between “registration and notification” (collecting data on sex offenders and disseminating that information to the public) and “restrictions” (the implementation of laws such as 720 ILCS 5/11-9.41(b)) which prohibit sex offenders from living in restricted areas, working restricted jobs, or being present in restricted areas.

A. Effect of Registration and Notification

There is mixed evidence whether registration and notification have a statistically significant impact on sex offender recidivism rates. Most studies, including those funded by the U.S. Department of Justice, do not find a statistically significant link between sex offender registration and notification and

decreased recidivism.¹² However, there are at least some studies that show a statistically significant drop in recidivism after the enactment of registration and notification laws – though it should be noted that these studies generally cannot say with confidence that this drop in recidivism was due to registration and notification as opposed to other factors.¹³ Another study has suggested that registration alone may decrease recidivism, but that notification (providing registry information to the public) may *increase* recidivism.¹⁴ Thus, while there is some evidence that registration may reduce recidivism, the strong weight of evidence is that it does not.

¹² Richard Tewksbury, Wesley G. Jennings, and Kristen Zgoba, *Sex Offenders: Recidivism and Collateral Consequences* (2011) (DOJ Funded); Elizabeth J. Letourneau, Jill S. Levenson, Dipankar Bandyopadhyay, Debajyoti Sinha, and Kevin S. Armstrong, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women, Final Report* (2010) (DOJ Funded); Kristen M. Zgoba and Karen Bachar, *Sex Offender Registration and Notification: Limited Effects in New Jersey* (2009) (DOJ Funded); Kristen Zgoba, Philip Witt, Melissa Dalessandro, and Bonita Veysey, *Megan's Law: Assessing the Practical and Monetary Efficacy* (2008) (DOJ Funded); Richard G. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Registration* (2006); Geneva Adkins, David Huff, and Paul Stageberg, *The Iowa Sex Offender Registry and Recidivism* (2000); and Donna D. Schram and Cheryl Darling Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism* (1995).

¹³ Robert Barnoski, *Sex Offender Sentencing in Washington State: Has Community Notification Reduced Recidivism?* (2005); and Grant Duwe and William Donnay, *The Impact of Megan's Law on Sex Offender Recidivism: The Minnesota Experience*, *Criminology*, Vol. 46 (2008).

¹⁴ J.J. Prescott and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 *J. Law & Econ.* 161 (2011).

B. Effect of Restrictions

In contrast to the mixed evidence on *registration*, there appears to be no evidence that sex offender *restrictions* reduce recidivism. For instance, researchers looking at the effect of residency restrictions¹⁵ have uniformly found that such restrictions do *not* reduce recidivism.¹⁶ A study of every sex offender released in Minnesota between 1990 and 2002 and reincarcerated for a new sex offense prior to 2006 found that not one of those offenses would likely have been prevented by residency restrictions.¹⁷ This study also noted that, of the 224 crimes committed by recidivists, in only two cases did the perpetrator contact his victim in a park. Though the data is not entirely clear, it appears that one of these victims was an

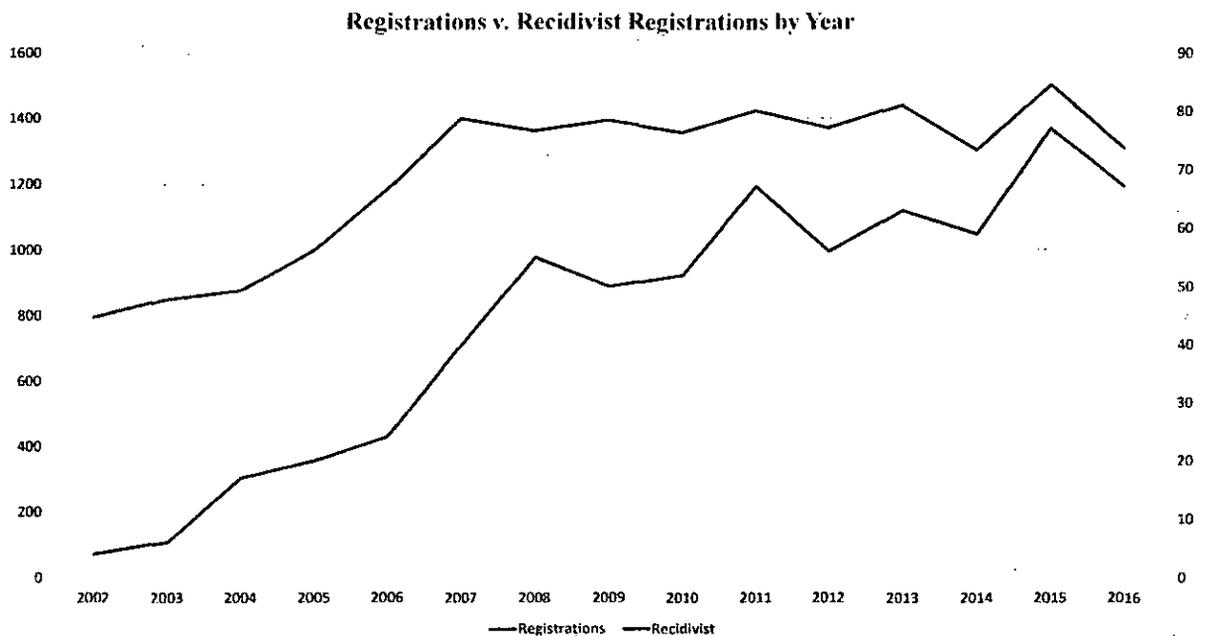
¹⁵ These statutes, enacted in the majority of states, restrict registered sex offenders from living within a certain proximity of schools and/or parks, playgrounds, and the like. *See, e.g.*, 720 ILCS 5/11-9.3.

¹⁶ Matt R. Nobles, Jill S. Levenson, and Tasha J. Youstin, *Effectiveness of Residence Restrictions in Preventing Sex Offense Recidivism*, *Crime and Delinquency*, Vol. 58, No. 4 (2012); Paul A. Zandbergen, Jill S. Levenson, and Timothy C. Hart, *Residential Proximity to Schools and Daycares An Empirical Analysis of Sex Offense Recidivism*, *Criminal Justice and Behavior*, Vol. 37, No. 5 (2010); Nicole Colombino, Cynthia Calkins Mercado, and Elizabeth L. Jeglic, *Situational Aspects of Sexual Offending: Implications for Residence Restriction Laws*, *Justice Research and Policy*, Vol. 11 (2009); and Phyllis Blood, Lanette Watson, and Paul Stageberg, *State Legislation Monitoring Report: FY 2007* (2008).

¹⁷ Grant Duwe, William Donnay, and Richard Tewksbury, *Does Residential Proximity Matter? A Geographic Analysis of Sex Offense Recidivism*, *Criminal Justice and Behavior*, Vol. 35, No. 4 (2008).

adult¹⁸. This is in line with the study's note that the "vast majority" of recidivist acts involved victims previously known to the perpetrator.¹⁹

In North Carolina, significant restrictions on registrants went into place in 2006²⁰ and 2008.²¹ However, as shown below, these restrictions do not appear to correlate to a decrease in recidivist activity.



As registrations have increased in North Carolina, recidivist acts have kept pace. The Minnesota and North Carolina results are consistent with the academic studies on the effects of registry restrictions – which show that increased

¹⁸ See *id.* at 498.

¹⁹ *Id.* at 492.

²⁰ 2005 N.C. HB 1896 (imposing residency and work restrictions).

²¹ 2007 N.C. HB 933 (imposing premises restrictions).

restrictions tend to *increase* recidivism. See, e.g., Kelly M. Socia and Jason Rydberg, *Sex Offender Legislation and Policy*, *Advancing Criminology and Criminal Justice Policy*, p. 193 (Thomas. M. Blomberg, et al. eds., 2013) (“A key finding of the meta-analytic research in this area is that primarily sanction and deterrence-based programs . . . result in an average *increase* in recidivism among program participants. In other words, they make offenders *worse*.”) (emphasis in original) (citations omitted).

C. Conclusion

The strong weight of evidence is that registration and notification statutes do not have a statistically significant impact on recidivism rates though there is some research showing a correlation between registration alone and reduced recidivism. But, there appears to be no evidence that residence and premises restrictions reduce recidivism and, in fact, these types of restrictions actually tend to *increase* recidivism as shown above. There does not appear to be a relationship between the imposition of restrictions and the State’s goal of increasing public safety.

Conclusion

In this case, the Court must decide whether 720 ILCS 5/11-9.4-1(b) is reasonably related to the legislature’s goal of increasing public safety. This brief is submitted to assist in that task.

With regard to sex offender recidivism and the efficacy of restrictions such as 720 ILCS 5/11-9.4-1(b), there is now sufficient evidence that there is no reasonable dispute as to baseline facts. As shown above, the actual recidivism rate can be established with reasonable certainty and there is no empirical evidence to support the argument that sex offender restrictions reduce that rate. The empirical evidence does show, however, that by restricting sex offenders broadly from public life, legislatures inadvertently create the conditions for recidivism – thereby actually *increasing* precisely the danger they seek to mitigate.

A “rational belief” (as opposed to an article of faith) is a belief grounded in empirical fact. As shown above, twenty (20) years of data demonstrates that the recidivism risk among sex offenders is not unique – or even higher than for other types of offenses. Nor does widespread restriction of sex offenders from public spaces meaningfully reduce that risk. If anything, the opposite is true. A statute grounded in these beliefs, then, cannot fairly be said to evince a reasonable determination that the statute is an appropriate means of protecting the public, especially when the statute proscribes a broad swath of innocent conduct without a limiting *mens rea*.

Appendix A

Federal Studies

1. Beth M. Huebner, Timothy S. Bynum, Jason Rydberg, Kimberly Kras, Eric Grommon, and Breanne Pleggenkuhle, *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (2013) (DOJ Funded).
2. Stephen V. Gies, Randy Gainey, Marcia I. Cohen, Eoin Healy, Dan Duplantier, Martha Yeide, Alan Bekelman, Amanda Bobnis, and Michael Hopps, *Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of The California Supervision Program Final Report* (2012) (DOJ Funded).
3. U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Pattern from 2005 to 2010, Supplemental Tables: Most Serious Commitment Offense and Types of Post-Release Arrest Charges of Prisoners Released in 30 States in 2005* (2016).
4. U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (2003).

State Studies

1. Alaska Judicial Council, *Criminal Recidivism in Alaska, 2008 and 2009* (2011).
2. Arizona Criminal Justice Commission, *Recidivism of Sex Offenders Released from the Arizona Department of Corrections in 2001* (2009).
3. California Department of Corrections and Rehabilitation, *2015 Outcome Evaluation Report: An Examination of Offenders Released in Fiscal Year 2010-11* (2016).
4. California Sex Offender Management Board, *An Assessment of Current Management Practices of Adult Sex Offenders in California* (2008).
5. California Sex Offender Management Board, *Recidivism of Paroled Sex Offenders – A Five Year Study* (2008).
6. California Sex Offender Management Board, *Recidivism of Paroled Sex Offenders – A Ten Year Study* (2008).
7. Connecticut Office of Policy and Management, Criminal Justice Policy & Planning Division, *Recidivism Among Sex Offenders in Connecticut* (2012).

8. Delaware Office of Management and Budget, Statistical Analysis Center, *Delaware Sex Offenders Profiles and Criminal Justice System Outcomes* (2008).
9. Indiana Department of Correction, *Recidivism Rates Compared 2005-2007* (2009).
10. Minnesota Department of Corrections, *Sex Offender Recidivism in Minnesota* (2007).
11. New Jersey Parole Board, *Report on New Jersey's GPS Monitoring of Sex Offenders* (2007)
12. New York Department of Correctional Services, *2003 Releases: Three Year Post Release Follow-up.*
13. New York Department of Correctional Services, *2010 Releases: Three Year Post Release Follow-up* (2014).
14. New York Department of Correctional Services, *2011 Releases: Three Year Post Release Follow-up* (2015).
15. South Carolina Department of Corrections, *Recidivism Among Sex Offenders in South Carolina* (2007).
16. Virginia Department of Corrections, *Preliminary Evaluation of Virginia's Sex Offender Containment Programs* (2006).
17. Washington State Institute for Public Policy, *Sex Offender Sentencing in Washington State: Recidivism Rates* (2005).
18. Wisconsin Department of Corrections, *Sex Offender Recidivism after Release from Prison* (2015).

Private Studies

1. Alaska Justice Forum, *Recidivism of Alaska Sex Offenders* (2009).
2. Geneva Adkins, David Huff, and Paul Stageberg, *The Iowa Sex Offender Registry and Recidivism* (2000).
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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of November, 2017, a copy of the attached **BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS IN SUPPORT OF DEFENDANT-APPELLEE** was delivered to the below-listed parties by sending an electronic copy from my email address as listed below to the email address of the Parties and to Mr. Marc A. Pepitone by depositing a copy, postage pre-paid, in the United States mail:

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I certify that this brief conforms to the requirement of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 18 pages.



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