

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2008-2502
Plaintiff-Appellee,	:	
v.	:	On Appeal from the
	:	Sixth Appellate District,
CHRISTIAN N. BODYKE,	:	Huron County, Ohio
	:	Case Nos. H-07-040, H-07-041,
Defendant-Appellant.	:	H-07-042

MERITS BRIEF OF AMICI CURIAE IOWA COALITION AGAINST SEXUAL ASSAULT, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, THE JACOB WETTERLING RESOURCE CENTER, DETECTIVE ROBERT A. SHILLING, CALIFORNIA COALITION AGAINST SEXUAL ASSAULT, TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT, AND THE NATIONAL ALLIANCE TO END SEXUAL VIOLENCE IN SUPPORT OF THE APPELLANT

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
STATEMENT OF FACTS	4
ARGUMENT.....	4
I. Offense-Based Classification Makes Monitoring the Most Dangerous Offenders More Difficult and Costly for Law Enforcement.	4
II. Classifying Offenders Based On Offense At Conviction Harms Public Safety and Is Antithetical to the Goals of the Protecting the Public from Sex Crimes.....	7
III. The Reclassification of Sex Offenders Under Ohio’s AWA Is Driven by Fear, Not Facts.	9
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
CASES	
<i>State v. Eppinger</i> (2001), 91 Ohio St. 3d 158.....	7
STATUTES	
OHIO REV. CODE § 2950.01, <i>et. seq.</i>	1
OTHER AUTHORITIES	
Bureau of Justice Statistics, <i>Recidivism of Sex Offenders Released from Prison in 1994</i> , 24 (2003)	10
Bureau of Justice Statistics, <i>Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault</i> , 27 (1997)	6, 9
Bureau of Justice Statistics, <i>Sexual Assault of Young Children as Reported by Law Enforcement: Victim, Incident, and Offender Characteristics</i> , 10 (2000)	6, 9
Colo. Dep't of Public Safety, <i>Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community</i> (2004)	7
Freeman, Naomi J. and Sadler, Jeffrey C., <i>The Adam Walsh Act: A False Sense of Security or an Effective Public Policy?</i> , CRIM. JUSTICE POLICY REV. (2009)	5
P. Gendreau, T. Little, and C. Goggin, <i>A Meta-Analysis of the Predictors of Adult Crime Recidivism: What Works</i> , 34 CRIMINOLOGY, 575-607 (1996).....	8
Hanson, R. Karl & Kelly Morton-Bourgon, <i>Predictors of Sexual Recidivism: An Updated Meta-Analysis</i> (2004)	7, 10
Hanson, R. Karl & Monique T. Bussiere, <i>Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism</i> , Studies, 66 J. OF CONSULTING & CLINICAL PSYCHOL., 348-362 (1998).....	10
<i>Hearing on the Sex Offender Registration and Notification Act (SORNA) Before the H.Comm. on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security</i> (March 10, 2009) (statement of Amy Borrer, Public Information Officer, Office of the Public Defender)	5, 6
Human Rights Watch Report, <i>No Easy Answers, Sex Offender Laws in the U.S.</i> , Vol. 19, No. 4(G), 62 (Sept. 2007)	8

TABLE OF AUTHORITIES
(continued)

	Page
Indiana Dep't of Corr., <i>Recidivism Rates Decrease for 3d Consecutive Year</i> , (2009) http://www.in.gov/idoc/files/IDOCRecidivism.pdf	11
Kruttschnitt, Candace, Uggen, Christopher and Shelton, Kelly <i>Predictions of Desistance Among Sex Offenders: The Interactions of Formal and Informal Social Controls</i> , 17 JUST. QUARTER, No. 1, 67-87 (2000).....	7, 9
Levinson, Jill and Cotter, Leo, <i>The Effects of Megan's Law on Sex Offender Reintegration</i> , 21 J. OF CONTEMPORARY CRIM. JUSTICE, No. 3, 298-300 (2005).....	8
Minn. Dep't of Corr., <i>Residential, Proximity & Sex Offense Recidivism in Minn.</i> (2007), http://www.corr.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf	10
Nat'l Alliance to End Sexual Violence, <i>Legislative Analysis: The Adam Walsh Child Protection and Safety Act of 2006</i> , http://www.naesv.org/Polycypapers/Adam_Walsh_SumMarch07.pdf	7
Ohio Dep't of Rehab. & Corr., <i>Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases</i> , 12, 24 (2001)	10
PETERSILIA, JOAN, <i>WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY</i> (Oxford Univ. Press 2003)	7
Prentky, Robert A., Lee, Austin F.S., Knight, Raymond A. & Cerce, David, <i>Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis</i> , 21 LAW & HUM. BEHAV. 635, 643 (1997).....	11
Tewskbury, Richard, <i>Collateral Consequences of Sex Offender Registration</i> , 21 J. OF CONTEMPO. CRIM. JUST., No. 1, 67-81 (2005).....	8
Va. Crim. Sentencing Comm'n, <i>Assessing Risk Among Sex Offenders in Virginia</i> (January 15, 2001) http://www.vcsc.state.va.us/sex_off_report.pdf	8, 9

INTRODUCTION

Ohio's Adam Walsh Act ("Ohio's AWA"), OHIO REV. CODE § 2950.01, *et. seq.*, enacted on June 30, 2007, fundamentally transforms the classification process and registration and notification requirements under Ohio's sex offender laws. In particular, the pre-AWA law classified adult sex offenders based on the individual's likelihood of committing future offenses and the offender's risk to the community. The AWA abandons classification based on individual assessment in favor of classification based on the convicted offense alone, and it applies this purely offense-based classification scheme retroactively to all adult and juvenile sex offenders.

While protecting Ohioans from sex offenders is a compelling interest—and indeed, is the core mission of each of the *Amici*—none of the changes implemented as part of Ohio's AWA have been proven to achieve that goal. To begin with, these changes put law enforcement agencies, already in budgetary crises, in the position of spending precious dollars on monitoring low risk individuals with a limited impact on public safety. Further, research shows that the law's more burdensome requirements on law enforcement, the public, and sex offenders can cause *higher* levels of recidivism and thus pose *increased* danger to the community. More onerous sex offender registration and community notification laws threaten to harm the very people they are intended to protect and to undermine goals of community safety and treatment of offenders. Research demonstrates that victimization can be reduced when sex offenders successfully reenter the community. Thus, any argument that Ohio's AWA is simply a remedial law designed to protect children and the public from sexual abuse and sex crimes is seriously flawed. Ohio's AWA is not based on empirical evidence or proven research, but on fear and misinformation.

STATEMENT OF INTEREST OF AMICI CURIAE

The *Amici* are organizations committed to working on behalf of victims and witnesses of sexual violence to prevent further violence. Each of the *Amici* believes this goal is best achieved through evidence-based practices and policies. And each of the *Amici* believes Ohio's Adam Walsh Act conflicts with this goal.

The Iowa Coalition Against Sexual Assault ("IowaCASA") is a non-profit organization whose mission is to unite people and organizations to promote a society free from sexual violence and to meet the diverse needs of survivors. IowaCASA consists of twenty-seven sexual assault crisis centers serving survivors of sexual assault throughout Iowa. Its staff works on several initiatives including: technical assistance and training to member centers; civil legal assistance for survivors of sexual assault; improving responses to sexual assault within communities of color; training initiatives for assistance to other sexual assault coalitions; statewide sexual assault prevention; training for allied professionals; and public policy efforts at the state and national level.

ATSA is a non-profit, interdisciplinary organization focused on preventing sexual abuse through effective management of individuals who have sexually abused or are at risk to abuse. Through research and shared learning, ATSA was founded to foster research, facilitate information exchange, further professional education and provide for the advancement of professional standards and practices in the field of sex offender evaluation and treatment. ATSA's members include the world's leading researchers in the study of sexual violence as well as professionals who conduct evaluations and treat sexual offenders, sexually violent predators, and victims. Members work closely with public and private organizations such as prisons, probation departments, child protection agencies, State Attorney's Offices, Public Defender's Offices, the National Council Against Sexual Violence, and state legislatures in an effort to

protect citizens from sexual assault. ATSA advocates for evidence-based practices and policies that are most likely to protect the public from sexual violence, while allowing for the rehabilitation of sexual offenders.

The Jacob Wetterling Resource Center ("JWRC"), formerly the Jacob Wetterling Foundation, is a victim advocacy agency that was established on January 22, 1990, four months after eleven-year-old Jacob Wetterling was abducted near his home in St. Joseph, Minnesota. JWRC seeks to educate families and communities to prevent the exploitation of children, including sexual victimization. In addition, JWRC provides victim support and has worked extensively to promote legislation which seeks to protect children and communities from sexual offenders. The JWRC was instrumental in passing Jacob's Law in 1996, which facilitated the registration of convicted sex offenders in all states.

Detective Robert A. Shilling has worked on sexual assaults and child abuse cases for twenty years and is a nationally recognized authority in the area of community notification. He currently serves on the Interpol Specialists Group on Crimes Against Children. He has previously testified on the Adam Walsh Act in the United States House of Representatives' Subcommittee on Crime and spoken to groups around the country on the subject of sexual offenders and community safety.

The California Coalition Against Sexual Assault ("CALCASA") provides the unifying vision and voice to all Californians speaking out against sexual violence. Founded in 1980, CALCASA is the only statewide organization in California whose sole purpose is to promote public policy, advocacy, training and technical assistance on the issue of sexual assault. CALCASA's primary members include ninety-two rape crisis centers and rape prevention programs in the state. CALCASA works closely with rape crisis centers, government agencies,

campuses, institutions, lawmakers, the criminal justice system, medical personnel, community-based organizations and business leaders providing a central resource for improving society's response to sexual violence by supplying knowledge and expertise on a wide range of issues.

The Texas Association Against Sexual Assault ("TAASA") is the statewide organization committed to ending sexual violence in Texas. A nonprofit educational and advocacy organization based in Austin, TAASA member agencies comprise a statewide network of over eighty crisis centers that serve rural as well as metropolitan areas. Founded in 1982, the agency has a strong record of success in community education, youth outreach, law enforcement training, legislative advocacy, and curricula and materials development.

The National Alliance to End Sexual Violence ("NAESV") utilizes a comprehensive grassroots communication network to shape national policy related to sexual violence and victims needs, ensure funding for rape crisis programs and sexual assault coalitions, and provide expertise to governments, businesses and non-profit organizations addressing sexual violence in all of its forms. NAESV advocates on behalf of the victim/survivors, women, children and men who have needlessly suffered the serious trauma of sexual violence and envisions a world free from sexual violence.

STATEMENT OF FACTS

Amici adopt the statement of facts presented in the brief of Appellant Christian N.

Bodyke.

ARGUMENT

I. OFFENSE-BASED CLASSIFICATION MAKES MONITORING THE MOST DANGEROUS OFFENDERS MORE DIFFICULT AND COSTLY FOR LAW ENFORCEMENT.

The "one size fits all" approach to classification fails to account for individual facts and circumstances and can impede efforts to monitor the offenders considered to be the most

dangerous and most likely to commit additional sex crimes. Under Ohio's former sex offender laws, which classified adult offenders based on individualized judicial determinations, the sex offender registry reflected what research has shown about the likelihood of recidivism and focused resources on high risk adults. *Hearing on the Sex Offender Registration and Notification Act (SORNA) Before the H. Comm. On the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security* (March 10, 2009) (statement of Amy Borrer, Public Information Officer, Office of the Ohio Public Defender). Under the former system of classification, 77% of Ohio's sex offenders were classified in the lowest "sexually oriented offenders" category, 4% were in the middle category, and 18% were in the highest "sexual predator" category. *Id.*

Under Ohio's AWA, however, the classification scheme is turned on its head. The lowest category now contains only 13% of sex offenders, while the highest, or most dangerous category, now contains 54% of sex offenders. *Id.* While this certainly creates a more onerous burden on offenders who jumped from the lowest to the highest tier, it also creates needless significant burdens on law enforcement. The propensity to re-offend for these new "dangerous" offenders is not known,¹ but law enforcement must monitor and supervise three times the number of people in this category. This puts a tremendous burden on law enforcement budgets that are already thinly stretched, with limited, if any, impact on public safety.²

¹ The only study to date on the effectiveness of conviction-based classifications found that registered sex offenders classified as Tier I were rearrested for sex offenses more often and sooner than Tier II or Tier III offenders. By the end of the 8th year in the community, 8.1% of Tier I offenders were rearrested for a sex crime compared with 6.1% of Tier II offenders and 7.5% of Tier III offenders. The study concluded that actuarial tools such as the Static 99 yielded a more accurate prediction than the AWA Tier levels, and the Tier level was almost completely ineffective at categorizing based on risk. Freeman, Naomi J. and Sadler, Jeffrey C., *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy?*, CRIM. JUSTICE POLICY REV. (2009).

² The Justice Policy Institute, a non-profit organization, calculated estimates of the potential costs of complying with the Federal Adam Walsh Act. If a state fails to comply with the Federal AWA, it risks losing 10 percent of its "Byrne Grant." The Justice Policy Institute compares the cost of implementation with the potential loss of Byrne Grant funds. In Ohio, the potential cost of implementation was approximately \$18,598,869. The potential loss of Byrne Grant money was \$622,383. Under this analysis, the cost of implementation to the state clearly outweighed any loss of grant money.

This also confuses the public and causes the community to focus on convicted offenders instead of more likely perpetrators. The Department of Justice has reported that 87% of the individuals arrested for sex offenses had not been previously convicted of a sex crime. Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, (1997). Most sexually abused children are victimized by someone they know and trust, and only about 7 percent of sex crimes against minors are perpetrated by strangers. Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported by Law Enforcement: Victim, Incident, and Offender Characteristics*, 10 (2000).

Perhaps even more problematic than the increased numbers of *low risk* "tier three" offenders is the possibility that *high risk*, likely re-offenders will be classified into one of the lower tiers because the new classification scheme irrationally fails to account for individualized circumstances. Consider an offender who pleaded to a lower offense, but was subsequently judicially determined to be a dangerous, high-risk offender. Retroactive application of new classifications means that, despite a previous judicial determination of dangerousness, this high-risk offender will be subject to less monitoring and less community notification simply because he originally pleaded to a lower-tier offense. In effect, law enforcement and the courts will be forced to wait until the sex offender commits another crime, and creates another victim, before being able to properly monitor this offender. *Hearing on the Sex Offender Registration and Notification Act (SORNA) Before the H. Comm. On the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security* (March 10, 2009) (statement of Amy Borrer, Public Information Officer, Office of the Ohio Public Defender).

What is more, by classifying adult and juvenile offenders based on offense at conviction, the law creates a three-fold increase in the number of offenders who will be subject to

community notification. This increase affects the usefulness of the sex offender database by diluting the percentage of serious offenders listed, making the identification of the truly dangerous offenders very difficult. In fact, this Court acknowledged this problem in *State v. Eppinger* (2001), 91 Ohio St. 3d 158, 165: “if we were to adjudicate all sexual offenders as sexual predators, we run the risk of ‘being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many.’” *Id.* This theoretical tragedy will become reality under Ohio’s AWA as the database becomes merely a repository for people convicted of various sex crimes, but not actually dangerous to the public. The Nat’l Alliance to End Sexual Violence, *Legislative Analysis: The Adam Walsh Child Protection and Safety Act of 2006*, http://www.naevs.org/Polycypapers/Adam_Walsh_Sum_March07.pdf.

II. CLASSIFYING OFFENDERS BASED ON OFFENSE AT CONVICTION HARMS PUBLIC SAFETY AND IS ANTI-THETICAL TO THE GOALS OF THE PROTECTING THE PUBLIC FROM SEX CRIMES.

Research demonstrates that stability and support increase the likelihood of successful reintegration for former offenders, and that public policies making it more difficult for former offenders to succeed undermine public safety. *See, e.g.,* JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (Oxford Univ. Press 2003). With respect to sex offenders in particular, research has shown that isolation, unemployment, depression, and instability—conditions known as dynamic risk factors—correlate with increased recidivism. *See, e.g.* R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis* (2004); Colo. Dep’t of Public Safety, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community* (2004); Candace Kruttschnitt, Christopher Uggen & Kelly Shelton, *Predictors of Desistance Among Sex*

Offenders: The Interaction of Formal and Informal Social Controls, 17 JUST. Q., No. 1, 61-88 (2000).

Under Ohio's AWA, adult and juvenile sex offenders will live in constant fear that their convictions will be added to the list of "tier three" worst-of-the-worst offenses, subjecting them to increasingly onerous notification registration requirements, despite their leading an otherwise offense-free life. Community notification and publication of a sex offender's identity, home address, place of work, and other identifying information can profoundly affect the sex offender's life. As a result, the stresses of notification (shame, isolation, anxiety, and depression) can trigger recidivism in some offenders. Jill Levinson and Leo Cotter, *The Effects of Megan's Law on Sex Offender Reintegration*, 21 J. OF CONTEMPORARY CRIM. JUST., No. 3, 298-300 (2005); Richard Tewskbury, *Collateral Consequences of Sex Offender Registration*, 21 J. OF CONTEMPO. CRIM. JUST., No. 1, 67-81 (2005); Human Rights Watch Report, *No Easy Answers, Sex Offender Laws in the U.S.*, vol. 19, no. 4(G), 62 (September 2007).

Blanket community notification based on offense at conviction may also drive sex offenders underground, and away from treatment programs, gainful employment, and law enforcement monitoring and supervision. Human Rights Watch Report, *No Easy Answers, Sex Offender Laws in the U.S.*, vol. 19, no. 4(G), 79 (September 2007). Research has shown that gainful employment contributes to the likelihood that an offender will not commit another crime. P. Gendreau, T. Little, and C. Goggin, *A Meta-Analysis of the Predictors of Adult Crime Recidivism: What Works*, 34 CRIMINOLOGY 575-607 (1996). For example, a 2001 risk assessment study by Virginia's Criminal Sentencing Commission found that, among other factors, sex offenders who did not have regular employment were more likely to re-offend than sex offenders who had stable employment. Va. Crim. Sentencing Comm'n, *Assessing Risk*

Among Sex Offenders in Va. (January 15, 2001) http://www.vcsc.state.va.us/sex_off_report.pdf.

Other studies have shown that stable employment and access to treatment programs greatly contribute to lower rates of recidivism. Candace Kruttschnitt, Christopher Uggen, and Kelly Shelton, *Predictions of Desistance Among Sex Offenders: The Interactions of Formal and Informal Social Controls*, 17 JUST. QUARTER., No. 1, 67-87 (2000).

When the threat of community notification drives sex offenders underground, their ability to access gainful employment and critical treatment programs is severely curtailed. The isolation and inability to maintain social connections make an otherwise low-risk offender more likely to re-offend. This is directly contrary to the goals of sex offender laws and puts the public in greater danger.

III. THE RECLASSIFICATION OF SEX OFFENDERS UNDER OHIO'S AWA IS DRIVEN BY FEAR, NOT FACTS.

More sweeping sex offender laws are growing in number across the country. The proliferation of more burdensome and costly laws, however, is driven by fear, not facts. Tragic cases of child abduction and sexually motivated murder receive extraordinary media attention, and the publicity creates a public sense of alarm and urgency. In reality, however, such cases are extremely rare. Less than 1% of all murders involve sexual assault, and in fact, the prevalence of sexual murders declined by about half between the late 1970s and the mid 1990s. Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, 27 (1997).

Moreover, a 2000 Department of Justice study found that 93% of child sexual abuse victims knew their abuser, 34.2% were family members, and 58.7% were acquaintances. Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, 10 (2000). Only 7% of child victims reported that they

were abused by strangers. *Id.* These conclusions are confirmed by a 2007 Minnesota study, which found that the vast majority (79%) of recidivists selected victims with whom they had a previous relationship—whether social or biological. Minn. Dep't of Corr., *Residential Proximity & Sex Offense Recidivism in Minn.* (2007), <http://www.corr.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf>. Thus, laws that seek to notify or register people based on the crimes they commit, and with the goal of informing the public of the danger of these strangers, miss the heart of the problem of sex-based crimes: protecting potential victims from attackers that they know.

Proponents of more onerous registration and community notification statutes also point to allegedly high sex offender recidivism rates as a justification for such laws. Recent research, however, contradicts the misunderstanding that most sex offenders will re-offend. For example, the Department of Justice found that only 5.3% of sex offenders were rearrested for a new sex crime within three years after release from prison. Bureau of Justice Statistics, *Recidivism of Sex Offenders Released From Prison in 1994*, 24 (2003). Moreover, studies by Canadian researchers, who examined recidivism statistics for more than 29,000 sex offenders in North America and Europe, found a 14% recidivism rate among all sex offenders, though child molesters were re-arrested at a slightly higher rate of about 20%. See R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. OF CONSULTING & CLINICAL PSYCHOL. 348-362 (1998); R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis* (2004). See also Ohio Dep't of Rehab. & Corr., *Ten-Year Recidivism Follow-Up of 1989 Sex Offender Releases* 12, 24 (2001) (reporting total sex offense related recidivism rate of 11% over ten-year period, and characterizing sex offense recidivism as a “fairly unusual” occurrence in Ohio). More recently,

the Indiana Department of Correction found that only 1.05% of released sex offenders returned to prison for a new sex offense within 3 years of their release. Indiana Dep't of Corr., *Recidivism Rates Decrease for 3rd Consecutive Year (2009)* <http://www.in.gov/idoc/files/IDOCRecidivism.pdf>. While it is true that official recidivism data (for any offense type) underestimates actual re-offense rates, it is clear, based on the research discussed above, that the majority of sexual offenders are unlikely to commit new sex offenses.³

CONCLUSION

Increased community notification and registration requirements neither decrease recidivism among adult and juvenile sex offenders nor promote public safety and the protection of Ohio's children. To the contrary, more burdensome restrictions undermine public safety goals by ostracizing and isolating offenders, potentially leading to *higher* rates of recidivism. The new registration and community notification laws will be difficult for Ohio's law enforcement professionals to enforce and will divert precious resources from monitoring truly dangerous individuals. Ohio's AWA is not a remedial law designed to protect children and the public from sexual abuse and sex crimes; it is a counterproductive and unempirical overreaction driven by fear and misinformation.

³ Some studies, based on older data, have suggested higher recidivism rates. See, e.g., Robert A. Prentky, Austin F.S. Lee, Raymond A. Knight, & David Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635, 643 (1997) (reporting an estimated recidivism rate of 52%, but only among sex offenders who chose boys as their victims, a very targeted subset of all sexual offenders). Drawing conclusions about current recidivism rates based upon old data is unwarranted, however. For example, the subjects of the Prentky study were sex offenders released from prison during the period 1959-1985, before treatment became widespread and state-of-the-art. Additionally, the subjects were the proverbial "worst of the worst," men who were civilly committed for repeat and/or aggressive sex offenses. Because the subjects of the Prentky study were not necessarily representative of sex offenders generally, the authors issued two caveats: (1) "[t]he obvious heterogeneity of sexual offenders precludes automatic generalization of the rates reported here to other samples," and (2) "these findings should *not* be construed as evidence of the inefficacy of treatment," since "the treatment services [available to the subjects of the study] were not provided uniformly or systematically and did not conform to a state-of-the-art mode." *Id.* at 656-57 (emphasis in original).

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CERTIFICATE OF SERVICE

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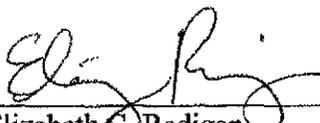
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