
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC No. 11520

Michael Moe, *et al.*

v.

Chair of the Sex Offender Registry Board

On Reservation and Report from the Single Justice

BRIEF FOR MASSACHUSETTS ASSOCIATION FOR
TREATMENT OF SEXUAL ABUSERS (“MATSA”) AS
AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The Massachusetts Association for the Treatment of Sexual Abusers ("MATSA") is a non-profit, voluntary professional organization with 92 members statewide, whose specific focus is on the prevention of sexual abuse through the effective treatment and management of sex offenders. It is an active chapter of the international Association for the Treatment of Sexual Abusers ("ATSA"), an organization that fosters research, facilitates information exchange, furthers professional education, and provides for the advancement of professional standards and practices in the field of sex offender evaluation and treatment.

Clinical professionals within MATSA, such as psychiatrists and psychologists, are among those most familiar with, and well-versed in, the research literature on the sex offending population. These professionals regularly evaluate sex offenders across a variety of contexts including assessments of sexual dangerousness and likelihood of reoffending with respect to civil commitment pursuant to G.L. c. 123A and relevant to sex offender registration hearings. They also perform aid in sentencing evaluations that

identify the individual treatment and risk-management needs of convicted sex offenders. As such, MATSA advocates for evidence-based practices and policies that are most likely to protect the public from sexual violence, while allowing for the meaningful rehabilitation of sex offenders.

This brief of MATSA as *amicus curiae* presents the court with the current state of the scientific evidence relevant to this Court's consideration of whether there is a rational basis behind the July 2013 amendment to the Sex Offender Registry Law that requires that sex offender registry information on identified Level 2 sex offenders be published on the internet. It argues that although empirical data specifically on the direct effects of internet dissemination of Massachusetts Level 2 sex offender information is lacking, substantial relevant data indicate that it is highly likely that increasing the dissemination of Level 2 registry information will neither serve to prevent sexual re-offense, to reduce recidivism or to protect the public from sexual aggression. In addition, such dissemination will likely decrease opportunities for safe, optimal

rehabilitation, re-entry, and re-integration of sex offenders into the community.

ISSUES PRESENTED

Whether a July, 2013, amendment to the Sex Offender Registry Law - which requires that sex offender registry information of Level 2 sex offenders now be published on the Internet - is necessary to protect the public given that:

- Sex offenders generally reoffend at very low rates;
- Public dissemination of an offender's personal information does not actually increase public safety or decrease his risk to reoffend (but sometimes has the opposite effect of increasing an offender's risk to reoffend);
- The specific harm of public notification to certain classes of offenders, such as juveniles and low risk offenders, is devastating to their ability to reintegrate with their family and become responsible, law-abiding adults.

STATEMENT OF THE CASE

Amicus adopts the statement of the issues set forth in the Plaintiffs' brief.

STATEMENT OF FACTS

Amicus adopts the Statement of facts set forth in the Plaintiffs' brief.

SUMMARY OF ARGUMENT

Despite public perception, empirically validated research demonstrates that sex offenders as a group are heterogeneous and that the broad application of supervisory and public policy practices does not serve to reduce sex offender recidivism. Although some convicted sex offenders may pose a high risk of re-offense upon release to the community from incarceration, research supports that this is not actually true for the majority of sex offenders. Moreover, it is not true for specific types of offenders, all of whom are among those classified, and likely to be classified, as Level 2 offenders. See, *infra*, pg. 6-15.

Amicus believes that expanding the level of public notification of registered sex offenders via internet to include Level 2 registered sex offenders, a heterogeneous group that is comprised of offenders ranging from a theoretically "moderate" to "low" risk for sexual re-offense, is not an empirically sound public policy and is based on the unsupportable assumption that public dissemination of, and access to sex offender registry information, is an effective method for reducing sexual offense. Public dissemination of sex offender registry information should be reserved only for those individuals who present the highest risk of danger and harm to the community and who are allowed access to the community. See, *infra*, pgs. 15-21.

ARGUMENT

I. Sex Offenders As a Whole Do Not Reoffend at "High Rates." Furthermore, Current Research Indicates That Certain Groups Of Sex Offenders Actually Reoffend at Low Rates--Lower Than Other Criminal Offenders and Lower Than Other Sex Offenders.

Public perception is that sex offenders reoffend at high rates. See e.g. *McKune v. Lile*, 536 U.S. 24, 32-33 (2002); *Commonwealth v. Cory*, 454 Mass 559, 574 (2009) (Ireland, J., dissenting) ("Both the Legislature and this court have recognized that sex offenders present a serious threat to the public and have a high rate of recidivism."). While this statement is often repeated, it is a gross overgeneralization. In reality, the most current research indicates that sex offenders, as a group, reoffend less than other criminal offenders. A study by the Department of Justice found that sex offenders have the lowest recidivism rates of all criminal offenders except for homicide offenders. See U.S. Department of Justice, Bureau of Justice Statistics *Recidivism of Prisoners Released in 1994* (2002). The same is true of Massachusetts specific offenders. See e.g. *Comprehensive Recidivism Study*, Massachusetts Sentencing Commission, June 1, 2002, pg. 38 ("Of the

major offense categories, recidivism rates were lowest for sex offenders (20.8%) and highest for property offenders (56.5%)”).

It is difficult to overstate the harm that sex offenders cause their victims. Harm is, and can be, a valuable consideration in making sentencing decisions and creating public policy to treat offenders and prevent reoffending. However, the magnitude of the harm caused by the small percentage of those identified as high risk sex offenders is often used to distort the reality of whether or not most offenders are likely to repeat their conduct. The benefit of this concern is that researchers have done extensive studies about sex offenders, whether they reoffend, and why they reoffend. Accordingly, we know more today than we ever have about sex offender recidivism. It is no longer true to say that all sex offenders reoffend at high rates. In reality, some do, most do not. And the research is helping distinguish between the types of offenders that may reoffend at high rates and those that do not.

A. Sex Offenders, As A Whole, Reoffend At Low Rates

Much attention has been placed on studying sex offenders and recidivism. The studies have attempted to pinpoint characteristics or traits that may help understand why some sex offenders reoffend and others do not. These studies first establish general rates of recidivism, often referred to as a base rate,¹ for all sex offenders before they can distill the relevance of any particular trait and its association with recidivism. As such, there are countless studies that report aggregate rates of reoffending for groups of sex offenders. These studies show, uniformly, that sex offender recidivism is generally low. See e.g. Hanson, K.R.; Bussière, M.T., *Predicting relapse: A meta-analysis of sexual offender recidivism studies*, *Journal of Consulting and Clinical Psychology*, Vol 66(2), Apr 348-362, (1998) (13.4% sexual recidivism for all offenders in meta-analysis of 61 studies and 23,400 offenders); Hanson, K.R.; Morton-Bourgon, K., *The Characteristics of Persistent Sexual Offenders: A*

¹ "A 'base rate' is simply the proportion of a designated population sharing a certain characteristic." Doren, D., *Evaluating Sex Offenders* (2002) pg. 145.

Meta-Analysis of Recidivism Studies, Journal of Consulting and Clinical Psychology, Vol 73(6), 1154-1163 (Dec 2005) (13.7% sexual recidivism in meta-analysis of 95 studies with over 31,000 sexual offenders over five year follow-up period); Hanson, R. K., & Morton-Bourgon, K. E. *The accuracy of recidivism risk assessments for sexual offenders: A meta-analysis of 118 prediction studies*, Psychological Assessment, 21, 1-21 (2009) (11.5% sexual recidivism rate meta-analysis of 100 studies and 28,757 offenders).

Government studies have produced similar results, both here in Massachusetts and elsewhere. See *Comprehensive Recidivism Study, supra*; Recidivism Among Sex Offenders in Connecticut, State of Connecticut Criminal Justice Policy and Planning Division (2/15/12) (Study of offenders who served a prison sentence for at least one sex related offense found 3.6% rearrested or charged with new sex offense and 2.7% convicted over five-year period); U.S. Department of Justice, Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994 (Nov. 2003) (studying 9,691 sex offenders over three year follow-up period found sexual recidivism

rates of 5.1% based on re-arrests and 3.5% based on reconviction).

Thus, it cannot be said that all sex offenders reoffend at "high rates." In reality, most sex offenders reoffend at low rates. This is particularly important because the research is relatively new--at least in relation to the research used to create the present classification scheme used by the Sex Offender Registry Board. See *Doe 151564 v. Sex Offender Registry Board*, 456 Mass. 612, 622, n. 5 (2010) ("Although the regulations were last updated in 2002, most of the research on which they rely was published in the late 1990s... [and] '[k]nowledge concerning sexual offender recidivism risk has advanced considerably during the past [ten] years.'").

Additionally, beyond documenting general rates of reoffense for all sex offenders, these studies have honed in on specific types or characteristics of offenders that are correlated with lower rates of reoffending.

B. Recidivism Risk Declines with Age

As this Court already acknowledged, "age is an important factor in determining the risk of recidivism

and that such risk diminishes significantly as an offender ages." See *Doe 151564, supra*, at 621. This is one of the most widely accepted, uncontroversial, and unrefuted research findings. See e.g. Helmus, L., Thornton D., Hanson, R.K., and Babchishin, K., *Improving the Predictive Accuracy of the Static-99 and Static-2002 With Older Sex Offenders: Revised Age Weights*, *Sexual Abuse: A Journal of Research and Treatment* (2011); Hanson, R.K., *Does Static-99 Predict Recidivism Among Older Offenders?* *Sex Abuse, A Journal of Research and Treatment*, 18: 343-355 (2006); Barbaree, Blanchard & Langton, *The Development of Sexual Aggression Through the Lifespan*, *Ann.N.Y. Acad. Sci.* 989:59-71 (2003). Yet, to date, SORB has no specific factor considering advanced age in classifying sexual offenders.

C. Gender Moderates Recidivism Rates

Female offenders, who are required to register as sexual offenders, have lower recidivism rates than the general sex offender male population. Empirical studies have found that the general recidivism rates for female sexual offenders are as low as 1% to 3%. See Cortoni, F. & Hanson, R.K., and Coache, M.E., *The*

Recidivism Rates of Female Sexual Offenders are Low: A Meta-Analysis, *Sexual Abuse: A Journal of Research and Treatment* (2010); Cortoni, F. & Hanson, R.K., *A Review of the Recidivism Rates of Adult Female Sexual Offenders*, Correctional Service of Canada (May 2005). Moreover, with females, studies show that the reasons they offend, and reoffend, are substantially different than males. See Freeman, N., Sandler, J. *Female and Male Sex Offenders, A Comparison of Recidivism Patterns and Risk Factors*, *Journal of Interpersonal Violence* (2008); U.S. Department of Justice, Center for Sex Offender Management *Female Sex Offenders* (March 2007). Like aging, the current regulations have not incorporated this new research.

D. *Juveniles Who Sexually Offend Are At Lower Risk for Recidivism Than Adults.*

As a group, juveniles who sexually offend evidence lower risks for sexual offense recidivism than adults who sexually offend. See Human Rights Watch, *Raised on the Registry, The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S.*, pp. 30-31 (May 2013); Caldwell, M. F. *Study characteristics and recidivism base rates in juvenile sex offender recidivism*, *International Journal of*

Offender Therapy and Comparative Criminology, 54(2), 197-212 (2010); Caldwell, M. , Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders, Sexual Abuse: A Journal of Research and Treatment, 19(2), 107-113 (2007) (Recidivism rate of 6.8% for juvenile offenders). And like females, juveniles tend to offend, and reoffend, for different reasons. See Justice Policy Institute, *Registering Harm: How Sex Offender Registries Fail Youth Communities* (2008), pg. 21-22. SORB has some regulations that acknowledge youth, but has not incorporated the more recent data presented here.

E. Offense-Free Community Time Reduces Recidivism Risk

The empirical research has found that the longer offenders remain sex offense-free in the community, the less likely they are to reoffend sexually.

Hanson, R. K., Harris, A.J.R., Helmus, L., & Thornton, D., *High risk sex offenders may not be high risk forever*, Journal of Interpersonal Violence (November 2013). In this respect, SORB regulations also recognizes the risk lowering effects of time in the community offense-free. See 803 CMR

1.40(9)(a) ("Studies have shown that the likelihood of

recidivating decreases for most offenders after the first five to ten years following release from incarceration and becomes substantially lower after 10 years in the community.").

F. All Persons Classified As Level 2 Offenders Prior to Enactment of the New Law Mandating Dissemination Were Not Classified Based on the Most Current Research.

It is beyond reproach that SORB's regulations are outdated. See *Doe 151564, supra*, at 622 n. 5. The consequence of that, in the context of this case, is that all persons classified as Level 2 offenders have not been appropriately assessed. There is no doubt that among the current crop of Level 2's reside persons over 60, females, juveniles, and persons who have been in the community for over 10 years. Without a current, individualized assessment, many of the current Level 2's may not actually pose a "moderate" (let alone "high") risk to reoffend. As such, there can be no rational relation to protecting the public by notifying them of these offenders. See *Coe v. Sex Offender Registry Board*, 442, Mass. 250, 259 (2004).

II. **There is No Public Safety Benefit to Broad Public Dissemination (or Internet Dissemination) And, In Fact, Such Dissemination Has the Unintended Consequences of Destabilizing Otherwise Stable, Low-Risk Offenders.**

A. ***Broad Dissemination Does Not Prevent or Reduce Reoffending.***

About 87% of victims of sexual violence each year are abused by offenders with no previous sex crime, i.e., people who are not required to register as sex offenders. See Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.*, vol.19, no. 4(G), p. 25 (Feb. 2007) citing Lawrence Greenfeld, Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, Feb. 1997. A study of 136 new sex crimes in Massachusetts found that only six (or 4.4%) were committed by individuals listed on the sex offender registry. *Id.* at 45 citing Anthony and Carolyn Petrosino, *The Public Safety Potential of Megan's Law in Massachusetts: An Assessment from a Sample of Criminal Sexual Psychopaths*, *Crime & Delinquency*, vol. 45, pp. 140-158 (1999). Such low recidivism risk and low frequency of sex crimes committed by offenders on the registry in any given year belies the efficacy of a strategy of broad-based dissemination of information about sex

offenders and supports the utility of focused dissemination that targets only the most dangerous high-risk offenders.

Moreover, numerous empirical studies have found that internet notification does not increase or enhance public safety, i.e, reduce sexual recidivism. See Letourneau, E. J., Levenson, J.S., Bandyopadhyay, D., Sinha, D., and Armstrong, K., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*, Final Report for National Institute of Justice, U.S. DOJ (Sept. 2010); Sandler, J.C., Freedman, N. J., Socia, K. M, *Does a Watched Pot Boil? Psychology, Public Policy and Law*, vol. 14, no. 4, 284-302 (2008); Zgoba, K., Witt, P., Dallessandro, M., and Veysey, B., *Megans Law: Assessing the Practical and Monetary Efficacy*, N.J. Department of Corrections, Research and Evaluation Unit, Office of Policy and Planning (Dec. 2008); Walker, J. et al, Arkansas Crime Information Center, *The Influence of Sex Offender Registration and Notification laws in the United States*, (2005); Adkins, G., Huff, D. & Stageberg, P., *The Iowa Sex offender Registry and Recidivism*, Iowa

Department of Human Rights, Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center (Dec. 2000).

B. Broad-Based Dissemination may Increase Risk

Furthermore, public dissemination can result in the loss of a stable living environment, homelessness, and unemployment as well as restrict access to appropriate supports, (such as family and professional services), contribute to substance use relapse, and increase isolation. These destabilizing life conditions in turn can contribute to psychological dysregulation and disruption that creates excessive levels of stress, fear, shame, and hopelessness. See Prescott, J.J. and Rockoff, J.E., *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, Law & Economics Working Papers Archive: 2003-2009 (Paper 85); Levenson, J. D'Amora M.S., & Hern, A., *Megan's law and its impact on community re-entry for sex offenders*, Behavioral Sciences & the Law Special Issue: Current Directions Volume 25, Issue 4, pages 587-602, (July/August 2007); Levenson, J. & Cotter, L., *The Effects of Megan's Law on Sex Offender Reintegration*, Journal of Contemporary Criminal

Justice (Feb. 2005), pgs. 58, 62-63. These types of negative life conditions reflect the very factors that have been demonstrated in the research to be associated with criminal recidivism generally, and sexual offense recidivism more specifically. Indeed, the SORB statute and regulations recognize that a stable living situation lessens the likelihood of offense by reducing the stressors in the offender's life. See G.L c. 6, section 178K(1) (c) and 803 CMR 1.40 (12).

With the ever-increasing accessibility of web-based information to a broad and at times undiscerning public, the more expanded nature of Online dissemination of sex offender information will serve to exponentially diminish the likelihood of successful reintegration into the community by further limiting appropriate access to housing and employment opportunities. *No Easy Answers: Sex Offender Laws in the U.S., supra*. This overly broad net of Internet dissemination may only further exacerbate the identified psychological stressors and risk factors, such as isolation, shame and disconnection from social supports, which are empirically known to influence

behavioral relapse and thereby decrease public safety.

Id. at page 63.

C. *Juveniles are particularly vulnerable to negative consequences.*

For a juvenile, the consequences of any public dissemination, let alone internet dissemination, are drastic:

The link between barriers to education, employment, housing, and treatment and involvement in the criminal justice system has been well documented for both youth and adults. Registries alienate individuals from the very opportunities that are likely to reduce the likelihood of future offending. Research on adolescent brain development indicates that youth are particularly vulnerable to the stigma and isolation that registration and notification create. The Annie E. Casey Foundation's annual Kids Count data book also keeps tally of "disconnected" youth (youth who are not working or in school) as a factor in child well-being. In other words, the youth who are connected to school or work are generally expected to have better life outcomes than youth who are not.

Placement on a registry can be extremely detrimental to a young person's development, making it difficult to progress through school and to participate in appropriate adolescent activities. Youth who are labeled "sex offenders" often experience rejection from peer groups and adults and are therefore more likely to associate with delinquent or troubled peers and are less likely to be attached to social institutions such as schools and churches. Youth who are detached from normative social institutions

may be more likely to engage in illegal behaviors.

In addition to the negative impacts on education or employment for youth who are put on a registry, having a young person's information made publicly available may also put him or her at risk of physical harm. There have been numerous reports of vigilantism against people on the sex offender registry, including harassment, threats, and even murders. A qualitative study by Richard Tewksbury at the University of Louisville found that 47 percent of people surveyed had been harassed in person and 28 percent had received threatening phone calls as a result of being on the registry; 16 percent had been assaulted.

. . . For youth, registries and notification systems are particularly damaging to developing brains, increase the risk of suicide, alienate a youth from school and community, and raise barriers to successful participation in society. Additionally, youth who are on public registries have their home and school addresses, as well as other personal information, displayed for everyone to see.

See Registering Harm, How Sex Offender Registries Fail Youth Communities, Justice Policy Institute (2008), at 24-25 (footnotes omitted).

And like adults, recent data indicate that neither adolescent sex offender registration nor public dissemination of this information serves as a deterrent for sexual recidivism among juveniles who sexually offend. See Letourneau, E. J., Bandyopadhyay,

D., Armstrong, K.S., & Sinha, D., *Do sex offender registration and notification requirements deter juvenile sex crimes?* Criminal Justice and Behavior 37: 553-569(2010). "(N)ot only does registration fail to reduce recidivism, it appears to be associated with increased risk of new charges that do not result in new convictions-possibly indicating a surveillance or 'scarlet letter' effect of registration." *Id.* With the pervasive nature of internet use, this "scarlet letter" of sex offender registration is broadened by on-line dissemination of information for juvenile offenders and serves to complicate or impede their efforts at successful reintegration and rehabilitation.

CONCLUSION

The primary purpose of any law or public policy related to the management of sexual offenders in a community setting must be to legitimately enhance the public safety. It is the position of this brief that, although public dissemination of information regarding registered sex offenders may play a role in this critical mission, we strongly believe that expanding public notification of level 2 sex offenders to

include dissemination of their registry information by internet should be guided by the empirical research. The public's general misperception and subsequently valid, but misguided, fear that all sex offenders pose an equally high risk to re-offend should not guide public policy. Relevant literature in the field of sex offender psychology, treatment, and management suggests that the application of internet dissemination to all Level 2 registered sex offenders, (those deemed moderate to low risk for sexual offense recidivism) will not only fail to reduce sexual re-offense and fail to enhance public safety as would be hoped and expected, but will instead serve to increase risk for recidivism by unintentionally setting up those conditions that have been shown to facilitate criminal recidivism and sexual re-offense.

Additionally, there is no empirical support that suggests that broadening public dissemination of sex offender registration information to the internet to include sex offenders identified to represent moderate to low levels of risk for sexual re-offense in any way reduces sexual re-offense rates. These points invalidate any putative public safety rationale for

expanding public dissemination of Level 2 sex offenders' registration information to include posting it on the internet.

Therefore, we strongly encourage this Court to reject the application of internet dissemination of Level 2 registry information in favor of a more rational approach that supports the empirical and accurate assessment of the risk for recidivism posed by registered sex offenders and the limitation of internet dissemination of sex offender registration information to those identified at highest risk of sexual offense recidivism. Without evidence-based and research-informed public policy regarding sex offenders, efforts to more effectively address the actual risk for recidivism that sex offenders present to the public will continue to fall short of the intended goal of maximizing the enhancement of public safety.

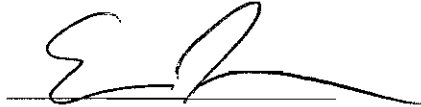
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CERTIFICATION

I, Eric Tennen, certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6), Mass. R. A. P. 16(e), Mass. R. A. P. 16(f), Mass. R. A. P. 16(h), Mass. R. A. P. 18, and Mass. R. A. P. 20.



Eric Tennen