S254599

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

In re GREGORY GADLIN,

on Habeas Corpus.

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE NINETEEN SOCIAL SCIENCE AND LAW SCHOLARS IN SUPPORT OF PETITIONER GREGORY GADLIN

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This application is on behalf of nineteen scholars across six disciplines whose work includes leading empirical studies of persons convicted of sexual offenses and the laws applied to them. These scholars respectfully apply for leave to file the accompanying amici curiae brief in support of Petitioner Gregory Gadlin pursuant to rule 8.520(f) of the California Rules of Court. The amici are familiar with the content of the parties' briefs.

Amici believe judicial decisions affecting statutory and constitutional rights should be grounded on an accurate understanding of empirical facts. They therefore wish to provide the Court a summary of the scientific evidence that shows why the factual premise underlying the CDCR regulation at issue here (that all those required to register pursuant to Penal Code section 290 present a high re-offense risk) is wrong. They also wish to summarize the evidence that registrants' re-offense risk, just as that of other felons, varies from low to high, and may be individually

assessed in the normal parole process as readily as the risk presented by others made eligible for parole consideration by Proposition 57.

The amici are:

Amanda Agan is Assistant Professor of Economics and an Affiliated Professor in the Program in Criminal Justice at Rutgers University. She received her Ph.D. in Economics from the University of Chicago. Her research focuses on the economics of crime, and her studies spotlight the unintended consequences of policies such as sex offender registration and ban-the-box laws. Her studies on the consequences of sex offender registration include papers in the *Journal of Law and Economics* and the *Journal of Empirical Legal Studies*.

Catherine L. Carpenter is The Honorable Arleigh M. Woods and William T. Woods Professor of Law, Southwestern Law School. She teaches and writes in the area of criminal law. Her primary scholarly focus is on questions of the justice and constitutionality of sex offender registration laws. Her work has been cited by courts, including the Maryland Court of Appeals in *Doe v. Department of Public Safety and Correctional Services* (Md. 2013) 62 A.3d 123, which overturned Maryland's sex offender registration laws on ex post facto grounds.

Ira Mark Ellman is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Affiliated Faculty of the Berkeley Center for Child and Youth Policy. He is a member of the Editorial Board of the *Psychology, Public Policy, and Law*, a research journal published by the American

Psychological Association. He was Chief Reporter for the American Law Institute's major project, *Principles of the Law of Family Dissolution*. His empirical studies with social psychologists focused on family policy. His 2015 article, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has been widely discussed in both legal publications and in key national media.

R. Karl Hanson, Ph.D., C.Psych., is one of the leading researchers in the field of risk assessment and treatment for individuals with a history of sexual offending. He has published more than 175 articles, including several highly influential reviews, and has contributed to the development of the most widely used risk assessment tools for individuals with a history of sexual offending (Static-99R; Static-2002R; STABLE-2007). Based in Ottawa, Canada, he worked for Public Safety Canada between 1991 and 2017, a federal department, and retired as Manager of Corrections Research. He is now adjunct faculty in the psychology departments of Carleton University (Ottawa) and Ryerson University (Toronto).

Eric Janus is a professor of law at Mitchell Hamline School of Law, former President and Dean of William Mitchell College of Law, a scholar and expert in sex offender civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

Richard A. Leo, Ph.D., J.D., is the Hamill Family Chair Professor of Law and Psychology and Dean's Circle Scholar at the University of San Francisco School of Law. He is an expert on police

interrogation practices, the impact of Miranda, psychological coercion, false confessions, and the wrongful conviction of the innocent. Dr. Leo has won numerous individual and career achievement awards for research excellence and distinction, and in 2016, the *Wall Street Journal* named him as one of the twenty-five law professors most cited by appellate courts in the United States.

Chrysanthi Leon, J.D., Ph.D., is Associate Professor of Sociology and Criminal Justice at the University of Delaware. She received her J.D. and Ph.D. from the University of California, Berkeley. She is the author of *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America*, and co-editor of *Challenging Perspectives on Street-Based Sex Work*.

Jill S. Levenson, Ph.D., is a Professor of Social Work at Barry University in Miami Shores, Florida. She studies the impact and effectiveness of social policies and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

Wayne A. Logan is Gary & Sallyn Pajcic Professor, Florida State University College of Law. Professor Logan is the author of *Knowledge as Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009), cited by the U.S. Supreme Court in *United States v. Kebodeaux* (2013) 570 U.S. 387, and co-editor (with J.J. Prescott) of *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge Univ. Press, under contract).

Robert D. Lytle is an Assistant Professor in the Department of Criminal Justice at the University of Arkansas at Little Rock. He has published research on public opinion, desistance patterns, and policy relating to sex offending, including a dissertation and several papers on sex offender registration and notification laws. His current work is focusing on policy implementation and effectiveness for criminal justice policy, including sex offense laws generally and sex offender registration and notification specifically.

Michael H. Miner, Ph.D., L.P., is Professor of Family Medicine and Community Health and Research Director for the Program in Human Sexuality at the University of Minnesota Medical School. He is Coordinator of Psychological and Forensic Assessment for the Program in Human Sexuality. His research focuses on sex offender treatment, sexual abuse perpetration by adolescent males, risk assessment, and psychological and cognitive mechanisms underlying hypersexuality and sexual risk behavior. He is the Past President of the Association for the Treatment of Sexual Abusers and Past Vice President of the International Association for the Treatment of Sexual Offenders.

John Monahan is the John Shannon Distinguished Professor of Law and Psychology at the University of Virginia School of Law. His work has been cited frequently by courts, including the California Supreme Court in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 and the United States Supreme Court in *Barefoot v. Estelle* (1983) 463 U.S. 880, in which he was referred to as "the leading thinker on th[e] issue" of violence risk assessment. *Id.* at 920.

J.J. Prescott, Ph.D., J.D., is an economist and Professor of Law at the University of Michigan where he is co-director of the Empirical Legal Studies Center and the Program in Law and Economics. His recent research includes examination of the ramifications of post-release sex offender laws and the socio-economic consequences of criminal record expungement. The Sixth Circuit Court of Appeals relied upon his work in *Does #1–5 v. Snyder* (6th Cir. 2016) 834 F.3d 696, cert. denied, (2017) 138 S.Ct. 55 in holding that portions of Michigan's sex offender registration law violated the Ex Post Facto clause.

Michael J. Saks, Ph.D., is Regents Professor at the Arizona State University, where he is on the faculty of the Sandra Day O'Connor College of Law and the Department of Psychology, and a fellow in the Center for Law, Science, and Innovation. He is a co-founding editor/author of *Modern Scientific Evidence: The Law and Science of Expert Testimony* as well as a past editor-in-chief of *Law & Human Behavior*, a journal which reports empirically-grounded, legally-relevant studies of psychology and behavior. His work on forensic science was a major stimulus to the National Research Council's project which led to the landmark report, *Strengthening Forensic Science in the United States: A Path Forward.*

Lisa L. Sample is the Reynolds Professor of Public Affairs and Community Service in the School of Criminology and Criminal Justice at the University of Nebraska Omaha. She has been publishing research on public opinion, re-offending, and sex offender laws since 2001. Her current research focus is the longitudinal effects of sex offender laws on registrants, their partners/spouses, and their

children, which is the subject of her forthcoming co-authored book, *Living Under Sex Offense Laws: Consequences for Offenders and their Families*.

Jonathan Simon, J.D., Ph.D., is the Adrian Kragen Professor of Law and Director of the Center for the Study of Law and Society at the University of California, Berkeley. His work focuses on the political dimensions of criminal law and crime policies.

Kelly Socia, Ph.D., is an Associate Professor in the School of Criminology and Justice Studies at the University of Massachusetts Lowell. His research has focused on individuals listed on sex offense registries, residency restrictions, re-entry and recidivism, among other topics. In a recent Florida case he provided expert testimony and geomapping that resulted in a ruling against ex post facto application of local residency restrictions.

Richard Wollert, Ph.D., is a member of the Mental Health, Law, and Policy Institute at Simon Fraser University. An expert witness in many cases involving sexually violent predators, his publications critique sex offender recidivism risk assessments, DSM paraphilia diagnoses, and federal sentencing guidelines for child pornography. Dr. Wollert and his associates have treated over 5,000 sex offenders at his Oregon and Canadian clinics.

Franklin Zimring is the William G. Simon Professor of Law and Faculty Director, Criminal Justice Studies, at the University of California, Berkeley. He is known worldwide for his empirical work on criminal justice policy, and was the 2020 recipient of the Stockholm Prize in Criminology, the field's highest international honor. Among his many books are *Criminal Law and the Regulation*

of Vice and *An American Travesty: Legal Responses to Adolescent Sexual Offending*.

No party or counsel for a party has authored the accompanying brief in whole or in part, nor made any monetary contribution intended to fund the preparation or submission thereof. No person or entity, other than the amici curiae and their undersigned counsel, have made any monetary contribution intended to fund the preparation or submission of the accompanying brief.

Amici respectfully submit that consideration of the accompanying brief will assist the Court in deciding this matter, and respectfully request that the Court grant leave to file.

DATED: January 23, 2020

Respectfully submitted,

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BRIEF OF AMICI CURIAE NINETEEN SOCIAL SCIENCE AND LAW SCHOLARS IN SUPPORT OF PETITIONER GREGORY GADLIN

INTRODUCTION

The Public Safety and Rehabilitation Act of 2016, adopted by the voters that year as Proposition 57, was intended to soften California's excessively harsh sentencing rules. Sentence enhancements, many arising from the 1994 Three Strikes Law, led to the routine incarceration of many low-risk individuals for decades or more beyond the sentence for their crime of conviction. (Zimring, Hawkins, and Kamin, *Punishment and Democracy* (2002).) A consensus emerged that many of these prisoners did not present public safety concerns that justified their continued incarceration. Yet state law required their continued confinement even though the state was unable or unwilling to provide constitutionally adequate prison conditions. As a result, California prisons were eventually subjected to a federal population cap. (*Brown v. Plata* (2011) 563 U.S. 493, 502-503 [131 S.Ct. 1910, 1923-1924, 179 L.Ed.2d 969].) Under this judicial compulsion, the state finally embarked on a series of reform measures meant to reduce prison populations. Proposition 57 was the most recent of these.

The portion of Proposition 57 at issue in this case adds Article 1, Section 32 to the California Constitution. It states that "any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." Subsection (1)(A) explains that "full term" means "the longest term of imprisonment" the inmate

is currently serving "excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." These exclusions thus targeted sentencing rules that were an important sources of excessive incarceration. After Proposition 57, the additional prison time resulting from these rules cannot bar prisoners who have otherwise completed their current sentence for a non-violent crime from being considered for parole.

Article 1, Section 32 contains no exceptions to the right to parole consideration that it establishes. By its terms, it applies to *anyone* currently serving a sentence for a nonviolent felony. But the California Department of Corrections and Rehabilitation (CDCR) has adopted a regulation creating an exception for any prisoner required to register pursuant to Penal Code section 290, including those currently serving a sentence for a nonviolent, nonregistrable felony. (Cal. Code Regs., tit. 15, § 3491(b)(3), Register 2018, No. 18 (May 1, 2018).) The exception applies even if the older offense triggering the registration requirement was itself nonviolent under the uncontested definition of that term, based upon Penal Code section 667.5(c). The CDCR thus denies registrants the parole consideration that the new Constitutional language had assured them. The issue here is whether it may do so. Amici support Mr. Gadlin's argument that it may not.

The CDCR initially explained this exception as "necessary to protect public safety because the crimes [requiring registration] reflect the determination … that 'Sex offenders pose a potentially high risk of committing further sex offenses after release.'" (Citing Penal Code § 290.03). (CDCR Initial Statement of Reasons in support of Regulations to be Adopted or Amended in Compliance with

Section 32 of Article 1 of the California Constitution, at 11 (April 19, 2019.)) The gist of this claim is now repeated several times in the State's Reply Brief (e.g., "[the regulation was prompted by] the special recidivism risk posed to the public by this class of offenders", p. 16).[2] CDCR also explains that the Department "Secretary … ultimately certified the sex-offender exclusion … as protecting and enhancing public safety," Reply Brief at 19. *Amici* agree with Mr. Gadlin that any such policy rationale for the CDCR regulation is irrelevant because the law simply does not permit the CDCR to substitute its own rule for the one plainly stated in the text of the Constitution. But Amici believe it is also important to explain why CDCR's public safety rationale could not justify the contested regulation even if it was relevant, because the rationale rests on factual premises that scientific studies show are false, and is inconsistent with established California policy that is grounded on those scientific studies.

A rule denying parole consideration to anyone required to register under § 290 clashes fundamentally with the "containment model" California has adopted for registrants' management. That model assumes registrants *are* eligible for release to the community with supervision by a probation or parole officer. California's

> "sex offender management program has three required components: supervising (e.g., probation or parole) officer; sex offender treatment provider; and polygraph examiner, using a victim-centered approach. These three

[2] See also Reply Brief at 13 (relying on ballot argument claim that Proposition 57 would "keep the most dangerous offenders locked up").

> people are the core of the Containment Team, although other team members should participate at times (e.g., the registering law enforcement agency). [¶] The probation officer or parole agent is responsible for the supervision of the offender."

(California Sex Offender Management Board, Containment Team Approach.)

The key factual premise underlying California's approach is that the sexual re-offense risk presented by registrants *varies,* and can be individually assessed for each registrant. California Penal Code § 290.04 establishes a committee (known as the SARATSO (State Authorized Risk Assessment Tools for Sex Offenders) Review Committee) to identify scientifically validated tools for assessing registrant re-offense risk. A 2018 study commissioned by the SARATSO committee demonstrated the validity of the Static 99R in assessing the sexual re-offense risk presented by adult male California registrants convicted of a contact sexual offense.[3] SARATSO commissioned studies also show that while some registrants do

[3] Seung Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update*. The Static 99R is not designed or validated for assessing the sexual re-offense risk of women, juveniles or of certain non-contact sexual offenders, such as those whose only sexual offense conviction is for possession of illicit images of minors. The SARATSO Committee has approved a separate assessment instrument for juvenile offenders, the JSORRAT-II.

present a high sexual re-offense risk, the great majority do not.[4] CDCR's blanket rule excluding all registrants from parole consideration, on the premise they *all* present a high re-offense risk, thus defies both the scientific consensus and established California policy, as well as the language of the California Constitution adopted by Proposition 57. The only rule consistent with California's scientifically grounded policy is to treat all otherwise qualified registrants as eligible for parole *consideration*, allowing for an individualized determination of each registrant's suitability for parole.

Four years ago this Court addressed CDCR's enforcement in San Diego County of a different blanket rule, applied to all registrants on parole, which limited where they may live. The Court observed that a parole officer could impose residency restrictions in particular cases "as long as they are based on, and supported by, the particularized circumstances of each individual parolee." (*In re Taylor* (2015) 60 Cal.4th 1019, 1024.) But it held a blanket rule excluding *all* registrant parolees from wide areas of the county, without any reference to their particular situation, violated the registrants' "basic constitutional right to be free of unreasonable, arbitrary, and oppressive official action." (*Id.*) The CDCR regulation at issue here suffers from the same defects. Registrants, alone among prisoners otherwise eligible for parole consideration under the language of Article 1, Section 32 of the California Constitution, are

[4] 107 of the 371 adult male registrants in the sample were assessed as presenting an above average risk level. (*Id.* at 19 [Table 4, Risk Levels IVa and IVb].)

subject to the CDCR rule denying them the individualized parole consideration it promises. Because this rule denies registrants the protection provided by the California Constitution without either a textual or factual basis, it is also unconstitutionally arbitrary and irrational.

ARGUMENT

I. CDCR'S OWN DATA DEMONSTRATE THE ERROR OF THE FACTUAL PREMISE IT OFFERS TO JUSTIFY DENYING REGISTRANTS THE PAROLE CONSIDERATION PROMISED THEM IN THE CALIFORNIA CONSTITUTION.

CDCR justifies the registrant exclusion as "necessary to protect public safety" because registrants "pose a potentially high risk of committing further sex offenses after release." (CDCR Initial Statement of Reasons in support of Regulations to be Adopted or Amended in Compliance with Section 32 of Article 1 of the California Constitution, at 11 (April 19, 2019).) That explanation's necessary premise is that the re-offense risk posed by registrants is distinctively higher than the risk posed by others eligible for parole consideration. But CDCR's own data demonstrate that the opposite is true.

CDCR publishes annual studies of released prisoners. The most recent, published in January of 2019, covers all 33,113 offenders who were released from custody between July 1, 2013 and June 30, 2014.[5] Forty-one percent of this release cohort had committed a

[5] California Department of Corrections and Rehabilitation, Division of Correctional Policy Research and Internal Oversight Office of Research, *2018 Recidivism Report* (January 2019) at p. v.

crime against persons, 26% were second strikers, 22% had committed a serious offense, and 19% a violent offense.[6] The entire cohort of released offenders was followed for three years after release. By the end of this three-year post-release follow-up period, 24% were convicted of a new felony, and 22% of a new misdemeanor. The other 54% incurred no new convictions.[7] Just over 6% had re-offended with a felony against a person (as compared to property crimes or drug offenses).[8] Of those who re-offended, most (56%) did so within fifteen months of their release.[9]

The 33,113 prisoners in this release cohort included 3,068 (9.3% of the total) who were required to register under Penal Code § 290–the *registrant* cohort.[10] CDCR's published data allows one to make some comparisons between the registrant and release cohorts. Thirty-two percent of the registrant cohort (984 of them) incurred a new conviction by the end of the three year follow-up period. But 166 of the convictions were for failure to register or update their registration, a regulatory offense with no victim that is a crime only for registrants.[11] Another 366 of the convictions were for misdemeanors that were not sexual offenses.[12] That leaves 452, or

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[6] *2018 Recidivism Report* at Table 2, p. 11.

[7] *Id.* at p. v.

[8] *Id.* at Table 5, p. 19.

[9] *Id.* at Table 5, p. 16.

[10] *Id.* at Table 15, p. 39.

[11] *Id.* at 40-41.

[12] *Id.*

14% of the registrant cohort, who committed either a felony of any kind (sexual or non-sexual), or a sexual misdemeanor. That figure is substantially lower than the 24% rate at which the release cohort committed felonies. Thus, even if we treat sexual misdemeanors along with all felonies as serious crimes justifying special measures to ensure public safety, CDCR's own data show that registrants released from prison pose a substantially lower threat to public safety than do other released felons.

CDCR publications do not break down post-release offenses committed by those in the release cohort in categories that distinguish sexual from nonsexual offenses. They do provide such data, however, for the registrant cohort. We present it in Table One.

Table One
Percent of Registrants Released in 2018 Who Re-Offend Within Three Years, By Category of the New Offense[13]

Reason for New Conviction	Number Convicted	Percent of 3,068 Released Registrants
Non-Sexual Felony	401	13.0%
Non-Sexual Misdemeanor	366	11.9%
Failure to Register	166	5.4%
Sexual Felony	34	1.1%
Sexual Misdemeanor	17	0.6%
TOTAL	**984**	**32.0%**

[13] The first two columns of Table One are taken from Table 16, p. 41, of *2018 Recidivism Report*. The percentages in the third column are calculated.

One can see that sexual felonies and misdemeanors combined totaled 51 of the 3,068 released registrants, for a three-year sexual re-offense rate of 1.7%, following release. That rate is about the same as the three-year rate of sexual offending by released felons who have no prior sexual offense history.[14]

Other studies, of non-California populations, find three-year sexual re-offenses rates for released registrants to be closer to 3 or 4 percent.[15] One likely reason for CDCR's lower rates is that this California group is in fact a lower risk population. Most re-offense studies look at the rate of new sexual offenses committed by individuals after their release from custody for a sexual offense.[16] By contrast, CDCR's definition of registrants includes individuals released from custody for a non-sexual offense, if they are or ever were required to register for sexual offense.[17] Some of these

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[14] That rate has been estimated to fall between 1 and 2 percent. Kahn, R. E., Ambroziak, G., Hanson, R. K., & Thornton, D., *Release from the "sex offender" label* (2017) 46 ARCHIVES OF SEXUAL BEHAVIOR 861.

[15] Studies that define re-offending as a new arrest rather than a new conviction will generally find higher re-offense rates, and this could account for part of the reason why the rates in the CDCR studies are lower than other studies often find. For example, a Connecticut study that followed 746 offenders after release from a prison sentence for a least one sex-related offense found a 3.6% five year re-arrest rate for a new sex crime was, but a 2.7% five-year reconviction rate. (Connecticut Office of Policy and Management, Criminal Justice Policy & Planning Division, *Recidivism among sex offenders in Connecticut* (2012), at p.4.)

[16] This is the case, for example, with the Connecticut study (*id.*).

[17] Registrants are defined as those released from custody who have "at some point been convicted of an offense that requires registration as a

individuals could have been at liberty (perhaps for many years) without sexual re-offending, before returning to prison for a non-sexual offense.

Such individuals can present a very low sexual re-offense risk, since it matters in a risk assessment (as we shall see below) whether the prior sexual offense was recent or a long time ago. Including those who have not recently offended sexually can thus bring down the overall rate.

This difference is not just a technical statistical point. It in fact illustrates a core problem with CDCR's global exclusion of all registrants from parole consideration. By excluding all registrants from parole eligibility, without regard to when the registrable offense occurred or the registrant's history following it, they will necessarily conflate in one "high risk" category individuals of highly varied re-offense risk. The global exclusion thus pointlessly bars from parole consideration many who present a low sexual re-offense risk that could be discerned in the parole process, as explored more fully in the next section.[18]

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sex offender." (*2018 Recidivism Report* at 88.) The designation as a registrant "is permanent in CDCR records." (*Id.*)

[18] The actual CDCR rule excludes those whose conviction "currently requires or will require" registration. (Cal. Code. Regs, tit.15, § 3491(b)(3).) However, California currently requires nearly everyone subject to Penal Code § 290 to register for life, so nearly everyone ever convicted of a registrable offense is "currently" required to register. While some registrants will be able to seek removal after the law changes in 2021, removal petitions cannot be granted to anyone currently incarcerated or on parole. (Penal Code § 290.5(a)(2) [operative July 1, 2021, Stats 2017, ch. 541, § 12].)

What about the general re-offense risk posed by registrants, as opposed to the risk of sexual re-offending? CDCR data allows one to compare the general re-offense rates of registrants with that of all released felons, broken down by their crime of conviction. Table Two provides this comparison.

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Table Two
The Number and Percentage of Prisoners Released in 2013-2014 Who Were Convicted of a New Crime Within Three Years of Release, By the Crime of Conviction Before Release*

Crime of Conviction Before Release	Total Released	Total Re-Convicted Within 3 Years	3-Year Re-Conviction Rate
Selected Nonsexual Offenses			
Vehicle Theft	1,034	639	61.8%
Receiving Stolen Property	771	469	60.8%
Burglary 2d	1,651	892	54.0%
Possession Weapon	2,972	1,584	53.3%
Burglary 1st	2,383	1,270	53.3%
Other Assault/Battery	4,072	1,992	48.9%
Robbery	2,951	1,334	45.2%
Assault with Deadly Weapon	3,176	1,398	44.0%
Arson	140	53	37.9%
All Identified Sexual Offenses*			
Oral Copulation	77	13	16.9%
Rape	188	30	16%
Penetration with Object	57	6	10.5%
Lewd Act with Child	899	85	9.5%

*Adapted from CDCR, *2018 Recidivism Report*, Table 12, page 35.

**CDCR also employs an additional category of "other sexual offenses", a grab bag category that consists primarily, if not exclusively, of offenses that involve no force or coercion, such as unlawful sex with a minor, and offenses that do not involve contact with any victim, such as indecent exposure and failure to register. *Id*. at note 18.

It is obvious from the data in Table Two that compared to those convicted of many other serious felonies, registrants have a general re-offense risk that is lower, not higher.

CDCR's own data thus show that registrants are no more likely than other released felons to commit a sexual offense, and less likely to commit other serious offenses. These facts make it impossible to construct a public safety rationale for singling out registrants for categorical exclusion from the parole consideration process extended to all other prisoners convicted of a nonviolent felony, as established by Proposition 57.

II. THE REGULATION'S ASSUMPTION THAT ALL REGISTRANTS SHARE A HIGH RISK OF RE-OFFENDING IS BASED ON MYTH, NOT SCIENCE. THOSE REQUIRED TO REGISTER UNDER CALIFORNIA PENAL CODE § 290 PRESENT WIDELY VARYING RISK PROFILES THAT CAN BE INDIVIDUALLY ASSESSED AND CONSIDERED, AS IN ANY PAROLE PROCESS.

The Government refers to individuals required to register under Penal Code § 290 as "sex offenders." (See, e.g., Opening Brief at 33.) That term carries meaning: to most people it suggests dangerous individuals with uncontrolled compulsions who are likely to do harm. But Penal Code § 290 establishes a legal classification, not a psychological diagnosis. And that legal classification is applied to an enormously diverse group with widely varying criminal histories as well as psychological traits. Some have never been accused of any violent act, or of any contact of any kind, physical or communicative,

with any victim.[19] It is hardly surprising that scientific studies show that the implausible assumption that all those captured by the label share a similar re-offense risk is simply wrong. But it is difficult to avoid that mistaken understanding in any discussion in which registrants are referred to with a label that re-characterizes one event in a registrant's life into a frightening personal attribute. We therefore do not use the term "sex offender" for those required to register. We instead refer to them as "registrants," as their duty to register under the law is the one thing they reliably have in common.

We begin with this observation about language in the belief that the loaded label "sex offender" facilitates the mistaken perception of registrants that became embedded in statutory and judicial language. Some of this history traces back to *McKune v. Lyle* (2002) 536 U.S. 24, 33-34, in which the plurality opinion described the re-offense rates of "sex offenders" as "frightening and high," thought to approach "80 percent." The opinion took that 80% figure from one essay in an anthology put together by the Justice Department.[20] But the essay offered no data of its own to support this 80% figure. It instead cited a single casual and data-free comment in an article in *Psychology Today*, a mass-market magazine.[21] *McKune*'s language was then

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[19] This is typical, for example, of individuals convicted of possession of images of minors. (Penal Code § 311.11.)

[20] *McKune,* 536 U.S. at 33 (quoting U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* (1988) at xiii).

[21] The *Psychology Today* article touted the author's prison counseling program for sexual offenders. The 80% figure for untreated offenders was offered as a contrast with the article's equally unsupported claim

quoted by the Court majority in *Smith v. Doe* (2003) 538 U.S. 84, 103 ("The risk of recidivism posed by sex offenders is 'frightening and high'.") Over the following years the Court's "frightening and high" description of registrant re-offense rates was cited in more than 100 judicial opinions.[22] The effect was to validate the popular myth that anyone who ever committed a sexual offense is a "sex offender" and thus extraordinarily more likely than others released from custody to repeat his or her offense. The same idea, if not the precise words, found its way into statutory formulations, adopted by legislatures who felt no need to provide empirical verification for this intuitively appealing and widely accepted myth. The "high risk" language in Penal Code § 290.03, cited on page 19 of the Opening Brief, is an example.

But there never was any scientific basis for this rogue claim. Indeed, both the author of the *Psychology Today* article, and the author of the anthologized essay that cited it, have since recanted the claim on camera.[23] Courts have now begun to realize the mistake. (See, e.g., *Does #1-5 v. Snyder* (6th Cir. 2016) 834 F.3d 696, 704,

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about the lower rate for those who completed the author's program. The article contained no data of any kind. See Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, (2015) 30 CONST. COMMENT. 495, 497-498.

[22] A Lexis search conducted on December 3, 2019 found 127 opinions quoting the phrase "frightening and high."

[23] Jacob Sullum, "I'm Appalled," Says Source of Phony Number Used to Justify Harsh Sex Offender Laws, *Reason* (Sep. 14, 2017); David Feige, *A "Frightening" Myth About Sex Offenders*, New York Times Video Op-Doc (Sept. 12, 2017).

cert. denied (2017) 138 S.Ct. 55 ["The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that the risk of recidivism posed by sex offenders is frightening and high."] [internal quotation marks omitted].)

The mistaken tendency to think of registrants as a homogenous group has sometimes led courts and attorneys to perceive variations in registrants' reported re-offense rates as evidence of uncertainty about what the rates actually are. These variations, however, typically result from differences in the sample of registrants whose re-offense rates are measured. Consider the discussion in *United States v. Kebodeaux* (2013) 570 U.S. 387. After acknowledging there are studies finding low registrant re-offense rates, the Court goes on to suggest others find higher rates, referencing a frequently cited study by Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*:

> There is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals. See Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, *Recidivism of Sex Offenders Released in 1994*, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime).

(570 U.S. at 395-96.)

The Langan report is in fact a serious effort to measure re-offending by the group it studies. And the 5.3% re-offense figure *Kebodeaux* quotes from the study is hardly the "frightening and high" 80% rate erroneously relied on in *McKune* and *Smith*. But the reason

that even this lower three-year re-arrest rate is higher than found by other studies is that Langan does not purport to examine the re-offense rate across *all* registrants, but only of adult, male, violent registrants released from state prisons.[24] This subgroup has a higher re-offense risk than do registrants generally, in large part because repeat offenders are more likely than first offenders to be sentenced to prison, rather than to local jails or probation.[25] Repeat sexual offenders are more likely to offend again than are those with only one conviction.[26] Any sample that contains a disproportionately high

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[24] Dept. of Justice, Bureau of Just. Stat., Patrick A. Langan, *et al.*, *Recidivism of Sex Offenders Released From Prison in 1994* (Nov. 2003) at pp. 1, 3, 7 (noting that everyone in the study population was male, all men in the study were violent sex offenders, and only a "few" were under age 18).

[25] First offenders commit about 95% of sex crimes. Jeffrey C. Sandler, et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law* (2008) 14 PSYCHOL., PUB. POL'Y & L. 284 (finding that 95% of sex-offense arrestees in New York between 1986 and 2006 were first-time sex offenders). Other studies find consistent results. E.g., Craun, Simmons, & Reeves, *Percentage of Named Offenders on the Registry at the Time of the Assault; Reports From Sexual Assault Survivors* (2011) 17 VIOLENCE AGAINST WOMEN 1374, 1378 (only 3.7% of alleged offenders against 1267 sexual assault victims seen in 2006 by an urban sexual assault resource center were on the sex offender registry). But only 71.5% of the Langan study sample were first offenders. Langan et al., supra note 24, at 26 tbl.27, 28 tbl.31 (showing that 29% of those in the study had a prior arrest for a sex crime; 78.5% had prior arrests of any crime).

[26] The *Langan* study itself makes this very point. While first offenders are underrepresented in the study's sample, those who are in it re-offended at half the rate of others in the study with a prior conviction (not necessarily a sex offense). The re-offense rate of first-

percentage of repeat offenders will report a higher re-offense rate than would a more representative sample of registrants.

The most obvious lesson to learn from this review is that one cannot use re-offense data from a statistically distinct subgroup of registrants to predict the likelihood of re-offending by another subgroup—or by registrants as a whole. But even more importantly, one can see why even an average re-offense rate that is properly computed across a representative sample of all registrants will not be much help in estimating any individual's re-offense risk. Such an average is no more likely to fit a random registrant than would a pair of pants of the group's average waist and length. And there is no reason to use the average if one can use instead the re-offense risk associated with those who share the relevant attributes of the individual in question, where "relevant attributes" means those which empirical studies have shown predict the likelihood of re-offending. Section III below explains that one can in fact do that, and that the available methods are practical and cost-effective, and are already in use in California.

III. WIDELY USED AND INEXPENSIVE ACTUARIAL TESTS CAN SORT REGISTRANTS BY RISK LEVEL, AND STUDIES SHOW THAT NON-OFFENDING REGISTRANTS AT ALL RISK LEVELS DECLINE IN RISK OVER TIME.

The Static 99R, a non-proprietary instrument developed by researchers employed by the Canadian government, is globally the

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time offenders in the study (all adult, male, violent sexual offenders) was 3.3%. Langan et al., *supra* note 24, at 26 tbl.27.

tool most widely used to assess the sexual re-offense likelihood of individuals convicted of a sexual offense.[27] California law (Penal Code § 290.04) establishes a committee on risk assessment to choose the instruments authorized to assess sexual re-offense risk in California. The committee is known as the SARATSO Review Committee (SARATSO stands for "state authorized risk assessment tool for sex offenders"), and its official actions are posted on the SARATSO web site, www.saratso.org. The committee has adopted the Static 99R as the principal tool used in California for assessing the re-offense risk of adult males convicted of contact sexual offenses. The test is routinely administered in California by parole officers trained in administering and scoring it.[28] It consists of a 10-item actuarial scale.[29]

Several studies commissioned by the SARATSO committee have validated its predictive accuracy for adult males on the

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[27] See Clearinghouse, Static-99/Static-99R, http://www.static99.org/.

[28] R. Karl Hanson, Alyson Lunetta, Amy Phenix, Janet Neeley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, (2014) 1 J. THREAT ASSESSMENT & MGMT. 102, 104-05, 108.

[29] The ten items cover demographics, sexual criminal history (e.g., prior sexual offense), and general criminal history. See, e.g., Leslie Helmus, David Thornton, R. Karl Hanson & Kelly M. Babchishin, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, (2012) 24 SEXUAL ABUSE: J. RES. & TREATMENT 64, 65, 67. Such "structured" risk assessment tools are more accurate than clinical assessments. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, (2009) 21 PSYCHOL. ASSESSMENT 1, 6–8.

California registry.[30] The Static 99R measures re-offense risk as of the time an individual is released from custody. But that risk changes during the years that follow. Some re-offend, others do not. The single most well-established finding in criminology is that for every year after release that a felon does not re-offend, the likelihood of a future re-offense declines.[31] Two widely-cited studies, described below, show that the same is true for those convicted of sexual offenses. They also show that this reduction in sexual re-offense risk over time follows predictable trajectories that vary with the initial risk level measured by the Static 99R at the time of release. The studies thus show not only how registrant re-offense risk may be assessed at the time of release, but also how that risk declines over time.

Figure One is taken from the first of the two studies described here, published in 2014.[32] It combined data from 21 prior studies that

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[30] See, e.g., *Helmus, Thornton et. al.*, *supra* n. 29.

[31] Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, (2009) 47 CRIMINOLOGY 327; Megan C. Kurlychek, Shawn D. Bushway, & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, (2012) 50 CRIMINOLOGY 71, 75. Close to half (43%) of American males report being arrested by age 35, but the vast majority never re-offend. Barnes, Jorgensen, Beaver, Boutwell, & Wright, *Arrest Prevalence in a National Sample of Adults*, (2015) 40 AMERICAN J. OF CRIMINAL JUSTICE 457; Hanson, *Long-Term Recidivism Studies Show That Desistance Is the Norm*, (2018) 45 CRIMINAL JUSTICE AND BEHAVIOR 1340.

[32] R. Karl Hanson, Andrew J.R. Harris, Leslie Helmus & David Thornton, *High Risk Sex Offenders May Not Be High Risk Forever*, (2014) 29 J. INTERPERSONAL VIOLENCE 2792, 2799. This study examined re- offending by adult men only, because the Static-99R has

in the aggregate followed 7,740 adult male registrants after their release from custody. The 2014 study used the Static 99R to classify them as High, Moderate, or Low risk for sexual re-offending at the time of release.

FIGURE ONE

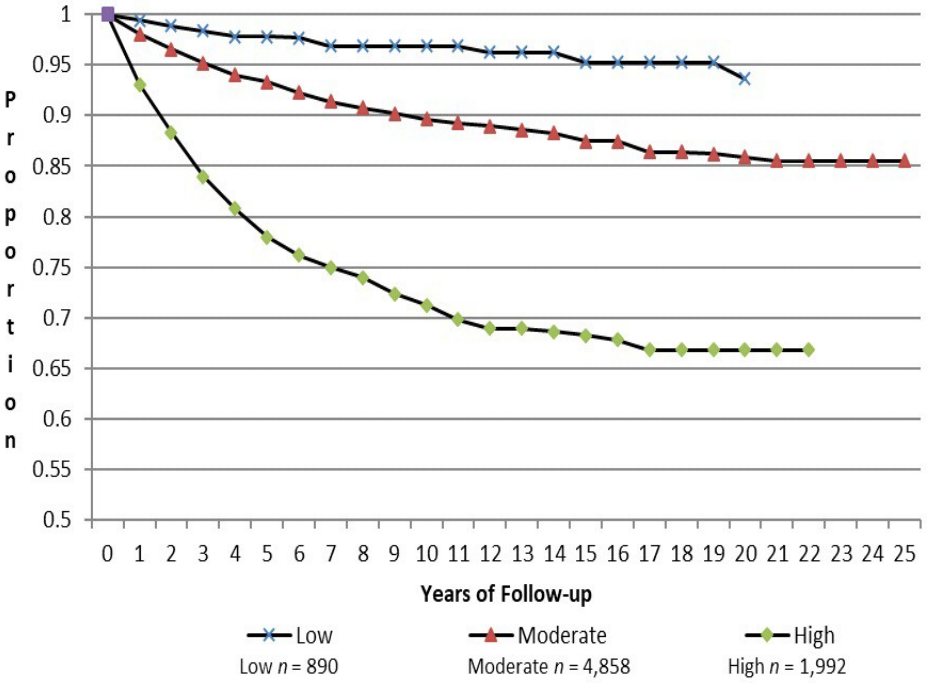

Figure One shows, for all three risk groups, the proportion who had remained sexual-offense free at years 1 to 21 after release.[33] The Static-99R's predictive power is shown by the separation of the three lines in the years after release.[34] But Figure One also shows how the

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not been validated for women, juveniles, or some non-contact offenders.

[33] In 10 of the 21 studies, re-offense was defined as a new conviction for a sex offense; in 11, re-offense was defined as the filing of new sex offense charges. (*Id.* at 2797-98 Tbl. 1.)

[34] Sixteen of the 21 studies drawn upon for this analysis followed offender populations in other Western countries (most often, Canada)

proportion who are offense-free stabilizes over time: for all three lines there is a point beyond which the line's downward slope becomes very small, or ceases altogether. That means very few, if any, new sexual offenses were committed by registrants in that risk group after that point. Not surprisingly, that point comes sooner for those whose initial risk level was lower. But even registrants initially classified high risk become low risk after enough years at liberty without re-offending. This important finding is shown more clearly in the second study, published in 2018.[35]

This second study directly compares the risk of a new sex offense by registrants with the risk of a sex offense by other felons with no prior history of sexual offending. This is an appropriate comparison if one is considering special rules for registrants that are not imposed on other released felons. You cannot apply special rules to every group whose sexual offense risk is above zero, because the rules would then apply to everyone. No group in the population presents a zero sex offense risk. Any risk reduction program must take account of this fact.[36] After reviewing available data on the rate

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in which released offenders are not subject to American-style offender registries or residency restrictions. (*Id.*)

[35] Hanson, Harris, Letourneau, Helmus and Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, (2018) 24 PSYCHOL. PUB. POL'Y & L. 48, 50.

[36] The wider the net a risk reduction program casts, the fewer the resources available to apply to each person caught in it, or to other programs that reduce risk. Too wide a net can therefore undermine the purpose animating special rules in the first place. Probably for this reason, states generally do not include nonsexual offenders in

of post-release sexual offending, the researchers concluded that a registrant group with a post-release sexual offense arrest rate of two percent cannot be distinguished from released felons with no sexual offense history.[37] They label this 2% rate "desistance."

The second study used Static 99R scores to classify registrants into one of five risk levels as of the time of their release, ranging from "Very Low" through "Well Above Average."[38] Risk levels for all five groups were then recalculated at six-month intervals in the years following release, to take account (when true) of the absence of any sexual re-offending up to that point. These "hazard rates" for each of the five risk categories are shown in Figure Two, reproduced from the 2018 study,[39] for the 24 years following release. The horizontal black line shows the 2% "desistance" rate against which each group's hazard rate for any given year can be compared.

Figure Two again illustrates the predictive accuracy of the Static 99R. Moreover, it shows the connection between the likelihood of a registrant re-offending in the first few years after release, and how that likelihood declines–for every risk group–with each year after release in which the registrant remains sex-offense free. Even those

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their sex offense registry, or subject them to other restrictions imposed on registrants, such as residency bans. So using the rate of sexual offending by released felons with no sexual offense history as a benchmark is consistent with common legislative practice.

[37] Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, (2017) 46 ARCHIVES SEXUAL BEHAV. 861, 862; see also Hanson et al., *supra* note 35, at 49.

[38] Hanson et al., *supra* note 35, at 49, 54-56.

[39] *Id.* at 55 (Figure 2)

initially placed in the highest risk group ("well above average") fall below the 2% benchmark eventually, if they do not re-offend. Obviously, however, those in the lower risk groups are more likely to be good candidates for parole. And there are a lot of them. A recent California study found that only 33 of a random sample of 371 adult male registrants (8.8%) were in this "well above average" risk category.[40] Another 74 (20%) were above average in risk.[41] More than 70% of registrants were in the three lower risk categories, Average, Below Average, and Very Low. The Average group reaches desistance before their tenth year at liberty, while the Below Average group does so before the fifth year. The lowest group is at the 2% rate *at the time of their release*. The importance of individualized assessment is obvious.

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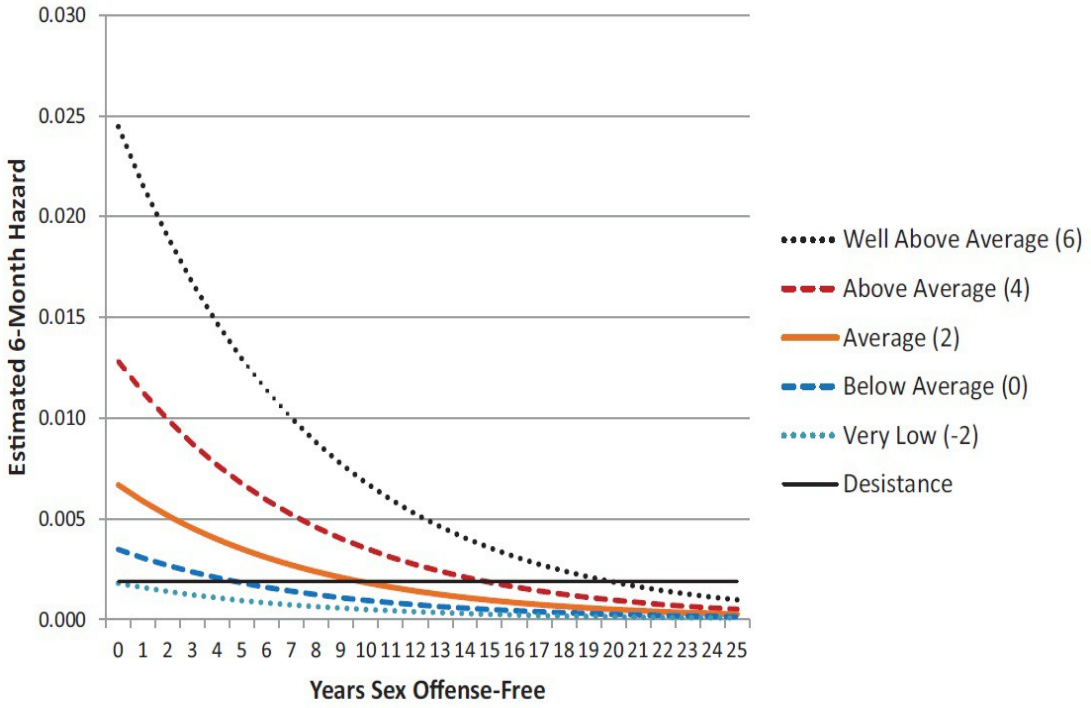
[40] Seung Lee, R. Karl Hanson, Nyssa Fullmer, Janet Neeley & Kerry Ramos, *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update*, 19.

[41] *Id.*

FIGURE TWO



The CDCR rule disallows individual consideration for registrants on the premise that a single offense triggering a registration requirement establishes the individual remains a high risk to commit a new sexual offense for the rest of his life, no matter what else one knows about him. But the data illustrated by Figure Two tell us that is wrong, that registrants, just as much as other felons, vary in their re-offense risk. Some were never likely to commit a second sexual offense, and never did. Some not initially low risk became so by remaining sex-offense-free during some years at liberty. Of course, all the registrants potentially eligible for parole by virtue of Proposition 57 have committed at least a second offense of some kind, but that is equally true of many non-registrants made parole eligible by Proposition 57. But the purpose of Proposition 57 is to look beyond the single fact of their re-offending to a fuller consideration of

each individual's circumstances. The rule at issue here, however, categorically prevents such individualized consideration for registrants, though all other categories of prisoners convicted of a nonviolent felony are entitled to that individual consideration. Two contrasting examples of the rule's potential effect illustrate its irrationality.

Consider first someone convicted in 2012 under Penal Code § 451(b) (arson causing an inhabited structure/property to burn, a violent crime under Penal Code § 667.5(c)(10)), who is given a determinate sentence of five years, the middle of the three sentencing possibilities. Six months following his release, he is convicted of arson again, but this time under § 451(c) (not classified a violent offense), because the second fire he set did not cause great bodily injury or burn an inhabited structure. He receives a four-year sentence for this second arson offense, again the middle of the three possible determinate terms. But the sentence is doubled to 8 years, because it is a second strike, and a five-year enhancement is added to that under Penal Code § 451.1(1), because this is his second *arson* conviction. His total sentence is thus 13 years.

Because § 451(c) is not is not a violent offense under § 667.5(c), Arsonist is eligible for parole consideration after serving his basic sentence of 4 years, potentially reducing his time in custody by 9 years. He may not be granted parole, of course, but under Article 1, Section 32 he is entitled to be considered for it, effectively allowing him an individualized reconsideration of whether the statutory sentence enhancements should in fact apply to his case, as part of a parole consideration process.

Now consider someone convicted in 2007 of first degree burglary of an unoccupied vacation home, Penal Code § 460(a). When he was arrested a search revealed that Burglar's phone contained nude selfies taken by his 17-year-old girlfriend. He agrees to plead guilty to a misdemeanor conviction for possession of child pornography (§ 311.11(a)), with a short sentence served concurrently with his two-year sentence for burglary. He is released in 2009 and does not re-offend until 2016, when he is convicted of another vacation home burglary. Because it is his second burglary, his four year sentence is doubled to 8 years, to which is added a 5 year enhancement for the second strike, for a total sentence of 13 years.

The plain language of Proposition 57 makes Burglar parole-eligible in 2020, after he completed his primary four-year sentence. Were he granted parole he could petition for removal from the registry as soon as he completes his parole term, under the new tiered registration system that becomes effective in 2021.[42] But CDCR's rule making Burglar parole-ineligible keeps him in prison until 2032, which also bars him from petitioning off the registry until 2033. Does Burglar present a higher re-offense risk than Arsonist, or a higher risk

[42] He will be able to apply to terminate his registration after ten years at liberty without committing a new sexual offense. (Penal Code § 290(d) [operative July 1, 2021, Stats 2017, ch. 541, § 2.5; amended by Stats 2018 ch. 423 § 52].) Registrants cannot be relieved of their duty to register while on parole (Penal Code § 290.5(a)(2) [operative July 1, 2021, Stats 2017, ch. 541, § 12]) but their time at liberty on parole counts toward their minimum registration period, which is not increased for a conviction for a nonsexual offense. (Penal Code § 290(e) [operative July 1, 2021, Stats 2017, ch. 541, § 2.5; amended by Stats 2018 ch. 423 § 52.)

to commit a new offense that will cause someone personal harm? CDCR effectively adopts an irrebuttable presumption he does, on the basis of his 13-year-old misdemeanor conviction for possession. Whatever a fuller inquiry into his history and circumstances might reveal, it's certain that no scientifically valid assessment of the risk Burglar presents in 2020 (were he then considered for parole) would treat this 13-year-old possession conviction as alone establishing that he presents a high risk.

The Static 99R cannot be used to assess the sexual re-offense risk of individuals like Burglar who have committed no sexual offense other than possession of images of minors, because there is no data showing it provides accurate predictions for this group of non-contact offenders.[43] But this fact illustrates another important point. There are many kinds of data that are available in a parole consideration process to assess re-offense risk. We do not need a Static 99R score in this case to know that Burglar probably presents a low risk for sexual offending, because studies establish that individuals with no sexual offense history other than a possession conviction have a very low sexual re-offense risk. For example, the United States Sentencing Commission looked at the post-release conduct of every one of the 610 individuals released from federal custody in 1999 and 2000

[43] Possession of child pornography is a Category B offense within the nomenclature used for the Static 99R, and the coding manual states the "Static-99R should not be used with offenders who have only Category 'B' offences." Amy Phenix, Yolanda Fernandez, Andrew J.R. Harris, Maaike Helmus, R. Karl Hanson, & David Thornton, *Static-99R Coding Rules, Revised – 2016*, at p. 22.

who was convicted of possession, receipt, or distribution of child pornography. (U.S. Sentencing Commission, *Federal Child Pornography Offenses* (2011) pp. 295-296.) Most people convicted of a child pornography offense have no prior criminal record, but 92 of the 610 had prior convictions of some kind. (*Id*. at p. 302.)

The study followed these individuals for an average of 8.5 years after their release from custody. All but 22 of the 610 (96.4%) remained free of a contact sex offense of any kind. (*Federal Child Pornography Offenses*, *supra*, at p. 300.) Fourteen were arrested or convicted for possessing child pornography again. But the overwhelming majority did neither. (*Ibid.*) These 8.5-year rates are far lower than the *three-year* re-offense rates for *any* of the offenses listed in Table Two, sexual or non-sexual. Other studies show similar results.[44]

Any parole process requires assessing re-offense risk, and it is clear that registrants present no special challenge in this regard. One

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[44] A 2010 paper by leading scholars on sexual re-offending (Seto, Hanson, & Babchishin, *Contact Sexual Offending by Men With Online Sexual Offenses* (2010) 23 SEXUAL ABUSE: J. RES. & TREATMENT 124, 135) found that just 25 of 1,247 online child pornography offenders committed a contact sexual offense after release. They concluded that "online offenders rarely go on to commit detected contact sexual offenses." (*Id.* at 136.) Similarly, researchers at the Federal Bureau of Prisons who studied re-offense rates in 2014 concluded that efforts to reduce the re-offense rates for internet child pornography offenders should be reconsidered, because the "overall re-offense base rate of CP offenders" was so low it was difficult to further reduce. (Faust et al., *Child Pornography Possessors and Child Contact Sex Offenders: A Multilevel Comparison of Demographic Characteristics and Rates of Recidivism* (2014) 27 SEXUAL ABUSE: J. RES. & TREATMENT 1, 15.)

can look at assessment tools like the Static 99R, one can look at the distinctive re-offense rates associated with some offenses, such as possession of child pornography, and one can even look at major demographic variables. The SARATSO review committee, for example, has never certified an assessment tool for female sexual offenders, but concludes that they generally present a very low risk.[45]

Mr. Gadlin himself may present a higher re-offense risk than Burglar in our second illustration. Or, he may not. But under CDCR's blanket exclusion of all registrants, his particular circumstances and characteristics will not be examined because his actual re-offense risk is rendered irrelevant by CDCR's unjustified decision to instead adopt an irrebuttable presumption of elevated risk for all registrants. They could as easily adopt such a presumption for those required to be on the arson registry.[46] Or indeed, for anyone who has committed multiple felonies of any kind, rendering Proposition 57 largely inoperative. Such rules would surely be

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[45] See the "frequently asked questions" section of the SARATSO committee website at http://saratso.org/pdf/Females_Who_Sexually_Offend_FAQ_Edits_2018_06_13.pdf:

> At this time, there is no actuarial or structured professional judgment instrument validated to assess the risk of sexual recidivism for females. Cortoni (2016) stated, "because of their low risk of sexual recidivism, female sexual offenders would virtually never be considered to pose a high risk for sexual recidivism". Risk instruments developed for men over-estimate risk of recidivism for females who sexually offend.

[46] Penal Code § 457.1.

indefensible, but no more so than the actual rule adopted by CDCR, barring all registrants.

CONCLUSION

CDCR cannot substitute its policy preference for the one adopted by the voters, even if its preferred policy had some plausible factual basis. But it does not. There is no factual basis for the claim that all registrants present a heightened risk to public safety, as compared to others eligible for parole consideration under Proposition 57. It is clear instead that registrants vary in the re-offense risk they present, that many present a low risk, and that an individual registrant's re-offense risk can be assessed in any parole consideration process as easily as the re-offense risk of all other prisoners made eligible for parole consideration under Proposition 57. The CDCR rule violates the California Constitution and cannot stand.

DATED: January 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 14 points and contains 9,657 words.

Ernest Galvan