No. 3-14-0627

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MARC A. PEPITONE, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois No. 13-CM-844 Honorable Carmen Goodman, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. 720 ILCS 5/11-9.4-1(b) is unconstitutional on its face in that it violates substantive due process where the statute does not bear a reasonable relationship to the interest of protecting the public by permanently banning child sex offenders from public parks regardless of whether children, or persons of any age, are present.

II. 720 ILCS 5/11-9.4(b), which became law on January 1, 2011, violates the *ex post facto* clause when applied to a defendant, such as Marc Pepitone, who committed the offense which resulted in his being characterized as a child sex offender well before January 1, 2011.

NATURE OF THE CASE

Marc A. Pepitone, based on his status of child sex offender, was prohibited within certain places, including public parks. He was charged in 2013 with violating 720 ILCS 5/11-9.4-1(b) (2013) based on his being present in a public park. After a jury trial, Defendant was found guilty of presence of a child sex offender in a public park and was sentenced to 24 months conditional discharge/fines and costs.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether 720 ILCS 5/11-9.4-1(b) is unconstitutional on its face in that it violates substantive due process where the statute does not bear a reasonable relationship to the interest of protecting the public by permanently banning child sex offenders from public parks regardless of whether children, or persons of any age, are present.

II. Whether 720 ILCS 5/11-9.4-1(b), which became law on January 1, 2011, violates the *ex post facto* clause when applied to a defendant, such as Marc Pepitone, who committed the offense which resulted in his being characterized as a child sex offender well before January 1, 2011.

JURISDICTION

Marc A. Pepitone appeals from a final judgment of conviction in a criminal case. He was sentenced on June 11, 2014 (C112-113). A motion to reconsider sentence was filed on June 24, 2014 (C96,113). The motion was granted on August 13, 2014, and a notice of appeal was timely filed on August 14, 2014 (R310, C100). (The motion to reconsider sentence was granted since Defendant had already completed the mandatory 100 hours of community service, the only portion of Defendant's sentence that was requested to be reconsidered (C96, R310)). Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

STATUTE INVOLVED

720 ILCS 5/11-9.4-1 (2013) **Sexual predator and child sex offender; presence or loitering in or near public parks prohibited**

* * *

(b) It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park.

STATEMENT OF FACTS

Defendant, Marc Pepitone, was charged by criminal complaint on April 4, 2013, with Presence of a Child Sex Offender in a Public Park (a Class A misdemeanor) in violation of 720 ILCS 5/11-9-4-1(b) (2013) (C3). Defendant previously pled guilty to Predatory Criminal Sexual Assault of a Child and was sentenced to 6 years in prison on March 17, 1999 (C27). A Notice of Expiration of Illinois Sex Offender Registration requirement stating that Defendant's term of registration had ended was dated November 29, 2010 and was mailed to Defendant (C28). The letter also informed Defendant that he was responsible for complying with 720 ILCS 5/11-9.3, which restricts sex offenders from being near schools, and 720 ILCS 5/11-9.4, which, among other restrictions, restricted sex offenders from interacting with a child in a public park zone (C28).

At the time that Defendant successfully completed his term of registration, 720 ILCS 5/11-9.4-1 was not in effect, and only became law on January 1, 2011 (C12). Defendant did not receive notice that the law had changed, and was therefore not aware that the new law was more restrictive. 720 ILCS 5/11-9.4-1(b) states "It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park or on real property comprising any public park" (2013) (C12). The current statute differs from the statute it replaced in that the former statute made it a criminal offense for a child sex offender to approach, contact, or communicate with a child within a public park zone (C28). The current statute, on the other hand, places an outright ban on the presence of a child sex offender in a public park at any time regardless of whether a child is present.

On March 8, 2013, Defendant was walking his dog in Indian Boundary

Park, a public park, when he was arrested for violating 720 ILCS 5/11-9.4-1 (R192). A motion to dismiss and declare 720 ILCS 5/11-9.4-1(b) unconstitutional was filed on October 25, 2013 (C109). The motion was denied after a hearing held on January 13, 2014 (C111). A jury trial was held on April 29-30, 2014 (C43). At trial, Officer Steven Alexander testified that on March 8, 2013, he was patrolling Indian Boundary Park when he observed a van parked sideways across 3 parking spaces (R194-95). This prompted the Officer to run the registration on the van, which showed that the owner was Marc Pepitone, who was a child sex offender (R196). The Officer testified that he then walked over to the van and looked inside (R196-197). At that time, Officer Alexander saw Defendant approaching with his dog and heard him ask if everything was okay (R197). Officer Alexander then asked Defendant if it was his van and Defendant said that it was his van and that Defendant was just walking his dog. The officer thought Defendant might have also stated that he was a child sex offender (R197). Officer Alexander testified that he told Defendant that he was not allowed to be there and Defendant responded by saying he was unaware that he was not supposed to be on the property (R197). Officer Alexander also stated that Defendant told the Officer that he was no longer required to register as a sex offender (R200). Officer Alexander placed Defendant under arrest (R198).

A jury found Defendant guilty on April 30, 2014 (C49). A motion for a new trial was filed on May 30, 2014 (C92). The motion was denied and Defendant was sentenced to 24 months conditional discharge, 100 hours of public service and fines and costs totaling $400, on June 11, 2014 (C94, 112-113). A motion to reconsider sentence and to direct the clerk to file a notice of appeal was filed on June 24, 2014 (C96,113). The motions were granted on August 13, 2014, and a

notice of appeal was timely filed on August 14, 2014 (R310, C100). The motion to reconsider sentence was granted since Defendant had already completed the mandatory 100 hours of community service, the only portion of Defendant's sentence that was requested to be reconsidered (C96, R310).

I. 720 ILCS 5/11-9.4-1(b) is unconstitutional on its face in that it violates substantive due process where the statute does not bear a reasonable relationship to the interest of protecting the public by permanently banning child sex offenders from public parks regardless of whether children, or persons of any age, are present.

STANDARD OF REVIEW

Whether a statute – and 720 ILCS 5/11-9.4-1(b) in particular – is constitutional is a question of law that is reviewed *de novo*. *People v. Leroy*, 357 Ill. App. 3d 530 (5th Dist. 2005) (relying on *People v. Malchow*, 193 Ill.2d 413, 418 (2000)).

ARGUMENT

The Due Process Clause of the Fourteenth Amendment of the United States Constitution and of Article I Section 2 of the Illinois Constitution provides that the state shall not deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, §1; Ill. Const. art. I, §2. Both substantive and procedural due process rights stem from the due process clause of each Constitution. Since Defendant does not challenge 720 ILCS 5/11-9.4-1(b) on procedural grounds, the analysis undertaken here is confined to substantive due process.

Substantive due process limits the state's ability to act, irrespective of the procedural safeguards provided. *In re Marriage of Miller*, 227 Ill. 2d 185, 197 (2007).

When a substantive due process challenge to the constitutionality of a statute is raised, the appropriate inquiry is "whether the individual has been subjected to 'the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'" *Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 768 (7th Cir. 2004) (citations omitted). To effectuate such an inquiry, it is first necessary to determine the nature of the right being infringed by the government's police power. *People v. Cornelius*, 213 Ill. 2d 178, 203 (2004). If the statute infringes on a fundamental right, a court must apply the strict scrutiny test to the statute. *People v. R.G.*, 131 Ill. 2d 328, 342 (1989). Because Defendant does not allege that his liberty right encompasses a fundamental right to freely enter and/or remain in public parks, it follows that this Court should apply the rational basis standard of review to the statute's ban on child sex offenders in public parks. *Lafayette*, 377 F.3d at 773. In that vein, this Court must ask "whether the ban is 'rationally related to a legitimate government interest, or alternatively phrased,' whether the ban is 'arbitrary' or 'irrational.'" *Id.* (citing *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003).

More to the point, the specific issue this Court must address under this argument is whether an all-out banishment, of all child sex offenders, from all public parks, including all forest preserves and all conservation areas, at all times, regardless of the presence or even likely presence of persons under the age of 18, or of any person whatsoever, and for all remaining years of a child sex offender's life, is a reasonable means of achieving the legislature's stated goal of "protect[ing] users of public parks from child sex offenders and sexual predators." Transcript at 54, Ill. 96th Gen. Assembly, Reg. Sess., Sen Bill 2824, March 16, 2010) (Statement

of Senator Althoff) (Senate Transcript)[1]. Because 720 ILCS 5/11-9.4-1 is relatively nascent, having come into effect on January 1, 2011, it has not yet been interpreted by any court in this State, so this Court's analysis on the issue at hand is a matter of first impression. That said, 720 ILCS 5/11-9.4-1 is similar to 720 ILCS 5/11-9.3 generally, and, more specifically, section 11-9.4-1(b) of 720 ICLS is similar to since-repealed section 11-9.4(a) of the Criminal Code.[2] Accordingly, precedent that pertains to these similar criminal statutes that target sex offenders may provide guidance in this Court's present analysis.

For example, the Fifth District examined whether section 11-9.4(a) of the Code (720 ILCS 5/11-9.4 (2003)) violated substantive due process in *People v. Diestelhorst*, 344 Ill. App. 3d 1172, 1183-85 (5th Dist. 2003). Section 11-9.4(a) made it unlawful for a child sex offender to knowingly be present in any public park (or building on park land) when persons under the age of 18 are present *and* to attempt to approach, contact, or communicate with a child under the age of 18, *unless* the child sex offender is a parent or guardian of a child under the age of 18 and that child is present. In upholding section 11-9.4(a) of the Code as constitutional, the *Diestelhorst* court first determined that "[i]t is clear from a reading of the statute that section 11-9.4(a) is intended to protect children from known sex offenders." *Id.* at 1184. With that public interest in mind, the court then found that the statute passed the rational-basis test since the restrictions

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[1]For the Court's convenience, a copy of the legislative debate transcript from March 16, 2010, concerning the enactment of 720 ILCS 5/11-9.4-1, is included in the Appendix of this brief.

[2]720 ILCS 5/11-9.4 was repealed on July 1, 2011. However, a sightly more restrictive version of section 5/11-9.4(a) is current law and can be found in section 5/11-9.3(a-10) (2015).

the statute placed on known child sex offenders bore a reasonable relationship to achieving its end-goal. The court based its decision largely on the following reasoning: that, because "[s]ection 11-9.4(a) does not prohibit a known child sex offender from being present in a public park and enjoying its amenities," and because the statute "make[s] an exception for a known child sex offender who is a parent or a guardian of a person under the age of 18," the statute is not overly broad and, so, it does not violate a defendant's substantive due process rights. *Id.* at 1185. It is not a far jump to deduce from the court's reasoning that, had the statute been devoid of these limiting parameters and instead provided for an all-out ban on all child sex offenders from enjoying a park's amenities or spending time with offspring in a park, then the statute would be irrationally overbroad and not reasonably related to the protection of children from child sex offenders.

Similarly, the Second District examined the constitutionality of section 11-9.3 of the Code (720 ILCS 5/11-9.3 (1998)), a statute which places affirmative restrictions on child sex offenders in an attempt to protect children, in *People v. Stork*, 305 Ill. App. 3d 714 (1999). As the *Stork* court described, section 11-9.3 makes it unlawful for a child sex offender to "knowingly be present in a school zone '*unless the offender * * * has permission to be present.*'" *Id.* at 722 (emphasis in original). The court reasoned that "[b]y construing the statute to proscribe *only* conduct performed 'without lawful authority,' the possibility that the statute reaches innocent conduct is avoided." *Id.* (emphasis added). The court also upheld the statute as constitutional, finding that the statute bore a reasonable relationship to protecting school children from known sex offenders by "prohibiting known child sex offenders from having access to children in schools, *where they are present in large numbers.*"

Id. (emphasis added).

The statute at hand, though similar to those ruled on in *Diestelhorst* and *Stork,* also differs from them in fundamental ways. For one, both the statutes that were held to be constitutional were far narrower in scope in that each contained at least one limiting provision. One required not only the presence of children under the age of 18 in a park but also a concrete act on the part of the child sex offender, namely, approaching or attempting to interact with a child, in order for the statute to be triggered. See 720 ILCS 5/11-9.4 (2003). It also allowed for the presence of a child sex offender in a public park if the sex offender is the parent or guardian of a child present in the park, thereby falling short of infringing on a sex offender's fundamental right to rear a child. *Id.* The other statute limited a child sex offender's ability to be present in a school zone, a location that has a direct connection to children, but, importantly, permitted the presence of a sex offender should permission be obtained. See 720 ILCS 5/11-9.3 (1998).

Unlike either of those, section 11-9.4-1(b) does not restrict a known child sex offender's access to a person, much less a child, in order for the statute to be violated. Rather, section 11-9.4-1(b) restricts a known child sex offender's access to a place, namely a public park, without caveat. Because section 11-9.4-1(b) neither requires the presence of any person of whatever age, nor does it provide any exception should certain qualifications be met (as does section 11-9.3), the statute casts an impermissibly broad net and is not reasonably related to the public interest of protecting people.

The decision in *Doe v. City of Lafayette,* 377 F.3d 757, (7th Cir. 2004), is instructive in analyzing the reasonableness of section 11-9.4-1(b). Defendant

acknowledges that his argument is at odds with the majority's holding in *Lafayette*; however, there are distinctions to be drawn as well as a well-reasoned, vociferous dissent that supports Defendant's argument. There, similar to, though less sweeping than, section 11-9.4-1(b), the City of Lafayette issued a letter informing the plaintiff that he was banned from all public parks in the City. The plaintiff sued the City to have the ordinance declared unconstitutional, both as a violation of his First Amendment right to freedom of thought, and on the ground that it deprived him of his fundamental rights under substantive due process, including "a generalized right to movement" and the right "to enter parks and to loiter for other innocent purposes." *Id.* at 769. The majority rejected the plaintiff's contentions, holding that the ordinance did not violate substantive due process since, although "not unimportant," the right to enter and loiter in parks is an "uncomfortable fit" with those rights previously determined by the Supreme Court to be fundamental, such as the right to marry, reproduce, rear one's child as one so chooses, bodily integrity, and others. *Id.* at 770.

Significantly, the majority discussed at length the "demonstrable threat of sexual abuse" presented by Doe himself, the only person impacted by the ordinance. *Id.* at 774. In fact, the reason the majority believed the City had a compelling interest to ban Doe from public parks was based predominantly on Doe's unique characteristics. The majority found it significant that Doe was an admitted "sexual addict who always will have inappropriate urges toward children," noting that "[t]he City has banned only one child sex offender, Mr. Doe, from the parks, and they have banned Mr. Doe only because of his near-relapse in January of 2000 when he went into the park to engage in psychiatric brinkmanship." *Id.*

at 773. Finally, because the plaintiff did not raise the issue of the ban being overbroad, the issue was not addressed by the majority. The dissent, however, was "puzzled by the omission of that issue from [plaintiff's] discussion," noting that the city would typically ban an individual from public parks for a week or, at most, a summer, but certainly not a lifetime. *Id.* at 775, and see n. 6.

Justice Kuehn, who wrote the dissenting opinion in *People v. Leroy*, 357 Ill. App. 3d 530 (5th Dist. 2005), used similar reasoning to the majority in *Lafayette* when he considered the persons to whom the challenged statute applied. In *Leroy*, the defendant challenged the constitutionality of 720 ILCS 5/11-9.4 (b-5) (2002), which made it unlawful for a child sex offender to knowingly reside within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age. *Id.* While Justice Kuehn found the statute unconstitutional on more grounds than one, he also strongly suggested that the statute was unconstitutionally overbroad when he discussed how the legislation failed to take specific aim at particular individuals (i.e. those most likely to re-offend). See *Id.* at 552 ("[t]he nature of the crime and the choice of the victim constitute important considerations in predicting what a prior offender's proximity to a given child-laden facility could mean in terms of reoffending"). The dissent ultimately found the statute unreasonable since it imposed a generalized restraint on all child sex offenders. To underscore how the restriction irrationally "constitute[d] a totally blind imposition of disability and restraint," Justice Kuehn offered the following paradox:

> "A man [Leroy] who was convicted 18 years ago of an offense that brands him a child sex offender, who had consensual sex with a 17-year old underage teen and who has not reoffended since, must relocate. . . even if his home rests 499 feet from an infant daycare

> center. But a recently released child molester, with a lengthy history of molesting very young children, and a diagnosed pedophile to boot, can live in any house he chooses, so long as it rests at least 501 feet from a place attended on a daily basis by children, the prime targets of his known sexual propensities. . . I fail to understand how the restriction imposed by Public Act 91-911 bears any rational relationship to the protection of children from people capable of taking sexual advantage of them." *Id.* at 555.

Also see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985) (when discussing ordinance as related to the mentally retarded, finding that, even under a rational basis analysis, "vague, undifferentiated fears" as they pertain to a particular group cannot support an ordinance).

Unlike *Lafayette*, section 11-9.4-1(b) imposes an all out ban on every child sex offender, and imposes the ban state-wide. Although the plaintiff in *Lafayette* invoked a strict scrutiny analysis by alleging a substantive due process violation of a fundamental right, the court there also found that the City ordinance passed the rational-basis test since it was reasonable to ban Doe from City parks based on Doe's specific threat to re-offending against children. In contrast, it appears that the Illinois Legislature has made no attempt to determine the level of danger posed by any particular child sex offender since, in passing 720 ILCS 5/11-9.4-1, it imposed an all out ban on all child sex offenders without conducting any sort of analysis as to the likelihood of re-offending.

To demonstrate, in the spare, one-paragraph-long Senate transcript that preceded a majority vote in favor of passing Senate Bill 2824, which became 720 ILCS 5/11-9.4-1, no factually nor statistically supported mention is made of the specific danger that previously-convicted child sex offenders pose specifically to people in every type of public park. In fact, data supplied in a U.S. Department of Justice report – Lawrence A. Greenfield, *Sex Offenses and Sex Offenders: An*

Analysis of Data on Rape and Sexual Assault, U.S. Department of Justice (Feb. 1997) – contradicts the notion that parks are particularly attractive to sex offenders and particularly dangerous for potential victims.[3] According to the report, "[n]early 6 out of 10 rape/sexual assault incidents were reported by victims to have occurred in their own home or at the home of a friend." *Id.* at 3 (see Appendix). Another 10% of victims stated the crime occurred on the street, while 7.3% of victims identified the scene of the crime as a parking lot/garage. Parks were not singled out, but "[a]ll other locations" accounted for only 26.1% of the victimizations. *Id.* at 28 (see Appendix).

So, although Senator Althoff opines that, "[b]y their nature, parks have many obscured views and other distractions that . . . offer opportunities for sex offenders to access potential victims," not only does her statement lack statistical support, but if its logic were to be re-deployed, then it could be used to ban sex offenders from no less than everywhere. (See Appendix, Senate Transcript at 55). For example, if the goal is to protect "potential victims," which the Legislature deems to be both "[c]hildren and lone adults," from sex offenders in places that provide "obscured views," then what limits the legislature from banning sex offenders from public parking garages, public libraries, public hospitals, public restrooms, public transportation (which frequently contains lone passengers in enclosed moving cabins, obscured from anyone's view), public sidewalks, and the list goes on. But one need not resort to rhetorical questions to identify that section 11-9.4-1(b) is

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[3] *Sex Offenses and Sex Offenders: An Analysis of Data on Rape and Sexual Assault* can be found in full by visiting: http://www.bjs.gov/content/pub/pdf/SOO.PDF, last visited April 4, 2016. The pertinent pages of the report can also be found in the Appendix.

facially unconstitutional in that the means it employs to protect "potential victims" are vastly overbroad and, therefore, irrational.

Also noteworthy is Senator Althoff's passing remark that "convicted sex offenders are four times more likely to re-offend than other offenders" (see Appendix, Senate Transcript at 55), yet no source is provided to back up that statistic. A North Carolina Court of Appeals Justice has highlighted the logical fallacy in championing statistics that are accompanied by neither context nor source, precisely what Senator Althoff is shown to have done in her comments to the legislature. In *Standley v. Town of Woodfin*, 186 N.C.App.134 (2007), the plaintiff challenged a town ordinance identical to section 11-9.4-1, alleging the statute infringed on his fundamental rights. Although the majority held that a "right to enter parks is not encompassed by either the fundamental right of travel or the right to intrastate travel," dissenting Justice Geer strongly contested the statute's validity based on the lack of demonstrable proof that the ban would serve the town's legitimate interest of protecting people from sex offenders. *Id.* at 136, 160-162.

Like Senator Althoff, the Town of Woodfin used the same "scary 'four times as more likely' to re-offend statistic [to] [form] the entire basis for the Town's argument," a figure that comes from a report prepared by the U.S. Department of Justice Bureau of Justice Statistics – "Recidivism of Sex Offenders Released from Prison in 1994" – Patrick A. Langan, Ph.D., Erica L. Schmitt, and Matthew R. Durose (Nov. 2003). *Town of Woodfin,* 186 N.C.App. at 161. That report reviewed data relating to the recidivism of 9,961 sex offenders (out of 272,111 total releasedprisoners) released across 15 states, including Illinois. (See. Appendix

at p.1).[4] The following excerpt is contained in the report:

> "Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime. Within the first 3 years following their release from prison in 1994, 5.3% (517 of the 9,691) of released sex offenders were rearrested for a sex crime. The rate for the 262,420 released non-sex offenders was lower, 1.3% (3,328 of 262,420)." *Id.*

With the above contextual framework for the only statistic relied on by Senator Althoff in her presentation of Senate Bill 2824 for approval, it would appear far more likely that a sex offense committed in a public park would be committed by a non-sex offender since, based on the above statistics, it is actually over 6 times more likely that a sexual assault would be committed by a non-sex offender. And, this does not even account for the fact that 74% of sexual assaults do not take place in a public park, or that only an unknown portion of the remaining 26% of sexual assaults do occur in parks.[5] But perhaps even more significant for the purpose of demonstrating the overly broad nature of section 11-9.4-1(b) is that only 2.2% of child sex offenders reoffended within 3 years, accounting for 209 victims, making non-offenders 16 times more likely to reoffend than child sex offenders. *Id.* at 30. (See Appendix)

In sum, far from rational, the sweeping and unsubstantiated nature of the means employed by section 5/11-9.4-1(b) to "protect users of public parks" showcases just how arbitrary the statute is. Instead of banning child sex offenders from public

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[4]*Recidivism of Sex Offenders Released from Prison in 1994* can be found in full by visiting: http://www.bjs.gov/content/pub/pdf/rsorp94.pdf, last visited March 31, 2016. The pertinent pages of the report to Defendant's argument can also be found in the Appendix.

[5]It is worth noting that it is entirely possible, even if unlikely, that 0% of sex offenses take place in public parks. The fact is, whatever the percentage of sexual assaults occur in public parks is, it is less than 26%.

parks when persons under the age of 18 are present; or during certain hours; or banning them from parks that have playgrounds; or permitting sex offenders to be present in a public park if it is not wooded, or if accompanied by a person who is not a known sex offender; or requiring a permit for registered sex offenders to enter parks; or limiting the ban only to parks frequented by minors; or limiting the ban only to individual sex offenders based on conduct suggesting a risk of re-offending in the park; or incorporating any number of reasonable limitations on the statute's breadth, the statute imposes an unreasonable affirmative disability on all child sex offenders by legislating their permanent banishment from all public parks. See *Brown v. City of Michigan City*, 462 F.3d 720, 734 (7th Cir. 2006) (banning specific sex offender from park when he had been witnessed watching patrons of the park with binoculars).

The overbreadth of 720 ILCS 5/11-9.4-1(b) means that a child sex offender can never walk a dog in a pubic park, go hunting in a public forest preserve, participate in a rally (in exercise of First Amendment rights) held in a public park, take a shortcut through a park, attend a concert or parade hosted in a public park, coach his/her child's Little League team or, merely, as the *Diestelhorst* court put it, enjoy a park's amenities, all of which are entirely innocent and legitimate activities. While Defendant is not alleging that section 11-9.4-1(b) itself infringes his fundamental liberty right, a number of fundamental rights are necessarily impacted by the all-out public park ban. As alluded to above, several first amendment rights are infringed, along with the right to rear one's child as one sees fit, for example. Section 11-9.4-1(b) is by far the most restrictive statute aimed at child sex offenders in Illinois to date. While less restrictive statutes have been

held to be constitutional, it is precisely because they were less restrictive that they were found to pass constitutional muster. Section 11-9.4-1(b) is a prime example of the continuing trend of, with each passing enactment, making it harder and harder for a person to avoid both persecution and prosecution as a convicted sex offender. While some regulation of convicted child sex offenders may be appropriate, section 11-9.4-1(b) simply goes too far in the restraints it places on them. Accordingly, Defendant respectfully asks this Court to declare 720 ILCS 5/11-9.4-1(b) unconstitutional on its face, and reverse Defendant's conviction of being a child sex offender in a public park.

II. 720 ILCS 5/11-9.4-1(b), which became law on January 1, 2011, violates the *ex post facto* clause when applied to a defendant, such as Marc Pepitone, who committed the offense which resulted in his being characterized as a child sex offender well before January 1, 2011.

STANDARD OF REVIEW

This issue presents a constitutional challenge to a statute on *ex post facto* grounds. Such an attack is subject to a *de novo* standard of review. *E.g., People v. Leroy*, 357 Ill. App. 3d 530 (5th Dist. 2005).

ARGUMENT

Both our state and federal constitutions prohibit the enactment of *ex post facto* laws. U.S. Const. art. I, §10; Ill. Const. 1970, art. I, §16. A criminal statute is *ex post facto* if it is both retroactive and disadvantageous to the defendant. *Weaver v. Graham*, 450 U.S. 24, 101 (1981). A civil statute will also be judged by this standard if it is "so punitive either in purpose or effect as to negate the state's intention to deem the scheme 'civil.'" *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted).

Defendant, here, was prosecuted under a statutory provision 720 ILCS 5/11-9.4-1 (2011) which was enacted by Public Act 96-1099, § 5. With the passage of P.A. 96-1099, which took effect on January 1, 2011, subsection 11-9.4-1(b) became law for the first time. This subsection provides:

> "It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property

comprising any public park."

720 ILCS 5/11-9.4-1(b) (2011). In evaluating Defendant's claim that this statute was unconstitutionally applied to him, the initial inquiry this Court must make is whether Defendant's status as a "child sex offender" was attributable solely to conduct which predated the passage of P.A. 96-1099. *E.g. People v. Dalby*, 115 Ill. App. 3d 35, 38 (3d Dist. 1983) ("A statute is characterized as retroactive if it takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions already past").

During Defendant's trial, the parties stipulated that defendant was a child sex offender "in that he has been charged and convicted under Illinois law... with a sex offense, and the victim was a person under 18 years of age at the time of the offense." (C50). Defendant's Exhibit A, a Certified Statement of Conviction, reflects that Defendant was charged with Predatory Criminal Sexual Assault of a Child in 98-CF-389 on March 3, 1998, and was subsequently sentenced to 6 years' imprisonment. (C26-27). Furthermore, Defendant's Exhibit B, a Notice of Expiration of Illinois Sex Offender Registration Requirement, reflects that, as of November 29, 2010, Defendant was no longer required to register under the Illinois Sex Offender Registration Act (SORA) (730 ILCS 150/1) (C28).[6] Thus, defendant committed the offense which resulted in his being characterized a child sex offender over 12 years before subsection 5/11-9.4-1(b) took effect, and had also been off the SORA Registry prior to January 1, 2011.

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[6]A copy of the Notice of Expiration of Illinois Sex Offender Registration Act can be found in the Appendix.

In *People v. Cornelius*, 213 Ill. 2d 178, 207 (2004), the Illinois Supreme Court stated that the purpose of the *ex post facto* provision is to "restrain a legislative body from enacting arbitrary or vindictive legislation," and to "assure that statutes provide fair warning of their effect." In *Cornelius*, and in the predecessor decision in *People v. Malchow*, 193 Ill. 2d 413 (2000), the Supreme Court rejected *ex post facto* challenges brought by sex offenders challenging the Illinois sex offender registration laws. The United States Supreme Court similarly rejected an *ex post facto* attack on Alaska's Internet sex offender registry in *Smith v. Doe*, 538 U.S. 84 (2003). Since this is a case of first impression, however, there is no precedent precisely on point as it pertains to whether section 5/11-9.4-1(b), in particular, violates the prohibition against *ex post facto* legislation.

Nevertheless, a useful framework for determining whether a statute is punitive in effect, a prerequisite to declaring a statute unconstitutional on *ex post facto* grounds, was laid out by the *Smith* Court when it pointed to five factors from a seven-factor test established by an earlier decision [*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)]. *Smith*, 538 U.S. at 92. And see *Leroy*, 357 Ill. App. 3d at 538 (where the enactment in question applies only to past conduct that was, and still is, criminal, five of the seven *Mendoza-Martinez* factors are the most relevant). See also *People v. Morgan*, 377 Ill. App. 3d, 821, 825 (3d Dist. 2007) (whether the punitive effect negates the civil nonpunitive purpose is evaluated using five factors from United States Supreme Court precedent that, while not exhaustive or dispositive, are "useful guideposts") (internal quotation marks omitted).

To find that subsection 11-9.4-1(b) constitutes an *ex post facto* law as applied to Defendant would require this Court to conclude that the all-out banishment

from public parks contained in that provision does, indeed, constitute punishment. The finding that a statute is punitive, as opposed to a merely civil or regulatory law, can be made in one of two ways. The first and easiest way is to ascertain that the legislative body which enacted the law meant to impose punishment. As the Supreme Court observed in *Smith v. Doe* [538 U.S. at 92] if the legislature intended to impose punishment, the inquiry is complete. See also *People v. Leroy*, 357 Ill. App. 3d. at 538. If, on the other hand, the intent of the legislature was to enact a nonpunitive, purely regulatory scheme, the reviewing court "must further examine whether the statutory scheme is so punitive in either purpose or effect that it negates the state's intention to deem it civil." *Id.*

Assuming a finding that the legislature intended to create a civil, nonpunitive scheme in passing P.A. 96-1099, § 5, the question then becomes one of effect, in spite of intent. As mentioned above, the *Smith* Court pointed to five particular factors from an earlier decision [*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)] which it believed could provide a useful framework for determining whether a statute was punitive in effect. The five factors to consider are:

(1) whether the law has been regarded in our history and traditions as punishment;

(2) whether the law imposes an affirmative disability or restraint;

(3) whether the law promotes the traditional aims of punishment;

(4) whether the law has a rational connection to a nonpunitive purpose; and

(5) whether the law is excessive with respect to its nonpunitive purpose.

Smith, 155 L. Ed. 2d at 179-80.

Notably, the standard announced in *Smith* for evaluating whether an act of legislation runs afoul of the *ex post facto* clause of the United States Constitution has twice been applied to prohibitions essentially identical to section 5/11-9.4-1(b). In *Dowdell v. City of Jefersonville*, 907 N.E. 2d 559 (Ind.Ct.App. 2009), the Court of Appeals of Indiana employed all seven of the *Mendoza-Martinez* factors when examining whether an ordinance that banned sex offenders from city parks was unconstituional under the *ex post facto* prohibition of Article I, section 24 of the Indiana Constitution.[7] There, the majority came to the following conclusion:

> "[O]f the seven factors identified by *Mendoza-Martinez* as relevant to the inquiry of whether a statute has a punitive effect despite legislative intent that the statute be regulatory and non-punitive, only one factor in our view - advancing a non-punitive interest - points clearly in favor of treating the effects of the [Ordinance] as non-punitive. The remaining factors . . . point in the other direction." *Id.* at 571 (quoting *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009).

Likewise, three dissenting justices of the Seventh Circuit also operated under the *Mendoza-Martinez* framework in *Doe v. City of Lafayette, Ind.*, 377 F.3d 757 (7th Cir. 2004) in determining whether the effect of an ordinance that banned a single sex offender from city parks was punitive. Under that analysis the dissent

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[7]The two additional factors considered by *Dowdell* are (1) whether the sanction comes into play only on a finding of scienter, and (2) whether the behavior to which it applies is already a crime. The court determined that these added factors were included in the (six of the seven) factors the court weighed in favor of treating the effects of the Ordinance as punitive. 907 N.E.2d at 566-571.

found the ordinance punitive in nature, in contrast to the majority's characterization of the ban as a form of "'civil exclusion.'" *City of Lafayette, Ind.* 377 F.3d at 780-82 (Williams, J., dissenting).

The *Mendoza-Martinez* factors have also been applied to other statues similar to section 11-9.4-1(b). For example, when determining whether a residency restriction was constitutional by applying the *Smith* standard, judges disagreed on whether these newer statutes directed at sex offenders should be considered punitive in nature. *People v. Leroy*, 357 Ill. App. 3d 530, (5th Dist. 2005); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) *cert. den'd* 546 U.S. 1034 (2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005). In each of those cases, at least one justice dissented on the basis that retroactive application of a law which applies to all convicted child sex offenders and prohibits an offender from making a home in certain geographic areas for the rest of his life has a more onerous and punitive effect than simply having to register a residential address.

This Court should agree with the majority in *Dowdell*, and the seven dissenting justices in the *Lafayette, Leroy, Miller* and *Seering* cases, and reach the conclusion that application of the *Smith* factors demonstrates that a conviction under 720 ILCS 5/11-9.4-1(b), of a defendant whose underlying sex offense was committed prior to January 1, 2011, violates the *ex post facto* clauses of the United States and Illinois constitutions.

Since Defendant concedes that section 11-9.4-1(b) has a non-punitive purpose (to protect the public from child sex offenders), this Court must, now, assess whether the effect of section 11-9.4-1(b) is punitive, employing the five *Mendoza-Martinez* factors established in *Smith* to aid in such an assessment.

1. Sanctions that have historically been considered punishment.

720 ILCS 5/22-9.4-1(b) permanently bans Defendant and all convicted child sex offenders from ever entering (or loitering within 500 feet of) a public park. As the three dissenting justices observed in *Doe v. City of Lafayette*, such a sweeping ban has the effect of permanently segregating child sex offenders both from the community and the general population, such that "[t]his form of segregation is similar to a condition of probation or supervised release." *Id.* at 781. And see *Dowdell*, 907 N.E.2d at 569 (finding the ordinance banning sex offenders to be similar to probation or parole where prohibitions on entering certain types of places is a common condition of probation or parole and, so, finding this factor in favor of treating the ban as punitive). Also see *Smith v. Doe,* 538 U.S. at 115 (discussing how Alaska's registration and reporting requirements are comparable to conditions of supervised release or parole) (Ginsburg, J. dissenting).

While the *Smith* court ultimately upheld Alaska's Sex Offender Registration Act as constitutional, it only did so by acknowledging that "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." (*Smith,* 538 U.S. at 101). Contrary to the relative freedoms afforded sex offenders required to register as such on Alaska's registry, section 11-9.4-1(b) strips child sex offenders of their freedom of movement by prohibiting their presence in public parks.

Finally, section 11-9.4-1(b) is akin to a partial banishment, and serves to expel Defendant and child sex offenders from portions of every part of the State of Illinois and local government's property. See *Smith* , 538 U.S. at 98 (discussing banishment as a measure historically recognized as punishment, and therefore

is not reminiscent of a duty to register).

The above analyses identify the essence of why section 11-9.4-1(b) constitutes punishment under the first *Mendoza-Martinez* factor: it resembles probation or mandatory supervised release, which is traditionally regarded as punishment, and is imposed only on individuals convicted of criminal sex offenses. Further, in enacting section 11-9.4-1(b), the legislature has set forth a mandatory restriction on child sex offenders such that, should one set foot in a public park, a first violation of this statute constitutes a Class A misdemeanor, with subsequent violations constituting Class 4 felonies. Thus, the first *Mendoza-Martinez* factor weighs in favor of finding section 11-9.4-1(b) punitive.

2. Affirmative disability or restraint.

720 ILCS 5/11-9.4-1 operates as a lifetime prohibition on child sex offenders and sexual predators from entering any public park or building thereon, and throughout the entire state of Illinois. Such a prohibition is, unquestionably, a restraint. See *Doe v. City of Lafayette, Ind.*, 377 F.3d at 780 (Williams, J., dissenting) (recognizing the proposition that " [l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." (citation omitted)). Unlike the sex offender registry statute the *Doe* court held to be constitutional since it "does not restrain activities sex offenders may pursue," child sex offenders are permanently prohibited from pursuing an array of activities due to their banishment from public parks. *Id.* at 100. To expand, as the court in *Dowdell* recognized:

"Much of a community's social life occurs in public parks – youth

and adult sporting events, picnics, community celebrations and events, to name but a few – and an ordinance that fully and forever prohibits one from taking part in such activities – or from taking a walk in the park – is a real and significant restraint." 907 N.E.2d at 566.

There, the court found this factor weighed in favor of finding the ordinance it analyzed as punitive, and found that despite the inclusion in that ordinance of an exemption procedure whereby a sex offender could petition the court to enter a public park for a legitimate reason. *Id.* at 567-568. This Court should also conclude that, because section 11-9.4-1(b) imposes an affirmative disability on Defendant, and child sex offenders generally, factor two favors treating its effect as punitive.

3. The traditional aims of punishment

The third factor examines whether section 11-9.4-1(b) promotes the traditional aims of punishment: retribution and deterrence. See *Mendoz-Martinez*, 372 U.S. at 168; *Smith v. Doe,* 538 U.S. 84; *People v. Leroy*, 357 Ill.App.3d at 552; and *Doe v. City of Lafayette, Ind.*, 377 F.3d at 781. While Justice Souter's concurrence in *Smith* succinctly describes how Alaska's sex offender registration scheme tips into retribution under this factor, his logic can aptly be applied in the case at hand. Justice Souter reasoned:

"The fact that the Act uses a past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims,

there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." 538 U.S. at 108-109 (Souter, J. concurring).

The supreme court of Oklahoma also employed the *Mendoza-Martinez* intent-effects test to analyze the constitutionality of a sex offender registration scheme in *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013), and found that the effect of the scheme was punitive and that retroactive application of it violated *ex post facto* principles. *Id.* at 1030. There, the court cited approvingly the Kentucky Supreme Court's use of the above quotation in analyzing Kentucky's restrictions on sex offenders under the fourth *Mendoza-Martinez* factor in *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky 2009). *Starkey*, 305 P.3d at 1028. A key element of the Kentucky court's analysis was the fact that the Kentucky restrictions applied without any individualized determination of risk to the community: "'When a restriction is imposed equally on all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.'" *Starkey*, 305 P.3d at 1028 (quoting *Baker*, 295 S.W.3d at 444).

Starkey relied on *Baker*'s analysis to determine that the lack of such a mechanism rendered Oklahoma's sex offender registration act (SORA) punitive under the third *Mendoza-Martinez* factor, noting that the SORA lacked a means by which a registrant could appeal registration requirements by showing he was no longer a danger to the community. *Starkey*, 305 P.3d at 1028. The Alaska Supreme Court similarly found that the Alaska SORA's lack of such a mechanism

weighed in favor of finding the SORA punitive. *Doe v. State*, 189 P.3d at 1014.

Similarly, while commenting on "registration and reporting duties" created by sex offender registration provisions, Justice Stevens observed that three characteristics of these laws were present which, in the aggregate, are not found in any civil sanction. Because Justice Steven's reasoning is universally applicable to any statute that targets sex offenders, it merits highlighting a portion of it here:

> "It is also clear beyond preadventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. *Smith.* 538 U.S. at 112 (Stevens, J. dissenting).

Importantly, no other civil sanction found in cases which have survived *ex post facto* challenges shared the feature that a prior offender's triggering conviction was both "a *sufficient* and a *necessary* condition for the sanction." *Id.* at 189 (Stevens, J. dissenting) (emphasis in original). It is difficult to imagine how a law which applies universally to every past offender of certain enumerated crimes, without any mechanism for distinguishing those offenders who might present the greatest risk of harm to minors, is not retributive in effect.

Section 11-9.4-1(b) is analogous to the SORA laws discussed above in that it provides no individualized determination of risk, but instead imposes a blanket ban on all child sex offenders, from all public parks, at all times. Moreover, there exists no mechanism by which a registrant can obtain an exemption from the statute

by demonstrating that he or she is no longer a danger to the community. As Justice Souter identified, there is something more than regulation of safety going on; and as *Starkey* and *Doe v. State* found, that something is retribution. As such, the third *Mendoza-Martinez* factor demonstrates the punitive effect of section 11-9.4-1(b).

4. Rational connection to a non-punitive interest

Because Defendant concedes that 720 ILCS 5/11-9.4-1(b) advances the legitimate, regulatory purpose of protecting the public from child sex offenders, this factor favors treating the statute as regulatory and non-punitive.

5. Excessiveness

Defendant committed the offense which resulted in his being characterized as a child sex offender over 12 years before subsection 11-9.4-1(b) took effect on January 1, 2011. Further, as of November 29, 2010, Defendant was no longer required to register under the Illinois Sex Offender Registration Act (730 ILCS 150/1) (C28). In other words, the State of Illinois made the determination that public safety will no longer be served by tracking Defendant's whereabouts and imposing the burdens of registration upon him. In fact, as far as the State is concerned, Defendant had served his time and met all of his obligations prior to the enactment of Public Act 96-1099, § 5. It follows that, as applied to Defendant, and as was the case in *Dowdell*, "any connection between the enforcement of the [statute] and protection of the public is attenuated at best, given the fact that the State has determined that [Defendant] is no longer required to register." *Dowdell*, 907 N.E.2d at 571.

While the statute is excessive as it applies to Defendant in particular, the statute is arguably excessive as compared to its non-punitive purpose in general, and that is so because the effect of 720 ILCS 5/11-9.4-1(b) is the same on all child sex offenders, without regard for: 1) how likely the particular offender is to reoffend; or 2) for how long their risk of reoffending may continue. Instead, each and every one of them is barred from entering all public parks, without a limiting provision or an exception provision, for the rest of his or her life. See *Doe*, 377 F.3d at 781 (Williams, J., dissenting) (three dissenting justices finding the ban from public parks imposed on Doe to be excessive in relation to its stated purpose since the ban was life-long). The effect of such a blanket restriction is out of all proportion to the laudable nonpunitive purpose of the law such that this factor weighs in favor of finding section 11-9.4-1(b) punitive in effect.

In summary, applying the analysis from *Smith v. Doe* should result in a finding that Public Act 96-1099, § 5 created additional punishment for child sex offenders by adding, *inter alia*, section 11-9.4-1 to the Criminal Code. The legislature was certainly entitled to create this new sanction if it had been limited to prospective application. However, the *ex post facto* prohibition exists to prevent the enactment of laws which "impose a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 27 (1981). The legislature could not therefore subject every child sex offender in Illinois to the new law. As the *Weaver* Court put it, through the *ex post facto* prohibition, the Framers sought to assure that "legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Id.* The ban is meant to restrict

governmental power by restraining arbitrary and potentially vindictive legislation. *Id.* Because section 11-9.4-1 would run afoul of these principles if it were applied to offenders who had committed the offense that caused them to be characterized a "child sex offender" prior to January 1, 2011 [the effective date of P.A. 96-1099], this Court should find that the statute under which defendant was charged was unconstitutionally applied in this case.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court reverse Defendant's conviction by finding 720 ILCS 5/11-9.4-1 to be facially unconstitutional in that it is a violation of substantive due process (Issue I) or, alternatively, by finding 720 ILCS 5/11-9.4-1 to be unconstitutional as applied to Defendant in that it violates the prohibition against *ex post facto* law (Issue II).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Katherine M. Strohl, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 35 pages.

KATHERINE M. STROHL
Assistant Appellate Defender

APPENDIX

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, OR)
Village or City of _____, Plaintiff)
Vs.)
Mark Pepitone, Defendant) Case No. 13 CM 844

ORDER OF CONDITIONAL DISCHARGE

ON THIS DAY, 6/11/14, the defendant having appeared in person (and by counsel) and having (pled guilty to/been found guilty of) the charge(s) of, Sex Offender Pres. in Public Park Class A Misdemeanor(s)/Felony, and the court being fully advised of the premises, does hereby enter judgment(s) of conviction and places the defendant on 24 months Conditional Discharge subject to the following conditions:

1. Shall pay total fines, fees and costs (including bond fee) in the amount of $ 400. JHD
   a. ☐ $25 shall go to AAIM Drunkbusters.
   b. If not otherwise specified, payment of fines, fees, and costs are due at least 14 (fourteen) days prior to the status date scheduled in Courtroom 305 / 314
2. Shall pay Restitution in the amount of $_____ on or before _____ to the Clerk of the Circuit Court for the benefit and use of _____.
3. Defendant's bond of $_____ is to apply toward payment of Restitution, if any, and then toward payment of fines, fees, and costs. Restitution shall be paid before any fines, fees and costs.
4. Shall not possess a firearm or other dangerous weapon.
5. Shall not violate any criminal statute of any jurisdiction.
6. ☐ Shall serve _____ days in the Will County Jail (Straight Time/Day for Day credit to apply), with credit for____ days actually served. Mittimus Issues/ Is Stayed until _____.
7. ☒ Shall perform 100 hours of community service work for a non-profit organization at a rate of 25 hours per month, and file written proof of completion. All community service work is subject to verification and any individual presenting or attempting to present false proof of community service work is subject to prosecution.
8. ☐ Shall attend a Victim Impact Program and file written proof of completion.
9. ☐ Shall obtain a drug & alcohol evaluation, file proof of same, and comply with the recommendations therein.
10. ☐ Shall complete _____ counseling and aftercare, and file written proof of completion.
11. ☐ Shall attend and successfully complete an Anger Management Program and file written proof of completion.
12. ☐ Shall have no contact with _____
    _____.
13. ☐ Shall refrain from having in his/her body the presence of any illicit drug prohibited by the Cannabis Control Act, or the Illinois Controlled Substances Act, unless prescribed by a physician, and [ ] Shall submit on any status date requested by the court samples of his/her blood/urine, or both, for tests to determine the presence of any illicit drug.
14. ☐ Shall appear at the Circuit Clerk's Office, Room 228, 14 West Jefferson Street, Joliet, Illinois 60432 between the hours of 8:30 am through 4:30 pm on _____ to show proof of payment of fines, fees, and costs and/or proof of community service work. **As to the status date scheduled in Room 228 only**: (1) if defendant **only** owes fines, fees and costs and pays **all** monies due at least 14 (fourteen) days prior to the status date, defendant's presence will be waived for the status date set above, (2) if defendant owes community service work **and** fines, fees and costs, if defendant pays **all** monies due **and** completes **all** community service work prior to the status date, defendant can bring in proof of same between the hours of 8:30 am through 4:30 pm on any court business day prior to the scheduled status date set above and, if defendant is in full compliance, defendant's presence will be waived for the status date set above.
    Note: A status date in courtroom 305 or 314 is also scheduled. If defendant has been ordered to Room 228 and is in full compliance with this order, defendant will not need to appear for the status date scheduled in Room 305 or 314 set forth in paragraph 15 below.
15. ☒ Shall appear in courtroom ~~305 / 314~~ 304 at 9:00 am on 9-10-14 for status on compliance with this order.
16. _____

This cause is hereby continued until 6/8/15 for termination of conditional discharge at 4:30 pm on said date.

DEFENDANT IN CUSTODY ON THIS CASE? _____ YES ☒ NO

Dated 6/11/14 ENTER Carmen Gloomis

ASA/Municipal Prosecutor _____

Defendant's Attorney APD Marks Defendant _____

FILED
14 JUN 11 PM 12:07
CLERK CIRCUIT COURT
WILL COUNTY ILLINOIS

White - Court **Yellow - Defendant** **Pink - Prosecutor**

Conditional Discharge Order Rev. 5/2013

3-14-0627

08/18/14 09:40:45 WCCH

STATE OF ILLINOIS)
)SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

State
Plaintiff
vs
Marc Pepitone
Defendant

CASE NO. 13 CM 844

COURT ORDER

This Matter Coming Before this Honorable Court upon Defendant's Motions, It is Hereby Ordered that:

(1) Defendant's Motion to Reconsider Sentence is granted;

(2) Defendant's Motion for the appointment of the Appellate Defender is Hereby Granted for purposes of Appeal.

FILED
AUG 13 2014
WILL COUNTY CIRCUIT CLERK
BY .....

Attorney or Party, if not represented by Attorney
Name Nicholas Plattos, APD
ARDC # _____
Firm Name _____
Attorney for △ Marc Pepitone
Address _____
City & Zip _____
Telephone (815) 727-8666

Dated August 20__
Entered _____
Judge

PAMELA J. MCGUIRE, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

08/15/14 11 06 48 WCCH

White – Court Yellow – Plaintiff Pink – Defendant 17 D Revised (06/06)

3-14-0627
08/15/14 11:06:46 WCCH

NOTICE OF APPEAL

APPEAL TAKEN FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN WILL COUNTY, ILLINOIS

APPEAL TAKEN TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT, ILLINOIS

The People of the State of Illinois

Plaintiffs-Appellees,
-vs-
Marc A Pepitone
Defendant-Appellant

Case No 13CM844 (People vs Marc Pepitone)

FILED
2014 AUG 14 P 2 55
CLERK OF THE CIRCUIT COURT
WILL COUNTY, ILLINOIS

☐ Joining Prior Appeal / ☑ Separate Appeal / ☐ Cross Appeal
(Mark One)

An appeal is taken from the Order of Judgment described below

(1) Court to which appeal is taken is the Appellate Court

(2) Name of Appellant and address to which notices shall be sent
NAME Marc A Pepitone
ADDRESS 101 Park Lawn St Bolingbrook, IL 60440

(3) Name and address of Appellant's Attorney on appeal
NAME Peter A Carusona, Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E Etna Rd
Ottawa, Illinois 61350
If Appellant is indigent and has no attorney, does he/she want one appointed?
Yes

(4) Date of Judgment or Order June 11, 2014
(a) Sentencing Date June 11, 2014
(b) Motion for New Trial June 11, 2014
(c) Motion to Vacate Guilty Plea N/A
(d) Other
Motion to reconsider - granted on August 13, 2014

(5) Offense of which convicted
Presence of a Child Sex Offender in a Public Park

(6) Sentence
24 months of conditional discharge/fines and costs/100 hours of community service work

(7) If appeal is not from a conviction, nature of order appealed from

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal

NHWN

(Signed)
(May be signed by appellant, attorney, or clerk of circuit court)

PAMELA J. McGUIRE
Clerk of the Circuit Court

NOAPL

cc State's Attorney
Attorney General

record. Senator Jacobs, on Senate Bill 2817. Madam Secretary, read the bill.

SECRETARY ROCK:

Senate Bill 2817.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR CLAYBORNE)

Senator Jacobs, to explain.

SENATOR JACOBS:

Thank you, Mr. President. This is some cleanup language brought to us by the Director of Insurance. I know of no known opposition. It came out of committee with full support. And we'd appreciate your support.

PRESIDING OFFICER: (SENATOR CLAYBORNE)

Is there any discussion? Seeing none, the question is, shall Senate Bill 2817 pass. All those in favor will vote Aye. Opposed will vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. There are 55 voting Yea, none voting Nay, none voting Present. Senate Bill 2817, having received the required constitution majority, is declared passed. Senator Althoff, on Senate Bill 2824. Madam Secretary, read the bill.

SECRETARY ROCK:

Senate Bill 2824.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR CLAYBORNE)

Senator Althoff, to explain the bill.

SENATOR ALTHOFF:

Thank you very much, Mr. President. Senate Bill 2824 limits the prohibition on "sex offenders" being in a public park or loitering near a public park to "sexual predators", as defined in the Sex Offender Registration Act, and "child sex offenders", as defined in the current child sex offender law, but excludes those convicted of criminal sexual abuse involving consensual sex when accused is under seventeen and the victim is between nine and sixteen years of age and when the victim is thirteen to sixteen years of age and accused is less than five years older. Convicted sex offenders are four times more likely to reoffend than other offenders. This propensity presents a significant threat to public safety. Current law places restrictions on where child sex offenders can reside and go. Senate Bill 2824 extends the prohibitions on child sex offenders to include being in a public park or loitering near a park. It also prohibits sexual predators, the most dangerous of other sex offenders, from being in public parks due to the danger they pose to society. Sexual predators are already subject to lifetime registration under the Sex Offender Registration Act. Public parks offer many opportunities for sexual predators and child sex offenders to have easy access to potential victims. Children and lone adults frequently use parks for recreational activities. By their nature, parks have many obscured views and other distractions that other opportunities -- or, that -- excuse me, that offer opportunities for sex offenders to access potential victims. This legislation is necessary to protect users of public parks from child sex offenders and sexual predators who use the attributes of a park to their advantage to have access to potential victims. I would ask for an Aye vote

or I'd be happy to answer any questions.

PRESIDING OFFICER: (SENATOR CLAYBORNE)

Is there any discussion? Seeing none, the question is shall Senate Bill 2824 pass. All those in favor will vote Aye. Opposed will vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. There are -- there are 54 voting Yea, none voting Nay, none voting Present. Senate Bill 2824, having received the required constitutional majority, is declared passed. Senator Radogno, on Senate Bill 2825. Out of the record. Senator Radogno, on Senate Bill 2826. Out of the record. Senate -- Senator Radogno, on Senate Bill 2827. Out of the record. Senator Radogno, on Senate Bill 2828. Out of the record. Senator Radogno, on Senate Bill -- I'm sorry, 2829. Out of the record. Senator Radogno, on Senate Bill 2830. Out of the record. Senator Radogno, on Senate Bill -- okay. Well, we'll skip -- skip all of Leader Radogno's bills and go over to the bottom of page 24. Senate Bill 2925. Senator Frerichs. Out of the record. Senator Althoff, for what purpose do you seek recognition?

SENATOR ALTHOFF:

Thank you, Mr. President. Might the record reflect that I intended to vote Aye on my own bill, Senate Bill 2824? Thank you, sir.

PRESIDING OFFICER: (SENATOR CLAYBORNE)

You're welcome. The record will so reflect. Senator Sandoval, on Senate Bill 2927. Out of the record. Senator Righter, on Senate Bill 2931. Out of the record. Senator Harmon, on Senate Bill 2934. Out of the record. Turning to top

Characteristics of rape/sexual assault incidents

- About two-thirds of rapes/sexual assaults were found to occur during the 12 hours from 6 p.m. to 6 a.m. (figure 2).

- Nearly 6 out of 10 rape/sexual assault incidents were reported by victims to have occurred in their own home or at the home of a friend, relative, or neighbor (figure 3).

- More than half of rape/sexual assault incidents were reported by victims to have occurred within 1 mile of their home or at their home.

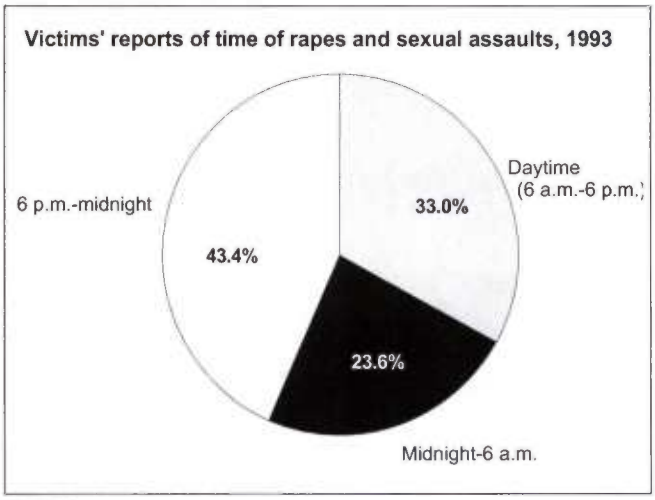

Figure 2

- About 1 of every 16 rape/sexual assault victims reported that a firearm was present during the commission of the offense. Most victims (84%), however, reported that no weapon was used by the offender.

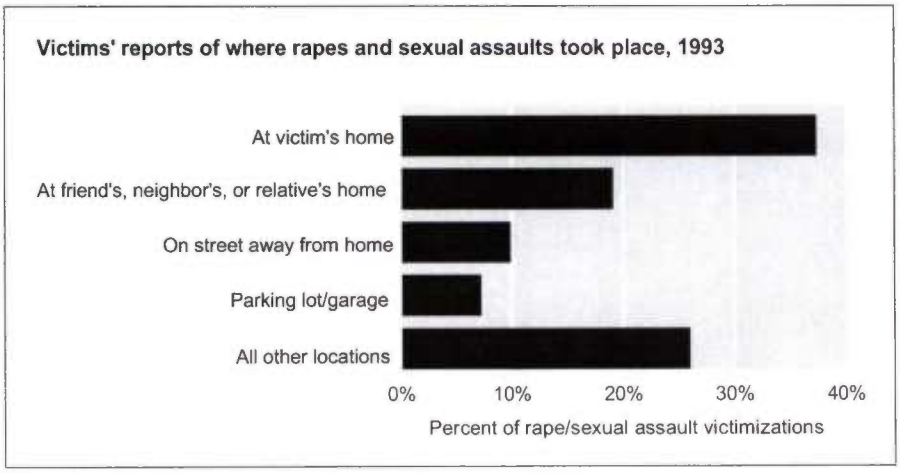

Figure 3

The narrative statements of circumstances are classified into 32 categories, including rape and other sex offenses. *Other sex offenses* includes sexual assaults such as statutory rape, sodomy, and incest and attempts to commit these crimes. Excluded from both of these categories of circumstances are commercial sex offenses such as prostitution or commercial vice.

Age of known offenders in all murders and in murders involving sexual assault, 1976-94

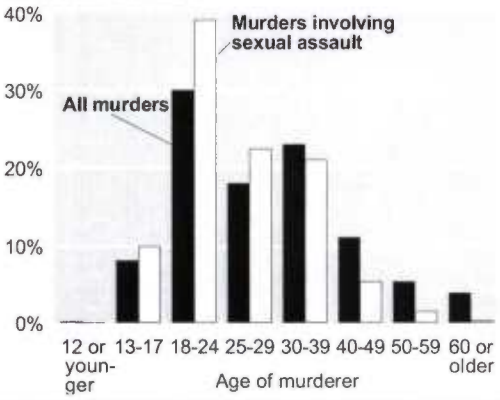

Figure 29

• Between 1976 and 1994 there were an estimated 405,089 murders in the United States. Of these, the circumstances surrounding the murder are known in 317,925, or 78.5%. Among the cases with known circumstances, an estimated 4,807, or 1.5%, were classified as involving rape or another sex offense.[3]

Table 5. Characteristics of known offenders in murders involving sexual assault, 1976-94

Offender characteristic	Murders	
	All	Sexual assault
Sex		
Male	86.6%	95.0%
Female	13.4	5.0
Race		
White	47.8%	58.0%
Black	50.3	39.9
Other	1.9	2.1
Age		
12 or younger	.2%	.1%
13 to 17	8.1	9.9
18 to 24	30.1	39.1
25 to 29	18.0	22.5
30 to 39	23.1	21.1
40 to 49	11.1	5.4
50 to 59	5.4	1.5
60 or older	3.9	.4
Average	31 yrs	26 yrs

• In 1986 sexual assault murders accounted for 1.8% of murders with known circumstances; in 1994, an estimated 0.7% of murders involved sexual assault, the lowest percentage in the 19 years for which SHR data are available (figure 28).

• Known offenders in sexual assault murders are more likely to have been male than is true for murders in general (table 5). Sexual assault murders are also more likely than all murders to involve a white offender (58% versus 48%).

• Offenders in sexual assault murders are on average about 5 years younger than all murderers. More than 60% of sexual assault murderers, but less than 50% of all murderers, are between ages 18 and 29 (figure 29).

[3]Murders classified as involving rape or other sex offenses will be referred to as *sexual assault murders.*

Introduction

In 1994, prisons in 15 States released 9,691 male sex offenders. The 9,691 men are two-thirds of all the male sex offenders released from State prisons in the United States in 1994. This report summarizes findings from a survey that tracked the 9,691 for 3 full years after their release. The report documents their "recidivism," as measured by rates of rearrest, reconviction, and reimprisonment during the 3-year followup period.

This report gives recidivism rates for the 9,691 combined total. It also separates the 9,691 into four overlapping categories and gives recidivism rates for each category:

- 3,115 released rapists
- 6,576 released sexual assaulters
- 4,295 released child molesters
- 443 released statutory rapists.

The 9,691 sex offenders were released from State prisons in these 15 States: Arizona, Maryland, North Carolina, California, Michigan, Ohio, Delaware, Minnesota, Oregon, Florida, New Jersey, Texas, Illinois, New York, and Virginia.

Highlights

The 15 States in the study released 272,111 prisoners altogether in 1994. Among the 272,111 were 9,691 men whose crime was a sex offense (3.6% of releases).

On average the 9,691 sex offenders served 3½ years of their 8-year sentence (45% of the prison sentence) before being released in 1994.

Rearrest for a new sex crime

Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime. Within the first 3 years following their release from prison in 1994, 5.3% (517 of the 9,691) of released sex offenders were rearrested for a sex crime. The rate for the 262,420 released non-sex offenders was lower, 1.3% (3,328 of 262,420).

The first 12 months following their release from a State prison was the period when 40% of sex crimes were allegedly committed by the released sex offenders.

Recidivism studies typically find that, the older the prisoner when released, the lower the rate of recidivism. Results reported here on released sex offenders did not follow the familiar pattern. While the lowest rate of rearrest for a sex crime (3.3%) did belong to the oldest sex offenders (those age 45 or older), other comparisons between older and younger prisoners did not consistently show older prisoners' having the lower rearrest rate.

The study compared recidivism rates among prisoners who served different lengths of time before being released from prison in 1994. No clear association was found between how long they were in prison and their recidivism rate.

Before being released from prison in 1994, most of the sex offenders had been arrested several times for different types of crimes. The more prior arrests they had, the greater their likelihood of being rearrested for another sex crime after leaving prison. Released sex offenders with 1 prior arrest (the arrest for the sex crime for which they were imprisoned) had the lowest rearrest rate for a sex crime, about 3%; those with 2 or 3 prior arrests for some type of crime, 4%; 4 to 6 prior arrests, 6%; 7 to 10 prior arrests, 7%; and 11 to 15 prior arrests, 8%.

Rearrest for a sex crime against a child

The 9,691 released sex offenders included 4,295 men who were in prison for child molesting.

Of the children these 4,295 men were imprisoned for molesting, 60% were age 13 or younger.

Half of the 4,295 child molesters were 20 or more years older than the child they were imprisoned for molesting.

On average, the 4,295 child molesters were released after serving about 3 years of their 7-year sentence (43% of the prison sentence).

Compared to the 9,691 sex offenders and to the 262,420 non-sex offenders, released child molesters were more likely to be rearrested for child molesting. Within the first 3 years following release from prison in 1994, 3.3% (141 of 4,295) of released child molesters were rearrested for another sex crime against a child. The rate for all 9,691 sex offenders (a category that includes the 4,295 child molesters) was 2.2% (209 of 9,691). The rate for all 262,420 non-sex offenders was less than half of 1% (1,042 of the 262,420).

Of the approximately 141 children allegedly molested by the child molesters after their release from prison in 1994, 79% were age 13 or younger.

Assuming that the 209 sex offenders who were rearrested for a sex crime against a child each victimized no more than one child, the number of sex crimes they committed against children after their prison release totaled 209. Assuming that the 1,042 non-sex offenders rearrested for a sex crime against a child after their release also victimized only one child, the number of sex crimes against a child that they committed was 1,042. The combined total number of sex crimes is 1,251 (209 plus 1,042 = 1,251). Released sex offenders accounted for 17% and released non-sex offenders accounted for 83% of the 1,251 sex crimes against children committed by all the prisoners released in 1994 (209 / 1,251 = 17% and 1,042 / 1,251 = 83%).

Rapists and sexual assaulters

Following their 1994 release, 1.4% of the 3,115 rapists (44 men) and 2.5% of the 6,576 sexual assaulters (165 men) were rearrested for molesting a child (table 34).

Child molesters and statutory rapists

Within 3 years following their release from prison in 1994, 141 (3.3%) of the released 4,295 child molesters and 11 (2.5%) of the 443 released statutory rapists were rearrested for molesting another child (table 35). For the reasons outlined earlier, these percentages undercount actual rearrest rates by a few percentage points at most.

Each of the 141 released molesters rearrested for repeating their crime represented at least 1 child victim. Of the conservatively estimated 141 children allegedly molested by released child molesters, 79% were age 13 or younger, 9% were 14 or 15 years of age, and 12% were ages 16 or 17.

Table 35. Of child molesters and statutory rapists released from prison in 1994, percent rearrested for a sex crime against a child, and percent of their alleged victims, by age of victim

	Percent rearrested for a sex crime against a child within 3 years	
	Child molesters	Statutory rapists
Total	3.3%	2.5%
Number released	4,295	443
Age of child that sex offender was charged with molesting after release	Percent of allegedly molested children	
13 or younger	79.2%	30.0*%
14-15	9.1	10.0*
16-17	11.7	60.0*
Number of molested children	141	11

Note: The 4,295 child molesters were released in 15 States; the 443 statutory rapists in 11 States. Because of overlapping definitions, all statutory rapists also appear under the column "child molesters." The approximate ages of the children allegedly molested by the 141 prisoners after their release were available for 54.6% of the 141. "Number of molested children" was set to equal the number of released sex offenders rearrested for child molesting.
*Percentage based on 10 or fewer cases.

Prior arrest for a sex crime against a child

All sex offenders

After their 1994 release from prison, sex offenders with a prior arrest for child molesting were more likely to be arrested for child molesting (6.4%) than those who had no arrest record for sex with a child (1.7%) (table 36).

Table 36. Of sex offenders released from prison in 1994, percent rearrested for a sex crime against a child, by prior arrest for a sex crime against a child and type of sex offender

Arrest prior to 1994 release	All	Rapists	Sexual assaulters
Percent rearrested for a sex crime against a child within 3 years			
Total	2.2%	1.4%	2.5%
The arrest responsible for their being in prison in 1994 was —*			
Their first arrest for a sex crime against a child	1.7	1.3	1.9
Not their first arrest for a sex crime against a child	6.4	4.0	6.9
Percent of released prisoners			
Total	100%	100%	100%
The arrest responsible for their being in prison in 1994 was — *			
Their first arrest for a sex crime against a child	89.7	94.3	87.5
Not their first arrest for a sex crime against a child	10.3	5.7	12.5
Total released	9,691	3,115	6,576

Note: The 9,691 sex offenders were released in 15 States.
*By definition, all sex offenders had at least 1 arrest prior to their release: namely, the arrest responsible for their being in prison in 1994. "First arrest for a sex crime against a child" pertains exclusively to those released prisoners whose first arrest was the sex offense arrest responsible for their being in prison in 1994.

ILLINOIS STATE POLICE
Division of Operations

Pat Quinn
Governor

Jonathon E Monken
Acting Director

November 29, 2010

NOTICE OF EXPIRATION OF ILLINOIS SEX OFFENDER REGISTRATION REQUIREMENT

MR MARC PEPITONE
101 PARKLAWN COURT
BOLINGBROOK, ILLINOIS 60440

You are no longer required to register under the Illinois Sex Offender Registration Act (730 ILCS 150/1) If you move to another state, it is your responsibility to contact law enforcement authorities in that state to verify you are not required to register there Sex offender registration laws vary from state to state

All records pertaining to your registration have been, or will be, removed from our public website and related databases A copy of this document is being provided to your last registering law enforcement agency

Be advised, any individual who is convicted of a second subsequent offense which requires registration after July 1, 1999 will be required to register as a sex offender for life in Illinois Should you again become liable for registration under the Act, your registration requirement will be activated

If you were convicted as a 'child sex offender', you must continue to adhere to the following Illinois criminal code statutes (please note that only a portion of the statutes are listed below, please refer to the actual statutes at www ilga gov for clarification)

- **720 ILCS 5/11-9.3** It is unlawful for a child sex offender to knowingly be present, reside or loiter within 500 feet of any school building, school ground, or on a school conveyance used to transport students to or from school-related activities or as defined by law, and
- **720 ILCS 5/11-9.4** It is unlawful for a child sex offender to reside, approach, contact, loiter, or communicate with a child within public park zones or as defined by law It is unlawful for a child sex offender to knowingly reside within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age It is also unlawful for a child sex offender to knowingly operate, manage, be employed by, volunteer at, be associated with, or knowingly be present at any facility providing programs or services exclusively directed towards persons under the age of 18

Tracie H Newton
Sex Offender Registration Unit

DEFENDANT'S EXHIBIT B

cc Bolingbrook Police Department
File

Sex Offender Registration Unit, 801 South 7th Street, Suite 200-S, P O Box 19461, Springfield, Illinois 62794

No. 3-14-0627

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MARC A. PEPITONE, Defendant-Appellant.	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois No. 13-CM-844 Honorable Carmen Goodman, Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Mr. Lawrence Bauer, Deputy Director, State's Attorney Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350

Mr. Marc A. Pepitone,C/O Christy's Motel, 326 E. U.S. Rt. 20, Michigan City, IN 46360

I hereby certify that on April 14, 2016, I filed an original and nine copies of the Brief and Argument and supporting documents with the Clerk of the Appellate Court, Third Judicial District, and that opposing counsel has been electronically served and one courtesy printed copy was provided to the State's Attorneys Appellate Prosecutor and one copy was mailed to appellant by depositing in the mail in Ottawa, Illinois, with sufficient prepaid postage and addressed as indicated above.

Esmeralda Cruz

Legal Secretary
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us

SUBSCRIBED AND SWORN
to before me on April 14, 2016.

Roberta J Eisert

NOTARY PUBLIC

Official Seal
Roberta J Eisert
Notary Public State of Illinois
My Commission Expires 02/19/2018