



STATE SENATOR

**Eric Wimberger**

DISTRICT 30

**State Senator Eric Wimberger**

**Testimony before the Senate Committee on Judiciary and Public Safety**

**Re: counting convictions and findings for the purpose of the sex offender registry and notifications.**

Thank you Senator Wanggaard and committee members for holding a hearing today on Senate Bill 874 which codifies that each conviction or finding of a sex offense is counted separately, even if they were part of the same proceeding, occurred on the same date, or were included in the same complaint.

Until early last year, Wisconsin law operated under the guidance of a formal opinion from former Attorney General Schimel, which stated that people who were convicted of multiple counts of a sex offense stemming from a single event are “repeat offenders” and are therefore required to register as sex offenders for life. However, this changed when the Wisconsin State Supreme Court issued a ruling overturning this interpretation of state statute, and as a result, the Department of Corrections (DOC) has begun releasing certain sex offenders from lifetime GPS tracking.

This legislation aims to codify the practices established before the Supreme Court decision and ensure that each conviction or finding is counted separately, even if they were part of the same proceeding, occurred on the same date, or were included in the same complaint.

Additionally, Senate Bill 874 is retroactive and the Department of Corrections will have 60 days to identify persons who were released from the registry requirement, and notify these persons that they must register as sex offenders. The offenders will then have 60 days after being notified to register or they are guilty of a Class H felony.

I want to thank Rep. Born and the Department of Corrections for their efforts in helping draft this bill. We must work to address this oversight and ensure that DOC continues to monitor those who should be under supervision under Wisconsin state law.

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# MARK BORN

STATE REPRESENTATIVE • 39<sup>TH</sup> ASSEMBLY DISTRICT

**Testimony on SB 874/AB 944**  
**Senate Committee on Judiciary and Public Safety**  
**January 30, 2024**

Thank you Chairman Wanggaard and committee members for allowing me to provide testimony in support of Senate Bill 874/Assembly Bill 944.

I am proud to have worked with my legislative colleagues to author this important piece of legislation focused on protecting our communities.

In 2017 Attorney General Schimel issued an Attorney General Opinion (OAG-02-17), which stated that people who are convicted of multiple counts of a sex offense stemming from single event are “repeat offenders” and are therefore required to register as sex offenders for life. However, earlier this year the Wisconsin State Supreme Court issued a ruling overturning this interpretation of state statute, and as a result, the Department of Corrections (DOC) has begun releasing certain sex offenders from lifetime GPS tracking.

This legislation codifies the opinion established in OAG-02-17 before the recent Wisconsin Supreme Court decision and ensures each conviction or finding is counted separately, even if they were part of the same proceeding, occurred on the same date, or were included in the same complaint.

It is important to note this legislation is retroactive and DOC will have 60 days to identify persons who were released from the registry requirement, and notify these persons they must register as sex offenders. The offenders have 30 days after being notified to register or they are guilty of a Class H felony.

Sen. Wimberger and I drafted this legislation in consultation with the Department of Corrections and I appreciate their efforts to address this important issue.

Thank you again for allowing me to provide testimony in support of this legislation and for your consideration of SB 874/AB 944.



# WISCONSIN DEPARTMENT OF CORRECTIONS

Governor Tony Evers / Secretary Kevin A. Carr

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To: Chairman Wanggaard, Senate Committee on Judiciary and Public Safety

From: Anna Neal, Legislative Advisor, Wisconsin Department of Corrections

Date: January 30, 2024

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RE: Testimony in Support of Senate Bill 874/Assembly Bill 944 Relating to: counting convictions and findings for the purpose of the sex offender registry and notifications.

The Department of Corrections (DOC) appreciates the opportunity to testify in support of Senate Bill 874/Assembly Bill 944.

As you know, the DOC administers the Sex Offender Registry under Wisconsin State Statute s. 301.45 and GPS tracking of certain individuals under Wisconsin State Statute 301.48. This includes providing notification to law enforcement of certain individuals who meet the criteria under Wisconsin State Statute s. 301.46 (2m) commonly referred to as a Special Bulletin Notification (SBN). In addition, Wisconsin State Statute s. 301.48 requires the Department of Corrections to place certain sex offenders on lifetime Global Positioning System (GPS) tracking.

The current statutory language utilized to determine if an individual is required to comply with lifetime registration includes the criterion that "the person has, on 2 or more separate occasions, been convicted of or found not guilty or not responsible by reason of mental disease or defect for a sex offense, or for a violation, or the solicitation, conspiracy or attempt to commit a violation, of a federal law, a military law, a tribal law or a law of any state that is comparable to a sex offense." We commonly refer to this language as "Two Strikes." Similar statutory language requiring convictions on "2 or more separate occasions" is also used to determine whether the Department is required to send local law enforcement a Special Bulletin Notification upon an individual's release, which in turn may require the person to be placed on lifetime GPS tracking.

In the judicial system, the term "counts" refers to separate charges or allegations within a single criminal complaint. Each count represents a different criminal offense or violation of the law that took place, and each is counted as an independent charge. A person can be convicted or acquitted of each count separately.

In an effort to obtain clarification on the term "2 or more separate occasions", the Department relied on the 2017 Attorney General opinion, which interpreted "on 2 or more separate occasions" as two or more convictions, regardless of whether the convictions arose from multiple counts filed within the same criminal case or whether the convictions occurred at the same hearing.

In May of 2023, the Wisconsin Supreme Court issued a decision in *State v. Rector*. Under *Rector*, the Wisconsin Supreme Court has held that a person convicted of multiple sex offenses, that were charged in the same case and convicted at the same hearing, was not convicted “on 2 or more separate occasions.”

While the *Rector* decision itself was aimed at providing clarification for a registrant’s length of registration on the sex offender registry, the same “2 or more separate occasions” language interpreted by the court will now apply to the mandatory law enforcement notification statute for sex offender registrants, known as Special Bulletin Notifications. Wisconsin State Statute s. 301.46(2m) provides for mandatory notifications to local law enforcement when certain individuals that have been convicted, or found not guilty by reason of mental disease or defect, of a sex offense “on 2 or more separate occasions” reside, are employed, or attend school, and regularly travel through their communities. In addition, under current law, those that are subject to mandatory law enforcement notifications, are also subject to lifetime GPS tracking.

The *Rector* decision may limit or reduce the notifications law enforcement agencies receive from the Department regarding the release of individuals who have been convicted of multiple counts and the Department’s ability to require GPS tracking of these individuals. Our agency is concerned the change in interpretation is not reflective of communities’ and law enforcement’s expectations regarding notice and monitoring of sex offender registrants. While our agency has moved forward with the implementation of *Rector*, we continue to utilize our discretionary authority, when applicable, to do appropriate notifications to law enforcement and continue to monitor individuals through GPS tracking, in the interest of public safety.

AB 944/SB 874 would codify the attorney general opinion, OAG-02-17, and clarify the statutory phrase “2 or more separate occasions” in context of the sex offender registry and notification requirements. The bill would make clear that each conviction or finding is to be counted separately, even if they were a part of the same court proceeding, occurred on the same date, or were included in the same complaint.

Thank you.



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Senate Committee on Judiciary & Public Safety  
2023 Senate Bill 874  
Tuesday, January 30, 2024

Chairman Wanggaard and members,

Thank you for having a hearing on 2023 Senate Bill (SB) 874. SB 874 seeks to codify an Attorney General's Opinion (OAG) which interpreted the current statute regarding the counting of convictions for the sex offender registry. The OAG interpretation was found by the Supreme Court of Wisconsin not to meet the plain language of the statute in *State v. Rector*. As the case largely rested on the language of the statute, it is within the purview of the legislature to consider changes to that statute. The State Public Defender (SPD), in *Rector*, filed a friend of the court brief arguing beyond the statutory interpretation that the policy of lifetime registration is best determined by a judge based on the individual facts of the case before them. While lifetime registration is currently mandated for more serious sex offenses, the court has discretionary authority with less serious sex offenses to determine whether 15 years or lifetime registration is appropriate based upon the individual facts and circumstances of a given case. SB 874 eliminates that discretion if a person has two convictions for non-mandatory lifetime registration sex offenses. The current statutory language, as clarified by *Rector*, focuses on repeat offenders—i.e., convicted on two or more separate occasions—whereas the proposed language focuses on the number of charges without consideration of whether the person engaged in repeat conduct. The question in the *Rector* case was “can we,” but with SB 874, the question becomes “should we.”

Under current law, an individual who has been convicted of a sex offense is subject to criminal penalties including prison, extended supervision, and inclusion on the sex offender registry. For the more serious sex offenses—notably first- or second-degree sexual assault of either an adult or a child—the statutes already mandate lifetime registration; the *Rector* decision didn't change that. But for some offenses judges have been provided with discretion: they can decide whether to place an individual defendant on the registry for either 15 years or for life. The registry is meant as a non-punitive measure for the protection of the public once that individual is no longer under the supervision of the Department of Corrections. And, in fact, a 15-year registry term doesn't start running until the person has completed any supervision, so in practice a 15-year term on the registry may run as much as 40 years after the original conviction. An individual on the registry, particularly those for lifetime, is often required to wear a GPS monitor.

In reality, while it may be considered a non-punitive measure in an effort to comply with case law, it is a significant collateral consequence of conviction. Most directly, failure to register,

update the registry, or removal or tampering with the GPS device are all punishable as a felony penalty. Removing or tampering with a GPS device is as often as not a technology error as it is a willful attempt to avoid monitoring. Technology problems with the device and having a reliable connection to a cellular network, particularly in rural parts of the state, often lead to false reports of monitoring violations that, at best, require a local law enforcement response, and at worst result in criminal charges being filed. Even those whose GPS devices have simply malfunctioned often end up in jail while the situation is resolved. So though the individual may no longer be under the direct control of the Department of Corrections, lifetime registration is akin to perpetual quasi-supervision.

Beyond the exposure to criminal charges, there are documented negative impacts on housing, employment, and the physical well being of individuals who are on the registry and being monitored. In a survey by the United States Department of Justice, 83% of respondents said they had been excluded from residences due to their registration status. More than 150 Wisconsin municipalities have residency restrictions. In some cases, those restrictions exclude over 90% of the city from possible residency. Any residence that doesn't have adequate cell phone coverage is also practically excluded. And the monitors themselves are obtrusive, essentially the modern day visual and auditory equivalent of a scarlet letter.

The public safety benefit of the sex offender registry and GPS monitoring is fact specific on a case-by-case basis. First, the recidivism rates among sex offenders has declined since 1992 and are lower compared to the overall offender population. That drop pre-dates the 1995 law that created the sex offender registry. A 2015 report from the Department of Corrections also noted that 75% of sex offenders who re-offend do so within 5 years. In addition, the sex offender registry is based on preventing stranger-on-stranger sexual abuse. In fact, in 93% of sexual abuse cases against children and teens, the victim knows the perpetrator. Finally, available risk assessment tools for sex offenders, such as the Static 99R, find that the number of index offenses is unrelated to recidivism, but that prior sentences strongly correlates to reoffense.

There is also a multi-faceted cost to SB 874. The maintenance of the registry as well as passive and active GPS tracking has a significant workload impact on DOC. In addition, the response to violations is provided by local law enforcement agencies statewide. Not only does that place a workload demand on those agencies, but it creates a false sense of security when the response times could be 20-30 minutes or more, especially in rural areas. And while all of this has an impact in the current system, SB 874 is likely to cause the number of individuals on the registry and being monitored to grow exponentially as individuals increases and they stay on the list for decades. Finally, it is worth noting that a cost is assessed to the individual for the GPS monitor. It can be as much as hundreds of dollars per month.

While the bill itself is relatively straightforward, there is one provision of note. On page 4, line 18, if a person served a sentence in a Wisconsin prison, the special bulletin notification is provided to law enforcement for any county or jurisdiction in which the person will be residing, employed, or attending school. It is also required, as it is in current law, that notification be given to jurisdictions through which the person will be regularly traveling. This notification is not required if the individual moves to Wisconsin from another state (page 5, line 17).

While the traveling provision disparity is in current statute, the workload impact on law enforcement agencies will increase as the number of people on lifetime monitoring increases and exist for many years. Which ultimately also reduces the public safety benefit of registration and

monitoring. If everyone is considered a risk to the point of lifetime monitoring, it dilutes the efficacy of tracking those that a court determined are of higher risk based on the individual facts of that case.

In addition to this testimony, there is an article from The Capital Times in April 2022<sup>1</sup> and the amicus brief filed by the State Public Defender<sup>2</sup> in Rector which provide additional context and information on the issues addressed in SB 874. These documents are good primary resources and provide additional links to other source material.

In summary, our concerns related to SB 874 are that it is not an effective change to benefit public safety and comes at a high literal cost for those enforcing it and an equally high figurative cost for those subject to it. Keeping in place the current scheme that allows judicial discretion is the best way to balance future potential risk and the chance for rehabilitation. Thank you for the opportunity to speak on SB 874.

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<sup>1</sup> Nicholas Garton & Jessie Opoient, *Sex Offenders Placed on Lifetime GPS Tracking Fight Reinterpretation of Wisconsin Law*, The Capital Times (Apr. 20, 2022), [https://captimes.com/news/sex-offenders-placed-on-lifetime-gps-tracking-fight-reinterpretation-of-wisconsin-law/article\\_48187b6c-1b40-5a2c-91f7-d3e20a66c69d.html](https://captimes.com/news/sex-offenders-placed-on-lifetime-gps-tracking-fight-reinterpretation-of-wisconsin-law/article_48187b6c-1b40-5a2c-91f7-d3e20a66c69d.html)

<sup>2</sup> <https://acefiling.wicourts.gov/document/eFiled/2020AP001213/535849>

Senate Bill 874--Wisconsin Committee on Judiciary and Public Safety

Public Hearing set for Tuesday, January 30, 2024

Members of the Judiciary and Public Safety Committee,

I am writing in opposition to SB 874.

My husband, John Nerbonne, entered a plea-bargained guilty plea to possession of child pornography in 2018 in St. Croix County Circuit Court. His sentence included prison time and 5 years of community supervision. He was granted early release from Stanley Correctional in April of 2020. Only then did he learn that the Department of Corrections was enforcing the Attorney General Schimel's opinion of 2017 requiring him to endure lifetime Sex Offender Registry and wear a GPS ankle bracelet. Neither we nor our attorney were aware (or advised) of the mandatory GPS penalty being part of his plea bargain.

John was a first-time offender, a former business owner, an upstanding community citizen, a family man but also a man overwhelmed by major depression and anxiety. He chose to escape the reality of life by hoarding pornography which led to his collecting child pornography. A 70+ year old depressed man hiding in his basement collecting pornography on his computer. No contact with the outside world—just downloading from the internet. Guilty as charged and he took a plea bargain for his "single occasion" crime.

Only when he was released did he learn about the GPS bracelet and the newly enacted opinion that I believe is cruel and inhumane treatment. It all predicated on the definition of the phrase "separate occasions". He was arrested, charged, entered a guilty plea and served time for a single "separate occasion". Never was he considered a repeat offender nor deemed a danger by any psycho-sexual or criminal justice evaluation.

But he's nearly 80 years old now and wears an ankle bracelet that has malfunctioned multiple times. He's been taken to the St. Croix County Jail and held without his medications, forced into a jail setting during the peak of Covid-19 and lives in constant fear of our front door being smashed in by deputies with a warrant for his arrest because of an ankle bracelet malfunction.

There was hope for him when the Wisconsin Supreme Court ruled in 2023 that the definition of "separate occasions" meant just that. A lifetime Registry and GPS for a repeat offender—defined by multiple arrests, multiple trials, multiple convictions and a history of offenses. John's single arrest, etc. would mean he would complete his community supervision and be able to resume a life without fear and problems caused by the GPS equipment.

SB 874 is a slick way to override the Wisconsin Supreme Court's correct ruling that returned sex offender sentencing to what it was meant to be prior to the Schimel opinion. The repeat offenders and high risk deviants would be punished and society would supposedly be protected with GPS monitoring. SB 874 brings back the bad policy that's making my husband's life miserable. What is it accomplishing? How much does it cost the state to keep John in this draconian system? It is wrong and this bill is wrong.

I strongly oppose passage of SB 874.

Evalyn Nerbonne

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Robert E. Thibault II  
Writing for the Board of Prison Action Milwaukee  
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To: The Wisconsin State Senate Committee on Judiciary and Public Safety RE: Bill 874  
The Wisconsin State Assembly Committee on Criminal Justice and Public Safety RE: Bill 944

We are writing to vehemently speak against Wisconsin Senate Bill 879 and Assembly Bill 944. Both reference "counting convictions" for the purpose of the sex offender registry and notifications. We find it extremely disturbing that legislators would propose this at the urging of the Wisconsin Department of Corrections. These bills would effectively create 'life sentences' for individuals whose offenses may not rise to the level of deserving such extreme punishment. The bills seek to somehow negate the decision of the Wisconsin State Supreme Court in the *State v. Rector* decision (2020AP1213-CR May 23, 2023)

As we understand it, the purpose for listing someone on the Registry for the remainder of their lives was to give the public a warning regarding individuals who had repeatedly offended. The Rector decision specifically ruled that multiple counts in one single case or occasion did not qualify as a repeat offense. Wisconsin's criminal repeater statute, § 939.62(2), reads:

The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during the same period, which convictions remain unreversed.

Also: "the court determined that the purpose of repeater statutes, "regardless of the particular phraseology", is to serve as a warning to first offenders. The infliction of more severe punishment for a repeater is based upon his persistent violation of the law after conviction for previous infractions."

The United States Supreme Court also recently considered the ordinary meaning of the word "occasion" in Wooden v. United States, determining that "occasion" commonly refers to an "event, occurrence, happening, or episode" which "may itself encompass multiple, temporally distinct activities." 142 S. Ct. 1063, 1069 (2022).

The effect of listing an individual on the Registry for life, simply due to the number of 'counts' contained in a criminal complaint has can punish someone disproportionately. While the statute regarding the Registry itself does not contain any specific punitive measures, the effect of being listed on the Registry can be devastating. Other laws and regulations, devised by any entity who wishes to, can leave people homeless and unemployed without understanding that there are different levels offenses.

Many other states have addressed this issue and have found reasonable and proportionate levels in their registries, rather than the WI DOC approach of 'one size fits all'. Nationally there is a recognized 'Three Tier' approach that differentiates based on the severity of the offense. In Wisconsin, judges have been given an option, based on their understanding of the case. Sentencing an individual to 15 years on the Registry after the completion of their sentence or lifetime registration was up to the Court's informed

judgment. These bills remove the informed judgment of the Court and impose the DOC's drastic measures for everyone.

At this point, a hypothetical case may give some deeper sense of the unintended consequences of these bills. Suppose:

An 18-year-old high school senior is romantically involved with a 16-year-old high school junior. Not an unusual situation. The two become sexually active and engage in that behavior on multiple occasions. Somehow, this becomes known, and the 18-year-old is charged with Sexual Assault of a Minor. The court judging this case has several options in how drastic a sentence it imposes on the 18-year-old. If these bills are put into effect, the Court would have no choice about the decision on the Registry. Because there are multiple occasions or "counts", the decision would be for lifetime registration.

The individual would immediately be restricted as to where they live, go to school, or work. Different municipalities or government agencies could restrict their movements or even what stores they go to. Having their identity publicly posted may lead to them being physically attacked or individuals attempting to scam or extort money from them.

Let's suppose that after the completion of the Court's sentence the two individuals decide to continue their relationship, and perhaps even marry. The couple would both then have many of the restrictions applied to both of them, especially where they live and go as a couple. In the course of life, the couple have a child. When the time comes for the child to go to school, the one parent will, in most cases, not be allowed on school grounds. Not to pick up a child from school (even in an emergency) or attend a school play or sporting event. Exceptions can be made, but many schools are reluctant to cooperate with the provisions because they feel they may be liable or have other parents complain. This puts a strain on the life of a family and can cause embarrassment and other problems for the child.

Let's go further down the timeline. The couple's child is now grown and has a child of their own. But a grandparent is on the Registry. What's the effect on the grandchild? The grandparent is not allowed to attend the grandchild's activities and the family of the child's spouse may not understand the circumstances of the original conviction. That could make for some very awkward family gatherings.

The individual is now 80 years old. Still on the Registry. They are in need of full-time medical care. But, being on the Registry, no nursing home or care facility will accept them. What are they to do? All this, because of a romantic relationship when they were in high school?

This may seem to be an exaggeration, but it is well within the experiences of people Prison Action Milwaukee is working with. Are we suggesting that individuals should not be punished for serious offences? Not at all. We are suggesting that punishment should be proportionate to the offense.

Our hope and suggestion is that Wisconsin's state legislators take these bills back into the committee process and do more research. Look at what other states have done and used successfully. Create a system that presents a proportionate level of supervision, depending on the offense. Stop condemning people for life. Very few of the individuals involved in the Registry present the level of danger to society that these bills suggest. It's more important to get this right than to push it through quickly.

Dear Senator Wanggaard:

I am one of your constituents (Village of Rochester), and I am reaching out to discuss SB874. I am a clinical child psychologist and a forensic psychologist, and while I appreciate your efforts to keep our communities safe, I have some reservations about this bill.

SB874 seems to overlook the diverse nature of individuals convicted of sexual crimes. Research shows that personalized approaches to handling sexual abuse are most effective. These individuals don't fit a single profile, and a one-size-fits-all response isn't practical.

It's important to note that most sexual offenses are committed by acquaintances or family members, not strangers. Also, according to a 2019 Bureau of Justice Statistics report, less than 10% of adults convicted of sexual offenses were re-arrested for a similar offense after nine years.

Michael Caldwell, a psychologist at UW-Madison, published a paper in 2016 that examined juvenile sex offender recidivism rates for the past 15 years. He tracked youth who had been placed at the Mendota youth treatment program (a program operated in conjunction with the Dept. of Corrections) and found a roughly 2.4 % sexual recidivism rate. This is an extremely low rate of reoffending.

To the extent that SB874 would apply retroactively to persons who committed offenses as juveniles, such requirements would be devastating to those youth. Research demonstrates that while many adolescents do stupid things, including inappropriate sexual behavior, the vast majority of them desist from delinquent behavior by early adulthood and go on to leave crime-free and productive lives.

The expansion of Lifetime GPS Registration proposed by SB874 will likely create barriers to community reintegration and add to the costs of an already strained GPS tracking system without significantly enhancing public safety.

Thank you for considering my views on this matter.

Sincerely,

David Thompson

David W. Thompson, PhD, ABPP (Forensic)  
Clinical and Forensic Psychologist

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