

No. 13-7120

In The
Supreme Court of the United States

—————◆—————
SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—————◆—————
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

—————◆—————
**BRIEF OF LAW PROFESSORS AS *AMICI*
CURIAE IN SUPPORT OF RESPONDENT**

STEPHEN RUSHIN
ERIC A. JOHNSON*
UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 244-6015
(217) 244-6661
srushin@illinois.edu
ejohnsn@illinois.edu

EVAN TSEN LEE
UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF LAW
200 McAllister St.
San Francisco, CA 94102
(415) 565-4820
lee@uchastings.edu

**Counsel of Record*

QUESTION PRESENTED

Whether mere possession of a short-barreled shotgun should be treated as a violent felony under the Armed Career Criminal Act.

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**STATEMENT OF INTEREST
OF *AMICI CURIAE***

Evan Tsen Lee, Stephen Rushin, and Eric A. Johnson are law professors who teach and write about criminal law, criminal procedure, and punishment.¹ They have an interest in the sound development of law in these fields.



SUMMARY OF ARGUMENT

This brief presents empirical data that bears on the question of whether possession of a short-barreled shotgun presents “serious potential risk of injury to another” under the so-called residual clause of the Armed Career Criminal Act (ACCA). 18 U.S.C. § 922(e)(2)(B)(ii). In addressing whether a particular felony falls under the residual clause, this Court often

¹ All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The University of Illinois at Urbana-Champaign and the University of California, Hastings College of Law provided financial support for activities related to faculty members’ research. This support helped defray the cost of preparing and filing this brief. Neither the University of Illinois at Urbana-Champaign nor the University of California, Hastings College of Law are signatories to this brief. The views expressed in this brief are those of the *amici curiae*. Otherwise, pursuant to this Court’s Rule 37.6, the *amici curiae* note that no person or entity other than the *amici curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

asks whether the offense is at least as dangerous as the four felonies explicitly listed in the ACCA – burglary, arson, extortion, and use of explosives. *See, e.g., Sykes v. United States*, 131 S. Ct. 2267, 2274-75 (2011) (comparing the risk of injury posed by vehicular flight from a peace officer with that posed by burglary and arson). If the risk posed by the felony “outstrip[s] the dangers of . . . offenses enumerated in” the residual clause, then the felony may qualify under the ACCA. *Id.* at 2274; *see also James v. United States*, 550 U.S. 192, 203 (2007) (stating that enumerated offenses from the ACCA provide a “baseline against which to measure the degree of risk” for nonenumerated offenses).

The adoption of this standard has presented a methodological challenge. How should the Court measure the comparative risk posed by different felonies? In multiple cases, the Court has turned to statistical evidence. *See, e.g., Chambers v. United States*, 555 U.S. 122, 129 (2009) (asserting that, in some cases, statistical evidence “helps provide a conclusion” about the risk of a crime); *Sykes*, 131 S. Ct. at 2274 (asserting that statistics, although not dispositive, are useful to “confirm commonsense conclusions”).

The statistical evidence presented in this brief shows that weapons law violations are more frequently associated with physical injury than are burglary, arson, or extortion, as those offenses are defined in the National Incident-Based Reporting System (NIBRS). Admittedly, this sort of statistical evidence

is not dispositive, as “data in and of themselves are incapable of interpreting a statute.” Evan Tsen Lee, Lynn A. Addington & Stephen Rushin, *Which Felonies Pose a “Serious Potential Risk of Injury” for Federal Sentencing Purposes?*, 26 Fed. Sentencing Rep. 118 (2013). To the extent that the Court considers statistics in the present case,² however, the best available evidence weighs in favor of finding that possession of a short-barreled shotgun qualifies under the residual clause of the ACCA. *Amici* make two primary arguments:

1. NIBRS provides the best available database for measuring whether a felony presents a serious potential risk of injury to another. NIBRS is the largest available database that contains records on injuries associated with criminal offenses. *Id.* at 119. NIBRS uses uniform offense definitions allowing researchers to compare the risk posed by different categories of criminal offenses across jurisdictions. *Id.*

2. According to NIBRS, weapons law violations, including possession of a short-barreled shotgun, are associated with injuries in a larger percentage of incidents than blackmail, arson, or burglary. *Id.* (Table 1). *Amici* acknowledge that mere possession of an unlawful weapon cannot, in and of itself, “cause” an injury. But the NIBRS data shows that when a

² *Amici* take no position on the qualitative determination as to whether possession of a short-barreled shotgun constitutes “purposeful, violent, and aggressive” conduct. See *Begay v. United States*, 553 U.S. 137, 145 (2008).

criminal incident involves some weapons law violation, that incident is more likely to involve a physical injury than incidents involving blackmail, arson, or burglary.³ The data further indicates that, in the cases that involve weapons law violations and injuries, it is a weapon that almost always inflicts the injury. This evidence supports the conclusion that weapons law violations pose a higher potential risk of injury than do offenses like blackmail, arson, and burglary.

Amici acknowledge that the NIBRS dataset is not perfect for the task at hand. The data somewhat over-represent smaller police departments. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. NIBRS also contains no specific crime category for the possession of a short-barreled shotgun. *Amici* claim only that weapons law violations generally – that is, unlawful possession of guns, knives, and explosives – are associated with a higher percentage of injuries than three of the four specifically enumerated violent felonies in the ACCA. With these caveats, *Amici* contend that the NIBRS data weigh in favor of Respondent’s position that the residual clause covers possession of a short-barreled shotgun.



³ This is because weapons law violations commonly co-occur with inherently dangerous offenses that involve the use or threatened use of physical force against another, including assault and robbery. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 120 n.27.

ARGUMENT

I. The National Incident-Based Reporting System (NIBRS) provides the best available database for measuring whether a felony presents a serious potential risk of physical injury to another

Comparative statistical analysis has been an important component in this Court's determination of which felonies fall within the ACCA's residual clause. In *James v. United States*, 550 U.S. 192, 206-07 (2007), the Court approvingly cited statistics on the risk posed by different felony offenses. The Court ultimately concluded in *James* that attempted burglary poses a risk of injury similar to, if not greater than, the risk of injury associated with completed burglary. *Id.* Because the risks associated with attempted burglary approximated one of the enumerated violent felonies under the ACCA, its inclusion under the residual clause was appropriate.

Similarly, in *Chambers v. United States*, the Court consulted statistics to determine the risk posed by a criminal's failure to report to a penal institution. 555 U.S. at 129. In holding that this crime did not fall under the ACCA's residual clause, the Court favorably cited a statistical study done by the United States Sentencing Commission. *Id.* The recent case of *Sykes v. United States* also relied on comparative statistics to help determine whether a felony falls within the residual clause. 131 S. Ct. at 2274-75. *Sykes* involved an individual who had previously been convicted of fleeing a police officer in a motor vehicle. *Id.* at 2270.

In holding that offense covered by the residual clause, the Court compared the rate of injuries associated with police pursuits to the injury rates for the enumerated offenses of burglary and arson. *Id.* at 2274-75.

These cases establish the importance and relevance of comparative statistical analysis in applying the ACCA residual clause. In light of these precedents, *Amici* argue that NIBRS data hold considerable probative value. Indeed, *Amici* contend that NIBRS provides the best available database for helping to determine whether certain felonies pose a serious potential risk of physical injury to another.

The Federal Bureau of Investigation (FBI) collects crime data from law enforcement agencies across the country each year as part of the Uniform Crime Reports (UCR). Lee et al., *supra*, 26 Fed. Sentencing Rep. at 118. Historically, the UCR only recorded aggregate-level information on the prevalence of eight major criminal offenses – homicide, aggravated assault, rape, burglary, larceny, arson, and auto-theft. *Id.* With the exception of homicides, these UCR records provided no details about the circumstances surrounding each offense. *Id.* Recently, though, the FBI has begun collecting additional crime data through the database known as NIBRS. *Id.* This new system requests information from local law enforcement agencies on 46 different offense categories. *Id.* NIBRS also groups together criminal offenses into incident-level data. *Id.* at 118-19. This means that if an offender commits two different offenses as

part of a single criminal incident, NIBRS groups these two offenses together for data analysis purposes. For example, suppose that an offender commits an assault in the course of committing a burglary. Traditionally, the UCR would register that event as two separate criminal events. By contrast, NIBRS groups together these two criminal offenses into a single incident. Police agencies that use NIBRS also report information on the circumstances of each criminal incident, including whether the incident resulted in any physical injuries to victims.⁴

NIBRS represents a major advance in cross-sectional, national crime statistics. It better reflects the reality of crime by measuring it in a more holistic way – by incident. Actors frequently commit multiple crimes in the same incident, and offenses committed as part of the same incident usually bear a significant relationship to one another. From an incident-based perspective, it becomes clear that some offenses are commonly associated with other offenses.

At the same time, NIBRS has two main weaknesses as a source of data for studying the association

⁴ If the incident created an injury, NIBRS departments categorize that injury by type and severity. Available NIBRS injury categories include: apparent minor injury, apparent broken bones, other major injury, possible internal injury, loss of teeth, severe laceration, and unconsciousness. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. If the incident led to no injuries, departments select “none” in the injury category. *Id.* The study treated all injuries the same, regardless of severity.

of felonies with injuries on a nationwide basis. First, the NIBRS database is not perfectly representative of the United States. Participation in NIBRS is voluntary and NIBRS agencies must undergo a lengthy certification process. *Id.* at 119. The sample of agencies in the NIBRS database over-represents smaller population areas. *Id.* Fairfax County, Virginia, is the only agency to report statistics to the NIBRS database that serves a population of more than one million residents. *Id.* Thus, one must consider whether this overrepresentation of smaller police agencies skews the data in any systematic way.

Second, although NIBRS greatly expands on the number of offense categories traditionally used in the UCR, it still cannot capture every single offense category. *Id.* For example, NIBRS has no category for possession of a short-barreled shotgun. The closest analogous category is an aggregation of offenses titled “weapons law violations.” NIBRS defines weapons law violations as “laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.” *Id.* at 125. The NIBRS definition of weapons law violations includes possession of a short-barreled shotgun, but it also includes other weapons-related offenses. It is not possible to determine what percentage of NIBRS weapons law violations consist of possession offenses versus use, sale, manufacture, purchase, transportation, or concealment offenses. Nor is it possible to determine what percentage of

NIBRS weapons law violations involve short-barreled shotguns versus handguns, cutting instruments, explosives, incendiary devices, brass knuckles, nunchucks, or other deadly weapons. Thus, observers should use common sense to adjust for mismatches between offenses enumerated in the ACCA and NIBRS offense definitions.

With these caveats, *Amici* nonetheless assert that NIBRS represents the best available data source for judging whether a felony poses a serious potential risk of injury to another within the meaning of the ACCA, for three reasons. First, NIBRS represents the largest and most comprehensive database on injuries associated with criminal offenses. *Id.* at 119. As of 2010, NIBRS contained records on 4,998,914 incidents across 32 states.⁵ The 2010 NIBRS database covered law enforcement agencies that serve around 30% of the population of the United States. *Id.*

In the past, the Court has used significantly smaller databases to ascertain the approximate dangerousness of felony offenses under the ACCA. For example, in *Sykes*, the Court relied on a 2008 study published by the International Association of Chiefs of Police (IACP). 131 S. Ct. at 2274. That study reported the results of an online survey of around 23

⁵ The Lee et al., study used the 2010 NIBRS database to analyze which felonies pose a serious potential risk of injury under the ACCA. *Id.* The 2010 data was the most up-to-date data available at the time of the Lee et al., study.

police agencies conducted annually between 2001 and 2007. *Id.* Similarly, in *Chambers*, the Court turned to a study that examined a mere 160 incidents where a criminal failed to report to a penal institution. 555 U.S. at 129. By contrast, the 2010 NIBRS database contains records on nearly 5,000,000 criminal incidents. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. Even with its drawbacks, NIBRS represents a significant upgrade over these previously employed sources because the NIBRS database is much larger and more national in scope.

Second, because NIBRS groups together multiple offenses into incidents, it allows researchers to measure more accurately the risk associated with criminal offenses. Some offenses cannot, or usually do not, injure another person directly. But that does not mean that such offenses do not pose “serious *potential* risk of injury to another” 18 U.S.C. § 922(e)(2)(B)(ii) (emphasis added). When interpreting statutory text, “[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). Congress’s use of the word “potential” in conjunction with the word “risk” suggests that a felony need not be the direct or exclusive source of an injury in order to qualify under the residual clause. Any offense that, viewed categorically, facilitates or is otherwise meaningfully associated with highly injury-prone offenses “poses a serious potential risk of injury.”

The quintessential illustration of this idea is burglary. The mere act of unlawfully entering into a structure is unlikely to be the direct source of an injury to another person. But burglary is associated with other offenses that do typically cause injury – most prominently, assault.⁶ In a similar vein, possession of a weapon rarely, if ever, constitutes the direct source of an injury to another. Yet it is sufficiently associated with aggravated assaults – which frequently cause injury – to pose a serious potential risk of injury within the meaning of the ACCA. Lee et al., *supra*, at 120 n.27 (showing that 7.33% of incidents involving weapons law violations also involve an aggravated assault).

NIBRS allows *Amici* to measure both how often an offense directly results in an injury, and how often an offense co-occurs with other injurious offenses in a single criminal incident. By virtue of this recordkeeping structure, the NIBRS database is uniquely designed to measure both direct risk and *potential* risks posed by felony offenses.

Third, NIBRS allows the Court to compare the dangerousness of different felony offenses accurately because it uses a consistent methodology across

⁶ It should be noted that the Lee et al., study distinguishes generic burglary from non-generic burglary and recommends that the latter be excluded from the residual clause, precisely because non-generic burglary is insufficiently associated with other commonly injurious felonies. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 122-23.

reporting jurisdictions. In its residual clause jurisprudence to date, this Court has compared the dangerousness of crimes explicitly mentioned in the ACCA with crimes that might fall within the ambit of the residual clause. *See, e.g., Sykes*, 131 S. Ct. at 2274; *James*, 550 U.S. at 203. Such comparisons would ideally employ statistical data from a single source that uses a consistent methodology. Otherwise, small differences in methodology may skew any comparative measurements of dangerousness. In this dimension, NIBRS is ideal for comparative analysis.

II. According to NIBRS, weapons law violations are associated with a higher percentage of injuries than blackmail, arson, or burglary

In a study published in the *Federal Sentencing Reporter*, Professors Lee, Addington, and Rushin used NIBRS to measure which felonies pose a serious potential risk of injury. To do this, the authors compiled data on how frequently criminal incidents led to injuries to victims. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. The study relied on the 2010 NIBRS extract file – one of the most recent years of publicly available NIBRS data. *Id.* In total, about 10.5% or 526,280 of the 4,998,914 criminal incidents listed in

the 2010 NIBRS extract file involved some injury to a victim.⁷

Predictably, the study found that incidents involving some criminal offenses more commonly co-occurred with injuries than others. *Id.* For example, criminal incidents involving offenses like aggravated assault, kidnapping, and robbery frequently involved injuries to victims.⁸ On the other hand, incidents involving seemingly less violent offenses, such as wire fraud and credit card fraud, rarely involved injuries.⁹

The study found that extortion, arson, and burglary – three offenses that Congress specifically enumerated as violent felonies in the ACCA – were associated with a significant, but fairly modest, percentage of injuries relative to other crimes.¹⁰ Incidents involving extortion co-occurred with injuries 4.41% of the time. *Id.* Arson incidents were associated with injuries 1.11% of the time. *Id.* And 1.02% of incidents involving burglary also involved

⁷ For the Lee et al., study, an incident is considered injurious if any victim suffered any injury at all, including fatalities. *Id.* at 119.

⁸ Aggravated assault, kidnapping, and robbery resulted in injuries in 62.84%, 41.30%, and 31.71% of the incidents respectively. *Id.*

⁹ Wire and credit card fraud incidents led to injuries 0.04 and 0.07% of the time respectively. *Id.*

¹⁰ NIBRS has no specific offense category that maps neatly onto to the fourth enumerated offense category in the ACCA – use of explosives. *Id.*

injuries. *Id.* These numbers provide a statistical baseline for judging which offenses ought to be included within the residual clause of the ACCA. Using this Court's past decisions as a guide, if an offense poses a risk greater than or equal to one of the enumerated felonies in the ACCA, then inclusion of that offense in the residual clause may be appropriate.

In the present case, the Court must decide whether possession of a short-barreled shotgun falls under the residual clause. As already discussed, while NIBRS has no specific offense category for possession of that particular type of weapon, NIBRS does contain the broader category of weapons law violations. NIBRS defines this offense category as “[t]he violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.” *Id.* at 125. This category includes possession of a short-barreled shotgun.

As noted by the study, 5.36% of incidents involving weapons law violations in 2010 led to some type of physical injury to a victim.¹¹ This is 21.5% more often

¹¹ *Id.* at 119. It is also worth noting that the 2010 NIBRS data is roughly consistent with data from other years. Lee et al. used the 2010 NIBRS database for this previous study because it was the most recent data available at the time. In other years, weapons law violations were associated with injuries in the following percentage of incidents: 4.66% (2007), 4.26% (2008), 5.04% (2009), and 5.02% (2011). NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND

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than extortion, 382.9% more often than arson, and 425.5% more often than burglary. Put simply, as measured by NIBRS, weapons law violations are associated with injuries more often than three of the four felonies explicitly mentioned in the ACCA. Based on this observation, the study concluded that “[a]ll weapons law violations should be regarded as sufficiently risky to be included within the residual clause.” *Id.* at 122.

Petitioner may criticize this conclusion for either of two reasons. First, Petitioner may argue that the study does not prove that weapons law violations actually *cause* physical injuries. Merely possessing a weapon can never, by itself, cause harm to another person. All the study can show is whether weapons law violations co-occur with other criminal offenses that cause physical injury to another. It is easy, moreover, to construct hypothetical cases where a weapons-law offense co-occurs with, but is causally unrelated to, an injury.

Imagine, for example, that two men get into a fistfight on a public street. During this fistfight, one of the men physically injures the other with his hands. Police report to the scene and arrest the two

SOCIAL RESEARCH, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2007-2011: EXTRACT FILES (2007-2011), *available at* <https://www.icpsr.umich.edu/icpsrweb/NACJD/series/128> (querying incident-level files for each year to determine how the percentage of incidents involving at least one “weapon law violation” that lead to any injury to a victim, measured by “type of injury” variables).

men. Upon arrest, officers find an unlawful firearm in the waistband of one of the combatants. The agency would record these events into NIBRS as a single criminal incident involving an assault, a weapons law violation, and an injury. Thus, NIBRS would show the injury and the weapons offense as co-occurring, even though the injury did not represent a coming-to-fruit of a risk associated with possession of an unlawful firearm. If this sort of case were common, Petitioner might have a valid argument that the NIBRS data do not effectively measure the real injury risk associated with weapons law violations.

Further evaluation of the NIBRS database, though, reveals that this sort of case is quite rare. Of the weapons law violation incidents that led to injuries, approximately 93% involved the use of a weapon against a victim.¹² This suggests that weapons law violations pose a serious potential risk of injury because a possessor may use the weapon to harm another person. The study also found that weapons

¹² A total of 3,341 incidents involving a weapons law violation led to some injuries in a victim in the 2010 NIBRS extract file. In 3,106 of these incidents, the local agency reported that the incident involved the use of a weapon. NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2010: EXTRACT FILES (2010), *available at* <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/33601> (querying incident-level file to determine the percentage of incidents involving both a “weapon law violation” and an injury that also involved the use of any weapon, as measured by the “type of weapon” variable).

law violations most commonly co-occurred with such offenses as robbery and assault. *Id.* at 120 n.27. That finding is consistent with a conclusion that weapons law violations pose a serious potential risk of injury to another person *because they tend to facilitate the commission of other dangerous crimes*, like assault and robbery, where possession of a weapon may aid the criminal act.

Second, Petitioner may argue that the weapons law violations category used by NIBRS does not accurately map onto the offense at hand – possession of a short-barreled shotgun. No doubt, this category is an imperfect fit. It is broader than the specific offense at issue in this case.¹³ But common sense offers no reason to think that possession of a short-barreled shotgun poses less potential risk of injury than the

¹³ NIBRS defines weapons law violations as “laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.” *Id.* at 125. Although there is no way to know the percentage of “weapons laws violations” that involved possession versus manufacture, sale, purchase, transportation, concealment or use, and although there is no way to know the percentage of violations that involved short-barreled shotguns versus (for example) handguns, switchblades, or Molotov cocktails, *Amici* can think of no reason that a subcategory of incidents involving possession of a short-barreled shotgun would co-occur with injuries significantly less often than the overall “weapons law violation” category figure of 5.36%.

average weapons law violation in the NIBRS database.

* * *

In sum, *Amici* believe that the empirical evidence presented in the Lee et al. study provides strong quantitative evidence for including weapons law violations generally, and possession of a short-barreled shotgun particularly, within the residual clause of the ACCA.



CONCLUSION

For the foregoing reasons, the Court should find that possession of a short-barreled shotgun meets the quantitative standards for inclusion within the residual clause of the ACCA.

Respectfully submitted,

STEPHEN RUSHIN
ERIC A. JOHNSON*
UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 244-6015

EVAN TSEN LEE
UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF LAW
200 McAllister St.
San Francisco, CA 94102
(415) 565-4820

**Counsel of Record*

TABLE 1

**Actual (fatal and non-fatal) Injuries Reported
by Any Victim in Incident, 2010 NIBRS Data**

Crimes	Percentage Injured
Murder/Nonnegligent Manslaughter	100%
Aggravated Assault	62.84%
Simple Assault	55.00%
Kidnaping/Abduction	41.30%
Robbery	31.71%
Forcible Rape	28.12%
Sexual Assault With An Object	24.40%
Forcible Sodomy	19.66%
Forcible Fondling	9.15%
<i>Weapon Law Violations</i>	5.36%
<i>Extortion/Blackmail</i>	4.41%
Bribery	3.71%
Destruction/Damage/Vandalism of Property	2.77%
Purse-snatching	1.71%
Pocket-picking	1.69%
Drug Equipment Violations	1.14%
<i>Arson</i>	1.11%
Drug/Narcotic Violations	1.06%

App. 2

Intimidation	1.05%
<i>Burglary/Breaking and Entering</i>	1.02%
Stolen Property Offenses	0.74%
Statutory Rape	0.71%
Pornography/Obscene Material	0.67%
All Other Larceny	0.63%
Assisting or Promoting Prostitution	0.63%
Motor Vehicle Theft	0.49%
Theft From Building	0.49%
Shoplifting	0.39%
Gambling Equipment Violations	0.38%
Welfare Fraud	0.33%
Impersonation	0.28%
Operating/Promoting/ Assisting Gambling	0.27%
Prostitution	0.27%
False Pretenses/Swindle/ Confidence Game	0.23%
Betting/Wagering	0.17%
Theft From Coin-Operated Machine or Device	0.16%
Incest	0.14%
Counterfeiting/Forgery	0.13%
Embezzlement	0.09%
Theft From Motor Vehicle	0.09%

App. 3

Credit Card/Automatic Teller Machine Fraud	0.07%
Theft of Motor Vehicle Parts/Accessories	0.06%
Wire Fraud	0.04%
