S T A T E O F N E W Y O R K

3233

2009-2010 Regular Sessions

I N S E N A T E

March 13, 2009

Introduced by Sens. FLANAGAN, ALESI, LANZA, LIBOUS, MAZIARZ, SALAND, VOLKER, WINNER -- read twice and ordered printed, and when printed to be committed to the Committee on Mental Health and Developmental Disabilities

AN ACT to amend the mental hygiene law, in relation to disclosure of sexual offender information related to a patient or client, and to amend the correction law, in relation to inclusion of certain persons within the provisions of the sex offender registration act who have had pleas accepted, or who have had verdicts entered with respect to them, of not responsible by reason of mental disease or defect

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph 9 of subdivision (c) of section 33.13 of the mental hygiene law is amended by adding a new subparagraph (ix) to read as follows:

(IX) APPROPRIATE PERSONS AND ENTITIES PURSUANT TO ARTICLE SIX-C OF THE CORRECTION LAW, WHEN DISCLOSURE IS LIMITED TO SEXUAL OFFENDER REGISTRATION INFORMATION NECESSARY TO ENSURE THE WELFARE AND SAFETY OF OTHERS.

S 2. Subdivision 1 of section 168-a of the correction law, as added by chapter 192 of the laws of 1995, is amended to read as follows:

1. "Sex offender" includes any person who is convicted of any of the offenses set forth in subdivision two or three of this section. Convictions that result from or are connected with the same act, or result from offenses committed at the same time, shall be counted for the purpose of this article as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this article. FOR PURPOSES OF THIS ARTICLE, THE TERM "SEX OFFENDER" SHALL BE DEEMED TO INCLUDE A PERSON WHO HAS HAD A CRIMINAL ACTION COMMENCED AGAINST THEM BY THE FILING OF AN ACCUSATORY INSTRUMENT, A SUPERIOR COURT INFORMATION, OR INDICTMENT WHICH INCLUDES A CHARGE FOR THE COMMISSION OF ANY OF THE OFFENSES SET FORTH IN SUBDIVISION TWO OR THREE OF THIS SECTION AND, WITH

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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RESPECT TO SUCH OFFENSE OR OFFENSES, HAS ENTERED A PLEA, WHICH IS ACCEPTED, OR HAS HAD A VERDICT ENTERED AGAINST SUCH PERSON, OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT. ANY SUCH PLEA OR VERDICT WITH RESPECT TO SUCH OFFENSE OR OFFENSES SHALL BE CONSIDERED A CONVICTION OF ALL OF THE OFFENSES SO CHARGED, OR THAT REMAIN AS CHARGED OR OTHERWISE EXIST AT THE TIME OF THE ENTRY OF SUCH PLEA OR VERDICT, AS MAY BE APPLICABLE, THAT FALL WITHIN THE DEFINITION OF SEX OFFENSE OR SEXUALLY VIOLENT OFFENSE AS SET FORTH IN SUBDIVISION TWO OR THREE OF THIS SECTION AND SHALL BE DEEMED TO BE A CONVICTION FOR ALL OTHER PURPOSES OF THIS ARTICLE.

S 3. Paragraph (c) of subdivision 1 of section 168-b of the correction law, as amended by chapter 11 of the laws of 2002, is amended to read as follows:

(c) A description of the offense for which the sex offender was convicted, the date of conviction and the sentence imposed. IN THE EVENT THAT SUCH CONVICTION IS DEEMED TO EXIST FROM THE ENTRY AND ACCEPTANCE OF A PLEA, OR THE ENTRY OF A VERDICT, OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT AS DESCRIBED IN SUBDIVISION ONE OF SECTION ONE HUNDRED SIXTY-EIGHT-A OF THIS ARTICLE, THE DATE OF CONVICTION SHALL BE DEEMED TO BE THE DATE THE PLEA WAS ACCEPTED BY THE COURT, OR THE DATE A VERDICT WAS ENTERED, OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT. IN LIEU OF A DESCRIPTION OF THE SENTENCE IMPOSED WHERE A CONVICTION IS DEEMED TO EXIST AS A RESULT OF SUCH PLEA OR VERDICT, THERE SHALL BE ENTERED A DESCRIPTION OF ALL PROCEEDINGS THAT HAVE OCCURRED PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW.

S 4. Section 168-d of the correction law, as amended by chapter 11 of the laws of 2002, paragraph (a) of subdivision 1 as amended by chapter 69 of the laws of 2003, paragraph (b) of subdivision 1 as amended by chapter 74 of the laws of 2007, subdivision 2 as amended and subdivision 4 as added by chapter 684 of the laws of 2005, is amended to read as follows:

S 168-d. Duties of the court. 1. (a) Except as provided in paragraphs (b) and (c) of this subdivision, upon conviction of any of the offenses set forth in subdivision two or three of section one hundred sixty-eight-a of this article the court shall certify that the person is a sex offender and shall include the certification in the order of commitment, if any, and judgment of conviction OR IN AN ORDER ISSUED PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW, except as provided in paragraph (e) of subdivision two of section one hundred sixty-eight-a of this article. The court shall also advise the sex offender of his or her duties under this article. Failure to include the certification in the order of commitment [or], the judgment of conviction, OR IN AN ORDER ISSUED PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW shall not relieve a sex offender of the obligations imposed by this article.

(b) Where a defendant stands convicted of an offense defined in paragraph (b) of subdivision two of section one hundred sixty-eight-a of this article or where the defendant was convicted of patronizing a prostitute in the third degree under section 230.04 of the penal law and the defendant controverts an allegation that the victim of such offense was less than eighteen years of age or, in the case of a conviction under section 230.04 of the penal law, less than seventeen years of age, the court, without a jury, shall, prior to sentencing OR ISSUING AN ORDER PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW, conduct a hearing, and the people may prove by clear

and convincing evidence that the victim was less than eighteen years of age or less than seventeen years of age, as applicable, by any evidence admissible under the rules applicable to a trial of the issue of guilt. The court in addition to such admissible evidence may also consider reliable hearsay evidence submitted by either party provided that it is relevant to the determination of the age of the victim. Facts concerning the age of the victim proven at trial or ascertained at the time of entry of a plea of guilty, OR FACTS CONCERNING THE AGE OF THE VICTIM ASCERTAINED AT THE TIME A PLEA IS ENTERED, WHICH IS ACCEPTED BY THE COURT, OR AT A TRIAL WHERE VERDICT IS ENTERED AGAINST SUCH PERSON, OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, shall be deemed established by clear and convincing evidence and shall not be relitigated. At the conclusion of the hearing, or if the defendant does not controvert an allegation that the victim of the offense was less than eighteen years of age or less than seventeen years of age, as applicable, the court must make a finding and enter an order setting forth the age of the victim. If the court finds that the victim of such offense was under eighteen years of age or under seventeen years of age, as applicable, the court shall certify the defendant as a sex offender, the provisions of paragraph (a) of this subdivision shall apply and the defendant shall register with the division in accordance with the provisions of this article.

(c) Where a defendant stands convicted of an offense defined in paragraph (c) of subdivision two of section one hundred sixty-eight-a of this article and the defendant controverts an allegation that the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, the court, without a jury, shall, prior to sentencing OR ISSUING AN ORDER PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW, conduct a hearing, and the people may prove by clear and convincing evidence that the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, by any evidence admissible under the rules applicable to a trial of the issue of guilt. The court in addition to such admissible evidence may also consider reliable hearsay evidence submitted by either party provided that it is relevant to the determination of whether the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law. At the conclusion of the hearing, or if the defendant does not controvert an allegation that the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, the court must make a finding and enter an order determining whether the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law. If the court finds that the defendant has such a previous conviction, the court shall certify the defendant as a sex offender, the provisions of paragraph (a) of this

subdivision shall apply and the defendant shall register with the division in accordance with the provisions of this article.

2. Any sex offender, who is released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge, OR IS RELEASED OR DISCHARGED PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW shall, prior to such release or discharge, be informed of his or her duty to register under this article by the court in which he or she was convicted OR BY THE COURT ISSUING AN ORDER PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW. At the time sentence is imposed OR AT THE TIME THE COURT ISSUES AN ORDER PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW, such sex offender shall register with the division on a form prepared by the division. The court shall require the sex offender to read and sign such form and to complete the registration portion of such form. The court shall on such form obtain the address where the sex offender expects to reside upon his or her release, and the name and address of any institution of higher education he or she expects to be employed by, enrolled in, attending or employed, whether for compensation or not, and whether he or she expects to reside in a facility owned or operated by such an institution, AND, IF APPLICABLE A COPY OF THE ORDER ISSUED, AND DESCRIPTION OF ALL PROCEEDINGS THAT HAVE OCCURRED, PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW and shall report such information to the division. The court shall give one copy of the form to the sex offender and shall send two copies to the division which shall forward the information to the law enforcement agencies having jurisdiction. The court shall also notify the district attorney and the sex offender of the date of the determination proceeding to be held pursuant to subdivision three of this section, which shall be held at least forty-five days after such notice is given. This notice shall include the following statement or a substantially similar statement: "This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. If you fail to appear at this proceeding, without sufficient excuse, it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney." The court shall also advise the sex offender that he or she has a right to a hearing prior to the court's determination, that he or she has the right to be represented by counsel at the hearing and that counsel will be appointed if he or she is financially unable to retain counsel. If the sex offender applies for assignment of counsel to represent him or her at the hearing and counsel was not previously assigned to represent the sex offender in the underlying criminal action, the court shall determine whether the offender is financially unable to retain counsel. If such a finding is made, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. Where the court orders a sex offender released on probation, such order must include a provision requiring that he or she comply with the requirements of this article. Where such sex offender violates such provision,

probation may be immediately revoked in the manner provided by article four hundred ten of the criminal procedure law.

3. For sex offenders released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge, OR RELEASED OR DISCHARGED PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW, it shall be the duty of the court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. At least fifteen days prior to the determination proceeding, the district attorney shall provide to the court and the sex offender a written statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations. The court shall allow the sex offender to appear and be heard. The state shall appear by the district attorney, or his or her designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence. Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from any state or local facility, hospital, institution, office, agency, department or division. Such materials may be obtained by subpoena if not voluntarily provided to the requesting party. In making the determinations, the court shall review any victim's statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the court may consider reliable hearsay evidence submitted by either party provided that it is relevant to the determinations. Facts previously proven at trial or elicited at the time of entry of a plea of guilty OR PREVIOUSLY ELICITED AT THE TIME A PLEA IS ENTERED, WHICH IS ACCEPTED BY THE COURT, OR ARE PROVEN AT A TRIAL WHERE A VERDICT HAS BEEN ENTERED, OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT shall be deemed established by clear and convincing evidence and shall not be relitigated. The court shall render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based. A copy of the order shall be submitted by the court to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute. Either party may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

4. If a sex offender, having been given notice, including the time and place of the determination proceeding in accordance with this section, fails to appear at this proceeding, without sufficient excuse, the court shall conduct the hearing and make the determinations in the manner set forth in subdivision three of this section.

S 5. Section 29.16 of the mental hygiene law, as amended by chapter 465 of the laws of 1992, is amended to read as follows:

S 29.16 Discharge OR RELEASE; certain cases.

(A) The director of a facility shall, with respect to any patient admitted to such facility pursuant to section five hundred nine of the executive law or 353.4 of the family court act and article nine or fifteen of this chapter, give immediate written notice to the [director of the division for youth] OFFICE OF CHILDREN AND FAMILY SERVICES and to the mental hygiene legal service when any such patient leaves the facility without the consent of its director. Such patient shall not be discharged so long as there is a valid order of the family court placing such person with the [division for youth] OFFICE OF CHILDREN AND FAMILY SERVICES, except in accordance with the provisions of section five hundred nine of the executive law or section 353.4 of the family court act.

(B) NOTWITHSTANDING ANY PROVISIONS OF LAW TO THE CONTRARY, PRIOR TO THE DISCHARGE OR RELEASE, INCLUDING A COURT ORDERED RELEASE, FROM A DEPARTMENT FACILITY OF A PATIENT WHO IS A SEX OFFENDER REQUIRED TO REGISTER PURSUANT TO ARTICLE SIX-C OF THE CORRECTION LAW, THE DIRECTOR OF A FACILITY SHALL CONTACT THE DIVISION OF CRIMINAL JUSTICE SERVICES (HEREIN THE "DIVISION") TO DETERMINE WHETHER OR NOT SUCH PATIENT HAS REGISTERED A CHANGE OF ADDRESS PURSUANT TO THE PROVISIONS OF SUBDIVISION FOUR OF SECTION ONE HUNDRED SIXTY-EIGHT-F OF THE CORRECTION LAW. IN THE EVENT THAT THE DIRECTOR DETERMINES THAT SUCH PATIENT HAS FAILED TO PROVIDE THE DIVISION WITH THE NOTIFICATION OF CHANGE OF ADDRESS WHICH WILL PROVIDE THE DIVISION WITH THE PATIENT'S INTENDED NEW ADDRESS WHICH WILL TAKE EFFECT UPON SUCH DISCHARGE OR RELEASE, THE DIRECTOR IMMEDIATELY SHALL NOTIFY THE PATIENT AND THE MENTAL HYGIENE LEGAL SERVICE OF THE REQUIREMENTS OF REGISTERING A CHANGE OF ADDRESS PURSUANT TO SUCH PROVISIONS OF THE CORRECTION LAW. NOTWITHSTANDING THE PROVISIONS OF SECTION ONE HUNDRED SIXTY-EIGHT-F OF THE CORRECTION LAW, THE DIRECTOR OF A FACILITY IS AUTHORIZED TO DELAY THE IMPLEMENTATION OF THE DISCHARGE OR RELEASE, INCLUDING A COURT ORDERED RELEASE, OF SUCH PATIENT FOR A PERIOD OF UP TO TEN DAYS OR UNTIL THE DATE THAT SUCH PATIENT COMPLIES WITH THE REGISTRATION REQUIREMENTS OF SUCH PROVISIONS OF THE CORRECTION LAW, WHICHEVER OCCURS FIRST.

S 6. Section 29.17 of the mental hygiene law is amended to read as follows:

S 29.17 Clothing and money to be furnished patients discharged or released.

No patient shall be discharged or released from a department facility without suitable clothing adapted to the season in which he OR SHE is discharged or released; and if it cannot be otherwise obtained, the facility shall upon the order of the director, or of the commissioner, as the case may be, furnish the same, and money not exceeding fifty dollars, to defray his OR HER expenses until he OR SHE can reach his OR HER relatives or friends, or find employment to earn a subsistence. THE FACILITY, UPON THE ORDER OF THE DIRECTOR, OR OF THE COMMISSIONER, AS THE CASE MAY BE, SHALL FURNISH A PATIENT, WHO IS A SEX OFFENDER AND IS REQUIRED TO REGISTER A CHANGE OF ADDRESS PURSUANT TO SUBDIVISION FOUR OF SECTION ONE HUNDRED SIXTY-EIGHT-F OF THE CORRECTION LAW, WITH MONEY, IN AN AMOUNT EQUAL TO THE STATUTORY AMOUNT CHARGED BY THE DIVISION OF CRIMINAL JUSTICE SERVICES TO DEFRAY THE EXPENSE OF REGISTERING HIS OR HER CHANGE OF ADDRESS WITH THE DIVISION, AT OR PRIOR TO THE DATE OF SUCH DISCHARGE OR RELEASE.

S 7. Paragraph a of subdivision 2 of section 168-b of the correction law, as amended by chapter 645 of the laws of 2005, is amended to read as follows:

a. The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information OR TO THE COMMISSIONER OF MENTAL HEALTH OR THE COMMISSIONER OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES. The division shall accept files from any regional or national registry of sex offenders and shall make such files available when requested pursuant to the provisions of this article.

S 8. This act shall take effect on the one hundred eightieth day after it shall have become a law.