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

3747

2011-2012 Regular Sessions

I N A S S E M B L Y

January 27, 2011

Introduced by M. of A. ENGLEBRIGHT -- read once and referred to the Committee on Correction

AN ACT to amend the correction law, in relation to the judicial determination that an offender is a sex offender or a sexually violent predator; and to repeal subdivision 2 of section 168-k of such law relating thereto

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

Section 1. Subdivision 3 of section 168-d of the correction law, as amended by chapter 11 of the laws of 2002, is amended to read as follows:

3. For sex offenders released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge, [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

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

LBD06057-01-1

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 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] THE BOARD SHALL MAKE A LEVEL OF NOTIFICATION RECOMMENDATION TO THE COURT IN ACCORDANCE WITH SECTION ONE HUNDRED SIXTY-EIGHT-L OF THIS ARTICLE. FINAL LEVEL OF NOTIFICATION DETERMINATIONS BY THE COURT SHALL BE MADE AFTER A CLASSIFICATION HEARING WHERE IN MAKING THE DETERMINATION, THE COURT SHALL INCLUDE A REVIEW OF ANY VICTIM'S STATEMENT AND ANY MATERIALS SUBMITTED BY THE SEX OFFENDER. THE COURT SHALL PROVIDE THAT THE OFFENDER RECEIVE FAIR WRITTEN NOTICE OF THE CLASSIFICATION HEARING WHICH SHALL INCLUDE A STATEMENT OF THE PROCEEDINGS PURPOSE, THE BOARD'S RECOMMENDATION AND RAMIFICATIONS OF CLASSIFICATION LEVEL, AND A STATEMENT OF THE OFFENDER'S RIGHT TO BE REPRESENTED BY COUNSEL AT THE HEARING. THE OFFENDER SHALL HAVE THE RIGHT TO HAVE COUNSEL APPOINTED AND FOR PRE-HEARING DISCOVERY OF DOCUMENTARY EVIDENCE ON WHICH THE BOARD'S LEVEL OF NOTIFICATION RECOMMENDATION WAS DETERMINED. THE STATE MUST PROVE THE FACTS SUPPORTING ANY CLASSIFICATION DETERMINATION. THE OFFENDER SHALL HAVE THE RIGHT TO APPEAL A LEVEL OF NOTIFICATION DETERMINATION.

S 2. Subdivisions 1, 2 and 3 of section 168-g of the correction law, as added by chapter 192 of the laws of 1995, are amended to read as follows:

1. [The division of parole or department of probation and correctional alternatives in accordance with risk factors pursuant to section one hundred sixty-eight-l of this article shall determine the duration of registration and notification for every sex offender who on the effective date of this article is then on parole or probation for an offense provided for in subdivision two or three of section one hundred sixty-eight-a of this article] FOR SEX OFFENDERS UNDER THIS SECTION, THE BOARD SHALL MAKE A LEVEL OF NOTIFICATION RECOMMENDATION TO THE COURT IN ACCORDANCE WITH SECTION ONE HUNDRED SIXTY-EIGHT-L OF THIS ARTICLE. FINAL LEVEL OF NOTIFICATION DETERMINATIONS BY THE COURT SHALL BE MADE AFTER A CLASSIFICATION HEARING WHERE IN MAKING THE DETERMINATION, THE COURT SHALL INCLUDE A REVIEW OF ANY VICTIM'S STATEMENT AND ANY MATERIALS SUBMITTED BY THE SEX OFFENDER. THE COURT SHALL PROVIDE THAT THE OFFENDER RECEIVE FAIR WRITTEN NOTICE OF THE CLASSIFICATION HEARING WHICH SHALL INCLUDE A STATEMENT OF THE PROCEEDINGS PURPOSE, THE BOARD'S RECOMMENDATION AND RAMIFICATIONS OF CLASSIFICATION LEVEL, AND A STATEMENT OF THE OFFENDER'S RIGHT TO BE REPRESENTED BY COUNSEL AT THE HEARING. THE OFFENDER SHALL HAVE THE RIGHT TO HAVE COUNSEL APPOINTED AND FOR PRE-HEARING DISCOVERY OF DOCUMENTARY EVIDENCE ON WHICH THE BOARD'S LEVEL OF NOTIFICATION RECOMMENDATION WAS DETERMINED. THE STATE MUST PROVE THE

FACTS SUPPORTING ANY CLASSIFICATION DETERMINATION. THE OFFENDER SHALL HAVE A RIGHT TO APPEAL A LEVEL OF NOTIFICATION DETERMINATION.

2. Every sex offender who on the effective date of this article is then on parole or probation for an offense provided for in subdivision two or three of section one hundred sixty-eight-a of this article shall within ten calendar days of [such determination] RECEIPT OF HEARING NOTIFICATION register with his parole or probation officer. On each anniversary of the sex offender's initial registration date thereafter, the provisions of section one hundred sixty-eight-f of this article shall apply. Any sex offender who fails or refuses to so comply shall be subject to the same penalties as otherwise provided for in this article which would be imposed upon a sex offender who fails or refuses to so comply with the provisions of this article on or after such effective date.

3. [It] UPON FINAL COURT LEVEL OF NOTIFICATION DETERMINATION IT shall be the duty of the [parole or probation officer] COURT to inform and register such sex offender according to the requirements imposed by this article. [A parole or probation officer] THE COURT shall give one copy of the form to the sex offender and shall, within three calendar days, send two copies electronically or otherwise to the division which shall forward one copy electronically or otherwise to the law enforcement agency having jurisdiction where the sex offender resides upon his parole, probation, or upon any form of state or local conditional release.

S 3. Subdivision 2 of section 168-k of the correction law is REPEALED and two new subdivisions 2 and 2-a are added to read as follows:

2. FOR SEX OFFENDERS UNDER THIS SECTION, THE BOARD SHALL MAKE A LEVEL OF NOTIFICATION RECOMMENDATION TO THE COURT IN ACCORDANCE WITH SECTION ONE HUNDRED SIXTY-EIGHT-L OF THIS ARTICLE. FINAL LEVEL OF NOTIFICATION DETERMINATIONS BY THE COURT SHALL BE MADE AFTER A CLASSIFICATION HEARING WHERE IN MAKING THE DETERMINATION, THE COURT SHALL INCLUDE A REVIEW OF ANY VICTIM'S STATEMENT AND ANY MATERIALS SUBMITTED BY THE SEX OFFENDER. THE COURT SHALL PROVIDE THAT THE OFFENDER RECEIVE FAIR WRITTEN NOTICE OF THE CLASSIFICATION HEARING WHICH SHALL INCLUDE A STATEMENT OF THE PROCEEDINGS PURPOSE, THE BOARD'S RECOMMENDATION AND RAMIFICATIONS OF CLASSIFICATION LEVEL, AND A STATEMENT OF THE OFFENDER'S RIGHT TO BE REPRESENTED BY COUNSEL AT THE HEARING. THE OFFENDER SHALL HAVE THE RIGHT TO HAVE COUNSEL APPOINTED AND FOR PRE-HEARING DISCOVERY OF DOCUMENTARY EVIDENCE ON WHICH THE BOARD'S LEVEL OF NOTIFICATION RECOMMENDATION WAS DETERMINED. THE STATE MUST PROVE THE FACTS SUPPORTING ANY CLASSIFICATION DETERMINATION. THE OFFENDER SHALL HAVE A RIGHT TO APPEAL A LEVEL OF NOTIFICATION DETERMINATION.

2-A. UPON FINAL COURT LEVEL OF NOTIFICATION DETERMINATION, IT SHALL BE THE DUTY OF THE COURT TO INFORM AND REGISTER SUCH SEX OFFENDER ACCORDING TO THE REQUIREMENTS IMPOSED BY THIS ARTICLE. THE COURT SHALL GIVE ONE COPY OF THE FORM TO THE SEX OFFENDER AND SHALL, WITHIN THREE CALENDAR DAYS, SEND TWO COPIES ELECTRONICALLY OR OTHERWISE TO THE DIVISION WHICH SHALL FORWARD ONE COPY ELECTRONICALLY OR OTHERWISE TO THE LAW ENFORCEMENT AGENCY HAVING JURISDICTION WHERE THE SEX OFFENDER RESIDES UPON HIS PAROLE, PROBATION, OR UPON ANY FORM OF STATE OR LOCAL CONDITIONAL RELEASE.

S 4. Subdivision 1 and the opening paragraph of subdivision 6 of section 168-l of the correction law, subdivision 1 as added by chapter 192 of the laws of 1995 and the opening paragraph of subdivision 6 as amended by chapter 11 of the laws of 2002, are amended to read as follows:

1. There shall be a board of examiners of sex offenders which shall possess the powers and duties hereinafter specified. Such board shall consist of five members appointed by the governor. [Three] THERE SHALL BE members who [shall be] ARE experts in the field of the behavior and treatment of sex offenders AND shall be employees of the division of parole and [the remaining two] THERE SHALL BE members [shall be] from the department. The term of office of each member of such board shall be for six years; provided, however, that any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the remainder of the unexpired term of the member whom he is to succeed. In the event of the inability to act of any member, the governor may appoint some competent informed person to act in his stead during the continuance of such disability.

Applying these guidelines, the board shall MAKE A RECOMMENDATION, FOR OFFENDERS WHO ON THE EFFECTIVE DATE OF THIS ARTICLE WERE THEN INCARCERATED, ON PROBATION OR PAROLE FOR AN OFFENSE PROVIDED FOR IN SUBDIVISION TWO OR THREE OF SECTION ONE HUNDRED SIXTY-EIGHT-A OF THIS ARTICLE, WHICH SHALL BE CONFIDENTIAL AND SHALL NOT BE AVAILABLE FOR PUBLIC INSPECTION, EXCEPT FOR SEX OFFENDER PREHEARING DISCOVERY, TO THE SENTENCING COURT AS TO WHETHER SUCH SEX OFFENDER WARRANTS THE DESIGNATION OF SEXUAL PREDATOR, SEXUALLY VIOLENT PREDATOR OR PREDICATE SEX OFFENDER. APPLYING THESE SAME GUIDELINES, THE BOARD SHALL within [sixty] NINETY calendar days prior to the discharge, parole, release to post-release supervision or release of a sex offender make a recommendation which shall be confidential and shall not be available for public inspection, EXCEPT FOR SEX OFFENDER PREHEARING DISCOVERY, to the sentencing court as to whether such sex offender warrants the designation of sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. In addition, the guidelines shall be applied by the board to make a recommendation to the sentencing court which shall be confidential and shall not be available for public inspection, providing for one of the following three levels of notification depending upon the degree of the risk of re-offense by the sex offender.

S 5. Section 168-n of the correction law, as added by chapter 192 of the laws of 1995, subdivision 1 as amended by chapter 11 of the laws of 2002, subdivisions 2 and 5 as amended by chapter 453 of the laws of 1999, and subdivision 3 as amended and subdivision 6 as added by chapter 684 of the laws of 2005, is amended to read as follows:

S 168-n. Judicial determination. 1. [A determination that an offender is 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 shall be made prior to the discharge, parole, release to post-release supervision or release of such offender by the sentencing court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article after receiving a recommendation from the board pursuant to section one hundred sixty-eight-l of this article.

2. In addition, applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article, the sentencing court shall also make a determination with respect to the level of notification, after receiving a recommendation from the board pursuant to section one hundred sixty-eight-l of this article. Both determinations of the sentencing court shall be made thirty calendar days prior to discharge, parole or release.

3. No later than thirty days prior to the board's recommendation, the sex offender shall be notified that his or her case is under review and that he or she is permitted to submit to the board any information relevant to the review. Upon receipt of the board's recommendation, the sentencing court shall determine whether the sex offender was previously found to be eligible for assigned counsel in the underlying case. Where such a finding was previously made, the court shall assign counsel to represent the offender, pursuant to article eighteen-B of the county law. At least twenty days prior to the determination proceeding, the sentencing court shall notify the district attorney, the sex offender and the sex offender's counsel, in writing, of the date of the determination proceeding and shall also provide the district attorney, the sex offender and the sex offender's counsel with a copy of the recommendation received from the board and any statement of the reasons for the recommendation received from the board. 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 written notice to the sex offender shall also advise the offender that he or she has a right to a hearing prior to the court's determination, and that he or she has the right to be represented by counsel at the hearing. If counsel has been assigned to represent the offender at the determination proceeding, the notice shall also provide the name, address and telephone number of the assigned counsel. Where counsel has not been assigned, the notice shall advise the sex offender that counsel will be appointed if he or she is financially unable to retain counsel, and a returnable form shall be enclosed in the court's notice to the sex offender on which the sex offender may apply for assignment of counsel. If the sex offender applies for assignment of counsel and the court finds that the offender is financially unable to retain counsel, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. If the district attorney seeks a determination that differs from the recommendation submitted by the board, at least ten days prior to the determination proceeding the district attorney shall provide to the court and the sex offender a 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 the state board of examiners of sex offenders or 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 recommendation and any materials submitted by the board, and 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 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] THE BOARD SHALL MAKE A RECOMMENDATION TO THE COURT AS TO WHETHER AN OFFENDER IS A SEX OFFENDER, A SEXUAL PREDATOR, A SEXUALLY VIOLENT PREDATOR OR A PREDICATE SEX OFFENDER PURSUANT TO SECTION ONE HUNDRED SIXTY-EIGHT-L OF THIS ARTICLE. THE BOARD SHALL MAKE A LEVEL OF NOTIFICATION RECOMMENDATION TO THE COURT IN ACCORDANCE WITH SECTION ONE HUNDRED SIXTY-EIGHT-L OF THIS ARTICLE. FINAL LEVEL OF NOTIFICATION DETERMINATIONS BY THE COURT SHALL BE MADE PRIOR TO THE OFFENDER'S DISCHARGE, PAROLE OR RELEASE AND AFTER A CLASSIFICATION HEARING WHERE IN MAKING THE DETERMINATION, THE COURT SHALL INCLUDE A REVIEW OF ANY VICTIM'S STATEMENT AND ANY MATERIALS SUBMITTED BY THE SEX OFFENDER. THE COURT SHALL PROVIDE THAT THE OFFENDER RECEIVE FAIR WRITTEN NOTICE OF THE CLASSIFICATION HEARING WHICH SHALL INCLUDE A STATEMENT OF THE PROCEEDING'S PURPOSE, THE BOARD'S RECOMMENDATION AND RAMIFICATIONS OF CLASSIFICATION LEVEL, AND A STATEMENT OF THE OFFENDER'S RIGHT TO BE REPRESENTED BY COUNSEL AT THE HEARING. THE OFFENDER SHALL HAVE THE RIGHT TO HAVE COUNSEL APPOINTED AND FOR PRE-HEARING DISCOVERY OF DOCUMENTARY EVIDENCE ON WHICH THE BOARD'S LEVEL OF NOTIFICATION RECOMMENDATION WAS DETERMINED. THE STATE MUST PROVE THE FACTS SUPPORTING ANY CLASSIFICATION DETERMINATION. THE OFFENDER SHALL HAVE A RIGHT TO APPEAL A LEVEL OF NOTIFICATION DETERMINATION.

[4.] 2. Upon determination that the risk of repeat offense and threat to public safety is high, the sentencing court shall also notify the division of such fact for the purposes of section one hundred sixty-eight-q of this article.

[5.] 3. Upon the reversal of a conviction of a sexual offense defined in paragraphs (a) and (b) of subdivision two or three of section one hundred sixty-eight-a of this article, the appellate court shall remand the case to the lower court for entry of an order directing the expungement of any records required to be kept [herein] PURSUANT TO THIS ARTICLE.

[6.] 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] ONE of this section.

S 6. This act shall take effect immediately.