

9258

I N A S S E M B L Y

February 9, 2012

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

AN ACT to amend the correction law, in relation to risk assessment
instruments for sex offenders

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

1 Section 1. Subdivision 3 of section 168-d of the correction law, as
2 amended by chapter 11 of the laws of 2002, is amended to read as
3 follows:
4 3. For sex offenders released on probation or discharged upon payment
5 of a fine, conditional discharge or unconditional discharge, it shall be
6 the duty of the court applying the guidelines AND RISK ASSESSMENT
7 INSTRUMENT established in subdivision five of section one hundred
8 sixty-eight-1 of this article to determine the level of notification
9 pursuant to subdivision six of section one hundred sixty-eight-1 of this
10 article and whether such sex offender shall be designated a sexual pred-
11 ator, sexually violent offender, or predicate sex offender as defined in
12 subdivision seven of section one hundred sixty-eight-a of this article.
13 At least fifteen days prior to the determination proceeding, the
14 district attorney shall provide to the court and the sex offender a
15 written statement setting forth the determinations sought by the
16 district attorney together with the reasons for seeking such determi-
17 nations. The court shall allow the sex offender to appear and be heard.
18 The state shall appear by the district attorney, or his or her designee,
19 who shall bear the burden of proving the facts supporting the determi-
20 nations sought by clear and convincing evidence. Where there is a
21 dispute between the parties concerning the determinations, the court
22 shall adjourn the hearing as necessary to permit the sex offender or the
23 district attorney to obtain materials relevant to the determinations
24 from any state or local facility, hospital, institution, office, agency,
25 department or division. Such materials may be obtained by subpoena if
26 not voluntarily provided to the requesting party. In making the determi-
27 nations, the court shall review any victim's statement and any relevant
28 materials and evidence submitted by the sex offender and the district

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

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1 attorney and the court may consider reliable hearsay evidence submitted
2 by either party provided that it is relevant to the determinations.
3 Facts previously proven at trial or elicited at the time of entry of a
4 plea of guilty shall be deemed established by clear and convincing
5 evidence and shall not be relitigated. The court shall render an order
6 setting forth its determinations and the findings of fact and conclu-
7 sions of law on which the determinations are based. A copy of the order
8 shall be submitted by the court to the division. Upon application of
9 either party, the court shall seal any portion of the court file or
10 record which contains material that is confidential under any state or
11 federal statute. Either party may appeal as of right from the order
12 pursuant to the provisions of articles fifty-five, fifty-six and fifty-
13 seven of the civil practice law and rules. Where counsel has been
14 assigned to represent the sex offender upon the ground that the sex
15 offender is financially unable to retain counsel, that assignment shall
16 be continued throughout the pendency of the appeal, and the person may
17 appeal as a poor person pursuant to article eighteen-B of the county
18 law.

19 S 2. Subdivision 2 of section 168-k of the correction law, as amended
20 by chapter 684 of the laws of 2005, is amended to read as follows:

21 2. The division shall advise the board that the sex offender has
22 established residence in this state. The board shall determine whether
23 the sex offender is required to register with the division. If it is
24 determined that the sex offender is required to register, the division
25 shall notify the sex offender of his or her duty to register under this
26 article and shall require the sex offender to sign a form as may be
27 required by the division acknowledging that the duty to register and the
28 procedure for registration has been explained to the sex offender. The
29 division shall obtain on such form the address where the sex offender
30 expects to reside within the state and the sex offender shall retain one
31 copy of the form and send two copies to the division which shall provide
32 the information to the law enforcement agency having jurisdiction where
33 the sex offender expects to reside within this state. No later than
34 thirty days prior to the board making a recommendation, the sex offender
35 shall be notified that his or her case is under review and that he or
36 she is permitted to submit to the board any information relevant to the
37 review. After reviewing any information obtained, and applying the
38 guidelines AND RISK ASSESSMENT INSTRUMENT established in subdivision
39 five of section one hundred sixty-eight-1 of this article, the board
40 shall within sixty calendar days make a recommendation regarding the
41 level of notification pursuant to subdivision six of section one hundred
42 sixty-eight-1 of this article and whether such sex offender shall be
43 designated a sexual predator, sexually violent offender, or predicate
44 sex offender as defined in subdivision seven of section one hundred
45 sixty-eight-a of this article. This recommendation shall be confiden-
46 tial and shall not be available for public inspection. It shall be
47 submitted by the board to the county court or supreme court and to the
48 district attorney in the county of residence of the sex offender and to
49 the sex offender. It shall be the duty of the county court or supreme
50 court in the county of residence of the sex offender, applying the
51 guidelines AND RISK ASSESSMENT INSTRUMENT established in subdivision
52 five of section one hundred sixty-eight-1 of this article, to determine
53 the level of notification pursuant to subdivision six of section one
54 hundred sixty-eight-1 of this article and whether such sex offender
55 shall be designated a sexual predator, sexually violent offender, or
56 predicate sex offender as defined in subdivision seven of section one

1 hundred sixty-eight-a of this article. At least thirty days prior to the
2 determination proceeding, such court shall notify the district attorney
3 and the sex offender, in writing, of the date of the determination
4 proceeding and the court shall also provide the district attorney and
5 sex offender with a copy of the recommendation received from the board
6 and any statement of the reasons for the recommendation received from
7 the board. This notice shall include the following statement or a
8 substantially similar statement: "This proceeding is being held to
9 determine whether you will be classified as a level 3 offender (risk of
10 repeat offense is high), a level 2 offender (risk of repeat offense is
11 moderate), or a level 1 offender (risk of repeat offense is low), or
12 whether you will be designated as a sexual predator, a sexually violent
13 offender or a predicate sex offender, which will determine how long you
14 must register as a sex offender and how much information can be provided
15 to the public concerning your registration. If you fail to appear at
16 this proceeding, without sufficient excuse, it shall be held in your
17 absence. Failure to appear may result in a longer period of registration
18 or a higher level of community notification because you are not present
19 to offer evidence or contest evidence offered by the district attorney."
20 The court shall also advise the sex offender that he or she has a right
21 to a hearing prior to the court's determination, that he or she has the
22 right to be represented by counsel at the hearing and that counsel will
23 be appointed if he or she is financially unable to retain counsel. A
24 returnable form shall be enclosed in the court's notice to the sex
25 offender on which the sex offender may apply for assignment of counsel.
26 If the sex offender applies for assignment of counsel and the court
27 finds that the offender is financially unable to retain counsel, the
28 court shall assign counsel to represent the sex offender pursuant to
29 article eighteen-B of the county law. If the district attorney seeks a
30 determination that differs from the recommendation submitted by the
31 board, at least ten days prior to the determination proceeding the
32 district attorney shall provide to the court and the sex offender a
33 statement setting forth the determinations sought by the district attor-
34 ney together with the reasons for seeking such determinations. The court
35 shall allow the sex offender to appear and be heard. The state shall
36 appear by the district attorney, or his or her designee, who shall bear
37 the burden of proving the facts supporting the determinations sought by
38 clear and convincing evidence. It shall be the duty of the court apply-
39 ing the guidelines AND RISK ASSESSMENT INSTRUMENT established in subdi-
40 vision five of section one hundred sixty-eight-1 of this article to
41 determine the level of notification pursuant to subdivision six of
42 section one hundred sixty-eight-1 of this article and whether such sex
43 offender shall be designated a sexual predator, sexually violent offen-
44 der, or predicate sex offender as defined in subdivision seven of
45 section one hundred sixty-eight-a of this article. Where there is a
46 dispute between the parties concerning the determinations, the court
47 shall adjourn the hearing as necessary to permit the sex offender or the
48 district attorney to obtain materials relevant to the determinations
49 from the state board of examiners of sex offenders or any state or local
50 facility, hospital, institution, office, agency, department or division.
51 Such materials may be obtained by subpoena if not voluntarily provided
52 to the requesting party. In making the determinations the court shall
53 review any victim's statement and any relevant materials and evidence
54 submitted by the sex offender and the district attorney and the recom-
55 mendation and any material submitted by the board, and may consider
56 reliable hearsay evidence submitted by either party, provided that it is

1 relevant to the determinations. If available, facts proven at trial or
2 elicited at the time of a plea of guilty shall be deemed established by
3 clear and convincing evidence and shall not be relitigated. The court
4 shall render an order setting forth its determinations and the findings
5 of fact and conclusions of law on which the determinations are based. A
6 copy of the order shall be submitted by the court to the division. Upon
7 application of either party, the court shall seal any portion of the
8 court file or record which contains material that is confidential under
9 any state or federal statute. Either party may appeal as of right from
10 the order pursuant to the provisions of articles fifty-five, fifty-six
11 and fifty-seven of the civil practice law and rules. Where counsel has
12 been assigned to represent the sex offender upon the ground that the sex
13 offender is financially unable to retain counsel, that assignment shall
14 be continued throughout the pendency of the appeal, and the person may
15 appeal as a poor person pursuant to article eighteen-B of the county
16 law.

17 S 3. Subdivision 5 and the opening paragraph of subdivision 6 of
18 section 168-1 of the correction law, subdivision 5 as added by chapter
19 192 of the laws of 1995, subparagraph (i) of paragraph (a) of subdivi-
20 sion 5 the opening paragraph of and subdivision 6 as amended by chapter
21 11 of the laws of 2002, are amended and a new subdivision 5-a is added
22 to read as follows:

23 5. The board shall develop guidelines and procedures AND USE A VALI-
24 DATED RISK ASSESSMENT INSTRUMENT to assess the risk of a repeat offense
25 by such sex offender and the threat posed to the public safety. SUCH
26 RISK ASSESSMENT INSTRUMENT SHALL BE PERIODICALLY SUBJECTED TO EMPIRICAL
27 RE-VALIDATION. Such guidelines [shall] MAY be based upon, but not limit-
28 ed to, the following:

29 (a) criminal history factors indicative of high risk of repeat
30 offense, including:

31 (i) whether the sex offender has a mental abnormality or personality
32 disorder that makes him or her likely to engage in predatory sexually
33 violent offenses;

34 (ii) whether the sex offender's conduct was found to be characterized
35 by repetitive and compulsive behavior, associated with drugs or alcohol;

36 (iii) whether the sex offender served the maximum term;

37 (iv) whether the sex offender committed the felony sex offense against
38 a child;

39 (v) the age of the sex offender at the time of the commission of the
40 first sex offense;

41 (b) other criminal history factors to be considered in determining
42 risk, including:

43 (i) the relationship between such sex offender and the victim;

44 (ii) whether the offense involved the use of a weapon, violence or
45 infliction of serious bodily injury;

46 (iii) the number, date and nature of prior offenses;

47 (c) conditions of release that minimize risk or re-offense, including
48 but not limited to whether the sex offender is under supervision;
49 receiving counseling, therapy or treatment; or residing in a home situ-
50 ation that provides guidance and supervision;

51 (d) physical conditions that minimize risk of re-offense, including
52 but not limited to advanced age or debilitating illness;

53 (e) whether psychological or psychiatric profiles indicate a risk of
54 recidivism;

55 (f) the sex offender's response to treatment;

56 (g) recent behavior, including behavior while confined;

1 (h) recent threats or gestures against persons or expressions of
2 intent to commit additional offenses; and
3 (i) review of any victim impact statement.

4 5-A. (A) THE BOARD IN CONSULTATION WITH THE DEPARTMENT AND THE DIVI-
5 SION OF CRIMINAL JUSTICE SERVICES SHALL MAINTAIN A STATEWIDE DATABASE OF
6 SEX OFFENDER RECIDIVISM STATISTICS.

7 (B) THE BOARD IN CONSULTATION WITH THE DEPARTMENT AND THE DIVISION OF
8 CRIMINAL JUSTICE SERVICES SHALL CONDUCT A PERIODIC RETROACTIVE STUDY AT
9 LEAST EVERY FIVE YEARS TO DETERMINE THE PREDICTIVE VALUE OF THE RISK
10 ASSESSMENT INSTRUMENT USED TO ASSIGN RISK OF REPEAT OFFENSE LEVELS TO
11 SEX OFFENDERS PURSUANT TO SUBDIVISION SIX OF THIS SECTION. AFTER EACH
12 SUCH STUDY THE BOARD SHALL PREPARE A DETAILED REPORT TO THE GOVERNOR AND
13 LEGISLATURE DETERMINING THE PREDICTIVE VALUE OF THE RISK ASSESSMENT
14 INSTRUMENT AND THE PREDICTIVE VALUE OF EACH FACTOR CONSIDERED IN THE
15 OVERALL RISK ASSESSMENT WHEN APPLIED TO THE STATEWIDE DATABASE MAIN-
16 TAINED PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION. THE REPORT SHALL
17 INCLUDE RECOMMENDED CHANGES TO THE RISK ASSESSMENT INSTRUMENT TO ENHANCE
18 ITS PREDICTIVE CAPABILITIES FOR THE PURPOSE OF PERIODIC REVALIDATION OF
19 SUCH INSTRUMENT PURSUANT TO SUBDIVISION FIVE OF THIS SECTION. THE FIRST
20 SUCH STUDY SHALL BE COMPLETED WITHIN TWO YEARS OF THE EFFECTIVE DATE OF
21 THIS SUBDIVISION.

22 Applying these guidelines AND THE VALIDATED RISK ASSESSMENT
23 INSTRUMENT, the board shall within sixty calendar days prior to the
24 discharge, parole, release to post-release supervision or release of a
25 sex offender make a recommendation which shall be confidential and shall
26 not be available for public inspection, to the sentencing court as to
27 whether such sex offender warrants the designation of sexual predator,
28 sexually violent offender, or predicate sex offender as defined in
29 subdivision seven of section one hundred sixty-eight-a of this article.
30 In addition, the guidelines AND SUCH INSTRUMENT shall be applied by the
31 board to make a recommendation to the sentencing court which shall be
32 confidential and shall not be available for public inspection, providing
33 for one of the following three levels of notification depending upon the
34 degree of the risk of re-offense by the sex offender.

35 S 4. Subdivisions 1 and 2 of section 168-n of the correction law,
36 subdivision 1 as amended by chapter 11 of the laws of 2002 and subdivi-
37 sion 2 as amended by chapter 453 of the laws of 1999, are amended to
38 read as follows:

39 1. A determination that an offender is a sexual predator, sexually
40 violent offender, or predicate sex offender as defined in subdivision
41 seven of section one hundred sixty-eight-a of this article shall be made
42 prior to the discharge, parole, release to post-release supervision or
43 release of such offender by the sentencing court applying the guidelines
44 AND RISK ASSESSMENT INSTRUMENT established in subdivision five of
45 section one hundred sixty-eight-1 of this article after receiving a
46 recommendation from the board pursuant to section one hundred sixty-
47 eight-1 of this article.

48 2. In addition, applying the guidelines AND RISK ASSESSMENT INSTRUMENT
49 established in subdivision five of section one hundred sixty-eight-1 of
50 this article, the sentencing court shall also make a determination with
51 respect to the level of notification, after receiving a recommendation
52 from the board pursuant to section one hundred sixty-eight-1 of this
53 article. Both determinations of the sentencing court shall be made thir-
54 ty calendar days prior to discharge, parole or release.

55 S 5. This act shall take effect on the one hundred eightieth day after
56 it shall have become a law.