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I N   S E N A T E

April 27, 2012

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Introduced by Sen. KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Crime Victims, Crime and 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  
29 attorney and the court may consider reliable hearsay evidence submitted  
30 by either party provided that it is relevant to the determinations.

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

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1 Facts previously proven at trial or elicited at the time of entry of a  
2 plea of guilty shall be deemed established by clear and convincing  
3 evidence and shall not be relitigated. The court shall render an order  
4 setting forth its determinations and the findings of fact and conclu-  
5 sions of law on which the determinations are based. A copy of the order  
6 shall be submitted by the court to the division. Upon application of  
7 either party, the court shall seal any portion of the court file or  
8 record which contains material that is confidential under any state or  
9 federal statute. Either party may appeal as of right from the order  
10 pursuant to the provisions of articles fifty-five, fifty-six and fifty-  
11 seven of the civil practice law and rules. Where counsel has been  
12 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. 2. Subdivision 2 of section 168-k of the correction law, as amended  
18 by chapter 684 of the laws of 2005, is amended to read as follows:

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

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

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

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

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

27 (a) criminal history factors indicative of high risk of repeat  
28 offense, including:

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

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

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

35 (iv) whether the sex offender committed the felony sex offense against  
36 a child;

37 (v) the age of the sex offender at the time of the commission of the  
38 first sex offense;

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

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

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

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

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

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

51 (e) whether psychological or psychiatric profiles indicate a risk of  
52 recidivism;

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

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

55 (h) recent threats or gestures against persons or expressions of  
56 intent to commit additional offenses; and

1 (i) review of any victim impact statement.

2 5-A. (A) THE BOARD IN CONSULTATION WITH THE DEPARTMENT AND THE DIVI-  
3 SION OF CRIMINAL JUSTICE SERVICES SHALL MAINTAIN A STATEWIDE DATABASE OF  
4 SEX OFFENDER RECIDIVISM STATISTICS.

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

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

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

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

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

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