

4591--A

2013-2014 Regular Sessions

I N   A S S E M B L Y

February 6, 2013

---

Introduced by M. of A. O'DONNELL, AUBRY -- Multi-Sponsored by -- M. of A. PERRY -- read once and referred to the Committee on Correction -- recommitted to the Committee on Correction in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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

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

LBD00904-02-4

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

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

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

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

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

23 S 3. Subdivision 5 and the opening paragraph of subdivision 6 of  
24 section 168-1 of the correction law, subdivision 5 as added by chapter  
25 192 of the laws of 1995, subparagraph (i) of paragraph (a) of subdivi-  
26 sion 5 and the opening paragraph of subdivision 6 as amended by chapter  
27 11 of the laws of 2002, are amended and a new subdivision 5-a is added  
28 to read as follows:

29 5. The board shall develop guidelines and procedures AND USE A VALI-  
30 DATED RISK ASSESSMENT INSTRUMENT to assess the risk of a repeat offense  
31 by such sex offender and the threat posed to the public safety. SUCH  
32 RISK ASSESSMENT INSTRUMENT SHALL BE PERIODICALLY SUBJECTED TO EMPIRICAL  
33 RE-VALIDATION. Such guidelines shall [be based upon,] INCORPORATE  
34 FACTORS FOUND TO BE PREDICTIVE OF RISK OF RE-OFFENSE, INCLUDING but not  
35 limited to, the following:

36 (a) criminal history factors indicative of high risk of repeat  
37 offense, including:

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

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

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

44 (iv) whether the sex offender committed the felony sex offense against  
45 a child;

46 (v) the age of the sex offender at the time of the commission of the  
47 first sex offense;

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

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

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

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

54 (c) conditions of release that minimize risk or re-offense, including  
55 but not limited to whether the sex offender is under supervision;

1 receiving counseling, therapy or treatment; or residing in a home situ-  
2 ation that provides guidance and supervision;

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

5 (e) whether psychological or psychiatric profiles indicate a risk of  
6 recidivism;

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

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

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

11 (i) review of any victim impact statement.

12 5-A. (A) THE BOARD IN CONSULTATION WITH THE DEPARTMENT AND THE DIVI-  
13 SION OF CRIMINAL JUSTICE SERVICES SHALL MAINTAIN A STATEWIDE DATABASE OF  
14 SEX OFFENDER RECIDIVISM STATISTICS.

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

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

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

47 1. A determination that an offender is a sexual predator, sexually  
48 violent offender, or predicate sex offender as defined in subdivision  
49 seven of section one hundred sixty-eight-a of this article shall be made  
50 prior to the discharge, parole, release to post-release supervision or  
51 release of such offender by the sentencing court applying the guidelines  
52 AND RISK ASSESSMENT INSTRUMENT established in subdivision five of  
53 section one hundred sixty-eight-1 of this article after receiving a  
54 recommendation from the board pursuant to section one hundred sixty-  
55 eight-1 of this article.

1     2. In addition, applying the guidelines AND RISK ASSESSMENT INSTRUMENT  
2 established in subdivision five of section one hundred sixty-eight-1 of  
3 this article, the sentencing court shall also make a determination with  
4 respect to the level of notification, after receiving a recommendation  
5 from the board pursuant to section one hundred sixty-eight-1 of this  
6 article. Both determinations of the sentencing court shall be made thir-  
7 ty calendar days prior to discharge, parole or release.  
8     S 5. This act shall take effect on the one hundred eightieth day after  
9 it shall have become a law.