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\*\*\* ARCHIVE \*\*\*

\*\*\* THIS SECTION IS CURRENT THROUGH THE **2005** SESSION \*\*\*

**CORRECTION LAW**  
 ARTICLE 6-C. SEX OFFENDER REGISTRATION ACT

*NY CLS Correc* **β 168-a (2005)**

**β 168-a.** Definitions

As used in this article, the following definitions apply:

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.

2. "Sex offense" means:

(a) (i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 250.50 and 255.25 or article two hundred sixty-three of the penal **law**, or section 135.05, 135.10, 135.20 or 135.25 of such **law** relating to kidnapping offenses, provided the victim of such kidnapping or related offense is less than seventeen years old and the offender is not the parent of the victim, or sections 230.04, where the person patronized is in fact less than seventeen years of age, 230.05 or 230.06 or subdivision two of section 230.30, *section 230.32 of the penal law*, or (ii) a conviction of or a conviction for an attempt to commit any of the provisions of *section 235.22 of the penal law*, or (iii) a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted as a hate crime defined in *section 485.05 of the penal law* or as a crime of terrorism defined in section 490.25 of such **law**; or

(b) a conviction of or a conviction for an attempt to commit any of the provisions of *section 130.52 or 130.55 of the penal law*, provided the victim of such offense is less than eighteen years of age; or

(c) a conviction of or a conviction for an attempt to commit any of the provisions of *section 130.52 or 130.55 of the penal law* regardless of the age of the victim and the offender has previously been convicted of: (i) a sex offense defined in this article, (ii) a sexually violent offense defined in this article, or (iii) any of the provisions of *section 130.52 or 130.55 of the penal law*, or an attempt thereof; or

(d) a conviction of (i) an offense in any other jurisdiction which includes all of the essential elements of any such crime provided for in paragraph (a), (b) or (c) of this subdivision or (ii) a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred or, (iii) any of the provisions of *18 U.S.C. 2251, 18 U.S.C. 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, or 18 U.S.C. 2260*, provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect.

(e) a conviction of any of the provisions of subdivision two, three or four of *section 250.45 of the penal law*, unless upon motion by the defendant, the trial court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that registration would be unduly harsh and inappropriate.

3. "Sexually violent offense" means:

(a) (i) a conviction of or a conviction for an attempt to commit any of the provisions of *sections 130.35, 130.50, 130.65, 130.66, 130.67, 130.70, 130.75 and 130.80 of the penal law*, or (ii) a conviction of or a conviction for an attempt to commit any of the provisions of *sections 130.53, 130.65-a and 130.90 of the penal law*, or (iii) a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted as a hate crime defined in *section 485.05 of the penal law* or as a crime of terrorism defined in *section 490.25 of such law*; or

(b) a conviction of an offense in any other jurisdiction which includes all of the essential elements of any such felony provided for in paragraph (a) of this subdivision or conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred.

4. "**Law** enforcement agency having jurisdiction" means: (a) (i) the chief **law** enforcement officer in the village, town or city in which the offender expects to reside upon his or her discharge, probation, parole, release to post-release supervision or upon any form of state or local conditional release; or (ii) if there be no chief **law** enforcement officer in such village, town or city, the chief **law** enforcement officer of the county in which the offender expects to reside; or (iii) if there be no chief enforcement officer in such village, town, city or county, the division of state police and (b) in the case of a sex offender who is or expects to be employed by, enrolled in, attending or employed, whether for compensation or not, at an institution of higher education, (i) the chief **law** enforcement officer in the village, town or city in which such institution is located; or (ii) if there be no chief **law** enforcement officer in such village, town or city, the chief **law** enforcement officer of the county in which such institution is located; or (iii) if there be no chief **law** enforcement officer in such village, town, city or county, the division of state police; and (iv) if such institution operates or employs a campus **law** enforcement or security agency, the chief of such agency.

5. "Division" means the division of criminal justice services as defined by *section eight hundred thirty-seven of the executive law*.

6. "Hospital" means a hospital as defined in subdivision two of *section four hundred of this chapter* and applies to persons committed to such hospital by order of commitment made pursuant to *article sixteen of this chapter*.

7. (a) "Sexual predator" means a sex offender who has been convicted of a sexually violent offense defined in subdivision three of this section and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses.

(b) "Sexually violent offender" means a sex offender who has been convicted of a sexually violent offense defined in subdivision three of this section.

(c) "Predicate sex offender" means a sex offender who has been convicted of an offense set forth in subdivision two or three of this section when the offender has been previously convicted of an offense set forth in subdivision two or three of this section.

8. "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

9. "Predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

10. "Board" means the "board of examiners of sex offenders" established pursuant to *section one hundred sixty-eight-1 of this article*.

11. "Local correctional facility" means a local correctional facility as that term is defined in subdivision sixteen of *section two of this chapter*.

12. Probation means a sentence of probation imposed pursuant to *article sixty-five of the penal law* and shall include a sentence of imprisonment imposed in conjunction with a sentence of probation.

13. "Institution of higher education" means an institution in the state providing higher education as such term is defined in subdivision eight of *section two of the education law*.

14. "Nonresident worker" means any person required to register as a sex offender in another jurisdiction who is employed or carries on a vocation in this state, on either a full-time or a part-time basis, with or without compensation, for more than fourteen consecutive days, or for an aggregate period exceeding thirty days in a calendar year.

15. "Nonresident student" means a person required to register as a sex offender in another jurisdiction who is enrolled on a full-time or part-time basis in any public or private educational institution in this state including any secondary school, trade or professional institution or institution of higher education.

**HISTORY:** Add, L 1995, ch 192, B 2, eff Jan 21, 1996 (see 1995 note below).

Sub 2, par (a), amd, L 1999, ch 453, B 1 (see 1999 note below), L 2002, ch 11, B 1 (see 2002 note below), L 2003, ch 69, B 4, eff Aug 11, 2003 (see 2003 note below).

Sub 2, par (b), add, L 2002, ch 11, B 1, eff March 11, 2002 (see 2002 note below).

Former sub 2, par (b), redesignated sub 2, par (d), L 2002, ch 11, B 1, eff March 11, 2002.

Sub 2, par (c), add, L 2002, ch 11, B 1, eff March 11, 2002 (see 2002 note below).

Sub 2, par (d), formerly sub 2, par (b), amd, L 1999, ch 453, B 1 (see 1999 note below); so designated sub 2, par (d) and amd, L 2002, ch 11, B 1 (see 2002 note below); amd, L 2004, ch 146, B 1, eff July 13, 2004.

Sub 2, par (e), add, L 2003, ch 69, B 4, eff Aug 11, 2003 (see 2003 note below).

Sub 3, par (a), amd, L 1999, ch 453, B 2 (see 1999 note below), L 2002, ch 11, B 2, eff March 11, 2002 (see 2002 note below).

Sub 3, par (b), amd, L 1999, ch 453, B 2 (see 1999 note below), L 2002, ch 11, B 2, eff March 11, 2002 (see 2002 note below).

Sub 4, amd, L 1999, ch 453, B 3 (see 1999 note below), L 2002, ch 11, B 3, eff March 11, 2002 (see 2002 note below).

Sub 7, add, L 2002, ch 11, B 4, eff March 11, 2002 (see 2002 note below).

Former sub 7, amd, L 1999, ch 453, B 5 (see 1999 note below); deleted, L 2002, ch 11, B 4, eff March 11, 2002 (see 2002 note below).

Sub 12, add, L 1999, ch 453, B 4, eff Jan 1, 2000 (see 1999 note below).

Sub 13, add, L 2002, ch 11, B 5, eff March 11, 2002 (see 2002 note below).

Sub 14, add, L 2002, ch 11, B 5, eff March 11, 2002 (see 2002 note below).

Sub 15, add, L 2002, ch 11, B 5, eff March 11, 2002 (see 2002 note below).

## NOTES:

### Editor's Notes

**Laws** 1995, ch 192, B 1, 3, eff Jan 21, 1996, provide as follows:

Section 1. Legislative purpose or findings: The legislature finds that the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, and that the protection of the public from these offenders is of paramount concern or interest to government. The legislature further finds that **law** enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the lack of information about sex offenders who live within their jurisdiction and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders.

The system of registering sex offenders is a proper exercise of the state's police power regulating present and ongoing conduct. Registration will provide **law** enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly. It will allow them to alert the public when necessary for the continued protection of the community.

Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in safety and in the effective operation of government. In balancing offenders due process and other rights, and the interests of public security, the legislature finds that releasing information about sex offenders to **law** enforcement agencies and, under certain circumstances, providing access to limited information about certain sex offenders to the general public, will further the primary government interest of protecting vulnerable populations and in some instances the public, from potential harm.

Therefore, this state's policy, which will bring the state into compliance with the federal crime control act 42 U.S.C. 170101, is to assist local **law** enforcement agencies' efforts to protect their communities by requiring sex offenders to

register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act.

§ 3. This act shall take effect 180 days after the date on which it shall have become a **law**, provided, however, that any rules and regulations necessary for the timely implementation of this act on such date shall be promulgated immediately.

**Laws** 1999, ch 453, § 29, eff Jan 1, 2000, provides as follows:

§ 29. This act shall take effect on the first day of January next succeeding the date on which it shall have become a **law**; provided, however that the amendments made to subdivisions 2 and 3 of *section 168-a of the correction law* by sections one and two of this act shall apply to persons convicted of an offense committed prior to such date who, on such date, have not completed service of the sentence imposed thereon.

**Laws** 2002, ch 11, § 24, subs (a) and (c), eff March 11, 2002, provides as follows:

§ 24. This act shall take effect immediately provided, however, that:

(a) the provisions of subdivision 1 of *section 168-d of the correction law*, as amended by section eight of this act, and sections one and two of this act shall apply to offenses committed on or after such effective date, except that:

(i) the provisions of subparagraphs (ii) and (iii) of paragraph (a) of subdivision 2 of *section 168-a of the correction law* as added by section one of this act shall apply to persons convicted of such an offense prior to the effective date of this act who, on such effective date, have not completed service of the sentence imposed thereon;

(ii) the provisions of subparagraph (iii) of paragraph (d) of subdivision 2 of *section 168-a of the correction law* as added by section one of this act shall apply to persons convicted of such an offense prior to the effective date of this act who, on such effective date, have not completed service of the sentence imposed thereon;

(iii) the provisions of subparagraphs (ii) and (iii) of paragraph (a) of subdivision 3 of *section 168-a of the correction law* as added by section two of this act shall apply to persons convicted of such an offense prior to the effective date of this act who, on such effective date, have not completed service of the sentence imposed thereon;

(c) the provisions of sections four, fifteen, nineteen, twenty and twenty-one of this act and subdivision 3 of *section 168-d of the correction law*, as amended by section eight of this act and the opening paragraph of subdivision 6 of *section 168-l of the correction law*, as amended by section seventeen of this act shall apply to sex offenders for whom an initial risk level determination has not been made prior to such effective date or who, on the effective date of this act, are not members of the plaintiff class in the U.S. District Court, Southern District of New York case entitled Doe v. Pataki, Index Number 96CIV1657 (DC).

**Laws** 2003, ch 69, § 1, eff Aug 11, 2003, provides as follows:

Section 1. This act shall be known and may be cited as "Stephanie's **Law**."

New York References:

This section referred to in BB 168-d, 168-l; CLS *Penal* § 60.35

Federal References:

Megan's **Law**, 42 *USCS* § 14071(d)

Protection of children from sexual predators act of 1998, ■■■ 105-314

Research References & Practice Aids:

**Law Reviews:**

Feldman, The "scarlet letter **laws**" of the 1990s: a response to critics. *60 Albany L Rev* 1081

Case Notes: 1. In general 2. "Sex offender"; "sex offense" 3. "Sexual predator"; "sexually violent predator"

## 1. In general

Risk level 3 determination under Sex Offender Registration Act constitutes "determination of status" which imposes significant burdens, implicating defendant's liberty interest and triggering due process safeguards. *People v David W.* (2000) 95 NY2d 130, 711 NYS2d 134, 733 NE2d 206.

Youthful offender adjudication should not be used in determining risk factor involving prior sex crimes or felonies under *Sex Offender Registration Act*. *People v Bryant* (2000, Co Ct) 184 Misc 2d 513, 708 NYS2d 835.

Defendant, who kidnapped a three-year-old girl as part of a scheme to blackmail the girl's parents, was not properly subject to classification and registration under the New York Sex Offender Registration Act, [REDACTED]. *Correct. Law* β 168 et seq., upon his release from prison; furthermore, an automatic application of the Act to a defendant is unconstitutional as conviction of any crime where classification under the Act is mandatory but no element of the crime itself involves an improper sexual component, requires a hearing, at which there must be presented evidence of some sexual facet to the defendant's actions or motivations sufficient to sustain a classification as a sexual offender. *People v Bell* (2003, Sup) 3 Misc 3d 773, 778 NYS2d 837.

## 2. "Sex offender"; "sex offense"

Supreme Court had jurisdiction to classify parolee as risk level 3 sex offender, and thus writ of prohibition did not lie, where parolee was sex offender under CLS Correc B 168-a(1) who was not definitely released from parole supervision when Sex Offender Registration Act took effect. *Raphael S. v Leventhal* (1998, 2d Dept) 246 App Div 2d 659, 668 NYS2d 50.

In Article 78 proceeding challenging petitioner's classification as risk level 3 sex offender, "upward departure" to level 3 was not arbitrary, even though scoring guidelines ostensibly placed petitioner at level 2, where he had 4 convictions relating to unlawful contact with children, 2 of which were not adequately accounted for in initial calculation, and he had been diagnosed as homosexual pedophile, which automatically results in presumptive level 3 assessment when one of 4 specified "overriding factors" is present, including diagnosis of chronic inability to control impulsive sexual behavior, such as petitioner's pedophilia. *O'Brien v State Div. of Probation & Correctional Servs.* (1999, 3d Dept) 263 App Div 2d 804, 693 NYS2d 735, app den (1999) 94 NY2d 758, 704 NYS2d 532, 725 NE2d 1094.

In hearing to determine appropriate risk level classification under Sex Offender Registration Act (SORA), court did not abuse its discretion in treating defendant's prior adjudication as juvenile delinquent solely as endangering welfare of child, which does not constitute sex offense within meaning of SORA, although People maintained that defendant should be assessed additional points for committing prior sex crime. *People v MacNeil* (2001, 3d Dept) 283 App Div 2d 835, 727 NYS2d 485.

Trial court erred in certifying defendant as a sex offender under the Sex Offender Registration Act, [REDACTED]. *Correct. Law* art 6-C, based on defendant's conviction of unlawful imprisonment in the second degree where the victim was not less than 17 years old, because, under such circumstances, the conviction was not for a "sex offense" within the meaning of [REDACTED]. *Correct. Law* β 168-a(2)(a). *People v Lewis* (2002, 4th Dept) 294 App Div 2d 847, 741 NYS2d 760.

Defendant who pleaded guilty to attempted third degree rape for engaging in sexual intercourse with girl when she was 16 years old and he was 45 years old was sex offender subject to notification procedures of *New York Sex Offender Registration Act*. *People v Terdeman* (1997, City Crim Ct) 175 Misc 2d 379, 669 NYS2d 136.

"Essential elements" test, which is used in predicate felony context, must also be used to determine whether out-of-state conviction requires registration as sex offender in New York, given legislative history of Sex Offender

Registration Act and identical language in CLS Correc B 168-a(2)(b) and such predicate felony statutes as CLS Penal B 70.04(1)(b)(i); also, that test must be strictly construed. *In re Nadel* (2001, Sup) 188 Misc 2d 427, 724 NYS2d 262 (criticized in *In re Millan* (2001, Sup) 189 Misc 2d 419, 730 NYS2d 392).

Respondent did not have to register as sex offender in New York, even though he had been convicted of violating 18 USCS B 2252(a)(1), which prohibits knowing transportation or shipping, in interstate or foreign commerce, of visual depictions involving minor engaging in sexually explicit conduct, where (1) 18 USCS B 2256(1) defines "minor" as person under age of 18, (2) analogous New York statutes--CLS Penal B B 263.10 and 263.15--prohibit knowing production, direction, or promotion of performance or obscene performance of child less than 17 years of age, and (3) thus, because of those different age requirements, strict requirements of "essential elements" test were not met. *In re Nadel* (2001, Sup) 188 Misc 2d 427, 724 NYS2d 262 (criticized in *In re Millan* (2001, Sup) 189 Misc 2d 419, 730 NYS2d 392).

Although a conviction of sex offenses at a summary court-martial could be a conviction subjecting a former service person to the obligation to register as a sex offender, the Board of Examiners of New York State's Sex Offender Registry made an error of law when it found an obligation to register on the part of a person who was convicted at a summary court-martial, and had served time and been discharged, months before ■■■. Correct. Law B 168-a was amended to eliminate the obligation to register as to persons whose convictions in foreign jurisdictions were for offenses that could not possibly have resulted in sentences of death or imprisonment for a year or longer. *Coram v Bd. of Examiners* (2003, Sup) 195 Misc 2d 392, 758 NYS2d 235.

Trial court's order that adjudicated defendant a level three sex offender following a hearing pursuant to the Sex Offender Registration Act, ■■■. Correct. Law art. 6-C, and designated him a sexually violent offender pursuant to ■■■. Correct. Law B 168-a(3)(b) and (7)(b) was modified and defendant was adjudicated a level two sex offender where the total points that should have been assessed to defendant fell within the level two classification because (1) the trial court properly raised defendant's "Use of Violence" score based on a medical examination which indicated that the 11-year-old victim sustained the requisite physical injury, namely, an abrasion to her vulva and a tear to her hymen, under ■■■. Penal Law B 10.00(9), (2) the trial court also properly raised defendant's "Sexual Contact with Victim" score because the People demonstrated that defendant engaged in aggravated sexual abuse by inserting his finger into the vagina of a physically helpless victim, under ■■■. Penal Law B 130.67(1)(b), (3) the trial court should not have assessed points against defendant in the "Other Victim Characteristics" category because, under the particular circumstances of the case, double counting was inappropriate for the "Age of the Victim" and "Other Victim Characteristics" factors absent special circumstances, which the People did not establish, (4) the trial court improperly assessed points in the "Relationship with the Victim" category because the People failed to establish by clear and convincing evidence that the victim was a stranger to defendant or a person with whom a relationship had been established or promoted for the primary purpose of victimization, and (5) there was no basis to disturb the trial court's determination that defendant did not fully accept responsibility for his actions. *People v Fisher* (2005, App Div, 1st Dept) 803 NYS2d 45.

### 3. "Sexual predator"; "sexually violent predator"

Where defendant was convicted of sexual abuse in the first degree pursuant to ■■■. Penal Law B 130.65(3), the trial court improperly engaged in the analysis under ■■■. Correct. Law B 168-d(3) and ■■■. Correct. Law B 168-l(5) in determining that defendant was not a sexually violent offender; the injured party was a sexually violent offender under ■■■. Correct. Law B 168-a(7)(b), because defendant's conviction of sexual abuse in the first degree was deemed a sexually violent offense under ■■■. Correct. Law B 168-a(3). *People v Lockwood* (2003, 3d Dept) 308 App Div 2d 640, 764 NYS2d 290.

It was proper to classify petitioner probationer as level 3, sexually violent predator, since he met one of child victims when victim participated in residential camp at which petitioner was employed, second child victim was cousin of first victim, and petitioner did not show that Board of Examiners of Sex Offender's inclusion of history of drug or alcohol abuse as factor was arbitrary and capricious. *Doe v Division of Probation & Correction Alternatives* (1997, Sup) 171 Misc 2d 210, 654 NYS2d 268.

Defendant, who was released from prison following his conviction for series of violent assaults and brutal gang rape of female jogger, was deemed sexually violent predator and given risk level 3 designation in view of nature of his crimes, which resulted in victim's serious physical injury. *People v Salaam* (1997, Sup) 174 Misc 2d 726, 666 NYS2d 881.

Court determined that defendant was a sexually violent offender, as determined in the statute, on the basis of defendant's conviction of a prior offense in Maryland for which defendant was required to register as a sex offender and defendant's conviction for an offense in another jurisdiction that included all of the essential elements of [REDACTED]. *Penal Law* § 130.65. *People v Johnson* (2003, Dist Ct) 2 Misc 3d 777, 770 NYS2d 844.

After defendant was afforded due process upon remittal to redetermine and reclassify him under the Sex Offender Registration Act, the reviewing court, upon considering: (1) the risk factors set forth in the risk assessment instrument; (2) a psychological evaluation; (3) a Colorado conviction for aggravated sexual abuse, the equivalent of which was third-degree aggravated sexual abuse under [REDACTED]. *Penal Law* § 130.66; (4) and the evidence, including reliable hearsay from the victim, designated defendant as a level three offender, and designated him as a sexually violent offender under [REDACTED]. *Correct. Law* § 168-a(3). *People v Brown* (2004, Co Ct) 5 Misc 3d 440, 785 NYS2d 277.