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MEGAN'S LAW SHOULD SURVIVE THE LATEST ROUND OF ATTACKS

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On May 7, 1998, the District Court for the Southern District of New York once again held unconstitutional certain procedures under New York's Sex Offender Registration Act ("SORA"), commonly referred to as Megan's Law.¹ In *Doe v. Pataki*,² the district court found SORA's provisions that establish procedures for assigning risk level classifications to convicted sex offenders to be in violation of the Fourteenth Amendment's guarantee of due process.³

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1 See N.Y. Correct. Law §§ 168 to 168-v (McKinney 1998).

2 3 F. Supp. 2d 456, 459 (S.D.N.Y. 1998) [hereinafter *Doe I*].

3 See *Doe I*, 3 F. Supp. 2d at 461-63. Each convicted sex offender subject to SORA's

SORA, like many other sex offender laws across the country, was enacted in response to the alarming statistics demonstrating that a staggering number of children are sexually molested each year in the United States, that sex offenders have a high rate of recidivism and are one of the most difficult classes of offenders to rehabilitate.⁴ SORA, which was enacted on July 25, 1995, and became effective on January 21, 1996, requires sex offenders to register with the Division of Criminal Justice Services ("DCJS").⁵ Additionally, under limited circumstances, SORA provides for the public dissemination of certain registration information on a sex offender. This information may be obtained from a local law enforcement agency or a "900" telephone number maintained by the local law enforcement agency.⁶

SORA is applicable not only to sex offenders sentenced after the effective date, but also to those incarcerated or institutionalized and on probation or parole on that date.⁷ Indeed, the retroactive application of SORA has led to constitutional challenges, and will undoubtedly lead to more.⁸ The constitutionality of the public notification provisions of SORA, as well as other states'

provisions has been or will be classified at one of the following levels: (1) risk level one, requiring restricted level of notification; (2) risk level two, permitting limited public notification; or (3) risk level three, permitting the broadest amount of public notification. Identifying information about the offender may be disseminated depending upon the risk level classification. *Id.* For level one offenders, SORA provides only for notification of the offender's address to a local law enforcement agency. *Id.*; see also N.Y. Correct. Law § 168-l(6)(a) (West Supp. 1999). For level two offenders, the law provides that local law enforcement agencies may disseminate an approximate address based upon the offender's zip code, a photograph, and certain background information to any entity with vulnerable populations (such as schools). *Id.* at § 168-l(6)(b). A level three offender is deemed a "sexually violent predator" and the law provides for a subdirectory containing explicit identifying information including the exact address of the offender which may be provided by police agencies to entities with vulnerable populations. *Id.* at § 168-l(6)(c). Moreover, "any entity receiving information on a sex offender may disclose or further disseminate such information at their discretion." *Id.* at § 168-l(6)(b), (c).

⁴ See N.Y. Correct. Law § 168 (West Supp. 1999) (stating legislative findings that danger of recidivism posed by sex offenders, and protection of public from these offenders is of paramount concern to government); 139 Cong. Rec. H10,321 (daily ed. Nov. 20, 1993) (statement of Rep. Ramstad) (explaining that child sex offenders repeat their crime to point of compulsion).

⁵ N.Y. Correct. Law § 168 (West Supp. 1999).

⁶ N.Y. Correct. Law § 168-p and q.

⁷ N.Y. Correct. Law § 168-p and q (West Supp. 1999). See *People v. Afrika*, 648 N.Y.S.2d 235 (N.Y. Sup. Ct. 1996) (Article 6-c of N.Y. Correct. Law, effective January 21, 1996, is applicable not only to sex offenders sentenced after that date, but also to those incarcerated or on probation or parole on that date).

⁸ See *Matter of Parolee v. Calabrese*, 246 A.D. 2d 53, 54 (2d Dep't 1998) (holding that N.Y. Correction Law § 168 does not violate ex post facto clause of United States Constitution).

sex offender registration laws,⁹ have been challenged by sex offenders who were convicted prior to the passage of SORA. These offenders have argued that the notification provision is quintessentially punitive in nature and violative of the Ex Post Facto Clause in the Constitution, which forbids all laws that increase punishment after the commission of the crime.

In 1996, a number of convicted sex offenders challenged the retroactive application of SORA's registration and public notification provisions in *Doe v. Pataki*.¹⁰ The District Court for the Southern District of New York held the registration provisions of SORA to be regulatory and not punitive in nature whereas retroactive application of the notification provisions would violate the ex post facto clause.¹¹

The Court of Appeals for the Second Circuit reversed the district court with respect to the notification provisions, holding that such requirements do not constitute punishment for purposes of the Ex Post Facto Clause.¹² The United States Supreme Court subsequently denied certiorari.¹³ On remand for further proceedings on plaintiffs' remaining due process and statutory claims, the district court held that the sex offenders on parole or probation when SORA became effective were denied due process under SORA's classification procedures. The court, therefore, permanently enjoined any classification of this group of sex offenders at a level higher than risk level one unless and until those offenders are reclassified by a court in accordance with the procedures set forth in the court's decision.¹⁴ Additionally, the court permitted the complaint to be amended to add a class of convicted sex offenders who were incarcerated on SORA's effective date, and preliminarily enjoined this group's classification above risk level one unless and until they are reclassified under the same procedures.¹⁵

⁹ See *People v. Afrika*, 648 N.Y.S.2d at 241 (finding SORA does not contravene ex post facto clause); *Doe v. Poritz*, 142 N.J. 1, 12 (1995) (finding registration and community notification provisions of New Jersey's sex offender registration act constitutional); *State v. Ward*, 869 P.2d 1062, 1062 (Wash. 1994) (upholding notification provisions of Washington's sex offender registration statute).

¹⁰ 940 F. Supp. 603, 603 (S.D.N.Y. 1996).

¹¹ See *Id.* at 631.

¹² See *Doe v. Pataki*, 120 F.3d 1263, 1265 (2d Cir. 1997) [hereinafter *Doe II*].

¹³ See *Doe v. Pataki*, 118 S.Ct. 1066, 1066 (1998)[hereinafter *Doe III*].

¹⁴ See *Doe I*, 3 F. Supp. 2d. at 472.

¹⁵ See *Id.* at 475.

The procedures for assigning individual risk levels are the subject of heated debate. These procedures have generated significant controversy primarily because the risk level assigned to a convicted sex offender determines the amount of information about the offender that can be disseminated to the public under SORA's notification procedures.¹⁶ Proponents of SORA focus on the safety risks to children, citing instances of sexually mutilated children, and argue that the release of information about level two and level three sex offenders in communities is necessary to protect the public at large.¹⁷ Opponents focus on the possibility that convicted sex offenders will be mistakenly classified at levels two or three solely because of inadequate procedural safeguards, thereby permitting public release of identifying information about offenders that could result in harassment and stigmatization.¹⁸

As a result of the district court's latest ruling in *Doe v. Pataki*, there are now over 6,000 convicted sex offenders¹⁹ living among us, whose registration information cannot be disseminated because they cannot be classified at a risk level higher than level one, regardless of the severity of their crimes. This grievous situation will exist until there is a judicial re-classification in accordance with the procedures set forth in the district court's opinion²⁰ or until *Doe v. Pataki* is overturned on appeal.²¹

According to the district court, SORA does not provide the minimum procedural safeguards required under the due process

¹⁶ See N.Y. Correct. Law §168-l(6)(a)-(c).

¹⁷ See Simeon Schopf, *Megan's Law: Community Notification and the Constitution*, 29 COLUM. J. L. & SOC. PROBS. 117, 117 (1995) (illustrating how young girl Megan Kanka was raped and strangled to death by her sex offender neighbor); Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 729 (1994) (discussing how convicted child molester Joseph Gallardo refused treatment while in prison and upon release, he still had sexual fantasies about children); *Ex-Con Arrested in Sexual Mutilation of Young Boy*, UPI, May 22, 1989, available in LEXIS, News Library, Arcnws File.

¹⁸ See *Doe I*, 3 F. Supp. 2d. at 469-470.

¹⁹ See Judge: *Section of Megan's Law Unconstitutional*, N.Y. NEWSDAY, May 8, 1998, at A46. According to statements attributed to Thomas M. O'Brien, a lawyer with The Legal Aid Society, this most recent District Court ruling "will affect more than 6,000 sex offenders who were on probation or parole or were released shortly after the law took effect." *Id.*

²⁰ See *Doe I*, 3 F. Supp.2d at 479. Apparently, Judge Chin does not believe New York's Legislature is able to provide due process protection under SORA since he has set forth a list of procedures that all state courts must follow.

²¹ As of this writing, the Attorney General's office has filed a notice of appeal and will perfect same on or before May 1, 1998.

clause of the Constitution with respect to the administrative classification of convicted sex offenders who were on parole or probation on SORA's effective date.²² The court based its opinion on the fact that these classifications were not made by a court with the full panoply of procedural safeguards, such as notice, a hearing, discovery and appointment of counsel.²³ The opinion also indicated that there are constitutional deficiencies in SORA's procedures for classifying all other convicted sex offenders, notwithstanding the fact that these individuals are afforded notice, a judicial hearing, and appointment of counsel.²⁴ Judge Chin's complaint, however, appears not to be with SORA's procedures concerning judicial classifications as much as it is with what he perceives to be the failure by the majority of the state's supreme court justices to properly implement SORA's procedures before assigning risk levels in individual cases.²⁵

The different procedures for classifying the two categories of convicted sex offenders and the absence of a provision giving sex offenders a direct right of judicial appeal from a risk level determination, understandably raises concerns and renders SORA vulnerable to procedural attack.²⁶ As this article will discuss, however, SORA's provisions should ultimately withstand the constitutional and statutory attacks upon its classification procedures.

THE STATUTORY AND DUE PROCESS CHALLENGES

SORA's statutory scheme creates two distinct categories of convicted sex offenders with respect to classification procedures: (1) those who were on parole or probation at the time SORA became effective (the "Parolee-Probationer" category); and (2) all other convicted sex offenders, including those who were incarcerated or institutionalized and not yet released, paroled or discharged on SORA's effective date.²⁷ As discussed herein, this

²² See *DoeI*, 3 F. Supp. 2d at 473.

²³ See *Id.*

²⁴ See N.Y. Correct. Law §§ 168-d and n (McKinney Supp. 1999).

²⁵ See *DoeI*, 3 F. Supp. 2d at 471.

²⁶ See *People v. Stevens*, 91 N.Y.2d 270, 278 (1998) (explaining that neither Megan's law nor CPL allow criminal appeal leaving court with "no alternative source of authority").

²⁷ See N.Y. Correct. Law §§ 168-d, -g, -n (McKinney Supp. 1999).

statutory scheme is logical and justified under well-established legal precedent.

In the Parolee-Probationer category, convicted sex offenders' risk levels are determined by either the Division of Parole ("DOP") or the Department of Probation and Correctional Alternatives ("DPCA") without notice or a hearing before the risk level is determined.²⁸ In contrast, all other convicted sex offenders, including those still incarcerated or institutionalized on SORA's effective date, were and are classified by the original sentencing court after notice, appointment of counsel if necessary, and a full hearing.²⁹ There is no express statutory provision for a direct right of appeal from a judicial risk level classification.³⁰

Four questions immediately arise upon an analysis of SORA's classification provisions: (1) Whether the state can justify treating Parolee-Probationers procedurally different from all other convicted sex offenders; (2) whether the risk assessment instrument promulgated by the Board of Examiners of Sex Offenders ("Board")³¹ and utilized by the Board, the DOP,³² the DPCA³³ and the courts to determine risk levels, arbitrarily assigns numerical values to specific risk factors; (3) whether SORA's classification procedures result in accurate risk level assessments; and (4) whether an appeal lie from a judicial risk level determination in the absence of an express statutory provision therefor?

CONVICED SEX OFFENDERS ON PAROLE OR PROBATION OR
INCARCERATED ON SORA'S EFFECTIVE DATE ARE AFFORDED
SUFFICIENT PROCEDURAL PROTECTION UNDER SORA

The primary constitutional attacks on SORA's classification procedures are directed at the absence of (1) notice, (2) appoint-

²⁸ See N.Y. Correct. Law § 168-g (West Supp. 1999).

²⁹ See N.Y. Correct. Law §§ 168-d(3), n(3) (McKinney Supp. 1999).

³⁰ See *Stevens*, 91 N.Y.2d at 278-79 (holding trial court's risk level assessment was not appealable pursuant to Criminal Procedure Law).

³¹ See N.Y. Correct. Law § 168-1(1) (McKinney Supp. 1999). The Board consists of five members appointed by Governor, three of whom are DOP employees and "experts in the field of the behavior and treatment of sex offenders" and two of whom are from DPCA. *Id.*

³² See N.Y. Correct. Law § 168-g(1) (McKinney Supp. 1999) (identifying Division of Parole, Department of Probation and Correction as authorized to apply risk factors).

³³ See *id.*

ment of counsel and (3) a judicial hearing prior to classification of convicted sex offenders in the Parolee-Probationer category.³⁴ The absence of such procedural safeguards is even more apparent because these procedures are specifically provided to all other convicted sex offenders, including those who were incarcerated or institutionalized on SORA's effective date.

The risk level classifications for the Parole-Probationer category were made by the DOP or the DPCA with the assistance of the Board.³⁵ The convicted sex offenders in this category were then notified in writing of the risk levels assigned, the duties imposed by SORA, and the right to administratively appeal the agency's determination within twenty days.³⁶

The court found that SORA's procedures do not provide the necessary safeguards to prevent a deprivation of the constitutionally protected liberty interests of the convicted sex offenders in the Parolee-Probationer category.³⁷ According to the court, each of these convicted sex offenders has a constitutionally protected liberty interest, apparently in his good name, and the right to privacy recognized and protected by the state, both of which could be significantly harmed by an erroneous risk level determination.³⁸ On this ground, the district court held that SORA's administrative classification procedures do not meet the constitutional standards of due process.³⁹

Not satisfied with simply finding SORA's administrative classification provisions unconstitutional, the court appeared to step into the shoes of the state legislature and essentially re-wrote SORA to provide for judicial classification of the Parolee-Probationer category of convicted sex offenders.⁴⁰ This judicial "legislation" provides for written notice to Parolee-Probationer convicted sex offenders; the right to counsel and pre-hearing discovery; the right to seek a stay of notification while making an application to a state appellate court; and the

³⁴ See *Doe I*, 3 F. Supp. 2d 456, 459 (S.D.N.Y. 1998).

³⁵ See N.Y. Correct. Law § 168-1(1) (McKinney Supp. 1999). A member of the Board, or a designee, reviewed each case prior to the final risk level assignment. *Id.*; *Doe I*, 3 F. Supp. 2d, at 472.

³⁶ See N.Y. Correct. Law § 168-g (McKinney Supp. 1999); see also *Doe I*, 3 F. Supp. 2d at 463.

³⁷ See *Doe I*, 3 F. Supp. 2d at 475.

³⁸ See *id.*

³⁹ See *id.* at 470-73.

⁴⁰ See *id.* at 478.

burden of persuasion on the state to justify the proposed risk level and manner of notification.⁴¹

The soundness of the district court's latest ruling may be questioned on at least two grounds. It is certainly doubtful whether convicted sex offenders have "good names" deserving of constitutional protection under the rubric of liberty interests.⁴² Moreover, convicted sex offenders within the Parolee-Probationer category are not similarly situated to other members of society.⁴³

Convicted sex offenders on parole or probation on SORA's effective date were under the active administrative supervision of trained officials of the DOP. Not only is there "no Federal or State constitutional right for an inmate to be released before serving his full sentence," but it is well recognized that "the State has the discretion to place conditions on parole release."⁴⁴ In this state, the authority of the DOP to impose conditions upon an offender under parole supervision has long been absolute and beyond judicial review as long as no positive statutory requirement is violated.⁴⁵ What could be more logical than for the Legislature to give responsibility to classify this category of convicted sex offenders to the administrative agency having supervision over them?⁴⁶ There do not appear to be the requisite liberty interests at stake sufficient to invoke the procedural guarantees contained in the federal and state constitutions for those in the Parolee-Probationer category of convicted sex offenders.

Additionally, just because this category of sex offenders was classified by an administrative agency rather than by a court does not automatically mean that there were no procedural safeguards to assure accurate classifications. These convicted sex offenders had the right to challenge their risk level classifications by taking an administrative appeal as of right.⁴⁷ They also could

⁴¹ See *id.* at 470.

⁴² See *Doe II*, 120 F.3d 1263, 1280 (2d Cir. 1997) (discussing consequences of conviction of crimes in general and sex offenses in particular).

⁴³ See *Doe I*, 3 F. Supp. 2d 456, 470 (S.D.N.Y. 1998) (stating that in order to invoke procedural guarantees of Fourteenth Amendment, "the governmental action must 'alter a right or status previously recognized by state law.'").

⁴⁴ See *M.G. v. Travis*, 236 A.D.2d 163, 167 (1st Dep't 1997).

⁴⁵ See *Briguglio v. Board of Parole*, 24 N.Y.2d 21, 29 (1969) (noting action of Board is not reviewable if done lawfully).

⁴⁶ See N.Y. Correct. Law § 168-g(1) (McKinney Supp. 1999).

⁴⁷ See N.Y. Exec. Law §259-i(4)(a), (b) (McKinney 1993)(providing that offender on

have sought judicial review of the agency's determinations through an Article 78 proceeding as of right.⁴⁸ Additionally, SORA itself provides a procedure for petitioning the court for relief from the requirement to register, which impliedly encompasses the determination of a risk level assessment.⁴⁹

The Legislature plainly did not intend to prevent judicial review of the DOP's or the DPCA's risk level determinations under SORA or it easily could have done so as it did with respect to other determinations made by the agency having supervision over offenders on parole or probation and under the supervision of the DOP as set forth in N.Y. Executive Law § 259-i(5).⁵⁰

Moreover, whether the risk level designation was made by an administrative agency or by the sentencing court, the designation was and is made by utilizing the Risk Assessment Guidelines ("Guidelines") developed by the Board.⁵¹ These Guidelines were created to conform to the criteria set forth in SORA⁵² and to achieve maximum uniformity and objectivity based upon the perceived risk of re-offense.⁵³ Accordingly, whether the risk level assignment was made by an administrative agency or by the court, the facts of each case were reviewed utilizing the same uniform, objective Guidelines, and with the Board's oversight and recommendation.⁵⁴

parole or probation may appeal from determination by parole agency and has right to have attorney appointed if necessary); *Doe v. Division of Probation and Correction Alternatives*, 658 N.Y.S.2d 268, 272 (N.Y.Sup.Ct. 1997) (noting DPCA has established administrative review process).

⁴⁸ See *Doe v. Division of Probation and Correction Alternatives*, 654 N.Y.S.2d 268 (N.Y.Sup.Ct. 1997) (reviewing risk assessment made by DPCA under arbitrary and capricious or abuse of discretion standard in Article 78 proceeding); *Youngs v. Division of Probation and Correction Alternatives*, 667 N.Y.S.2d 1021, 1023-24 (N.Y. Co. Ct. 1997) (reviewing risk assessment made by DPCA under arbitrary and capricious or abuse of discretion standard in Article 78 proceeding).

⁴⁹ See N.Y. Correct. Law §§ 168-g(4), -o (McKinney Supp. 1999).

⁵⁰ See N.Y. Exec. Law § 259-I (5) (McKinney 1993) (expressly providing "[a]ny action by the board [of parole] or by a hearing officer pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law"); *Doe v. Division of Probation and Correction Alternatives*, 654 N.Y.S.2d 268, 272 (N.Y.Sup.Ct. 1997)(noting that DPCA has established an administrative review process).

⁵¹ See N.Y. Correct. Law §168-l(6), 168-d(3) (McKinney Supp. 1999); see also Practice Commentaries, N.Y. Correct. Law §168 (McKinney 1997)(stating generally it is duty of court applying guidelines to determine duration of registration and notification); Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (Nov. 1997), at 4 [hereinafter Guidelines].

⁵² See N.Y. Correct. Law §168-l(5) (McKinney Supp. 1999)(setting forth bases for Board's development of guidelines).

⁵³ Guidelines, *supra* note 51, at 3.

⁵⁴ See N.Y. Correct. Law § 168-l(6) (McKinney Supp. 1999).

In sum, SORA's procedures for administratively classifying convicted sex offenders who were on parole or probation on its effective date appear to provide sufficient procedural due process to withstand attacks upon its constitutionality. Indeed, "[d]ue process requirements are flexible and call for such procedural protection as the particular situation demands."⁵⁵ In this particular situation, at the time of classification, the convicted sex offenders were under the active supervision of the classifying agency, and they had a right to challenge their classifications in a judicial proceeding. Thus it cannot be said that these sex offenders were denied due process.

THE GUIDELINES ARE NEITHER VAGUE NOR ARBITRARY AND ARE
RATIONALLY RELATED TO THE RISK LEVEL DESIGNATIONS

In accordance with SORA's mandate, the Guidelines were developed by the Board.⁵⁶ The Guidelines are a detailed, point-based system, which assign numerical values to fourteen risk factors, in four different categories relating to the sex offender's current offense, criminal history, post-offense behavior and planned release environment.⁵⁷ A presumptive risk level is

⁵⁵ See *Doe v. Division of Probation and Correction Alternatives*, 654 N.Y.S.2d at 271 (citing *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976)).

⁵⁶ See N.Y. Correct. Law § 168-l(5) (McKinney Supp. 1999) ("The board shall develop guidelines and procedures to assess the risk of a repeat offense by such sex offender and the threat posed to the public safety.").

⁵⁷ See N.Y. Correct. Law § 168-l(5)a-i (McKinney Supp. 1999). The Guidelines are based upon the following factors:

- (a) criminal history factors indicating a high risk of repeat offense, including:
 - (i) whether the sex offender has a mental abnormality;
 - (ii) whether the sex offender's conduct was found to be characterized by repetitive and compulsive behavior, associated with drugs or alcohol;
 - (iii) whether the sex offender served the maximum term;
 - (iv) whether the sex offender committed the felony sex offense against a child;
 - (v) the age of the sex offender at the time of the commission of the first sex offense;
- (b) other criminal history factors to be considered in determining risk, including:
 - (i) the relationship between such sex offender and the victim;
 - (ii) whether the offense involved the use of a weapon, violence or infliction of serious bodily injury;
 - (iii) the number, date, and nature of prior offenses;
- (c) conditions of release that minimize risk of re-offense, including: whether the sex offender is under supervision, receiving counseling, therapy or treatment, or residing in a home situation that provides guidance and supervision;
- (d) physical conditions that minimize risk of re-offense, including advanced age or debilitating illness;
- (e) whether psychological or psychiatric profiles indicate a risk of recidivism;
- (f) the sex offender's response to treatment;

calculated for an offender by adding the points assigned to him in each category.⁵⁸ Departures up or down from the presumptive risk level are permissible if "there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the [G]uidelines."⁵⁹ The Guidelines and the use of a numerical methodology to calculate risk levels were developed by the Board based upon specific criteria set forth in SORA.⁶⁰

The Board appears to have developed the Guidelines with painstaking care, mindful of the gravity of the result of its application.⁶¹ The end result of the Board's endeavor was the creation of an objective instrument that should accomplish the legislative goal of assigning risk levels for sex offenders in a uniform manner. It "bring[s] academic knowledge and practical acumen to the difficult task of predicting whether a person convicted of a

- (g) recent behavior, including behavior while confined;
- (h) recent threats or gestures against persons or expressions of intent to commit additional offenses; and
- (i) review of any victim impact statement.

Id.

⁵⁸ See *id.*

⁵⁹ See *People v. Salaam*, 666 N.Y.S.2d 881, 886 (Sup. Ct. 1997); see also *Doe v. Pataki*, 120 F. 3d 1263, 1268 (2d Cir. 1997) (noting Board may only depart from presumptive risk level if mitigating circumstances are present).

⁶⁰ See Guidelines, *supra* note 51, at 5. The risk assessment instrument is divided into four parts: "Current Offense[s]; Criminal History; Post-Offense Behavior; and Release Environment." *Id.* Each category includes various factors (i.e., under the current offense(s) category, such factors considered are: use of violence, sexual contact with the victim, number of victims, and duration of the offense conduct with the victim). *Id.* There are numerical values assigned to each risk factor (i.e., 20 points are assigned if there were two victims, 30 points if there were three or more victims). The presumptive risk level is calculated by adding the points that the offender receives in each category. "If the total score is 70 points or less, the offender is presumptively level 1; if more than 70 but less than 110, he is presumptively level 2; if 110 or more, he is presumptively level 3." *Id.* at 3. Additionally, the Guidelines contain four "overrides" that automatically result in a presumptive risk level of 3: "(i) a prior felony conviction for a sex crime; (ii) the infliction of serious physical injury or the causing of death; (iii) a recent threat to reoffend; or (iv) a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior." *Id.* at 3-4.

⁶¹ See Guidelines, *supra* note 51, at 23-24. The Guidelines "were developed with the assistance of a group of experts with diverse experience in dealing with sex offenders," which included consultation with a national expert and author on the subject of sex offenders, reference to Guidelines adopted by other states and review of myriad academic publications. *Id.* The Board, assisted by experts, made revisions "in an effort to make [the instrument] as objective as possible." *Id.* at 23. Following review and testing of the Guidelines by a panel of experts, comprised of professionals with diverse and in depth experience relating to the behavior and treatment of sex offenders, the Board modified the Guidelines to incorporate various recommendations and to address concerns of the experts. *Id.* at 23-24.

sex crime is likely to reoffend.”⁶² Indeed, the Board has cautioned against applying the Guidelines without first “carefully studying th[e] commentary,” which explains the rationale behind each factor.⁶³ Moreover, as further protection of the sex offender’s substantial interests that are at stake, the Guidelines provide that points may not be assessed for a factor “unless there is clear and convincing evidence of the existence of that factor.”⁶⁴ Notably, the federal sentencing guidelines are not as protective of convicted offender’s rights since sentencing factors “need only be proved by a preponderance of the evidence to satisfy due process.”⁶⁵ The courts are consistent, however, in their approval of the risk assessment instrument and have found it to be “fair and objective,”⁶⁶ with a “rational basis for the classifications.”⁶⁷

Further, placing numerical values to the various factors resulting in an aggregate score is not a new concept, nor is it a basis for faulting the risk assessment instrument. The federal sentencing guidelines utilize similar scoring devices and have withstood due process attack.⁶⁸ Simply put, “[t]he risk assessment instrument is merely the codification of [SORA’s] guidelines in a uniform and detailed document.”⁶⁹ Thus, the manner of developing the Guidelines and the use of a numerical methodology to calculate risk levels will likely continue to withstand constitutional challenges.⁷⁰

⁶² See *id.* at 1.

⁶³ See *id.*

⁶⁴ See *id.* at 5.

⁶⁵ See, e.g., *U.S. v. Rodriguez-Gonzales*, 899 F.2d 177, 182 (2d Cir. 1990) (sentencing factors need only be proved by preponderance of evidence to satisfy due process); *U.S. v. Rivalta*, 892 F.2d 223, 230 (2d Cir. 1989) (holding that preponderance of evidence standard is sufficient); *U.S. v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989) (finding “the preponderance of the evidence standard satisfies requisite due process in determining relevant conduct pursuant to the sentencing guidelines”).

⁶⁶ See *People v. Cropper*, 651 N.Y.S.2d 1019, 1022 (Monroe Co. Ct. 1996). Justice Marks observed: “This Court cannot imagine a more thorough and complete process to develop and implement a fair and objective assessment instrument that would meet the goal of the legislation.” *Id.*

⁶⁷ *People v. Nieves*, 659 N.Y.S.2d 972, 975 (N.Y. Sup. Ct. 1997).

⁶⁸ See Federal Sentencing Guidelines, 18 U.S.C. §3553 (1985). See, e.g., *U.S. v. Vizcaino*, 870 F.2d 52, 53-54 (2d Cir. 1989) (sentence determined by aggregate of weight accorded various factors under sentencing guidelines was not denial of due process).

⁶⁹ See *People v. Cropper*, 651 N.Y.S.2d 1019, 1022 (N.Y. Co. Ct. 1996).

⁷⁰ See *id.* at 1022 (upholding risk assessment instrument and finding no due process or equal protection violations); *Nieves*, 659 N.Y.S. 2d at 975 (upholding Guidelines as “reasonable intrusions upon the individual’s privacy for the protection of society”).

APPLICATION OF THE GUIDELINES IS NOT A DENIAL OF DUE
PROCESS

While the Guidelines were designed to be followed to promote uniformity, they also provide for the ability to depart from them "if special circumstances warrant."⁷¹ "The ability to depart from the Guidelines is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case."⁷² Thus, "[n]ot to allow for departures would therefore deprive the Board or the court of the ability to exercise sound judgment and to apply its expertise to the offender."⁷³

The Board also recognized that the risk assessment instrument should not be mechanically applied, but instead should be applied after "carefully studying th[e] commentary," and that there should be a "review [of] the case file to determine what occurred."⁷⁴ A review of the cases in which courts have been called upon to review administrative classifications⁷⁵ or to make the initial classification,⁷⁶ demonstrates that the state courts are giving careful consideration to each individual case, as required under the Guidelines.

Further, the courts have not demonstrated a propensity to merely adopt a presumptive risk level recommended by the Board, without independent review.⁷⁷ For example, the court in

⁷¹ See Guidelines, *supra* note 51, at 4.

⁷² See *id.*

⁷³ See *id.* The Guidelines recognize that departures, upward or downward, should be the exception and not the rule, otherwise "the objective instrument would be of minimal value." *Id.* Thus, as a general rule, "the Board or court may not depart from the presumptive risk level unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines." *Id.*

⁷⁴ See *id.* at 1, 5.

⁷⁵ See *Doe v. Division of Probation and Correction Alternatives*, 654 N.Y.S.2d 268 (Sup. Ct. 1997); *Youngs v. Division of Probation and Correction Alternatives*, 667 N.Y.S.2d 1021 (N.Y. Co. 1997).

⁷⁶ See, e.g., *People v. Salaam*, 666 N.Y.S. 2d 881, 884 (N.Y. Sup. 1997) (court performs its own assessment); *People v. Ayten*, 658 N.Y.S.2d 175, 176 (N.Y. Sup. Ct. 1997) (same); *People v. Lombardo*, 640 N.Y.S.2d 995, 996 (N.Y. Co. Ct. 1996) (same).

⁷⁷ See N.Y. Correct. Law §168-n (McKinney Supp. 1999). The Board makes its recommendation to the court 60 days prior to the release of the sex offender and after at least two Board members have independently reviewed all of the evidence submitted for that particular case, the risk assessment instrument, and after a third member has given a final review to the information. *Id.* After the Board forwards its recommendation to the court, the court has 30 days to schedule a hearing, notify the offender, arrange for the appointment of counsel if necessary, review the file, and hold the hearing, after which, the sex offender is assigned a risk level. *Id.*

*People v. Lombardo*⁷⁸ departed upward one level from the presumptive risk level recommended by the Board after its own in depth analysis of the facts of the case and the applicable Guidelines. The court in *People v. Ayten*⁷⁹ departed downward one level from the presumptive risk level recommended by the Board, taking into account all of the facts and circumstances of the case and, in particular, the sex offender's change of heart in accepting responsibility for his crime.⁸⁰ Additionally, even though the court in *People v. Salaam*⁸¹ abided by the Board's recommendation, it did so only after performing its own independent review of all relevant factors.⁸² There is no indication that the courts have or will abdicate their obligations under SORA. On the contrary, the courts have demonstrated that they take their responsibilities very seriously when making risk level assignments.⁸³

The Guidelines require that there be clear and convincing evidence of each factor before it can be applied under the risk assessment instrument. Thus, even if the court reviews the Board's determination under an arbitrary and capricious or abuse of discretion standard, the court would still be required to consider whether there existed clear and convincing evidence of each factor applied by the Board.⁸⁴ This will ensure a high level

⁷⁸ See *Lombardo*, 640 N.Y.S.2d at 996. The court departed downward because the sex offender's conduct did not precisely fit the conduct defined by the particular risk factor, and the court deemed it appropriate, in the exercise of its judicial discretion, to raise the risk level at which the defendant was classified. Observing that the risk level calculated from aggregating the numerical values assigned to the various factors as recommended by the Board "is 'presumptive' only" and that the court "may depart from it, up or down," the judge concluded that "the potential threat posed by this defendant to the safety of the very young warrants more than merely a minimal dissemination of information about him to the public." *Id.*

⁷⁹ 658 N.Y.S.2d 175, 177 (N.Y. Sup. 1997) (moving downward one level based upon finding that Board's assessment was arbitrary and capricious).

⁸⁰ See *id.* at 574.

⁸¹ 666 N.Y.S.2d 881, 886 (Sup. Ct. 1997). See *People v. Jimenez*, 679 N.Y.S.2d 510, 512 (Sup. Ct. 1998) (reasoning that legislature did not intend to place burden to act merely as regulatory body to confirm determination of board on New York criminal courts).

⁸² See *Salaam*, 666 N.Y.S.2d at 888 (court should not merely confirm the Board's recommendation absent finding of arbitrariness, but should perform independent review of applicable factors taking into account testimony and other evidence presented at judicial hearing).

⁸³ See *People v. Ross*, 646 N.Y.S.2d 249, 251-52 (Sup. Ct. 1996) (discussing applicable standard of proof in determining whether to adopt presumptive risk level).

⁸⁴ See *Salaam*, 666 N.Y.S.2d at 888.

of protection to sex offenders.⁸⁵ Whatever the degree of deference given to the Board's recommendations, however, SORA itself expressly mandates that courts make an independent determination with respect to the level of risk and the corresponding level of notification.⁸⁶

AN APPEAL PURSUANT TO ARTICLE 78 OF THE CPLR IS AVAILABLE
TO CHALLENGE A JUDICIAL CLASSIFICATION

Controversy exists with respect to SORA's failure to provide a direct right to appeal from a judicial determination of a sex offender's risk assessment under SORA.⁸⁷ Recent cases demonstrate that the courts are not in agreement as to how such an appeal may or may not be pursued.⁸⁸ For example, in *People v. Stevens*,⁸⁹ the Court of Appeals made clear that no right of appeal lies from a risk level determination pursuant to the Criminal Procedure Law ("CPL").⁹⁰

The Court of Appeals rejected the argument that a judicially determined risk level assignment constitutes a final disposition of the original criminal sentence, which would seemingly permit a right of appeal under the CPL.⁹¹ The court reasoned that a judgment from a criminal conviction "incorporates both 'a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence'."⁹² Since the criminal action is terminated by the time the risk assessment determination is made, such determination is not part of the criminal proceeding.⁹³ Thus, the CPL provides no right to appeal from that de-

⁸⁵ See Guidelines, *supra* note 51, at 5; N.Y. Correct. Law §§ 168-1(5) (McKinney Supp. 1999).

⁸⁶ See N.Y. Correct. Law §§ 168-d(3), -n(2) (McKinney Supp. 1999).

⁸⁷ See *People v. Stevens*, 91 N.Y.2d 270, 278 (1998) (holding judicial determination of risk level assessment may not be appealed pursuant to Criminal Procedure Law); *People v. Rodriguez*, 240 A.D.2d 351, 351 (1st Dep't 1997) ("[N]o avenue exists to appeal a judicial determination of a sex offender's risk assessment under New York's Sex Offender Registration Act.").

⁸⁸ There is no doubt that an administrative determination of a risk assessment may be challenged pursuant to Article 78 of the CPLR. See *Doe v. Division of Probation and Correction Alternatives*, 654 N.Y.S.2d at 272; *Youngs v. Division of Probation and Correction Alternatives*, 667 N.Y.S.2d at 1023.

⁸⁹ See *Stevens*, 91 N.Y.2d at 272.

⁹⁰ See *id.* at 278.

⁹¹ See *id.* at 279.

⁹² See *id.* at 276.

⁹³ See *id.*

termination.⁹⁴ Clearly, appealing from a judgment of conviction, which is part of the criminal proceeding, is not the same as appealing from a risk level classification, which is in the nature of a civil proceeding.

Nor does such an appeal lie pursuant to Article 78 by writ of prohibition. In *Raphael S. v. Leventhal*,⁹⁵ the Appellate Division, Second Department held that the "writ of prohibition does not lie" to challenge a judicial determination of a sex offender's risk level classification.⁹⁶ The reasoning underlying this conclusion is sound.⁹⁷ In none of the reported cases discussed herein, was the challenge to the court's risk level determination made upon the ground that the court acted without or in excess of authority.⁹⁸ Nor could it have been since SORA explicitly authorizes the courts to make such determinations.⁹⁹ Therefore, the writ of prohibition is inapplicable to review judicial risk level determinations.¹⁰⁰

The appropriate method of review of a judicial risk level determination appears to be found under Article 78 by way of mandamus or certiorari.¹⁰¹ Section 7803 of the CPLR which prescribes the scope of Article 78 review, sets forth the only matters that may be raised in such a proceeding.¹⁰²

⁹⁴ See *id.* at 288.

⁹⁵ 668 N.Y.S.2d 50, 51 (2d Dep't 1998).

⁹⁶ See *id.* at 51-52.

⁹⁷ See *Pat's Carpet Outlet, Inc. v. State of New York Exec. Dep't, Div. of Human Rights*, 244 A.D.2d 338, 339 (2d Dep't 1997) ("extraordinary writ of prohibition may be maintained solely to prevent a body or officer acting in a judicial or quasi-judicial capacity from proceeding or threatening to proceed without, or in excess of, its jurisdiction").

⁹⁸ See *People v. Salaam*, 666 N.Y.S.2d 881, 886 (N.Y. Sup. 1997).

⁹⁹ See N.Y. Correct. Law §§ 168-d, -n (McKinney Supp. 1999).

¹⁰⁰ See, e.g., *Raphael S. v. Leventhal*, 668 N.Y.S.2d 50, 50 (2d Dep't 1998) (holding that relief is not available by way of application for writ of prohibition).

¹⁰¹ See N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1994). It should be noted that a position was attributed to the Attorney General's office in *Spencer, No Appeal in Megan's Law Case Risk Level Decision Not Part of Sentence*, Feb. 20, 1998 N.Y.L.J. (col. 3), that a civil appeal from a judicial determination of a risk level determination lies in CPLR § 5701; however, we understand that the Attorney General's office was making a distinction between civil appeals and criminal appeals in the context of *People v. Stevens*, 91 N.Y.2d at 279.

¹⁰² See N.Y. Civ. Prac. L. & R. § 7803 (McKinney 1994). The only questions that may be raised in a proceeding under Article 78 are: "1. whether the body or officer failed to perform a duty enjoined upon it by law; or 2. whether the body or officer proceeded, is proceeding, or is about to proceed without or in excess of jurisdiction; or 3. whether a determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion as to the measure or mode of penalty or discipline imposed; or 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire rec-

The right of appeal or review from a judicial risk level determination apparently lies within CPLR Section 7803, subdivision three and/or four, the so-called mandamus and certiorari right(s) of review. The questions set forth in section 7803 of the CPLR are relevant to sentencing courts' determinations of risk level classifications of convicted sex offenders.¹⁰³

It appears that an Article 78 proceeding challenging a sentencing court's risk level determination can be "commenced in the appellate division in the judicial department where the . . . matter sought to be . . . restrained originated."¹⁰⁴ Notwithstanding the apparent applicability of CPLR §7803(3) and/or (4) to challenge(s) risk level determinations, two of the Judicial Departments in the state are in conflict as to such challenge(s).¹⁰⁵

In *People v. Cash*,¹⁰⁶ the Appellate Division, Fourth Department held that the appropriate procedure for challenging risk level determinations under SORA is by way of an Article 78 proceeding (although the Court did not specify under which subdivision thereof). A contrary holding was recently made by the Appellate Division, Second Department in *People v. Haddock*¹⁰⁷ wherein on the court's own motion, two appeals from a risk level classification were dismissed. Although the reported decision makes no mention of Article 78, we understand the appeals were brought by way of Article 78 (and not merely limited to the writ of prohibition). The Court of Appeals recently denied certiorari even though there is a clear split between the Second and Fourth Departments.

Because of the unspecific language in *Haddock*, potential challengers of risk level assessments are seemingly without a remedy in the Second Department.¹⁰⁸ Therefore, we are pres-

ord, supported by substantial evidence."

¹⁰³ See *id.*

¹⁰⁴ See *id.* § 506(b)(1).

¹⁰⁵ There are two reported decisions from the Appellate Divisions which are in direct conflict as to the right of appeal by way of CPLR 7803 as of this writing. See Raphael S. v. Leventhal, 668 N.Y.S.2d 50, 51 (A.D.2d Dep't 1998) (holding that absence of right to appeal did not compel conclusion that relief was available in writ of prohibition); *People v. Cash*, 664 N.Y.S.2d 696, 696 (A.D.4th Dep't 1997) (explaining that proper procedure for challenging SORA classification is Article 78).

¹⁰⁶ 664 N.Y.S.2d 696 (4th Dep't 1997). Note that *Cash* was criticized in Raphael S. v. Leventhal, 668 N.Y.S.2d 50, 51 (2d Dep't 1998), "to the extent that it holds that prohibition is available under these or similar circumstances". *Id.* at 659.

¹⁰⁷ 678 N.Y.S.2d 518 (2d Dep't 1998).

¹⁰⁸ Fourteen days before rendering its decision in *Haddock*, the Appellate Division,

ently in a situation where a perfectly viable avenue to challenge a risk level determination by way of Article 78 subdivision (3) and/or (4), is available in at least the Fourth Department, but is seemingly foreclosed in the Second Department. Obviously, legislative intervention is needed unless the Court of Appeals grants certiorari on this issue and determines that Article 78, subdivision (3) and/or (4) is available to challenge risk level determinations. In the interim, it is hoped that any such Article 78 proceedings brought to challenge risk level determinations made by the courts of this state will be reviewed by appellate courts.

CONCLUSION

SORA's procedures for classifying convicted sex offenders subject to its provisions appear to pass muster under the federal and state constitutions. The two groups of convicted sex offenders subject to SORA's provisions are not similarly situated for the purposes of equal protection, and the different procedures applicable to each group are logical and supported by strong legal precedent. Further, each group is provided with procedural safeguards to counter constitutional due process challenges.

The concern that convicted sex offenders might be misclassified is understandable. The Legislature appears, however, to have provided sufficient safeguards to prevent such misclassifications and the Guidelines form a well reasoned standard of measurement with the ability to depart therefrom when mitigating or aggravating factors are present.

In expressing concern for the rights of convicted sex offenders, we must not completely lose sight of the purpose of SORA and the unpleasant reality that sex offenders are unlikely to be "cured" in the present system or rehabilitated in prison. Moreover, there is a dearth of programs and facilities to cure convicted offenders once they are released, even assuming they would participate in a curative program.¹⁰⁹ In the district court's zeal to

Second Department held in *People v. Kearns*, 677 N.Y.S.2d 497 (2d Dep't 1998), that "the sentencing court's assessment of the defendant as a 'sexually violent predator' under [SORA] . . . is not reviewable." (citations omitted).

¹⁰⁹ See A. Kenneth Fuller, M.D., *Child Molestation and Pedophilia: An Overview for the Physician*, 261 J.A.M.A. 602 (1989) (observing that "[a] person with a history of rape or child molestation stands on a different footing" than others inasmuch as "[h]is past conduct provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against

protect convicted sex offenders who have been classified at high risk levels, the court failed to consider the countless children who may be sexually abused by these high level offenders, pending appellate review of the decision in *Doe v. Pataki* or until each offender comes before a court for a new assessment as mandated by the *Doe v. Pataki* decision.

acting on these impulses, and that the risks involved do not deter him"); David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI. KENT. L. REV. 15, 20-21 (1994) (noting that it is difficult to stop rapists and child molesters because of reluctance of many victims to report crime or testify).

