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**REPORT ON LEGISLATION BY THE  
CRIMINAL COURTS COMMITTEE AND THE  
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE**

**A.9019  
S.3645-C**

**M. of A. Gabryszak  
Sen. Griffo**

AN ACT to amend the correction law, in relation to enacting "Brittany's Law".

**THIS BILL IS OPPOSED**

**INTRODUCTION**

This report is respectfully submitted by the Criminal Courts Committee and the Corrections and Community Reentry Committee (the "Committees") of the New York City Bar Association. The Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The members of the Criminal Courts Committee include prosecutors, and criminal defense attorneys who analyze laws and policies that affect the criminal courts in New York. The Corrections and Community Reentry Committee addresses issues affecting people in jails, prisons and other detention facilities, as well as people on probation and parole and with conviction histories.

The Committees have thoroughly analyzed the legal, social, and fiscal implications of A.9019/S.3645-C (the "Bill"), also known as "Brittany's Law." The Bill, which passed the Senate on May 17, 2011, proposes to create a registry for all violent felony offenders in New York State, similar to New York's registry for sex offenders. The Committees opposes passage of the Bill for a number of reasons, summarized as follows:

- The Bill was modeled almost verbatim on the original version of New York's Sex Offender Registration Act ("SORA"), which was found unconstitutional in 1998 based on several violations of the due process rights of sex offenders. Thus, immediately upon the Bill's enactment, the State will likely be subject to extensive and costly litigation to ensure that the constitutional rights of offenders are protected.
- There is no empirical data showing that the Bill will be effective in deterring violent crime. That it was modeled after SORA is telling in this respect, as every study of sex offender registries has found no evidence showing that sex offender registries prevent recidivism. In fact, because they ostracize offenders from communities, these registries may increase the rate of re-offense. In addition, there is little evidence that these registries deter crime. Finally, law enforcement officials

complain that monitoring thousands of people on registries prevents them from focusing their attention on individuals who pose the highest risk to public safety.

- The registry will require the immediate inclusion of over 30,000 offenders currently on parole, post-release supervision or serving a sentence of a conditional discharge or probation for a violent felony offense. An additional 8,000 offenders would be added each year. Each of these offenders will have to be brought before a criminal judge for a risk-level determination. The law would undoubtedly tax an already overburdened state criminal justice system that is operating on a reduced budget with a growing backlog of criminal cases awaiting trial, including those for incarcerated pre-trial detainees.
- Compared to states that have enacted similar laws, the Bill is extremely broad. Each of the ten states that have enacted registries for violent felony offenders has confined its scope to offenders who have committed a small subset of violent crimes, such as homicide and crimes against children, and some states vest judges with the discretion to exempt a specific offender from the registry. Should New York enact this registry as proposed, it will be the broadest in the country by far, including over 100 offenses and many thousands of offenders. The registry's scope will dilute its effectiveness and waste precious law enforcement resources.

## OVERVIEW OF THE BILL

The Bill classifies anyone convicted of a “violent felony,” as defined under New York Penal Law § 70.02 (McKinney 2009), as a violent felony offender, and would subject them to certain registration and public notification requirements.<sup>1</sup> The Bill would apply to anyone convicted of a violent felony who, as of the effective date of the legislation, is incarcerated, on parole or post-release supervision, or serving a sentence of probation or conditional discharge, as well as to those convicted of violent felonies in the future.<sup>2</sup> People convicted of violent felonies in other states and who relocate to New York will also be subject to the law's provisions.<sup>3</sup> Under the Bill, violent felony offenders would be designated as level one, level two, or level three offenders, depending on their perceived risk of re-offense.<sup>4</sup> An initial recommendation of an offender's level would be issued by a newly-created Board of Examiners of Violent Felony Offenders (“Board”), and the ultimate determination would be made by the court.<sup>5</sup>

Although all offenders would be required to register for a period of 10 years,<sup>6</sup> the frequency of their registration as well as the extent to which the community is notified about them would vary depending on their designated risk level. For instance, level three offenders would be required to register with local law enforcement in person every 90 days,<sup>7</sup> while other offenders would be required to register by mail

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<sup>1</sup> A.9019/S.3645-C, 235<sup>th</sup> Session (N.Y. 2012), Article 6-B (to be codified as N.Y. Corr. L. §§ 162-67).

<sup>2</sup> Id., Section 2, § 164.

<sup>3</sup> Id., Section 2, § 167-e.

<sup>4</sup> Id., Section 2, § 167-f(6).

<sup>5</sup> Id., Section 2, § 165(3), 167-f.

<sup>6</sup> Id., Section 2, § 167-b. During those ten years, offenders may petition the court to be relieved of any further duty to register (§ 167-i).

<sup>7</sup> Id., Section 2, § 167(3).

annually.<sup>8</sup> In addition, while information about all violent felony offenders will be available through a 900 number,<sup>9</sup> information about level two and three offenders will be posted on the internet.<sup>10</sup> Failure to register is a class A misdemeanor for a first offense, and a class D felony thereafter.<sup>11</sup>

The term “violent felony” under Penal Law § 70.02 refers to over 100 offenses, including several that do not require the commission of violence.<sup>12</sup> For instance, the following are considered “violent felonies” in New York: intimidating a victim or witness, burglary of a dwelling (whether or not someone is home at the time of the burglary), and falsely reporting an incident. Notably, Penal Law § 70.02 does not include any A-I or A-II felony offenses, such as murder in the first or second degrees and arson in the first degree.

## THE BILL IS POORLY DRAFTED AND CONSTITUTIONALLY FLAWED

The drafters of the Bill modeled it almost exclusively on New York’s Sex Offender Registration Act (“SORA”), codified as New York Correction Law § 168. The Bill that is currently before the Legislature, however, is nearly a carbon copy of the 1996 version of SORA, which has since been amended three times. In 1998, after lengthy litigation in the federal courts, the initial version of SORA was found to violate sex offenders’ due process rights under the Fourteenth Amendment. Doe v. Pataki, 3 F.Supp.2d 456, 459 (S.D.N.Y. 1998).<sup>13</sup> The Bill before the Legislature shares the same flaws as the initial version of SORA: it lacks essential constitutional provisions including the right to counsel at a risk-level determination hearing, the right to appeal the determination, notice to the offender of the nature of the hearing, the right to pre-hearing discovery, and a provision setting forth that the state bears the burden of proof at a hearing by clear and convincing evidence. Each of these provisions was added to SORA by the New York State Legislature in 1999, after the Doe Court deemed them constitutionally required.<sup>14</sup>

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<sup>8</sup> Id., Section 2, § 167(2).

<sup>9</sup> Id., Section 2, § 167-j

<sup>10</sup> Id., Section 2, § 167-q(1).

<sup>11</sup> Id., Section 2, § 167-n.

<sup>12</sup> The offenses listed in § 70.02 are attached to this report as Exhibit A.

<sup>13</sup> After SORA went into effect, a class action lawsuit was filed in the Southern District of New York on behalf of those who had been convicted of a sex offense and were incarcerated or on probation or parole prior to the Act’s effective date. Doe v. Pataki, 940 F. Supp. 603, 608 (S.D.N.Y. 1996). The District Court initially found that the public notification requirements of SORA violated the Ex Post Facto clause of the United States Constitution, id. at 604, but its decision was reversed by the Second Circuit. Doe v. Pataki, 120 F.3d 1263, 1265 (2d Cir. 1997). On remand, the District Court found that SORA violated the plaintiffs’ due process rights under the Fourteenth Amendment. Doe v. Pataki, 3 F.Supp.2d at 459. The Court summarized:

A system that permits a convicted sex offender to be classified at a risk level that subjects him to community notification on the basis of a perfunctory proceeding or incorrect information, that fails to provide a full and fair opportunity to be heard or legal representation, that places the burden on him to prove that the Board’s findings were wrong without disclosing to him the bases for those findings, and that offers no avenue for appellate review even in the face of gross error does not pass constitutional muster.

Id. at 461. Thus, the Court enjoined the State from classifying anyone designated a sex offender at higher than risk one until it uses procedures that accord with due process. Id. at 478-79.

<sup>14</sup> See 1999 Sess. Law News of N.Y. Ch. 453 (S. 6100) (amending, inter alia, N.Y. Corr. L. §§ 168-k, 168-n).

Therefore, the Bill in its current form would invite extensive litigation against the State and would almost undoubtedly be found unconstitutional.

## A VIOLENT FELONY OFFENDER REGISTRY WILL LIKELY BE USELESS, IF NOT DETRIMENTAL, TO PROTECTING PUBLIC SAFETY

We are unaware of studies in which the effectiveness of violent felony offender registries has been examined. However, studies of sex offender registries conclude that the registries are ineffective, and possibly counterproductive. Although we recognize that sex offender registries provide an imperfect analogy to a registry for violent felony offenders, we believe that the overwhelming evidence that sex offender registries are futile or, even worse, detrimental, provides strong reason to believe a violent felony offender registry - which would be much larger than SORA - would be the same.

A 2011 study published by the University of Chicago's Journal of Law and Economics examined data from 1998 to 2003 from all 50 states, and concluded that the passage of sex offender registries did not result in a decrease in the rates of sex offenses.<sup>15</sup> Moreover, studies suggest that sex offender registries might backfire. One study concluded that community notification laws "may, in fact, increase recidivism among registered offenders by reducing the relative attractiveness of a crime-free life. This finding is consistent with work by criminologists showing that notification imposes social and financial costs on registered sex offenders, perhaps offsetting the relative benefits of forgoing criminal activity."<sup>16</sup> There has also been documentation of the stigmatization of registered sex offenders, which can lead to protests, threats and even vigilante attacks.<sup>17</sup>

Research further indicates that sex offender registries are ineffective as a law enforcement tool. Speaking anonymously, law enforcement officials told Human Rights Watch that the increased resources committed to monitoring people on registries detract from the police's ability to focus on high-risk offenders.<sup>18</sup> A child safety advocate also complained that an "excessively long list" of registered offenders "does not generate enough accurate information to make registration useful to anyone."<sup>19</sup> As discussed below, New York's proposed violent felony offender registry will include tens of thousands of offenders.<sup>20</sup>

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<sup>15</sup> See Amanda Agan, Sex Offender Registries: Fear without Function?, 54 J.L. & Econ. 207, 213-25 (2011).

<sup>16</sup> J.J. Prescott & Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior, 54 J.L. & Econ. 161, 161 (2011); see also Jocelyn Ho, Incest and Sex Offender Registration: Who is Registration Helping and Who is It Hurting?, 14 Cardozo J. of Law and Gender 429, 443 (2008) ("Because the punishment for a sex offense never seems to end, the sex offender might feel hopeless in his ability to reform himself.").

<sup>17</sup> See id. at 440.

<sup>18</sup> Human Rights Watch, No Easy Answers: Sex Offender Laws in the US, 45-46 (2007) (<http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>). (Last visited March 14, 2012.)

<sup>19</sup> Id. at 45.

<sup>20</sup> It is also worth noting that the public already has access to information about the convictions of many offenders. The website of the Department of Corrections and Community Supervision (<http://nysdoccslookup.doccs.ny.gov/>) includes "all conviction, sentence and other information about offenders currently and previously incarcerated with the Department" dating back to the early 1970s. This information stays online for at least five years after the individual completes all post-release requirements. (N.Y. Corr. Law, Art. 2, § 9.) Moreover, the website of the New York State Division of Parole

## THE PROPOSED REGISTRY WILL BE EXTREMELY COSTLY, BOTH FINANCIALLY AND IN TERMS OF BURDENS ON THE CRIMINAL JUSTICE SYSTEM

The Bill would significantly burden the agencies tasked with its implementation. In response to an inquiry by the Senate Finance Committee, the Office of Sex Offender Management estimated that the proposed registry would cost approximately \$2 million to create, and between \$4.5 and \$5 million annually to maintain. Administering SORA, by contrast, costs approximately \$1.25 million annually. Notably, these figures exclude the costs of hardware, such as computers for registry personnel, as well as the costs of the additional police and parole officers that would be needed to implement and monitor the registration of offenders. Finally, as with SORA litigation, New York's prison facilities would have to expend resources compiling and printing records to be used by both the prosecution and defense at risk-level determination hearings.

It is likely, however, that the greatest, and most disabling, costs of the Bill would be those imposed on the court system. The Bill will require the immediate registration of the over 30,000 offenders who are currently incarcerated, on parole or post-release supervision, or serving a sentence of probation or a conditional discharge for a violent felony. In addition, every year, the approximately 8,000 people who are convicted of violent felonies in the State would have to register.<sup>21</sup> As a point of reference, New York's sex offender registry, which was implemented in 1996, contains a total of 33,137 offenders. Therefore, within one year of its enactment, the violent felony offender registry would be larger than the sex offender registry.

Each violent felony offender would require an assessment by the Board and a court hearing to determine his or her risk level. Because the hearing would occur in the county where the offense was committed, incarcerated offenders would have to be transported from prison facilities throughout the state to that county, where they would be housed in local jails until the hearing's completion. In addition, as discussed above, each offender is constitutionally entitled to legal representation at the hearing, as well an appeal - both of which are extremely costly. Furthermore, the State's limited judicial and prosecutorial resources would be burdened by the hearings. And, lastly, there will be additional strain on the court system as a result of the criminal prosecution of offenders who fail to adhere to the registration requirements.

This strain would be difficult to manage at any time, but is especially concerning now. In recognition of the fiscal problems facing the State, the 2012-2013 operating budget for the court system was reduced by 0.17 percent over the current year funding.<sup>22</sup> Even before the recent budget cuts, New York's criminal courts were having difficulty getting through caseloads, as the numbers of cases tried annually plummeted while the backlog of those awaiting trial increased.<sup>23</sup> After the budget cuts, the

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(<https://www.parole.ny.gov/lookup.html>) lists the crime of conviction and parole status of those under its supervision. (Last visited March 15, 2012.)

<sup>21</sup> These figures are based on information from the Department of Corrections and Community Supervision and the Division of Criminal Justice Services.

<sup>22</sup> NYS Unified Court System Budget, 2012-2013, Executive Summary, p. ii. See <http://www.courts.state.ny.us/admin/financialops/BGT12-13/Final2012-13Budget.pdf>. (Last visited March 15, 2012.)

<sup>23</sup> See, e.g., New York State Unified Court System, *The Bronx Criminal Division: Merger After Five Years* 9-10, 12-13 (Oct. 2009). See <http://www.courts.state.ny.us/publications/pdfs/BronxReport11-09.pdf>. (Last visited March 15, 2012.)

situation has only gotten worse.<sup>24</sup> Lawyers, judges, and advocates recently described a criminal justice system suffering from “overburdened dockets,” which “left defendants languishing unnecessarily behind bars, created massive overcrowding and in some cases led to mistrials.”<sup>25</sup>

We further predict that the Bill could reduce the number of criminal defendants who plead guilty to violent felony offenses, given that a plea would result in mandatory registration. It is already more difficult to secure these pleas since violent felonies carry longer periods of post-release supervision. Therefore, by adding another consequence to a conviction for a violent felony, the Bill would increase the number of these cases going to trial and add even more stress to a court system that depends on guilty pleas to function.<sup>26</sup>

It is difficult to foresee all of the hidden costs - financial and otherwise - of implementation of the Bill. However, we are certain that they will be myriad. For instance, the stigmatization of offenders would make it harder for them to find employment and housing and to pursue education. And offenders’ inability to reintegrate into society could lead to a dependence on government assistance as well as a need to live in shelters. Additionally, the property values of homes located near the residence of an offender may decrease. Indeed, homes close to a registered sex offender sell for approximately \$5,500 less than comparable homes.<sup>27</sup>

## OTHER STATES HAVE ENACTED REGISTRIES THAT ARE MUCH NARROWER THAN NEW YORK’S PROPOSED REGISTRY

Currently only 10 states - Alabama, Montana, Missouri, Illinois, Indiana, Florida, Kansas, Louisiana, Nevada, and Oklahoma - have enacted violent felony offender registries. Yet, each of these registries is much more limited than New York’s proposed Bill, in terms of both the number of offenders required to register and the registerable offenses.

Kansas’ registry is so narrow as to only include homicide offenses. And, in Illinois, registration is required only for those convicted of certain offenses- first-degree murder, involuntary manslaughter,

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<sup>24</sup> See New York State Bar Association, Report of the Executive Committee on the Impact of Recent Budget Cuts in New York State Court Funding, at 10 (January 2012), available at [http://www.nysba.org/AM/Template.cfm?Section=Substantive\\_Reports&ContentID=62098&template=/CM/ContentDisplay.cfm](http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&ContentID=62098&template=/CM/ContentDisplay.cfm) (“In criminal matters, the impact on defendants is significant because the delays can lead to longer incarcerations pending disposition. The defendants consequently are away from their families and jobs longer. They are less able to care for their dependents, both in terms of time and money. There also has been an increase in some areas of the state in the arrest-to-arraignment time, resulting in longer incarceration periods before defendants’ first appearances in court.”) (Last visited March 16, 2012.); see also New York County Lawyers’ Association, Task Force on Judicial Budget Cuts, Preliminary Report on the Effect of Judicial Budget Cuts On New York State Courts, at 28 (Aug. 11, 2011), available at [http://www.nycla.org/siteFiles/Publications/Publications1516\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications1516_0.pdf).

<sup>25</sup> Joseph Ax, Budget cuts causing delays, crowding in NY courts, witnesses say, Thomson Reuters, Dec. 2, 2011. See [http://newsandinsight.thomsonreuters.com/Legal/News/2011/12\\_-\\_December/Budget\\_cuts\\_causing\\_delays\\_crowding\\_in\\_NY\\_courts\\_witnesses\\_say/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Budget_cuts_causing_delays_crowding_in_NY_courts_witnesses_say/). (Last visited March 15, 2012).

<sup>26</sup> In 2009, 45,612 of the 50,915 criminal filings in New York State were disposed of by guilty plea. New York State Unified Court System, Annual Report, 17 (2010). See <http://courts.state.ny.us/reports/annual/pdfs/UCSAnnualReport2010.pdf>. (Last visited March 15, 2012.)

<sup>27</sup> See Agan at 207 *supra* n. 15.

kidnapping, unlawful restraint, battery, child abuse or abduction, and endangering the life or health of a child—and only when the victims are under the age of 17. Oklahoma requires registration only for those convicted of murder, use of a firearm with the intent to kill, intentional discharge of a firearm, assault, battery, bombing, and - if the sentencing judge deems it appropriate - domestic abuse. In fact, Oklahoma currently includes a total of only 453 active offenders. In Montana, one must register if he or she is convicted of murder, assault, kidnapping, robbery, arson, and operation of an unlawful clandestine laboratory. And in Indiana, which has a joint sex and violent felony offender registry, registerable offenses are murder, assault, child abuse, rape, child sexual abuse, and kidnapping.

The New York registry proposes to include over 100 offenses and requires immediate registration of over 30,000 offenders, with approximately 8,000 offenders added annually. Therefore, upon enactment, New York's violent felony offender registry would become the largest and broadest in the country. And while the New York registry would include people convicted of burglary of a dwelling, criminal possession of a weapon in the third degree, and falsely reporting an incident in the second degree, it would not include people convicted of murder in the first or second degree, as those crimes are not defined as violent felony offenses. Given the doubtful efficacy of any registry law, as well as the burdens on law enforcement and the criminal justice system that the registry would create, such a large, broad registry would be extremely ineffectual, costly, and onerous. In fact, unlike many other states that combine their sex offender and violent felony offender registries, New York's Bill does not, leading to a further waste of resources. Therefore, in New York a person convicted of a sex offense that is also considered a violent felony would be subject to the registration requirements under both SORA and the violent felony offender registry.<sup>28</sup>

## CONCLUSION

The Committees recognizes the seriousness of violent crime in New York and applauds the Legislature's attempts to reduce the rate of such crime in the State. However, passage of the Bill will not achieve that goal. Not only are several aspects of the Bill unconstitutional and will almost certainly be invalidated by a court, but the Bill is not likely to be effective. Studies have shown that registries fail to reduce crime rates and, by inhibiting offenders' ability to reintegrate into the community, may even increase them. Moreover, the law will be extremely costly both in actual financial costs and burdens that will be placed on the criminal justice system to conduct the many thousands of risk-level determination hearings and implement and enforce this Bill.

For these reasons, the Committees opposes the Bill.

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<sup>28</sup> Eight offenses listed as violent felonies in Penal Law § 70.02 are also registerable sex offenses. In addition, kidnapping offenses under Penal Law §135.05, § 135.10, § 135.20, and § 135.25, which are considered violent felonies, are registerable under SORA when the victim is less than 17 and the defendant is not the parent.

## **EXHIBIT A**

New York Penal Law § 70.02 classifies the following offenses as “violent felonies”:

(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, aggravated manslaughter in the first degree as defined in section 125.22, rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the first degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75; assault in the first degree as defined in section 120.10, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15, incest in the first degree as defined in section 255.27, criminal possession of a weapon in the first degree as defined in section 265.04, criminal use of a firearm in the first degree as defined in section 265.09, criminal sale of a firearm in the first degree as defined in section 265.13, aggravated assault upon a police officer or a peace officer as defined in section 120.11, gang assault in the first degree as defined in section 120.07, intimidating a victim or witness in the first degree as defined in section 215.17, hindering prosecution of terrorism in the first degree as defined in section 490.35, criminal possession of a chemical weapon or biological weapon in the second degree as defined in section 490.40, and criminal use of a chemical weapon or biological weapon in the third degree as defined in section 490.47.

(b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a) of this subdivision; aggravated criminally negligent homicide as defined in section 125.11, aggravated manslaughter in the second degree as defined in section 125.21, aggravated sexual abuse in the second degree as defined in section 130.67, assault on a peace officer, police officer, fireman or emergency medical services professional as defined in section 120.08, assault on a judge as defined in section 120.09, gang assault in the second degree as defined in section 120.06, strangulation in the first degree as defined in section 121.13, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10, criminal possession of a weapon in the second degree as defined in section 265.03, criminal use of a firearm in the second degree as defined in section 265.08, criminal sale of a firearm in the second degree as defined in section 265.12, criminal sale of a firearm with the aid of a minor as defined in section 265.14, soliciting or providing support for an act of terrorism in the first degree as defined in section 490.15, hindering prosecution of terrorism in the second degree as defined in section 490.30, and criminal possession of a chemical weapon or biological weapon in the third degree as defined in section 490.37.

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); reckless assault of a child as defined in section 120.02, assault in the second degree as defined in section 120.05, menacing a police officer or peace officer as defined in section 120.18, stalking in the first degree, as defined in subdivision one of section 120.60, strangulation in the second degree as defined in section 121.12, rape in the second degree as defined in section 130.30, criminal sexual act in the second degree as defined in section 130.45, sexual abuse in the first degree as defined in section 130.65, course of sexual conduct against a child in the second degree as defined in section 130.80, aggravated sexual abuse in the third degree as defined in section 130.66, facilitating a sex offense with a controlled substance as defined in section 130.90, criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, intimidating a victim or witness in the second degree as defined in section



215.16, soliciting or providing support for an act of terrorism in the second degree as defined in section 490.10, and making a terroristic threat as defined in section 490.20, falsely reporting an incident in the first degree as defined in section 240.60, placing a false bomb or hazardous substance in the first degree as defined in section 240.62, placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall as defined in section 240.63, and aggravated unpermitted use of indoor pyrotechnics in the first degree as defined in section 405.18.

(d) Class E violent felony offenses: an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the criminal procedure law, persistent sexual abuse as defined in section 130.53, aggravated sexual abuse in the fourth degree as defined in section 130.65-a, falsely reporting an incident in the second degree as defined in section 240.55 and placing a false bomb or hazardous substance in the second degree as defined in section 240.61.