REPORT BY THE CRIMINAL JUSTICE OPERATIONS COMMITTEE AND THE SEX OFFENSE WORKING GROUP

PROPOSED AMENDMENT TO NEW YORK CORRECTION LAW § 168-H CLARIFYING THE PHRASE "INITIAL DATE OF REGISTRATION" FOR INDIVIDUALS CONVICTED OF LEVEL ONE SEX OFFENSES

The New York City Bar Association, by and through its Criminal Justice Operations Committee and its Sex Offense Working Group, proposes that Correction Law § 168-h be amended to add a new subdivision four, as follows:

> 4. The initial date of registration shall mean the first date of registration in New York, or the first date of registration in any other jurisdiction, whichever is earlier.

JUSTIFICATION

Under New York's Sex Offender Registration Act (SORA), Correction Law Article 6-C, individuals convicted of certain sex-related offenses are required to register and verify certain required information with the New York State Division of Criminal Justice Services. Information required to be provided includes: name, address of residence, phone number, name and address of employer, automobile information including license plate number and driver's license number, internet information including service providers, identifiers and e-mail addresses, higher education information including whether attending, employed or enrolled in school. Failure to provide this information or keep it updated subjects the person to prosecution for a class E felony.

The duration of the registration and verification requirements are established in New York Correction Law § 168-h. For a person who is classified as being at low risk to reoffend, or "level one," the duration of the registration requirement is twenty years, measured from "the initial date of registration." *Id.* However, the phrase "initial date of registration" has been interpreted inconsistently with respect to individuals who first registered in another state before moving to New York. The purpose of the proposed amendment is to bring fairness and uniformity to the time a person must spend on the registry, regardless of the state where they may have initially registered. With this amendment – which will impact only those classified as having a low risk of reoffending - twenty years will mean twenty years, with the clock starting when the person first

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

registers in any jurisdiction. As discussed below, this change is consistent with how judges have ruled on the issue when the individual is fortunate enough to have counsel.

We also note that since some of this information is provided to the public, individuals often are targeted for harassment and vigilantism, which subjects them to social isolation, and struggling to find housing, education, and employment. One federal appeals court has observed that SORA registration and verification laws "resembles traditional shaming punishments" and have the effect of "branding registrants as moral lepers solely on the basis of a prior conviction." *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016). The proposed amendment will better reflect the balance struck by the Legislature when it determined that the information should be publicly available for twenty years.

BACKGROUND

The New York State Division of Criminal Justice Services (DCJS) is charged with establishing and maintaining the registry required by SORA. DCJS is also responsible for placing a person on the registry and removing a person classified as level one from the registry after the twenty-year requirement has expired. According to DCJS's interpretation, "the initial date of registration" from which the twenty years is measured is the date when the person registers in New York, regardless of the time the individual may have spent on a sister state's registry. This means that DCJS, on its own, will not credit the time spent on another state's registry towards the twenty years' registration that New York requires of a person who is deemed to be at low risk of reoffending.

New York courts considering this question, however, have reached a position contrary to that of DCJS, concluding that "initial date of registration" refers to the date when the person first registered on *any* state's registry for people convicted of sex offenses. If, in the course of an initial SORA hearing, a person's attorney is aware that he or she should request credit for time on another state's registry, and if the court orders that such credit be granted, DCJS will credit that individual with time spent on the other state's registry. The Appellate Division, First Department, has noted with approval the practice of the SORA court granting the defendant full credit for the time spent on the registry in a sister state. *People v. McGarghan*, 83 A.D.3d 422, 423 (1st Dept. 2011). And, as set forth below, this interpretation has support from federal regulators. Such decisions support giving all individuals credit for the time they spent on the registry of a sister state when calculating the twenty years that the person is required to register under New York's SORA law. The length of time one has to be on the registry should not differ based on whether the individual's attorney knows to request the time credit at the SORA hearing.

NEED FOR THIS LEGISLATION

Because the interpretation by the courts conflicts with that of DCJS regarding how the duration of time on the registry should be measured, the law is being unevenly and unfairly applied to individuals moving to New York from other states. The proposed legislation would address this inconsistency.

Crediting for time on the registry of another state has become common judicial practice throughout New York. As one New York Supreme Court judge astutely observed, the meaning of

"the initial date of registration" is plain and unambiguous and clearly applies to the "first time a convicted sex offender registers with the required state and local authorities" and not just when they first register "with the required New York authorities." *Matter of James Hubert v. Michael C. Green, as the Executive Deputy Commissioner of the NYS DCJS,* Index No. 258275 (Sup. Ct. Rensselaer Co. Sept. 7, 2018).

However, whether an individual receives such credit depends in large part on the experience level of the individual's attorney. Where a person's attorney knows to ask the SORA hearing judge for credit for time spent on the registry of another state, the individual will receive credit. If the attorney is unaware of the need to ask, the individual will not receive such credit, unless a judge orders the time credit *sua sponte.* To date, to our knowledge, no judge has ordered such time credit without being requested to do so.

The proposed legislation would ensure that all individuals deemed to be "low risk" are treated in a uniform way, rather than having inconsistencies based on which judge makes the determination or whether the individual's attorney knows to request credit for time spent in other states. This amendment would only impact individuals deemed by New York Courts to be low risk of reoffending. The amendment would also obviate the need for New York courts to spend unnecessary time addressing this legal issue.

Receiving credit for time spent on another state's registry is permitted under Federal law. New York's SORA, like almost all state registration laws, was enacted and amended in response to federal legislation that required all states to establish registries for people convicted of sex offenses. One such federal law was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the "Wetterling Act"). On January 5, 1999, the Office of the Attorney General, through the U.S. Department of Justice, issued Guidelines, published in the Federal Register, for the implementation of the Wetterling Act as amended by Megan's Law, the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, and section 115 of the General Provisions of Title I of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998. Those Guidelines addressed the durational requirements of registration and the issue of a registrant moving from one state to another as follows:

> *If a portion of the applicable registration period has run while the registrant was residing in another state, a new state of residence* ***may give the registrant credit for that period.*** *For example, if a person required to register for 10 years under the Act's standards has lived for six years following release in the state of conviction, another state to which the registrant moves at that point does not have to require registration for more than the four remaining years.* (Emphasis added).[1]

[1] *Megan's Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended,* 64 Fed. Reg. 2 at 578 (January 5, 1999).

CONCLUSION

To the extent that requiring a person to spend a full twenty years on the registry has a purpose, that purpose is fulfilled whether they spend that time on New York's registry, a sister state's registry, or a combination of the two. The twenty-year requirement is the key, not the state in which the person is living while on the registry. New York has made the policy decision that, in order to protect the public, twenty years is sufficient time for a person deemed level one to register certain information. At the end of that period, registration and notification to the public are no longer deemed necessary for such low-risk individuals. It is the length of time that the person is required to register that is relevant, not the state in which the person lived during the twenty-year period. There is no reason to restart the registration, verification and notification period simply because the individual spent part of this time period living in another state. Rather, it is the passage of time without reoffending that diminishes the likelihood of reoffending. The proposed legislation will therefore require DCJS to apply the credit for time spent on a sister state's registry without the need for judicial intervention, making for the uniformity and universality of application.[2]

Thank you for your consideration. We stand ready to assist and respond to any questions.

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[2] It should be noted that New York conducts a risk-level assessment hearing when the person moves to New York from another state. If at that hearing he or she is deemed to be level one, i.e., at the lowest risk of reoffending, then under this proposal, any time spent on the registry in another state would count as credit towards New York's twenty-year requirement. If there were problems encountered in the other state (e.g., re-offense or failure to properly register), then that would be taken into account at the New York SORA hearing and possibly affect the risk assessment level. If the person is determined to be level 2 or level 3, then he or she would be subject to lifetime registration under New York law, and this proposal would not be applicable, unless his or her risk level is subsequently reduced to a low risk by a New York Court as the result of a modification petition.