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February 9, 2022

Hon. Alvin Bragg
Manhattan District Attorney
Manhattan District Attorney's Office
One Hogan Place
New York, NY 10013

Re: Recommendations Respectfully Submitted Regarding Risk Level Determination Proceedings Under the Sex Offender Registration Act

Dear District Attorney Bragg,

Congratulations on your recent election to the position of New York County District Attorney. We write to you as representatives of the New York City Bar Association's Criminal Justice Operations Committee and Sex Offense Working Group in order to provide some preliminary recommendations concerning the New York County District Attorney's Office's policies and practices in risk level determination proceedings pursuant to the Sex Offender Registration Act ("SORA").¹ As you settle into your role as District Attorney, we urge you to carefully examine the Office's prior practices and policies and to adopt as a starting point those suggested below. We further invite you and members of your office to engage in dialogue with the Committee and Working Group going forward as the post-conviction registration scheme in New York is intricate and multi-faceted and there is ample room for collaborative improvement and reform.

¹ The Criminal Justice Operations Committee evaluates issues relevant to New York State penal law and procedure and the functioning of the courts with regard to criminal cases. The Sex Offense Working Group is a task force comprised of City Bar attorneys, as well as mental health practitioners specializing in the treatment of people accused or convicted of sexual offenses. It studies the effects of the legal regimes regulating individuals convicted of sex-related offenses and recommends policy and programmatic changes.

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.

Concerning risk level determination proceedings under SORA, we outline below three recommendations. First, we recommend that, where an offense did not involve a minor, you instruct assistant district attorneys in your office to consider the far-reaching consequences of a Level 3 adjudication for registrants subject to parole or post-release supervision when recommending a risk level to the court. Next, we suggest that you implement an office-wide policy of considering and, absent exceptional aggravating circumstances, consenting to downward departures in cases involving registrants convicted of non-contact offenses, such as possession of child pornography. Finally, we urge you to adopt an office-wide policy of consenting to the entry of orders granting out-of-state registrants credit in New York State for their time spent on their home state’s registry. These recommendations are a starting point for what we hope will be an ongoing dialogue with you and the Office. They are informed by our experience litigating SORA proceedings, our interest in and commitment to sound policy and the just application of laws that impact reentry, and social science research concerning factors that most effectively predict and deter sex offense recidivism.

I. OVERVIEW OF SORA AND RISK LEVEL DETERMINATIONS

SORA requires that individuals residing in New York who have been convicted of certain offenses defined in Correction Law §§ 168-a(2)-(3) register as “sex offenders.” Registration requirements and the extent to which a registrant will be subjected to community notification depend, in large part, on the risk level assigned at a hearing conducted by a trial court, *i.e.*, Level One, Level Two, or Level Three.

At risk level determination proceedings, the State is represented by the District Attorney’s Office that prosecuted the registrant or, if the registrant must register because of a federal conviction or a conviction from another state, the District Attorney’s Office in the county in which the registrant resides.² In most cases, the Board of Examiners of Sex Offenders (the “Board”) will submit a recommendation to the trial court as to which risk level the registrant should be assigned, and the court must consider that recommendation and any submissions from the parties before rendering a decision.³ The Board’s recommendation is based on an assessment of the registrant using a 15-factor Risk Assessment Instrument (“RAI”) that the Board created in the 1990s.⁴ It is important to note that the RAI has never been validated, nor has it been revised or updated in the years since its creation. Though the RAI has been roundly criticized⁵ and there is legislation

² Correction Law § 168-n(3).

³ Correction Law § 168-n(3).

⁴ “Sex Offender Registration Act, Risk Assessment Guidelines and Commentary (2006)” (“Commentary”), http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf. (All websites last visited Feb. 4, 2022.) The Commentary is a guide to interpreting and scoring the RAI. It is published by the Board and the most recent version was released in 2006.

⁵ *See e.g.*, Daniel Conviser, “After 25 Years, It is Past Time to Reform New York’s Sex Offender Risk Assessment System,” NYLJ (Jan. 5, 2021; Feb. 9, 2021), <https://www.law.com/newyorklawjournal/2021/01/05/after-25-years-it-is-past-time-to-reform-new-yorks-sex-offender-risk-assessment-system-part-i/> and <https://www.law.com/newyorklawjournal/2021/02/09/after-25-years-it-is-past-time-to-reform-new-yorks-sex-offender-risk-assessment-system-part-ii/>.

pending to replace it with a validated instrument,⁶ it remains a driving force behind risk level determinations.

A registrant's obligations under SORA are far-reaching and often lifelong. First, regardless of their risk level, for the duration of their registration, registrants must keep the New York State Division of Criminal Justice Services ("DCJS") apprised of changes to their residence and other identifying information by notifying DCJS within 10 days of having made any such change.⁷ Other obligations vary depending on the registrant's risk level. Level One registrants, unless they are subject to a statutory designation,⁸ must maintain their registration for 20 years, while people classified as Level Two and Level Three must register for life.⁹ Level One and Level Two registrants must also confirm their address by mail annually and appear in person for a photograph every three years, while Level Three registrants must register in person every 90 days.¹⁰ In addition, detailed information about Level Two and Level Three registrants, including the nature of their conviction and their picture, home address, and place of employment, is available to the public on New York State's official online Sex Offender Registry. And, finally, Level Three registrants subject to the supervisory oversight of the Department of Corrections and Community Supervision ("DOCCS") are subject to additional mandatory supervision conditions, including residency restrictions that can make finding a place to live, particularly in New York City, nearly impossible.¹¹

II. RECOMMENDED POLICIES AND PRACTICES

Although registries have been in place throughout the nation for decades, many question their utility, particularly whether they promote public safety.¹² In New York, more than 45,000 individuals are required to register, more than 8,400 of whom reside in New York City.¹³ As such,

⁶ See Report by the Criminal Courts Committee, the Criminal Justice Operations Committee, the Criminal Law Committee, and the Corrections and Community Reentry Committee, "Updating the Guidelines of the Sex Offender Risk Assessment Instrument," Jan. 23, 2020, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/updating-the-guidelines-of-the-sex-offender-risk-assessment-instrument>.

⁷ Correction Law § 168-f.

⁸ Any individual, including someone deemed a Level One registrant who is classified as a sexual predator, a sexually violent offender, or a predicate sex offender must register for life. Correction Law § 168-h.

⁹ Correction Law §§ 168-f, 168-h. Level Two registrants may petition for relief from registration after 30 years. Correction Law § 168-o(1).

¹⁰ Correction Law §§ 168-b(1)(b), 168-f(2), 168-h(3).

¹¹ Executive Law § 259-c(14); see *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 234 (2020) (Wilson, J., dissenting) (explaining why "[l]ocating SARA-compliant housing in New York City is virtually impossible"); *Berlin v. Evans*, 923 N.Y.S.2d 828 (N.Y. Co. Sup. Ct. 2011) (finding that most residences in New York City fall within 1,000 feet of a school).

¹² Cynthia Calkins, *et al.*, *Sexual Violence Legislation: A Review of Case Law and Empirical Research* 20(4) Psychology, Public Policy and Law 443-462 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2672083.

¹³ Included among the 45,000 individuals required to register in New York are individuals who are currently incarcerated and registrants who have been deported. Presently, there are over 1,700 individual registrants residing

the New York County District Attorney's Office is frequently called upon to represent the State in risk level determination proceedings. The policies and practices the Office adopts under your leadership will have a profound impact on the lives of countless individuals subject to SORA's registration and notification provisions, as well as the lives of their families and loved ones. We urge you to consider the following recommendations.

(a) Where the offense did not involve a minor, instruct ADAs to consider civil consequences when deciding whether to seek a Level Three adjudication.

As noted above, Level Three registrants subject to supervision must comply with certain mandatory conditions, the most consequential of which is imposed as a result of the enactment of the 2005 Sexual Assault Reform Act ("SARA"). Pursuant to SARA, individuals convicted of a sex offense against a minor and all Level Three registrants (regardless of the nature of their offense) are prohibited, for the duration of their supervision, from "knowingly entering" within 1,000 feet of the property line of school grounds and certain other facilities used by persons under 18 years old.¹⁴ This condition is interpreted by DOCCS as a residency restriction and, as applied, it severely limits where subject individuals can live, particularly if they intend to reside in New York City.¹⁵

As a result of this restriction, many Level Three registrants intending to reside in New York City are prevented from living with supportive family and friends, despite family support and community ties being shown to support successful reentry and reduce recidivism. They are instead forced to reside at one of a handful of compliant homeless shelters. Worse yet, until there is space for them at a compliant shelter or they are somehow able to locate a compliant residence on their own, DOCCS keeps these registrants in prison, often for months or years past their release dates.¹⁶ This extends their term of incarceration for indefinite periods and jeopardizes their successful reentry when they are finally released because they are often left isolated from their support networks. Moreover, the restrictions themselves have been found to have no meaningful impact on sex offense recidivism.¹⁷

in New York County. See New York State Division of Criminal Justice Services, "Registered Sex Offenders by County as of November 2, 2021," https://www.criminaljustice.ny.gov/nsor/stats_by_county.htm.

¹⁴ See Executive Law § 259-c(14).

¹⁵ See *supra* Note 11.

¹⁶ See *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 205-06 (2020) (discussing DOCCS' refusal to release individuals absent compliant housing).

¹⁷ Christopher Lobanov-Rostovsky, *Adult Sex Offender Management*, Sex Offender Management Assessment and Planning Initiative (SOMAPI) Research Brief, U.S. Dep't of Justice, Office of Justice Programs, at 4 (July 2015) ("Research has demonstrated that residence restrictions do not decrease and are not a deterrent for sexual recidivism."), <https://smart.gov/pdfs/AdultSexOffenderManagement.pdf>; Beth M. Huebner *et al.*, "An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri," National Criminal Justice Reference Service, at 21-22 (July 2013) (summarizing studies of residence restrictions, including in New York, showing either no change or even slight increase in recidivism rates), <https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf>; Matt Nobles, Jill Levenson, & Tasha Youstin, "Effectiveness of Residence Restrictions in Preventing Sex Offense Recidivism," 58(4) *Crime & Delinquency* 491-513, 506 (2012) (concluding that "the results presented herein suggest that lawmakers should view residence restrictions neither as an effective method of preventing sexual victimization perpetrated by known sex offenders nor as a general deterrent for sex crimes"), https://www.researchgate.net/publication/241644649_Effectiveness_of_Residence_Restrictions_in_Preventing_Sex

Given the outsized impact a Level Three adjudication can have on a registrant, we urge you to instruct the assistant district attorneys in your office to incorporate into their risk level recommendation calculus these significant civil implications. For a registrant whose offense did not involve a minor, the draconian residency restrictions will apply any time the registrant is subject to supervision and adjudicated a Level Three registrant. Therefore, rather than relying on the presumptive risk level resulting from the RAI (a highly questionable tool itself), ADAs should be encouraged to take into account the collateral implications of a Level Three adjudication and recommend a Level One or Level Two adjudication where no minor complainant is involved. Doing so would avoid the counterproductive consequences a Level Three result would have on the registrant.

Whether Level Two or Level Three, a registrant's information will still be available to the public on the State's online registry, accomplishing SORA's stated goal of community notification, and because all registrants, regardless of their risk level, are required to keep that information current (by notifying the Registry within 10 days of any change of address), the absence of an in-person address verification every 90 days will not result in outdated information being available for Level Two registrants.¹⁸ Further, for any registrant subject to specialized DOCCS' supervision, regardless of their risk level, they will be required to check-in regularly with a parole officer, further rendering the in-person 90-day address verification required for Level Three registrants unnecessary from an oversight perspective. In practice, where a registrant's offense did not involve a minor, the most significant difference between a Level Two and Level Three adjudication is the application of draconian residency restrictions that have been shown to jeopardize successful re-entry without appreciably improving public safety and this counterproductive result should be considered by the ADAs in your office making risk level recommendations.

(b) Since the RAI is not equipped to assess cases involving the possession of child pornography, adopt an office-wide policy of considering and, absent exceptional aggravating circumstances, consenting to downward departures in such cases.

In addition to never being tested to determine if it accurately predicts recidivism risk, the RAI was created primarily with contact sex offenses in mind. And, while registration has expanded over time to include non-contact sex offenses, the RAI has never been updated or modified.

As a result, rather than distinguishing between certain offenses based on the facts and circumstances of a given case, certain factors on the RAI simply apply, by their plain language, to

[Offense Recidivism](https://s3.amazonaws.com/documents.nycbar.org/files/20073107-SARAResidencyRestrictions_CrimCourt.CrimLaw.CJO.Corrections_Report_FINAL_10.24.16.pdf); see also Report by the Criminal Courts Committee, Criminal Law Committee, Criminal Justice Operations Committee and Corrections & Community Reentry Committee, "The Impact and Legality of Sex Offender Residency Restrictions Created by New York's Sexual Assault Reform Act," Oct. 2016, at 4-5, https://s3.amazonaws.com/documents.nycbar.org/files/20073107-SARAResidencyRestrictions_CrimCourt.CrimLaw.CJO.Corrections_Report_FINAL_10.24.16.pdf.

¹⁸ Indeed, a registrant who fails to timely update his information is subject to prosecution for a Class E felony. Correction Law § 168-t.

all registrants because of the nature of their conviction.¹⁹ This is particularly true in cases where the registrant was convicted of a non-contact offense like sharing or viewing child pornography. In such cases, the RAI is not a particularly sensitive tool for discerning the registrant’s relative risk. Rather, as the Board of Examiners of Sex Offenders itself has recognized, it produces an “unintended, anomalous result as the majority of offenders convicted of pornography offenses will be scored the same when there are clearly vast differences amongst these types of offenders.”²⁰ In such cases, then, as noted in People v. Gillotti, “particularly strong consideration [should be given] to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration.”²¹

To avoid anomalous results that overestimate a registrant’s risk, we encourage you to implement as a policy a presumption that, unless exceptional aggravating circumstances exist, ADAs handling risk level determinations for individuals convicted of non-contact offenses involving the possession or sharing of child pornography consent to a downward departure from the risk level recommended as a result of the registrant’s RAI score.

(c) Adopt an office-wide policy of agreeing to credit an out-of-state registrant’s time on another state’s registry toward their term of registration in New York.

In addition to applying to individuals convicted of a sex offense in New York, SORA’s registration and notification requirements also apply to New York State residents convicted of a qualifying offense in another jurisdiction. This includes individuals convicted of a felony offense requiring registration in another state.²² And, just like individuals convicted in New York State, once an individual relocates to New York, they must receive a risk level from a New York trial court.²³ That risk level then determines the length and extent of their New York registration obligations.

¹⁹ See People v. Gillotti, 23 N.Y.3d 841, 854-55 (2014). In nearly all cases involving the possession of child pornography, points under Factors 3 (number of victims), 5 (age of victim) and 7 (relationship with victim) will be assessed because there is often more than one minor depicted in the files possessed, Factor 5 applies where a victim is 16 or younger, and the minors depicted in the subject files are rarely personally known to the registrant. As the Court of Appeals observed in People v. Johnson, 11 N.Y.3d 416, 420 (2008), this not only demonstrates the RAI’s limited ability to discern between registrants convicted of this offense, but it can produce nonsensical results. For example, while “it would surely be worse—and defendant would seem a significantly more dangerous man—if he had been looking at pictures of his friends’ or neighbors’ children,” under Factor 7, “previous acquaintance with the children would...decrease defendant’s risk score, not increase it.” *Id.* at 420.

²⁰ Board of Examiners of Sex Offenders, “Scoring of Child Pornography Cases Position Statement 6/1/12,” <https://static1.squarespace.com/static/5f99b5a0e4e1693ab3d3649e/t/61848c4341b2063f7e6d4ac2/1636076611455/Board+of+Examiners+Position+Paper+on+Child+Pornography+6-1-13.pdf>. See also Anne Goller, *et al.*, “Criminal Recidivism of Illegal Pornography Offenders in the Overall Population—A National Cohort Study of 4612 Offenders in Switzerland,” 6 *Advances in Applied Sociology* 48-56 (2016) (finding that “illegal pornography offenders were also significantly less likely to be convicted of further pornography offences, or indeed other sexual offences” and that “[l]ess than 1% of illegal pornography offenders progress to contact child sexual crimes within three, five and ten years”), <https://www.scirp.org/journal/paperinformation.aspx?paperid=63440>.

²¹ Gillotti, 23 N.Y.3d at 860.

²² Correction Law § 168-a(2)(d)(ii).

²³ Correction Law § 168-k.

Often registrants relocating to New York will have spent time, sometimes years, registered in the state in which their qualifying offense occurred. However, unless a court order is entered setting their initial registration date to the date they first registered in their home state, DCJS will not give them any credit for that time. Fortunately, in those cases in which a registrant's attorney has requested that the individual receive full credit for time served on another state's registry and there is no opposition from the prosecution, New York courts have generally approved the request.²⁴ Otherwise, while a Level One registrant convicted in New York State or one who has spent the entirety of their post-offense life in New York will only have to register for a total of 20 years, a similarly situated individual who first lived out-of-state would be required to register for 20 years in addition to however many years they spent on another state's registry. Such disparate treatment is illogical as research tells us that an individual's recidivism risk significantly decreases with each year spent at liberty offense-free, regardless of the state a person was living in at the time.²⁵

The only just and equitable approach then is to credit a person's time on another state's registry toward the time they must spend registered in New York. This helps reduce the number of individuals required to register long after their recidivism risk has become negligible. And to ensure this fair treatment across registrants, we strongly encourage you to adopt an office-wide policy of consenting to the entry of orders granting an out-of-state registrant full credit for time spent on the registry in a sister state. This is consistent with federal law²⁶ and satisfies the purposes served by the 20-year registration requirement for Level One registrants while also treating all such registrants equitably.

III. CONCLUSION

As New York County District Attorney, you have the power to influence not only how criminal offenses are prosecuted and punished in Manhattan, but also which avenues of relief will be available to those who have completed their sentences and served their time. Individuals convicted of sex offenses are required to carry with them the stigma and civil consequences of being labeled a "sex offender" for decades, if not their entire lives. The positions your office takes regarding matters related to these individuals and the policies you implement can help foster an environment that enables everyone, regardless of their offense of conviction, to pursue pathways to reentry and contribute to society in prosocial, productive ways going forward.

²⁴ See e.g., People v. McGarghan, 83 A.D.3d 422, 423 (1st Dep't 2011) (noting with approval the SORA court's grant of full credit for time spent on a registry in a sister state).

²⁵ See, e.g., David Thornton, *et al.*, "Estimating Lifetime and Residual Risk for Individual Who Remain Sexual Offense Free in the Community: Practical Applications," 33(1) Sexual Abuse 3-33 (2021); Harris, A.J.R. & Hanson, R.K., "Sex Offender Recidivism: A Simple Question, Public Safety and Emergency Preparedness Canada," at 1, 7, 11 (2004), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/sx-ffndr-rcdvsm/sx-ffndr-rcdvsm-eng.pdf> ("One factor that should be noted from the graphs is that without exception, the longer offenders remain offence-free in the community the less likely they are to sexually recidivate.").

²⁶ See "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) ("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.").

Thank you for your attention to this letter. We hope you will consider our recommendations and we stand ready to provide any assistance and resources we can. We look forward to the changes you are sure to marshal as District Attorney.

Sincerely,

Tess M. Cohen, Chair
Criminal Justice Operations Committee

Zachary Margulis-Ohnuma, Chair
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