SEX OFFENDER REGISTRATION ACT

Risk Assessment Guidelines
and Commentary

2006

SEX OFFENDER GUIDELINES

I. CURRENT OFFENSE(S)

Factor 1: Use of Violence (Choose only one)

1: The offender used forcible compulsion (10 pts)

2: The offender inflicted physical injury (15 pts)

3: The offender was armed with a dangerous instrument (30 pts)

Factor 2: Sexual Contact with Victim

1: The Offender/Victim contact was over clothing (5 pts)

2: The Offender/Victim contact was under clothing (10 pts)

3: The offender engaged in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual abuse with the victim (25 pts)

Factor 3: Number of Victims

1: There were two victims (20 pts)

2: There were three or more victims (30 pts)

Factor 4: Duration of Offense Conduct with Victim

The offender engaged in a continuing course of sexual misconduct with at least one victim (20 pts)

Factor 5: Age of Victim

1: The victim was 11 through 16 years of age (20 pts)

2: The victim was 10 years old or less, or 63 years of age or more (30 pts)

Factor 6: Other Victim Characteristics

The victim suffered from a mental disability, mental incapacity, or physical helplessness (20 pts)

Factor 7: Relationship Between Offender and Victim

The offender's crime (i) was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization or (ii) arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of that relationship (20 pts)

II. CRIMINAL HISTORY

Factor 8: Age at First Sex Crime

The offender committed a sex offense, that subsequently resulted in an adjudication or conviction for a sex crime, at age 20 or less (10 pts)

Factor 9: Number and Nature of Prior Crimes

1: The offender has a prior criminal history but no convictions or adjudications for a sex crime or felony (5 pts)

2: The offender has a prior criminal history that includes a felony conviction or adjudication but not for a violent felony or sex crime (15 pts)

3: The offender has a prior criminal history that includes a conviction or adjudication for the class A felonies of Murder, Kidnaping or Arson, a violent felony, a misdemeanor sex crime, or endangering the welfare of a child, or any adjudication for a sex offense (30 pts). Please note that when an offender has a prior felony sex crime conviction, it is an automatic override to a level 3 risk. In the past, when a case was an override, the instrument was not scored. However, pursuant to People v. Sanchez (20 A.D.3r 693 [2005]), a companion score is now provided. Because there is no mechanism in the instrument to score adequately a prior felony sex offense conviction and it is considered to be an automatic level 3 risk, a prior felony sex offense conviction is scored conservatively at only 30 points. However, in all cases where there is a prior felony sex offense conviction, the companion score is overriden by the Board and the Board recommendation is an automatic override to risk level 3, unless there is some cause for departure from that level.

Factor 10: Recency of Prior Felony or Sex Crime

The offender has a prior conviction or adjudication for a felony or sex crime that occurred less than three years before the instant offense (10 pts)

Factor 11: Drug or Alcohol Abuse

The offender has a history of drug or alcohol abuse (15 pts)

III. POST-OFFENSE BEHAVIOR

Factor 12: Acceptance of Responsibility

1: The offender has not accepted responsibility for his sexual misconduct (10 pts)

2: The offender has refused or been expelled from treatment subsequent to sentencing (15 pts)

Factor 13: Conduct While Confined or Under Supervision

1: The offender's adjustment to confinement or supervision has been unsatisfactory (10 pts)

2: The offender's adjustment to confinement or supervision has been unsatisfactory and has included inappropriate sexual conduct (20 pts)

IV. RELEASE ENVIRONMENT

Factor 14: Supervision

1: The offender will be released under the supervision of a probation, parole or mental health professional who specializes in the management of sexual offenders or oversees a sex offender caseload (0 pts)

2: The offender will be released under the supervision of a probation, parole or mental health professional, but not one who specializes in the management of sexual offenders or oversees a sex offender caseload (5 pts)

3: The offender will be released with no official supervision (15 pts)

Factor 15: Living or Employment Situation

The offender's living or employment situation is inappropriate (10 pts)

V. OVERRIDES

1: Prior sex felony conviction

The offender has a prior felony conviction for a sex crime

2: Serious Physical Injury or Death

The offender inflicted serious physical injury or caused death to the victim

3: Recent Threat

The offender has made a recent threat that he will reoffend by committing a sexual or violent crime

4: Mental Abnormality

There has been a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior

SEX OFFENDER GUIDELINES: COMMENTARY

The Sex Offender Registration Act ("Act"), set forth in Correction Law Article 6-C, requires the Board of Examiners of Sex Offenders ("Board") to "develop guidelines and procedures to assess the risk of a repeat offense by [a] sex offender and the threat posed to public safety." Correction Law §168-l(5). There are three levels of risk depending upon the offender's danger to the community: level 1 (low risk), level 2 (moderate risk), and level 3 (high risk). The offender's risk level determines the amount of information that can be disseminated about him to the public under the Act's notification procedures.[1] In addition, an offender receives a designation as a Sexually Violent Offender, Predicate Sex Offender, Sexual Predator or no such designation. A designation, in combination with the risk level, determines the length of an offender's registration.

This commentary discusses the general principles that underlie the guidelines and explains the specific factors included in them. As set forth in the appendix, the guidelines were developed with the assistance of a group of experts with diverse experience in dealing with sex offenders. With their aid, the Board sought to establish guidelines that would bring academic knowledge and practical acumen to the difficult task of predicting whether a person convicted of a sex crime is likely to reoffend. No one should attempt to assess a sex offender's level of risk without first carefully studying this commentary.

The 2006 revisions do not change the scoring of the instrument but, rather, simply include updated statutory language and clarification. Further information regarding the Act can be found at www.criminaljustice.state.ny.us.

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[1] The guidelines and commentary use the masculine pronoun (he or him) to refer to a sex offender. Most sex offenders are males, and the masculine is therefore used for convenience, as it is in the Act.

A. General Principles

In developing the guidelines, the Board adhered to the following general principles:

1. As the Act makes clear, the threat posed by a sex offender depends upon two factors: (i) the offender's likelihood of reoffense and (ii) the harm that would be inflicted if he did reoffend. Some offenders repeatedly reoffend, but the harm they inflict, while not insubstantial, is less grave. Others may pose a lesser likelihood of recidivism, especially if properly supervised, but the harm would be great were they to reoffend. The sex offender whose modus operandi is to rub himself against women in a crowded subway car generally falls into the former category[2]; the child molester into the latter. The guidelines seek to capture both these elements -- the probability of reoffense and the harm therefrom -- in determining an offender's risk level. It is important to note that the risk level seeks to capture not only an offender's risk of reoffense but also the harm posed by a particular offender should he reoffend.

2. What is somewhat less clear is whether offenders who are convicted of certain violent sex crimes (e.g., first-degree rape) should automatically be designated level 3, regardless of the facts of the particular case or the offender's prior history. A careful reading of the statute supports the conclusion that the guidelines should eschew per se rules and that risk should be assessed on the basis of a review of all pertinent factors (see Correction Law §168-l[5]&[6]). Such an individualized approach is also mandated by the federal Violent Crime

[2] This is not to suggest that offenders who commit "lesser" sex crimes do not also commit offenses that cause greater harm. An offender who engages in public lewdness by exposing himself also may commit crimes that involve direct "hands on" contact with a victim (McGrath 1991; Abel et al. 1988; Romero & Williams 1985).

Control and Law Enforcement Act of 1994 (see, 42 U.S.C. §14071), with which the Legislature intended the Board comply.[3]

3. After much discussion, the Board opted to create an objective assessment instrument that would provide a risk level combining risk of reoffense and danger posed by a sex offender.[4] As required by the Act, the instrument includes factors related to the offender's current offense, his criminal history, his post-offense behavior (e.g., his conduct while confined for the offense), and his planned release environment (Correction Law §168-l[5]). It assigns numerical values to each risk factor -- e.g., 20 points if there were two victims; 30 points if there were three or more victims. The presumptive risk level is then calculated by adding the points that the offender scores in each category.[5] 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.

4. The guidelines contain four "overrides" that automatically result in a presumptive risk assessment of level 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 by committing a

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[3] The legislative purpose section of the Act states that its enactment will bring "the state into compliance with the federal crime control act." Federal law eschews per se rules and requires a court to make an individualized determination that a person is a high risk offender (see, 42 U.S.C. §14071[a][2]).

[4] New Jersey has also adopted an objective risk assessment scale to implement its "Megan's Law" (see, New Jersey Sex Offender Risk Assessment Scale Manual, [dated 9/14/95]). That scale was designed "to provide an objective standard on which to base the community notification decision *** and to insure that the notification law is applied in a uniform manner throughout the state." (id). As discussed in the appendix, the New Jersey scale was the starting point for the development of New York's assessment instrument.

[5] Where the category does not apply to the offender, he should be scored 0 points. For example, if his crime involved one victim, that factor should be scored 0; if there was not a continuing course of sexual misconduct with the victim, that factor also should be scored 0

sexual or violent crime; or (iv) a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior. If any of these factors exist, the offender is presumptively level 3. The Board decided to treat these factors as overrides (rather than scoring them heavily) because each provides compelling evidence that an offender poses a serious risk to public safety (Quinsey, et al. 1995; Rice & Harris 1995; Schram & Millroy 1995; Serin 1994; Quinsey 1992; Rice, Harris & Cormier 1992; Romero & Williams 1985). As noted previously in Part II of the Guidelines (Criminal History) Factor 9, the fact that the offender has a prior felony sex crime conviction automatically results in a presumptive risk assessment of level 3.

5. The risk level calculated from aggregating the risk factors and from applying the overrides is "presumptive" because the Board or court may depart from it if special circumstances warrant. The ability to depart is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case. Not to allow for departures would, therefore, deprive the Board or a court of the ability to exercise sound judgment and to apply its expertise to the offender. Of course, if there was to be a departure in every case, the objective instrument would be of minimal value. The expectation is that the instrument will result in the proper classification in most cases so that departures will be the exception -- not the rule.

6. Generally, the Board or a 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, that is otherwise not adequately taken into account by the guidelines (cf., 18 U.S.C. §3553 [federal sentencing guidelines departure provision]). Circumstances that may warrant a departure cannot, by their very nature, be comprehensively listed in advance. Departures may be upward

(e.g., from level 1 to 2) or downward (e.g., from level 3 to 2). For example, if an offender's presumptive risk level is 3 but he suffers from a physical condition that minimizes his risk of reoffense, such as advanced age or debilitating illness, a downward departure may be warranted.

7. Completing the risk assessment instrument will often require the Board or a court to review the case file to determine what occurred. Points should not be assessed for a factor -- e.g., the use of a dangerous instrument -- unless there is clear and convincing evidence of the existence of that factor. This evidence can be derived from the sex offender's admissions; the victim's statements; the evaluative reports of the supervising probation officer, parole officer or corrections counselor; or from any other reliable source. Notably, the Board is not limited to the crime of conviction but may consider the above in determining an offender's risk level. Similarly, the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred. By contrast, the fact that an offender was not indicted for an offense may be strong evidence that the offense did not occur. For example, where a defendant is indicted for rape in the first degree on the theory that his victim was less than 11 (Penal Law §130.35[3]), but not on the theory that he used forcible compulsion (Penal Law §130.35[1]), the Board or court should be reluctant to conclude that the offender's conduct involved forcible compulsion.

8. The risk assessment instrument is divided into four parts: Current Offense[s]; Criminal History; Post-Offense Behavior; and Release Environment. The Current Offense[s] section should be completed on the basis of all of the crimes that were part of the instant disposition. For example, if the offender pleaded guilty to two indictments in two different counties, both indictments should be considered in scoring the section. If one indictment involved one victim and the other involved two victims and if there is clear and convincing

evidence that all three were abused, the offender should receive 30 points (three or more victims) in category 3.

For an offender who has been sentenced to an incarcerative sentence, the Post-Offense Behavior section will usually involve an assessment of his conduct while in custody. The Release Environment section will involve an assessment of the offender's planned work and living arrangements upon his release from custody. Because those arrangements are prospective and can readily change, the Board chose not to weigh this section as heavily as others in the assessment instrument.

9. In scoring the categories in the Current Offense[s] section of the instrument, the Board or court should look to the most serious wrongdoing in each category. For example, if the offender committed two crimes, a knifepoint rape of a 21-year-old woman and a rape of a 10-year-old girl in which no weapon was used, he should be assessed 30 points for using a dangerous instrument (from crime #1) and 30 points for victimizing a person under the age of 11 (from crime #2). The offender's willingness to use a weapon and to attack a young child are each factors that add to the risk level, even if they did not occur together in any one criminal incident.

10. The Criminal History section of the instrument asks for information about the offender's prior crimes. As used therein, the term "crime" includes criminal convictions, youthful offender adjudications and juvenile delinquency findings. The Board concluded that these determinations are reliable indicators of wrongdoing and, therefore, should be considered in assessing an offender's likelihood of reoffense and danger to public safety.[6] Convictions for

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[6]Although an adjudication as a youthful offender is not a conviction, it constitutes a reliable determination that an offender committed the underlying criminal conduct (People v. Compton, 38 A.D. 2d 788 [4th Dept., 1972]); cf. People v. Cook, 37 N.Y. 2d 591 [1975][a person can be questioned as to conduct underlying a youthful offender adjudication for purposes of impeaching credibility]).

Penal Law offenses and unclassified misdemeanors should be considered. Where an offender has admitted committing an act of sexual misconduct for which there has been no such judicial determination, it should not be used in scoring his criminal history. It may, however, form the basis for an upward departure if there is clear and convincing evidence that the conduct occurred.

11. The guidelines assume that the Board or a court will generally apply traditional principles of accessorial liability in calculating an offender's presumptive risk level (see Penal Law §20). That means that if an offender held the victim down while his co-defendant had sexual intercourse with her, the offender should receive 25 points in the category for sexual contact with the victim. The Board or court, however, may choose to depart from the risk level so calculated if it determines that this point score results in an over-assessment of the offender's risk to public safety.

B. Specific Guidelines

Factor 1: Use of Violence

Research on sex offenders shows that an offender's use of violence is positively correlated with his likelihood of reoffending (Quinsey et al. 1995; Limandri & Sheridan 1995; Rice et al. 1991). It is, of course, also a factor strongly associated with how dangerous an offender is to the community. A sex offender who rapes at knifepoint or inflicts physical injury to the victim poses a far greater threat to public safety than one who rubs himself against another on a crowded subway (see, p.2, n.2, supra). The guidelines reflect this fact by assessing an offender 30 points if he was armed with a dangerous instrument; 15 points if he inflicted physical injury; and 10 points if he used forcible compulsion. There is an override if the offender caused serious physical injury or death, so that he is presumptively level 3. See infra p. 17.

To avoid ambiguity, the guidelines use terms that are defined in the Penal Law. Forcible compulsion means to compel by either " (a) use of physical force or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped***" (Penal Law §130.00[8]). As the New York State Court of Appeals has observed, "the point *** is not what the defendants would have done, but rather what the victim observing their conduct, feared they *** might do if she did not comply with their demands." (People v. Coleman, 42 N.Y.2d 500, 505 [1977]). Discrepancies in age, size, or strength are relevant factors in determining whether there was such compulsion (e.g., People v. Yeaden, 156 A.D.2d 208 [1st Dept., 1989] [forcible compulsion shown "by evidence of defendant's dominating his smaller and weaker daughter and preventing her from leaving him"]). The victim's age, by itself, however, is not a sufficient basis for a finding of forcible compulsion.

Dangerous instrument means "any instrument, article or substance, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law §10.00[13]). Physical injury means "impairment of physical condition or substantial pain."(Penal Law §10.00[9]). It does not include petty slaps, shoves, kicks and the like. (see, e.g., Matter of Philip A., 49 N.Y.2d 198 [1980] [two punches to the face causing red marks, crying, and unspecified degree of pain was insufficient to prove physical injury]; People v. Tabachnik, 131 A.D.2d 611 [2d Dept., 1987] [testimony about "very sore" upper thigh did not establish physical injury].

Factor 2: Sexual Contact with Victim

This factor is also associated with the offender's danger to the community. The guidelines distinguish among offenders whose contact with their victims was touching over the clothing (5 points), touching under the clothing (10 points), or sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual abuse (25 points) as defined in Penal Law Article 130.

The Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety.

Consideration was given to modifying this category so that an offender who intended to have sexual intercourse with his victim but whose attempt was prevented by some factor other than his own change of mind (e.g., police intervention) would still receive a significant number of points. Such a mens rea-based approach, however, was rejected in favor of a more workable guideline that focuses upon the offender's conduct.

Thus, if there was no sexual contact, the offender should receive 0 points in this category even if his intent was to have forced sexual intercourse with his victim. In such instances, where it is evident that an offender intended to rape his victim, the Board or a court may choose an upward departure if it concludes that the lack of points in this category results in an under-assessment of the offender's actual risk to public safety.

Factor 3: Number of Victims

This category focuses upon the number of people whom the offender victimized in the case (or cases) that ultimately resulted in the instant conviction. Clear and convincing evidence of sexual conduct by the actor against victims may be taken into consideration. The existence of multiple victims is indicative of compulsive behavior and is, therefore, a significant factor in assessing the offender's risk of reoffense and dangerousness (Rice & Harris 1995; Abel et al. 1993; Toch & Adams 1989; Abel et al. 1987). The guidelines assess 20 points if there were two victims, and 30 points if there were three or more victims.

Factor 4: Duration of Offense Conduct with Victim

This category is designed to reflect the fact that some offenders, particularly those who prey on young children, manifest their compulsive behavior by engaging in a continuing course of sexual contact with the same victim. The offender who sexually abuses his girlfriend's young daughter over a period of several weeks falls into this 20-point category.

The Board opted for a definition of continuing course of sexual contact that includes both the nature and length of the offender's conduct. For purposes of these guidelines an offender has engaged in a continuing course of sexual contact when he engages in either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks.[7]

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[7]Since the issuance of the original guidelines in January 1996, the Legislature has enacted a continuing course of sexual misconduct crime, which addresses conduct occurring over a period of more than three months. See Penal Law §§130.75, 130.80. The Legislative history of this law makes clear that the three-month period was selected for reasons related to the law of pleadings and particulars -- i.e., because court decisions had made it difficult to prosecute sex crimes

Factor 5: Age of Victim

Offenders who target young children as their victims are more likely to reoffend (Abel et al. 1993; Weinrott & Saylor 1991). Moreover, such offenders pose a heightened risk to public safety since young children lack the physical strength to resist and can be more easily lured into dangerous situations than adults. The guidelines therefore assess 20 points if the victim was 11 through 16 years old and 30 points if the victim was 10 years old or younger. These ages are adopted from the Penal Law (see, e.g., Penal Law §§130.05[3][a]; 130.35[3]; 130.50[3]). An offender who preys on an elderly person, defined as a person 63 years old or more, is treated the same as one who chooses a young child as his victim.

Factor 6: Other Victim Characteristics

For much the same reason as in Factor 5, the guidelines assess 20 points if the victim suffered from a mental disability, mental incapacity or physical helplessness. The terms mental disability, mental incapacity and physical helplessness have their same meaning as in the Penal Law (see Penal Law §130.00 [5],[6],[7] and Penal Law §130.05[3][b], [c], [d]). Offenders who prey upon such victims consciously choose people who cannot protect themselves or effectively report their abuse (McGrath 1991). Such offenders pose a greater risk to public safety since their crimes are more difficult to detect and prosecute. Absent extraordinary circumstances, an offender who has been assessed points for the age of his victim (factor 5) should not be assessed points in this category in order to avoid double-counting.

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occurring over a period in excess of three months when the child victim could not specify the precise dates on which the crimes occurred. The history does not suggest that the legislature believed that repeated crimes occurring over a shorter period -- e.g., two weeks -- were not a sound basis for finding an offender to be compulsive in his misconduct. Hence, the Board has determined not to modify this guideline.

Factor 7: Relationship between Offender and Victim

The guidelines assess 20 points if the offender's crime (i) was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization or (ii) arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of such relationship. Each of these situations is one in which there is a heightened concern for public safety and need for community notification. (Schwartz 1995; McGrath 1991).[8]

As used herein, the term "stranger" includes anyone who is not an actual acquaintance of the victim. It can include a person living in the same apartment building if the relationship between the offender and victim is limited to their passing in the hallway or sharing an elevator. The phrase "established or promoted for the primary purpose of victimization" is adopted from the Act itself (Correction Law §168-a[9]). An uncle who offends against his niece generally would not fall into this category. A scout leader who chooses his profession or vocation to gain access to victims and "grooms" his victims before sexually abusing them would qualify. The final category -- the abuse of a professional relationship -- reaches health care providers and others who exploit a professional relationship in order to victimize those who repose trust in them. A dentist who sexually abuses his patient while the patient is anesthetized would fall squarely within this category.

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[8] This, of course, is not meant to minimize the seriousness of cases where the relationship is other than that of stranger or professional -- e.g., familial. The need for community notification, however, is generally greater when the offender strikes at persons who do not know him well or who have sought out his professional care.

Factor 8: Age at First Sex Crime

The offender's age at the commission of his first sex crime, which includes his age at the time of the commission of the instant offense, is a factor associated with recidivism: those who offend at a young age are more prone to reoffend (Schwartz 1995; Barbaree, et al. 1993; McConaghy, et al. 1989; Groth & Lorendo 1987). For this reason, the guidelines assess 10 points if an offender's first sex crime, whether a felony or misdemeanor, was at age 20 or less. As discussed above, criminal convictions, youthful offender adjudications and juvenile delinquency findings are to be considered in scoring this category, as well as categories 9 and 10 (see, p. 6, supra).

Factor 9: Number and Nature of Prior Crimes

An offender's prior criminal history is significantly related to his likelihood of sexual recidivism, particularly when his past includes violent crimes or sex offenses (Quinsey et al. 1995; McGrath 1991; Quinsey 1990; Romero & Williams 1985; Longo & Groth 1983; Groth, Longo & McFadin 1982). This category incorporates this research by assessing an offender 30 points if he has a prior conviction or adjudication for a Class A felony of Murder, Kidnaping, or Arson, a violent felony, a misdemeanor sex crime, or endangering the welfare of a child, or any adjudication for a sex offense; 15 points if he has a prior felony conviction or adjudication for a crime other than a Class A felony of Murder, Kidnaping, or Arson, a violent felony, or a sex offense (e.g., drug dealing); and 5 points if he has any criminal history other than a felony or sex crime. As noted previously in Factor 9, under Part II of the Guidelines (Criminal History), the fact that the offender has a prior felony sex crime conviction automatically results in a presumptive risk assessment of level 3. If an offender has a conviction for a felony sex crime,

there is an override, and he is presumptively level 3 (see p. 17, infra). The term violent felony, as used in the guideline, has the same meaning as in the Penal Law (see Penal Law §70.02[1]). The Board decided to treat endangering the welfare of a child as if it were a sex crime because it generally involves sexual misconduct, especially when it is part of a plea bargained disposition. Where a review of the record indicates that there was no such misconduct, a departure may be warranted.

Notably, this category looks to an offender's prior criminal history. However, some sex offenders have concurrent or subsequent offenses not scored in this category. Although such concurrent or subsequent criminal history is not covered by this particular category, it may be the basis for an upward departure if it is indicative that the offender poses an increased risk to public safety.

Factor 10: Recency of Prior Felony or Sex Crime

In weighing an offender's criminal history, the nature of his prior crime is not the only important factor; the recency of those crimes matters as well. To capture this factor, the guidelines assess 10 points if an offender has a prior felony or sex crime within three years of the instant offense. This three-year period should be measured without regard to the time during which the offender was incarcerated or civilly committed. It is an offender's behavior during his time at liberty that is relevant in assessing his likelihood to reoffend. In other words, this category measures the time from when the offender is released into the community until the date he commits the instant offense.

Factor 11: Drug or Alcohol Abuse

Alcohol and drug abuse are highly associated with sex offending (Lightfoot and Barbaree 1993; Langevin & Lang 1990; Crowe & George 1989; Rada 1976). The literature indicates that use of these substances does not cause deviate behavior; rather, it serves as a disinhibitor and therefore is a precursor to offending (Green 1995). The guidelines reflect this fact by adding 15 points if an offender has a substance abuse history or was abusing drugs and or alcohol at the time of the offense. The category focuses on the offender's history of abuse and the circumstances at the time of the offense. It is not meant to include occasional social drinking. In instances where the offender abused drugs and/or alcohol in the distant past, but his more recent history is one of prolonged abstinence, the Board or court may choose to score zero points in this category. An offender need not be abusing alcohol or drugs at the time of the instant offense to receive points in this category.

Factor 12: Acceptance of Responsibility

An offender who does not accept responsibility for his conduct or minimizes what occurred is a poor prospect for rehabilitation (Strate et al. 1995; Byrum & Rogers 1993; Simkins et al. 1989). Such acknowledgement is critical, since an offender's ability to identify and modify the thoughts and behaviors that are proximal to his sexual misconduct is often a prerequisite to stopping that misconduct (McGrath 1991). The guidelines assess 10 points to an offender who has not accepted responsibility for his conduct and 15 points are assessed to an offender who has refused or been expelled from a sex offender program. In scoring this category, the Board or court should examine the offender's most recent credible statements and should seek evidence of genuine acceptance of responsibility. An offender who pleads guilty but tells his pre-sentence

investigator that he did so only to escape a State prison sentence has not accepted responsibility. The guidelines add five points if the offender has refused or been expelled from treatment since such conduct is powerful evidence of the offender's continued denial and his unwillingness to alter his behavior. If an offender who has historically not accepted responsibility and historically has refused sex offender treatment but, subsequently participates in such programming, the Board or court should seek to examine whether there is evidence of a genuine acceptance of responsibility.

Factor 13: Conduct While Confined or Under Supervision

This factor looks to the offender's conduct while in custody or under supervision as a predictor of future behavior. For example, an offender who has numerous citations for disciplinary violations or who accrues disciplinary dispositions of a serious nature or who receives dispositions for behavior such as attempting to contact the victim may be assessed points in this category. An offender who has incurred serious disciplinary violations in prison poses a heightened risk of recidivism: his misconduct bodes ill for his return to the streets. An offender's adjustment to confinement in prison also is unsatisfactory if he has a recent Tier Three disciplinary violation.[9] His adjustment on probation or parole is unsatisfactory if he has violated a condition of his release. The guidelines assess the offender 10 points for unsatisfactory adjustment.

Even more troubling are instances where the offender, while in custody or under supervision, has been involved in inappropriate sexual behavior or receives dispositions for

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[9] Tier 3 disciplinary violations are the most serious infractions under DOCS' Three-Tier disciplinary system. Such violations can result in the loss of good time credits for an inmate

behavior such as possessing pornography or any factor related to his sexual acting out. In such instances, the guidelines assess the offender 20 points.

Factor 14: Supervision

Strict supervision is essential when a sex offender is released into the community. (English et al. 1995). This category is premised on the theory that a sex offender should be supervised by a probation or parole officer who oversees a sex offender caseload or who otherwise specializes in the management of such offenders. Sex offender caseloads generally permit more intensive supervision and provide for the offender's enrollment in a treatment program. An offender who is released without such intensive supervision is assessed points in this category. The Board initially considered having a separate category for whether the offender was in a treatment program. Because the efficacy of sex offender treatment is open to question, this approach was rejected (Kaul 1993; Marshall, Laws & Barbaree 1990). An offender's response to treatment, if exceptional, can be the basis for a downward departure.

There are cases received by the Board in which the offender was convicted in a jurisdiction other than New York and subsequently relocates to New York. If such an offender satisfactorily completed the terms of that jurisdiction's community supervision, he will be scored 0 points in this category.

Factor 15: Living or Employment Situation

Many sex offenders are opportunistic criminals whose likelihood of reoffending increases when their release environment gives them access to victims or a reduced probability of detection (Pettett and Weirman 1995). An example of an offender in an inappropriate work situation is a

child molester employed in an arcade or as a school bus driver. If the same offender were to live near an elementary school playground, his living environment would be inappropriate. An offender is assessed 10 points in this category if either his work or living environment is inappropriate.

A Note on Overrides

As indicated above, the guidelines contain four overrides that automatically result in a presumptive risk assessment of level 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 by committing a sexual or violent crime; or (iv) a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior. Three matters require some explanation. First, the term serious physical injury has its Penal Law meaning: "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ" (Penal Law §10.00[10]). Second, the Board initially considered a requirement that the threat to reoffend must have occurred within the previous year. It decided, however, not to impose such a rigid time limit; if the threat is recent enough that there is cause to believe that the offender may act upon it, an override is warranted. Finally, the Board chose to require a clinical assessment of an abnormality so that loose language in a pre-sentence report would not become the basis for an override. Examples of a clinical assessment that would support an override are pedophilia and sexual sadism (Schwartz 1995; Rice & Harris 1995; Andrews & Bonta 1994; Serin 1994).

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APPENDIX: Development of the Guidelines

The Sex Offender Guidelines were developed with the assistance of Kim English, the Director of the Office of Research and Statistics for the Colorado Division of Criminal Justice. Ms. English is the author of Adult Sex Offenders on Probation and Parole: A National Survey (December 1995), prepared for the United States Department of Justice. Drawing on guidelines in use in New Jersey and applying the factors enumerated in New York's Act, Ms. English prepared a working draft for New York's guidelines. The draft incorporated risk assessment criteria that find support in the academic literature and are commonly used by sex offender experts.

Thereafter, with Ms. English's continued assistance, the Board modified the draft assessment instrument in an effort to make it as objective as possible. The Board recognized that the instrument would be used by courts throughout the State and that unnecessary complexity would frustrate uniform results. The review process lasted two months; it included testing the guidelines against a large sample of cases to insure that accurate results were produced.

After the Board was satisfied that the guidelines were workable, it invited a panel of experts to review them and propose improvements. The panel was comprised of eight professionals with diverse experience related to the behavior and treatment of sex offenders: Linda Fairstein, Chief, Sex Crimes Prosecution Unit, New York County District Attorney's Office; Marjorie Fischer, Bureau Chief, Special Victims Bureau, Queens County District Attorney's Office; Kenneth Cullen, Clinical Director of C.A.P. Behavior Associates and former coordinator of the Sex Offender Treatment program at Bronx-Lebanon Hospital (1983-1993); Captain Timothy McAuliffe, New York State Police; Dr. David Barry, University of Rochester School of Medicine; Judith Cox, Acting Director, Bureau of Forensic Services, New York State

Office of Mental Health; Ed Varela, Probation Officer, Westchester County; and Michael Rossetti, Deputy Attorney General for Legal Policy.

The panelists met for two days, carefully reviewed the guidelines, and applied them to 20 cases. Based upon the concerns expressed during those sessions, the Board modified the guidelines in several ways. For example, the panelists noted that the guidelines, as then proposed, failed to assess points if an offender had exploited a professional relationship to abuse his victim. The panelists emphasized that where such exploitation had occurred, there was a heightened need for community notification. Factor 7 was modified to incorporate this concern. The panelists also suggested that an offender's history of violence or sex offending should be weighted more heavily. This was accomplished by modifying the scoring system for Factor 9 and by creating an override for a prior sex felony. Finally, the panelists encouraged skepticism toward treatment, recommending that an offender's participation in a treatment program, by itself, should not reduce his risk level. The Board accepted this recommendation as well.