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(Cite as: 188 Misc.2d 427, 724 N.Y.S.2d 262)

Supreme Court, New York County, New York. In the Matter of David NADEL, Respondent. Feb. 22, 2001.

Convicted federal sex offender appealed from determination of the State Board of Examiners of Sex Offenders requiring him to register in New York as a sex offender under the Sex Offender Registration Act (SORA). The Supreme Court, New York County, Rosalyn Richter, J., held that: (1) Court had authority to review Board's legal conclusion that offender was required to register in New York as a sex offender under SORA; (2) Court is limited to comparing New York statute with the out-of-state statute in determining whether federal conviction is based on the same essential elements as analogous New York felony sex offenses; and (3) federal offense was not based upon same essential elements as analogous New York offense.

So ordered.

West Headnotes

[1] Mental Health 257A \$\infty\$=469(6)

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak469 Registration and Community Notification

257Ak469(6) k. Appeal. Most Cited

Cases

Supreme Court had authority to review State Board of Examiners of Sex Offenders' legal conclusion that federal sex offender was required to register in New York as a sex offender under the Sex Offender Registration Act (SORA); statutory power of the court to determine how long and at what level the offender had to register included the power to determine whether registration was required at all. McKinney's Correction Law § 168-k, subd. 2.

[2] Mental Health 257A \$\infty\$=469(4)

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak469 Registration and Community Notification

257Ak469(4) k. Proceedings. Most

Cited Cases

In determining whether an out-of-state conviction is based on the same essential elements as analogous New York felony sex offenses, such that the conviction would qualify as "sex offense" under Sex Offender Registration Act (SORA), court is limited to comparing the New York statute with the out-of-state statute, and may not consider the factual allegations in the indictment or the evidence at trial. McKinney's Correction Law § 168-a, subd. 2(b).

[3] Mental Health 257A \$\infty\$=469(2)

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak469 Registration and Community Notification

257Ak469(2) k. Persons and Offenses Included. Most Cited Cases

Sex offender's federal offense of computer transmission of material involving sexual exploitation of minors was not based upon same essential elements as analogous New York offense of promoting sexual performance by a child or promoting obscene sexual performance by a child, for purposes of determining whether offender's federal offense qualified as "sex offense" under Sex Offender Registration Act (SORA); federal law defined minor as a person under age of eighteen years, while New York statute prohibited such conduct with a child less than seventeen years of age. 18 U.S.C.A. §§ 2252(a)(1), 2256(1); McKinney's Penal Law §§ 263.10, 263.15.

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**263*428 Gerald Lefcourt, New York City, for respondent.

Eliot Spitzer, Attorney General, New York City (Christine Morrison of counsel), for People of State of New York.

ROSALYN RICHTER, J.

In this proceeding, this court must decide whether it has the authority to review a determination made by the New York State Board of Examiners of Sex Offenders (the Board) requiring David Nadel (respondent), who was convicted of a federal sex offense, to register in New York State as a sex offender. For the reasons discussed herein, the court concludes that it has the power to review whether the Board's determination is legally correct. Upon reviewing the Board's decision, the court finds that the Board erred when it determined that respondent's Federal conviction requires him to register as a sex offender in New York.

On June 23, 1998, respondent pleaded guilty in the Southern District of New York to an Information charging one count of Computer Transmission of Material Involving Sexual Exploitation of Minors (18 U.S.C. § 2252[a][1]). That charge arose from allegations that respondent had transmitted via the internet three photographs of juveniles engaged in sexually explicit conduct. Respondent was sentenced to home detention for a period of fifteen months and five years probation, and was directed to undergo mental health treatment during the entire term of his probation.

FN1. United States v. David Scott Nadel, 98 Cr. 14 (JFK).

**264 On May 17, 2000, the Board informed respondent that since he had been convicted of a sex offense in another jurisdiction and resides in New York State, he may be required to register *429 as a sex offender under the provisions of the Sex Offender Registration Act (SORA)(Correction Law, Article 6-C, § 168). The letter invited respondent to submit any materials that he wished the Board to consider in making their determination.

In a letter to the Board dated June 6, 2000, respondent's counsel argued that respondent should not be required to register as a sex offender because the Federal crime of which respondent was convicted does not contain all of the essential elements of any New York State sex offense. Specifically, respondent contended that whereas the Federal crime requires that a defendant transmit sexually explicit images of an individual under the age of eighteen, the analogous State statutes criminalizing such conduct apply only where the images are of children less than sixteen years old. Thus, respondent argued, under the strict statutory construction rules developed by the Court of Appeals for using outof-State convictions to adjudicate defendants as prior felony offenders, respondent's Federal conviction does not qualify as a sex offense under SORA's definition of that term.

On August 15, 2000, the Board informed respondent and the clerk of this court that it had determined that respondent would be required to register because the Federal statute to which respondent pleaded guilty contains the essential elements of two New York crimes: Promoting a Sexual Performance By a Child (Penal Law § 263.15) and Promoting an Obscene Sexual Performance By a Child (Penal Law § 263.10). The Board's submission to this court included a case summary which indicated that the Board's conclusion that respondent must register was based upon a review of the respondent's file, including a pre-sentence investigation conducted by the Southern District's Probation Office. The case summary states that the three photographs respondent had transmitted over the internet contained images of children under the age of twelve. FN2 Thus, the Board concluded, "the facts of [respondent's] case clearly entail the transmission of material depicting children, under the age of sixteen, engaged in sexual behavior." The Board recommended to the court that respondent be adjudicated a Level One sex offender.

FN2. The Board does not indicate how it concluded that the children depicted in the

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photographs were under the age of twelve. Notably, neither the Probation Office's presentence investigation nor any document in the Federal court file states the children's ages. The pre-sentence investigation does indicate that a search of respondent's computer files uncovered images of children, most of whom were under twelve years old. However, respondent was not convicted of possessing those images.

*430 This court's correspondence unit subsequently informed respondent that the Board had recommended that he register as a Level One sex offender. Respondent was advised that the court would make a final determination of the risk level at a hearing at which he had a right to be present and have counsel. At the request of respondent, the hearing was adjourned for the parties to submit written memoranda on two issues: a) whether this court has the power to review the Board's determination that respondent must register as a sex offender, and if so; b) whether the Board erred in making its determination. FN3 **265 After consideration of the parties' submissions, this court concludes that it has the power to review the Board's determination that respondent's Federal conviction requires him to register as a sex offender in New York. Upon such review, the court finds that the Board erred in concluding that respondent must register, and therefore no factual hearing regarding respondent's specific risk level is necessary.

FN3. The Attorney General's Office submitted a memorandum to this court on behalf of the Board. The New York County District Attorney's Office did not submit papers, but rather agreed to allow the Attorney General's Office to present the case for the People.

On January 21, 1996, New York's Sex Offender Registration Act (SORA)(Correction Law, Article 6-C, § 168) became effective. SORA established a notification and registration scheme for individuals convicted of certain enumerated sex offenses. Un-

der that scheme, a convicted sex offender is classified into one of three levels based upon the risk that the offender will commit a repeat offense. Corr. Law \S 168-l(6). If the risk of repeat offense is low, the sex offender is designated as a Level One offender. For these individuals, SORA requires notification to law enforcement agencies located in the offender's jurisdiction, and annual registration by the offender for a period of ten years. Corr. Law §§ 168-f, 168-h, 168-l(6)(a). Level Two classification, which is given to offenders who present a moderate risk of re-offense, also requires law enforcement notification and annual registration for ten years. In addition, SORA allows law enforcement agencies to notify any entity with "vulnerable populations" that a convicted Level Two sex offender resides in the community. Those entities, in turn, may further disseminate that information at their discretion. Corr. Law §§ 168-f, 168-h, 168-l(6)(b). The highest designation, Level Three, is given to sex offenders whose risk of a repeat offense is high. Level Three offenders must register in person every ninety days for a minimum of ten years, and potentially for life. In addition*431 to all of the notification provisions applicable to Level Two offenders, Level Three offenders are included in a directory of sex offenders which is made available to the public. Corr. Law §§ 168-f, 168-h, 168-l(6) (c). Finally, for all three classification levels, SORA requires that information about the offender be available to any member of the public who calls a designated "900" telephone number. Corr. Law § 168-p.

Correction Law § 168-a establishes the criteria used to determine whether sex offenders convicted in other jurisdictions must register in New York. FN4 Under that section, an individual is required to register as a sex offender in New York if either: (a) he is convicted of an offense in any other jurisdiction which includes "all of the essential elements" of certain enumerated New York felonies for which a prison sentence of more than one year or a sentence of death was authorized in the foreign jurisdiction; or (b) he is convicted of a felony in any other jurisdiction for which a prison sentence of

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more than one year or a sentence of death was authorized in the foreign jurisdiction, and for which the offender is required to register as a sex offender in the foreign jurisdiction. Corr. Law § 168-a(2)(b).

FN4. The parties agree that the Southern District is considered another jurisdiction.

The procedures used to ensure registration by sex offenders convicted in other jurisdictions are set forth in Correction Law § 168-k. That section provides:

The [Division of Criminal Justice Services] shall advise the [B]oard that the sex offender has established residence in this state. The [B]oard shall determine whether the sex offender is required to register ... No later than thirty days prithe [B]oard making recommendation, **266 the sex offender shall be notified that his or her case is under review and that he or she is permitted to submit to the [B]oard any information relevant to the review. After reviewing any information obtained, and applying the [risk level guidelines], the [B]oard shall ... make a recommendation regarding the duration of registration ... and level of notification ... This recommendation... shall be submitted by the [B]oard to the ... court and to the district attorney ... It shall be the duty of the ... court, applying the [risk level guidelines], to determine the duration of registration*432 ... and level of notification.

Corr. Law § 168-k(2)(emphasis added). That subdivision further requires that the court provide the offender with a copy of the Board's recommendation, and advise him that he has a right to a hearing prior to the court's determination, the right to be represented by counsel at the hearing and that a lawyer will be appointed if he is unable to afford one.

At the hearing, the offender must be given the opportunity to appear and be heard. Further, the offender must be provided with discovery relevant to the issues at the hearing. The People bear the burden of proving facts supporting the duration of registration and level of notification sought by clear and convincing evidence. At the conclusion of the hearing, the court must render an order setting forth its risk level determination, and the findings of fact and conclusions of law on which the determination is based. Finally, either party may appeal as of right from the court's order pursuant to provisions of the CPLR. Corr. Law § 168-k(2).

With this statutory backdrop in place, the first issue the court must address is whether it has the authority to review the Board's legal conclusion that respondent must register as a sex offender. Respondent argues that the above-quoted statutory language makes clear that the Board's role is merely to recommend to the court that an individual with a foreign conviction register as a sex offender and to further recommend an appropriate risk level. Thus, respondent contends, this court is not bound by the Board's determination that respondent's foreign conviction requires him to register in New York. This court agrees with respondent. There is nothing in the statutory language which unequivocally states that the Board has the exclusive authority to decide the threshold issue of whether respondent is required to register. Likewise, nothing in the statute prohibits this court from reviewing the Board's decision on this issue.

[1] To the contrary, the statute specifically states, in three separate places, that the Board's determination concerning the level of notification and duration of registration is a *recommendation* to the court. Moreover, the statute explicitly grants to the court the ultimate power to decide the offender's level of notification and duration of registration. This court concludes that the only reasonable interpretation of the statute is that the power of the court to determine how long and at what level the offender has to register includes the power to determine *433 whether registration is required at all. This conclusion is further supported by that section of the statute which requires the court to "render an order setting forth its risk level determination and the find-

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ings of fact and conclusions of law on which the determination is based." Corr. Law § 168-k(2). Certainly, any legal conclusions concerning the level of notification and duration of registration must encompass the essential legal issue of whether the offender has to register at all.

Notably, the Attorney General, which represents the Board in this proceeding, appears to believe that the Board's determination**267 that respondent is required to register is subject to this court's review. In its memorandum submitted to this court, the Attorney General does not argue that the court lacks the power to review the Board's legal determination that respondent must register. To the contrary, the memorandum, citing Correction Law § 168-k(2), specifically acknowledges that "the Board initially determines whether or not an offender convicted in an out-of-state jurisdiction is required to register and then makes a recommendation to the court." Attorney General's Memorandum, p. 2 (emphasis added). Thus, it appears that the Attorney General agrees with this court's interpretation of the statute and does not contest the court's power to review whether the Board's decision was legally sound.

This court has found no cases from either the Court of Appeals or the Appellate Divisions which would preclude the court from reviewing the Board's registration decision. Indeed, no appellate court has addressed the precise issue presented here. The court is aware, however, of a decision to the contrary issued by a court of concurrent jurisdiction. In In the Matter of Mandel, 184 Misc.2d 897, 711 N.Y.S.2d 313 (N.Y. Cty. Ct.2000), the court held that SORA vests the authority to determine if registration is required solely with the Board, and that the court has no power to review that determination. The court in *Mandel* did not cite any cases in support of its position, but rather relied only on the few words in the statute concerning the Board's role in deciding this issue. However, the Mandel opinion does not discuss any of the due process and legislative history issues covered in this court's opinion. Thus, this court respectfully disagrees with the *Mandel* decision and reaches a different result.

The conclusion reached here is entirely consistent not only with the specific section of SORA governing out-of-State offenders, but also with other subdivisions of the statute which *434 give the court the authority to determine if in-State offenders are subject to SORA's provisions. For example, as to those defendants convicted in New York of any of the enumerated offenses, SORA provides that "[u]pon conviction, ... the court shall certify that the person is a sex offender" Corr. Law § 168-d(1). Similarly, for defendants about to be discharged from jail or paroled, the statute states that "[a] determination that an offender is a sex offender ... shall be made ... by the sentencing court" Corr. Law § 168-n(1). These determinations for New York offenders are quite simple-the court need only compare the crime of which defendant was convicted with the list of sex offenses laid out in the statute. Corr. Law § 168-a(2),(3). On the other hand, as discussed more fully below, the test to determine if an out-of-State conviction qualifies as a sex offense under SORA is much more complicated and involves a painstaking comparison of the New York and foreign statutes. To conclude that this court does not have the power to review the Board's decision would mean that the Legislature provided for the courts to make the simplest of SORA determinations, yet entrusted the much more complicated legal conclusions to an administrative agency free from any judicial review of its decisions. The Legislature could not have intended this anomaly to occur.

Interpreting the statute to conclude that this court cannot review the Board's determination that an out-of-State offender must register would be contrary to the statute's legislative history and would present grave due process concerns. In *Doe v. Pataki*, 3 F.Supp.2d 456 (S.D.N.Y.1998), Judge Denny Chin found that **268 SORA, as originally enacted, had failed to provide procedural due process to convicted sex offenders who were required to register. Specifically, the court held that in order

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to satisfy due process, the offender must be given a hearing with notice, an opportunity to retain counsel or have counsel appointed, pre-hearing discovery, the right to have his risk level determined by clear and convincing evidence, and the right to appeal his risk level determination. *Doe v. Pataki*, 3 F.Supp.2d at 471-72.

In 1999, recognizing that SORA did not provide for uniform due process procedures, the Legislature amended the statute, effective January 1, 2000, to specifically address the concerns set forth in Judge Chin's decision. *See* Bill Jacket, L.1999, ch. 453, Sep. 1, 1999 Memorandum from James M. McGuire to Kathy A. Bennett. According to the Governor's Program Bill, the primary purpose of the amendments was "to incorporate in *435 [SORA] additional due process standards". *See* Bill Jacket, L.1999, ch. 453, Governor's Program Bill, p. 4. Included in those amendments were changes to the subdivision of SORA governing out-of-State offenders.

As amended, that subdivision now provides that the court's risk level determination must be accompanied by all of the due process protections enumerated by Judge Chin in Doe v. Pataki. In contrast, on its face, that part of the subdivision giving the Board the power to determine whether an out-of-State offender is required to register contains none of those due process protections. Although not specifically mentioned in this subdivision, it is entirely consistent with the legislative history for this court to conclude that due process protections must be read to apply not only to the procedures to determine the specific risk level to be assigned, but also to the Board's determination that an offender must register in the first place. Were this court to interpret the statute to prohibit judicial review of the Board's decision, there would be absolutely no due process protection for an out-of-State offender with regard to the Board's determination as to whether registration is necessary. Such an interpretation would be entirely contrary to the legislative history, could not have been what the Legislature intended and might present constitutional concerns.

To hold that this court has no power to review the Board's determination of the purely legal issue involved here would simply make no sense. Such a narrow interpretation of the statute would mean that if a court, at the risk level hearing, notices a clear legal error in the Board's conclusion that an outof-State offender must register, as is the case here, its hands would be tied and it would be forced to issue an illegal order directing the offender to register. Further, it would mean that an aggrieved offender seeking relief would be forced to pursue two distinct proceedings: an appeal pursuant to SORA of the court's risk level determination, and an article 78 proceeding attacking the Board's determination that registration is warranted. FN5 Such a result **269 could not have been what the Legislature intended. See *436People v. Kearns, 95 N.Y.2d 816, 712 N.Y.S.2d 431, 734 N.E.2d 743 (2000) (Legislature could not have intended SORA statute to generate dual civil and criminal tracks of appeal). Accordingly, the only logical, reasonable and just interpretation of the statute is that this court has the authority to review the Board's threshold determination that respondent must register.

> FN5. It is not entirely clear that an article 78 proceeding would even lie to challenge the Board's determination. See People v. David W., 95 N.Y.2d 130, 711 N.Y.S.2d 134, 733 N.E.2d 206 (2000)(refusing to reach the issue as to whether a defendant could seek article 78 review of Probation Department's determination that offender must register). If, in fact, respondent here had no right to any judicial review of the Board's determination, either through this court or by way of article 78, additional due process concerns would be presented. See People v. Hernandez, 93 N.Y.2d 261, 689 N.Y.S.2d 695, 711 N.E.2d 972 (1999)(defendants who are certified at conviction as sex offenders entitled to appellate review for constitutional, substantive

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or procedural irregularities).

Having concluded that it is in the court's province to review the Board's determination, the court must now decide whether that determination was legally correct. As explained above, Correction Law § 168-a(2)(b) sets forth the criteria for determining whether a sex offender convicted in another jurisdiction must register in New York. Under that section, registration is required under two circumstances. First, if the offense is a felony for which the offender would have to register as a sex offender in the other jurisdiction, he is required to register as a sex offender in New York. The Attorney General does not argue that this provision is applicable to respondent, presumably because it recognizes that there is no registration requirement in the jurisdiction of FN6 conviction here, the Southern

FN6. It is true that under Federal law, the F.B.I. is required to maintain a database of sex offenders. However, registration in that database for sex offenders convicted of Federal offenses is required only if the offender resides in a State that has not established a minimally sufficient sex offender registration program. See42 U .S.C. § 14072(a),(c). The Attorney General does not argue that New York's program is insufficient. See also In re Mandel, 184 Misc.2d at 897, 711 N.Y.S.2d 313 (holding that New York has a sex offender registration statute that meets federal standards).

Registration in New York is also required for those sex offenders convicted in other jurisdictions of any offense which includes "all of the essential elements" of certain enumerated New York felony sex offenses. The statute does not define "essential elements" nor does it provide any further guidance on how to determine if an out-of-State conviction qualifies for New York registration. Respondent argues that that term should be strictly construed and urges this court to apply the "essential elements" test developed by the Court of Appeals for using out-

of-State convictions to adjudicate defendants as prior felony offenders. The Attorney General argues that applying that test would frustrate the intent of the SORA statute.

The New York Court of Appeals has strictly construed the "essential elements" test for determining whether an out-of-State conviction qualifies as a prior felony for predicate felon adjudications. The test requires that the elements of the out-of-State *437 crime be virtually identical to the counterpart elements of the New York felony. People v. Olah, 300 N.Y. 96, 89 N.E.2d 329 (1949). Moreover, in determining whether the test is satisfied, the court is limited to comparing the New York statute with the out-of-State statute, and may not consider the factual allegations in the indictment or the evidence at trial. People v. Muniz, 74 N.Y.2d 464, 548 N.Y.S.2d 633, 547 N.E.2d 1160 (1989); People v. Gonzalez, 61 N.Y.2d 586, 475 N.Y.S.2d 358, 463 N.E.2d 1210 (1984). If the elements do not match, the out-of-State conviction cannot be used to adjudicate the defendant a predicate felon. People v. Muniz, 74 N.Y.2d at 464, 548 N.Y.S.2d 633, 547 N.E.2d 1160.

[2] This court is constrained to agree with respondent and conclude that the "essential elements" test in the predicate felony context must be used to determine whether an out-of-State conviction requires registration as a sex offender in **270 New York. The court reaches this conclusion because the language used in Correction Law § 168-l(2)(b), the section of SORA at issue here, is identical to the language of the predicate felony statutes. For example, Penal Law § 70.04(1)(b)(i) states that in determining whether a defendant is a second violent felony offender, the court may consider the defendant's prior conviction "in any other jurisdiction of an offense which includes all of the essential elements of [a New York violent] felony" (emphasis added). Since these words are the exact same words contained in SORA, the court concludes that the Legislature must have intended that the tests for determining the use of out-of-State convictions be the

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same. FN7

FN7. This court has not found any appellate decision on point. The only decision addressing this precise issue is *In re Mandel*, 184 Misc.2d at 897, 711 N.Y.S.2d 313. In *Mandel*, the court, in *dicta*, reached the same conclusion as this court.

The legislative history of the recent amendments to SORA lends further support to this court's conclusion. As originally enacted, offenders with outof-State convictions were required to register only if their convictions satisfied the "essential elements" test. In 1999, SORA was amended to also mandate registration where the offender was required to register as a sex offender in the jurisdiction of conviction. The Governor's Program Bill explains that the amendment was necessary because "[t]he present language of the statute [i.e., the 'essential elements' test] requires a detailed analysis of the statutes in other jurisdictions to determine whether registration is required in New York State." See Bill Jacket, L.1999, ch. 453, Governor's Program Bill, p. 5. In light of this legislative statement, there can be no doubt that the "essential elements" *438 test in SORA is the same as the "essential elements" test in the predicate felony statutes.

[3] Having determined that the "essential elements" test of SORA must be strictly construed, this court must now compare the Federal statute of which respondent was convicted with its New York analogue. Defendant was convicted of violating 18 U.S.C. § 2252(a)(1). That statute prohibits the knowing transportation or shipping, in interstate or foreign commerce, visual depictions involving a minor engaging in sexually explicit conduct. "Minor" is defined as a person under the age of eighteen years. 18 U.S.C. § 2256(1). According to the Board, that statute is analogous to two New York statutes: Promoting a Sexual Performance By a Child (Penal Law § 263.15) and Promoting an Obscene Sexual Performance By a Child (Penal Law § 263.10). Those laws prohibit the knowing

production, directing or promoting of a performance or obscene performance of a child less than seventeen years of age. "Promote" means, *inter alia*, to deliver, transfer or distribute. Penal Law § 263.00(5).

FN8. These statutes were amended effective February 1, 2001 to raise the age of the child from sixteen to seventeen.

This court agrees with respondent that the elements of the Federal and New York statutes are not sufficiently alike to require respondent to register in New York as a sex offender. It is apparent that it is possible to violate the Federal statute with depictions of an individual less than eighteen years of age without violating either of the analogous New York statutes. Since the New York and Federal statutes have different elements with regard to the age of the victim, this court concludes that the Federal statute fails the "essential elements" **271 test contained in SORA. Accordingly, respondent cannot be required to register in New York as a sex offender.

This court is not unmindful of the Attorney General's position that a strict application of the "essential elements" test may limit the number of convicted offenders who must register and therefore may be inconsistent with the spirit of the Sex Offender Registration Act. The recent statutory amendments to SORA make clear that the Legislature intended to expand, rather than limit, SORA's scope with regard to out-of-State offenders. However, this court is bound by the language of the statute and by the unequivocal holdings of the Court of Appeals that define the "essential elements" test. It may be that the SORA statute has a gap with regard to some sex offenders *439 convicted in Federal court because there is no requirement of Federal registration. However, it is the Legislature, not this court, that has the power to cure what may be an oversight.

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