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acts and omissions, not those of Ferguson Signs or NEVCO Scoreboard Company. The College was not free from any wrongdoing. It thus cannot claim indemnity.

V. CONCLUSION

Because of our decision, other issues that the parties assigned are no longer relevant. We conclude that the court did not err in finding the College liable. Further, it correctly denied the College's claim for indemnity. The court, however, did err in apportioning negligence to Ferguson Signs. On remand, the court should reapportion Ferguson Signs' share of the negligence to the remaining parties—Downey and the College. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CHAD NORMAN, APPELLANT.
808 N.W.2d 48

Filed January 6, 2012. No. S-10-888.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
4. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal.
6. **Criminal Law: Convicted Sex Offender: Notice.** Before determining that a defendant convicted of a crime not sexual in nature is subject to sex offender

registration pursuant to Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010), the court must provide notice and a hearing and must make the finding whether sexual penetration or sexual contact occurred in connection with the incident that gave rise to the conviction based on the record and the hearing.

7. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
8. **Statutes: Legislature: Intent.** An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.
9. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
10. **Constitutional Law: Statutes.** It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.
11. **Due Process.** When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. Second, having found a liberty interest, the court must determine what procedural safeguards are required. Third, the facts of the case are examined to ascertain whether there was a denial of that process which was due.
12. **Criminal Law: Convicted Sex Offender: Presentence Reports: Due Process.** Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010) provides that the court's finding shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report. However, the statute does not limit the court's consideration to such sources and, because a liberty interest is at stake, a meaningful hearing requires consideration of evidence at the hearing as well as the factual basis and the presentence report.
13. **Criminal Law: Convicted Sex Offender: Proof.** The finding required under Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010) should be established by clear and convincing evidence.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael J. Synek for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Chad Norman pled no contest to third degree assault, Neb. Rev. Stat. § 28-310 (Reissue 2008), and was sentenced by the district court for Buffalo County to probation for 2 years and jail for 30 days with credit for time served. After a hearing, the court also ordered Norman to register under Nebraska's Sex Offender Registration Act (SORA) pursuant to Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010). Norman appeals the portion of his sentence which ordered him to register, because he claims he was denied due process. We find merit to this claim and reverse the registration order and remand for resentencing in a manner that comports with procedural due process as outlined in this opinion. We find no merit to Norman's remaining assignments of error.

STATEMENT OF FACTS

On August 20, 2009, the State filed an information charging Norman with one count of third degree sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 2008). The State alleged that in February 2009, Norman had subjected T.A.W., born in March 1998, to sexual contact. Norman pled not guilty.

On April 22, 2010, Norman filed a motion to take the depositions of certain witnesses and for discovery of certain information. Norman sought, inter alia, to depose three persons who had treated T.A.W. for behavioral disorders and to discover T.A.W.'s juvenile and residential treatment records maintained by the Nebraska Department of Health and Human Services. The court sustained portions of the motion but, on the basis of physician-patient and counselor-client privileges, denied his requests to depose the three counselors and to discover treatment and juvenile records compiled by the Department of Health and Human Services.

Thereafter, Norman and the State reached a plea agreement pursuant to which the State filed an amended information charging Norman with one count of third degree assault in violation of § 28-310. Section 28-310 provides:

> (1) A person commits the offense of assault in the third degree if he:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Threatens another in a menacing manner.
>
> (2) Assault in the third degree shall be a Class I misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it shall be a Class II misdemeanor.

The information tracked the language of § 28-310(1)(a) and (b).

Norman offered to plead no contest to this amended charge at a plea hearing held June 16, 2010. When questioning Norman prior to accepting his plea, the court informed Norman that the State had advised the court that if a conviction were entered, the State would request, based upon the factual basis for the plea, that the court require Norman to register pursuant to SORA. Norman replied that he understood.

The State provided the following factual basis:

> [O]n July 9th of 2009, officers were dispatched to [a certain address] to have contact with . . . the mother of the victim identified in the complaint as [T.A.W.], date of birth [March 1998]. During this contact, [T.A.W.'s mother] stated that her son had told her that he had been sexually assaulted by . . . Norman.
>
> An interview was conducted with the minor child. He stated that [Norman] had touched his penis. Then stated that [Norman] told him or threatened him by saying not to tell anyone or he would hurt his family.
>
> Those events occurred in Buffalo County, Nebraska.

After recitation of the factual basis, the court clarified that the third degree assault charge was "based upon the threat," to which the State agreed. The State added that "[t]here was no physical injury to the child . . . ." Finding that an adequate factual basis had been established for conviction of third degree assault based on threats made in a menacing manner, the court accepted Norman's plea and found Norman guilty of third degree assault.

Because of the potential for SORA registration, the court conducted an expansive sentencing hearing. At the sentencing hearing held August 2, 2010, the State offered two exhibits in support of its request to require Norman to register under SORA. Norman did not object to the stipulated redacted version of the police reports. The police reports stated that T.A.W. had told officers that Norman had touched his penis on more than one occasion. Norman objected to the State's offer of a copy of a deposition of T.A.W. taken by Norman's attorney. The court found that the relevant portions of the deposition were cumulative to statements in the police reports and sustained the objection.

Norman later offered a redacted version of the deposition of T.A.W. as a rebuttal to statements in the police reports. The State objected to admission of the redacted version of the deposition. In the redacted version, T.A.W. stated that he had told police Norman "sexually abused" him and that he had heard of sexual abuse because "[a] lot of my friends have been sexually abused"; upon further questioning, T.A.W. stated that only one friend had talked to him about being sexually abused. The court received Norman's redacted version of the deposition but also received the full deposition that had been offered by the State "to the extent that [it] clarifies or places into context the contents of" the redacted version.

Norman offered two additional exhibits pertaining to SORA registration. The court sustained the State's relevance objection to Norman's offer of a copy of the record of T.A.W.'s juvenile proceedings, but the court received a redacted version of a deposition of T.A.W.'s mother in which she stated, inter alia, that T.A.W. had been removed from her home and was a ward of the State and that T.A.W. had behavioral problems. She further stated that Norman had lived with her and that she continued to ask him for money after he moved out. She also described the circumstances under which T.A.W. told her that Norman had sexually abused him.

Norman testified at the sentencing hearing. He stated that he had lived with T.A.W.'s mother and her children, that both T.A.W. and his mother had asked Norman for money to buy things when he lived with them, and that they continued to ask

him for money after he had separated from T.A.W.'s mother. Norman testified that a week or two before he was arrested in this case, he had denied requests from T.A.W. and his mother for money and they became angry and confronted him publicly. During the confrontation, T.A.W. stated that Norman had sexually abused him. Norman testified that this was the first he had heard such claims and that he was later arrested based on T.A.W.'s allegations. Norman denied that he had sexually abused T.A.W. and testified that there had "never been any contact between me and him."

The State requested that as part of his sentence, Norman be required to register under SORA pursuant to § 29-4003. In 2009, the Legislature had amended § 29-4003 such that persons convicted of certain offenses not sexual in nature would be required to register under SORA if the court found evidence of sexual penetration or sexual contact in the record. The relevant portion of § 29-4003(1)(b) provides that SORA applies to, inter alia, "any person who on or after January 1, 2010 . . . has ever pled guilty to, pled nolo contendere to, or been found guilty of any of" a list of offenses, which list includes "[a]ssault in the third degree pursuant to section 28-310." Section 29-4003(1)(b)(i)(B) provides that in order for SORA to apply to the offenses listed in § 29-4003(1)(b)(i) which are not sexual in nature, including third degree assault under § 28-310, of which Norman stands convicted, "a court shall have found that evidence of sexual penetration or sexual contact, as those terms are defined in section 28-318, was present in the record, which shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report."

After the 2009 amendments to SORA, an individual ordered to register must provide certain information and adhere to certain reporting requirements. Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2010). Failure to do so subjects the individual to a felony. § 29-4011. The information provided shall not be confidential, § 29-4009, except for certain facts, such as the individual's Social Security number. Further, the information provided will be made publicly available using the Internet, § 29-4013, without regard to classification as to level of dangerousness.

In sum, the individual ordered to register under SORA will be publicly listed in the sex offender registry and be identified as a sex offender.

After hearing argument by both the State and Norman, the court made the following oral ruling with regard to SORA registration under the revised statute:

> You appear to have gone to a rather enlarged hearing because of the language contained in Nebraska statutes that was recently amended which provided that a person who is convicted of an offense that is not a sex offender offense based upon the contents of the Court's record can still be required to register pursuant to [SORA]. As far as that particular statute is concerned, it provides that if there is evidence within the record that the person has committed actions which would lead him to be convicted of a registrable offense, that regardless of whatever the defendant is convicted of, he can be required to register. There's no provision for any facts, findings, or any decisions by the Court or a jury or any trier of fact to resolve the dispute in the evidence in the record. And to the extent that the statute can require registration based upon evidence that rule isn't evidence but statements which are contained in the record, the Court will not find that the law is applicable.
>
> However, the law does provide that one of the things the Court must consider is the factual basis that was established in getting to the conviction. We had a plea, we had a factual basis, we had an agreement by [Norman] that the State would be able to offer that evidence at the time of trial. And by the very nature of his plea, [Norman] was saying that he was not willing to contest those statements at trial. The Court then accepted those statements and . . . accepted [Norman's] plea in part based upon the Court's acceptance of the statements and then found beyond a reasonable doubt [Norman] guilty.
>
> Based upon that portion of the arraignment and solely upon that portion of the arraignment, the Court will find that [Norman] will have to register pursuant to [SORA].

The court then sentenced Norman to probation for 2 years and to jail for 30 days, with credit for time served, on the conviction for third degree assault and ordered Norman to register pursuant to SORA.

Norman appeals.

ASSIGNMENTS OF ERROR

Norman generally claims that the district court erred and imposed an "excessive sentence" when it ordered him to register pursuant to § 29-4003(1)(b)(i)(B) of SORA. He claims that the district court denied him procedural due process and that the court erred when it failed to find § 29-4003(1)(b)(i)(B) unconstitutional. Norman claims that the district court erred when it denied his motion to allow him to take certain depositions and conduct discovery seeking additional information about T.A.W.

STANDARDS OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010). On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Travelers Indem. Co. v. Gridiron Mgmt. Group, supra*.

[4] The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

Before addressing Norman's arguments, we clarify the issues that are properly before us and that we will address on appeal. The State asserts that Norman failed to argue his "excessive

sentence" assignment of error in his brief. Norman replies that the court imposed an "excessive sentence" to the extent it found him subject to the registration requirements of SORA and that he did not challenge any other part of his sentence. We therefore read Norman's "excessive sentence" assignment of error as being encompassed by and resolved in his claim that the court erred when it ruled that he was subject to SORA.

Norman also claims that the district court erred when it failed to find § 29-4003(1)(b)(i)(B) unconstitutional. The State argues that Norman did not properly raise and preserve a challenge to the constitutionality of the statute before the trial court and that he did not give proper notice of his challenge or comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008). Norman asserts that he had no opportunity to challenge the statute until sentencing, when he was ordered to register under SORA.

[5] A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006). To the extent that Norman contends that § 29-4003(1)(b)(i)(B) is unconstitutional, he failed to timely make that challenge to the trial court, and therefore the issue is not properly before this court on appeal.

The record shows that prior to accepting the plea, the district court advised Norman that the State intended to invoke § 29-4003(1)(b)(i)(B) and that Norman could be subject to SORA upon the requisite factual finding. Norman had the opportunity to challenge the constitutionality of the statute at the trial level. The fact that Norman's proposed challenge goes to the constitutionality of a statute that affects his sentence, rather than the underlying charge, does not absolve Norman of the need to challenge the statute at the trial level. See *State v. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010). Therefore, we do not consider Norman's arguments on appeal that the statute is unconstitutional.

In contrast, Norman generally challenges the district court's application of the statute to him and asserts in particular that the court did not use procedures required by the statute and by procedural due process. Our analysis of whether the court complied with the statute requires interpretation of the statute, and,

as we discuss below, our interpretation of the statute entails consideration of the constitutional requirements of procedural due process. Whether Norman received procedural due process is properly before us.

Norman Was Entitled to Procedural Due Process With Regard to the Court's Finding Under § 29-4003(1)(b)(i)(B); Although the Court Gave Norman Notice and a Hearing, the Court Erred When It Failed to Consider Evidence From the Hearing When It Determined He Was Subject to SORA.

[6] Norman generally claims he was denied procedural due process in connection with the court's order directing him to register under SORA. He specifically asserts that the district court erred because the court did not provide the process due under § 29-4003 and under constitutional principles of procedural due process. We find merit to Norman's claim that he was denied procedural due process. For reasons explained below, we conclude that before determining that a defendant convicted of a crime not sexual in nature is subject to SORA registration pursuant to § 29-4003(1)(b)(i)(B), the court must provide notice and a hearing and must make the finding whether sexual penetration or sexual contact occurred in connection with the incident that gave rise to the conviction based on the record and the hearing. In this case, although Norman was given notice and a hearing, the court stated that it did not consider the evidence adduced at the hearing and instead found Norman had committed an act of sexual contact subjecting him to SORA registration based solely on statements in the State's factual basis for the plea. Under our reading of § 29-4003(1)(b)(i)(B), Norman did not receive the process he was due. We therefore reverse the portion of the sentencing order which found Norman subject to SORA, and we remand the cause to the district court with instructions to make the § 29-4003(1)(b)(i)(B) finding, based on all the evidence in the record, including evidence from the hearing, and to determine, based on such finding, whether Norman is subject to SORA.

Broadly speaking, the issue in this case is to determine the procedures required before a defendant convicted of a

crime not sexual in nature can be ordered to register as a sex offender. The primary statute at issue in this case is § 29-4003, which specifies persons to whom SORA is applicable. Section 29-4003(1)(a) provides that SORA "applies to any person who on or after January 1, 1997 . . . [h]as ever pled guilty to, pled nolo contendere to, or been found guilty of any of" a list of specific criminal offenses. The offenses listed under subsection (1)(a) are generally offenses of an obviously sexual nature or offenses committed against minors. However, subsection (1)(b) provides that "[i]n addition to the registrable offenses under subdivision (1)(a) of this section, [SORA] applies to any person who on or after January 1, 2010 . . . has ever pled guilty to, pled nolo contendere to, or been found guilty of any of" a list of offenses. The offenses listed in subsection (1)(b) include offenses that are not of a sexual nature, including "(VI) Assault in the third degree pursuant to section 28-310." Norman was found guilty of third degree assault.

Section 29-4003(1)(b)(i)(B), upon which we focus, provides as follows:

> In order for [SORA] to apply to the offenses listed in subdivisions (1)(b)(i)(A)(I) [murder in the first degree], (II) [murder in the second degree], (III) [manslaughter], (IV) [assault in the first degree], (V) [assault in the second degree], (VI) [assault in the third degree], (VII) [stalking], (IX) [kidnapping], and (X) [false imprisonment] of this section, a court shall have found that evidence of sexual penetration or sexual contact, as those terms are defined in section 28-318, was present in the record, which shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report.

In sum, Norman was convicted of third degree assault pursuant to § 28-310, which is an offense listed in both § 29-4003(1)(b)(i)(A) and § 29-4003(1)(b)(i)(B). Therefore, for a person such as Norman convicted of third degree assault to be subject to SORA, the court must make the required finding of either "sexual penetration or sexual contact." § 29-4003(1)(b)(i)(B). Norman claims that the district court did not make a proper finding under § 29-4003(1)(b)(i)(B) and that

he was denied procedural due process in the manner by which the district court reached its finding. We look to the statute and our procedural due process jurisprudence in order to determine whether the court made a proper finding and what procedures are required in reaching the finding which subjects Norman to registration under SORA and its consequences.

[7-10] With regard to reading the statute at issue, we note certain standards of statutory construction. In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute. *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010). An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent. *Id*. In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Id*. It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done. *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011); *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

The purpose of SORA is indicated by the legislative findings set forth in Neb. Rev. Stat. § 29-4002 (Reissue 2008), which provides in part:

> The Legislature finds that sex offenders present a high risk to commit repeat offenses. The Legislature further finds that efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction.

From these findings, it is apparent that the purpose of registration under SORA is to identify persons who are "guilty of sex offenses" and to gather and publish information regarding

these individuals which is necessary for the protection of the public. The Nebraska State Patrol Sex Offender Registry similarly indicates that it contains "information about individuals who have pleaded guilty to or have been found guilty of sex offenses." The persons referred to in § 29-4002 and listed in the registry are deemed "sex offenders."

Unlike other state sex offender registry statutes, "sex offender" is not explicitly defined in SORA. Compare *Rainer v. State*, 286 Ga. 675, 678, 690 S.E.2d 827, 830 (2010) (noting that "sexual offender" is defined in Ga. Code Ann. § 42-1-12(a)(20)(A) (Supp. 2009) and that there "is no requirement that sexual activity be involved"). In the absence of a statutory definition, we look to SORA overall to determine who is a sex offender for registration purposes. Section 29-4003(1)(b) states that SORA applies to persons who stand convicted of the listed offenses and, as to certain crimes, where the requisite finding of sexual penetration or sexual contact has been made. Persons so convicted are deemed to have committed "sex offenses" and are "sex offenders" for purposes of SORA and the Nebraska State Patrol Sex Offender Registry.

We read § 29-4003(1)(b)(i)(B) in light of the purpose of SORA. As to persons convicted of crimes not sexual in nature, we read § 29-4003(1)(b)(i)(B) to require the court to make a factual finding that the defendant committed an act of "sexual penetration" or "sexual contact" which is related to the incident that gave rise to the conviction before the defendant can be ordered to register under SORA as a sex offender. That is, before an individual convicted of a crime not sexual in nature listed in § 29-4003(1)(b)(i)(B) can be publicly identified as a "sex offender" under SORA and the registry, this requisite finding must be made.

Having identified the finding that the court must make under § 29-4003(1)(b)(i)(B), we next consider the procedures the court must follow under the statute and constitutional principles in making such finding. The statute does not clearly specify the procedure the court must follow in making its finding. Because, as we explain below, registering and failing to register under SORA as amended in 2009 implicate a liberty interest, we construe § 29-4003(1)(b)(i)(B) as requiring those procedures

that comply with constitutional mandates for procedural due process. In doing so, we give the statute an interpretation that meets constitutional requirements. See, *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011); *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

We had occasion in *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004), a case involving a reputational claim under a previous version of SORA, to consider the procedural due process required by U.S. Const. amend. XIV, § 1, and Neb. Const. art. I, § 3. As we noted in *Slansky* by reference to our prior due process jurisprudence, procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. In this regard, the U.S. Supreme Court has stated that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). "Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Id*. Procedural due process reduces the risk of a finding which both is erroneous and places an individual in a false light.

Due process requires that parties at risk of the deprivation of liberty interests be provided adequate notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which may be affected by it. *Slansky v. Nebraska State Patrol, supra*. The U.S. Supreme Court has stated that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Consideration should be given to "the risk of an erroneous deprivation of such [liberty] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id*. at 335.

[11] When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there

is a liberty interest at stake. Second, having found a liberty interest, the court must determine what procedural safeguards are required. Third, the facts of the case are examined to ascertain whether there was a denial of that process which was due. See, *id.*; *Slansky v. Nebraska State Patrol, supra*.

In *Slansky*, the Nebraska State Patrol determined that the defendant was a Level 3 sex offender and, under SORA then in effect, such determination required public disclosure of information concerning his status as a sex offender. The defendant asserted that public disclosure impacted his reputational liberty interest and that the manner by which the assigned level was ascertained violated his right to procedural due process. We determined in *Slansky* that we did not need to reach the issue whether a liberty interest was at stake, because even if we assumed there was a liberty interest in not having his Level 3 sex offender status and associated information released, the process afforded before public dissemination of the information was surely adequate. In *Slansky*, we noted that the defendant had notification and the ability to contest his classification prior to public disclosure. We concluded that the defendant "was afforded notice and a meaningful opportunity to contest the [State Patrol's] decision." 268 Neb. at 385, 685 N.W.2d at 355. The instant case differs from *Slansky* because SORA has been revised and to analyze Norman's claim, we are required to determine whether Norman had a liberty interest and, if so, whether he received procedural due process.

For completeness, we also note that the instant case differs from *State v. Worm*, 268 Neb. 74, 89, 680 N.W.2d 151, 164 (2004), where we noted under an earlier version of SORA that the "only issue currently before this court is the registration requirements, which do not involve public notice." *Worm* involved a defendant already found guilty of a sexual crime, attempted first degree sexual assault on a child, and at issue was whether he had committed an aggravated offense. Unlike *Worm*, Norman's underlying conviction for third degree assault is not a crime necessarily sexual in nature, but under the current version of SORA, if the finding under § 29-4003(1)(b)(i)(B) is made, then public notice of Norman's status as a sex offender is required.

The current version of SORA, applicable to this case, is more expansive than those previously considered by this court. It has been described as follows: "What the [current version of SORA] actually did . . . was to replace a system that required individualized risk assessments of sex offenders" to determine if the fact of their registration should be made public with a law which requires that "certain information regarding *all* registrants is disclosed to the public." *Doe v. Nebraska*, 734 F. Supp. 2d 882, 917, 919 (D. Neb. 2010) (emphasis supplied). See § 29-4009(1) ("[i]nformation obtained under [SORA] shall not be confidential . . ."). See, also, § 29-4013. Upon registration, information is published on the Sex Offender Registry Web site, which tracks the statutory language at § 29-4002 and identifies the individuals listed as sex offenders who "have pleaded guilty to or have been found guilty of sex offenses."

Norman identifies several liberty interests which he asserts are at stake. We focus on the reputational claim to the effect that he was denied procedural due process when he was required to register under SORA, thus identifying him as a sex offender and placing his information on the public Web site, because such order deprived him of a liberty interest—his reputation combined with the alteration of his status under state law—without a meaningful hearing. We have previously noted that such a reputational claim is subject to the "'stigma plus'" test. *State v. Worm*, 268 Neb. at 88, 680 N.W.2d at 164. In *Worm*, we stated:

> Reputational damage caused by state action which results in a person's stigmatization can implicate a protected liberty interest, but only if it is coupled with some more tangible interest . . . . See *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001), quoting *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

268 Neb. at 88, 680 N.W.2d at 163. The stigma-plus analysis is applicable to procedural due process claims. *Doe v. Nebraska, supra*.

Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), referred to in *Worm*, is a case brought under 42 U.S.C. § 1983 (1970). The U.S. Supreme Court observed in *Paul* that to establish a violation of due process, a plaintiff who

complains of governmental defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatization. The stigma-plus test applies to cases such as the present one which show indications of material government involvement in its public role such that the claim of a violation of a liberty interest in one's reputation is distinguishable from a common state law defamation suit.

A "stigma" is "'[a] mark or token of infamy, disgrace, or reproach . . . .'" *Doe v. Dept. of Public Safety ex rel. Lee*, 271 F.3d 38, 48 (2d Cir. 2001), *overruled on other grounds* 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) (quoting The American Heritage Dictionary of the English Language 1702 (4th ed. 2000)). Being publicly deemed a sex offender is sufficiently derogatory to injure a person's reputation. The Nebraska State Patrol Sex Offender Registry, following the language of § 29-4002, "stigmatizes" the people listed on it insofar as it asserts that the persons listed are sex offenders, that is, "individuals who have pleaded guilty to or have been found guilty of sex offenses." Although this stigmatizing statement would be true as to persons convicted of a sex offense, it may be a false statement as to persons such as Norman who are convicted of an offense not sexual in nature. That is, if the requisite finding of sexual penetration or sexual contact under § 29-4003(1)(b)(i)(B) is not established, it would be inaccurate to identify Norman as a sex offender. Through his procedural due process claim, Norman seeks to show that he has been inaccurately deemed a "sex offender."

To summarize our stigma analysis under § 29-4003(1)(b)(i)(B), persons convicted of offenses not sexual in nature, such as murder in the first degree, manslaughter, and various degrees of assault, can be ordered to register under SORA. Such order is based upon a finding of an act of sexual penetration or sexual contact. This finding will require the defendant to register under SORA, and hence, he or she will publicly be deemed by the State as a "sex offender" and his or her information will be

publicly disclosed. Norman was found guilty of third degree assault, and by application of § 29-4003(1)(b)(i)(B), he was ordered to register under SORA, identified publicly as guilty of a sex offense, and deemed a sexual offender on the public registry. We believe the stigma component of Norman's claim has been satisfied by the making of a reputation-tarnishing statement, i.e. he is a sex offender, which may be proved false.

Having isolated the "stigma" that the Nebraska sexual offender registry visited on Norman, we must next inquire whether there is a "plus" factor that gives rise to a liberty interest triggering procedural due process. A plus factor includes an alteration or impairment by the State of "a right or status previously recognized by state law." *Paul v. Davis*, 424 U.S. 693, 711, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). *Paul* clarified that stigmatization by the State alone does not give rise to a liberty interest or necessitate procedural due process. Under *Paul*, common-law defamation is available for ordinary insults visited by nonstate actors. Only where there is a stigma imposed by state action and where that stigma causes a nontrivial injury which could not have been initiated by a private citizen will the plus factor be recognized. Although the stigma factor may be comparable to private defamation, the plus factor directly implicates state action.

Applying the stigma-plus test to the case before us, we agree with Norman's assertion that the statutory registration duties imposed on him constitute the plus factor. These obligations alter his legal status and are governmental in nature. The registration duties imposed on Norman by SORA are extensive and onerous. Under Nebraska's SORA statutes, a person subject to SORA is required within specified time limits to register in person at a location designated by the State Patrol, to notify the sheriff if he or she moves within the county or outside the state, and, if he or she moves to a new county, to notify the sheriff of the new county. § 29-4004. The person must provide DNA samples, §§ 29-4004(10) and 29-4006(1)(r). The person must provide certain information, such as his or her remote communication device identifiers, domain names registered by the person, and blogs and Internet sites maintained by the person, and verify such information annually for the duration of the

registration period. § 29-4006. If a person required to register under SORA violates the act, he or she is guilty of a Class IV felony for such failure and, for a subsequent failure, is guilty of a Class III felony and shall be sentenced to a minimum term of 1 year in prison. § 29-4011.

We believe these and other statutory obligations taken together constitute the plus factor. "The imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a 'change of [that person's] status' under state law" under *Paul* and constitutes the plus factor. *Doe v. Dept. of Public Safety ex rel. Lee*, 271 F.3d 38, 57 (2d Cir. 2001) (quoting *Paul v. Davis, supra*). Although the issues raised differ from Norman's claim, we note that the plus factor has been found by several other courts considering sex offender registration requirements. *Gwinn v. Awmiller*, 354 F.3d 1211 (10th Cir. 2004); *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999); *State v. Germane*, 971 A.2d 555 (R.I. 2009); *State v. Briggs*, 199 P.3d 935 (Utah 2008); *Schuyler v. Roberts*, 285 Kan. 677, 175 P.3d 259 (2008); *State v. Guidry*, 105 Haw. 222, 96 P.3d 242 (2004); *Noble v. Board of Parole*, 327 Or. 485, 964 P.2d 990 (1998).

Having found stigma and the plus factor, we conclude that Norman had a reputational liberty interest at stake when the court made a finding under § 29-4003(1)(b)(i)(B) and ordered him to register under SORA. Because a liberty interest is at stake, due process requires notice and a meaningful opportunity to be heard. We therefore must consider what procedural safeguards are required.

The U.S. Supreme Court considered the requirements of procedural due process in connection with a sex offender registration scheme in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003). In that case, the U.S. Court of Appeals for the Second Circuit determined that being listed on the Connecticut state registry implied that such individual was currently dangerous. The Second Circuit concluded that public disclosure of sex offender status deprived offenders of a liberty interest and that the Connecticut scheme violated procedural due process because offenders were not afforded a predeprivation hearing

to determine whether they were likely to be "currently dangerous." See *Doe v. Dept. of Public Safety ex rel. Lee, supra*. The U.S. Supreme Court assumed without deciding that a liberty interest was at stake in connection with registering as a sex offender. The Court reversed the Second Circuit's decision. The Court found that under Connecticut's law, registration was required based only on the fact that a person had been convicted of a sex offense and no other finding; that is, no finding of current dangerousness was required as a predicate to registration. The Court concluded that "due process does not entitle [the defendant] to a hearing to establish a fact that is not material under the [State] statute." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. at 7.

[12] Unlike the statute in *Doe*, Nebraska's SORA requires a finding of fact in addition to the fact of conviction as a predicate to registration for persons like Norman who were convicted of an offense not sexual in nature. Given the liberty interest at stake, we conclude here that in order to make the finding initially requiring a person who is guilty of an offense not sexual in nature to be subject to SORA, pursuant to § 29-4003(1)(b)(i)(B), the court is required to give notice to the defendant that such order is being sought and that a hearing will be held. The court must then hold a hearing at which the defendant is given the opportunity to dispute evidence in the record regarding sexual penetration or sexual contact. For the hearing to be meaningful, the court must make its finding based on the evidence in the record, including evidence adduced at the hearing. We note that § 29-4003(1)(b)(i)(B) provides that the court's finding "shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report." However, the statute does not limit the court's consideration to such sources and, because a liberty interest is at stake, a meaningful hearing requires consideration of evidence at the hearing as well as the factual basis and the presentence report. A registration decision is not punitive, and the fact necessitating registration can be decided by the court as opposed to a jury. See, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[13] In regard to the burden of proof, we look initially to the statute at issue. Section 29-4003(1)(b)(i)(B) under consideration does not specify a standard of proof required for the finding which subjects the defendant to SORA. We note, however, that Nebraska's Sex Offender Commitment Act provides statutorily in Neb. Rev. Stat. § 71-1209(1) (Reissue 2009) that the State must prove certain facts "by clear and convincing evidence" before the defendant can be committed. See *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009). Having examined the burden of proof issue in other jurisdictions, we agree with the observation of the Supreme Court of Wyoming, where it stated: "It is difficult to identify a general rule as to the 'correct' burden of proof under a sexual offender registration statute, both because statutes differ so much from jurisdiction to jurisdiction, and because the questions raised in the reported cases vary so much one from the other." *JJF v. State*, 132 P.3d 170, 177 (Wyo. 2006). Returning to Nebraska law, we note that although being subject to SORA does not implicate liberty interests to the same degree as commitment under the Sex Offender Commitment Act, we nevertheless conclude that the finding required under § 29-4003(1)(b)(i)(B) which converts a defendant convicted of a crime not sexual in nature into a "sex offender" should also be established by clear and convincing evidence. We add that because the SORA registration requirement is not considered punitive, see *Slansky v. Nebraska State Patrol, supra*, and *State v. Worm, supra*, due process does not require evidence beyond a reasonable doubt, see *Com. v. Maldonado*, 576 Pa. 101, 838 A.2d 710 (2003). However, because of the liberty interests at stake in a registration decision under the current statute, we conclude that the fact of sexual penetration or sexual contact should be based on more than a mere preponderance of the evidence. We are aware of state statutes that require clear and convincing evidence for registration and notification decisions. E.g., N.Y. Correct. Law § 168-n(3) (McKinney 2003 & Cum. Supp. 2012); 42 Pa. Cons. Stat. Ann. § 9795.4(e)(3) (West 2007 & Cum. Supp. 2011). See, also, *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998). But

see, *JJF v. State, supra*; *State v. Guidry*, 105 Haw. 222, 96 P.3d 242 (2004); *In re W.M.*, 851 A.2d 431 (D.C. 2004); *Sweet v. State*, 371 Md. 1, 806 A.2d 265 (2002) (all holding that appropriate burden was preponderance of evidence). We conclude that the appropriate burden of proof for a finding under § 29-4003(1)(b)(i)(B) is clear and convincing evidence.

To summarize, in order to fulfill our duty to construe statutes in a manner that meets constitutional requirements, including requirements of procedural due process, we construe § 29-4003(1)(b)(i)(B) to require the following: When considering requiring a defendant convicted of an offense not sexual in nature to register under SORA pursuant to § 29-4003(1)(b)(i)(B), the court must give the defendant notice that such order is being considered and that a hearing will be held to determine whether the fact required under § 29-4003(1)(b)(i)(B) exists. The State must establish the fact of sexual penetration or sexual contact by clear and convincing evidence. The defendant may present evidence at the hearing to dispute evidence regarding sexual penetration or sexual contact. After considering the evidence in the record, including the factual basis for a plea, the presentence report, and evidence adduced at the hearing, the court must make a finding, based on clear and convincing evidence, whether the defendant committed an act of sexual penetration or sexual contact related to the incident that gave rise to the defendant's conviction. If the court so finds, then it must order that the defendant is subject to SORA.

We now consider whether the court followed these requirements in this case to ensure that Norman received procedural due process before his reputational liberty interest was impacted by ordering him to register under SORA and being publicly deemed a sex offender. In this case, the court gave Norman notice that the State sought an order requiring him to register under SORA. The court also held an evidentiary hearing and took evidence. However, the court erred when it ignored the evidentiary record and instead based its decision that Norman was subject to SORA solely on the State's assertion of sexual contact in the factual basis for the plea. Because the court did not consider the evidence adduced at the hearing, Norman was

not given a meaningful opportunity to be heard. We conclude that the court erred and Norman was denied procedural due process when it found sexual contact and ordered Norman to be subject to SORA based solely on statements from the factual basis.

Later in this opinion, we reject Norman's discovery-related assignment of error and affirm his conviction. Hence, the trial record made at the hearing is complete. Accordingly, we must now consider the remedy resulting from the improper sentencing order directing Norman to register under SORA. The improper SORA portion of the sentence is divisible from the remainder of the sentence pertaining to incarceration and probation. See *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010). We therefore reverse that portion of the sentencing order requiring Norman to register under SORA. We remand the cause to the district court to make a proper finding under § 29-4003(1)(b)(i)(B) as set forth in this opinion. We note that because the court already conducted an evidentiary hearing regarding facts relevant to the finding required under § 29-4003(1)(b)(i)(B), on remand, the court need not hold a new hearing. Instead, the court should make a finding whether sexual penetration or sexual contact occurred in connection with the incident giving rise to his conviction for third degree assault based on the record before it, including evidence adduced at the hearing. Based on such finding, the court must then determine whether Norman is required to register under SORA.

The District Court Did Not Err When It Denied Norman's Motions for Depositions and Discovery.

Norman finally asserts that the district court erred when it denied his motion to take depositions and to allow discovery of additional information about T.A.W. A plea of guilty or nolo contendere waives certain claims on appeal. See *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). See, also, *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). However, we consider it prudent to comment on this assignment of error as further support of our determination that the

hearing on the § 29-4003(1)(b)(i)(B) finding is complete for purposes of consideration on remand. We find no merit to this assignment of error.

The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). We conclude that the district court did not abuse its discretion with respect to these discovery rulings, and this assignment of error does not provide a basis for reversing Norman's conviction or necessitate additional evidence at the § 29-4003(1)(b)(i)(B) hearing.

After the State initially charged Norman with third degree sexual assault of a child, Norman sought to depose three counselors who had treated T.A.W. for behavioral disorders and to discover T.A.W.'s juvenile and residential treatment records compiled by the Department of Health and Human Services. The court denied the requests on the basis of the physician-patient privilege set forth in Neb. Rev. Stat. § 27-504 (Reissue 2008). Norman and the State thereafter reached a plea agreement whereby the State amended the information and charged Norman with third degree assault. Norman pled no contest to that charge.

Norman argues that the district court should have allowed the discovery under an exception to the physician-patient privilege set forth in § 27-504(d), which provides that "[t]here is no privilege under this rule . . . in any criminal prosecution involving injury to [children]." Norman refers us to the original information, which charged him with third degree sexual assault of a child and alleged that he "did not cause serious personal injury to [T.A.W.]." He argues that the charge impliedly involves an injury, albeit not a *serious* injury and that therefore, under § 27-504(d), there is no privilege.

Regardless of whether the district court's discovery ruling was correct at the time it was made, the ruling was not made in the context of the charge to which Norman pled no contest. The State amended the information and charged Norman with third degree assault. At the plea hearing, it was made clear by the State that the third degree assault to which Norman plead nolo contendere was based on a threat to T.A.W. made in a

menacing manner, not based on a physical injury. We further note that the exception to the physician-patient privilege would not apply to the SORA hearing, because the purpose of the hearing is to determine whether Norman had "sexual contact" with T.A.W., which finding does not necessarily involve a physical injury to T.A.W.

Norman makes no convincing argument that the district court abused its discretion when it denied his discovery requests. We reject this assignment of error.

CONCLUSION

We find merit to Norman's claim that he was denied procedural due process in connection with the ruling ordering him to register under SORA. We conclude that before a court orders a defendant to be subject to SORA pursuant to § 29-4003(1)(b)(i), subsection (B) requires that the court make a finding, based on clear and convincing evidence, whether the defendant committed an act of sexual penetration or sexual contact as part of the incident that gave rise to the defendant's conviction for one of the offenses not sexual in nature listed in § 29-4003(1)(b)(i)(B). We conclude that a liberty interest is implicated in the making of this finding and that the court must provide procedural due process when it makes this finding. The court must make the finding after providing the defendant proper notice and a meaningful opportunity to be heard. We determine that although the court in this case provided Norman notice and a hearing, the court erred when it based its finding solely on statements in the State's factual basis for Norman's plea and explicitly ignored the evidence at the hearing. We therefore reverse that portion of the sentencing order requiring Norman to be subject to SORA, and we remand the cause with directions to make a finding under § 29-4003(1)(b)(i)(B) based on all the evidence in the record, including evidence adduced at the hearing, and to determine based on such finding whether Norman is subject to SORA.

We reject Norman's remaining discovery-related assignment of error. We therefore affirm his conviction, and we affirm his sentence, except we vacate the portion of the sentence in which the court ordered that Norman was subject to SORA,

and remand the cause for a finding whether Norman is subject to SORA consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., participating on briefs.

WRIGHT, J., not participating in the decision.

IN RE INTEREST OF ELIZABETH S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES, V. VICTORIA G., APPELLANT.

809 N.W.2d 495

Filed January 6, 2012. No. S-11-153.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. ____: ____. An appellate court reviews questions of law independently of the juvenile court's conclusions.
3. **Minors: Juvenile Courts.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
4. **Juvenile Courts: Parental Rights: Adoption.** Where a juvenile has been adjudicated pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and a permanency objective of adoption has been established, a juvenile court has authority under the juvenile code to order the Nebraska Department of Health and Human Services to accept a tendered relinquishment of parental rights.
5. **Juvenile Courts: Parental Rights: Evidence.** A parent's prior relinquishment of parental rights may be considered as evidence supporting adjudication or termination of parental rights in a future proceeding involving another child.
6. **Juvenile Courts: Parental Rights.** A juvenile court should exercise its authority to order the Nebraska Department of Health and Human Services to accept a valid relinquishment with respect to an adjudicated child when it would be in the best interests of that child to do so.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed.

Sanford J. Pollack, of Pollack & Ball, L.L.C., for appellant.

Shellie D. Sabata, Deputy Lancaster County Attorney, for appellee State of Nebraska.