INTRODUCTION

In a stunning reversal of the position they espoused on the record at the SORA hearing, the People oppose Appellant Jeffrey E. Epstein's appeal of the Order of the New York Supreme Court, Criminal Term, New York County, determining him to be a Level 3 sex offender, without designation, under New York's Sexual Offender Registration Act (SORA), Correction Law Article 6-C, by wholeheartedly relying upon -- and even quoting in exacting and lurid detail -- the very Probable Cause Affidavit that was rejected by the Florida prosecutors who handled Appellant's criminal case and which the People themselves expressly repudiated as unreliable for purposes of calculating Appellant's risk level under SORA.

Whether this complete abandonment of the People's previous position and sudden defense of the hearing court's unsupportable Order reflects a sincere but misguided re-evaluation of the facts at issue or a more opportunistic surrender to political pressures to avoid a potentially unpopular position on a sex crimes case, the People should be estopped from so radically reversing course on appeal. In direct and reasonable reliance on the People's representations that the District

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Attorney's Office, as the party representing the State and statutorily bearing the burden of proof at the SORA hearing, would not seek a Level 3 designation and would agree to a Level 1 designation on consent, Appellant logically understood that the SORA hearing would be a non-adversarial proceeding with no opportunity or need to present evidence. For the People now to suggest that Appellant erred "as a tactical matter" in trusting the prosecutor's word, and moreover, should be procedurally barred from challenging the Court's legally infirm Order because of supposed preservation issues, is disingenuous and squarely at odds with the prosecutor's duty to do justice.

Moreover, contrary to the suggestion in the People's brief, the People's decision to challenge the reliability of the Case Summary, reject the Board recommendation, and advocate that Appellant be adjudicated the lowest risk level, Level 1 -- thereby acting in line with every other jurisdiction to consider and evaluate Appellant's offenses -- was not based on misimpressions or a flawed understanding of the law. Rather, the People's position at the SORA hearing was the result of months of deliberation that included investigation, discussions with Appellant's counsel, and interaction with the Florida State Attorney's

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Office that actually investigated, prosecuted, and convicted Appellant of the offenses for which he is now required to register in New York under SORA. Upon considering the Florida investigation and primary source transcripts and documents that were excluded from the abbreviated, inaccurate, and inflammatory hearsay presentation of the Board, the Assistant District Attorney who represented the People at the SORA hearing -- no less than the Deputy Bureau Chief of the Sex Crimes Unit -- reached the same conclusion as that reached by officials from every other jurisdiction to have examined the case closely: that however objectionable, Appellant's conduct was simply that of a "john" who solicited massage and prostitution services from consenting women, and that Appellant's offenses consequently did not warrant the most severe level of registration under SORA.

Additionally, the People improperly attempt to introduce in their appellate brief new factually erroneous and immaterial contentions concerning the circumstances by which Appellant was only ever charged with the two Florida offenses to which he ultimately pled guilty. By their very effort to inject this new "evidence" into the record, the People

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themselves tacitly acknowledge that the hearing court's Order is not supported by the existing record.

At a minimum, the Court flagrantly disregarded the role of the prosecutor at the SORA hearing and abandoned its own duty under SORA to make a *de novo* determination based on factors proven by clear and convincing evidence. Additionally, the Order of the hearing court adjudging Appellant a Level 3 offender was based on improper considerations and suppositions by the Court and penalized Appellant for conduct that is patently not registerable under SORA, all in violation of Appellant's statutory and constitutional rights. Accordingly, the Order adjudging Appellant to be a Level 3 offender should be vacated and his SORA risk level should be recalculated to the lowest risk level, Level 1, as warranted by the provable evidence and in accordance with the law.

ARGUMENT

I. THE PEOPLE SHOULD BE ESTOPPED FROM REVERSING THEIR POSITION ON APPEAL WITH RESPECT TO THE RELIABILITY OF THE BOARD'S CASE SUMMARY AND RECOMMENDATION.

As an initial matter, the People's opposition to Appellant's appeal and their newfound support for the hearing court's improper Level 3

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SORA adjudication stands in stark contrast to the People's position at the SORA hearing itself and should not be permitted. *See Kilcer v. Niagara Mohawk Power Corp.*, 86 [redacted].3d 682, 682 (3d Dep't 2011) ("A litigant should not be permitted to lead a tribunal to find a fact one way and then attempt to convince a court in a different proceeding that the same fact should be found otherwise; the litigant should be bound by the prior stance that she clearly asserted."); *Karasik v. Bird*, 104 [redacted].2d 758 (1st Dep't 1984) ("It is a well-settled principle of law in this state that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position. Invocation of the doctrine of estoppel is required in such circumstances lest a mockery be made of the search for truth."); *Chautauqua County Federation of Sportsmens Club, Inc. v. Caflisch*, 15 [redacted].2d 260, 264 (4th Dep't 1962) ("Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.").

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At the SORA hearing, the People directly contested the Board's Level 3 recommendation and advised the Court that their investigation revealed the underlying Probable Cause Affidavit to be unreliable:

> The People did receive the board's recommendation of a Level Three. However, we received the underlying information from them and also had some contact with Florida, and we don't believe that we can rely on the entire probable cause affidavit.

A.83 (Tr.). Now on appeal, the People attempt to distance themselves from their well-founded and properly reasoned hearing position, clearly articulated by the Deputy Chief of the Sex Crimes Unit at the hearing itself, by dismissing repeated statements about the unreliability of the Probable Cause Affidavit as a "simple misunderstanding." Resp. Br. at 47. While citing no change in circumstance to justify such an abrupt and complete turnaround, the People now try to defend the Level 3 Order, which the hearing court made without evidentiary basis and without articulating findings of fact and conclusions of law. Indeed, the People improperly attempt to bolster their newfound alignment with the hearing court by offering speculative arguments as to the rationale for the Court's ruling and conjuring incorrect explanations as to why Appellant was not prosecuted on the vast majority of allegations in the

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Probable Cause Affidavit. *See* Resp. Br. at 47 (surmising, without basis, that the hearing court determined "where zealous private counsel are involved ... negotiated plea compromises may sometimes be reached well before an indictment has been handed down," and incorrectly suggesting that such was the case with Appellant). Through such tactics, the People impugn their own credibility, and as such, their brief should be disregarded and Appellant's appeal decided upon the Appellant's papers and the record alone.

The People should not be permitted to benefit from their own unjustified reversal of position. Instead, the People should be estopped from arguing in support of an Order that they clearly opposed on the record. "[The] purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice would result if the right were asserted." *Shondel v. Mark D.*, 7 [redacted].3d 320, 326 ([redacted]. 2006). Indeed, courts have invoked the doctrine of estoppel against government entities when not doing so would result in a "manifest injustice." *Matter of 1555 Boston Rd. Corp. v. Finance Adm'r of City of* [redacted]., 61 [redacted].2d 187, 192 (2d Dep't 1978) (manifest injustice would

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result if city was not estopped by its actions when petitioner relied on its agreement with the city, failed to take legal steps as a result of the reliance, and could no longer take those legal steps); *see also Landmark Colony at Oyster Bay v. Bd. of Supervisors of County of Nassau*, 113 [redacted].2d 741, 744 (2d Dep't 1985) (holding that a municipality or government body may be estopped where its wrongful or negligent conduct induces a party relying thereon to change his position to his detriment and where its misleading nonfeasance results in manifest injustice).

Here, the People argue in the first instance that several of Appellant's arguments on appeal should be disregarded on preservation grounds.[1] While Appellant disputes that it has made any appellate

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[1] Specifically, the People argue that Appellant did not properly preserve his arguments regarding the hearing court's personal bias against Appellant, the specific SORA scoring, his lack of opportunity to challenge evidence at the hearing, and the sufficiency of the hearing court's Order. *See* Resp. Br. at 52-57. But contrary to the People's assertions, these issues were not raised for the first time on appeal. In fact, Appellant challenged the SORA point assessment both generally and with regard to specific factors, including sexual intercourse and forcible compulsion, during the hearing. *See* A.88 (Tr.). Appellant also attempted to challenge the presentation of evidence, advising the hearing court of the existence of sworn testimony of witnesses which refuted the "summary" statements reflected in the police reports upon which the Board based its recommendation. A.95 (Tr.). Indeed, Appellant went so far as to alert the hearing court that significant additional evidence had been presented by Appellant to the People, including deposition testimony. A.89-A.90 (Tr.). But the hearing court decided not to consider these materials, despite their clear relevance to making a SORA

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arguments not properly raised before the hearing court, any shortcomings in Appellant's presentation of issues before the hearing court are directly attributable to Appellant's reasonable and justifiable reliance on the People's representations that a Level 1 adjudication was the just and proper risk level given the unreliability of the Board materials. *See generally* A.82-A.96. Indeed, but for the People's agreement to advocate for a Level 1 adjudication on consent, Appellant was primed to conduct an adversarial hearing to contest the sufficiency of evidence to support the Board recommendation. By relying on the assurances of the District Attorney's Office, the party bearing the burden of proof for the State, that there was no need for an evidentiary hearing because the State's evidence was itself legally insufficient to support anything but a Level 1 determination, Appellant changed his approach to the SORA proceeding and did not introduce countervailing

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determination, and instead chose to base its insufficient Order merely on the Board's recommendation. *See* A.96 (Tr.). Additionally, the Court's facially insufficient "form" Order was not even sent to Appellant until January 19, 2011, the day after the SORA hearing itself, such that Appellant had no opportunity to challenge the sufficiency of the written Order on the record. *See* A.78-A.79 (Letter from Supreme Court to Sex Offender Registry Unit Enclosing Final Determination, dated Jan. 19, 2011). The People's suggestion that Appellant did not properly preserve the arguments he brings on Appeal is, thus, flatly contradicted by the record and the transcript of the SORA hearing itself.

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evidence to establish the unreliability of the Board materials.[2] Indeed, the People themselves acknowledge that Appellant acted in reliance on the People's representations that they would be taking a position aligned with Appellant's at the SORA hearing and disclaiming the reliability of the Board materials, thus eliminating any need for an adversarial evidentiary presentation. *See* Resp. Br. at 57, n. 5. The People should not now be permitted to benefit from any alleged deficiencies in Appellant's presentation at the SORA hearing that they themselves occasioned, particularly where the People's change in position on appeal is so stark and without legitimate explanation. In fact, Appellant did not have a meaningful opportunity to present evidence on his own behalf because the People assured Appellant that they would not -- and indeed, could not -- present evidence to support a Level 3 risk assessment. Accordingly, the People should be estopped from asserting their new appellate position and seeking to further deprive Appellant of the due process rights to which he is entitled and which deprivation of those rights their actions occasioned.

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[2] As set forth in greater detail in Section II, *infra*, the District Attorney's Office was already presented with, and had already considered, much of this countervailing evidence as part of its pre-hearing investigation and discussions with Appellant's counsel.

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II. THE COURT'S LEVEL 3 DETERMINATION WAS BASED ON DEMONSTRABLY UNRELIABLE MATERIALS AND IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY SORA AND FEDERAL CONSTITUTIONAL LAW.

In adjudicating Appellant a Level 3 offender, the hearing court improperly and unjustifiably disregarded the position of the Assistant District Attorney charged with representing the State and instead, without making any independent examination of the quality of the evidence being challenged by both parties, adopted the Board recommendation and scoring in full. Indeed, despite being advised that the People reviewed the documents underlying the Board materials, spoke to the Florida prosecutors responsible for Appellant's case, met with Appellant's counsel, and reviewed additional evidence from related proceedings, the Court dismissed the People's advocacy by stating, "I don't think you did much of an investigation here." A.86 (Tr.). Yet the record and procedural history tell a much different story.

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A. The People Rejected the Board Recommendation As Unreliable Following Several Months of Investigation and Deliberation Prior to the SORA Hearing.

Contrary to the Court's hasty conclusion and the People's curious characterization on appeal, the People's disavowal of the Probable Cause Affidavit and advocacy in support of a Level 1 adjudication was not based on a "mistaken interpretation of the governing legal standards,", *see* Resp. Br. at 33, but rather, was the reasoned and principled culmination of months of investigation, scrutiny of the Board materials, and careful deliberation in light of applicable legal standards, at the highest levels of the Sex Crimes Unit of the District Attorney's Office.

In early August 2010, Appellant was notified that New York would require him to register under SORA, despite not being a resident of New York, given his ownership of a secondary property in Manhattan.[3] *See* A.53 (Letter of M. Weinberg to NYS Board of Examiners of Sex Offenders, dated Aug. 16, 2010). Shortly thereafter, Appellant's counsel submitted a letter to the Board outlining Appellant's personal background as an accomplished and respected

[3] It bears noting that Appellant had already been voluntarily registered with New York's Sexual Offender Monitoring Unit (SOMU) since May 2010. *See, e.g.*, A.88-A.89 (Tr.).

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financial advisor and philanthropist, acceptance of responsibility for his offenses, lack of prior and subsequent criminal record, successful completion of sentence and supervision, and determinations made by Florida officials and a forensic psychologist that Appellant poses a low, or "negligible," risk of reoffense. *See* A.53 (Letter of M. Weinberg to NYS Board of Examiners of Sex Offenders, dated Aug. 16, 2010). Less than two weeks later, on August 26, 2010, Appellant was notified that the Board had recommended a Level 3 classification and that a SORA hearing was scheduled for September 15, 2010. *See* A.68 (Letter from Supreme Court to Jeffrey E. Epstein Informing of SORA Level Determination Hearing, dated Aug. 26, 2010); A.71-A.76 (Letter from Supreme Court to Counsel Informing of SORA Determination Hearing, dated Aug. 26, 2010). Appellant promptly retained New York counsel and sought a brief adjournment to provide counsel an opportunity to prepare for the hearing. *See* A.77 (Letter from Jay P. Lefkowitz to Hon. Ruth Pickholz, dated Sept. 9, 2010).

In October 2010, Appellant's counsel submitted a detailed memorandum to the Assistant District Attorney assigned to the SORA hearing and met with both the assigned Assistant District Attorney and

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the Deputy Chief of the Sex Crimes Unit. *See* A.89-A.90 (Tr.). At the invitation of the District Attorney's Office, counsel for Appellant followed up that meeting by providing for the People's review additional evidence from the Florida investigation to supplement the relatively limited materials provided by the Board. *See* A.83, A.89-A.90 (Tr.). Among the materials furnished to the District Attorney's Office was a compendium of sworn testimony and interview transcripts from the same witnesses and complainants cited in the Probable Cause Affidavit and the Board's Case Summary. *See id.* These primary-source materials revealed glaring misquotes and material omissions of fact in the hearsay-based synopses contained in the Probable Cause Affidavit and Case Summary. They also highlighted the stark contrast between the jumbled, inflammatory and non-specific allegations in the Case Summary and the actual evidence concerning the alleged conduct for which Appellant was being assessed under SORA. Additionally, Appellant's counsel furnished the District Attorney's Office with current contact information for the former State Attorney for Palm Beach County, Florida who oversaw the investigation and prosecution of Appellant's case. *See* A.85-A.86 (Tr.).

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The SORA hearing was adjourned three more times, until January 18, 2011, to allow the People an opportunity to review the evidence, speak with Florida officials, and conduct their investigation of Appellant's underlying Florida case to supplement and place in context the limited materials provided by the Board. *See* A.81 (Handwritten Notations on Court Jacket - Jeffrey Epstein, No. 30129-2010). In December, prior to the SORA hearing, the District Attorney's Office advised Appellant's counsel that they would consent to Appellant being designated as a Level 1 offender. *See* A.83, A.89-A.90 (Tr.).

When the SORA hearing was held on January 18, 2011, the People -- represented by the Deputy Chief of the Sex Crimes Unit rather than the more junior Assistant District Attorney originally assigned to the matter -- advised the Court that based upon the People's investigation and interaction with Florida authorities, the Board materials could not be relied upon in full and therefore did not support a Level 3 adjudication. *See* A.83-A.87 (Tr.). Despite the months of investigation that the People devoted to the matter, the Court interrupted the People's presentation, berated the prosecutor, disregarded the People's position, and adopted the Board

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recommendation in full without conducting any meaningful evidentiary inquiry to make reasoned findings of fact as required under statutory and constitutional law. *See generally* A.82-A.96 (Tr.).

While the People may now attempt to distance themselves from a position that was unfortunately rejected by the SORA hearing court, the People's decision to disclaim the Board recommendation was neither hastily made nor uninformed. Instead, it was the proper, carefully considered, and inevitable conclusion to be drawn from the abundance of evidence demonstrating that the Board's calculation of Appellant's risk level under SORA was unsupportable under the legally mandated "clear and convincing evidence" standard. *See* Correction Law §§ 168-k(2), 168-n(2); *People v. Johnson*, 11 [redacted].3d 416, 421 (2008).

B. The District Attorney's Office Appropriately Applied the Governing Legal Standard, As Set Forth by SORA and Its Guidelines, For Assessing Appellant's Risk Level Based on Uncharged Allegations.

Likewise, the decision of the Assistant District Attorney at the SORA hearing to deem the Board recommendation unreliable and advocate for a lower risk level was not the product of any naïve misunderstanding of SORA. Rather, the People's position at the SORA hearing (as opposed to their current position on appeal) was legally

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appropriate, in accordance with SORA and its Guidelines, and completely in line with what multiple other jurisdictions had already determined through their own review of Appellant's case.

The SORA Guidelines, by statute, set forth the "procedures to assess the risk of a repeat offense by a sex offender and the threat to public safety." *See* Correction Law § 168-l(5). These Guidelines specifically direct that while evidence to establish designated risk factors under SORA is "not limited to the crime of conviction," points should not be assessed for a factor "unless there is clear and convincing evidence of the existence of that factor." *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary at 5, ¶ 7 (2006). The Guidelines then specifically elaborate:

> [T]he 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.

Id. (emphasis in original).

While the People are correct to point out that non-prosecution is not necessarily *conclusive* evidence that certain offenses did not occur, the SORA Guidelines are explicit that non-prosecution may be

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compelling evidence that such offenses did not occur. *See id*. Here, the District Attorney's Office was aware of the history of Appellant's case in Florida, and it was based on that history (and not in spite of it) that the People appropriately told the Court that the uncharged allegations in the Probable Cause Affidavit were not reliable and could not serve as a lawful basis for a Level 3 designation.[4]

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[4] Appellant does not challenge the notion, underscored by the People in their brief, that a probable cause affidavit or other documents containing hearsay may constitute "reliable evidence" and even clear and convincing evidence for purposes of a SORA hearing. *See* Resp. Br. at 36, 40; *see also People v. Rhodehouse,* 77 [redacted].3d 1032, 1033 (3d Dep't 2010) (to establish appropriate risk level, the People bear the burden of producing clear and convincing evidence, which may consist of reliable hearsay evidence). However, where, as here, the hearsay-based Probable Cause Affidavit is proven inaccurate by more reliable primary-source evidence (including the recorded witness statements which it was supposed to have summarized), and furthermore was deemed by the investigating prosecutor to be so unreliable as to not warrant arrest or prosecution for the majority of offenses alleged therein, then a court may not adopt that affidavit as a basis for scoring under SORA. *See, e.g., People v. Brown*, 7 [redacted].3d 831, 832-33 (3d Dep't 2004) (overturning lower court's SORA classification because the classification was based on unreliable hearsay).

The People itemize various theoretical "indicia of reliability" in their brief -- including statements made under oath, level of detail, similarity of witness accounts (which is not surprising when the accounts are "summaries" written by the same detective) and incriminating admissions -- in an attempt to rationalize their complete about-face as to the reliability of the Board materials. *See* Resp. Br. at 36-38, 40-46. However, it is hornbook law that even hearsay that may be presumptively reliable under a statute like SORA is *per se* not reliable where it is actually proven false, and directly contradicted by non-hearsay evidence. *See, e.g.*, 5 [redacted]. Prac., Evidence in New York State and Federal Courts § 8:98 (stating that hearsay "is not immune from impeachment" and that hearsay evidence "may be attacked in any of the usual ways"). The People acknowledge as much in their citation and repeated reference to *People v. Mingo*, 12 [redacted].3d 563, 577 (2009) (noting the unreliability of a victim statement where it is "equivocal, inconsistent with other evidence, or seems dubious in light of other evidence in the record") (*cited*

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Significantly, the experienced Florida sex crimes prosecutor who investigated and evaluated the allegations in the Probable Cause Affidavit discounted almost all of them, and, based on her assessment of the allegations, witness credibility, and other factors, in an exercise of prosecutorial discretion, she only indicted one count of Felony Solicitation for Prostitution, Fla. Stat. § 796.07. No charge of rape or sexual contact with a minor was ever charged or prosecuted in connection with any allegations made against Appellant, nor was Appellant even arrested on such a claim. That Appellant was not prosecuted on the overwhelming majority of allegations in the Probable Cause Affidavit does not reflect a "negotiated plea compromise" with Florida prosecutors, as the People now suggest on appeal, but rather, was based on the dearth of reliable evidence to substantiate a multiplicity of baseless claims. Given this history, of which the People were well aware given their communications with the Palm Beach County State Attorney's Office and their review of that office's files, the conclusion that Appellant should not be scored under SORA based on

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at Resp. Br. at 37). It stands to reason that here, where all the witness statements had been sworn and tape-recorded (as the People acknowledge, *see* Resp. Br. at 41) but the transcripts of those recorded statements differ materially from how the statements are described in an affidavit, that affidavit must be discredited and rejected as inherently unreliable.

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the uncharged, unreliable allegations contained in the Probable Cause Affidavit was appropriate, and indeed compelled, under SORA and its Guidelines.

The case of *People v. Johnson*, 77 [redacted].3d 548 (1st Dep't 2010), so heavily relied upon by the People with respect to this point, does not counsel differently. In *Johnson*, this Court upheld assessing points for forcible compulsion against a defendant who pleaded guilty to statutory rape, even though the defendant was not convicted of forcible rape, because the allegation of forcible compulsion was "amply supported" by inclusion of the victim's sworn statement that she was forcibly restrained by two unapprehended accomplices within the information to which the defendant pled. *Id.* at 549. Indeed, the allegations of forcible compulsion persisted throughout Johnson's prosecution; forcible compulsion was alleged in the felony complaint by which the prosecution commenced and was included in the information to which Johnson ultimately pled guilty. *See id.* at 550-51 (J. McGuire *concur.*).

In contrast, in the instant case, Appellant was never charged with *any* offense other than two prostitution offenses, nor was any specific allegation of sexual intercourse, forcible compulsion, or sexual conduct

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with a female under 17 ever included in any accusatory instrument to which Appellant pled guilty or on which Appellant was prosecuted. To the contrary, the Florida sex crimes prosecutor made the affirmative decision not to proceed with such charges at any point. In short, Appellant's case, where certain allegations are not substantiated, disappear entirely from the case after the initial police report, and are never prosecuted at all, is precisely the circumstance contemplated by the SORA Guidelines' instruction that where a certain offense was not charged or indicted, "the Board or court should be reluctant to conclude that the offender's conduct involved" that particular offense. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7. Thus, the People's position at the SORA hearing was informed, well-reasoned, and above all, the only correct one under the law. Because the majority of allegations included in the Board's Case Summary could not be proven by clear and convincing evidence, the Board's recommendation of a risk level of 3 could not be sustained as a matter of law.

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C. By Their Improper Attempt to Introduce New Arguments and "Evidence" on Appeal, the People Tacitly Acknowledge That The Court's Order Is Not Supported By the Record.

In opposing Appellant's appeal, the People endeavor to construct a *post facto* justification for the hearing court's Level 3 determination by offering numerous arguments, never actually made or even suggested by the hearing court, to rationalize why the vague and unsupported allegations in the Board materials should be deemed reliable -- the People's disavowal of the Board materials at the hearing notwithstanding. *See*, *e.g.*, Resp. Br. at 40-46. In addition, in what they term a preview of "[t]he People's evidence on remand," the People improperly inject into their brief factually inaccurate claims about Appellant's Florida case -- all evidence outside the appellate record -- purportedly to provide "a complete and accurate picture of the circumstances that gave rise to the two single-count accusatory instruments" to which Appellant ultimately pled guilty.[5] Resp. Br. at 62, n. 7. By so doing, the People themselves unwittingly concede that

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[5] By previewing for the Appellate Court "the People's evidence on remand," *see* Resp. Br. at 62, n. 7, the People have improperly introduced materials *dehors* the record. *See Mount Lucas Assoc., Inc. v MG Ref. and Mktg., Inc.*, 250 [redacted].2d 245, 254 (1st Dep't 1998) (noting "the basic precept that arguments in appellate briefs are to be based and appeals decided solely upon factual material before the court at *nisi prius*" and that "references to [non-record] material in briefs . . . is improper").

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the Order is not supported by the record as it currently stands. Specifically, absent clear and convincing evidence that the uncharged allegations were in fact credible and were only uncharged for reasons other than their lack of merit -- a claim that is belied by the record[6] -- the hearing court should not have scored Appellant for the majority of allegations which formed the basis of the Level 3 Order. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary at 5, ¶ 7 (2006). Accordingly, the Order adjudging Appellant a Level 3 offender should be vacated and Appellant's risk level should be recalculated, based solely on the provable evidence in the record.

III. THE COURT BASED ITS LEVEL 3 DETERMINATION UPON IMPROPER CONSIDERATIONS AND IN VIOLATION OF THE MANDATES OF SORA AND CONSTITUTIONAL DUE PROCESS.

As previously set forth in detail in Appellant's brief and further explained herein, the Court's Order adjudging Appellant to be a Level 3 offender is unsupported by the requisite clear and convincing evidence

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[6] The Assistant District Attorney clearly and correctly stated at the SORA hearing that Appellant's case was "unlike a situation where everything was indicted and then we get to sort of assess points for all of the victims, if it was part of a plea bargain. They did not actually choose to go forward on any except for the one victim." A.84 (Tr.).

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standard and was rendered in clear violation of SORA and its Guidelines as well as Appellant's federal constitutional rights. *See* Correction Law §§ 168-k(2), 168-n(2); *see also Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7 ("Points should not be assessed for a factor . . . unless there is clear and convincing evidence of the existence of that factor"); *People v. Johnson*, 11 [redacted].3d 416, 421 (2008) (holding that courts must apply a clear and convincing evidence standard when considering a Board recommendation and making its SORA determination); *Doe v. Pataki*, 3 F.Supp. 2d 456, 471-72 ([redacted]. 1998) (holding federal due process under SORA is only satisfied where each risk factor is supported by clear and convincing evidence). Despite the consensus of the People and Appellant at the SORA hearing that the majority of allegations in the Board materials could not be proven by clear and convincing evidence and should not be scored, the hearing court rested its Level 3 determination upon those unproven allegations, without hearing any evidence on which to base a *de novo* finding that the Board materials satisfied the statutory standard. *See* A.83-A.87, A.93-A.96 (Tr.).

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In addition, the Court improperly factored into Appellant's risk assessment conduct that is expressly not scoreable under SORA. *See* A.93-A.96 (Tr.). By its terms, SORA requires the Board, the District Attorney, and the Court to calculate a risk assessment based only on provable conduct that is specifically scoreable under SORA. *See* Correction Law §§ 168-d(3), 168-l(5)-(6), 168-n(2),(3); *see also Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* (2006). For example, consensual prostitution-related conduct with women aged 17 and over is not registerable under SORA. *See* Correction Law §§ 168-a(2)(a)(i), 168-d(1)(b); *see also* Penal Law § 130.05(3)(i) (identifying age of consent in New York as 17). Yet the hearing court clearly assessed points against Appellant for consensual prostitution-related conduct with 17-year-olds.[7] Likewise, SORA

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[7] Notably, the age of consent under Florida law is 18, whereas under New York law, it is 17. *See* Fla. Stat § 794.05; [redacted]. Penal Law § 130.05(3)(a). Thus, uncharged allegations in the Probable Cause Affidavit concerning prostitution-related conduct with women who were 17, and thus under the age of consent pursuant to Florida law but not New York law, do not qualify as scoreable conduct under New York law. *See, e.g.,* [redacted]. Penal Law § 130.05(3)(a); Corrections Law § 168-a(2)(a)(i). Upon being reminded that consensual sexual intercourse with a 17-year-old is not registerable conduct under SORA, *see* Correction Law §§ 168-a(2)(a)(i), 168-d(1)(b), the hearing court declared, "She is a child" (referring to the female named as "[redacted]." in the Board materials). *See* A.91-A.93 (Tr.). The hearing court then decided, without any evidentiary basis, that [redacted]. was actually only 16 when she was "procured" by Appellant, and notwithstanding the People's confirmation that the evidence established that [redacted]. was 17 at the time of provable

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provides no authority to assess points based on massages that do not involve "sexual conduct" as defined under the Penal Law. *See generally* Correction Law § 168 *et seq.* Thus, whether a number of different females repeatedly came to Appellant's Florida home, provided him with massages, and received money in exchange for their services is not material to the calculation of Appellant's risk level under SORA. Rather, what is material for purposes of determining Appellant's SORA risk level is whether Appellant engaged in conduct that is actually scoreable under SORA and can be proven by clear and convincing evidence.[8] *See* Correction Law §§ 168-k(2), 168-n(2); *People v. Johnson*, 11 [redacted].3d 416, 421 (2008).

In other words, to establish scoreable conduct for which points could be assessed under SORA, the evidence would need not merely to aggregate Appellant's conduct, but instead, to establish by clear and convincing evidence that, for example, he specifically engaged in a

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sexual conduct, improperly scored points against Appellant for sexual conduct involving [redacted].. *See* A.91-A.93 (Tr.).

[8] By highlighting in their brief the number of women who told police that they provided Appellant with massages, and in certain instances, engaged in sexual conduct with Appellant, to justify a Level 3 determination, *see* Resp. Br. 41-46, the People succumb to the same temptation that led the hearing court to issue a clearly erroneous and legally baseless Order improperly adjudicating Appellant to be a Level 3 offender: allowing emotion and personal distaste for Appellant's conduct to outweigh the duty to adhere to the rule of law.

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qualifying form of sexual conduct with a specific female at the time that female was a particular age, as required by the SORA Guidelines for the particular factor at issue.[9] *See* Correction Law §§ 168-n(3) ("facts supporting the determinations sought [must be proven by] clear and convincing evidence"), 168-a(2) (defining what constitutes a "sex offense" under SORA). The Board materials fail to establish the SORA factors with the required specificity, rendering the Board's Level 3 calculation and the hearing court's Order legally defective. Thus, the Level 3 adjudication cannot stand.

Moreover, the hearing court failed to abide by the clearly delineated procedures set forth by SORA and its Guidelines. *See*

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[9] For example, with respect to the factor entitled, "Continuing Course of Sexual Misconduct," the SORA Guidelines set forth the specific findings that must be made by clear and convincing evidence to support an assessment of points, including the age of the victim and the timing of when multiple such instances of sexual conduct with the given underage victim occurred in relation to each other. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 10. Although no such specific evidence was presented in the Board materials with respect to the timing of alleged sexual contact with any underage victim, the hearing court improperly assessed points against Appellant for this factor. *See* A.94 (Tr.) (scoring 20 points for "duration of offense, conduct with victim, continuing course of sexual misconduct"). Similarly, the hearing court scored Appellant for "number of victims," despite the absence of any specific evidence proving by clear and convincing evidence that Appellant engaged in qualifying sexual conduct with three or more underage women at the time that each woman was underage. *See* A.94 (Tr.) (assessing 30 points for "three or more" victims, despite acknowledging that the People disputed the reliability of allegations involving all but one victim).

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Correction Law §§ 168-k(2), 168-n(2) (outlining procedures for judicial determination of risk level under SORA, including, *inter alia*, that "the state shall appear by the district attorney, … who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence" and "the court shall render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based.") By flatly rejecting the position of the Assistant District Attorney assigned to vet the Board materials and advocate on behalf of the State, and instead adopting in full a Board recommendation that the People expressly disclaimed as unreliable, the Court improperly substituted the Board's function as an advisory, recommendation-rendering agency, for the burden of proof imposed on the District Attorney and sound exercise of judgment and fact-finding expected from the Court.[10] *See, e.g., People v. Brown*, 7 [redacted].3d 831, 833 (3d Dep't 2004) (rejecting Board's case summary as not supported by clear and convincing evidence and finding that Board made no effort to verify the reliability of information contained in materials provided

[10] That the People have now, on appeal, reversed course and advocate the reliability of the Board materials to uphold the Court's improper Level 3 ruling does not remedy the Court's manifest disregard for statutorily prescribed procedures.

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about defendant's out-of-state conviction); *see also Matter of New York State Board of Sex Examiners v. Ransom*, 249 [redacted].2d 891, 891-92 (4th Dep't 1998) ("The Board ... serves only in an advisory capacity ... similar to the role served by a probation department in submitting a sentencing recommendation.").

In sum, given the numerous and substantial legal and procedural flaws in the SORA hearing, the Court's Order assigning Appellant a risk level of 3, without proper evidentiary basis, should be vacated.[11]

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[11] As previously noted in Appellant's brief, given the apparent compromised impartiality of the hearing court to Appellant, Appellant respectfully seeks reassignment of the matter to a different Justice should this Court deem remand necessary to recalculate Appellant's risk assessment level. *See, e.g., People v. Rampino*, 55 [redacted].3d 348, 349 (1st Dep't 2008); *Fresh Del Monte Produce* [redacted]. *v. Eastbrook Caribe*, 40 [redacted].3d 415, 421 (1st Dep't 2007).

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CONCLUSION

For the reasons stated herein, Appellant Jeffrey E. Epstein respectfully submits that the January 18, 2011 Order of the New York Supreme Court determining him to be a Level 3 sex offender, without designation, should be vacated, and Appellant's SORA level should be recalculated in accordance with the law.

September 16, 2011

Respectfully submitted,

/s/ Jay P. Lefkowitz

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