

From: Martin Weinberg <[REDACTED]>
To: J <jeevacation@gmail.com>, Martin Weinberg <[REDACTED]>
Subject: Re: CONFIDENTIAL
Date: Wed, 19 Dec 2018 16:33:14 +0000

Cases support an element test for classifying registration levels, will send later today

Sent from my iPhone

On Dec 19, 2018, at 10:27 AM, J <jeevacation@gmail.com> wrote:

i spoke to brad , who asked if we had a suggestion on how to bridge the govt cvra position with theirs . . they had offered a video training wiht courtney in it . .? brad said they were told that the govt could not acknolege wrongdoing. thoughts.

On Tue, Dec 18, 2018 at 10:56 PM Martin G. Weinberg <[REDACTED]> wrote:

Even the SORNA definitions look to elements of offenses not to specifics of facts, see below. I will check my file of registration case law to locate the case we both recall tomorrow:

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section [1591](#) of title [18](#));

(ii) coercion and enticement (as described in section [2422 \(b\)](#) of title [18](#));

(iii) transportation with intent to engage in criminal sexual activity (as described in section [2423 \(a\)](#)) ^[1] of title [18](#);

(iv) abusive sexual contact (as described in section [2244](#) of title [18](#));

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections [2241](#) and [2242](#) of title [18](#)); or

(ii) abusive sexual contact (as described in section [2244](#) of title [18](#)) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender

From: Martin G. Weinberg [mailto:]
Sent: Tuesday, December 18, 2018 10:51 PM
To: 'J' <jeevacation@gmail.com>
Cc: 'Martin G. Weinberg' < >
Subject: RE: FW: People v. Epstein - AD1 Decision; see attached

My memory was it followed the Sup Cts recent decisions that when evaluating whether prior convictions are eg "crimes of violence" the Court cannot go to the facts of the case or to the facts of other related cases but must look only to the elements of the crime for which there was a conviction.

From: J [<mailto:jeevacation@gmail.com>]
Sent: Tuesday, December 18, 2018 10:17 PM
To: Martin G Weinberg < >
Subject: Re: FW: People v. Epstein - AD1 Decision; see attached

Yes but there was a court opinion after - maybe two years after that said the court must limit its decision to the facts of conviction only

On Tue, Dec 18, 2018 at 9:33 PM Martin G Weinberg < > wrote:

The NY appellate court allowed the SORNA Board to consider the Recarey Probable Cause Affidavit and its allegations of "offenses" outside the crimes of conviction. See below. Not sure if you want a fuller review or other documents.

Martin G. Weinberg, Esq.
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[REDACTED] Office
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From: Lefkowitz, Jay P. [mailto:[REDACTED]]
Sent: Thursday, November 17, 2011 12:39 PM
To: 'jeevacation@gmail.com' <jeevacation@gmail.com>
Cc: Musumeci, Sandra L. <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>
Subject: Fw: People v. Epstein - AD1 Decision; see attached

Decision affirming lower court. Relies on probable cause affidavit. Misstates the "evidence" before the trial court.

From: Cali, Joseph J.
Sent: Thursday, November 17, 2011 11:34 AM
To: Lefkowitz, Jay P.; Musumeci, Sandra L.; Klugman, Maura M
Cc: #NY Managing Clerk's Office
Subject: People v. Epstein - AD1 Decision; see attached

People v Epstein
2011 NY Slip Op 08293
Decided on November 17, 2011
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on November 17, 2011
Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

[*1]The People of the State of New York, Respondent,

v

Jeffrey E. Epstein, Defendant-Appellant.

Kirkland & Ellis LLP, New York (Jay P. Lefkowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about January 18, 2011, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence, including reliable hearsay ([see *People v Mingo*, 12 NY3d 563, 571 \[2009\]](#)) supported the assessment of points for risk factors sufficient for a level three sex offender adjudication (Correction Law § 168-n[3]). In the circumstances of this case, the court properly relied on highly reliable proof of criminal conduct for which defendant was neither indicted nor convicted.

The sex offender adjudication arises out of defendant's sex offenses in Florida. The evidence before the SORA hearing court established that defendant committed multiple offenses against a series of underage girls. The girls were brought to defendant's home to provide "massages" that led to very serious sex crimes.

These facts were established by reliable hearsay, including the probable cause affidavit prepared by Florida law enforcement authorities after their investigation, and the Board of Examiners of Sex Offenders' case summary ([see *Mingo*, 12 NY3d at 572-573, 577](#)). The probable cause affidavit was extremely detailed. It set forth the sworn, tape-recorded statements of the victims. The victims' detailed accounts of defendant's crimes corroborated each other, and were also corroborated by other evidence, including declarations against penal interest made by defendant's accomplice.

In 2006, the Florida prosecutor obtained an indictment charging defendant with solicitation of prostitution. In 2008, the Florida prosecutor filed an information, this time charging procuring a person under 18 for prostitution. A few days after the information, defendant pleaded guilty to both accusatory instruments. Both instruments involved the same victim, who was only one of defendant's many victims.

The Board and the hearing court are not limited to the underlying crime in determining an offender's risk level (*see People v Johnson*, 77 AD3d 548, 549-550 [2010], *lv denied* 16 NY3d 705 [2011]). "[T]he fact that an offender was not indicted for an offense may be strong evidence that the offense did not occur" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, General Principles ¶ 7, at 5 [2006]). However, here the strong evidence that the [*2] offenses against the other victims *did* occur outweighs any inferences to be drawn from the manner in which this case was prosecuted in Florida.

The reasons for the actions taken by the Florida authorities remain unclear on this record. The record before us is insufficient to establish that those authorities reasonably believed the charges involving the other victims were unprovable. The record permits competing inferences. In any event, the hearing court was entitled to rely on the reliably proven facts themselves, and was not necessarily bound by any exercises of prosecutorial discretion.

We reject defendant's argument that the People should be estopped from taking a different position on appeal from the position they took before the hearing court. At the hearing, the People mistakenly conceded that the conduct for which defendant was not indicted should not be considered, and that defendant should be adjudicated a level one offender. These were legal arguments that the court rejected, and it is the court's determination that we review on this appeal. Furthermore, when the court announced that it was rejecting the People's position and would consider the offenses against additional victims, defendant did not request any opportunity to challenge the reliability of the additional charges. Accordingly, defendant was not deprived of a fair opportunity to litigate the issue (*see e.g. People v Strong*, 276 AD2d 271 [2000], *lv denied* 96 NY2d 807 [2001]).

Defendant's remaining claims are improperly raised for the first time on appeal (*see People v Windham*, 10 NY3d 801 [2008]), and are unavailing in any event.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 17, 2011

CLERK

Joseph J. Cali | Managing Clerk | **Kirkland & Ellis LLP**
601 Lexington Avenue | New York, NY 10022 | [REDACTED] DIRECT | [REDACTED] CELL |
[REDACTED] Mail

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