No. _____

New York Supreme Court
Appellate Division, First Department

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

v.

JEFFREY E. EPSTEIN,

Defendant-Appellant.

On Appeal from
Case No. 31029-2010

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Appellant Jeffrey E. Epstein seeks to vacate the final decision and 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, based on a 2008 Florida conviction by plea of guilty to Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03, and Felony Solicitation of Prostitution, Fla. Stat. § 796.07(2)(f), for which Appellant was sentenced to 12 months incarceration followed by 12 months of Community Control. (Pickholz, J. at SORA hearing). Specifically, Appellant seeks to vacate the Order because the Court's risk level determination was not supported by clear and convincing evidence, was based on improper considerations, and was made without affording the parties an opportunity to present evidence concerning disputed relevant issues. Additionally, the Court issued a facially defective Order that fails to set forth findings of fact and conclusions of law, as required by law. Accordingly, the Order determining Appellant to be a Level 3 offender should be vacated, and Appellant's risk level should be recalculated based solely on only those

factors that may be properly considered under SORA and which are proven by clear and convincing evidence.

QUESTIONS PRESENTED

1. May the Court determine Appellant's risk level under SORA based on factors that are not proven by clear and convincing evidence?

2. Is the Court entitled to adopt the Board's recommendation in full, without hearing any further evidence, where Appellant disputes numerous unprosecuted allegations contained therein and the District Attorney, as representative of the State, disclaims the Board's recommendation as unreliable, based on allegations that were determined to be not prosecutable, and not provable by clear and convincing evidence?

3. In calculating Appellant's risk level under SORA, may the Court score points for consensual prostitution-related conduct involving women who were seventeen years of age or over, particularly where SORA provides that such conduct is only registerable where the person patronized "is in fact less than seventeen years of age," Correction Law § 168-a(2)(a)(i)?

4. Where the Court's Order assigning Appellant a risk level of 3 under SORA does not include any findings of fact or conclusions of law to support a Level 3 determination, must that Order be vacated?

STATEMENT OF FACTS

Defendant-Appellant Jeffrey E. Epstein is a 58-year old financial advisor and philanthropist who keeps his primary residence in the U.S. Virgin Islands and maintains vacation properties in New York, Florida, and New Mexico. *See* R. __ (CITE)[1]. Appellant does not live in New York, and since the commission of the Florida offense that forms the basis of this matter, he has not stayed in his New York property for periods exceeding ten days at a time. *See* R. __ (CITE).

I. The Underlying Offense

On June 30, 2008, Appellant Jeffrey E. Epstein pleaded guilty in the Circuit Court for Palm Beach County, Florida under an Information to the charge of Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03, an offense which required him to register under Florida's sexual offender registration statute, Fla. Stat. § 943.0435. *See* R. __ (Palm Beach County Information 08CF9381); R. __ (Plea of Jun. 30,

[1] References to the Record on appeal are denoted herein as "R." followed by the applicable Appendix number.

2008). This single registerable charge was brought in connection with a consensual, commercial arrangement in which Appellant received massages and engaged in sexual conduct with A.D., a young woman who was over the age of consent under New York law but just under 18 when the offense in the Information occurred back in 2005. *See* R. __ (CITE). Appellant concurrently pleaded guilty to an Indictment charging him with one count of Felony Solicitation for Prostitution, Fla. Stat. § 796.07(2)(f), (4)(c), a solicitation offense which does not include any elements of sexual contact with underage women and which is not registerable under either Florida or New York law. *See* R. __ (Indictment); R. __ (Plea of Jun. 30, 2008); Fla. Stat. § 943.0435; N.Y. Correction Law § 168-a(2)(a). Despite an extensive, thorough investigation by Florida prosecutors regarding various other complaints alleged against him and reported in police paperwork, Appellant was never charged with any other crimes or prosecuted on allegations made by any other complainants. *See* R. __ (CITE).

As a result of his two concurrent Florida convictions -- the first and only criminal convictions of his life -- Appellant was sentenced to 12 months incarceration followed by one year of Community Control

supervision. *See* R. __ (Plea of Jun. 30, 2008); R. __ (Sentence of Jun. 30, 2008). Appellant satisfactorily served his term of incarceration in the West Palm Beach County Jail (where he was granted permission to participate in the Sheriff's work release program) and completed his subsequent period of community control in Florida without incident. *See* R. __ (Letter of K. Smith of Aug. 12, 2010); R. __ (Letter of M. Weinberg of Aug. 16, 2010) at 4. Appellant has had no subsequent instances of misconduct of any kind. *See* R. __ (Letter of M. Weinberg of Aug. 16, 2010) at 1.

II. Sex Offender Registration

As required under Florida law in connection with his conviction for Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03, Appellant registered as a sex offender with Florida authorities and was designated as the ***lower*** of two levels under that state's sex offender registration act. *See* Tr. 7:6-15; *see also* R. __ (Letter of J. Goldberger of Aug. 12, 2010); Fla. Stat. §§ 775.21, 943.0435. In order to ensure his full compliance with the federal Sexual Offender Registration and Notification Act (SORNA), 42 U.S.C.A. § 16901 *et seq*., Appellant also registered as a sex offender in his home jurisdiction of the U.S. Virgin

Islands, as well as in New Mexico, where he maintains a secondary residence. *See* Tr. 7:1-5, 16-20. Significantly, the U.S. Virgin Islands reviewed Appellant's offenses and determined that he is only subject to that jurisdiction's ***lowest reporting obligations***, and New Mexico has determined that Appellant is ***not required to register at all*** under the state's sex offender registration scheme. *See* Tr. 7:1-5, 16-20; *see also* R. __ (Letter of R. Chacon of Aug. 19, 2010); N.M.S.A. 1978, § 29-11A-3(E); 14 V.I.C. §§ 1722(b), 1724(d),(e).

Although he does not actually reside in New York, in October 2009, before the completion of his term of community supervision, Appellant notified the New York State Division of Criminal Justice Services ("the Division") of his registerable Florida conviction and his ownership of a secondary residence in New York. *See* R. __ (CITE). Since May 2010, Appellant has been registered with the Sexual Offender Monitoring Unit (SOMU) of the New York Police Department and has voluntarily kept SOMU apprised of any temporary travel he has made to New York. *See* Tr. 7:21-8:3.

III. The Board's Recommendation

On or about August 26, 2010, Appellant received notice that a SORA hearing had been scheduled to determine a risk assessment level, accompanied by a copy of the recommendation of the Board of Examiners of Sex Offenders ("the Board"). *See* R. __ (Letter of M. Price of Aug. 26, 2010); R. __ (Board Recommendation). In stark contrast to all of the other jurisdictions to have considered Appellant's Florida convictions (including Florida), the Board recommended that Appellant be assigned the highest risk level -- Level 3, representing a high risk of repeat offense -- without further designation.[2] *See* R. __ (Letter of M. Price of Aug. 26, 2010); R. __ (Board Recommendation).

The Board's recommendation included a Risk Assessment Instrument (RAI) that calculated a total risk factor score of 130. *See* R. __ (Board Recommendation). Almost all of the points scored by the Board were based on "Current Offense" factors, including: 10 points for "Use of Violence" (forcible compulsion); 25 points for "Sexual Contact with Victim" (sexual intercourse and deviate sexual intercourse); 30

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[2] SORA requires the Board to recommend an offender's notification level of 1, 2, or 3, pursuant to Correction Law § 168-l(6), and to recommend whether any designations defined in Correction Law § 168-a(7) apply. *See* Correction Law §§ 168-k(2), 168-n(2).

points for "Number of Victims" (3 or more); 20 points for "Duration of offense conduct with victim" (continuing course of sexual misconduct); and 20 points for "Age of Victim" (11 through 16).[3] *See* R. __ (Board Recommendation). The Board's RAI did not assign Appellant any points under the "Post-Offense Behavior" and "Release Environment" categories. *See* R. __ (Board Recommendation).

In its Case Summary, the Board noted that Appellant was convicted of just two Florida sex offenses: (1) Procuring a Person Under 18 for Prostitution, and (2) Felony Solicitation of Prostitution. *See* R. __ (Board Recommendation). The Board then aggregated into just over a single page a host of uncharged allegations made by "numerous females," including "female participants [who] were age 18 or older," regarding "massages and unlawful sexual activity" that allegedly took place at Appellant's Florida residence. *See* R. __ (Board Recommendation). The Case Summary referred to "vaginal intercourse" and various other forms of sexual contact allegedly taking place without connecting specific females to such allegations, and more

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[3] The Board also assessed Appellant 5 points for "Criminal History," even though the Board itself noted that it was assessing points "absent specific information." *See* R. __ (Board Recommendation). Appellant submits that this scoring is unsupported by the record.

significantly, without identifying the age of the participants -- some of whom the Board noted were "age 18 or older" -- specifically at the time of such alleged conduct. *See* R. __ (Board Recommendation). Although Appellant was only convicted of two prostitution-related offenses and was neither charged with or convicted of any rape, sexual abuse, or violent offenses, the Case Summary highlighted reports in police paperwork involving alleged sexual abuse of underage girls and an alleged forcible rape, and assessed points against Appellant based of these unprosecuted allegations. *See* R. __ (Board Recommendation).

The Board recognized Appellant's conduct on Community Control as satisfactory and noted that he has no history of substance abuse. *See* R. __ (Board Recommendation). The Board also credited Appellant with accepting responsibility for his actions. *See* R. __ (Board Recommendation).

III. Pre-Hearing Investigation By the District Attorney

The SORA hearing, originally scheduled for September 15, 2010, was adjourned on consent of the parties until January 18, 2011 to provide the New York District Attorney ("the People"), which represented the State of New York at the SORA hearing, an

opportunity to investigate Appellant's Florida convictions and assess the validity of the Board's recommendation. *See* R. __ (Case Jacket); Tr. 8:22-9:8. As part of their investigation, the People were in contact with members of the Palm Beach County State's Attorney's Office to understand the investigation and prosecution of the allegations at issue in this SORA matter. *See* Tr. 2:14-3:19. Based on these interactions with Florida prosecutors, the People determined that they would be departing from the Board's recommendation and scoring Appellant based only on the conduct for which he was actually prosecuted, and not based on all of the allegations in the affidavit on which the Board's recommendation was based. *See* Tr. 2:14-3:19.

Although the People presented Appellant a new SORA risk assessment instrument (RAI) immediately before the SORA hearing itself, scoring Appellant as a Level 1, the People apparently did not present their proposed alternative RAI or any other written submission setting forth their departure from the Board's recommendation to the court, as no such statement is in the Court's file. *See* R. *generally*.

IV. SORA Hearing

On January 18, 2011, a SORA hearing was conducted in New York Supreme Court, New York County, Criminal Term, Part 66 before Hon. Ruth Pickholz. At the hearing, the People made a record that based on their investigation and contact with the Florida authorities who handled Appellant's prosecution, the probable cause affidavit underlying the Board's recommendation could not be relied upon. *See* Tr. 2:14-18. Specifically, the People informed the Court that many of the women referenced as complainants in the probable cause affidavit were not cooperative with Florida prosecutors, and accordingly, the Florida authorities chose not to prosecute any allegations other than those reflected by the two offenses to which Appellant ultimately pleaded guilty. *See* Tr. 3:2-6, 14-19. The People further noted that in light of Florida's decision not to prosecute the majority of allegations in the affidavit, and under the SORA statute and guidelines, only the conduct pertaining to the sole registerable crime for which Appellant was charged and to which he pleaded -- Procuring a Person Under 18 for Prostitution, involving a single complainant -- could be proven and

should be considered to evaluating Appellant's SORA score. *See* Tr. 4:11-16, 4:24-5:1.

Counsel for Appellant corroborated the record made by the People that the Florida Assistant State Attorney who prosecuted Appellant determined, after a full investigation, that there were "no victims" and that the only crime that could be presented to the grand jury was the single solicitation offense to which Appellant pleaded guilty. *See* Tr. 8:22-9:21, 14:12-18. Appellant disputed many of the allegations contained in the Board's case summary, both with respect to specific facts (such as the absence of any forcible compulsion and the exact age of a complainant at the time of specific conduct) and more broadly by noting that the Board's recommendation was based on police documentation that was not credible in significant measure. *See* Tr. 9:9-12, 11:13-21, 14:12-18. Further, Appellant advised the Court that there was sworn testimony from many of the women referenced in the police paperwork and Board case summary which expressly disclaimed allegations attributed to them. *See* Tr. 14:19-23.

Notwithstanding the clear record that facts underlying the Board's recommendation were disputed, the Court announced that it

was relying on the Board's case summary and adopting the Board's calculation and recommendation in full. *See* Tr. 12:21, 13:6-14:9. The Court did not conduct any factual hearing as to specific claims for which points were assessed. *See* Tr. *generally*. The Court scored Appellant for factors such as number of victims, use of violence / forcible compulsion, and duration of offense, and sexual intercourse, based on allegations that the People, as the party bearing the burden of proof, asserted on the record could not be supported by clear and convincing evidence. *See* Tr. 13:7-14:9. Despite the legal and factual position of the People that the Board's recommendation could not be relied on and that allegations concerning all complainants but the one in the Information could not be proven, the Court ruled that it was relying on the Board's recommendation in full and adjudicating Appellant a Level 3 sex offender with no additional designation. *See* Tr. 12:21, 12:25-13:3.

On the record, the Court recited the scoring of the Board in abbreviated form, without identifying any particular facts or allegations to support the scoring for each factor. *See* Tr. 13:6-14:9. In its written Order, the Court indicated a final risk level determination of Level 3 by circling a pre-printed form but did not indicate that no additional

designation under Correction Law § 168-a(7) had been made. *See* R. __ (Order of Jan. 18, 2011). The Court failed to articulate any finding of fact or conclusions of law, as required under SORA. *See* R. __ (Order of Jan. 18, 2011); Tr. *generally*.

Appellant was served with a copy of the Court's Order on or about January __, 2011. *See* R. __ (Letter of F. Halwick of Jan. 19, 2011). Appellant served a Notice of Entry of the Court's Order on February 8, 2011, and on the same day filed a Notice of Appeal to invoke this Court's jurisdiction. *See* R. __ (Notice of Entry of Feb. __, 2011); R. __ (Notice of Appeal of Feb. __, 2011). Appellant now respectfully files this appeal as of right, pursuant to Correction Law §§ 168-k(2), 168-n(2) and CPLR 5513, 5515, to vacate the legally erroneous and factually unsupportable Order and re-calculate Appellant's SORA risk level based solely on those factors that may properly be considered under SORA and that have been proven by clear and convincing evidence.[4]

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[4] Appellant asks this Court to render its own findings of fact and conclusions of law -- assigning a risk Level of 1 -- based on an appropriate consideration of the undisputed facts in the record proven by clear and convincing evidence concerning Appellant's conviction. To the extent this Court is unable to issue findings of fact and conclusions of law based on the present record, Appellant seeks remand for a recalculation in which the parties are afforded an opportunity to present evidence regarding contested relevant issues, if necessary.

ARGUMENT

The Court's reliance on allegations that were flatly rejected by the Florida prosecutors who investigated them and which, by the People's own admission, could not be proven by clear and convincing evidence, constitutes clear legal error, warranting vacatur of the Court's Order. Specifically, the Court calculated a risk assessment score based on untrustworthy double and triple hearsay allegations cited in the Board's recommendation that were squarely rejected as a basis for state prosecution in Florida, were disputed by Appellant, and did not constitute registerable conduct under New York law, all in violation of SORA and its guidelines. Moreover, the Court abused its discretion and failed to abide by the guidelines and mandates set forth in SORA, including by improperly considering factors outside the record and issuing a legally deficient Order that fails to set forth the findings of fact and conclusions of law on which the Court's determination was based.

I. THE COURT'S LEVEL 3 DETERMINATION IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AS SET FORTH BY SORA AND ITS GUIDELINES.

The SORA statute sets forth a formal procedure to determine the required level of notification for those individuals convicted of a

qualifying out-of-state offense,[5] based on a systematic assessment of the risk of reoffense posed by the particular individual. *See* Correction Law § 168-k. After the Board generates an initial recommendation based on its assessment of the individual's out-of-state offense and other factors, the Court has the duty of conducting a hearing to consider the Board's recommendation and other evidence presented in order to reach its own independent determination of an offender's SORA registration level. *See* Correction Law §§ 168-k(2), 168-n(2); *People v. Johnson*, 11 N.Y.3d 416, 422, 872 N.Y.S.2d 379, 3__ (2008) (holding that "the Board's duty is to make a recommendation to the sentencing court… and the court, applying a clear and convincing evidence standard, is to make its determination after considering that recommendation, and any other materials properly before it") (internal statutory citation omitted); *see also* _____. Yet the Court's authority to determine an offender's SORA risk level is not unfettered; instead, SORA requires the Court to determine an offender's risk level based on an evaluation of evidence in accordance with the guidelines promulgated by the Board. *See*

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[5] Appellant's Florida conviction for Procuring a Person Under 18 for Prostitution is a qualifying "sex offense" offense under SORA solely pursuant to Correction Law § 168-a(2)(d)(ii), which makes an out-of-state offense registerable under SORA if that particular offense is registerable in the jurisdiction where it was committed.

Correction Law §§ 168-k(2), 168-n(2) ("It shall be the duty of the court applying the guidelines established [by the Board under SORA] to determine the level of notification…"). Moreover, the Court's determination must be wholly based on facts that are provable by ***clear and convincing evidence***. *See* Correction Law §§ 168-k(2), 168-n(2).

Under New York law, "clear and convincing evidence" is defined as evidence that makes it "highly probable that the alleged activity actually occurred." *People v. Dominie*, 42 A.D.3d 589, 590, 838 N.Y.S.2d 730, ___ (3d Dept. 2007); *see also Prince, Richardson on Evidence* § 3-205, at 104 (Farrell 11th ed.). Clear and convincing evidence is "a higher, more demanding standard" than the preponderance standard, *Rossi v. Hartford Fire Ins. Co.*, 103 A.D.2d 771, 771, 477 N.Y.S.2d 402, in that it is evidence "that is neither equivocal nor open to opposing presumptions." *Solomon v. State of New York*, 146 A.D.2d 439, 440, 541 N.Y.S.2d 384 (1st Dept. 1989). Under SORA, the "burden of proving the facts supporting the determinations sought by clear and convincing evidence" is assigned to the District Attorney, which represents the State in the proceeding. Correction Law §§ 168-k(2), 168-n(2).

In the instant case, the Court did not conduct its own inquiry of relevant facts to determine Appellant's risk level in accordance with the SORA guidelines. Instead, as described further below, the Court improperly adopted a Board recommendation that had been rejected by both the People and Appellant as unreliable. Without any meaningful consideration of other evidence, the Court made its risk assessment determination based on allegations that did not -- and indeed could not, as a matter of law -- constitute clear and convincing evidence. For this reason, the Court's determination should be vacated.

A. The People's Investigation Revealed That The Board's Recommendation Could Not Be Proven By Clear and Convincing Evidence.

The People began the SORA hearing by advising the Court that their own investigation and communications with the Florida State Attorney's Office that handled Appellant's case revealed that the majority of allegations in the Board's recommendation (and in the police affidavit on which the recommendation was based[6]) were not prosecuted

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[6] It bears noting that the police affidavit upon which the Board based its case summary and recommendation appears not even to have been drafted to sustain charges against Appellant, but instead, recited numerous allegations based on double and triple hearsay directed toward filing charges against a defendant named [redacted]. *See* R. __ (Palm Beach Police Department Probable Cause Affidavit for Defendant [redacted] of May 1, 2006).

by Florida authorities and could not be proven by other evidence. *See* Tr. 2:14-3:19. In relevant part, the People made the following record:

> I tried to reach -- I reached the authorities in Florida to try to see if they had all the interview notes or other things that we can then subsequently rely on that might be considered clear and convincing evidence, if they had interviewed these women on their own, and they never did. No one was cooperative and they did not go forward any of the cases and none of them were indicted. So I don't know.

Tr. 4:19-5:1. As explained by the People, Appellant's Florida case was not one where a host of allegations were encompassed within a plea deal, but rather, was one where only the charges for which Appellant was ultimately convicted were determined to be prosecutable. *See* Tr. 3:2-3:6 ("So it is 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 case."). Given this history, the People advised the Court that it should depart from the Board's recommendation, both as a matter of fact and as a matter of law, in accordance with the SORA guidelines. *See* Tr. __.

The SORA guidelines are intended to provide clear guidance to the Court and the parties with respect to how various potential risk factors should be evaluated, including allegations that have not been prosecuted. While, in general, conduct not directly encompassed by the crime of conviction may be considered in determining how to score for given factors on the RAI, the SORA guidelines deem that, "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 (2006), at 5, ¶ 7 (emphasis added). Indeed, in deciding how to evaluate allegations outside of the crime of conviction, the SORA guidelines expressly caution, "the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred." *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7. More to the point, the guidelines emphasize, "[T]he fact that an offender was ***not*** indicted for an offense may be strong evidence that the offense did not occur," amplified with a relevant example:

> For example, where a defendant is indicted for rape in the first degree on the theory that his victim was less than 11 years old, but not on the theory that he used forcible compulsion, the Board or court should be reluctant to conclude that the offender's conduct involved forcible compulsion.

Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, Commentary (2006), at 5, ¶ 7 (emphasis in original, internal statutory citations omitted).[7]

In other words, SORA and the associated guidelines clearly prescribe that where allegations were reported to and investigated by law enforcement but not prosecuted (and not encompassed within a broader plea bargain), they should not be scored under the SORA guidelines in the absence of other evidence to corroborate their validity. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7*; see also People v. Smith*, 66 A.D.3d 981, 983, 889 N.Y.S.2d 464, 465-66 (2d Dept. 2009) (holding that defendant's alleged use of a knife was not proven by clear and convincing evidence and could not be scored against defendant in SORA

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[7] Of note, at one point during the SORA proceeding, the Court seemingly dismissed out of hand the SORA guidelines concerning uncharged allegations. *See* Tr. 3:7-13 (Court expressing skepticism toward the Board's guidelines that "if somebody is not indicted it is strong evidence that it did not occur").

hearing where testimony about use of knife was presented to grand jury but grand jury did not indict on any weapons charge); *People v. Coffey*, 45 A.D.3d 658, 846 N.Y.S.2d 239 (2d Dept. 2007) (holding that it was improper for court to consider allegations concerning a charge that was dismissed in evaluating defendant's SORA risk level); *People v. Arotin*, 19 A.D.3d 845, 796 N.Y.S.2d 743 (3d Dept. 2005) (holding that defendant could not be scored under SORA for deviate sexual intercourse where defendant was not indicted for such an offense and the only evidence of such conduct came from triple hearsay from a police report used by the Board).

Significantly, here, the People did not merely apply the SORA guideline suggesting that uncharged allegations may not be reliable evidence of an offense. Instead, the People had ***actual information from the Florida State Attorney's Office that investigated the uncharged claims cited in the Board's recommendation*** that the complainants at issue were not cooperative with authorities, prompting the Florida State Attorney's Office to decide not to pursue charges in connection with such unsupported allegations. *See* Tr. 3:14-19, 4:19-5:1, 5:10-12. Moreover, the People acknowledged that they had no

corroborating materials -- such as interview notes, sworn statements, or affidavits -- which would permit them to meet their burden of proving disputed allegations by clear and convincing evidence. *See* Tr. 3:14-19, 4:19-5:1, 5:10-12. As a result, the People advanced that the law compelled they take -- advising the Court that the Board's recommendation was wrong and that a Level 3 determination was not supported by the provable evidence.

B. The Court Improperly Relied on the Board's Recommendation Where the Facts Relied Upon Therein Were Disputed and No Further Evidence Was Presented.

Notwithstanding the clear disavowal by the People of the Board's recommendation, based on communications with the Florida prosecutor, the SORA Court relied wholesale upon the Board's recommendation. *See* Tr. 12:21, 13:6-14:9. The Court improperly overlooked the burden of proof statutorily imposed on the People and its own duty to evaluate the evidence, and adopted the Board's recommendation, seemingly as a *per se* matter. *See* Tr. 4:11-18 (the Court opining, without factual basis, that the Board "obviously took [their own guidelines] into consideration" when assessing points for uncharged conduct). Indeed, although the Court cited no specific information to suggest that the Board itself

communicated with Florida prosecutors about their investigation of claims cited in the Board's case summary, the Court attempted to justify its blind reliance on the Board's recommendation by stating, "I feel the board looked into all of this, made their recommendation, found him to have 130 points and I see no reason to disturb that." Tr. 15:11-13.

While the Court of Appeals has recognized that a Board's case summary may constitute "reliable hearsay" upon which the Court may base a SORA risk calculation, the law is equally clear that a Board's case summary is not *per se* reliable, particularly in the face of countervailing evidence. *See People v. Mingo*, 12 N.Y.3d 563, 572-73 (2009) ("Of course, information found in a case summary … need not always be credited -- it may be rejected when it is unduly speculative or its accuracy is undermined by other more compelling evidence"). Indeed, information contained in a Board's case summary does not by itself clear the hurdle of "clear and convincing evidence" -- a higher standard than mere "reliable evidence" -- where the offender disputes the relevant contents of that evidence. *See People v. Judson*, 50 A.D.3d 1242, 855 N.Y.S.2d 694 (3d Dept. 2008) (holding that case summary

alone could not satisfy state's burden of proving factors by clear and convincing evidence to support level 3 determination where defendant contested certain factual allegations related to those factors); *cf. People v. Wasley*, 73 A.D.3d 1400, 1401, 902 N.Y.S.2d 686, 687 (3d Dept. 2010) (holding "evidence included in the case summary may provide clear and convincing evidence in determining a defendant's risk assessment level ***where defendant did not dispute its contents insofar as relevant***.") (emphasis added); *People v. Curthoys*, 77 A.D.3d 1215, 1216, 909 N.Y.S.2d 824, 826 (3d Dept. 2010) (noting that the "***uncontested*** contents of a case summary can satisfy the People's burden of demonstrating . . . clear and convincing evidence") (emphasis added). Thus, it certainly follows that a Board's case summary cannot, as a matter of law, constitute the sole requisite "clear and convincing evidence" required to support a SORA determination where the People, as the party representing the Board, also expressly disclaim the reliability of that case summary.

Here, the People directly disputed the reliability of the Board's case summary and recommendation, based on information that was not before the Board following communications with the Florida prosecutor.

See Tr. __; *see also* R. __ (Board Recommendation) (noting that assessment was based on review of "inmate's file" and not citing specific contact with Florida authorities). Appellant also disputed the validity of many of the allegations contained therein, both generally and with regard to specific allegations. *See* Tr. 9:9-12, 11:13-21, 14:12-18. Notwithstanding the clear existence of disputed relevant issues, the Court did not provide the parties with any opportunity to present evidence on contested issues, nor did the Court conduct any factual inquiry on its own.

Even though there was no sufficient evidentiary basis to support the Board's recommendation, the Court announced that it was relying on the Board's case summary and adopting the Board's calculation and SORA determination in full. *See* Tr. 12:21, 15:11-13. This reliance on alleged conduct that the People, as the party bearing the burden of proof, expressly stated they could not prove by clear and convincing evidence, was plainly erroneous. *See* Correction Law §§ 168-k(2), 168-n(2) (stating that the facts supporting the court's determination shall be supported by clear and convincing evidence). Accordingly, the Court's

Level 3 determination, based specifically on that unproven alleged conduct, may not stand, and the Court's Order should be vacated.[8]

II. THE COURT BASED ITS LEVEL 3 DETERMINATION UPON IMPROPER CONSIDERATIONS.

In addition to basing Appellant's risk level determination on uncharged allegations that, both in fact and as a matter of law could not be proven by clear and convincing evidence, the Court improperly assessed Appellant as a Level 3 offender based on additional factors and considerations that should not have weighed into its RAI calculation. Namely, the Court improperly penalized Appellant for conduct that was not scoreable under SORA, even with respect to the complainant at issue in his crime of conviction. In addition, the record lays bare that

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[8] Even if the Court had a lawful evidentiary basis to adopt the Board's case summary in full (which it did not), the case summary does not establish by clear and convincing evidence all of the factors for which points were assessed against Appellant. For example, the facts set forth in the case summary, even if taken as true, do not set forth by clear and convincing evidence of a continuing course of sexual misconduct, which requires a specific finding of either "(i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" with an underage victim. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 10 ("Factor 4: Duration of Offense Conduct with Victim"); *see also People v. Boncic*, 15 Misc.3d 1139(A), 841 N.Y.S.2d 281 (N.Y.Sup. 2007) (holding that there must be a finding of "actual sexual contact" with the underage victim to score for the continuing course of conduct factor under SORA).

the Court allowed personal bias and irrelevant factors outside the record in Appellant's case to influence the Court's SORA determination.

A. The Court Improperly Assessed Points Against Appellant for Conduct That Is Not Scoreable Under SORA.

First, the SORA court improperly scored Appellant for alleged conduct that is not registerable, and in some cases is not even criminal, under New York law with respect to the one complainant at issue in Appellant's registerable Florida conviction. For example, the Court adopted the Board's assessment of points for "sexual intercourse," even though the People themselves conceded that the complainant at issue was 17 (and therefore over New York's age of consent) when she allegedly engaged in consensual intercourse with Appellant. *See* Tr. 11:1-7. This assessment of points for sexual intercourse was in clear contravention to the SORA statute, which states that prostitution offenses are only registerable under SORA where there is clear and convincing evidence that the prostitute was "in fact" under 17 at the time of the alleged sexual conduct, Correction Law § 168-a(2)(a)(i).[9]

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[9] Of course, the exact allegations for which the Court assessed points against Appellant are impossible to identify given the Court's failure to make or articulate findings of fact and conclusions of law supporting its scoring of particular factors. *See* R. __ (Order of Jan. 18, 2011); Tr. *generally*. Nor did the Board's recommendation tie its scoring to particular facts in its case summary, which

Additionally, the Court appears to have scored Appellant 20 points for this same complainant under the "age of victim" factor, even though the People made a record that the complainant was "either 16 or 17" when she met Appellant for the first time. Tr. 11:1-3. The fact that, even in the People's view, the specific age of the complainant when she first met Appellant -- no less when she may have engaged in sexual conduct with him -- could not be ascertained precludes a finding that this element was proven by clear and convincing evidence. *See Solomon v. State of New York*, 146 A.D.2d 439, 440, 541 N.Y.S.2d 384 (1st Dept. 1989) (defining clear and convincing evidence as evidence "that is neither equivocal nor open to opposing presumptions"). Yet the Court disregarded the burden of proof and made clear that it was scoring Appellant for this factor.[10] *See* Tr. 11:13-12:12. These improper assessments of points on the RAI should render the Court's Level 3 determination invalid.

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lumped a host of facts together in the aggregate. *See* R. __ (Board Recommendation).

[10] Again, the specific basis upon which the Court scored Appellant for certain factors cannot be ascertained from the legally deficient Order, *see* R. __ (Order of Jan. 18, 2011), although the Court's comments at the hearing itself certainly revealed the Court's belief that points should be assessed against Appellant for "procuring" this complainant when "she was either 16 or 17." *See* Tr. 11:1-23.

B. The Court Improperly Allowed Personal Emotions and Matters Outside the Record to Influence Its SORA Determination.

Next, the Court abused its discretion by allowing an apparent personal distaste for Appellant, the nature of the crime for which he pleaded guilty and was convicted, and the quantity and nature of unproven, unprosecuted allegations on which the Board's recommendation was based, impinge upon the Court's duty to follow the law. The Court demonstrated a remarkable disdain and lack of judicial objectivity in its response to hearing the District Attorney disavow the reliability of the Board's recommendation, in receiving the arguments of counsel for Appellant, and in rendering its Order as a whole.

First, although the SORA statute clearly contemplates that the District Attorney may depart from the Board's recommendation based upon its own evaluation of the evidence,[11] *see* Correction Law §§ 168-

[11] For example, SORA expressly provides, "If the district attorney seeks a determination that differs from the recommendation submitted by the board, at least ten days prior to the determination proceeding the district attorney shall provide to the court and the sex offender a statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations." Correction Law §§ 168-k(2), 168-n(2). While the more common application of this provision presumably involves the People seeking a higher risk level than the Board, the provision clearly encompasses the People's discretion to recommend a lower risk level as well.

k(2), 168-n(2), here, the Court rejected the investigation and advocacy of the People. Indeed, the Court went so far as to express "shock" that the People would support a lower risk level determination than that recommended by the Board, almost as a matter of principle. Tr. 5:9. The Court disregarded the detailed evidentiary investigation and careful parsing of allegations that the People undertook in evaluating the Board's recommendation. Ignoring the record at issue concerning Appellant and the evidence pertaining to him, the Court focused instead on the irrelevant facts of some unidentified case completely unrelated to Appellant's:

> I have to tell you, I am a little overwhelmed because I have never seen the prosecutor's office do anything like this. I have never seen it. I had a case with one instance it was a marine who went to a bar, and I wish I had the case before me, but he went to a bar and a 17 year old, he was an adult obviously, he was a Marine, a 17

Incidentally, it bears noting that the People failed to comply with these procedural mandates, a further procedural flaw in these proceedings. While the People provided Appellant with a written alternative RAI immediately prior to the SORA hearing -- and not ten days prior to the hearing, as required by SORA -- it appears that the People failed to submit their RAI to the court at all. *See* R. *generally*. Before rejecting out of hand the People's stance that a Level 3 determination could not be supported by sufficient evidence, the Court should have adjourned the matter to receive and review the required statement of the People's recommended determination and supporting reasons. The Court's failure to enforce the procedural mandates of the SORA statute was prejudicial to Appellant, in that the Court did not have sufficient opportunity to understand the compelling reasons for the alternative RAI calculation that the People promoted.

> year old came up to him and one thing lead [stet] to another and he had sex with her and the People would not agree to a downward modification on that.
>
> So I am a little overwhelmed here because I see -- I mean I read everything here, I am just a little overwhelmed that the People are making this application.
>
> I could cite many many, I have done many SORAs much less troubling than this one where the People would never make a downward departure like this.[12]

Tr. 3:21-4:10. The Court's subjective comparison of Appellant's case to some unidentified, unrelated case was improper and highly irregular, and it clearly interfered with the Court's duty to make an assessment based on the law.

Similarly, in response to an argument by counsel regarding the implications that a Level 3 assignment would have on Appellant, who does not actually reside in New York, the Court abandoned any semblance of judicial objectivity by snidely suggesting that he should "give up his New York home if he does not want to come every 90 days." Tr. 12:13-19. Rather than giving reasoned consideration to whether

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[12] Notably, the People were not advocating that the Court make a downward departure from the RAI calculation, but were advising the Court that the evidence required a recalculation of Appellant's risk level based on the RAI factors. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006) at 4-5, ¶¶ 5, 6.

Appellant's residence outside of New York might be a relevant factor in its overall risk assessment (such as for a downward departure from an RAI calculation), the Court improperly allowed its judgment to be clouded by emotion.

While the Court has discretion to go beyond the factors outlined in the SORA guidelines in evaluating a person's risk level,[13] the Court is nevertheless required to exercise such discretion only where justified by clear and convincing evidence. *See People v. Sherard*, 73 A.D.3d 537, 903 N.Y.S.2d 3, 4 (1st Dept. 2010) (citing *People v. Miller*, 48 A.D.3d 774, 854 N.Y.S.2d 138 (2008), *lv. denied* 10 N.Y.3d 711, 860 N.Y.S.2d 483 (2008)) (holding that where a court exercises its discretion to depart from the evidence-based scoring of an RAI, the court must base such a departure on "clear and convincing evidence of aggravating factors to a degree not taken into account" in the RAI); *see also Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006) at 4-5, ¶¶ 5, 6. Here, the Court abused its

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[13] Of course, the Court fully adopted the Board's calculation, which gave Appellant a presumptive rating of Level 3, and did not indicate that its Level 3 adjudication was an upward departure from the RAI calculation. *See* Tr. 12:21, 13:6-14:9, 15:11-13. In any event, the Court did not -- and could not -- cite any factors outside of the Board's consideration, proven by clear and convincing evidence, that would constitute lawful grounds for an upward departure.

discretion, warranting reversal of the Court's Level 3 determination and Order.

III. THE COURT'S ORDER DOES NOT COMPLY WITH THE MANDATES OF SORA AND MUST BE VACATED.

Finally, the Court's Order determining Appellant to be a Level 3 sex offender is itself facially defective in numerous regards and should be vacated as legally invalid.

SORA provides that it is the "duty of the court" to determine, pursuant to the SORA guidelines, both the "level of notification" required of an offender and whether any designations defined in Correction Law § 168-a(7) apply. Correction Law §§ 168-k(2), 168-n(2). In addition, SORA mandates that the court "render an order" which sets forth "its determinations and the findings of fact and conclusions of law on which the determinations are based." Correction Law §§ 168-k, 168-n.

Here, the Court's compliance with these requirements fell woefully short. The only Order issued by the Court in this matter was a standard cover form where the Court circled a pre-printed number and with a signature and date. *See* R. __ (Order of Jan. 18, 2011). In its apparent haste to brand Appellant with a Level 3 risk assessment, the

Court did not even check the appropriate place on the boilerplate form that no additional designation applied under SORA. *See* R. __ (Order of Jan. 18, 2011). Indeed, upon close examination of the only "order" in this matter, it appears that the form Order is actually intended to be a cover sheet to accompany a more formal order, with written findings of fact and conclusions of law, upon submission to the Division. *See* R. __ (Order of Jan. 18, 2011) (stating, "A copy of the order setting forth the risk level and designation determinations, and the findings and conclusions of law on which such determinations are based, shall be submitted to the Division of Criminal Justice Services' Sex Offender Registry Unit by the Court. In addition, please complete and attach this form indicating the offender's risk level and designation to the Court's order."). Yet this legally insufficient Order was served on Appellant following the SORA proceeding and was sent to the Division so that the Level 3 determination could be executed and enforced. *See* R. __ (Letter of F. Halwick of Jan. 19, 2011).

The appellate courts have consistently held that cursory, non-specific "findings" issued after SORA hearings -- including the wholesale adoption of a Board recommendation or recitation of RAI

factors without further explanation, as the Court offered here -- are legally insufficient under SORA. *See, e.g. People v. Strong*, 77 A.D.3d 717, 717-18, 909 N.Y.S.2d 734 (2d Dept. 2010) (reversing SORA order issued without findings of fact and conclusions of law, where court relied on RAI but failed to introduce the RAI in evidence or indicate any evidence relied upon); *People v. Gilbert*, 78 A.D.3d 1584, 910 N.Y.S.2d 808, 809 (4th Dept. 2010) (holding that the SORA court's conclusory recitation that it reviewed the parties' submissions and was adopting the Board's case summary and recommendation was insufficient to fulfill SORA's statutory mandate); *People v. Miranda*, 24 A.D.3d 909, 910-11, 806 N.Y.S.2d 729 (3d Dept. 2005) (holding that the court's adoption of the Board's RAI scores and "generic listing of factors" failed to fulfill the statutory mandate" of SORA and precluded "meaningful appellate review of the propriety of the court's risk level assessment"). The utterly deficient Order issued by the Court in this matter is itself another instance of clear legal error warranting reversal of the Court's Level 3 determination.

CONCLUSION

For the reasons stated herein, Appellant Jeffrey E. Epstein respectfully submits that the Criminal Term's January 18, 2011 Order determining Appellant Jeffrey E. Epstein 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, based solely on the registerable evidence that can be proven by clear and convincing evidence, to wit, the undisputed conduct encompassed by Appellant's registerable crime of conviction.

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Respectfully submitted,

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