

Pursuant to Civil Rights Law § 50-b, the identities of the victims, who are the victims of sex offenses, shall be confidential, and this document shall not be made available for public inspection.

*To be argued by*  
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**New York Supreme Court**

Appellate Division - First Department

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*- against -*

**JEFFREY E. EPSTEIN**

*Defendant-Appellant.*

**BRIEF FOR RESPONDENT**

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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JEFFREY EPSTEIN,

Defendant-Appellant.

BRIEF FOR RESPONDENT

INTRODUCTION

Defendant, Jeffrey Epstein, appeals from an order of the Supreme Court, New York County (Ruth Pickholz, J.), entered on January 18, 2011, adjudicating him a level-three sex offender pursuant to the Sex Offender Registration Act (“SORA”). By the underlying judgment, defendant was convicted in Palm Beach County, Florida, by his plea of guilty, of Procuring a Person Under 18 for Prostitution (Fla. Stat. 796.03) and Felony Solicitation of Prostitution (Fla. Stat. 796.07). On June 30, 2008, defendant was sentenced to serve consecutive jail terms of 12 months and 6 months, to be followed by a 12-month term of Community Control. Defendant has completed his sentence.

Apart from various other residential properties, defendant maintains homes both in Palm Beach, Florida, and on the Upper East Side of Manhattan. The SORA risk-level designation that defendant received in New York is the subject of this appeal. The criminal conduct underlying the SORA designation occurred in defendant's Palm Beach home.

On March 15, 2005, a 14-year-old girl and her family made a report to the Palm Beach Police Department about sexual misconduct committed against her by then 51-year-old defendant. For almost a year—from March 2005 to February 2006—the Palm Beach Police Department conducted an extensive investigation of defendant and two accomplices who had helped him lure young girls to the seclusion of his home. On May 1, 2006, a Palm Beach detective swore out a 22-page probable-cause affidavit detailing the results of dozens of police interviews as well as the first-hand observations of Palm Beach detectives.

Among other things, the investigation revealed that defendant had been paying young girls—many from [REDACTED] High School who were 16 years of age or less—to come to his home and give him a massage as he lay naked, masturbated, and engaged in sexual contact with them. The sexual contact during these “massages” included vaginal intercourse, mouth to vagina sodomy, touching of the girl's breasts and vagina, placing his fingers inside the girl's vagina, and using a vibrator on the girl's vaginal area—always as he masturbated to climax. During certain time periods, defendant was receiving these “massages” two or three times a day. The girls were

paid anywhere from \$200 to \$1,000 per massage, depending upon the nature of the sexual contact that they permitted.

In July of 2006, five months after the investigation had concluded, the Palm Beach County State's Attorney's Office obtained an indictment charging defendant with one count of Felony Solicitation of Prostitution. Defendant was taken into custody. Almost two years later, on June 26, 2008, the State's Attorney's Office filed an information charging defendant with an additional crime—namely, Procuring a Person Under 18 For Prostitution. Four days later, on June 30, 2008, defendant pleaded guilty to both accusatory instruments—namely, one count each of Procuring a Person Under 18 for Prostitution and Felony Solicitation of Prostitution. That same day, defendant was sentenced to serve consecutive jail terms of 12 months and 6 months, to be followed by a 12-month term of Community Control.

Because one of the crimes required that defendant register in Florida as a sex-offender, the fact that he also maintained a residence in Manhattan meant that he had to register in New York State as a sex offender as well. Following an investigation, the State of New York Board of Examiners of Sex Offenders (“The Board”) recommended that, on the three-tier SORA classification scale, defendant be classified as a level-three sex offender. The Board reached that conclusion after having calculated defendant's risk assessment score at 130—solidly above the 110 qualifying number for level three.

On January 18, 2011, after having received the appropriate notice months earlier, two attorneys—the ones who are representing defendant on appeal—appeared before Justice Ruth Pickholz on defendant’s behalf for a hearing to determine defendant’s risk level; defendant chose not to attend the proceedings. At the hearing, defendant urged that a proper application of the SORA guidelines to his conduct warranted a level-one classification. Apparently misapprehending the governing legal standards, the People expressed concern about assessing points against defendant on the basis of the victim-accounts detailed in the probable-cause affidavit; the People seem to have based that position largely on the mistaken notion that only sexual conduct for which defendant had been formally charged could be considered when calculating his risk-assessment score. After hearing argument from both parties, and reviewing all the materials that had been submitted, the court adopted the recommendation made by the SORA Board and found defendant to be a level-three sex offender.

On appeal, defendant contends that he was incorrectly classified a level-three offender and should have been classified a level-one offender instead. More particularly, defendant contends that the level-three designation lacked the support of clear and convincing evidence, and was based instead on improper considerations. Defendant further complains that the court rendered its ruling without affording the parties an opportunity to present evidence on disputed issues, and issued an order that

lacked the requisite findings and conclusions.

## **THE MATERIALS PROVIDED TO THE SORA COURT**

### **The Florida Probable-Cause Affidavit**

Among the materials provided to the SORA court was the probable-cause affidavit prepared by detectives of the Palm Beach Police Department (A6-27). This 22-page document, sworn to by a detective, outlined the findings of a “sexual battery” investigation beginning on March 15, 2005, and extending through February of 2006 (A6).<sup>1</sup> The numerous interviews conducted by the Palm Beach Police produced sworn, tape-recorded statements from what the police denominated as five victims and seventeen witnesses. The statements concerned “massages” provided to defendant by high school girls in exchange for money, and “other unlawful sexual activity” by defendant involving those young girls, in defendant’s Palm Beach home (A6). Defendant was 51 years of age at the time of four of the specified criminal incidents, and 52 years of age at the time of the fifth (A27).

The affidavit revealed that defendant had set up, and maintained, a highly organized operation to satisfy his compulsive need for young girls. Most of the victims were students at [REDACTED] High School (A6). And, defendant had

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<sup>1</sup> Parenthetical numerical references preceded by “A” are to the pages of Defendant’s Appendix.

maintained a steady and orderly stream of these girls with the aid of various employees. For the equivalent of a finder's fee, [REDACTED] a student at [REDACTED] High School, recruited classmates to perform these so-called "massages." [REDACTED] defendant's adult assistant, regularly was present at defendant's house at the time of the massages, recorded the girls' names and contact information for future reference, and set up appointments for the girls to come to the house at regular intervals on each day that defendant was in town (A6).

The affidavit further revealed that most of the "massage" sessions themselves followed a regular routine. Upon arrival at defendant's house, the victim was escorted to defendant's bedroom, where defendant entered the room wearing nothing but a towel and instructed the girl to remove her clothes as well (A6). As the girl provided the massage in some state of undress, which usually consisted of only panties, defendant subjected her to some sort of sexual contact—including rubbing her vagina with his fingers or a vibrator, or inserting his penis or fingers into her vagina (A6). At the conclusion of the massage, the girls were given cash in sums ranging from \$200 to \$1,000, depending upon the extent of the sexual contact (A6). More particularly, the affidavit related the following specific accounts:

#### **The Statements By Girls Who Had Provided "Massages"**

During an interview that was sworn and tape-recorded, 14-year-old [REDACTED], a student at [REDACTED] High School, reported to detectives that [REDACTED] had

offered her an opportunity to make money, and then had picked her up at home and driven her to defendant's house (A6-7). The two entered the house through the kitchen door, and were met shortly afterwards by defendant and [REDACTED] (A7). [REDACTED] escorted [REDACTED] up a flight of stairs, past walls lined with photographs, to a room containing a massage table and a "hot-pink and green" sofa (A7). There was a mural of a naked woman in the room, and on a shelf there were several photographs of naked women (A7).

Defendant entered the room wearing only a towel, and, speaking "stern[ly]," he commanded [REDACTED] to remove her clothes as well (A7). Not knowing "what to do," since she "was the only one there," [REDACTED] removed her shirt (A7). Defendant, who had removed the towel and was naked, directed [REDACTED] to take off everything, and she complied—leaving on only her thong panties (A7). Pointing to a particular container of lotion, defendant instructed [REDACTED] to massage his back (A7). Defendant then directed [REDACTED] to sit on his back, and as [REDACTED] straddled defendant's back, her exposed buttocks were touching his (A7).

After a while, defendant turned over on his back and instructed [REDACTED] to massage his chest (A7). As [REDACTED] complied, defendant held the small of [REDACTED]'s back [REDACTED] with one hand and masturbated with the other (A7). Retrieving a purple vibrator, defendant held the vibrator on her vaginal area, on top of her underwear (A6-7). Defendant ejaculated, used the towel to wipe himself, and left the room (A8). Downstairs, defendant gave [REDACTED] \$300 and told her to leave her telephone number

(A8). As they left the house, [REDACTED] said that she had received \$200 for having brought [REDACTED] to defendant's house that day (A8).

In a statement that was sworn and tape-recorded, [REDACTED] reported that she was 16 years of age when [REDACTED] asked if she wanted to "make money for Christmas"; she agreed (A23). [REDACTED] drove [REDACTED] to defendant's house, where a white woman with long blond hair led her up a spiral staircase to a bedroom containing a massage table; there was a steam room and shower in the bathroom next door (A23). The woman said that massage oils would be there, and that defendant would select the one he wanted (A23). Defendant was wearing only a towel, and he selected the oils that he wanted [REDACTED] to use (A23-24).

[REDACTED] began by rubbing defendant's feet, legs, and back (A24). At defendant's direction, [REDACTED] removed her clothes and continued massaging while wearing only underwear (A24). Turning onto his back, defendant told [REDACTED] to rub his chest and pinch his nipples (A24). As [REDACTED] complied, defendant reached up, unsnapped her bra (which opened in the front), and began rubbing her breasts (A24). Defendant asked if [REDACTED] liked that, and she said she did not (A24). Removing the towel and lying naked, defendant then masturbated while continuing to touch [REDACTED]'s breasts (A24).

Next, defendant rubbed [REDACTED]'s vaginal area over her panties (A24). When [REDACTED] tensed up, defendant said, "Relax, I'm not going inside" (A24). But then, defendant moved her panties aside, stroked her clitoris, and inserted two fingers into [REDACTED]'s vagina and began stroking (A24). [REDACTED] pulled back, trying to free herself, and finally

defendant removed his fingers and apologized (A24). Keeping his hand on her vagina, defendant rubbed her “very hard” while masturbating until he climaxed into the towel (A24). Defendant left \$200 on the dresser for [REDACTED] and \$100 to be given to [REDACTED] for having brought [REDACTED] there (A24). [REDACTED] knew that what had happened to her was “wrong,” and they did not contact her again (A24).

During a statement that was sworn and tape-recorded, [REDACTED] reported that, at 16 years of age, in September of 2004, [REDACTED] had offered her a chance to make money (A13). From conversations with friends at [REDACTED] High School, [REDACTED] knew “what [REDACTED] did for [defendant],” and [REDACTED] agreed (A13). [REDACTED] drove [REDACTED] to defendant’s house, where they entered through the kitchen and met defendant (A13). [REDACTED] escorted [REDACTED] upstairs—past many photographs of naked girls—to a bedroom, where [REDACTED] set up a massage table and oils (A13). Entering the room wearing only a towel, defendant selected an oil and instructed [REDACTED] to rub his legs, the area under his buttocks, his back, and chest (A13).

Defendant removed the towel and lay naked (A13). Defendant told [REDACTED] to “get comfortable,” but she did not undress (A13). As [REDACTED] rubbed defendant’s chest, he tried to reach down her pants and touch her buttocks, but he did not succeed because her clothing was too tight (A13). Defendant began to masturbate and tried to reach up her shirt and touch her breasts, but [REDACTED] pulled back (A13-14). Defendant continued masturbating to climax, cleaning himself with the towel (A14). [REDACTED]

received \$200 in cash, and gave her telephone number to [REDACTED] on the way out of the house (A14).

[REDACTED] did not provide a massage for defendant on any other occasion, but she accompanied [REDACTED] to defendant's house on two occasions when [REDACTED] brought other girls there (A14). One of those girls was [REDACTED]'s friend, [REDACTED], who was sixteen years of age (A14). The time they took [REDACTED], the three entered the house through the kitchen, where they were met by [REDACTED] (A14). [REDACTED] and [REDACTED] both escorted [REDACTED] to the upstairs bedroom, and later [REDACTED] gave [REDACTED] \$100 for having brought [REDACTED] to defendant's house (A14).

During a statement that was sworn and tape-recorded, [REDACTED] reported that, at the suggestion of a classmate at [REDACTED] [REDACTED] High School, she had given defendant massages at his house when she was 16 years of age (A16). On the first visit, the classmate took her to defendant's house, where they entered through the kitchen and were met by [REDACTED] (A16). As [REDACTED] led her upstairs, [REDACTED] saw that, on the wall and on tables, there were photographs of naked women (A16). Once in the bedroom, [REDACTED] set up a massage table and oils, and shortly afterwards defendant emerged from a steam room and shower area wearing only a towel (A16). Defendant lay on the table, and at his suggestion [REDACTED] removed all but her panties (A16). After [REDACTED] had rubbed defendant's legs and feet, he turned onto his back, touched her breasts, and masturbated until he ejaculated (A16). The massage ended at that point

(A16). [REDACTED] was given \$200 that day, and defendant asked her to leave her cell phone number so he could contact her “when [he] was in town” (A16).

[REDACTED] returned to defendant’s home “hundreds of times” over the course of the next two years to provide these massages; she became defendant’s “number one girl” (A16). Every time defendant was in Palm Beach, [REDACTED] called [REDACTED] and scheduled appointments for [REDACTED] to “work” for defendant (A17). A “routine” was established— [REDACTED] entered the house and “g[ot]t naked” in the bedroom; she began by massaging defendant’s back, after which he rolled over and she rubbed his chest; defendant masturbated, and with the other hand inserted his fingers into her vagina; defendant continued this process until he ejaculated, and then used a vibrator on her vagina until she climaxed (A16). During her visits, defendant asked [REDACTED] how old she was, and she said she was 16; defendant told her not to tell anyone her real age (A16).

At some point, “things escalated” during the massage sessions: at defendant’s instruction, [REDACTED] had intercourse with defendant’s female friend [REDACTED] the intercourse included using “strap-on dildos,” “large rubber penises,” and “other devices” that defendant had in his home (A16). Defendant watched and masturbated; occasionally, he joined in by providing oral sex to [REDACTED] and [REDACTED] (A17). These episodes took place during the time when [REDACTED] was 16 years of age (A17). Defendant sometimes photographed the naked sex sessions between [REDACTED] and [REDACTED] and he displayed the photographs in his home (A17).

Things “continued to escalate,” and [REDACTED] received additional money whenever something new was introduced into the routine (A17). [REDACTED] had an “understanding” with defendant, however, that he would not penetrate her vagina with his penis (A17). Defendant’s penis was “deformed”—when erect, it was “thick” toward the base, but “thin and small” toward the head; it was shaped like an “egg” or an “oval” (A17). During one massage, [REDACTED] and [REDACTED] kissed and fondled each other’s breasts as defendant watched (A17). Later, as the massage continued, defendant “grabbed” [REDACTED], turned her over on her stomach, and held her head down “forcibly” as he inserted his penis into her vagina and repeatedly “pump[ed]” his penis into her (A17). [REDACTED] “screamed,” “No!” and defendant stopped (A17). Defendant apologized and gave her \$1,000 that day (A17).<sup>2</sup>

During a statement that was sworn and tape-recorded, [REDACTED] related that, at 15 years of age, she was approached by [REDACTED] a classmate at [REDACTED] High School and asked about modeling lingerie at the home of a wealthy Palm Beach man (A24-25). When they arrived at defendant’s home, [REDACTED] and [REDACTED] were served dinner by defendant’s personal chef (A25). After dinner, defendant and [REDACTED] took [REDACTED] to an upstairs bedroom, where there was a massage table (A25). When defendant

[REDACTED]

[REDACTED] As noted on pages 26-27, *infra*, the police subsequently found [REDACTED]’s name and cell phone number on discarded papers that were retrieved from defendant’s trash (A16), and recovered a copy of her high school transcript from defendant’s bedroom desk (A23).

entered wearing only a towel [REDACTED] said she and [REDACTED] were going to give defendant a massage (A25). [REDACTED] asked why they were doing that instead of modeling, and [REDACTED] said it was defendant's "routine" (A25). [REDACTED] undressed at defendant's direction, until she was wearing only panties (A25). At first, [REDACTED] rubbed defendant's legs and feet; then, when he turned onto his back, defendant instructed her to rub his chest and nipples, and she complied (A25). Defendant masturbated, while alternately touching [REDACTED]'s breasts and stroking her vagina, until he ejaculated into the towel (A25).

Defendant paid [REDACTED] \$200 (A25). He said that "bad things could happen" if she told anyone what had taken place in his house (A25). Defendant's "houseman" drove [REDACTED] and [REDACTED] home, and [REDACTED] was afraid about the fact that defendant knew where she lived (A25). When [REDACTED] called her several days later to set up another appointment for "work," [REDACTED] agreed (A25). Once at defendant's house, [REDACTED] escorted [REDACTED] to the bedroom and prepared the room for the massage (A25). Defendant entered the room wearing only a towel and directed [REDACTED] to perform the massage naked, which she did (A25). [REDACTED] began by rubbing defendant's feet and legs, and defendant later turned onto his back and masturbated with one hand and with the other rubbed her vagina with his fingers (A25). Once defendant had ejaculated into the towel, the massage was over (A25). [REDACTED] was paid \$200, and defendant threatened her again— saying that "bad things would happen" if she talked about what had happened (A25). [REDACTED] wanted to notify the authorities but was afraid of what might happen to her or her family (A25).

In a statement that was sworn and tape-recorded, [REDACTED], related that she was 16 years of age when a fellow student at [REDACTED] [REDACTED] High School said [REDACTED] could make \$200 by providing massages to defendant while topless (A21-22). Entering the house through the kitchen, [REDACTED] was escorted upstairs to a bedroom that had a massage table and a large pink couch (A22). Defendant entered the room wearing only a towel, lay face-down on the table, and selected the oils to be used (A22). Wearing only thong panties, [REDACTED] rubbed defendant's legs, back, and feet for 40 minutes (A22). Defendant turned onto his back and [REDACTED] rubbed his chest while he masturbated to climax, ejaculating into the towel (A22). [REDACTED] was given \$200 for that massage (A22).

During a return visit, [REDACTED] again was led to the upstairs bedroom, and defendant entered wearing only a towel (A22). At defendant's direction, [REDACTED] performed this massage naked (A22). She rubbed his back first; when defendant rolled over and began masturbating, she rubbed his chest (A22). After a while, defendant retrieved a large gray vibrator with a large head, and he rubbed her vagina with it for about two or three minutes (A22). [REDACTED] continued rubbing defendant's chest until he climaxed, ejaculating into the towel (A22). The massage was over at that point, and [REDACTED] received \$200 that day (A22). [REDACTED] did not provide any more massages (A22).

During a tape-recorded statement, [REDACTED] related that, when she was sixteen years of age, her classmate [REDACTED] took her to defendant's house on two occasions (A11).

The first time, [REDACTED] drove, they entered through the kitchen door, and they were met there by defendant and [REDACTED] (A11-12). [REDACTED] escorted her to a bedroom, where [REDACTED] set up a massage table and oils, and entered the room wearing only a towel (A12). Defendant lay on the table, selected an oil for [REDACTED] to use, and she began the massage (A12). When defendant tried to remove [REDACTED]'s shirt, she became upset and discontinued the massage (A12). [REDACTED] left the house and did not receive any money (A12). [REDACTED] had told her to tell defendant if she was "uncomfortable" and defendant would "stop" (A12). [REDACTED] also knew that "the more you do, the more you get paid" (A12).

Several weeks later, [REDACTED] agreed to return to defendant's house with [REDACTED] (A12). Again they entered through the kitchen, [REDACTED] was escorted upstairs by [REDACTED] and [REDACTED] set up the massage table and oils (A12). During the massage, defendant tried to reach into [REDACTED]'s pants and touch her buttocks, but her clothing was too tight and he was unable to do so (A12). Rolling over on his back, defendant tried to touch [REDACTED]'s breasts, but she became upset, said she did not want to be touched, and discontinued the massage (A12). Defendant gave her \$200 that day, and [REDACTED] did not return (A12).

During a statement that was sworn and tape-recorded, a student whose birthdate was [REDACTED] reported having been approached by [REDACTED] and offered money to provide a "massage" to "a wealthy man in Palm Beach" (A12). [REDACTED] drove the girl to defendant's house, where they entered through the kitchen and met

defendant and [REDACTED] (A12). [REDACTED] took the girl upstairs to a bedroom, where [REDACTED] set up a massage table and oils, and defendant entered the room shortly afterwards wearing only a towel (A12). Removing the towel and lying on the table naked, defendant chose a lotion for the girl to rub on his thighs and back (A12).

At defendant's request, the girl undressed and continued the massage wearing only thong underpants (A12). The girl straddled defendant's back, her bare buttocks touching his, and later he turned onto his back and masturbated as she rubbed his chest (A13). The girl, who had "just turned seventeen," "did not want to look at [defendant's] penis area" because she "was uncomfortable" (A13). Retrieving a "large, white vibrator," defendant rubbed the vibrator on her vaginal area over her underwear until he ejaculated (A13). Defendant got up from the table, took a shower, and paid the girl either \$350 or \$400 (13). The girl did not return to defendant's house (13).

During a statement that was sworn and tape-recorded, a girl whose birthdate was [REDACTED] related that she had been told she could make some "quick money" by providing a massage while dressed only in underwear (A18). The girl was driven to defendant's home, where she and the other girl entered through the kitchen door and went to an upstairs bedroom, where there was a massage table near a sauna/shower area and photographs of naked women throughout the room (A18). Defendant entered wearing only a towel, and at defendant's direction the two girls undressed as well (A18). Wearing only panties, the girls rubbed defendant's legs and feet (A18).

At defendant's instruction, the recruiter left the room and the new girl finished the massage alone (A18).

At that point, defendant turned onto his back, removed the towel, and masturbated as the girl rubbed his chest (A18). Defendant then pulled down the girl's panties, retrieved a "large, white" vibrator from a nearby drawer, and rubbed it over the girl's outer vaginal area (A18). The girl was "very uncomfortable" but "knew it was almost over" at that point (A18). Once defendant had ejaculated, he wiped himself with the towel and went into the shower area (A18). The girl was given \$200 for the massage, and the recruiter girl was given \$200 for having brought the girl to defendant (A18). [REDACTED] subsequently called and asked the girl to return for some additional "work," as [REDACTED] called it; the girl said she was not comfortable providing "that type of work" (A18).

During a statement that was sworn and tape-recorded, a [REDACTED] High School student whose birthdate was [REDACTED] reported having been approached by [REDACTED] to provide a massage for defendant in exchange for \$200 in cash (A19). [REDACTED] made the arrangements but was unable to take the girl, so someone else drove the girl there (A19). Entering the house through the kitchen door, the girl met with [REDACTED] as well as another "assistant," [REDACTED]. As [REDACTED] escorted her upstairs, the girl noticed a number of photographs of naked girls throughout the house (A19).

Defendant entered the room wearing only a towel, lay down on the massage table, and selected oils for her to use (A19). Defendant asked the girl to remove her clothes, but that time she refused (A19). The girl returned and provided massages on several other occasions, and each time “it was more than a massage” (A19-20). The girl did not look below defendant’s waist, but she knew he always masturbated under the towel (A19). Eventually, defendant convinced the girl to remove her clothes and perform the massage dressed only in her thong panties (A19). On occasion, defendant rubbed a white vibrator with a large head on her vaginal area as he masturbated (A19). On two occasions, the girl brought a classmate to defendant’s home to perform a massage, and the girl received \$200 for each one she brought (A20).

In a statement that was sworn and tape-recorded, a girl whose birthdate was [REDACTED] related having been approached by [REDACTED] and asked about making money for providing massages to defendant (A20). The girl agreed, and [REDACTED] drove her to defendant’s home, where they were met by defendant and [REDACTED] (A20). [REDACTED] took the girl upstairs and then left the room (A20). Defendant entered wearing only a towel, and lay on his stomach as the girl, wearing only panties, rubbed his back (A20). Defendant masturbated until he ejaculated (A20). The girl “felt the whole situation was weird”; but she was paid \$200, so she returned (A20). [REDACTED] was paid \$200 for having brought the girl to defendant’s house (A20).



table as he handed her some oils (A21). Fully clothed, the girl rubbed defendant's legs and back (A21). Defendant paid her \$300 for the massage (A21). Subsequently, [REDACTED] called the girl and said that defendant was "in town" and wanted her to "work" (A21). The girl went to defendant's house and provided a massage, again while fully-clothed (A21). The following time, defendant asked the girl to remove her clothes, and she complied (A21). Wearing only thong panties, the girl continued the massage as defendant turned on his back and masturbated while she rubbed his chest (A21). Once he had climaxed, defendant got up and told her to get dressed (A21). The girl received \$300 that day (A21).

By the time [REDACTED] called and asked her to work again, in about January of 2005, the girl had a boyfriend and did not feel comfortable about going, but she decided to go one last time (A21). Defendant entered the bedroom wearing only a towel and lay down on the massage table (A21). During the massage, defendant caught the girl looking at the clock a few times, and he asked if she was "in a hurry" (A21). When the girl said that her boyfriend was waiting for her outside, and that she would not be back again, defendant told her to leave because she was ruining his massage (A21). Even after that falling out, defendant still wired her money by Western Union as a "Christmas bonus" (A21).

During a statement that was sworn and tape-recorded, a girl whose date of birth was [REDACTED] reported having provided massages to defendant for two years, beginning when she was 16 years of age (A14). Over the course of that time,

defendant “kept pushing to go further and further” (A14). “Recently” she had begun removing her clothes and providing the massage dressed only in a thong panty, and he had begun to masturbate as she rubbed his chest (A14-15). Defendant rubbed her buttocks, but she pulled back when he tried to touch her breasts (A15). She also refused to let defendant use a “large white” vibrator, with a “huge head on the tip,” on her; defendant kept the vibrator in a closet near the massage table (A14-15). Defendant “tr[ie]d to get away with more and more on each massage,” and she considered him to be a “pervert” (A14-15).

The most recent massage had been on October 1, 2005 (A15). On that date, the girl asked to borrow one of defendant’s cars, and he said he would rent a car for her (A15). Two days later, on October 3rd, [REDACTED] called and said that defendant had rented a new [REDACTED] for her, and that the car would be hers for a month (A15). The girl related that, at the time of the interview, the car was parked next to the [REDACTED] [REDACTED] (A15).

In a statement that was sworn and tape-recorded, a [REDACTED] [REDACTED] [REDACTED] High School student whose birthdate was [REDACTED] reported having been approached by a classmate who asked if the girl wanted to “work” (A17). As the girl explained it, arrangements were made with defendant’s “assistant,” [REDACTED] and then the girl went to defendant’s home in March of 2005 and gave him a massage, fully-clothed, in exchange for \$200 (A17). Since the girl’s answers seemed “almost scripted,” and she appeared to be “nervous,” the detective asked if she had been contacted by anyone

from defendant's "organizations" or "house" (A17). The girl said she had been "interviewed" by a "private investigator" named "Paul," who had been hired by defendant (A17). The investigator had asked her about the police investigation, and he had given her his telephone number, which she related to the detectives (A17).

### The Evidence Corroborating The "Massage" Statements

The probable-cause affidavit also outlined a variety of other evidence uncovered during the investigation, including the following:

██████████ gave a statement that was sworn and taped-recorded (A8-10). ██████████ said that she was 17 years of age when she was approached by a friend about providing a massage for defendant in exchange for \$200 (A8). ██████████ friend drove her to defendant's home, where defendant and ██████████ greeted her in the kitchen, and then ██████████ led ██████████ to the upstairs bedroom, arranged the massage table and oils, and left the room (A9). Defendant entered the room wearing only a towel, lay face-down on the table nude, and selected an oil for her to use (A9). ██████████ was naked while performing the massage, and defendant grabbed ██████████ buttocks; ██████████ "felt uncomfortable" and said that she did not want to be "touched" (A9).

Defendant paid ██████████ \$200 for the massage (A9). Defendant offered to pay ██████████ for simply bringing girls to him—"the younger the better," defendant said (A9). One time, ██████████ brought a 23-year-old, and defendant said she was "too old" (A9). ██████████ remembered having brought six different girls to defendant, including

█, █, and █, all between the ages of 14 and 16 (A9). █ was the youngest— she was 14 years of age at the time of the massage (A9). Defendant did not contact █ directly to make arrangements; defendant informed █ that he was going to travel to Palm Beach, and █ contacted █ who in turn arranged for girls to “work” for defendant during that time period (A9-10).

█ called for █ at home and drove her to defendant’s house; █ was driving a red pick-up truck at that time (A9). Entering through the kitchen door, █ and █ met with defendant’s house chef and █ after which █ escorted █ to the upstairs bedroom (A9). █ said she had been paid \$300 for the massage, and █ received \$200 for having brought █ there (A9). █ was the last girl █ took to defendant, because █ parents found out about her “visits” to defendant and she stopped (A10). █ changed her cellular number in order to avoid █ but █ continued to call █ house and leave messages for her there (A9-10).

█ gave the police cellular numbers and possible addresses for the girls whom she had mentioned (A10). Once the interview had concluded, a sergeant informed █ that, by admitting that she had taken underage girls to defendant’s house, she had implicated herself in a crime (A10). During the ride home, █ told the police, “I’m like a Heidi Fleiss” (A10). That statement was recorded by a device in the car (A10).

During a statement that was sworn and tape-recorded, [REDACTED] High School student whose birthdate was [REDACTED] reported that [REDACTED] approached girls at school and asked if they wanted to “work” for defendant by giving him massages (A19). The girl declined to provide any massages herself, but she went along on four or five occasions when [REDACTED] took other girls, including [REDACTED], to defendant’s home (A19). The girl waited in the kitchen with [REDACTED] during the massage, and defendant’s cook provided food for them (A19). [REDACTED] was given \$200 for each girl she delivered (A19). The girl noticed that there were many photographs of naked girls in the house (A19).

During an interview, **Jose Alessi** stated that, from about 1993 through 2004, he had been employed by defendant as house manager, driver, and maintenance person at the Palm Beach house (A26). Defendant’s cooks and assistants travelled with him on his private plane (A26). Defendant received three massages each day in the house (A26). Each masseuse was different, and toward the end of Alessi’s period of employment, the masseuses were “younger and younger”—sixteen or seventeen years of age “at the most” (A26). The massages took place in defendant’s bedroom; Alessi set up the massage table there (A26). There were times toward the end of Alessi’s employment that he found a vibrator and long rubber penis in the sink after the massage; Alessi had to wash off those items (A26). “[A]lmost always” after a massage Alessi had to make defendant’s bed (A26).

During a statement that was sworn and tape-recorded, Alfredo Rodriguez related that, from November 2004 through May of 2005, he had been employed by defendant as “house manager” of the Palm Beach home (A26). In this capacity, Rodriguez acted as butler, chauffeur, chef, and houseman; he also ran errands for defendant, and provided for defendant’s guests (A26). During the time defendant was “in residence,” he had two massages a day—one in the morning, and one in the afternoon (A26). Rodriguez was told to expect someone and to make them comfortable until either defendant or [REDACTED] arrived; Rodriguez admitted the girls into the kitchen, where either defendant or [REDACTED] met them and escorted them upstairs (A26).

The girls appeared to be too young to be masseuses; Rodriguez knew that the girls were still in high school and were of high school age (A26). On one occasion, at defendant’s direction, Rodriguez delivered a dozen roses to [REDACTED] [REDACTED] [REDACTED] High [REDACTED] for one of the girls who had come to the house to provide a massage (A26). On another occasion, also at defendant’s direction, Rodriguez rented a car from Dollar Rent-A-Car and delivered it to the same girl—so she could drive to defendant’s home without incident, whereas otherwise she often needed rides to and from the house (A27).

Rodriguez produced a folder containing documentation: there was a note on defendant’s stationery directing the delivery of roses to [REDACTED] [REDACTED] [REDACTED] High School after [REDACTED]’s school play, and on the same stationery a direction to rent a car

for [REDACTED], and to extend the contract (A27). Rodriguez believed that there was “a lot more going on than just massages” (A26). Rodriguez often cleaned defendant’s bedroom after the massages, and found vibrators and “sex toys” scattered on the floor; he “wiped down” those items and put them away in an armoire near defendant’s bed (A26-27).

While executing a search warrant at defendant’s home, the case detective saw a pink-and-green couch in the master bedroom, photographs of naked young girls lining a wall of the stairway leading from the kitchen to the bedroom, and numerous photographs of naked young girls throughout the houses; some of the subjects of the photographs seemed to be girls whom the detective had interviewed (A23). Inside a bedroom desk containing stationery in defendant’s name, the detective found a high school transcript for [REDACTED]. (A23). In an armoire next to the bed, the detective found a bottle of massage oil (A23). There was a massage table in the master bedroom, and other tables throughout that floor of the house (A23).

On the first floor, the detective found two covert cameras hidden within clocks—one in the garage, and the other on a shelf behind a desk (A23). A computer found in the house appeared to display images from the two covert cameras, and the hard drive of that computer contained several images of [REDACTED] and other girls whom the police had interviewed (A23). Telephone message books recovered from the house contained carbon copies of various messages, some of which listed the names and telephone numbers of girls whom the detective recognized from the

investigation (A23). In the text of some of those messages, there were notations indicating that the caller was confirming a “work” appointment (A23). Other messages listed the caller’s message as, “I have girls for him,” and, “I have 2 girls for him” [REDACTED] name appeared at the bottom of those messages, in the space provided for the name of the person who had taken the message (A23).

Subpoenaed cellular telephone records showed that [REDACTED] had called [REDACTED] “during the exact times and dates” of the incidents that [REDACTED] had described, and that [REDACTED] also had called [REDACTED] and [REDACTED] “during the time frame” of the incidents related by those girls (A27). A comparison of data from subpoenaed aviation records indicating arrival and departure times for defendant’s private plane at Palm Beach International Airport, and subpoenaed cellular telephone records showed that [REDACTED] had made telephone calls to [REDACTED] and the victims either “in the days just prior to” defendant’s arrival in Palm Beach, or during the time he was already there (A27).

After the interview of the girl whose birthdate was [REDACTED] detectives found a silver [REDACTED] parked near the [REDACTED]—the car was registered to Dollar Rent-A-Car; had been rented by Janusz Banasiack, who was employed as defendant’s houseman at the time; and had been charged to a credit card in defendant’s name (A15). Subpoenaed records of [REDACTED] revealed that, on [REDACTED], defendant had sent money to the girl with birthdate [REDACTED] (A21).

█'s father told police that █ had come to their home to get █ on February 6, 2005, and that █ was driving a pick-up truck at the time (A7). During a controlled, tape-recorded telephone call to █ cellular telephone, █ asked what she "need[ed] to do to make more money," and █ replied, "The more you do, the more you get paid" (A8). █ subsequently called █'s cellular telephone and left a voicemail message indicating that she had set up an appointment for █ to go to defendant's house at 11:00 a.m. on April 5, 2005; the police recorded that message from █ voicemail (A8). A trash pull from defendant's house on April 5, 2005, revealed a telephone message for defendant which listed the names of █ and █ and the time 11:00 a.m. (A8).

During the course of the investigation, detectives learned that several people whom the police had identified as possible victims were in fact 18 years of age or older, and therefore were consenting adults (A25). During interviews, these adults described what the police found to be "the same massage routine" as the one portrayed by the victims: █ contacted them and set up appointments for them to "work"; they entered defendant's house through the kitchen, and █ escorted them to an upstairs bedroom; defendant entered the room wearing only a towel and asked them to get comfortable; as they performed the massage naked, defendant either touched their vaginas with his fingers or rubbed their vaginal areas with a vibrator; defendant masturbated to climax, and at that point the massage ended (A25-26).

## **The Recommendations Of The Board**

Pursuant to the mandate of Corrections Law Section 168-1, the Board issued a “Case Summary” and a completed “Risk Assessment Instrument” with respect to defendant. These documents were based upon the Florida probable-cause affidavit, as well as defendant’s “inmate file,” which included defendant’s pre-sentence report, prior criminal history, and post-offense behavior (A65).

### **The Case Summary**

The Case Summary included a detailed account of the operation that defendant had established and maintained for the purpose of satisfying his obsessive sexual desire for young girls. The Summary stated that, during 2005, defendant had sexually assaulted “numerous” girls between the approximate ages of 14 and 17 (A65). “Most” of the victims had been “recruited” from a local high school by a 17-year-old who herself had begun as one of defendant’s massage victims (A65).

The Summary noted police reports containing references to police conversations with “numerous” girls (A65). According to the police reports, “most” of the girls were “embarrassed to speak with police regarding what had happened to them while they were in [defendant]’s home” (A65). Nonetheless, “[s]worn statements” had been taken from “at least five victims and seventeen witnesses” about “massages and unlawful sexual activity” that had taken place at defendant’s home (A65).

The Summary recounted how, one after another, school girls had been lured to defendant's home with the promise of money in exchange for performing a "massage" (A65). Once the girl had been led through his home and to his bedroom, past photo displays of naked young girls, defendant entered the bedroom wearing only a towel and lay down on a massage table that had been set up there (A65). On most occasions, defendant immediately removed the towel and asked the girl to remove her clothing as well (A65). Most girls undressed down to their bra and panties, and some removed even those items (A65). During the massage, defendant either touched the girl's breasts, inserted his fingers into her vagina, or used a vibrator on the girl's vaginal area—sometimes doing a combination of those things (A65). Defendant masturbated to climax during the encounter, often ejaculating into the towel that he had been wearing (A65). The girls were paid a minimum of \$200 at the end of each encounter (A65).

Pointing to a number of victims as examples, the Summary stated that, with a 14-year-old, for example, defendant had touched the girl's vaginal area with a vibrator while she performed the massage (A65). Yet a different girl, 16 years of age, had gone to defendant's home at least 100 times over the course of a two-year period (A65). When receiving a massage from this girl, defendant had masturbated while either touching the young girl's breasts, inserting his fingers into her vagina, or using a vibrator on her vaginal area (A65). On some occasions, defendant paid this young girl to engage in sexual activity with an adult female friend of his while he watched;

defendant sometimes participated by performing oral sex on the young girl (A65). On one occasion, the encounter escalated to the point where defendant forcibly raped the girl—turning the teenager over on the massage table and, against her will, forcibly inserting his penis into her vagina (A65).

The Summary stated that defendant's conduct while on Community Control had been assessed as "satisfactory"; that he lacked a history of substance abuse; and that, because defendant had pleaded guilty, he was being "credited" with having accepted responsibility for his actions (A65). Regarding defendant's criminal history, the Case Summary stated that, in 1973, in England, defendant had been convicted of the misdemeanor Unlawful Possession of an Offensive Weapon—namely, a cane that incorporated a concealed blade (A65). Defendant had been assessed for: "sexual and deviate intercourse, forcible compulsion, numerous victims and their ages, a continued course of sexual misconduct, a prior misdemeanor conviction in England absent specific information, his stranger relationship to most victims, and establishing a relationship with these underage girls for the purpose of victimization" (A65).

The Board calculated that defendant "score[d] as a Level III Sex Offender with absolutely no basis for downward departure" (A66). As the Board assessed the circumstances, defendant had "used his wealth and power in such a way so that he could take advantage of many teenage girls to satisfy his own sexual perversions" (A65-66).

### **The Risk Assessment Instrument**

Of the fifteen factors included in the Risk Assessment Instrument, the Board recommended that defendant receive points for seven of them, as follows: for the “Use of Violence” factor, 10 points, based on the fact that defendant had used forcible compulsion; for the “Sexual Contact with Victim” factor, 25 points, based on the fact that defendant had committed either sexual intercourse, oral or anal sexual conduct, or aggravated sexual abuse; for the “Number of Victims” factor, 30 points, based on the fact that there were three or more victims; for the “Duration of Offense Conduct with Victim” factor, 20 points, based on the fact that defendant had committed a continuing course of sexual misconduct; for the “Age of Victim” factor, 20 points, based on the fact that there was a victim between the ages of 11 and 16 years; for the “Relationship with Victim” factor, 20 points, based on the fact that a victim either was a stranger, someone with whom defendant had established a relationship for the purpose of victimizing, or someone with whom he had a professional relationship; and, for the “Number and Nature of Prior Crimes” factor, 5 points, since the Board concluded that defendant had no prior history of sex crimes or felonies. By the Board’s calculations, defendant had a total risk assessment score of 130 points (A64).

## POINT

THE SORA COURT'S DESIGNATION OF DEFENDANT AS A LEVEL-THREE OFFENDER WAS SUPPORTED OVERWHELMINGLY BY THE RECORD. THE PROCESS BY WHICH THE COURT REACHED AND DELIVERED THAT DETERMINATION WAS ENTIRELY FAIR AND PROPER (Answering Defendant's Brief).

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As noted, the Board assessed defendant's risk level according to the various factors set out in the Risk Assessment Instrument, and they calculated defendant's score at 130, making him a presumptive level-three offender. The Board also considered all of the facts and circumstances to see if there was any legitimate basis for a downward departure, and they concluded that there was none. For those reasons, the Board recommended that defendant be designated a level-three sex offender.

At the SORA hearing before Justice Pickholz, defendant essentially took the position that the level-three designation could not be supported by the crimes with which he had actually been charged. Minimizing the seriousness of the crimes and claiming he was present in New York only for limited periods of time, defendant urged additionally that strict level-three reporting requirements would be unfair in this particular case. The People, in turn, voiced their own concerns about assessing points for criminal conduct beyond that for which defendant had been charged; in reaching that conclusion, the People apparently relied on a combination of a mistaken interpretation of the governing legal standards and certain secondhand information

about the Florida case. After a full SORA hearing, including an extended inquiry revealing the unreliable nature of the prosecutor's information, Justice Pickholz adopted the recommendation made by the SORA Board and designated defendant a level-three offender.

On appeal, defendant claims that the SORA court erred in a number of ways. Defendant contends that the level-three finding was not supported by the record and instead was attributable to the court's "personal disdain" for defendant. Defendant further complains that the court denied the parties an opportunity to present evidence on disputed issues. In addition, defendant argues that the SORA order itself lacked the requisite findings and conclusions.

First, defendant's appellate complaints are almost entirely unpreserved. During the proceedings below, defendant mentioned only one of his current complaints—namely, the one about the purported lack of record support. Furthermore, none of defendant's current complaints has even a shred of merit. Thus, there is no reason to disturb the decision of the SORA court.

#### A.

As the Sex Offender Registration Act itself explains, "the threat posed by a sex offender depends upon two factors: (i) the offender's likelihood of reoffense, and (ii) the harm that would be inflicted if he did reoffend." Sex Offender Guidelines and Commentary ("Guidelines") at 2. "[I]n determining an offender's risk level," the

Guidelines “seek to capture both these elements.” *Id.* The Guidelines recognize that certain conduct, in particular, carries a strong likelihood of re-offense. “Offenders who target young children as their victims are more likely to reoffend,” the Guidelines state. Guidelines at 11 (internal citations omitted). “Such offenders also pose a heightened risk to public safety,” the Guidelines add, because young children both “lack the physical strength to resist” and “can be more easily lured into dangerous situations than adults.” *Id.* For those reasons, the Guidelines provide a special category for an offender whose victims are between the ages of 11 through 16. Likewise, the Guidelines explain that “[t]he existence of multiple victims is indicative of compulsive behavior and is, therefore, a significant factor in assessing the offender’s risk of re-offense and dangerousness.” Guidelines at 10 (internal citations omitted).

In an effort to predict the likelihood of re-offense and the extent of the harm inflicted as a result, a Risk Assessment Instrument assigns points to an offender for an extended series of risk factors—including those just mentioned—and the offender’s total score using that calculation becomes his “presumptive risk level.” Guidelines at 3. Although a court is empowered to exercise its discretion and depart from the presumptive risk level, “[t]he expectation is that the [risk assessment] instrument will result in the proper classification in most cases, so that departures will be the exception -- not the rule.” Commentary at 4; *see also* People v. Guaman, 8 A.D.3d 545 (2d Dept. 2004)(citation omitted). A SORA court may adopt the presumptive

risk level as long as the court finds that the risk factors giving rise to the offender's score were supported by "clear and convincing evidence." See Correction Law §168-n(3); People v. Pettigrew, 14 N.Y.3d 406, 408 (2010); People v. O'Neal, 35 A.D.3d 302 (1st Dept. 2006).

That SORA employs this relatively-relaxed standard, as opposed to proof beyond a reasonable doubt, reflects the fact that a SORA risk-level assessment is made not for the purpose of punishing the offender but rather for the sole purpose of protecting the public from the risk the offender poses. See People v. Knox, 12 N.Y.3d 60 (2009)("governmental interest advanced by SORA is, of course, the protection of the community against people who have shown themselves capable of committing sex crimes"); People v. Windham, 10 N.Y.3d 801, 802 (2008)(SORA risk-level determination "is a collateral consequence of a conviction for a sex offense designed not to punish, but rather to protect the public").

In determining whether a risk factor has been supported by "clear and convincing evidence," the SORA court may consider information from any source that is "reliable." Correction Law §168-n(3); Guidelines at 7. Plainly, that includes hearsay. Correction Law §169-8(3)(SORA court "may consider reliable hearsay evidence submitted by either party"); see also People v. Conway, 47 A.D.3d 492, 492-493 (1st Dept. 2008); People v. Mendez, 45 A.D.3d 429 (1st Dept. 2007). Indeed, case summaries prepared by the SORA Board and submitted to court "certainly meet the 'reliable hearsay' standard for admissibility at SORA proceedings," People v.

Mingo, 12 N.Y.3d 563, 573 (2009), and those materials “often [are] replete with hearsay culled from a variety of secondary sources.” People v. Vasquez, 20 Misc.3d 37 (App. Term 1st Dept. 2008). Hearsay is “reliable for SORA purposes” if, “based on the circumstances surrounding the development of the proof, a reasonable person would deem it trustworthy.” People v. Mingo, 12 N.Y.3d at 575.

Victim statements, in particular, are among the class of materials treated as presumptively reliable for purposes of a SORA hearing, and that is true even when the statement was not made under oath. People v. Mingo, 12 N.Y.3d at 576. The SORA court should disregard a victim statement only when that statement is “equivocal, inconsistent with other evidence, or seems dubious in light of other information in the record.” 12 N.Y.3d at 577.

Equally clearly, the mere fact that conduct has not been the subject of formal charges does not bar its consideration for SORA purposes. The SORA Guidelines explicitly provide that, when determining an offender’s risk level, “the Board is not limited to the crime of conviction.” Guidelines at 5. The Guidelines state that “the fact that an offender was not indicted for an offense may be strong evidence that the offense did not occur.” Guidelines at 5 (emphasis in original). However, by phrasing that principle in the permissive way—that the absence of indictment “may” be strong evidence (emphasis supplied)—the Legislature conveyed nothing more than the simple fact that there were circumstances under which the absence of formal charges would, in fact, cast doubt on the offender’s commission of the conduct at issue.

Indeed, this Court recently recognized as much in People v. Johnson, 77 A.D.3d 548 (1st Dept. 2010). In Johnson, the defendant had pleaded guilty to the sole count of a superior court information charging statutory rape, and this Court upheld a SORA assessment against him for having used forcible compulsion in the commission of that crime. The SORA court had based the forcible-compulsion assessment on the victim's hearsay statement, as contained in the felony complaint, describing the manner in which the crime had been committed. In doing so, Johnson implicitly acknowledged the likely scenario that the defendant had been permitted "to plead to a crime less serious than the one that could be proven." People v. Johnson, 77 A.D.3d at 550 (McGuire, J. concurring).

Finally, it is clear that the ordinary rules of preservation apply to an appeal from a SORA determination. See People v. Windham, 10 N.Y.3d at 802; People v. Roland, 292 A.D.2d 271 (1st Dept. 2002).

Here, for the reasons set out fully below, the SORA court properly recognized that the Board's assessment of points for repeated and serious sex offenses was based on information that was entirely reliable. The victim-accounts themselves carried strong indicia of reliability, and there was an abundance of reliable information corroborating the events described in the victim-accounts. Furthermore, the manner in which that information was conveyed had its own inherent assurances of reliability. Based upon the totality of extensive and compelling information before it, the SORA court had more than ample basis to conclude that the victim-accounts were reliable,

and that neither the formal charges that had brought against defendant nor his guilty plea accurately conveyed the nature and extent of his criminal conduct in this case.

## **B.**

Defendant claims that the risk-assessment determination was not supported by the requisite “clear and convincing evidence.” As he did below, defendant attempts to limit the Florida conduct considered for risk-assessment purposes to only those actions that can be said to have given rise to the two formal charges brought against him. Defendant claims that all of the detailed information about his additional and sordid sexual misconduct was unsuitable for consideration for SORA purposes. And, in advancing that argument, defendant points largely to statements to that effect made by the People at the SORA hearing. For the reasons set out more fully below, this Court should uphold the SORA court’s decision to accept the well-supported recommendations made by the SORA Board, notwithstanding arguments by both defendant and the People to the contrary.<sup>3</sup>

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<sup>3</sup> On appeal, defendant urges that the supposed absence of the requisite “clear and convincing evidence” constituted a violation of his federal constitutional right to due process (Brief for Defendant at 32-33). That notion was never mentioned below, so it has not been preserved for appellate review. *People v. Kello*, 96 N.Y.2d 740, 744 (2001)(constitutional complaints must be raised with specificity). In any event, the short answer is that, as set out herein, the requisite supporting information was, in fact, before the SORA court, and therefore no violation of defendant’s rights, constitutional or otherwise, occurred.

As noted, when determining whether a risk factor has been supported by “clear and convincing evidence,” the Board and a SORA court may consider information from any source that is “reliable.” So too, as a practical matter, the information at a SORA hearing very often is in the form of reliable hearsay. Here, the SORA court correctly recognized that the information submitted by the Board, including the victim-statements, was entirely reliable and therefore appropriately considered for the purpose of making a SORA risk-level determination.

To begin, the evidence of defendant’s extended course of sex crimes was before the court not only in the Board’s Case Summary of those activities—which, as noted, was presumptively admissible at the hearing—but also in the underlying 22-page probable-cause affidavit itself. The court saw that the affidavit systematically identified all the sources of the information it recounted—either by full name or, in the case of a minor, by initials and date of birth. The court also saw that the affidavit had been signed and sworn to by the Palm Beach detective who had prepared it. See People v. Mingo, 12 N.Y.3d 563, 573 (2009)(fact that statement made under oath is “a significant, though not indispensable, indication of reliability”). This combination of circumstances gave the document an unmistakable cast of reliability.<sup>4</sup>

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<sup>4</sup> Of course, defendant’s suggestions notwithstanding (Brief for Defendant at 21, 28), it was of no meaningful significance for SORA assessment purposes that the SORA materials provided to the court happened to contain a copy of the probable-cause affidavit listing defendant’s accomplice, [REDACTED], as the subject, rather than the one that listed defendant. As defendant himself knew, and therefore did not make a complaint along this  
(Continued...)

More particularly, though, the court knew that the affidavit's contents, and especially the victim-statements themselves, carried nothing short of hallmark indicia of reliability. Notably, the affidavit stated that all the victim-statements, and many of the witness-statements as well, had been sworn and tape-recorded. The affidavit also stated that these sworn statements by the victims had been preserved in the form of tape-recordings (A6). Significantly, too, virtually all of those accounts were highly detailed—itsself an indicator of reliability.

Even more telling was the fact that the victims' detailed accounts of the sexual encounters were virtually identical. As noted, all of the girls reported having been ushered through the kitchen entrance of defendant's house and then escorted to an upstairs bedroom containing a massage table, and then defendant, wearing only a towel, entered, made a selection from among an array of massage oils, and lay nude on the table while requesting that the girl undress as well. While some "massages" included supplemental sexual activities and even an additional participant, the average massage followed a strikingly similar pattern: defendant began by lying face-down and selecting a massage oil, after which, at his instruction, the girls first rubbed his feet, legs, and back; once defendant had rolled over onto his back, the girls followed his

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(...Continued)

line at the hearing, it was simply the content of the affidavit's sworn allegations themselves that was at issue at the hearing. And, for all the reasons set out in this brief, the affidavit's detailed, sworn allegations established both defendant's own extensive sexual misconduct and [REDACTED] criminal conduct as an accomplice of defendant in that process.

instruction to rub his chest, at which point defendant began masturbating with one hand while using the other to make some form of contact with their bodies—either with his hands alone or with the aid of a vibrator; and the massages all ended as soon as defendant ejaculated onto the towel that he had brought with him.

In fact, many of the victim-accounts included references to the same distinctive details about the “massage” locale—a hot-pink-and-green couch in the bedroom, for example, as well as an adjacent bathroom containing not just a shower but also a sauna/steam room, and a stairway-wall lined with photographs of naked young girls. Put simply, the similarity of all the massage accounts provided a valuable assurance of reliability to all those various accounts.

While the victim-accounts, in themselves, thereby carried strong indicia of reliability, the court saw that those accounts also were heavily corroborated by a wealth of independent and inherently reliable information. Again, this corroborative information as well was set out in detail in the sworn probable-cause affidavit.

For example, ██████ herself made a sworn, tape-recorded statement to police acknowledging her own particular role in defendant’s enterprise and confirming the core of what the victims had said. Just as many of girls described having been recruited by ██████ for the equivalent of a finder’s fee, ██████ confirmed that she had, in fact, done so. Echoing the routine portrayed by the victims, ██████ described how she herself had begun by providing a massage for defendant at age 17—entering the house through the kitchen, and being escorted by ██████ to an upstairs bedroom,

where she removed her clothes and performed a massage naked at defendant's request after he had selected oils while lying naked on the massage table. But, as ██████ explained, she soon "graduated" to bringing other girls to defendant for that purpose, in exchange for which she was given money.

In this regard, as noted, 14-year-old ██████ had given one of the detailed victim-accounts, and ██████ also acknowledged having brought ██████ to defendant when ██████ was 14 years of age, and having received \$200 for that service. ██████ received \$300 for the massage, ██████ confirmed. All of those details mirrored the account that ██████ herself had given. ██████ also confirmed another important fact common to the victim-accounts—namely, the vital importance of the young age of the girls supplied to defendant. All girls whom ██████ had brought to defendant were between the ages of 14 and 16, ██████ stated. ██████ related defendant's clear words to her on the subject—"The younger, the better," he had emphasized. ██████ remembered well defendant's rejection as "too old" a 23-year-old whom ██████ had once brought to him.

Significantly, when evaluating the trustworthiness of ██████ account, the court knew that ██████ remarks constituted admissions on her part, and therefore were imbued with a high degree of inherent reliability. See generally People v. Brensic, 70 N.Y.2d 9, 14 (1987). Notably, too, there was no doubt that ██████ was aware of the incriminatory nature of the remarks, since the police informed her of that circumstance explicitly. When a sergeant pointed out that ██████ had implicated

herself in criminal activity—by admitting that she had been paid for delivering minors for the purpose of sexual activity—██████████ bragged that she was “like Heidi Fleiss.”

Another compelling piece of corroborative evidence before the court came in the form of a controlled telephone call made by ██████. to ██████████. Detectives heard ██████. ask what exactly she had to “do” in order to “make more money,” and, without missing a beat, ██████████ replied by explaining, “The more you do, the more you get paid.” In that same connection, there was the voicemail message that ██████████ had subsequently left for ██████., informing ██████. of her appointment at defendant’s house at 11:00 a.m. on April 5, 2005; relatedly, the court also saw that, as a result of a trash pull, detectives had the remnants of a telephone message left for defendant listing the names of both ██████. and ██████████ along with that very same date and time.

For yet additional confirmation, the court also had read the accounts of two people who had worked as housemen for defendant—for a combined period of about eleven and a half years. Both housemen had seen a steady flow of different girls come to defendant’s house at regular intervals—either two or three times a day—on every day that defendant was in residence at his Palm Beach home. And, both housemen noticed that these supposed masseuses seemed to be very young—16 or 17 years of age, at most. The men further reported that, after so-called massage sessions, they routinely found various “sex toys”—such as a vibrator and a long rubber penis—strewn around the bedroom and adjacent bathroom, and it became the responsibility of the housemen to wash the sex toys and put them away.

Next, the affidavit pointed to various subpoenaed records that yielded additional corroboration of the victim-accounts. For example, cell phone records revealed calls made by [REDACTED] to certain victims at times consistent with ones reported by the victims. Indeed, cell phone records revealed calls made by [REDACTED] both to [REDACTED] and various victims, and, with aviation-record data of arrival and departure times for defendant's private plane at Palm Beach International Airport, it was clear that all of those calls had been made during periods either immediately before, or during, defendant's stays in Palm Beach. That information, thus, confirmed the accounts—by [REDACTED] and the victims alike—that once defendant informed [REDACTED] of his impending stays in Palm Beach, [REDACTED] reached out both to [REDACTED] and to certain girls directly, in order to ensure that, whenever defendant was in town, the requisite number of teen sex-providers showed up steadily, and in timely fashion, at his door.

Finally, the record also established that among the list of yet additional powerful corroboration were important observations made by the detectives themselves inside defendant's house during the execution of the search warrant. The affidavit recounted that the detectives had found the distinctive pink-and-green bedroom sofa, as well as the staircase-wall lined with photographs of naked young girls—some of whom, in fact, the detectives recognized from having interviewed them during the investigation. In a desk in defendant's bedroom, the detectives had found the high school transcript of [REDACTED], the teenaged victim who had dubbed herself

defendant's "number one girl"—having reportedly gone to his home regularly for sexual activity over the course of two full years, since the age of sixteen.

The detectives also recovered carbon copies of telephone messages left for defendant saying, "I have girls for him," and, "I have 2 girls for him"; [REDACTED] who had been named by virtually all the interviewed girls as defendant's assistant in the massage-mill operation, was listed on each of these particular messages as the person who had recorded it. Yet other messages listed names and numbers that the detectives recognized from the investigation.

Put simply, the information in the probable-cause affidavit certainly constituted the kind of "reliable" information upon which SORA findings are based. Given the detailed, sworn accounts of the victims, and the extraordinary amount of compelling evidence corroborating that dovetailing proof, the SORA court had every reason to rely on the victim-accounts when determining defendant's risk-level designation. Again, the sole purpose of the SORA registration and reporting requirements is the protection of the public from unlawful sexual conduct by an offender, and points may properly be assessed against an offender for any factor of which there is "clear and convincing evidence." With those governing principles in mind, the SORA court had ample basis to conclude that, as a general proposition, the victim-accounts set out in the probable cause affidavit provided reliable information about the level of risk that defendant posed.

### C.

Defendant's assertions notwithstanding, the People's remarks at the SORA hearing did nothing to diminish the propriety of the level-three risk designation. Again, the Board itself had recommended precisely that risk level. And, the court saw not only the Case Summary and resulting Risk Assessment Instrument calculations, but also the huge array of reliable information that had formed the basis of each individual point assessment. While the People expressed reservations about the suitability of certain portions of information for SORA purposes, the court correctly recognized that the People's arguments in that regard were based largely upon a simple misunderstanding of the governing legal standard, and otherwise on a combination of certain unreliable hearsay information and unfounded speculation which itself had roots in that same legal misunderstanding. Therefore, for the reasons set forth more particularly below, the SORA court acted well within its discretion when it chose to reject the arguments put forward by the People, and to adopt the well-supported recommendation of the SORA Board instead.

At the SORA hearing, the prosecutor informed the court, "[W]e don't believe that we can rely on the entire probable cause affidavit" (H: 2). When the court responded, "I don't know why you cannot rely on it," the prosecutor stated her reasons—namely, that, unlike in a "plea bargain" situation, the Florida prosecutor here "went forward" only on "one case," there was "an indictment for one victim," and "that is what the defendant pled to" (H2). The prosecutor stated her belief that,

“under the Board guidelines,” the lack of indictment for an offense “is strong evidence that the offense did not occur” (H2-3)(emphasis supplied).

Clearly, the prosecutor had simply misread the Guideline provision about the significance of the lack of indictment. As noted, the Guideline language on the subject is couched not in the absolute terms that the prosecutor used but rather in permissive ones. The rule to which the prosecutor referred provides that the lack of indictment for an offense “may be strong evidence that the offense did not occur.” Guidelines at 5 (emphasis supplied). The prosecutor, in contrast, characterized the text as reading “is strong evidence.” Certainly, the actual statutory phrasing “may be strong evidence” contemplates that there will, in fact, be circumstances where the lack of indictment does not carry any such negative connotation about the occurrence of the offense.

One obvious circumstance where the absence of indictment lacks probative value on the question of guilt is that of a plea bargain. The prosecutor believed that this case was unlike a situation where a plea bargain had taken place, because additional charges had not been indicted here before the plea. However, the experienced trial judge in this case knew that in some situations—and particularly ones where zealous private counsel are involved—negotiated plea compromises may sometimes be reached well before an indictment has been handed down, and sometimes may even stave off prosecution entirely.

In Johnson, as noted, this Court made the point about plea bargains very clearly. The Court upheld a SORA assessment on the forcible-compulsion factor despite the fact that the defendant had pleaded guilty to a single-count accusatory instrument charging him with statutory rape. The force assessment had been made on the basis of the victim's hearsay statement, as contained in the felony complaint, that force had been used in the commission of the crime. Clearly, in Johnson, this Court upheld the point-assessment on the theory that the defendant had likely been given the benefit of a plea bargain, and thus the conviction did not accurately represent the extent of his conduct in the case. The SORA court here, in turn, knew that the same scenario was likely in this case. Indeed, alluding to this commonsense idea, the court even asked the prosecutor straightforwardly, "Do you find that if somebody is not indicted it is strong evidence that it did not occur?" (H3).

Apart from her stated concern stemming from the mistake about the statute, the prosecutor also expressed a reluctance based upon what she believed had been a lack of "cooperation" on the part of the victims. As the below-quoted exchange shows, though, when the prosecutor first mentioned that additional reservation, the court was still grappling with the prosecutor's first stated concern.

From the court's perspective, since nothing was suspect about the victim-accounts, and there was so much other information as well—what the court called "everything here"—the court pressed the prosecutor on her position. The prosecutor went on to elaborate about what she believed to be a lack of "cooperation" on the

part of the victims, and the court questioned the prosecutor pointedly, establishing that the prosecutor simply lacked a reliable basis to conclude that there had been any such lack of cooperation. The prosecutor admitted that, since the Florida prosecutor who had handled the case had since “left the office,” she had merely spoken to the Florida prosecutor who “took over the case” (H5). The court characterized the prosecutor’s information as “hearsay,” and repeatedly urged the prosecutor to contact the Florida prosecutor who had actually handled the case (H5). Remarking that it had never seen the prosecutor’s office recommend what it termed a “downward argument” such as this, the court expressed its belief that the People had “done more in other cases looking into it,” and had not done “much of an investigation here” (H5-6).

Indeed, after its exchange with the prosecutor, the court correctly concluded that there was no reliable information indicating that the victims had failed to cooperate with the authorities. Again, the prosecutor had acknowledged that she had never even spoken to anyone with first-hand knowledge of the Florida case: she had not spoken to the Florida prosecutor who had handled the case, and there is no indication that she had spoken to any of the detectives who had dealt with the victims so extensively during the Palm Beach Police Department’s year-long investigation of these events. Instead, as the court pointed out, the prosecutor had relied on mere “hearsay” for the notion that the victims had not cooperated—unreliable hearsay, the court clearly meant, since it emphasized that the sole source of the prosecutor’s

information was one Florida prosecutor who had “taken over the case” after it had been resolved, and there was no logical reason to conclude that this take-over person was in a position to contribute anything whatsoever of value. Simply put, the court saw that, in contrast to the vast array of concrete reasons to credit the victim-accounts, the prosecutor’s hesitation was based on mere supposition and unfounded speculation.

Lastly, it is worth pointing out that, as the court also well knew from the record, even a reluctance on the victims’ part to cooperate with authorities would not necessarily have cast doubt on the truth of their accounts. Victims of sex crimes, and particularly child victims, commonly display an understandable reluctance to relive the traumatic ordeal of the crime, and sometimes they choose not to pursue the matter with the authorities. Indeed, the desire to protect a child sex-crimes victim from the ordeal of a public trial can lead a prosecutor to offer a favorable plea bargain even when the defendant’s guilt is entirely clear. Thus, whether or not these particular child sex-crime victims would have cooperated fully in an extended prosecution, their detailed, mutually-corroborative accounts—corroborated yet additionally by an extensive array of independent, reliable evidence—were properly considered for SORA purposes.

In short, while defendant has cast this as a situation where the People undertook their own independent “investigation” of the victim-accounts and determined that the accounts were unreliable, the record resoundingly defeats that

proposition. In reality, the prosecutor thought that the victim-accounts were automatically excluded from consideration by a legal rule, but it turns out that the legal interpretation was simply mistaken. The prosecutor also seems to have made some unwarranted factual leaps based upon information from an unreliable source. The SORA court understood that the combination of information provided by the Board provided more than the requisite “clear and convincing” reason to believe that defendant had preyed on the numerous victims in this case and thus posed a significant risk to the community. The court acted correctly, and certainly well within its discretion, when it concluded that the People’s stated concerns did not cast any meaningful doubt on the propriety of the Board’s recommendation.

#### **D.**

Nor is defendant persuasive when he contends that the court harbored a “personal distaste” for him, and allowed these “personal feelings” about him to influence the SORA determination (Brief for Defendant at 38-44). First of all, as noted, SORA appellate claims, like any others, must be preserved, and this one is not. At the hearing, defendant made no complaint whatsoever about a supposed lack of objectivity. And, defendant failed to advance a protest on this score because there simply was no meaningful complaint to be made on the subject. Indeed, defendant’s current baseless attack is simply a necessary part of his attempt to forum-shop, to enhance his chance of success if he succeeds in obtaining a remand. See infra at 55-

62. In the end, however, there is no merit whatsoever to defendant's attack on the SORA court, and his belated attempts in this regard must fail.

Significantly, defendant points to nothing that suggests there had been any personal contact or dealings between the court and him. In fact, since defendant chose not to attend the SORA hearing, the court may not have even met him. Rather, to support the current claim of supposed bias against him personally, defendant points merely to remarks made by the court during two isolated sections of the SORA hearing. Defendant's belated claims notwithstanding, though, there was nothing improper in those remarks, or any others for that matter.

For example, as noted, in one set of remarks that defendant now challenges (Brief for Defendant at 41-42), the court referred to a SORA determination that it had made in a different case—one involving a marine—to underscore its confusion about what seemed to be unexplained leniency on the part of the People here (H3-4). Since, in the court's view, the evidence of defendant's guilt was straightforward and compelling, and the crimes involved were numerous and serious, the court struggled with the fact that, in this particular case, the prosecutor was urging rejection of the Board's level-three finding. In a case where a marine had engaged in a consensual sexual relationship with a 17-year-old who had approached him in a bar, the court pointed out, the People vehemently insisted on a level-three finding. The court noted the sharp contrast between the People's position in that case and their position here.

As the above-discussed record shows, any “personal” disdain displayed by the court was directed at the prosecutor, not at defendant. The court’s decision to designate defendant a level-three offender was the product of its reasoned evaluation of the severity of the conduct that he had committed, and not any personal animus toward him.

Defendant’s other example of supposed personal bias against him is no more persuasive. At one point during the hearing, one of defendant’s attorneys tried to persuade the court that it would be unfair to impose level-three reporting requirements on defendant when all of the other states where defendant had homes had classified him in a less-severe fashion. Strict reporting requirements would be particularly inappropriate, counsel urged, since defendant spent so little time in New York in the first place. Defendant’s “primary residence is the U.S. Virgin Islands,” counsel urged; and, in addition to his home in New York, he maintained “vacation” homes in Florida and New Mexico as well (H6-7). For these reasons, counsel suggested, defendant “never comes to New York for more than seven days or at least he has not since he has been registered,” and “has no intention to ever be here for longer than a period of ten days” (H7-8). Defense counsel went so far as to protest that level-three registration requirements “actually would require him to come to New York more than he does normally” (H8). It was in response to that defense argument that the court remarked, “I am sorry that he may have to come here every 90 days. He can give up his home if he does want to come every 90 days” (H12). Plainly,

viewed in context, the now-challenged remarks by the court were not improper in any way, and they constituted a direct and appropriate response on the merits to an argument that had been made by defense counsel.

In short, defendant's attempts to discredit the objectivity of the SORA court have failed. If this Court were to determine that remand is appropriate to clarify some aspect of the SORA ruling, see infra at 55-62, the case should be heard by the judge who actually issued the ruling.

#### **E.**

Defendant's remaining complaints can be answered more quickly. As noted, defendant complains that the court rendered its ruling without affording the parties an opportunity to present evidence on disputed issues, and issued an order that lacked the requisite findings and conclusions. He also takes some passing swipes at the basis for a few of the individual point assessments. All of these complaints are unpreserved. More fundamentally, though, defendant's failure to protest along these lines yields an answer on the merits, as well, for the bulk of these current claims.

At the hearing, defendant primarily urged that, when assessing his risk-level, the court could properly consider only the criminal conduct that had resulted in the formal charges against him. Defendant also made some equitable pitches for leniency: he quoted the opinion of an individual Florida assistant state's attorney, cited his more modest reporting obligations in other states where he maintained similar "vacation"

homes, and portrayed his presence in New York as a decidedly minimal one. Defendant did not, however, take the position that, even if all the information before the SORA court were available for assessment, the risk-level calculation made by the Board would be unsustainable nonetheless. Likewise, defendant certainly did not tackle any of the individual point assessments that the Board had made on the basis of the full record before them. Instead, defendant's remarks about the risk level as calculated by the Board were limited to stating that he "joined in the prosecutor's application" (H8), that the Florida prosecutor had been able to present only one "case" to the grand jury (H9), and that "the evidence simply d[id] not support the foundation of the state's determination" (H15).

In keeping with his overarching legal position with respect to all of the conduct that was "uncharged," defendant most assuredly did not seek an opportunity to present any additional facts. Indeed, while defendant now protests the so-called lack of opportunity to "present evidence," it may be that there simply was no additional favorable evidence to be presented on his behalf. Whatever the reason, though, the result was plain: as a tactical matter, defendant chose to accept the factual universe as presented, and he used what was largely a legal approach to try to exclude the majority of that factual universe from consideration. Since the issues had been litigated in that manner, the SORA court cannot reasonably have been responsible for a lack of additional evidence on "contested" factual issues (Brief for Defendant at 30).

Again, there were no such contested factual issues, and that is undoubtedly why there was no request for an opportunity to introduce any additional proof.<sup>5</sup>

For much the same reasons, the SORA court's order cannot reasonably be viewed as deficient. Defendant now claims that the order lacked the requisite findings and legal conclusions (Brief for Defendant at 45-48). At the time the order was issued, though, defendant understandably saw no need to make that kind of protest. After all, as noted, none of the individual point assessments had been called into question. The court had rejected the notion—advanced by both defendant and the People—that the assessment had to be limited to the conduct formally charged. And there was no suggestion whatsoever, at any juncture of the hearing, that the totality of defendant's conduct, as set forth in the SORA materials, failed to support the point assessments as set forth in the Board's Risk Assessment Instrument.

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<sup>5</sup> In a related argument advanced in a footnote, defendant complains that he was denied his right to written notice of the People's intention to make a recommendation that differed from that of the Board; once the People had made their position known at the hearing, he further urges, the court should have "adjourned the matter to receive and review a written statement of the People's determination and supporting reasons" (Brief for Defendant at 39). Of course, had defendant voiced a need for additional time, the court certainly could have granted that request—thereby curing the purported problem about which defendant now complains. Defendant certainly should not be permitted to obtain relief on a basis that so easily could have been eliminated if he had only protested at the time.

It makes perfect sense, though, that defendant saw no need to cry surprise about the position taken by the People—both because his statements at the hearing indicated he was aware of that position in advance (H8-9), and more fundamentally because he simply did not need to prepare for arguments that were entirely favorable to him. Contrast People v. Ferguson, 53 A.D.3d 571 (2d Dept. 2008)(at the hearing, defendant objected to lack of notice of amendment to Risk Assessment Instrument).

Under these particular circumstances, the court’s dictated order—recounting the Board’s assessments one by one and endorsing them—more than amply explained the basis for its determination and thereby permit full appellate review. See People v. Smith, 75 A.D.3d 1112, 1112 (4th Dept. 2010)(SORA court’s oral findings of fact and conclusions of law were sufficient where they were “clear, supported by the record, and sufficiently detailed to permit intelligent appellate review”); People v. Belter, 84 A.D.3d 905, 906 (2d Dept. 2011)(“While a SORA determination should be supported by findings of fact, there is no need for a court to make gratuitous findings of fact with respect to issues that are entirely academic”); see generally Correction Law §168-n(3).

Indeed, defendant implicitly acknowledged as much at the hearing. After the court announced its determination to “rely on the board,” one of defendant’s attorneys declared that defendant “reserve[d] the right” to appeal; counsel then prompted the court, “For the purposes of appeal, I believe that Your Honor -- ” (H12-13). At that point, the court delivered its full decision (H13-14), and afterwards defendant did not complain that the form of the decision was deficient in any way. Instead, implicitly acknowledging that the order was entirely clear, defendant’s other attorney took the opportunity to make some additional remarks, essentially attempting to re-argue the merits of the court’s clear determination (H14-15).

Moreover, aside from the complete absence of preservation, there is no merit to any of defendant’s other complaints about the proceedings, including the

correctness of certain individual point assessments recommended by the Board and adopted by the court. For example, in a footnote, defendant refers to an “agreement” by “the parties” that defendant had not used forcible compulsion (Brief for Defendant at 42), but his record citation for that assertion reveals nothing more than the court’s assessment of points on the subject of force (H13). In fact, as noted, the materials set out in excruciating detail how, with one teenage victim, defendant responded to her stated refusal of vaginal penetration by “grabb[ing]” her, turning her over on her stomach, and holding her head down “forcibly” as he inserted his penis into her vagina and repeatedly “pump[ed]” his penis into her (A17). That defendant later apologized, and gave her \$1,000 in cash (A17) did not erase his use of forcible compulsion, and did not make that conduct other than a forcible rape—which, of course, was a crime no matter what her age, and no matter what her geographical location within the United States at the time. The Board recognized that obvious fact when it labeled the conduct as such on the first page of its Case Summary.<sup>6</sup>

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<sup>6</sup> At one point, when trying to minimize the nature of the conduct at issue, defense counsel urged that “[a]ll of the alleged conduct” that was “cited in the board’s write up” was “commercial conduct” (H9). As counsel explained, “All of the alleged conduct the women went voluntarily, there are no allegations of force certainly none” (H9). Plainly, that particular reference to the absence of force did not preserve his current claim on the subject. After all, these references to the girls having made the trip to defendant’s home voluntarily, in return for payment, cannot reasonably have alerted the SORA court to his current suggestion that the point assessment for forcible compulsion was unwarranted because none of the particular sex acts alleged to have been committed by defendant once in that house had been inflicted on a victim in a forcible manner. Certainly, these hearing remarks about the mere “commercial” and “voluntary” nature of the overall arrangement were not directed  
(Continued...)

In a different footnote, defendant complains that the Board assessed five points against him in the category of Criminal History despite its notation in the Case Summary that it had done so “absent specific information” (Brief for Defendant at 8). In fact, on the same page of the Case Summary, the Board also states that defendant had been convicted of Unlawful Possession of an Offensive Weapon, a misdemeanor, in England, stemming from his possession of a cane that contained a concealed blade (A65). Read in the context that the Risk Assessment Instrument itself provides, the notation “absent specific information” plainly was meant to explain why the Board had chosen to award the lowest point assessment permissible for that criminal conduct, rather than one of the higher ones mandated in the presence of certain listed aggravating factors. In other words, “absent specific information” about defendant’s weapons-possession conviction, the Board gave him the benefit of the doubt and did not award yet additional points.

As to the age-of-victim factor, in turn, defendant’s belated suggestions notwithstanding (Brief for Defendant at 36-38), the SORA court was well aware that defendant sometimes received “massages” from girls who were 18 years or older. The probable cause affidavit explicitly stated that certain people initially viewed as “victims” turned out to be 18 years of age or older and therefore were “consenting

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specifically at the point assessment that had been made in the category of “forcible compulsion.”

adults” under the law (A25-26). The affidavit further clarified, though, that these “adults” had recounted the “same massage routine” as had the underage girls (A25), and therefore the court, like the detectives who had conducted the investigation, recognized that the “adult” accounts provided valuable corroboration of the accounts given by the underage victims. Of course, more to the point for risk-assessment purposes, the court also knew from the record that the occasional adult “masseuse” did nothing to minimize the compelling evidence of demonstrated preference for young high school girls—“the younger the better,” as defendant himself instructed one of his high school recruiter-pimps.

One final note on the subject of point assessments. As defendant concedes (Brief for Defendant at 10), he was given credit for having accepted responsibility for his actions by pleading guilty. If the Board had taken the view that defendant now espouses—that his guilty plea reflected nothing more than his conduct with one 17-year-old victim—the point-assessment total would be even higher than the one defendant has now.

Plainly, then, defendant has provided no legitimate reason for this Court to doubt the propriety of the determination made by the SORA court. Therefore, defendant’s request for a recalculation of his risk level must be denied. Nevertheless, it bears mention that this Court would not be proper venue for any such recalculation in any event. As noted, defendant seeks recalculation on the basis of a myriad of arguments that are being made for the first time on appeal. The SORA court, thus,

was not given an opportunity to consider these arguments when fashioning its determination. The People, too, were not given an opportunity to present additional evidence on these newly-minted theories, if they so chose. If this Court were inclined to grant defendant's request for recalculation, the Court should remand the case for that purpose to the SORA court, where the People will have an opportunity to introduce additional evidence as well.<sup>7</sup>

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<sup>7</sup> If this Court chooses to remand the case for additional proceedings—either for the “re-calculation” of points that defendant seeks, or the opportunity that he seeks for “the parties to present evidence”—the People will have an opportunity to correct any misimpressions left by defendant, and to provide instead a complete and accurate picture of the circumstances that gave rise to the two single-count accusatory instruments dated fully two years apart.

The People's evidence on remand would include proof that defendant had engaged in aggressive negotiations with the Palm Beach State's Attorney's Office even before indictment; that, after the State's Attorney's Office obtained a single-count indictment, Florida federal authorities convened their own grand jury investigation; and that defendant entered into a federal non-prosecution agreement with the United States Attorney of the Southern District of Florida, under which he agreed to plead guilty to an additional state felony charge that carried a consecutive jail sentence and required registration as a sex offender.

While a defendant hardly could have a legitimate objection to an accurate portrayal of the facts and circumstances relevant to the SORA determination that he has challenged, defendant here would be particularly hard-pressed to complain on that score since his unpreserved entreaties for recalculation, as well as remand, call upon this Court to reach out in the interest of justice.

In sum, the decision of the SORA court is absolutely correct. There is no legitimate basis for complaint about either the form or content of that determination.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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