

To be Argued By:  
JAY P. LEFKOWITZ

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# New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

—against—

JEFFREY E. EPSTEIN,

*Defendant-Appellant.*

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## BRIEF FOR DEFENDANT-APPELLANT

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JAY P. LEFKOWITZ  
SANDRA LYNN MUSUMECI  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, New York 10022

jay.lefkowitz@kirkland.com  
sandra.musumeci@kirkland.com

*Attorneys for Defendant-Appellant*

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## PRELIMINARY STATEMENT

Appellant Jeffrey E. Epstein seeks to vacate the final decision and order of the New York Supreme Court, Criminal Term, New York County, determining him to be a Level 3 sex offender, without designation, under New York's Sexual Offender Registration Act (SORA), Correction Law Article 6-C, based on a 2008 Florida conviction by plea of guilty to Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03, and Felony Solicitation of Prostitution, Fla. Stat. § 796.07(2)(f), for which Appellant was sentenced to consecutive terms of 12 months and 6 months incarceration, followed by 12 months of Community Control. (Pickholz, J. at SORA hearing). Appellant seeks to vacate the Order because the Court's risk level determination was not supported by clear and convincing evidence, was based on improper considerations, and was made without affording the parties an opportunity to present evidence concerning disputed relevant issues. More specifically, in making its determination, the Court summarily adopted the recommendation of the Board of Examiners of Sex Offenders (the "Board"), notwithstanding the position of the District Attorney's Office that the Board's recommendation was legally infirm

and not supported by provable evidence. Additionally, the Court issued a facially defective Order that fails to set forth findings of fact and conclusions of law, as required by law. Accordingly, the Order determining Appellant to be a Level 3 offender should be vacated, and Appellant's risk level should be recalculated based solely on those factors that may be properly considered under SORA and which are proven by clear and convincing evidence.

### **QUESTIONS PRESENTED**

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

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

3. In calculating Appellant's risk level under SORA, may the Court score points for consensual prostitution-related conduct involving

women who were seventeen years of age or over, particularly where SORA provides that such conduct is only registerable where the person patronized “is in fact less than seventeen years of age,” Correction Law § 168-a(2)(a)(i)?

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

### **STATEMENT OF FACTS**

Defendant-Appellant Jeffrey E. Epstein is a 58-year old financial advisor and philanthropist whose primary residence is in the U.S. Virgin Islands and who also maintains vacation properties in New York and Florida. *See* A.53 (Letter of M. Weinberg of Aug. 16, 2010).<sup>1</sup> Appellant does not live in New York, and since the commission of the Florida offense that forms the basis of this matter, he has not stayed at his New York property for periods of ten days or more at a time. *See* A.53 (Letter of M. Weinberg of Aug. 16, 2010); A.87:21-25, 88:21-89:3\_(Tr.).<sup>2</sup>

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<sup>1</sup> References to the Record on appeal are denoted herein as “A.” followed by the applicable Appendix number.

<sup>2</sup> References to the transcript of the January 18, 2011 SORA hearing are denoted herein as “Tr.” followed by the applicable page and line citation.

## **I. The Underlying Offense**

On June 30, 2008, Appellant pleaded guilty in the Circuit Court for Palm Beach County, Florida under an Information to the charge of Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03, an offense which required him to register under Florida's sexual offender registration statute, Fla. Stat. § 943.0435. *See* A.31 (Information for Procuring Person Under 18 for Prostitution, dated June 26, 2008); A.32 (Guilty Plea, dated June 30, 2008). This single registerable charge was brought in connection with a consensual, commercial arrangement in which Appellant received massages and engaged in sexual conduct with █████ a young woman who was over the age of consent under New York law but just under 18 when the offense in the Information occurred back in 2005. *See* A.53 (Letter from M. Weinberg, dated Aug. 16, 2010, at 1, 3). Appellant concurrently pleaded guilty to an Indictment charging him with one count of Felony Solicitation for Prostitution, Fla. Stat. §§ 796.07(2)(f), (4)(c) -- a solicitation offense which does not include any elements of sexual contact with underage women and which is not registerable under either Florida or New York law. *See* A.26 (2006 Grand Jury Indictment of Felony Solicitation of Prostitution); A.32

(Guilty Plea, dated June 30, 2008); Fla. Stat. § 943.0435; Correction Law § 168-a(2)(a). Despite an extensive investigation by Florida prosecutors regarding various other complaints alleged against him and reported in police paperwork, Appellant was never charged with any other crimes or prosecuted on allegations made by any other complainants. *See* A.26 (2006 Grand Jury Indictment of Felony Solicitation of Prostitution); A.31 (Information for Procuring Person Under 18 for Prostitution, dated June 26, 2008); A.83:23-84:6, 85:19-86:1, 90:16-91:15, 95:14-18 (Tr.).

As a result of his two concurrent Florida convictions -- the first and only criminal convictions of his life -- Appellant was sentenced to consecutive terms of 12 months and 6 months incarceration in a Palm Beach County Detention Facility, followed by 12 months of Community Control supervision. *See* A.32 (Guilty Plea, dated June 30, 2008); A.34 (Sentence, dated Jun. 30, 2008). Appellant satisfactorily served 13 months of incarceration (during which time he was granted permission to participate in the Sheriff's work release program) and completed a subsequent period of 12 months Community Control (during which the Court trusted him, for business purposes, to travel outside of Florida

with prior notice and approval by his supervising probation officer) without incident. See A.49 (Letter from Florida Department of Corrections, dated Jul. 21, 2010); A.50 (Letter from Palm Beach Sheriff's Office, dated Aug. 12, 2010); A.51 (Letter from J. Goldberger, dated Aug. 12, 2010); A.48 (Order Granting Motion for Travel, dated Dec. 18, 2009); A.53 (Letter from M. Weinberg, dated Aug. 16, 2010, at 4). Appellant has had no subsequent instances of misconduct of any kind. See A.53 (Letter from M. Weinberg, dated Aug. 16, 2010, at 1).

## **II. Sex Offender Registration**

As required under Florida law in connection with his conviction for Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03, Appellant registered as a sex offender with Florida authorities and was designated at the *lowest* level under that state's sex offender registration act. See A.88:6-15 (Tr.); see also A.51 (Letter from J. Goldberger, dated Aug. 12, 2010); Fla. Stat. §§ 775.21, 943.0435. Appellant also registered in his home jurisdiction of the U.S. Virgin Islands (where Appellant maintains his primary residence and actually lives), where authorities reviewed Appellant's Florida offenses and

determined that he is only subject to that jurisdiction's *lowest reporting obligations*. See A.88:1-5 (Tr.); see also 14 V.I.C. §§ 1722(b), 1724(d), (e).

Although he does not actually reside in New York, before the completion of his term of Community Control, Appellant notified the New York State Division of Criminal Justice Services ("the Division") of his registerable Florida conviction and his ownership of a secondary residence in New York. See A.88:21-24 (Tr.). Since May 2010, Appellant has been registered with the Sexual Offender Monitoring Unit (SOMU) of the New York Police Department. See A.88:21-89:3 (Tr.).

### **III. The Board's Recommendation**

On or about August 26, 2010, Appellant received notice that a SORA hearing had been scheduled to determine a risk assessment level, accompanied by a copy of the recommendation of the Board. See A.67 (Letter from Supreme Court, dated Aug. 26, 2010); A.65 (Recommendation of Board of Examiners of Sex Offenders ("Board Recommendation").). In stark contrast to the other jurisdictions to have considered Appellant's Florida convictions (including Florida), the Board recommended that Appellant be assigned the highest risk level --

Level 3, representing a high risk of repeat offense -- without further designation.<sup>3</sup> See A.67 (Letter from Supreme Court, dated Aug. 26, 2010); A.65 (Board Recommendation); see also Correction Law § 168-1(6)(c).

The Board's recommendation included a Risk Assessment Instrument (RAI) that improperly calculated a total risk factor score of 130. See A.65 (Board Recommendation). Almost all of the points scored by the Board were based on "Current Offense" factors,<sup>4</sup> including: 10 points for "Use of Violence" (forcible compulsion); 25 points for "Sexual Contact with Victim" (sexual intercourse and deviate sexual intercourse); 30 points for "Number of Victims" (3 or more); 20 points for "Duration of Offense Conduct with Victim" (continuing course of sexual misconduct); and 20 points for "Age of Victim" (11 through 16). See A.65 (Board Recommendation). The Board's RAI did not assign Appellant

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

<sup>4</sup> The Board also assessed Appellant 5 points for "Criminal History," even though the Board itself noted that it was assessing points "absent specific information." See A.65 (Board Recommendation). Appellant submits that this scoring is unsupported by the Record.

any points under the “Post-Offense Behavior” and “Release Environment” categories. *See* A.65 (Board Recommendation).

In its “Case Summary,” the Board noted that Appellant was convicted of just two Florida sex offenses: (1) Procuring a Person Under 18 for Prostitution, and (2) Felony Solicitation of Prostitution.<sup>5</sup> *See* A.65 (Board Recommendation). The Board then aggregated into just over a single page a host of uncharged allegations made by “numerous females,” including “female participants [who] were age 18 or older,” regarding “massages and unlawful sexual activity” that allegedly took place at Appellant’s Florida residence. *See* A.65 (Board Recommendation). The case summary referred to “vaginal intercourse” and various other forms of sexual contact allegedly taking place without connecting specific females to such allegations, and more significantly, without identifying the age of the participants -- some of whom the Board noted were “age 18 or older” -- specifically at the time of such

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<sup>5</sup> Only one of these charges -- the procurement charge -- is registerable under SORA, and that charge is registerable under SORA only because it is registerable in Florida. *See* Correction Law § 168-a(2)(d)(ii). (Notably, the New York cognate of this offense, Promoting Prostitution in the Third Degree, N.Y. Penal Law § 230.25, is not itself a registerable offense under SORA. *See* Correction Law § 168-a(2).) The charge of Felony Solicitation of Prostitution, Fla. Stat. § 796.07(2)(f), (4)(c) -- which does not include any age-related elements and pertains solely to consensual, commercial conduct -- is not a registerable offense under either Florida or New York law. *See* Fla. Stat. § 943.0435; Correction Law § 168-a(2)(a).

alleged conduct. *See* A.65 (Board Recommendation). Although Appellant was only convicted of two prostitution-related offenses and was neither charged with nor convicted of any rape, sexual abuse, or violent offenses,<sup>6</sup> the case summary highlighted hearsay-based claims in police paperwork -- namely a probable cause affidavit signed by a Palm Beach Police detective that did not result in any of the charges sought -- involving alleged sexual abuse of underage girls and an alleged forcible rape (which claims were found by the Florida prosecutors to be unreliable to support charges against Appellant), and assessed points against Appellant based on these unprosecuted allegations. *See* A.65 (Board Recommendation).

The Board recognized Appellant's conduct on Community Control as satisfactory and noted that he has no history of substance abuse. *See* A.65 (Board Recommendation). The Board also credited Appellant with accepting responsibility for his actions. *See* A.65 (Board Recommendation).

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<sup>6</sup> The only registerable charge for which Appellant was prosecuted and convicted pertained to consensual, commercial, non-violent interaction with one woman, A.D., who was 17 years old (and therefore over the age of consent in New York but not in Florida) at the time of the relevant conduct. *See* A.31 (Information for Procuring Person Under 18 for Prostitution, dated June 26, 2008); A.53 (Letter of M. Weinberg of Aug. 16, 2010, at 1, 3); A.91:20-92:7 (Tr.).

#### **IV. Pre-Hearing Investigation By the District Attorney**

The SORA hearing, originally scheduled for September 15, 2010, was adjourned on consent of the parties until January 18, 2011 to provide the New York District Attorney (“the People”), which represented the State of New York at the SORA hearing, an opportunity to investigate Appellant’s Florida convictions and assess the validity of the Board’s recommendation. *See* A.81 (Handwritten Notations on Court Jacket); A.89:22-90:8 (Tr.). As part of their investigation, the People were in contact with members of the Palm Beach County State’s Attorney’s Office to understand the investigation and prosecution of the allegations at issue in this SORA matter. *See* A.83:14-84:19 (Tr.). Based on these interactions with Florida prosecutors, the People determined that they could not rely on the Board’s recommendation and the underlying probable cause affidavit (which the Florida prosecutors determined not to be reliable, and which therefore certainly could not satisfy the heightened standard of clear and convincing evidence), and would score Appellant based only on the conduct for which he was actually prosecuted, and not on the

unprosecuted allegations in the probable cause affidavit cited by the Board. *See* A.83:14-84:19 (Tr.).

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

## **V. SORA Hearing**

On January 18, 2011, a SORA hearing was conducted in New York Supreme Court, Criminal Term, New York County, Part 66 before Hon. Ruth Pickholz. *See* A.81 (Handwritten Notations on Court Jacket); A.82 (Tr. *generally*). At the hearing, the People made a record that based on their investigation and contact with the Florida authorities who handled Appellant's prosecution, the probable cause affidavit underlying the Board's recommendation could not be relied upon. *See* A.83:14-18 (Tr.). Specifically, the People informed the Court that many of the women referenced as complainants in the police

affidavit were not cooperative with Florida prosecutors, and accordingly, the Florida authorities chose not to prosecute any allegations other than those reflected by the two offenses to which Appellant ultimately pleaded guilty. *See* A.84:2-6, 14-19 (Tr.). The People further noted that in light of Florida's decision not to prosecute the majority of the allegations in the affidavit, (and under the SORA statute and guidelines), only the conduct pertaining to the sole registerable crime for which Appellant was charged and to which he pleaded -- Procuring a Person Under 18 for Prostitution, involving a single complainant -- could be proven and should be considered in evaluating Appellant's SORA score. *See* A.85:11-16, 85:24-86:1 (Tr.).

Counsel for Appellant corroborated the record made by the People that the Florida Assistant State Attorney who prosecuted Appellant determined, after a full investigation, that there were "no victims" and that the only crime that could be presented to the grand jury was the single solicitation offense to which Appellant pleaded guilty. *See* A.89:22-90:21, 95:12-18 (Tr.). Appellant disputed many of the allegations contained in the Board's case summary, both with respect to specific facts (such as the suggestion of any forcible compulsion and the

exact age of complainant A.D. at the time of specific conduct) and more broadly by noting that the Board's recommendation was based on police documentation that was not credible and that contained hearsay allegations that the lead sex crimes prosecutor in Florida decided not to prosecute. *See* A.90:9-12, 92:13-21, 95:12-18 (Tr.). Further, Appellant advised the Court that there was sworn testimony from many of the women referenced in the police paperwork and the Board's case summary which expressly disclaimed allegations attributed to them. *See* A.95:19-23 (Tr.).

Notwithstanding the clear record that facts underlying the Board's recommendation were disputed, the Court announced that it was relying on the Board's case summary and adopting the Board's calculation and recommendation in full. *See* A.93:21, 94:6-95:9 (Tr.). The Court did not conduct any factual hearing as to specific claims for which points were assessed. *See* A.82 (Tr. *generally*). The Court scored Appellant for factors such as number of victims, use of violence / forcible compulsion, duration of offense, and sexual intercourse, based on allegations that the People -- as the party bearing the burden of proof -- asserted on the record could not be supported by clear and convincing

evidence. *See* A.94:7-95:9 (Tr.). Despite the legal and factual position of the People that the Board's recommendation could not be relied on and that allegations concerning all complainants but the one in the Information could not be proven, the Court ruled that it was relying on the Board's recommendation in full and adjudicating Appellant a Level 3 sex offender with no additional designation. *See* A.93:21, 93:25-94:3 (Tr.).

On the record, the Court recited the scoring of the Board in abbreviated form, without identifying any particular facts or allegations to support each factor. *See* A.94:6-95:9 (Tr.). In its written Order, the Court indicated a final risk level determination of Level 3 by merely circling a pre-printed form. *See* A.4 (Order Appealed From, dated Jan. 18, 2011). The Court failed to articulate any findings of fact or conclusions of law, as required under SORA. *See* A.4 (Order Appealed From, dated Jan. 18, 2011); A.82 (Tr. *generally*).

Appellant was served with a copy of the Court's Order on or about January 19, 2011. *See* A.78 (Letter from Supreme Court, dated Jan. 19, 2011). Appellant served a Notice of Entry of the Court's Order on February 9, 2011, and on the same day filed a Notice of Appeal to

invoke this Court's jurisdiction. See A.4 (Order of Appealed From, dated Jan. 18, 2011, with Notice of Entry); A.3 (Appellant's Notice of Appeal, dated Feb. 9, 2011). Appellant now respectfully files this appeal as of right, pursuant to Correction Law §§ 168-k(2), 168-n(2) and CPLR 5513, 5515, to vacate the legally erroneous and factually unsupportable Order and re-calculate Appellant's SORA risk level based solely on those factors that may properly be considered under SORA and that have been proven by clear and convincing evidence.<sup>7</sup>

### ARGUMENT

The Court's reliance on allegations that were flatly rejected by the Florida prosecutors who investigated them and which, by the People's own admission, could not be proven by clear and convincing evidence, constitutes clear legal error and a violation of Appellant's due process rights, warranting vacatur of the Court's Order. Specifically, the Court calculated a risk assessment score based on untrustworthy double and

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<sup>7</sup> Appellant asks this Court to render its own findings of fact and conclusions of law -- assigning a risk Level 1 -- based on an appropriate consideration of the undisputed facts in the Record proven by clear and convincing evidence concerning Appellant's conviction. To the extent this Court is unable to issue findings of fact and conclusions of law based on the present Record, Appellant seeks remand to the lower court before a different Justice for a recalculation in which the parties are afforded an opportunity to present evidence regarding contested relevant issues, if necessary. See Section II(B), *infra*.

triple hearsay allegations cited in the Board's recommendation that were squarely rejected as a basis for state prosecution in Florida, were disputed by Appellant, and did not constitute registerable conduct under New York law, all in violation of SORA and its guidelines and Appellant's constitutionally guaranteed right to due process. Moreover, the Court abused its discretion and failed to abide by the guidelines and mandates set forth in SORA, including by improperly considering factors outside the record and issuing a legally deficient Order that fails to set forth the findings of fact and conclusions of law on which the Court's determination was based.

**I. THE COURT'S LEVEL 3 DETERMINATION IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY SORA AND AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.**

The SORA statute sets forth a formal procedure to determine the required level of notification for those individuals convicted of a qualifying out-of-state offense,<sup>8</sup> based on a systematic assessment of the risk of reoffense posed by the particular individual. *See* Correction Law § 168-k. After the Board generates an initial recommendation based on

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<sup>8</sup> Appellant's Florida conviction for Procuring a Person Under 18 for Prostitution is a qualifying "sex offense" under SORA solely pursuant to Correction Law § 168-a(2)(d)(ii), which makes an out-of-state offense registerable under SORA if that particular offense is registerable in the jurisdiction where it was committed.

its review of the out-of-state offense and other factors, the Court has the duty of conducting a hearing to consider the Board's recommendation and other evidence presented in order to reach its own independent determination of an offender's SORA registration level. *See* Correction Law §§ 168-k(2), 168-n(2); *People v. Johnson*, 11 N.Y.3d 416, 421 (2008) (holding that "the Board's duty is to make a recommendation to the sentencing court... and the court, applying a clear and convincing evidence standard, is to make its determination after considering that recommendation, and any other materials properly before it") (internal statutory citation omitted); *see also New York State Bd. of Sex Exam'rs v. Ransom*, 249 A.D.2d 891, 891-92 (4th Dep't 1998) (holding the "Board ... serves only in an advisory capacity ... similar to the role served by a probation department in submitting a sentencing recommendation."); *see also People v. Jimenez*, 178 Misc. 2d 319, 322-23, 679 N.Y.S.2d 510, 513 (Sup. Ct. Kings Cty. 1998) (observing "the Legislature did not intend to place upon the criminal courts of this State a burden to act merely as a regulatory body to confirm the determination of the Board," and noting that a SORA hearing is a "judicial proceeding in which the court must make a *de novo* determination."). Yet the Court's authority

to determine a SORA risk level is not unfettered; instead, SORA requires the Court to determine an offender's risk level based on an evaluation of evidence in accordance with the guidelines promulgated by the Board. *See* Correction Law §§ 168-k(2), 168-n(2) (“It shall be the duty of the court applying the guidelines established [by the Board under SORA] to determine the level of notification....”). Moreover, the Court's determination must be wholly based on facts that are provable by *clear and convincing evidence*. *See* Correction Law §§ 168-k(2), 168-n(2).

Under New York law, “clear and convincing evidence” is defined as evidence that makes it “‘highly probable’ that the alleged activity actually occurred.” *People v. Dominie*, 42 A.D.3d 589, 590 (3d Dep’t 2007); *see also Prince, Richardson on Evidence* § 3-205, at 104 (Farrell 11th ed.). Clear and convincing evidence is “a higher, more demanding standard” than the preponderance standard, *Rossi v. Hartford Fire Ins. Co.*, 103 A.D.2d 771, 771 (2d Dep’t 1984), in that it is evidence “that is neither equivocal nor open to opposing presumptions.” *Solomon v. State of New York*, 146 A.D.2d 439, 440 (1st Dep’t 1989). Under SORA, the “burden of proving the facts supporting the determinations sought by

clear and convincing evidence” is assigned to the District Attorney, which represents the State in the proceeding. Correction Law §§ 168-k(2), 168-n(2).

In the instant case, the Court did not conduct its own inquiry of relevant facts to determine Appellant’s risk level in accordance with the SORA guidelines. Instead, as described further below, the Court improperly adopted a Board recommendation that had been rejected by both the People and Appellant as unreliable. Without any meaningful consideration of other evidence, the Court made its risk assessment determination based on allegations that did not -- and indeed could not, as a matter of law -- constitute clear and convincing evidence. Such a determination was made in contravention of SORA and its guidelines and violated Appellant’s federal due process rights under the U.S. Constitution. For these reasons, the Court’s determination should be vacated.

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

The People began the SORA hearing by advising the Court that their own investigation and communications with the Florida State

Attorney's Office that handled Appellant's case revealed that the majority of allegations in the Board's recommendation (and in the police affidavit on which the recommendation was based<sup>9</sup>) were not prosecuted by Florida authorities and could not be proven by other evidence. *See* A.83:14-84:19 (Tr.). In relevant part, the People made the following record:

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

A.85:19-86:1 (Tr.). As explained by the People, Appellant's Florida case was not one where a host of allegations were encompassed within a plea deal, but rather, the only charges that were determined to be

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<sup>9</sup> It bears noting that the police affidavit upon which the Board based its case summary and recommendation appears not even to have been drafted to sustain charges against Appellant, but instead, recited numerous allegations based on double and triple hearsay directed toward filing charges against a defendant named [REDACTED]. *See* A.6 (Palm Beach Police Department - Probable Cause Affidavit of J. Recarey, dated May 1, 2006). Furthermore, the Florida State Attorney expressly rejected the claims asserted in the police affidavit (which sought to charge [REDACTED] as an accomplice to Appellant) by determining that there was not sufficient probable cause and *not* charging Appellant with the serious second-degree felony offenses which the affidavit sought to support, to wit, Unlawful Sexual Activity with a Minor, Fla. Stat. § 794.05(1), and Lewd and Lascivious Molestation, Fla. Stat. § 800.04(5).

prosecutable were the charges for which Appellant was ultimately convicted:

So it is unlike a situation where everything was indicted and then we get to sort of assess points for all of the victims, if it was part of a plea bargain. They did not actually choose to go forward on any except for the one victim.

A.84:2-6 (Tr.). Given this history, the People advised the Court that it should depart from the Board's recommendation, both as a matter of fact and as a matter of law, in accordance with the SORA guidelines. See A.83:14-84:19, 85:11-16, 87:10-12 (Tr.).

The SORA guidelines are intended to provide clear guidance to the Court and the parties with respect to how various potential risk factors should be evaluated, including allegations that have not been prosecuted. While, in general, conduct not directly encompassed by the crime of conviction may be considered in scoring for given factors on the RAI, the SORA guidelines deem, "Points should not be assessed for a factor... unless there is *clear and convincing evidence* of the existence of that factor." *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7 (emphasis added). Indeed, in deciding how to evaluate allegations outside of the crime of

conviction, the SORA guidelines expressly caution, “the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred.” *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7. More to the point here, the guidelines emphasize, “[T]he fact that an offender was *not* indicted for an offense may be strong evidence that the offense did not occur,” amplified with a relevant example:

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

*Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7 (emphasis in original, internal statutory citations omitted ).<sup>10</sup>

In other words, SORA and its guidelines clearly prescribe that where allegations were reported to and investigated by law enforcement but not prosecuted (and not encompassed within a broader plea

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<sup>10</sup> Of note, at one point during the SORA proceeding, the Court seemingly dismissed out of hand the SORA guidelines concerning uncharged allegations. *See* A.84:7-13 (Tr.) (Court expressing skepticism toward the Board’s guidelines that “if somebody is not indicted it is strong evidence that it did not occur.”).

bargain), they should not be scored on the RAI or factored into a risk determination in the absence of other evidence to corroborate their validity. See *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7; see also *People v. Smith*, 66 A.D.3d 981, 983 (2d Dep't 2009) (holding that defendant's alleged use of knife was not proven by clear and convincing evidence and could not be scored against defendant in SORA hearing where testimony about use of knife was presented to grand jury but grand jury did not indict on weapons charge); *People v. Coffey*, 45 A.D.3d 658 (2d Dep't 2007) (holding that it was improper for court to consider allegations concerning a charge that was dismissed in evaluating defendant's SORA risk level); *People v. Arotin*, 19 A.D.3d 845 (3d Dep't 2005) (holding that defendant could not be scored under SORA for deviate sexual intercourse where defendant was not indicted for such an offense and the only evidence of such conduct came from triple hearsay in a police report used by the Board).

Significantly, here, the People did not merely apply the SORA guideline suggesting that uncharged allegations may not be reliable evidence of an offense. Instead, the People had actual information from

the Florida State Attorney's Office that the complainants referenced by the Board in connection with uncharged claims were not cooperative with authorities, prompting the Florida State Attorney's Office to decide not to pursue charges in connection with those unsupported allegations. *See* A.84:14-19, 85:19-86:1, 86:10-12 (Tr.). Moreover, the People acknowledged that they had no corroborating materials -- such as interview notes, sworn statements, or affidavits -- which would permit them to meet their burden of proving disputed allegations by clear and convincing evidence. *See* A.84:14-19, 85:19-86:1, 86:10-12 (Tr.). As a result, the People advanced the position that the law compelled they take -- advising the Court that the Board's recommendation was wrong and that a Level 3 determination was not supported by the provable evidence.

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

Notwithstanding the reasoned, evidence-based disavowal by the People of the Board's recommendation (based on the People's communications with the Florida prosecutor), the SORA Court relied wholesale upon the Board's recommendation. *See* A.93:21, 94:6-95:9

(Tr.). The Court improperly overlooked the burden of proof statutorily imposed on the People and its own duty to evaluate the evidence, and adopted the Board's recommendation, seemingly as a *per se* matter. See A.85:11-18 (Tr.) (the Court opining, without factual basis, that the Board "obviously took [their own guidelines] into consideration" when assessing points for uncharged conduct). Indeed, although the Court cited no specific information to suggest that the Board itself communicated with Florida prosecutors in preparing the case summary, the Court attempted to justify its blind reliance on the Board's recommendation by stating, "I feel the board looked into all of this, made their recommendation, found him to have 130 points and I see no reason to disturb that." A.96:11-13 (Tr.).

While the Court of Appeals has recognized that a Board-generated case summary may constitute "reliable hearsay" upon which the Court may base a SORA risk calculation, the law is equally clear that a Board's case summary is not *per se* reliable, particularly in the face of countervailing evidence. See *People v. Mingo*, 12 N.Y.3d 563, 572-73, (2009) ("Of course, information found in a case summary ... need not always be credited -- it may be rejected when it is unduly speculative or

its accuracy is undermined by other more compelling evidence”); *see also* *People v. Mabee*, 69 A.D.3d 820 (2d Dep’t 2010) (finding Board’s case summary did not constitute clear and convincing evidence to support scoring under SORA where it provided only very limited information pertaining to the particular factor). Indeed, information contained in a Board’s case summary does not by itself clear the hurdle of “clear and convincing evidence” -- a higher standard than mere “reliable evidence” -- where the offender disputes the relevant contents of that evidence. *See People v. Judson*, 50 A.D.3d 1242 (3d Dep’t 2008) (holding that case summary alone could not satisfy state’s burden of proving factors by clear and convincing evidence to support level 3 determination where defendant contested certain factual allegations related to those factors); *cf. People v. Wasley*, 73 A.D.3d 1400, 1401 (3d Dep’t 2010) (holding “evidence included in the case summary may provide clear and convincing evidence in determining a defendant’s risk assessment level *where defendant did not dispute its contents insofar as relevant.*”) (emphasis added); *People v. Curthoys*, 77 A.D.3d 1215, 1216 (3d Dep’t 2010) (noting that the “*uncontested* contents of a case summary can satisfy the People’s burden of demonstrating . . . clear and convincing

evidence”) (emphasis added). Thus, it certainly follows that a Board’s case summary cannot, as a matter of law, constitute the sole requisite “clear and convincing evidence” required to support a SORA determination where the People, as the party representing the Board, also expressly disclaim the reliability of that case summary.

Here, the Board’s case summary was based almost entirely on double and triple hearsay allegations described in an affidavit submitted by police to the Florida prosecutor. See A.65 (Board Recommendation); A.6 (Palm Beach Police Department - Probable Cause Affidavit of J. Recarey, dated May 1, 2006). The allegations, even when aggregated, were not deemed by the Florida prosecutor who reviewed them to constitute sufficient “probable cause” to warrant the return of a complaint, information, or indictment as to any of the charges that the affidavit sought.<sup>11</sup> And, of course, because the requested charges were never brought, no court ever reviewed or authorized the affidavit’s allegations to make a judicial finding of “probable cause” as to any such allegations. Even had the Florida

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<sup>11</sup> Although the affidavit considered by the Board was submitted with respect to a defendant other than Appellant, it appears that the allegations in the affidavit were intended to establish probable cause to charge Appellant with Unlawful Sexual Activity with a Minor, Fla. Stat. § 794.05(1), and Lewd and Lascivious Molestation, Fla. Stat. § 800.04(5) -- charges that were never brought.

prosecutor decided to arrest and charge Appellant based on allegations contained in the affidavit, the mere fact of an arrest or charge is not sufficiently trustworthy by itself to support the assessment of points against Appellant under SORA. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7 (“the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred”). Such allegations cannot be deemed reliable -- never mind satisfying the elevated standard of clear and convincing evidence -- where, as here, the People had specific information from the Florida prosecutor that Florida made the decision not to pursue such charges based precisely on the insufficiency of the evidence. *See* A.83:23-84:19, 85:19-86:1 (Tr.).

In short, the People directly disputed the reliability of the Board’s case summary and recommendation, based on information that was not before the Board following communications with the Florida prosecutor. *See* A.83:14-84:19, 85:11-87:12 (Tr.); *see also* A.65 (Board Recommendation) (noting that Board’s assessment was based on review of “inmate’s file” and not citing specific contact with Florida authorities). Appellant also disputed the validity of many of the

allegations contained therein, both generally and with regard to specific allegations. *See* A. 90:9-12, 92:13-21, 95:12-18 (Tr.). Notwithstanding the obvious existence of disputed relevant issues, the Court did not provide the parties with any opportunity to present evidence on contested issues, nor did the Court conduct any factual inquiry on its own.

Even though there was no sufficient evidentiary basis to support the Board's recommendation, the Court announced that it was relying on the Board's case summary and adopting the Board's calculation and SORA determination in full. *See* A.93:21, 96:11-13 (Tr.). Indeed, at one point in adopting the Board's scoring, the Court openly acknowledged that it was assessing points against Appellant in the face of the People's position that the evidence of that factor was "not reliable":

Number of victims, three or more. He only plead [sic] guilty to one, but apparently there were more than one and I think the People concede that although they say it was not reliable.

A.94:10-13 (Tr.). This reliance on alleged conduct that the People, as the party bearing the burden of proof, expressly stated they could not prove by clear and convincing evidence, was plainly erroneous as a matter of law. *See* Correction Law §§ 168-k(2), 168-n(2) (stating that

the facts supporting the court's determination shall be supported by clear and convincing evidence). Accordingly, the Court's Level 3 determination, based specifically on unproven alleged conduct, cannot stand, and the Court's Order should be vacated.<sup>12</sup>

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<sup>12</sup> Even if the Court had a lawful evidentiary basis to adopt the Board's case summary in full (which it did not), the case summary does not establish by clear and convincing evidence all of the factors for which points were assessed against Appellant. For example, the facts alleged in the case summary, even if taken as true, do not set forth, by clear and convincing evidence, a continuing course of sexual misconduct, which requires a specific finding of either "(i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" with an underage victim. See *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 10 ("Factor 4: Duration of Offense Conduct with Victim"); see also *People v. Redcross*, 54 A.D.3d 1116 (3d Dep't 2008) (holding that continuing course of sexual misconduct was not supported by clear and convincing evidence where record was silent as to dates that incidents of sexual conduct occurred in relation to each other); *People v. Donk*, 39 A.D.3d 1268, 1269 (4th Dep't 2007) (modifying SORA risk assessment where there was not clear and convincing evidence to establish continuing course of sexual misconduct under specific definition set forth by SORA); *People v. Boncic*, 15 Misc. 3d 1139(A), 841 N.Y.S.2d 281 (Sup. Ct. N.Y. Cty. 2007) (holding that there must be a finding of "actual sexual contact" with the underage victim to score for the continuing course of conduct factor under SORA). Here, the case summary only speaks of certain allegations generally and provides no detail regarding the timing of specific alleged acts of sexual contact, the number of times Appellant allegedly engaged in specific acts with individual complainants, or the age of the complainants at the time of the relevant acts. Similarly, the case summary does not establish by clear and convincing evidence several other factors for which points were assessed against Appellant, including the "use of violence" (e.g. case summary provides only conclusory allegations of "forcible rape" without establishing the element of "forcible compulsion"); "sexual contact with victim" (e.g. case summary does not specify the age of each complainant at the time of alleged relevant sexual contact to determine whether each complainant was underage and therefore a "victim"); "number of victims" (same); and "age of victim" (same).

**C. Determining Appellant To Be a Level 3 Offender Based on Factors That Were Not Proven by Clear and Convincing Evidence Violated Appellant's Federal Due Process Rights.**

In addition, the Court's assessment of points against Appellant based on allegations that were not and could not be proven by clear and convincing evidence constituted a clear violation of Appellant's federal due process rights.

It is settled as a matter of federal constitutional law that those persons convicted of a sex offense and required to register under a state registration and notification scheme like SORA have a protected liberty interest that entitles them to procedural due process. *See Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998); *see also People v. David W.*, 95 N.Y.2d 130, 138 (2000) (holding that the imposition of a Level 3 SORA determination implicates liberty interests and triggers due process safeguards). Courts evaluating that liberty interest under the procedural due process analysis articulated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) (balancing the private interest affected by state action, the risk of erroneous deprivation of that interest, and the interests of the state) have determined that "the nature of the [sex offender] classification proceeding is serious enough"

and “carries with it a high risk of error,” such that the state must afford an individual facing such a risk classification a constitutionally-mandated minimum level of due process. *Doe*, 3 F. Supp. 2d at 469, 471 (citing *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995)). While “the due process protections required for a risk level classification proceeding are not as extensive as those required in a plenary criminal or civil trial,” *Id.* at 470, federal due process is only satisfied when a person being assessed under SORA is afforded a “pre-notification hearing accompanied by a comprehensive set of procedural safeguards,” including each of the following:

- (1) a judicial determination of his risk level classification [by hearing];
- (2) notice of the classification proceeding, sufficiently in advance of the hearing to... prepare a challenge;
- (3) notice of the proceeding must contain a statement of [its] purpose and the Board’s recommended risk level classification;
- (4) an opportunity to retain counsel;
- (5) pre-hearing discovery;
- (6) the state must prove the facts supporting each risk factor *by clear and convincing evidence*; and
- (7) the right to appeal.

*See id.* at 471-72 (articulating the above seven procedures as essential to satisfy procedural due process when assigning risk levels under SORA) (emphasis added); *see also People v. Brooks*, 308 A.D.2d 99, 103 (2d Dep't 2003) (same).

This sixth constitutional factor -- the requirement that the State bear the burden of proof and prove the facts supporting each risk factor upon which a risk assessment is based by the elevated standard of clear and convincing evidence -- is of particular significance, in that it is a recognition of the severe injurious impact upon liberty, reputation, and opportunity that an unjustified notification level can have on an offender:

Because “the possible injury to the individual [registrant] is significantly greater than any possible harm to the state,” the registrant, consistent with due process, cannot “be asked to share equally with society the risk of error” . . . . It necessarily follows that the Due Process Clause requires that the state prove its case by clear and convincing evidence in a Megan’s Law proceeding.

*E.B. v. Verniero*, 119 F.3d 1077, 1111 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998) (citing *Addington v. Texas*, 441 U.S. 418, 427 (1979)); *see also Brooks*, 303 A.D.2d at 105 (observing “a SORA determination

undeniably has a profound impact on a defendant's liberty interest due to the registration and community notification provisions"). In other words, because a SORA hearing "threaten[s] the individual involved with a significant deprivation of liberty or stigma," due process demands "more than average certainty on the part of the factfinder." *E.B.*, 119 F.3d at 1110-11 (citing *Santosky v. Kramer*, 455 U.S. 745, 756-58 (1982)). Accordingly, "registrants are entitled to have the burden of persuasion placed on the state, with the state obligated to prove the proposed level and manner of notification by clear and convincing evidence." *Doe*, 3 F. Supp. 2d at 471; *see also David W.*, 95 N.Y.2d at 140 (holding "Due process requires that the State bear the burden of proving, at some meaningful time, that a defendant deserves the classification assigned.").

Here, the Court's Level 3 determination, made without regard to the People's presentation and advocacy at the hearing and unsupported by clear and convincing evidence, failed to satisfy these basic constitutional requirements regarding both the allocation of the burden of persuasion (upon the People) and the standard of proof (by clear and convincing evidence) for a SORA hearing. The Court's complete

reliance on the unsupported, unprosecuted, and disputed hearsay allegations in the Board's case summary to buttress a Level 3 determination violated Appellant's due process rights, as set forth by *Doe v. Pataki*, and accordingly, the Court's Order should be reversed.

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

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

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

First, the SORA Court improperly scored Appellant for alleged conduct that is not registerable, and in some cases is not even criminal,

under New York law with respect to the sole complainant at issue in Appellant's single registerable Florida conviction. For example, the Court adopted the Board's assessment of points for "sexual intercourse," even though the People themselves conceded that the complainant at issue was 17 (and therefore over New York's age of consent) when she allegedly engaged in consensual intercourse with Appellant. *See* A.92:1-7 (Tr.). This scoring for sexual intercourse was in clear contravention to the SORA statute, which states that prostitution offenses are only registerable under SORA where there is clear and convincing evidence that the prostitute was "in fact" under 17 at the time of the alleged sexual conduct. Correction Law § 168-a(2)(a)(i).<sup>13</sup>

Additionally, the Court appears to have scored Appellant 20 points for this same complainant under the "age of victim" factor, even though the People made a record that the complainant was "either 16 or 17" when she met Appellant for the first time. A.92:1-3 (Tr.). The fact that, even in the People's view, the specific age of the complainant when

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<sup>13</sup> Of course, the exact allegations for which the Court assessed points against Appellant are nearly impossible to identify given the Court's failure to articulate findings of fact and conclusions of law supporting its scoring of particular factors. *See* A.4 (Order Appealed From, dated Jan. 18, 2011); A.82 (Tr. *generally*); *see also* Section III, *infra*. Nor did the Board's recommendation tie its scoring to particular facts in its case summary, which lumped a host of facts together in the aggregate. *See* A.65 (Board Recommendation).

she first met Appellant -- no less when she may have engaged in sexual conduct with him -- could not be ascertained precludes a finding that this element was proven by clear and convincing evidence. *See Solomon v. State of New York*, 146 A.D.2d 439, 440 (1st Dep't 1989) (defining clear and convincing evidence as evidence "that is neither equivocal nor open to opposing presumptions"). Yet the Court disregarded the burden of proof and made clear that it was scoring Appellant for this factor.<sup>14</sup> *See* A.92:13-93:12 (Tr.). These improper assessments of points on the RAI should render the Court's Level 3 determination invalid.

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

Next, the Court abused its discretion by allowing an apparent personal distaste for Appellant, the nature of the crime for which he pleaded guilty and was convicted, and the quantity and nature of unproven, unprosecuted allegations cited in the Board's recommendation to impinge upon the Court's duty to follow the law. The Court demonstrated a remarkable disdain and lack of judicial

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<sup>14</sup> Again, the specific basis upon which the Court scored Appellant for certain factors cannot be ascertained from the legally deficient Order, *see* A.4 (Order Appealed From, dated Jan. 18, 2011), although the Court's comments at the hearing revealed the Court's belief that points should be assessed against Appellant for "procuring" this complainant when "she was either 16 or 17." *See* A.92:1-23 (Tr.).

objectivity in its response to hearing the District Attorney disavow the reliability of the Board's recommendation, in receiving the arguments of counsel for Appellant, and in rendering its Order as a whole.

First, although the SORA statute clearly contemplates that the District Attorney may depart from the Board's recommendation based upon its own evaluation of the evidence,<sup>15</sup> *see* Correction Law §§ 168-

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<sup>15</sup> For example, SORA expressly provides, "If the district attorney seeks a determination that differs from the recommendation submitted by the board, at least ten days prior to the determination proceeding the district attorney shall provide to the court and the sex offender a statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations." Correction Law §§ 168-k(2), 168-n(2). While the more common application of this provision involves the People seeking a higher risk level than the Board, the provision clearly encompasses any deviation from the Board's recommendation, including the People's discretion to recommend a lower risk level. *See, e.g., People v. Ferguson*, 53 A.D.3d 571, 572 (2d Dep't 2008) (holding that 10-day notice requirement applies not only to changes in RAI scoring, but to changes in factual predicates for RAI scoring).

Incidentally, it bears noting that the People failed to comply with these procedural mandates, constituting a further procedural flaw in these proceedings. *See* Correction Law §§ 168-k(2), 168-n(2). While the People provided Appellant with a written alternative RAI immediately prior to the SORA hearing -- and not ten days prior to the hearing, as required by SORA -- it appears that the People failed to submit their RAI to the Court at all. *See* Appendix *generally*. Before rejecting out of hand the People's stance that a Level 3 determination could not be supported by sufficient evidence, the Court should have adjourned the matter to receive and review a written statement of the People's recommended determination and supporting reasons. *See People v. Ferguson*, 53 A.D.3d at 572 (reversing SORA order where defendant and court did not receive proper 10-day notice of People's revised RAI); *cf. People v. Jordan*, 31 A.D.3d 1196, 1196 (4th Dep't 2006) (holding People's failure to provide sufficient notice of revised RAI was cured where Court adjourned matter to allow meaningful opportunity to consider revised RAI). The Court's failure to enforce the procedural mandates of the SORA statute was prejudicial to Appellant, in that the Court did not have sufficient opportunity to

k(2), 168-n(2), here, the Court rejected the investigation and advocacy of the People. Indeed, the Court went so far as to express “shock” that the People would support a lower risk level determination than that recommended by the Board, almost as a matter of principle. *See* A.86:9 (Tr.). The Court disregarded the detailed evidentiary investigation and careful parsing of allegations that the People undertook in evaluating the Board’s recommendation. Ignoring the record at issue concerning Appellant and the evidence pertaining to him, the Court focused instead on the irrelevant facts of some unidentified case completely unrelated to Appellant’s:

I have to tell you, I am a little overwhelmed because I have never seen the prosecutor’s office do anything like this. I have never seen it. I had a case with one instance it was a marine who went to a bar, and I wish I had the case before me, but he went to a bar and a 17 year old, he was an adult obviously, he was a Marine, a 17 year old came up to him and one thing lead [sic] to another and he had sex with her and the People would not agree to a downward modification on that.

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understand the compelling reasons for the alternative RAI calculation that the People promoted. *See id.*

So I am a little overwhelmed here because I see -- I mean I read everything here, I am just a little overwhelmed that the People are making this application.

I could cite many many, I have done many SORAs much less troubling than this one where the People would never make a downward departure like this.<sup>16</sup>

A.84:21-85:10 (Tr.). Later, when Appellant's counsel disputed that there were any credible -- much less prosecuted -- allegations that Appellant ever used force, the Court again began comparing Appellant's case to the same irrelevant case about "a marine" -- a matter completely unknown to Appellant and having no connection whatsoever to Appellant's case -- seemingly to suggest that Appellant should nevertheless be scored as Level 3 under SORA:

There was no allegation of force in the marine either, who met a girl in a bar, a young girl 17, there was no force there.

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<sup>16</sup> Notably, the People were not asking the Court to make a downward departure from the RAI calculation, but were advising the Court that the evidence required a recalculation of Appellant's risk level based on the RAI factors. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006) at 4-5, ¶¶ 5, 6.

A.90:13-15 (Tr.).<sup>17</sup> The Court's subjective comparison of Appellant's case to some unidentified, unrelated case was improper and highly irregular, and it clearly interfered with the Court's duty to make an assessment based on the law.

Similarly, in response to an argument by counsel regarding the implications that a Level 3 assignment would have on Appellant, who does not actually reside in New York, the Court abandoned any semblance of judicial objectivity by dismissively suggesting that he should "give up his New York home if he does not want to come every 90 days." A.93:18-19 (Tr.). Rather than giving reasoned consideration to whether Appellant's residence outside of New York might be a relevant factor in its overall risk assessment (such as for a downward departure from an RAI calculation), the Court improperly allowed its judgment to be clouded by apparent personal disdain for Appellant.

Furthermore, the Court's apparent distaste for Appellant has eliminated any likelihood that Appellant will receive a fair redetermination hearing should this matter be remanded back to the

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<sup>17</sup> Significantly, the Court in fact scored 10 points against Appellant for forcible compulsion, despite the parties' agreement that there was no legitimate evidentiary basis to score Appellant for the use of force or violence. *See* A.94:7-8 (Tr.).

same Justice. Indeed, this Court has recognized that reassignment of a matter to a different Justice following appeal is warranted and appropriate where the apparent impartiality of the lower court has been legitimately questioned, as it most certainly has here. *See, e.g., People v. Rampino*, 55 A.D.3d 348, 349 (1st Dep’t 2008) (remanding resentencing matter to a different Justice where the “appearance of fairness and impartiality [was] compromised by the actions of the Justice to whom defendant’s application was assigned”); *Fresh Del Monte Produce N.V. v. Eastbrook Caribe*, 40 A.D.3d 415, 421 (1st Dep’t 2007) (remanding matter to a different Justice where “a reasonable concern about the appearance of impartiality” had been raised on appeal). Accordingly, should this Court deem remand the only appropriate mechanism for recalculating Appellant’s risk assessment level, Appellant respectfully asks that the SORA proceeding be reassigned to a different Justice.

In sum, a court only has discretion to go beyond the factors outlined in the SORA guidelines in evaluating a person’s risk level where justified by clear and convincing evidence. *See People v. Sherard*, 73 A.D.3d 537, 537 (1st Dep’t 2010) (citing *People v. Miller*, 854 N.Y.2d

138 (2008), *lv. denied* 10 N.Y.3d 711, 860 N.Y.S.2d 483 (2008)) (holding that where a court exercises discretion to depart from the evidence-based scoring of an RAI, the court must base such departure on “clear and convincing evidence of aggravating factors to a degree not taken into account” in the RAI); *see also Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006) at 4-5, ¶¶ 5, 6. Here, the Court’s SORA determination, made in the express absence of clear and convincing evidence,<sup>18</sup> constituted an abuse of discretion, warranting reversal of the Court’s Level 3 determination and Order. Moreover, given the Court’s demonstrated lack of judicial objectivity toward Appellant, should remand be required, Appellant respectfully requests that this matter be reassigned to a different Justice in the Supreme Court.

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<sup>18</sup> The Court did not -- and could not -- cite any factors within or outside of the Board’s consideration, proven by clear and convincing evidence, that would justify a Level 3 determination under RAI scoring or constitute lawful grounds for an upward departure. *See* A.82 (Tr. *generally*). Instead, the Court fully adopted the Board’s calculation, scoring Appellant a presumptive rating of Level 3, without meaningful inquiry into any of the underlying allegations or any consideration of other evidence which could bear upon Appellant’s risk level. *See* A.93:21, 94:6-95:9, 96:11-13 (Tr.).

### **III. THE COURT'S ORDER DOES NOT COMPLY WITH THE MANDATES OF SORA AND CONSTITUTIONAL DUE PROCESS AND MUST BE VACATED.**

Finally, the Court's Order determining Appellant to be a Level 3 sex offender is itself facially defective in numerous regards and should be vacated as legally invalid. In addition, the Court's failure to set forth any factual basis for its Level 3 determination renders the Order constitutionally infirm, warranting reversal on federal due process grounds as well.

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

Here, the Court's compliance with these requirements fell woefully short. The only order issued by the Court in this matter was a standard boilerplate form where the Court circled a pre-printed number and provided a signature and date. *See* A.4 (Order Appealed From,

dated Jan. 18, 2011). Indeed, upon close examination of the only “order” in this matter, it appears that the form Order is actually intended to be a cover sheet to accompany a more formal order, with written findings of fact and conclusions of law, upon submission to the Division. *See* A.4 (Order Appealed From, dated Jan. 18, 2011) (stating, “A copy of the order setting forth the risk level and designation determinations, and the findings and conclusions of law on which such determinations are based, shall be submitted to the Division of Criminal Justice Services’ Sex Offender Registry Unit by the Court. In addition, please complete and attach this form indicating the offender’s risk level and designation to the Court’s order.”). Yet this legally insufficient Order was served on Appellant following the SORA proceeding and was sent to the Division so that the Level 3 determination could be executed and enforced. *See* A.78 (Letter of Supreme Court, dated Jan. 19, 2011).

The appellate courts have consistently held that cursory, non-specific “findings” issued after SORA hearings -- including the wholesale adoption of a Board recommendation or recitation of RAI factors without further explanation, as the Court offered here -- are

legally insufficient under SORA. *See, e.g. People v. Strong*, 77 A.D.3d 717, 717-18 (2d Dep't 2010) (reversing SORA order issued without findings of fact and conclusions of law, where court relied on RAI but failed to introduce the RAI in evidence or indicate any evidence relied upon); *People v. Gilbert*, 78 A.D.3d 1584, 1584 (4th Dep't 2010) (holding that the SORA court's conclusory recitation that it reviewed the parties' submissions and was adopting the Board's case summary and recommendation was insufficient to fulfill SORA's statutory mandate); *People v. Miranda*, 24 A.D.3d 909, 910-11 (3d Dep't 2005) (holding that the court's adoption of the Board's RAI scores and "generic listing of factors" failed to "fulfill the statutory mandate" of SORA and precluded "meaningful appellate review of the propriety of the court's risk level assessment").

In addition, the Order in this case is constitutionally deficient, in that the Court's failure to set forth any factual or legal bases for its Level 3 determination falls short of the minimum due process rights guaranteed by the U.S. Constitution. In the landmark case of *Goldberg v. Kelly*, the U.S. Supreme Court held that, in relevant part, to demonstrate compliance with the procedural due process requirement

that the decision maker's conclusion rest solely on the legal rules and evidence adduced at hearing, "[the] decision maker should state reasons for his determination and indicate evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (internal citations omitted).<sup>19</sup> In short, the minimal due process requirement that the order set forth the basis for the court's determination is designed to provide some assurance that the court's conclusion rested on sufficient reliable evidence--which in Appellant's case, it did not.

The utterly deficient Order issued by the Court in this matter itself provides an independent basis for reversal of the Court's Level 3 determination, on both state statutory and federal constitutional grounds.

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<sup>19</sup> SORA, by specifically *requiring* the Court to issue findings of fact and conclusions of law to support its determination, therefore sets forth a higher standard than is required by federal due process. See Correction Law §§ 168-k, 168-n (requiring the court to "render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based").

## CONCLUSION

For the reasons stated herein, Appellant Jeffrey E. Epstein respectfully submits that the January 18, 2011 Order of the New York Supreme Court determining Appellant Jeffrey E. Epstein to be a Level 3 sex offender, without designation, should be vacated, and Appellant's SORA level should be recalculated -- either by this Court based on the present record or upon remand to a different Justice in the lower court -- in accordance with the law, based solely on the evidence that can be proven by clear and convincing evidence, to wit, the undisputed conduct encompassed by Appellant's registerable crime of conviction.

February 22, 2011

Respectfully submitted,

/s/ Jay P. Lefkowitz

Jay P. Lefkowitz, P.C.

jay.lefkowitz@kirkland.com

Sandra Lynn Musumeci

sandra.musumeci@kirkland.com

KIRKLAND & ELLIS LLP

601 Lexington Avenue

New York, New York 10022

Telephone: [REDACTED]

Facsimile: [REDACTED]

*Counsel for Defendant-Appellant  
Jeffrey E. Epstein*

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The undersigned hereby certifies that:

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*/s/ Jay P. Lefkowitz*

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Jay P. Lefkowitz, P.C.  
Sandra Lynn Musumeci  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, New York 10022  
Telephone: [REDACTED]  
Facsimile: [REDACTED]

SUPREME COURT FOR THE STATE OF NEW YORK  
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

- against -

JEFFREY E. EPSTEIN,

Defendant-Appellant.

Index No.: 30129-2010

**PRE-ARGUMENT STATEMENT**

1. TITLE OF ACTION: As set forth in caption.
2. FULL NAMES OF ORIGINAL PARTIES AND ANY CHANGE IN THE PARTIES:  
As set forth in caption. There has been no change in the parties.
3. NAME, ADDRESS, AND TELEPHONE NUMBER OF COUNSEL FOR APPELLANT OR PETITIONER:

Jay P. Lefkowitz, P.C.  
Sandra Lynn Musumeci  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, New York 10022-4611  
Telephone: [REDACTED]  
Facsimile: [REDACTED]

4. NAME, ADDRESS, AND TELEPHONE NUMBER OF COUNSEL FOR RESPONDENT:

Cyrus R. Vance, Jr.  
NEW YORK DISTRICT ATTORNEY'S OFFICE  
One Hogan Place  
New York, NY 10013  
Telephone: [REDACTED]

5. COURT AND COUNTY, OR ADMINISTRATIVE BODY, FROM WHICH APPEAL IS TAKEN: New York Supreme Court (Criminal Term), New York County.
6. THE NATURE AND OBJECT OF THE CAUSE OF ACTION OR SPECIAL PROCEEDING: Sex Offender Registration Act (SORA) hearing, pursuant to Article 6-C of the Correction Law.
7. RESULT REACHED IN THE COURT OF ADMINISTRATIVE BODY BELOW: Supreme Court, New York County, adjudged appellant Jeffrey E. Epstein to be a Level 3 sexual offender, without additional designation.
8. GROUNDS FOR SEEKING REVERSAL, ANNULMENT, OR MODIFICATION: The Court's designation of appellant Jeffrey E. Epstein as a Level 3 sexual offender was an abuse of

discretion and constituted reversible legal error based, in part, on the following: (1) the Court improperly relied on untrustworthy double and triple hearsay contained in the recommendation of the Board of Examiners of Sex Offenders, even though the District Attorney, as the party appearing on behalf of the State, rejected much of the Board's recommendation as not constituting clear and convincing evidence to support a Level 3 designation where such hearsay allegations were rejected as a basis for state prosecution; (2) the Court failed to provide the parties with an opportunity to present evidence on contested issues, as required by statute, and instead relied wholesale upon the recommendation of the Board, over the objection of the District Attorney, without any inquiry; (3) the Court did not apply the guidelines established by the Board, as required by statute; and (4) the Court failed to set forth the findings of fact and conclusions of law on which its determinations in support of a Level 3 designation were based, as required by statute.

9. THERE IS NO RELATED ACTION OR PROCEEDING NOW PENDING IN ANY COURT OF THIS OR ANY OTHER JURISDICTION.

10. THERE IS NO ADDITIONAL APPEAL PENDING IN THIS ACTION.

Dated: February 9, 2011



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Jay P. Lefkowitz, P.C.  
Sandra Lynn Musumeci

KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, New York 10022-4611  
Telephone: [REDACTED]  
Facsimile: [REDACTED]

*Attorneys for Defendant-Appellant Jeffrey E. Esptein.*

