

INTRODUCTION

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

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

←THIS IS WONDERFUL APPELLATE RHETORIC, BUT MAY BE FODDER FOR THE MEDIA HEADLINES. I ONLY POINT THAT OUT SO THAT WE ARE ALL THINKING ABOUT THE FACT THAT THIS COULD CREATE RENEWED INTEREST] In

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

Moreover, contrary to the suggestion in the People's brief, the People's decision to reject the Board recommendation, challenge the reliability of the Case Summary, and advocate that Appellant be adjudicated the lowest risk level, Level 1 -- in line with every other

jurisdiction to consider and evaluate Appellant's offenses -- was not based on misimpressions or a flawed understanding of the law. Rather, the People's position at the SORA hearing was the result of months of deliberation that included investigation, discussions with Appellant's counsel, and interaction with the Florida State Attorney's Office that actually investigated, prosecuted, and convicted Appellant of the offenses for which he is now required to register in New York under SORA. Upon considering the Florida investigation and primary source transcripts and documents that were excluded from the abbreviated, inaccurate, and inflammatory hearsay presentation of the Board, the Assistant District Attorney who represented the People at the SORA hearing -- no less than the Deputy Bureau Chief of the Sex Crimes Unit -- reached the same conclusion as that reached by officials from every other jurisdiction to have examined the case closely: [**that however objectionable, Appellant's conduct was constituted ~~nothing more than~~ that of a "john" who solicited massage and prostitution services from consenting women, and Appellant's offenses do not warrant the most severe level of registration under SORA. ←"NOTHING MORE THAN A JOHN" IS TAG LINE**

THAT WILL ALSO BE NEWSWORTHY, AND POTENTIALLY ANTAGONIZE USAO; ON THE OTHER HAND, EVEN IF YOU SOFTEN THIS BY ELIMINATING THE ‘NOTHING MORE THAN’ LANGUAGE, THE BASIC ARGUMENT THAT WILL BE ATTRIBUTED TO JE THAT THE GIRLS WERE CONSENTING PROSTITUTES WILL STILL BE FODDER FOR THE MEDIA AND STILL POTENTIALLY ANTAGONIZE USAO/VILLAFANA, SO NOT SURE THAT REMOVING THE HYPERBOLE WILL REALLY DO MUCH TO PROTECT JE ANYWAY. _ MOREOVER, NOT SURE HOW MUCH ANTAGONIZING USAO/VILLAFANA SHOULD DICTATE WHAT IS DONE HERE.]

Appellant was not engaged in a widespread commercial trafficking ring targeting minors, as the Board portrays, but rather, participated in consensual, commercial activity with women who voluntarily sought out Appellant and whom Appellant believed were aged 18 and older (and who for the most part were). In the **ISOLATED** [WHY ARE WE ARGUING ACTUAL FACTS HERE IN ANY EVENT. MOREOVER, BY STATING “ISOLATED” DON’T WE INVITE THE RESPONSE OF THE USAO’S LIST OF IDENTIFIED

VICTIMS? I REALIZE THAT THERE WILL BE NO WRITTEN RESPONSE, BUT IF WE GO TO HEARING . . . ON THE OTHER HAND, RESPONDENT HAS ALREADY MENTIONED THE FEDERAL INVESTIGATION AT THE END OF RESPONDENT'S BRIEF, SO IT WOULD NOT SURPRISE ME IF THE RESPONDENT RAISES THE LIST OF FEDERAL VICTIMS IN ANY EVENT. ON BALANCE, THE CONCEPT OF "ISOLATED INSTANCES" SOUNDS LIKE OVERREACHING AND MAY UNDERMINE THE POINT THAT JE WAS LIED TO. I WOULD DELETE "ISOLATED"] instances where Appellant unwittingly received services from underage women, the evidence establishes that these women intentionally and systematically concealed and misrepresented their ages to him. This view is substantiated by the primary source evidence provided to the District Attorney's Office, placing the limited set of materials furnished by the Board in context as misleading and unreliable. Moreover, it is consistent with the fact that, notwithstanding the 22-page, accusation-filled Probable Cause Affidavit, after a careful investigation of the accusations contained therein undertaken by Florida officials,—Appellant was only ever

arrested for, charged with, and convicted of two offenses -- the felony for which Florida law requires him to register and a second non-registerable felony---~~despite the 22-page, accusation-filled Probable Cause Affidavit and the extensive investigation undertaken by Florida officials.~~

That the Court so flagrantly disregarded the role of the prosecutor at the SORA hearing and abandoned its own duty under SORA to make a *de novo* determination based on factors proven by clear and convincing evidence provides ample basis for vacating the Order. Additionally, the Order of the hearing court adjudging Appellant a Level 3 offender was based on improper considerations and suppositions by the Court and penalized Appellant for conduct that is patently not registerable under SORA, all in violation of Appellant's statutory and constitutional rights.

Finally, the People improperly attempt to introduce in their appellate brief new factually erroneous contentions concerning the circumstances by which Appellant was only ever charged with the two Florida offenses to which he ultimately pled guilty. In attempting to inject this new "evidence" into the record, the People themselves tacitly

acknowledge that the hearing court's Order is not supported by the existing record. Accordingly, the Order adjudging Appellant to be a Level 3 offender should be vacated and his SORA risk level should be recalculated based on the evidence and in accordance with the law.

ARGUMENT

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

As an initial matter, the People's opposition to Appellant's appeal and challenge [WHY ARE YOU SAYING "CHALLENGE", ON APPEAL THE PEOPLE ARE NOT CHALLENGING THE HEARING COURT'S IMPROPER LEVEL 3 SORA ADJUDICATION? THE PEOPLE ARE SUPPORTING IT] to the hearing court's improper Level 3 SORA adjudication stands in stark contrast to the People's position at the SORA hearing itself and should not be permitted. *See Kilcer v. Niagara Mohawk Power Corp.*, 86 A.D.3d 682, 682 (3d Dep't 2011) ("A litigant should not be permitted to lead a tribunal to find a fact one way and then attempt to convince a court in a different proceeding that the same fact should be found otherwise; the litigant should be bound by the prior stance that she clearly asserted."); *Karasik v. Bird*, 104 A.D.2d 758 (1st

Dep't 1984) ("It is a well-settled principle of law in this state that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position. Invocation of the doctrine of estoppel is required in such circumstances lest a mockery be made of the search for truth."); *Chautauqua County Federation of Sportsmens Club, Inc. v. Caflisch*, 15 A.D.2d 260, 264 (4th Dep't 1962) ("Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.").

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

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

A.83 (Tr.). Now on appeal, the People attempt to distance themselves from their well-founded and properly reasoned hearing position, clearly articulated by the Deputy Chief of the Sex Crimes Unit, by dismissing repeated statements about the unreliability of the Probable Cause Affidavit as a “simple misunderstanding.” Resp. Br. at 47. While citing no change in circumstance to justify such an abrupt and complete turnaround, the People now try to defend the Level 3 Order, which the hearing court made without evidentiary basis and without articulating findings of fact and conclusions of law. Indeed, the People improperly attempt to bolster their newfound alignment with the hearing court by offering speculative arguments as to the rationale for the Court’s ruling and conjuring incorrect explanations as to why Appellant was not prosecuted on the vast majority of allegations in the Probable Cause Affidavit. See Resp. Br. at 47 (surmising, without basis, that the hearing court determined “where zealous private counsel are involved ... negotiated plea compromises may sometimes be reached well before an indictment has been handed down,” and incorrectly suggesting that such was the case with Appellant). Through such tactics, the People impugn their own credibility, and as such, their brief should be

disregarded and Appellant's appeal decided upon the Appellant's papers and the record alone. *See* Section IV, *infra*.

The People should not be permitted to benefit from their own unjustified reversal of position. Instead, the People should be estopped from arguing in support of an Order that they clearly opposed on the record. “[The] purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice would result if the right were asserted.” *Shondel v. Mark D.*, 7 N.Y.3d 320, 326 (N.Y. 2006). Indeed, courts have invoked the doctrine of estoppel against government entities when not doing so would result in a “manifest injustice.” *Matter of 1555 Boston Rd. Corp. v. Finance Adm’r of City of N.Y.*, 61 A.D.2d 187, 192 (2d Dep’t 1978) (manifest injustice would result if city was not estopped by its actions when petitioner relied on its agreement with the city, failed to take legal steps as a result of the reliance, and could no longer take those legal steps); *see also Landmark Colony at Oyster Bay v. Bd. of Supervisors of County of Nassau*, 113 A.D.2d 741, 744 (2d Dep’t 1985).

Here, the People argue in the first instance that several of Appellant's arguments on appeal should be disregarded on preservation grounds. While Appellant disputes that it has made any appellate arguments not properly raised before the hearing court, any shortcomings in Appellant's presentation of issues before the hearing court are directly attributable to Appellant's reasonable and justifiable reliance on the People's representations that a Level 1 adjudication was the just and proper risk level given the unreliability of the Board materials. See A.82-A.96, *generally*; see also Email of Dec. 10, 2010. Indeed, but for the People's agreement to advocate for a Level 1 adjudication on consent, Appellant was primed to conduct an adversarial hearing to contest the sufficiency of evidence to support the Board recommendation. [IF WE ARE TRYING TO AVOID A REMAND FOR A NEW HEARING ARE WE INVITING A HEARING ON THE EVIDENCE WITH THIS STATEMENT THAT APPELLANT WAS PRIMED TO CONDUCT AN ADVERSARIAL HEARING . . .? ON THE OTHER HAND, IS IT EVEN REMOTELY POSSIBLE THAT THE APPELLATE COURT WOULD DECIDE JE'S LEVEL? IF NOT, THEN NO HARM IN SAYING WAS PRIMED TO ARGUE.] By relying on the

assurances of the District Attorney's Office, the party bearing the burden of proof for the State, that there was no need for an evidentiary hearing, Appellant changed its approach to the SORA proceeding and did not introduce countervailing evidence to establish the unreliability of the Board materials.¹ Indeed, the People themselves acknowledge that Appellant acted in reliance on the People's representations that they would be taking a position aligned with Appellant's at the SORA hearing and disclaiming the reliability of the Board materials, thus eliminating any need for an adversarial evidentiary presentation. *See* Resp. Br. at 57, n. 5. The People should not now be permitted to benefit from any shortcomings in Appellant's presentation at the SORA hearing that they themselves occasioned, particularly where the People's change in position on appeal is so stark and without legitimate explanation. Accordingly, the People should be estopped from asserting their new appellate position.

¹ As set forth in greater detail in Section II, *infra*, the District Attorney's Office was already presented with, and had already considered, much of this countervailing evidence as part of its pre-hearing investigation and discussions with Appellant's counsel.

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

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

Contrary to the Court's hasty conclusion and the People's curious characterization on appeal, the People conducted an extensive

investigation prior to the SORA hearing, leading to the inescapable conclusion that the Board recommendation was not supported by clear and convincing evidence. In fact, as borne out in the record, the SORA hearing was adjourned several times on consent of the parties to permit the People an opportunity to speak directly with the Florida authorities who investigated and prosecuted Appellant, as well as to review sworn testimony and witness statements to supplement and contextualize the limited materials furnished by the Board. *See* A.81 (Handwritten Notations on Court Jacket - Jeffrey Epstein, No. 30129-2010).

Among the materials furnished to the District Attorney's Office prior to the SORA hearing was a compendium of sworn testimony and interview transcripts (as opposed to mere summaries) from the same witnesses and complainants cited in the Probable Cause Affidavit and the Board's Case Summary. *See* Letter of October 28, 2010. These materials revealed glaring misquotes and material omissions of fact in the Probable Cause Affidavit and Case Summary. They also highlighted the stark contrast between the jumbled, inflammatory and non-specific allegations in the Case Summary and the actual evidence concerning the alleged conduct for which Appellant was being assessed

under SORA. More fundamentally, these materials clearly established that the Board's calculation of Appellant's risk level under SORA was unsupportable under the legally mandated "clear and convincing evidence" standard, as the People rightfully represented at the SORA hearing. *See* Correction Law §§ 168-k(2), 168-n(2); *People v. Johnson*, 11 N.Y.3d 416, 421 (2008).

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

The People's disavowal of the Probable Cause Affidavit and advocacy in support of a Level 1 adjudication was not based on a "mistaken interpretation of the governing legal standards," as the People now contend, *see* Resp. Br. at 33, but rather, was the reasoned and principled culmination of months of investigation, scrutiny of the Board materials, and careful deliberation in light of applicable legal standards, at the highest levels of the Sex Crimes Unit of the District Attorney's Office. The procedural history of the SORA hearing itself reveals this to be the case.

In early August 2010, Appellant was notified that New York would require him to register under SORA, despite not being a resident

of New York, given his ownership of a secondary property in Manhattan.² See A.53 (Letter of M. Weinberg to NYS Board of Examiners of Sex Offenders, dated Aug. 16, 2010). Shortly thereafter, in response, Appellant’s counsel submitted a letter to the Board outlining Appellant’s personal background as an accomplished and respected financial advisor and philanthropist, acceptance of responsibility for his offenses, lack of prior and subsequent criminal record, successful completion of sentence and supervision, and determinations made by Florida officials and **[APPELLANT’S FORENSIC PSYCHOLOGIST ← SHOULDN’T WE JUST SAY A FORENSIC PSYCHOLOGIST, RATHER THAN APPELLANT’S FORENSIC PSYCHOLOGIST?]** that Appellant poses a low, or “negligible,” risk of reoffense. See A.53 (Letter of M. Weinberg to NYS Board of Examiners of Sex Offenders, dated Aug. 16, 2010). Less than two weeks later, on August 26, 2010, Appellant was notified that the Board had recommended a Level 3 classification and that a SORA hearing was scheduled for September 15, 2010. See A.68 (Letter from

² It bears noting that Appellant had already been voluntarily registered with New York’s Sexual Offender Monitoring Unit (SOMU) since May 2010. See, e.g., A.88-A.89 (Tr.).

Supreme Court to Jeffrey E. Epstein Informing of SORA Level Determination Hearing, dated Aug. 26, 2010); A.71-A.76 (Letter from Supreme Court to Counsel Informing of SORA Determination Hearing, dated Aug. 26, 2010). Appellant promptly retained New York counsel and sought a brief adjournment to provide counsel an opportunity to prepare for the hearing. *See* A.77 (Letter from Jay P. Lefkowitz to Hon. Ruth Pickholz, dated Sept. 9, 2010).

In October 2010, Appellant's counsel submitted a detailed memorandum to the Assistant District Attorney assigned to the SORA hearing and met with both the assigned Assistant District Attorney and the Deputy Chief of the Sex Crimes Unit. *See* Letter Memorandum of Oct. 3, 2010. At the invitation of the District Attorney's Office, counsel for Appellant followed up that meeting by providing for the People's review additional evidence from the Florida investigation and subsequent proceedings to supplement the relatively limited materials provided by the Board. *See* Letter of October 28, 2010. Additionally, Appellant's counsel furnished the District Attorney's Office with current contact information for the former State Attorney for Palm Beach

County, Florida who oversaw the investigation and prosecution of Appellant's case. *See* Email of [CITE].

The SORA hearing was adjourned no fewer than three more times, until January 18, 2011, to provide the People with an opportunity to review the materials, speak with Florida officials, and conduct their investigation of Appellant's underlying Florida case. *See* A.81 (Handwritten Notations on Court Jacket - Jeffrey Epstein, No. 30129-2010). On December 10, 2010, the District Attorney's Office advised Appellant's counsel that they would consent to Appellant being designated as a Level 1 offender, following their review of Appellant's offenses. *See* Email of December 10, 2010. When the SORA hearing was held on January 18, 2011, the People -- represented by the Deputy Chief of the Sex Crimes Unit rather than the more junior Assistant District Attorney originally assigned to the matter -- advised the Court that based upon the People's investigation and interaction with Florida authorities, the Board materials could not be relied upon in full and therefore did not support a Level 3 adjudication. *See* A.83-A.87 (Tr.). Despite the months of investigation that the People devoted to the matter, the Court interrupted the People's presentation, berated the

prosecutor, disregarded the People's position, and adopted the Board recommendation in full without conducting any meaningful evidentiary inquiry to make reasoned findings of fact as required under statutory and constitutional law. *See* A.82-A.96 (Tr.), *generally*.

While the People may now attempt to distance themselves from a position that was supported by the law and evidence but unfortunately rejected by the SORA hearing court, the history of this matter makes clear that the People's decision to disclaim the Board recommendation was neither hastily made nor the product of any naive misunderstanding of SORA itself.

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

The decision of the Assistant District Attorney at the SORA hearing to deem the Board recommendation unreliable and advocate for a lower risk level was neither naïve, uninformed, nor capricious. Rather, the People's position at the SORA hearing (as opposed to their current position on appeal) was legally appropriate, in accordance with

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

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

[T]he fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred. By contrast, the fact that an offender was *not* indicted for an offense may be strong evidence that the offense did not occur.

Id. (emphasis in original).

While Respondents are correct to point out that non-prosecution is not necessarily conclusive evidence that certain offenses did not occur, the SORA Guidelines are explicit that non-prosecution may be compelling evidence that such offenses did not occur. See *id.* Here, the

District Attorney's Office was aware of the history of Appellant's case in Florida, and it was based on that history (and not in spite of it) that the People appropriately represented to the Court that the uncharged allegations in the Probable Cause Affidavit were not reliable and could not serve as a lawful basis for a Level 3 designation.³

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

The People itemize various theoretical "indicia of reliability" in their brief (including statements made under oath, level of detail, "identical" witness accounts, and incriminating admissions) as they attempt to rationalize their complete about-face as to the reliability of the Board materials. DO WE NEED TO STATE THAT THE WITNESS ACCOUNTS ARE "IDENTICAL" BECAUSE THEY ARE SUMMARIZED BY THE SAME DETECTIVE FOR THE PURPOSE OF ATTEMPTING TO DEMONSTRATE THAT THEY ARE CONSISTENT, EVEN THOUGH CAREFUL REVIEW OF THE ACTUAL ACCOUNTS SHOWS THAT THEY ARE NOT CONSISTENT. THE SO CALLED CONSISTENCY IS THE SPIN THAT RECAREY PUT IN HIS PROBABLE CAUSE AFFIDAVIT See Resp. Br. at 36-38, 40-46. However, it is hornbook law that even hearsay that may be "presumptively reliable" under a statute like SORA is *per se* not reliable where it is actually proven false, and directly contradicted by non-hearsay evidence. **CITE.** The People acknowledge as much in their citation and repeated reference to *People v. Mingo*, 12 N.Y.3d 563, 577 (2009) (noting the unreliability of a victim statement where it is "equivocal, inconsistent with other evidence, or seems dubious in light of other evidence in the record") (cited at Resp. Br. at 37). It stands to reason that here, where all the witness statements had been sworn and tape-recorded (as the

Significantly, the experienced Florida sex crimes prosecutor who investigated and evaluated the allegations in the Probable Cause Affidavit discounted almost all of them and, based on her assessment of the allegations, witness credibility, and other factors, in an exercise of prosecutorial discretion, she determined that the only indictable charge was one count of Felony Solicitation for Prostitution, Fla. Stat. § 796.07. No charge of rape or sexual contact with a minor was ever charged or prosecuted in connection with any allegations made against Appellant, nor was Appellant even arrested on such a claim. –Moreover, the decision to indict Appellant for only one offense was made in 2006, well before any plea negotiations had been resolved. *See* A.29 (2006 Grand Jury Indictment of Felony Solicitation of Prostitution). [WE HAVE TO BE CAREFUL HERE. WE DON'T PREVIOUSLY TALK ABOUT THE FACT THAT THERE WAS INITIALLY ONLY ONE INDICTMENT. I KNOW THAT RESPONDENT DOES THIS IN RESPONDENT'S BRIEF, BUT DO WE REALLY WANT TO POINT OUT IN OUR BRIEF THAT THERE WAS A SECOND INFORMATION LATER (AFTER

People acknowledge, *see* Resp. Br. at 41) but those recordings differ materially from how the statements are described in an affidavit, that affidavit must be discredited and rejected as inherently unreliable. *See* Section IV, *infra*.

FBI/USAO INVESTIGATION). DOESN'T THIS LEAD INTO THE FACT THAT AFTER THE FEDS GOT INVOLVED AND DID THEIR INVESTIGATION JE AGREED TO PLEA TO THE REGISTRABLE OFFENSE. IM NOT SURE WE WANT TO EMPHASIZE THAT ONLY SOLICITATION OFFENSE FIRST BECAUSE IT BEGS THE QUESTION OF HOW IT CAME TO PASS THAT JE THEN PLEAD GUILTY TO THE PROCUREMENT OFFENSE] -That Appellant was

not prosecuted on the overwhelming majority of allegations in the Probable Cause Affidavit does not reflect a “negotiated plea compromise,” as Respondents now suggest on appeal, but rather, was based on the dearth of reliable evidence to substantiate an abundance of baseless claims. Given this history, of which the People were well aware given their communications with the Palm Beach County State Attorney’s Office and their review of that office’s files, the conclusion that Appellant should not be scored under SORA based on the uncharged, unreliable allegations contained in the Probable Cause Affidavit was appropriate and indeed compelled under SORA and its guidelines.

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

In contrast, in the instant case, Appellant was never charged with *any* offense other than two prostitution offenses, nor was any specific allegation of forcible compulsion, sexual intercourse, or sexual conduct with a female under 17 ever included in any accusatory instrument to which Appellant pled guilty or on which Appellant was prosecuted. To

the contrary, the Florida sex crimes prosecutor made the affirmative decision not to proceed with such charges at any point. In short, Appellant's case, where certain allegations are not substantiated, disappear entirely from the case after the initial police report, and are never prosecuted at all, is precisely the circumstance contemplated by the SORA Guidelines' instruction that where a certain offense was not charged or indicted, "the Board or court should be reluctant to conclude that the offender's conduct involved" that particular offense. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7. Thus, the People's position at the SORA hearing was informed, well-reasoned, and above all, the only correct one under the law. [DOES ALL OF THIS SOMEHOW

INVITE RESPONDENT TO ARGUE AT HEARING OF THIS APPEAL THAT OUR ARGUMENT NEGLECTS TO TAKE INTO ACCOUNT THAT AFTER THE STATE INVESTIGATION AND CHARGING DECISION, THERE WAS A FEDERAL INVESTIGATION WHERE THE FEDS CREATED A LIST OF NUMEROUS "VICTIMS" WHO WERE ALLEGEDLY UNDERAGE WHEN THEY INTERACTED WITH JE. AND IT WAS THAT INVESTIGATION THAT RESULTED IN JE

PLEADING GUILTY TO AN OFFENSE THAT WAS NOT EVEN CHARGED BY THE STATE IN ORDER TO AVOID FEDERAL PROSECUTION?

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

As previously set forth in detail in Appellant's Brief and further explained herein, the Court's Order adjudging Appellant to be a Level 3 offender is unsupported by the requisite clear and convincing evidence and was rendered in clear violation of SORA and its guidelines as well as Appellant's federal constitutional rights. *See* Correction Law §§ 168-k(2), 168-n(2); *see also Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 5, ¶ 7 ("Points should not be assessed for a factor . . . unless there is clear and convincing evidence of the existence of that factor"); *People v. Johnson*, 11 N.Y.3d 416, 421 (2008) (holding that courts must apply a clear and convincing evidence standard when considering a Board recommendation and making its SORA determination); *Doe v. Pataki*, 3 F.Supp. 2d 456, 471-72 (S.D.N.Y. 1998) (holding federal due process under SORA is only satisfied where each risk factor is supported by

clear and convincing evidence). Despite the consensus of the People and Appellant at the SORA hearing that the majority of allegations in the Board materials could not be proven by clear and convincing evidence and should not be scored in calculating Appellant's risk level, the hearing court rested its Level 3 determination upon those unproven allegations, without hearing any evidence on which to base a *de novo* finding that the Board materials satisfied the statutory standard. **CITE.**

In addition, implicit in its wholesale adoption of the Board recommendation is that the Court improperly factored into Appellant's risk assessment conduct that is expressly not scoreable under SORA. *See* A.93-A.96. By its terms, SORA requires the Board, the District Attorney, and the Court to calculate a risk assessment based only on provable conduct that is specifically scoreable under SORA. *See* **CITE.** For example, as previously noted, consensual prostitution-related conduct with women aged 17 and over is not registerable under SORA. *See* Correction Law § 168-a(2)(a)(i). Yet the hearing court clearly assessed points against Appellant for consensual prostitution-related

conduct with 17-year-olds.⁴ Likewise, SORA provides no authority to assess points based on massages that do not involve “sexual conduct” as defined under the Penal Law. *See generally* Correction Law § 168 *et seq.* Thus, whether a number of different females repeatedly came to Appellant’s Florida home, provided him with massages, and received money in exchange for their services is not material to the calculation of Appellant’s risk assessment under SORA. Rather, what is material for purposes of determining Appellant’s SORA risk level, as a matter of law, is whether Appellant engaged in conduct that is actually scoreable under SORA and can be proven by clear and convincing evidence.⁵

In other words, to establish scoreable conduct for which points could be assessed under SORA, the evidence would need not merely to

⁴ Upon being reminded that consensual sexual intercourse with a 17-year-old is not registerable conduct under SORA, *see* Correction Law § 168-a(2)(a)(i), (d)(i), the hearing court declared, “She is a child” (referring to the female named as “A.D.” in the Board materials). *See* A.91-A.93 (Tr.). The hearing court then decided, without any evidentiary basis, that A.D. was actually only 16 when she was “procured” by Appellant, and notwithstanding the People’s confirmation that the evidence established that A.D. was 17 at the time of provable sexual conduct, improperly scored points against Appellant for sexual conduct involving A.D.. *See* A.91-A.93 (Tr.).

⁵ By highlighting in their brief the number of women who told police that they provided Appellant with massages, and in certain instances, engaged in sexual conduct with Appellant, to justify a Level 3 determination, the People succumb to the same temptation that led the hearing court to issue a clearly erroneous and legally baseless order improperly adjudicating Appellant to be a Level 3 offender: allowing emotion and personal distaste for Appellant’s conduct to outweigh the duty to adhere to the rule of law.

aggregate Appellant's conduct, but instead, to establish by clear and convincing evidence that, for example, he specifically engaged in a qualifying form of sexual conduct with a specific female at the time that female was a particular age, as required by the SORA guidelines for the particular factor at issue.⁶ **CITE.** That the Board materials fail to establish the SORA factors with the required specificity renders the Level 3 calculation of the Board and the hearing court legally defective, and as such, the Level 3 adjudication cannot stand.

Moreover, the hearing court failed to abide by the clearly delineated procedures set forth by SORA and its guidelines. *See* Correction Law §§ 168-k(2), 168-n(2) (outlining procedures for judicial

⁶ For example, with respect to the factor entitled, "Continuing Course of Sexual Misconduct," the SORA Guidelines set forth the specific findings that must be made by clear and convincing evidence to support an assessment of points, including the age of the victim and the timing of when multiple such instances of sexual conduct with the given underage victim occurred in relation to each other. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary (2006), at 10. Although no such specific evidence was presented by the Board materials with respect to the timing of alleged sexual contact with any underage victim, the hearing court improperly assessed points against Appellant for this factor. *See* A.94 (Tr.) (scoring 20 points for "duration of offense, conduct with victim, continuing course of sexual misconduct"). Similarly, the hearing court scored Appellant for "number of victims," despite the absence of any specific evidence proving by clear and convincing evidence that Appellant engaged in qualifying sexual conduct with three or more underage women at the time that each woman was underage. *See* A.94 (Tr.) (assessing 30 points for "three or more" victims, despite acknowledging that the People disputed the reliability of allegations involving all but one victim).

determination of risk level under SORA, including, *inter alia*, that “the state shall appear by the district attorney, ... who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence” and “the court shall render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based.”) By flatly rejecting the position of the Assistant District Attorney assigned to vet the Board materials and advocate on behalf of the State, and instead adopting in full a Board recommendation that the People disclaimed as unreliable, the Court improperly substituted the Board’s function as an advisory, recommendation-rendering agency, for the burden of proof imposed on the District Attorney and sound exercise of judgment and fact-finding expected from the Court.⁷ Indeed, the court is not intended to be a mere rubber stamp for the Board; rather, the court’s obligation to consider the sufficiency of evidence underpinning a Board recommendation serves as an important check in the SORA process, particularly when considering convictions and materials from out-of-state. *See, e.g.,*

⁷ That the People have now, on appeal, reversed course and advocate the reliability of the Board materials to uphold the Court’s improper Level 3 ruling does not remedy the Court’s manifest disregard for statutorily prescribed procedures.

People v. Brown, 7 A.D.3d 831, 833 (3d Dep't 2004) (rejecting Board's case summary as not supported by clear and convincing evidence and finding that Board made no effort to verify the reliability of information contained in materials provided about defendant's out-of-state conviction); see also *Matter of New York State Board of Sex Examiners v. Ransom*, 249 A.D.2d 891, 891-92 (4th Dep't 1998) ("The Board ... serves only in an advisory capacity ... similar to the role served by a probation department in submitting a sentencing recommendation.")

In sum, given the numerous and substantial legal and procedural flaws in the SORA hearing, the Court's Order assigning Appellant a risk level of 3, without proper evidentiary basis, should be vacated.⁸

IV. THE PEOPLE'S ATTEMPT TO INTRODUCE NEW "EVIDENCE" ON APPEAL IS BOTH IMPROPER AND A TACIT CONCESSION THAT THE COURT'S ORDER IS NOT SUPPORTED BY THE RECORD AS IT EXISTS.

A. By Offering Novel Arguments Not Made at the SORA Hearing and Attempting to Introduce Materials Outside the Record, the People Acknowledge That The Court's Order Lacked Proper Legal Basis.

⁸ As previously noted in Appellant's brief, given the apparent compromised impartiality of the hearing court to Appellant, Appellant respectfully seeks reassignment of the matter to a different Justice should this Court deem remand necessary to recalculate Appellant's risk assessment level. See, e.g., *People v. Rampino*, 55 A.D.3d 348, 349 (1st Dep't 2008); *Fresh Del Monte Produce N.V. v. Eastbrook Caribe*, 40 A.D.3d 415, 421 (1st Dep't 2007).

In opposing Appellant's appeal, the People endeavor to construct a *post facto* justification for the hearing court's Level 3 determination by offering numerous arguments, never actually made or even suggested by the hearing court, to rationalize why the vague and unsupported allegations in the Board materials should be deemed reliable (the People's disavowal of the Board materials at the hearing notwithstanding). *See, e.g.*, Resp. Br. at 40-46. In addition, in what they term a preview of "[t]he People's evidence on remand," the People improperly inject into their brief factually inaccurate claims about Appellant's Florida case, purportedly to provide "a complete and accurate picture of the circumstances that gave rise to the two single-count accusatory instruments" to which Appellant ultimately pled guilty. Resp. Br. at 62, n. 7. By so doing, the People themselves unwittingly concede that the hearing court's Order is not supported by the record as it currently stands. Specifically, absent clear and convincing evidence that the uncharged allegations were in fact credible and were only uncharged because of "aggressive negotiations" and plea bargaining -- a claim that Appellant vehemently contests, and in any event, was not only never raised at the SORA hearing or in the Board

materials, but was actually expressly disclaimed by the People on the record⁹ -- the hearing court should not have scored Appellant for the majority of allegations which formed the basis of the Level 3 Order. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, Commentary at 5, ¶ 7 (2006).

B. The People’s Attempt to Introduce Materials Outside the Record Was Improper and Reference to Such Contentions Should Be Stricken.

By previewing for the Appellate Court in their brief “the People’s evidence on remand,” *see* Resp. Br. at 62, n. 7, the People have improperly introduced materials *dehors* the record. *See Mount Lucas Assoc., Inc. v MG Ref. and Mktg., Inc.*, 250 A.D.2d 245, 254 (1st Dep’t 1998) (noting “the basic precept that arguments in appellate briefs are to be based and appeals decided solely upon factual material before the court at *nisi prius*” and that “references to [non-record] material in briefs . . . is improper”) [DIFFERENT CITE?]. The People’s inappropriate attempt to enlarge the record should prompt this Court to strike the People’s newly offered (and factually incorrect) contentions, if

⁹ The Assistant District Attorney clearly and correctly stated at the SORA hearing that Appellant’s case was “unlike a situation where everything was indicted and then we get to sort of assess points for all of the victims, if it was part of a plea bargain. They did not actually choose to go forward on any except for the one victim.” A.84 (Tr.).

not the entire Respondent's brief in full. See 8 N.Y.Prac., Civil Appellate Practice § 12:21 ("Reliance in a brief upon material outside the record, or inclusion in the record of material not properly included in it, may result in the appellate division striking the brief and the record, or portions thereof.") **[IS THIS TOO AGGRESSIVE / RISKY THAT COURT WILL STRIKE OUR REPLY?] [WOULD IT BE APPLIED TO STRIKE THE WHOLE REPLY BRIEF. IF IT IS APPLIED, THEN IT WOULD BE APPLIED ONLY TO BOTH THE RESPONDENT AND APPELLANT NEWLY INTRODUCED MATERIALS, SO WOULDN'T THAT BE OK? ON THE OTHER HAND, IF YOU THINK THAT EVEN IF THE COURT STRIKES BOTH SIDES' NEWLY INTRODUCED MATERIALS, THE DAMAGE IS ALREADY DONE AND THIS WILL ONLY PROVIDE THE COURT WITH A JUSTIFICATION FOR IGNORING OUR CONTENTIONS, THEN MAYBE. JAY'S AND MARTY'S CALL.]**

C. Evidence Presented to the District Attorney's Office Prior to the SORA Hearing Established the Unreliability of the Board Materials.

[MARTY, JAY, PLEASE LET'S HAVE YOUR THOUGHTS ABOUT ALLEGATIONS ABOUT THE GIRLS HERE. DOES IT

INVITE ARGUMENT AT THE HEARING BRINGING IN ADDITIONAL DETAILS ABOUT CONDUCT, IS IT PERSUASIVE, DOES IT PAINT JE AS NOT BEING REMORSEFUL AND BUY INTO THE ARGUMENT THAT THE RESPONDENT MADE THAT JE SHOULD RECEIVE EVEN A HIGHER SCORE BECAUSE HE IS NOT REMORSEFUL AND ADMITTING GUILT? CREATE ADDITIONAL NEWS FODDER? DOES IT MAKE IT MORE LIKELY THAT WE WILL HAVE TO REARGUE ON REMAND OR IS REMAND A FOREGONE CONCLUSION (IF WE WIN THE APPEAL), SO THAT WE NEED TO INCLUDE THIS INFO TO COUNTER RESPONDENT AND IMPROVE OUR CHANCES OF WINNING APPEAL?]

It is also submitted that the People’s gambit of introducing in their brief “additional evidence” outside the record has opened the door for Appellant to respond directly to the alleged “misimpressions” about the evidence concerning Appellant’s Florida offenses and the circumstances of the Florida’s investigation and prosecution that the People apparently now wish to “correct.” *See, e.g., Conte v. Frelen Associates, LLC*, 51 A.D.3d 620, 621 (2d Dep’t 2008) (finding that a court may consider evidence raised in reply papers if the evidence was

submitted in direct response to allegations submitted in the opposition papers); *Ryan Management Corp. v. Cataffo*, 262 A.D.2d 628, 630 (2d Dep't 1999) (same).

Contrary to the People's newly framed and baseless contentions that accusations against Appellant went unprosecuted solely because of "aggressive negotiations" by counsel,¹⁰ in fact the incontrovertible evidence demonstrates that Florida prosecutors affirmatively decided not to prosecute the vast majority of allegations included in the Probable Cause Affidavit based on the lack of merit to such claims. The extensive investigation undertaken by the Palm Beach County State Attorney's Office revealed the Probable Cause Affidavit to be utterly unreliable and riddled with misquotes, omissions of material fact, and unprovable claims made by self-interested and compromised "witnesses." This evidence is briefly summarized herein to refute the

¹⁰ Of course, there is nothing about Appellant's representation by attentive and zealous counsel during the course of the Florida investigation that is inconsistent with the fact that the Florida State Attorney's Office determined, after completing a thorough investigation, not to prosecute the majority of allegations included in the Probable Cause Affidavit based on the lack of merit of those claims. The obvious unreliability of the Probable Cause Affidavit, when compared to actual witness statements, should dispel the People's baseless insinuation that the Florida prosecutor's decision not to pursue the majority of allegations was merely the product of aggressive lawyering and negotiation by the defense. [CAREFUL ABOUT INVITING THE RESPONDENT TO AGAIN MENTION THE FEDERAL INVESTIGATION. PROBABLY UNAVOIDABLE, JUST WANT TO MAKE SURE WE CONSIDER IT.]

People's last-ditch effort to give credence to the unprosecuted allegations in the Probable Cause Affidavit by incorrectly suggesting that they were not pursued because of considerations other than an utter lack of merit.

First, and as demonstrated to the District Attorney's Office prior to the SORA hearing, the actual transcripts of the interviews on which the Board materials were purportedly based reveal that Palm Beach Det. Joseph Recarey, the affiant of the Probable Cause Affidavit, inaccurately summarized and repeatedly mischaracterized information that he swore under oath came from "sworn taped statements," all to Appellant's detriment. *See* A.6 (Palm Beach Police Department - Probable Cause Affidavit); *see also* Resp. Br. at 41 (noting the Probable Cause Affidavit stated it was based on sworn and tape-recorded witness statements). This is especially true with respect to allegations concerning A.D., the subject of Appellant's conviction triggering his duty to register under Florida law,¹¹ which are referenced and

¹¹ Appellant is required to register in Florida solely based on his conviction for Procuring a Person Under 18 for Prostitution, Fla. Stat. § 796.03. Appellant's conviction for Felony Solicitation for Prostitution, Fla. Stat. § 796.07(2)(f), (4)(c), which did not involve allegations of sexual conduct with underage women [DOUBLE CHECK], is *not* a registerable offense under Florida or New York law. *See* Fla. Stat. § 943.0435; N.Y. Correction Law § 168-a(2)(a). Furthermore,

highlighted in the Probable Cause Affidavit, A.20 (Palm Beach Police Department - Probable Cause Affidavit), the Board's Case Summary, A.65 (Board Recommendation), and the People's opposition to this appeal (Resp. Br. at 18-19).

As he acknowledged by his guilty plea, Appellant's interactions with A.D. involved consensual conduct including massages and sexual touching in exchange for money, when A.D. was under 18 years old, the age of consent in Florida. *See* A.31 (Information for Procuring Person Under 18 for Prostitution, dated June 26, 2008); A.32 (Guilty Plea, dated June 30, 2008). Contrary to the inaccurate reference to A.D. as "a 16-year-old victim" in the Probable Cause Affidavit and the Board's Case Summary, the actual transcripts of A.D.'s November 8, 2005 interview with Det. Recarey make clear that A.D. was indisputably 17 by the time events "escalated" from massages to "sexual conduct," as defined under New York's Penal Law:

Appellant is only required to register in New York by virtue of Correction Law § 168-a(2)(d)(ii), which makes an out-of-state offense registerable if that particular offense is registerable in the jurisdiction where it was committed. New York law does not itself deem the underlying conduct of Appellant's registerable Florida conviction to be registerable under New York law. *See* N.Y. Penal Law § 230.25; Correction Law § 168-a(2). In other words, Appellant's conviction, if secured under New York law rather than Florida law, would not be registerable at all.

- A.D. Tr. 2:5-15 (A.D. stating that her date of birth is October 10, 1987, which would have made her two days short of 18 years and one month old when she was interviewed by Recarey on November 8, 2005).
- A.D. Tr. 3:15-20 (A.D. stating that she first heard about Appellant from a friend “about a year ago”).
- A.D. Tr. 5:14-23 (A.D. stating that after meeting Appellant for the first time, she “didn’t go again for about two months or so”).
- A.D. Tr. 6:13-22 (A.D. telling Recarey that she saw Appellant approximately 15 times in total, and “things escalated” as time went on).

Additionally, the actual interview transcripts establish beyond dispute that A.D. was at least 17 and over New York’s age of consent during the one time that she engaged in consensual sexual intercourse with Appellant. *See* A.D. Tr. 8:17-9:23 (A.D. stating that she engaged in sexual intercourse with Appellant only once, when she was nearly 18 years old).¹²

Likewise, Det. Recarey swore in the Probable Cause Affidavit that A.D. claimed that Appellant had A.D. and the other female “kiss and fondle each other around the breasts and buttocks,” whereas A.D. expressly denied that the female touched her buttocks or vagina at all,

¹² Indeed, at the SORA hearing, the Assistant District Attorney herself advised the hearing court that A.D. was 17 for most, if not all, of her interactions with Appellant, and that she was 17 during the one incident where they engaged in sexual intercourse. A.92 (Tr.).

and noted only a “very brief” touch of her breasts that A.D. thought may have been “accidental.” *See* A.D. Tr. 10:25-11:25, 12:12-17. Further, A.D. was clear that she voluntarily kissed “a female friend” in front of Appellant when she was well over 17 and nearing her 18th birthday -- a point conspicuously omitted from Det. Recarey’s affidavit. *See* A.D. Tr. 12:12-13:12 (A.D. stating the last time that she saw Appellant -- which, based on testimony cited above, was the time they had sex -- was the week before October 10th [A.D.’s 18th birthday], and further stating that the one time she was with the female friend was shortly before that, around October 2nd or 3rd). Similarly, Det. Recarey omitted from the Probable Cause Affidavit the material fact that A.D. unequivocally stated that her decision to engage in intercourse with Appellant was consensual. *See* A.D. Tr. 15:12-17 (A.D. stating that all of her conduct with Appellant was consensual and that Appellant never used any force).

Likewise, primary source materials (which were provided to the District Attorney’s Office) demonstrate that Det. Recarey also mischaracterized the testimony and allegations concerning A.H., another woman who played a significant role in the Board

recommendation. For instance, the actual transcripts of the interviews on which the Probable Cause Affidavit is based reveal that A.H. could not provide firm or even approximate dates for her earliest interactions with Appellant:

- A.H. Tr. 2:24-27 (A.H. stating that her date of birth is December 30, 1986, which would have made her nearly 19 years old when she was interviewed by Recarey on October 11, 2005).
- A.H. Tr. 4:12-23 (A.H. guessing about the timing of her first meeting with Appellant and stating that she does not know whether she was 16 or 17).
- A.H. Tr. 11:42-12:4 (A.H. saying that she cannot keep track of specifically when different interactions with Appellant took place).

Though A.H. could not say with certainty when she first met and massaged Appellant, A.H. stated unambiguously that she was 17 years old during their single instance of brief sexual intercourse, when she claimed that Appellant momentarily penetrated her in the midst of other consensual sexual conduct. *See* A.H. Tr. 17:21-33 (A.H. affirming that she was “definitely” 17 when she had sex with Appellant, but that she could not recall the specific date of when that took place).

In addition to establishing that A.H. was 17 during her interactions with Appellant (and therefore, Appellant’s conduct toward her is not scoreable under SORA), A.H.’s statements to Det. Recarey

further reveal that A.H. viewed her interactions with Appellant (both sexual and non-sexual), as well as her sexual interactions with a female named “Nadia,” as consensual and entirely self-interested:

- A.H. Tr. 15:1-21 (A.H. telling Recarey that Appellant would pay her to spend time with him, relax by the pool, and eat meals, without any sexual activity, and she did that to get paid).
- A.H. Tr. 20:35- 46 (A.H. describing how she and Nadia once decided on their own to buy sex toys and engage in sex with each other as a “birthday gift” to Appellant).
- A.H. Tr. 13:28-41 (A.H. stating that she “didn’t want to burn [her] bridges” with Appellant because she viewed him as a “spectacular connection” and she used him for money and other benefits).
- A.H. Tr. 27:12-27 (A.H. stating that she acted “crazy, promiscuous, whatever you want to call it,” in order to receive money and gifts from Appellant).

The interview transcripts make clear that A.H. -- inaccurately described in the Board’s Case Summary as the “16-year old victim” who went to Appellant’s home “at least 100 times”, A.65 (Tr.) -- was not, in fact, a victim of reportable criminal conduct by Appellant, but rather, was an opportunistic young woman who, at 17 and 18 years of age, repeatedly decided to engage in promiscuous behavior that she believed was in her self-interest.¹³

¹³ Notably, these transcripts were also furnished to the District Attorney’s Office prior to the SORA hearing, providing grounds for the People’s conclusion that the allegations concerning A.H. were not reliable and did not satisfy the heightened

Indeed, transcripts of police interviews with numerous other women who are cited in the Probable Cause Affidavit reveal multiple other troubling inaccuracies and exaggerations in the police paperwork on which the Board relied in making its unsupportable Level 3 recommendation. Most significantly, to the extent that any of the women cited in the Board materials were under the age of legal consent¹⁴ at the time of their prostitution-related interactions with Appellant, these young women acknowledged in sworn testimony (again, provided to the District Attorney's Office prior to the SORA hearing) that they lied outright or otherwise sought to deceive Appellant about their ages and counseled others to do the same. Again, the primary source evidence provided to the People prior to the SORA hearing made abundantly clear that these women took proactive steps

standard of clear and convincing evidence required to score Appellant under SORA. Other evidence provided to the District Attorney's Office further discredited A.H., including documents establishing: (1) that A.H. only agreed to speak to police about Appellant to curry favor following her own arrest for marijuana possession, and (2) shortly after speaking to police, A.H. was terminated from a job at a lingerie shop as a result of stealing merchandise. *See* Palm Beach Police Report for A.H., dated Sept. 11, 2005); Limited Brand Incident Report for A.H., dated Nov. 4, 2005).

¹⁴ Notably, the age of consent under Florida law is 18, whereas under New York law, it is 17. **CITE.** Thus, many of uncharged allegations in the Probable Cause Affidavit concerning prostitution-related conduct with women who were 17, and thus under the age of consent pursuant to Florida law, do not even qualify as scoreable conduct under New York law. **CITE.**

to ensure that Appellant did not know that they were underage when he hired them to provide massages:

- H.R. Tr. 12:13-21 (H.R. telling police that she lied to Appellant and told him that she was 18 when she was only 17, and further reporting to police that “most of the girls lied” to Appellant about their ages).
- J.L. Dep. 15:25-17:2 (woman testifying that she was told by H.R. that she had to be over 18 to massage Appellant, so she lied and claimed to be 19 because she wanted to make money).
- F.P. Tr. 5:5-8 (woman telling police that Appellant did not know her age).
- S.G. Tr. 38:21-39:18 (S.G. telling police that she told Appellant that she was 18 and in twelfth grade because H.R. told her that Appellant would not allow her in his house if she was under 18).
- S.G. Dep. 32:17-19, 35:19-38:7 (S.G. testifying that she was told that Appellant would not allow her into his house if she was under 18, and so she lied to Appellant and told him that she was 18 and went to a different school).
- T.M. Dep. 6:11-20, 7:24-8:8 (woman testifying that she was instructed to tell Appellant that she was 18 if she wanted to give him a massage for money, and since she had a fake ID she decided to go).
- M.L. Tr. 13:16-22 (woman telling police that Appellant never knew her age, but she was instructed to tell Appellant that she was 18 because women had to be a certain age to massage him).

In fact, S.G., the sole 14-year-old cited in the Board’s Case Summary, had a history of lying about her age and representing herself to be much older than she was, and engaging in sexual activity while underage:

- S.G. Dep. 68:12-69:18 (S.G. testifying that she lied about being 18 on her MySpace page).

- S.G. Dep. 108:7-110:1 (S.G. acknowledging that she was in a sexual relationship with a 22-year-old firefighter while she was still underage).
- S.G. Dep. 121:3-21 (S.G. admitting that she was sexually active when she was 14, before she ever met Appellant).

Moreover, the actual sworn testimony of H.R., a woman who recruited other women to provide massages to Appellant, lays bare how Det. Recarey extracted a particularly damning phrase from H.R.'s statement to police and emphasized it out of context in order to improperly and incorrectly build a case that Appellant had a propensity for underage girls. Indeed, the Probable Cause Affidavit and the People's appellate brief both underscore the extremely damaging claim that Appellant allegedly relayed to H.R. that his preference for female masseuses was, "the younger, the better." *See* A.9 (Probable Cause Affidavit); Resp. Br. at 22. But the actual transcript of H.R.'s police interview exposes that Recarey took the "the younger, the better" statement out of context and omitted from the Probable Cause Affidavit the critical qualification that Appellant specifically said that he liked females "between the ages of like 18 and 20." *See* H.R. Tr. 11:25-12:21. Such a shocking misrepresentation in a sworn document by a police

officer places the credibility of every statement included in the Probable Cause Affidavit is doubt.

Indeed, the primary source evidence demonstrates multiple instances of egregious misstatements and material omissions in the Probable Cause Affidavit to manufacture inflammatory, demonstrably false allegations that should not have been considered in calculating Appellant's risk level under SORA:

- F.P. Tr. 5:18-23, 11:6-22 (17-year-old woman telling police that Appellant did not touch her inappropriately, did not try to touch her, and did not masturbate while she gave him a massage, despite allegations in the Probable Cause Affidavit that Appellant “grabbed her buttocks and pulled her close to him”).
- S.V. Tr. 2:25-3:12, 18:7-20 (woman telling police that she was 17 when she first met Appellant and that Appellant never used any sex toys on her and touched her with his hands (as opposed to “something else”), refuting claim in the Probable Cause Affidavit that “on occasion, [Appellant] would use a massager/vibrator on her”).
- F.E. Tr. 12:6-12 (woman telling police that she was 17 when she first met Appellant, in contradiction to the Probable Cause Affidavit which states that this same woman was only 16 when she first met Appellant).
- J.L. Tr. 4:10-11, 11:4-7 (woman stating that her date of birth is February 8, 1987, which would have made her 17 years and 9 months old during her sole contact with Appellant in November 2004, and stating that her interaction with Appellant was entirely consensual, despite the Probable Cause Affidavit claim that she had “just turned seventeen” and suggestion that she was coerced or tricked into interacting with Appellant).
- A.T. Tr. 3:18-4:1, 5:6-15 (clarifying that woman was 19 or 20 years old during her sole consensual encounter with Appellant).

Finally, in deposition testimony that was furnished to the People prior to the SORA hearing,¹⁵ Det. Recarey himself acknowledged additional damning allegations contained in his police reports, including the Probable Cause Affidavit, that he failed to correct. For example, he failed to correct that certain objects recovered from Appellant's garbage, previously identified as sex toys, were in fact broken eating utensils, and that he knew that the "covert cameras" in Appellant's Palm Beach home were actually purchased for security purposes following a burglary in 2003. *See* Recarey Dep. 423:1-425:17, 458:8-460:18. Det. Recarey also admitted in sworn testimony that the Florida prosecutor handling Appellant's case, whom he acknowledged to be an experienced prosecutor specializing in sex crimes cases involving children, concluded following her investigation that, "There are no real victims here." *See* Recarey Dep. 484:21-485:13, 506:18-507:21.

In short, there is a wealth of evidence, gathered and considered by the Florida prosecutors who closely examined and investigated the allegations made against Appellant, which rendered the majority of

¹⁵ As referenced during the SORA hearing itself, the allegations made against Appellant were not only subject to investigation and scrutiny by prosecutors, but they were also the subject of protracted civil litigation which involved fact discovery and depositions. *See* A.95-A.96 (Tr.).

allegations unprosecutable, if not simply baseless. Accordingly, based on the merits (and not merely based on political expediency), the Palm Beach County State Attorney's Office appropriately exercised its discretion and made the affirmative decision not to prosecute the vast majority of allegations cited in the Probable Cause Affidavit.

Many of these same materials were provided to the People prior to the SORA hearing and properly informed their conclusion that the Probable Cause Affidavit and the Board's Case Summary were unreliable. More to the point, as the People rightfully concluded and represented on the record at the SORA hearing, the Board materials were certainly not sufficient to satisfy the requisite clear and convincing evidence standard to sustain a Level 3 calculation under SORA. Accordingly, the Court's Order lacks legal basis and should be vacated.

CONCLUSION

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

September 16, 2011

Respectfully submitted,

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Line Spacing: Double-spaced

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, and printing specification statement is _____.

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The undersigned hereby certifies that:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

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