Defending Against The New Scarlet Letter

A Defense Attorney's Guide to SORA Proceedings

Second Edition

Prepared by
Alan Rosenthal
in cooperation with the Onondaga County Bar Association Assigned Counsel Program

ACKNOWLEDGMENTS

I would like to first acknowledge the many people I have represented and from whom I have learned about the trials and tribulations that they face daily because of New York's SORA requirements. Their cases have taught me invaluable lessons that I seek to pass on to other defense attorneys who will take on these issues in many different forums.

I want to thank the many individuals who have written, published, and conducted Continuing Legal Education Programs on this subject. I have borrowed from them liberally and acknowledge their contributions. By sharing our work, we hopefully help raise the bar for the performance of defense attorneys throughout New York, be they assigned counsel, public defenders, or privately retained counsel. My special thanks to Patricia Warth, Gary Muldoon, Robert Newman, Jim Eckert, John Brunetti, Al O'Connor, Faye Santacroce, Kim Duguay, Nancy Little, Mark Mahoney, and Alan Williams. Also, a thank you to the New York State Office of Indigent Legal Services for helping to make this publication possible. Finally, a thank you to Jeff VanBuren for design and Keith Rosenthal for editing.

February 2022
Defending Against the New Scarlet Letter
by Alan Rosenthal is licensed under a
Creative Commons Attribution-Non-Commercial 4.0
International License

PREFACE

I have been a criminal defense lawyer for over forty years. For fifteen of those years, I focused on the issue of reentry. When people come home to their communities after a conviction of a sex offense, there is undoubtedly no criminal behavior that breeds as much condemnation, fear, and stigma as sex offending. Labels like "sex offender," "offender," and "sexual predator" are an unfair life sentence.[1] Use of these terms prevent people from living hopeful, helpful, and productive lives, preventing successful reentry and reintegration. Such labels create barriers to employment, housing, family life and education. They are a dehumanizing and stigmatizing scarlet letter.

Yet this terminology is the accepted language used by the media, law enforcement, academics, legislators and even treatment providers. As if the public shaming that comes from registries isn't enough, people who have been convicted of a sex offense face the constant reminder by our language.

As defense lawyers we should reject the use of such labels. We should adopt person-first language and seek to elevate the humanity of our clients. Whenever possible our clients should be referred to as people. People who have a sex offense conviction. People who have been imprisoned. But they are people.

Our words are important.[2] I have learned from my clients and co-workers that they can be and are much more than the scarlet letter with which our overly punitive, misguided, and counterproductive public policies have branded them by the internet, special phone numbers, e-mail notification, apps, and public notices sent by law enforcement.

SORA is the branding iron. It was not implemented as an afterthought, and we should not defend against it as an afterthought. We should refer to the people we defend thoughtfully and purposefully. We can do our part to help the people we serve overcome demonization, myths, and stigma.

---

[1] While discussing the approval of SORA in 1995, the New York State legislature used even more hateful language, referring to people who would be subject to the Act as "depraved," "the lowest of the low," "animals," and "the human equivalent of toxic waste." (New York State Assembly Debate Minutes, June 28, 1995, at 360-61, 393, 417).

[2] I owe a debt of gratitude to Eddie Ellis and the Center for NuLeadership on Urban Solutions. Eddie's Open Letter to Our Friends, first circulated in 2003, has inspired me to embrace the concept that our words matter and that we must see the humanity in those we represent. Given the opportunity, they can be our fellow citizens and our colleagues. Letter available at https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf.

Table of Acronyms and Abbreviations

ASD	Autism Spectrum Disorder
BESO	Board of Examiners of Sex Offenders
CP	Child Pornography
DCJS	NY State Division of Criminal Justice Services
DOCCS	NY State Department of Corrections and Community Supervision
E-STOP	Electronic Security and Targeting of Online Predators Act – Executive Law § 259-c (15) and Penal Law § 65.10 (4-a)(b)
EWOC	Endangering the Welfare of a Child
JD	Juvenile Delinquent
OMH	NY State Office of Mental Health
PSI	Pre-Sentence Investigation
PSR	Pre-Sentence Report
RAI	Risk Assessment Instrument
RTF	Residential Treatment Facility
SARA	Sexual Assault Reform Act – Executive Law § 259-c(14) and Penal Law § 65.10 (4-a)(a)
SIST	Strict and Intensive Supervision and Treatment
SOCTP	DOCCS Sex Offender Counseling and Treatment Program
SOMTA	Sex Offender Management and Treatment Act – Enacted as Chapter 7 of the laws of 2007 consisting of amendments to the Correction, County, Criminal Procedure, Executive, Judiciary, Penal, and Mental Hygiene Law and the Family Court Act and created a process for civil commitment of certain people convicted of sex offenses (Article 10 of the Mental Hygiene Law)
SORA	Sex Offender Registration Act – Correction Law Article 6-C
SORNA	Sex Offender Registration and Notification Act
YO	Youthful Offender

Table of Contents

Chapter 1: Introduction 2
Chapter 2: The SORA Hearing 23
Chapter 3: Scoring the Risk Assessment Instrument 31
Chapter 4: Overrides 95
Chapter 5: Departures 108
Chapter 6: Designations 146
Chapter 7: Tools for Defending a SORA Case 158
Chapter 8: Selected Issues 180
Chapter 9: Enmeshed Consequences of a Sex Offense Conviction 210
Chapter 10: Anticipating SORA While Defending the Criminal Sex Offense Case 224
Chapter 11: Charts and Checklists CC-1
Chapter 12: Sample Documents SD-1

Appendix A-1

Table of Cases TC-1

Index I-1

Chapter 1

INTRODUCTION

CHAPTER 1 SECTIONS

§ 1:1 About SORA
§ 1:2 Effective Date
§ 1:3 Who Must Register Under SORA
§ 1:4 Purpose of SORA
§ 1:5 Board of Examiners of Sex Offenders
§ 1.6 Risk Assessment Instrument
§ 1:7 The Processing of a SORA Case
§ 1:7a People Sentenced to Probation, Split Sentence, CD, UD or a Fine
§ 1:7b People Sentenced to Jail or Prison
§ 1:7c People Convicted of a Sex Offense in Another Jurisdiction and Returning or Moving to New York
§ 1:8 SORA Hearing
§ 1:9 Preparing to Defend a SORA Case
§ 1:10 History of SORA
§ 1:11 Legal Challenges to SORA
§ 1:12 Procedural Due Process Challenges
§ 1:13 Challenges to the RAI
§ 1:14 Double Jeopardy
§ 1:15 Due Process
§ 1:16 Ex Post Facto
§ 1:17 *Doe v. Pataki* Litigation
§ 1:18 Critiques of SORA
§ 1:19 Flaws in the RAI
§ 1:20 Reliance on the RAI Without Clinical Judgment
§ 1:21 Registration and Notification Do Not Increase Public Safety and Are Counterproductive

Chapter 1

INTRODUCTION

§ 1:1 ABOUT SORA

The Sex Offender Registration Act (Correction Law Article 6-C) is known as SORA. A copy of the Act is included in the Appendix. The Act is New York's version of Megan's Law, which was first adopted in New Jersey in response to the case of Megan Kanka. SORA established a Sex Offender Registry within the New York State Division of Criminal Justice Services (DCJS). The Act requires the registration of individuals convicted in New York State of a sex offense, as well as the registration of individuals convicted in another jurisdiction if certain statutory criteria are met. Individuals register with DCJS on a form created by that agency. The information provided on the registration form is made available to law enforcement. (Correction Law § 168-j). The information is further disseminated by law enforcement as provided by Correction Law § 168-l (6), by internet (Correction Law § 168-q), and by a special telephone number (Correction Law § 168-p).

The Act created a Board of Examiners of Sex Offenders (Board). (Correction Law § 168-l [1]) which was authorized to "develop guidelines and procedures to assess the risk of a repeat offense by such sex offender and the threat posed to the public safety." (Correction Law § 168-l [5]). The Board created a risk assessment instrument (RAI) to purportedly "provide a risk level combining risk of reoffense and danger posed by a sex offender." (Guidelines p. 3). A copy of the RAI is included in the Appendix. The Board also developed the *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* (Guidelines). The Guidelines were originally published in 1996, republished in 1997, and slightly revised and republished in 2006. A copy of the 2006 edition of the Guidelines is included in the Appendix.

The Act provides for three levels of risk classification: level 1 (low risk), level 2 (moderate risk) and level 3 (high risk). It also provides for the designation of a person as a "sexual predator," "sexually violent offender" or a "predicate sex offender." The level of risk determines the duration of time on the registry, the amount of information that can be disseminated about the registrant, and the reporting requirements. The designations, along with the risk level, govern the length of time a person has to be on the registry. The RAI is used by the Board to make a recommendation to the courts as to the person's presumptive risk level, override, designation, and departure. The court makes the determinations, and it is not bound by the Board's recommendation.

A person determined to be a risk level 1 must register for 20 years, although, if also designated as a "sexual predator," "sexually violent offender" or a "predicate sex offender," the duration of registration is for life. People determined to be risk levels 2 or 3 must register for life, however, a person classified as a risk level 2 may petition to be relieved of the duty to register after 30 years. (Correction Law § 168-o [1]). A designation as a "sexual predator," "sexually violent offender" or a "predicate sex offender" means that a

person at level 2 cannot petition to be relieved after 30 years, and a level 2 or 3, even if modified down to level 2 or 1, must register for life.

The implications of risk level and designation are substantial. Three charts are included in Chapter 11 on Charts and Checklists that summarize the duration of registration, reporting and verification requirements, and community notification by law enforcement. People classified as risk level 3 or whose victim was under the age of eighteen at the time of the offense are subject to additional statutory restrictions while on probation, conditional discharge, or parole concerning their presence within 1,000 feet of school grounds and their use of the internet. Executive Law § 259-c (14), (15) and Penal Law § 65.10 (4-a).

§ 1:2 EFFECTIVE DATE

SORA was enacted into law in 1995 and became effective on January 21, 1996. Since that time a number of changes have been made to the original Act. Some changes came about as a result of litigation by The Legal Aid Society, as it pressed for due process requirements to be added to the woefully inadequate initial legislation. Most other changes occurred as a result of a political and legislative process that continually tightened the screws on this disfavored population.

§ 1:3 WHO MUST REGISTER UNDER SORA?

Any person convicted of a sex offense (Correction Law § 168-a [2]) or a sexually violent offense (Correction Law § 168-a [3]) in New York on or after January 21, 1996, or who was serving a sentence on parole or probation or was incarcerated for such an offense as of January 21, 1996, must register. The net was further extended by the Court of Appeals in *People v. Buss,* 11 N.Y.3d 553 (2008) when the court held that the sentences for a non-sex offense and a sex offense are merged or aggregated, therefore even if the term of the sex offense had lapsed prior to January 21, 1996, if the longer concurrent non-sex offense sentence was still running, the defendant was subject to registration.

A list of registrable offenses is included in Chapter 11 on Charts and Checklists. Note that sexually motivated felonies were not included on this list prepared by DCJS. Do not rely on this list to conclude that sexually motivated felonies are not registrable. Prosecutors have argued that all sexually motivated felonies are subject to registration. In *People v. Buyund,* 179 A.D.3d 161 (2d Dept. 2019) the court held that only those sexually motivated felonies listed in Correction Law § 168-a (2)(a)(i) and (ii) are registrable, rejecting the prosecution argument that all sexually motivated felonies listed in Penal Law § 130.91 are registrable. The Court of Appeals reversed and remitted, concluding that the issue had not been preserved for appeal. *People v. Buyund,* 36 N.Y.3d 1037 (2021).

A person convicted in another jurisdiction of certain offenses and who establishes residence in New York may have to register in New York as determined by the Board. Convictions in other jurisdictions include federal, military, other states, or other countries. A person convicted in another jurisdiction of an offense that includes all the essential elements of a sex offense as defined in Correction Law § 168-a (2) must register in New York. The essential elements test is explained in *Matter of North v. Board of Examiners of Sex Offenders of State of New York,* 8 N.Y.3d 745 (2007) and is discussed at § 8:12 in chapter 8 on Selected Issues. A person convicted of a felony in another jurisdiction for

which the person is required to register as a sex offender in the jurisdiction in which the conviction occurred must also register in New York.[3] A person must register in New York if convicted of any of the provisions of 18 U.S.C. 2251, 18 U.S.C 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, 18 U.S.C. 2260, 18 U.S.C. 2422(b), 18 U.S.C. 2423, or 18 U.S.C. 2425, provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect. (Correction Law § 168-a (2)[d]). Also required to register in New York are people convicted in other jurisdictions for offenses which include all of the essential elements of a "sexually violent offense" as defined in Correction Law § 168-a (3), or people convicted of a felony in any other jurisdiction for which they are required to register as a sex offender in the jurisdiction in which the conviction occurred.

§ 1:4 PURPOSE OF SORA

The ostensible purpose of SORA is "both to protect members of the public, especially vulnerable populations, from sex offenders by notifying them of the presence of sex offenders in their communities and to enhance law enforcement authorities' ability to investigate and prosecute sex offenses." *Doe v. Pataki,* 481 F.3d 69, 70 (2d Cir. 2007).

§ 1:5 BOARD OF EXAMINERS OF SEX OFFENDERS (BOARD)

SORA establishes a Board that consists of five members appointed by the governor. All members are required to be employees of the Department of Corrections and Community Supervisions (DOCCS), and experts in the field of the behavior and treatment of people who have sexually offended. (Correction Law § 168-l [1]). The Board is responsible for developing guidelines and procedures to assess the risk of repeat offense and threat posed to public safety. (Correction Law § 168-l [5]). Another responsibility of the Board is to make a recommendation to the sentencing court as to whether the defendant warrants the designation of "sexual predator," "sexually violent offender" or "predicate sex offender," and a recommendation as to one of three levels of risk: low, moderate, or high.

Of the three categories of SORA cases, the Board recommendation is only applicable to two. The Board makes its recommendation in cases involving people returning to the community after being sentenced to jail or prison. It also makes a recommendation in cases involving people convicted in another jurisdiction that have changed their residence to New York. The Board does not, however, make a recommendation in cases where people are sentenced to probation, a split sentence, conditional discharge, unconditional discharge, or a fine. In the first two categories of cases, a court cannot make a SORA determination without a Board recommendation. *People v. Black,* 33 A.D.3d 981 (2d Dept. 2006).

It is important to keep in mind, and to remind the judge, that the Board-prepared RAI is "merely a recommendation." *People v. Douglas,* 18 A.D.3d 967, 968 (3d Dept. 2005). The Board "serves only in an advisory capacity." *People v. Johnson,* 11 N.Y.3d 416, 421 (2008), *Matter of New York State Board of Examiners of Sex Offenders v. Ransom,* 249 A.D.2d 891 (4th Dept. 1998). The Board's recommendation "is similar to the role served by a probation department in submitting a sentencing recommendation." *People v. Johnson,*

[3] But *See People v. Diaz,* 32 N.Y.3d 538 (2018).

11 N.Y.3d at 421. "The court, however, is not bound by the recommendation of the Board and, in the exercise of its discretion, may depart from that recommendation and determine the sex offender's risk level based upon the facts and circumstances that appear in the record." *Matter of New York State Board of Examiners of Sex Offenders v. Ransom,* 249 A.D.2d at 891-892, cited with approval in *Vandover v. Czajka,* 276 A.D.2d 945 (3d Dept. 2000). *See* also *People v. Arotin,* 19 A.D.3d 845 (3d Dept. 2005). "The statute (Correction Law § 168-n) directs the court to consider the same guidelines factors the Board is directed to consider and reach its own determination, after reviewing the Board's recommendation and conducting a hearing." *People v. Santos,* 25 Misc. 3d 1212(A) (Sup. Ct. N.Y. Co. 2009).

§ 1:6 RISK ASSESSMENT INSTRUMENT (RAI)

The Board developed the RAI and the Guidelines. The Guidelines discuss the general principles that underlie the RAI and explain the specific factors included in them. In the Guidelines, the Board cautions that "[n]o one should attempt to assess a sex offender's level of risk without first carefully studying this commentary." Guidelines p. 1. And no one should attempt to defend a SORA case without first carefully studying the Guidelines. The Guidelines are a guide to understanding the RAI and are widely cited and used by courts in setting risk levels.

The Board created a mathematical RAI in the form of a scoring sheet that is divided into four parts: Current Offense(s); Criminal History; Post-Offense Behavior; and Release Environment, with a total of 15 risk factors. In each of the four parts are several risk factors. The RAI assigns numerical values to each of the 15 risk factors. All risk factors can be assessed 0 points, and points range from 5 to 30 depending on the particular risk factor. The presumptive risk level is then calculated by adding the points that are scored for each risk factor. People who score from 0 to 70 points under the instrument are presumptively level 1; people who score from 75 to 105 points are presumptively level 2; and people who score from 110 to 300 points are presumptively level 3. The instrument also provides four "overrides" which make a person presumptively a level 3 regardless of the risk factor score. The "overrides" are:

1) Person[4] has a prior conviction for a sex crime
2) Person inflicted serious physical injury or caused death
3) Person has made a recent threat that he will reoffend by committing a sexual or violent crime
4) There has been a clinical assessment that the person has a psychological, physical, or organic abnormality that decreases ability to control impulsive sexual behavior

The RAI allows a court to depart upward or downward from the presumptive risk level created by the total risk score and the overrides, if applicable. The Guidelines provide that a court may not depart from the presumptive risk level unless it concludes

[4] The RAI uses the term offender to describe the person in each of these override categories. Consistent with the preface, I have elected to replace that dehumanizing terminology with the word "person."

that there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines. (Guidelines p. 4).

Once the risk level is established, the court must make one more determination. Attached to the RAI chart are three pages entitled Sex Offender Designation Form. This form provides the court with the Board and/or prosecution's recommendation as to whether a designation is warranted. The court is required to determine whether the defendant warrants designation in any of the three categories as a sexually violent offender, a predicate sex offender or a sexual predator as defined in Correction Law § 168-a (7), or whether none of the three categories is applicable.

Scoring of the RAI and the risk factors is discussed in Chapter 3 on Scoring the Risk Assessment Instrument. Overrides, designations, and departures are discussed in the corresponding Chapters for each.

The burden of proof is placed on the prosecution to prove each of the risk factors, overrides, designations, and aggravating factors warranting an upward departure by clear and convincing evidence. The only burden of proof that is borne by the defendant is to prove mitigating factors that warrant a downward departure, and that burden is by a preponderance of the evidence. A complete discussion of the burden of proof is included in Chapter 8 on Selected Issues.

§ 1:7 THE PROCESSING OF A SORA CASE

SORA establishes three different case-processing methods. For people convicted of a sex offense in New York, the person's sentence will dictate the method for processing their SORA case. There is one process for people sentenced to probation, split sentence, conditional discharge, unconditional discharge or a fine. (*See* Correction Law § 168-d). There is a different process for people sentenced to imprisonment in a local or state correctional facility. (*See* Correction Law § 168-n). There is a third method to process SORA cases for people who were convicted of a sex offense in another jurisdiction and are returning to or moving to New York to establish residence. (*See* Correction Law § 168-k). A chart in Chapter 11: Charts and Checklists, "Pathways to a SORA Hearing," captures the procedural pathways to a SORA hearing. The process for each will be explained below.

§ 1:7a PEOPLE SENTENCED TO PROBATION, SPLIT SENTENCE[5], CD, UD, OR FINE

These cases are processed following the procedures set out in Correction Law § 168-d.

Step 1: Court certifies defendant as a sex offender upon conviction. Usually done at time of sentencing.

- If the defendant is convicted of Penal Law §§ 130.52, 130.55/ 230.04 and controverts the allegation that the victim was under the age of 18/17 or that the defendant has a prior sex offense or sexually violent offense conviction or a prior conviction for Penal Law §§ 130.52 or

[5] Correction Law § 168-a (12) defines probation as including a sentence of imprisonment imposed in conjunction with probation.

130.55, the court holds a hearing (without a jury, prior to sentencing) regarding these issues. Certification is by clear and convincing evidence. The prosecution bears the burden of proof. Certification is entered in the order of commitment, if any, and in the judgment of conviction. (Correction Law § 168-d (1)(a), (b)and[c]). Note that for an article 135 kidnapping related offense, Correction Law § 168-a (2)(a)(i) requires that the victim must be less than 17 years old for it to be a sex offense, however, inexplicably there is no provision in Correction Law § 168-d for the court to hold a hearing to make that determination.

Step 2: Court registers the defendant at the time of sentence and explains duties; Court sends registration form to DCJS.

- DCJS enters the registration into the sex offender registry database and forwards the information to the appropriate law enforcement agency. (Correction Law § 168-d [2]).

Step 3: Court schedules risk level/designation hearing and notifies defendant and prosecution of the hearing.

- The statute requires that the hearing be held at least 45 days after sentencing. As a matter of practice, some courts ask the defendant to waive the 45 days' notice requirement. (Correction Law § 168-d [2]).
- Court assigns counsel if defendant is indigent. (Correction Law § 168-d [2]).

Step 4: Prosecution is required to provide a written statement to court and defendant of the determinations sought and the reasons, at least 15 days prior to the determination proceeding. (Correction Law § 168-d [3]).

Step 5: Court holds SORA hearing.

- If the defendant has received notice of the hearing and fails to appear, the court can conduct the hearing in his or her absence. (Correction Law § 168-c (4).
- Where there is a dispute between the parties concerning determinations, the court "shall adjourn the hearing as necessary" so parties can obtain and review relevant documents. (Correction Law § 168-d [3]).
- Court can issue a subpoena for such materials if not voluntarily provided to the requesting party. (Correction Law § 168-d [3]).

Step 6: Court renders Order and findings of fact and conclusions of law regarding risk level and designation (if any). (Correction Law § 168-d [3]).

- Either party may apply to the court to seal any portion of the court record or file which contains confidential material. (Correction Law § 168-d[3]).

Step 7: Court sends a copy of the order to DCJS. (Correction Law § 168-d [3]).

- DCJS enters the risk level and any designation along with other information in the SORA database. (Correction Law § 168-b [1]). DCJS notifies local law enforcement. (Correction Law § 168-j). DCJS maintains an internet accessible subdirectory of information on people in the registry who are risk level 2 or level 3. (Correction Law § 168-q).

Step 8: Either party may appeal as of right. (Correction Law § 168-d [3]).

§ 1:7b PEOPLE SENTENCED TO JAIL OR PRISON

These cases are processed following the procedures set out in Correction Law § 168-n, but other statutes are also implicated as noted below.

Step 1: Court certifies defendant as a sex offender upon conviction. Usually done at time of sentencing.

- If the defendant is convicted of Penal Law §§ 130.52, 130.55/ 230.04 and controverts the allegation that the victim was under the age of 18/17 or that the defendant has a prior sex offense or sexually violent offense conviction or a prior conviction for Penal Law §§ 130.52 or 130.55, the court holds a hearing (without a jury, prior to sentencing) regarding these issues. Certification is by clear and convincing evidence. The prosecution bears the burden of proof. Certification is entered in the order of commitment, if any, and in the judgment of conviction. (Correction Law § 168-d (1)(a), (b) and [c]). Note that for an article 35 kidnapping related offense, Correction Law § 168-a (2)(a)(i) requires that the victim must be less than 17 years old for it to be a sex offense, however, inexplicably there is no provision in Correction Law § 168-d for the court to hold a hearing to make that determination.

Step 2: At least 120 days prior to release, the Board is notified of defendant's impending release by the state or local correctional facility and is provided with relevant information. (Correction Law § 168-m).

Step 3: Board notifies defendant that case is under review by the Board and that the defendant has a right to submit relevant information to the Board.

- This notice must be provided to the defendant at least 30 days before the Board makes its recommendation to the court. (Correction Law § 168-n [3]).

Step 4: Board makes recommendation to the court, including RAI and case summary.

- This recommendation goes to the court 60 days prior to the defendant's scheduled release. (Correction Law § 168-l [6]).

Step 5: Court notifies the defendant and the prosecution of the scheduled SORA hearing date, providing at least 20 days' notice. (Correction Law § 168-n [3]).

- Court assigns counsel if defendant is indigent. (Correction Law § 168-d [3]).

Step 6: Prosecution must provide statement to the court and the defendant of determinations sought that differ from the Board's recommendations and reasons.

- Notice of the prosecution's statement must be provided at least 10 days prior to the hearing to satisfy the statute and due process. (Correction Law § 168-n [3]).

Step 7: Court holds SORA hearing.

- The hearing should be scheduled 30 days prior to the defendant's scheduled release because the determination is required by statute 30 days prior to the release date. (Correction Law § 168- n [3]).
- If SORA hearing cannot be completed so that the determinations can be made prior to the defendant's release, the court shall adjourn the hearing until after the defendant's release and complete expeditiously. (Correction Law § 168-l [8]).
- If the defendant has received notice of the hearing and fails to appear, the court can conduct the hearing in his or her absence. (Correction Law § 168-n [6]).
- Where there is a dispute between the parties concerning determinations, the court "shall adjourn the hearing as necessary" so parties can obtain and review relevant documents. (Correction Law § 168-n [3]).
- Court can issue a subpoena for such materials if not voluntarily provided to the requesting party. (Correction Law § 168-n [3]).

Step 8: Court renders Order and findings of fact and conclusions of law regarding risk level and designation (if any). (Correction Law § 168-n [3]). The order is to be made 30 days prior to the defendant's release. (Correction Law § 168-n [2]).

- Either party may apply to the court to seal any portion of the court record or file which contains confidential material. (Correction Law § 168-n [3]).
- If the hearing is not complete by the time the defendant is released, a provisional order will allow the correctional facility to release the defendant prior to a final order.

Step 9: Court sends a copy of the order to DCJS. (Correction Law § 168-n [3]).

- DCJS enters the risk level and any designation along with other information in the SORA database. (Correction Law § 168-b [1]). DCJS notifies local law enforcement. (Correction Law § 168-j). DCJS maintains an internet accessible subdirectory of information on people in the registry who are risk level 2 or level 3. (Correction Law § 168-q).

Step 10: Either party may appeal as of right. (Correction Law § 168-n [3]).

Step 11: State or local correctional facility registers defendant at least 15 days prior to release. (Correction Law § 168-e [1]).

Step 12: State or local correctional facility sends registration form to DCJS at least 10 days prior to release. (Correction Law § 168-e [1]).

§ 1:7c PEOPLE CONVICTED OF A SEX OFFENSE IN ANOTHER JURISDICTION AND RETURNING OR MOVING TO NEW YORK

These cases are processed following the procedures set out in Correction Law § 168-k.

Step 1: Defendant must notify DCJS of new address no later than 10 days after establishing new residence. (Correction Law § 168-k).

Step 2: DCJS advises Board that defendant has new address in N.Y. (Correction Law § 168-k [2]).

Step 3: Board determines if defendant is required to register. (Correction Law § 168-k [2]).

Step 5: Board notifies defendant that registration is required. DCJS sends form and registers the defendant. (Correction Law § 168-k [2]).

Step 6: No later than 30 days prior to Board making its recommendation, the Board notifies defendant that case is under review and that he or she is permitted to submit relevant information to the Board. (Correction Law § 168-l [2]).

Step 7: Board makes recommendation to the court including RAI and case summary. (Correction Law § 168-k [2]).

Step 8: Court notifies the defendant and prosecution of the scheduled SORA hearing date, providing at least 30 days' notice. (Correction Law § 168-k [2]).

- Court assigns counsel if defendant is indigent. (Correction Law § 168-k [2]).

Step 9: Prosecution must provide statement to the court and the defendant of determinations sought that differ from the Board's recommendations and reasons.

- Notice of the prosecution's statement must be provided at least 10 days prior to the hearing to satisfy the statute and due process. (Correction Law § 168-k [2]).

Step 10: Court holds SORA hearing. (Correction Law § 168-k [2]).

- If the defendant has received notice of the hearing and fails to appear, the court can conduct the hearing in his or her absence. (Correction Law § 168-k (4).
- Where there is a dispute between the parties concerning determinations, the court "shall adjourn the hearing as necessary" so parties can obtain and review relevant documents. (Correction Law § 168-k [2]).
- Court can issue a subpoena for such materials if not voluntarily provided to the requesting party. (Correction Law § 168-k [2]).

Step 11: Court renders Order and findings of fact and conclusions of law regarding risk level and designation (if any). (Correction Law § 168-k [2]).

- Either party may apply to the court to seal any portion of the court record or file which contains confidential material. (Correction Law § 168-k [2]).

Step 12: Either party may appeal as of right. (Correction Law § 168-k [2]).

There is a chart for the timeline for each of the three above types of cases in Chapter 11 on Charts and Checklists.

§ 1:8 SORA HEARING

The SORA statutes provide only bare-bones requirements for this "determination proceeding" or "hearing." Correction Law §§ 168-n (3), 168-d (3) and 168-k (2). The statutes provide for notice of the hearing from the court, notice by way of a statement from the prosecution of determinations sought, a right to an adjournment, the right to the use of a subpoena, burden of proof borne by the prosecution by clear and convincing evidence, the right to a hearing, and the requirement of an order by the court. No indication of how the hearing is to be conducted or the procedures to be followed are provided in the Act. A full discussion of the SORA hearing is found in Chapter 2 entitled The SORA Hearing.

§ 1:9 PREPARING TO DEFEND A SORA CASE

This Guide includes several checklists that can be used by defense counsel to take a systematic and organized approach to preparation of the defense case. Included in Chapter 11 are the following documents that may prove helpful: *The Twelve Cardinal Rules of SORA Defense; Checklist: Initial SORA Hearing: Review and Preparation; Checklist: Analyzing Each Risk Factor; Checklist: Arguments for a Downward Departure;* and *Checklist: Possible Arguments Against an Upward Departure.*

Checklist for reviewing and preparing for a SORA hearing

- o Review all documents provided by the court
  - ☐ RAI proposed by the Board
  - ☐ Case summary
  - ☐ Determination of registrability by the Board (usually if moving from another state or convicted in another jurisdiction)
  - ☐ Plea transcript
  - ☐ Sentencing transcript
  - ☐ PSR
  - ☐ Defendant's presentence memorandum
- o If any of the above documents are not available, obtain them from the court or elsewhere
- o Review the RAI
  - ☐ Review scoring of each risk factor
  - ☐ Review each risk factor scored against the Guideline principles
  - ☐ Review case law as to each risk factor to determine if there is a legal basis to challenge
  - ☐ Review whether there is a factual basis for each risk factor

    - ☐ Review possible challenges to override
    - ☐ Review possible challenges to designation
    - ☐ Review basis for upward departure and prepare challenge
    - ☐ Review the math resulting in the total risk factor score
- Determine if it is a registrable offense
- Review the case summary
- Initial conference with client
    - ☐ Explain why you want client to be present at the SORA hearing and why they should not waive their presence
    - ☐ Explain to client what you will do to avoid their being held past their release date in the event the SORA hearing has not been completed, and the use of a provisional order
    - ☐ Obtain releases from client
    - ☐ Review the SORA process
    - ☐ Review SORA consequences
    - ☐ Review the RAI, how it is scored, risk levels, etc.
    - ☐ Review overrides, designations, and departures
    - ☐ Interview for facts that counter each risk factor
    - ☐ Interview for facts that counter designation, override, or upward departure
    - ☐ Interview for mitigating factors
- Review and assess all possible mitigating factors for a downward departure or to be used to fend off an upward departure in a "totality of the circumstances" analysis
- Obtain documents
    - ☐ Discovery
    - ☐ Releases
    - ☐ Subpoena
- Speak with potential witnesses or supporters
- Serve Demand for statutory statement from prosecutor
- Review prosecutor's notice for scoring, departure, and reasons
- Determine if an expert witness is advisable and, if so, retain expert

§ 1:10 HISTORY OF SORA

SORA was enacted on July 25, 1995 and became effective on January 21, 1996. Over the years, it has been amended more than twenty times. Every single amendment of the SORA statutes, except one, made the requirements more rigorous, expanded the scope, and generally tightened the screws on people subject to the Act. The only amendment to SORA that expanded the rights of people subject to registration occurred in 1999 and became effective on January 1, 2000. It did not come voluntarily, and it did not come without a fight.

Within six weeks of SORA's effective date, the Legal Aid Society commenced a constitutional challenge to SORA in Federal District Court for the Southern District of New York. Captioned *Doe v. Pataki,* this litigation was brilliantly fought by the attorneys of the Legal Aid Society over a period of eleven years. In 1998, during one iteration of this protracted litigation, this District Court held that SORA violated the procedural due process rights of the plaintiffs. *Doe v. Pataki,* 3 F. Supp. 2d 456, 471-472 (S.D.N.Y. 1998). The court found that there were seven procedures required by due process for a SORA hearing: 1) a hearing before a court and a judicial determination of the risk level, 2) notice

of the classification hearing sufficiently in advance to prepare a challenge, 3) notice of the purpose of the proceeding, 4) representation by counsel, 5) pre-hearing discovery, 6) proof by the state of the facts supporting each risk factor by clear and convincing evidence, and 7) a right to appeal. SORA was sorely lacking. With its back up against the wall, the New York legislature begrudgingly adopted the due process rights required by Judge Chin.

The due process requirements were amended into SORA effective January 1, 2000. The new procedural due process requirements were prospective, applicable to all risk determinations conducted after the effective date but did not provide for redetermination of risk previously assigned without due process. Redetermination hearings would come by way of a Stipulation of Settlement, four years later.

When first enacted, SORA required registration annually for ten years for all three risk levels. There was a category of "sexually violent predator" required to register for at least ten years and potentially for life. However, all registrants had the right to petition the sentencing court to be relieved of the duty to register. The failure to register was punishable as a misdemeanor for a first-time offense.

Over the next eight years SORA was amended, becoming increasingly punitive. Effective January 21, 2001, internet availability of the subdirectory was made mandatory by the amendment of Correction Law § 168-q. The Sexual Assault Reform Act (SARA) became effective on February 1, 2001, restricting any registrant on parole or probation from entering onto school grounds.

Effective March 11, 2002, SORA, was amended to create three categories of designation, "sexually violent offender," "sexual predator," and "predicate sex offender." Any registrant so designated was required to register for life, and there would be no right to petition to be relieved of the duty to register and no right to modification of the lifetime registration. Level 1 and level 2 registrants were still required to register for "only" ten years. Level 3 registrants were now made to register for life, however, for people on the registry as a risk level 3 prior to March 11, 2002, they could petition to be relieved of the duty to register after thirteen years. With the amendment of the statute adding these three categories of designation, the former term "sexually violent predator" was removed from the statute. As a practical matter, the Legislature took the former category, "sexually violent predator," and split its definition into the two categories that would become "sexually violent offender" and "sexual predator."

In 2006, just as the ten-year registration period was about to end for many risk level 1 and 2 registrants, the Legislature amended SORA to increase the period of required registration. This amendment became effective on January 18, 2006. For risk level 1 it was increased from 10 years to 20 years. For risk level 2 it was increased from 10 years to life, with the right to petition for relief after 30 years, and the right to seek modification down to a level 1. For risk level 3 the period of registration remained life with the right to seek modification downward. The right previously provided by the statute for a person classified as risk level 1 or risk level 3 to seek to be relieved from registration was amended to strip out that language. (Correction Law § 168-h and § 168-o).

Effective June 23, 2006, the scope of community notification was expanded for risk levels 1 and 2. Effective April 12, 2006, the requirement for submitting to photographing was expanded.

SARA was amended effective September 1, 2006, expanding its repressive restrictions in two significant respects. First, it expanded SARA to include all risk level 3 registrants on parole, probation, or conditional discharge. Second, it expanded the definition of school grounds to create a 1000 feet buffer zone around any school property, thus making it increasingly difficult for registrants to find housing, while also restricting their ability to find employment.

Effective August 17, 2007, a first offense for failure to register was increased from a misdemeanor to a class E felony. (Correction Law § 168-t).

On April 28, 2008, the Electronic Security and Targeting of Online Predators Act (E-STOP) became effective. This amendment to SORA restricted the use of the internet as a condition of parole, probation, and conditional discharge and required all registrants to register with DCJS any internet account with internet access providers belonging to the registrant and internet identifiers used by such person.

When first enacted in 1996, SORA applied to 30 "sex offenses" including attempts. By 2013 the state Legislature had repeatedly amended SORA to widen its net to extend to over 100 offenses. *People v. Parilla,* 109 A.D.3d 20, 28 (1st Dept. 2013).

This is not an exhaustive review of the amendments to SORA, but simply an attempt to identify some of the significant changes that have been made over the years.

§ 1:11 LEGAL CHALLENGES TO SORA

Since its enactment, there have been numerous broad-based constitutional challenges to SORA, including challenges to the highly flawed nature of the RAI itself, procedural due process challenges, substantive due process challenges, Ex Post Facto Clause challenges, Fourth Amendment challenges, Double Jeopardy challenges, and Equal Protection challenges among others.

The only successful constitutional challenge to the initial SORA statute addressed its failure to provide even the most rudimentary of due process rights. See § 1:17 on the *Doe v. Pataki* litigation. The New York and Federal courts have not been receptive to any of the other constitutional challenges.

§ 1:12 PROCEDURAL DUE PROCESS CHALLENGES

The original 1996 SORA statute provided little by way of procedural due process rights to people who faced classification. The Legislature gave little consideration to what rights a person might have before a significant liberty was affected. *Doe v. Pataki,* 3 F. Supp. 2d 456 (SDNY 1998) established the minimal due process that was required for a SORA hearing, including: 1) a hearing before a court and a judicial determination of the risk level, 2) notice of the classification hearing sufficiently in advance to prepare a challenge, 3) notice of the purpose of the proceeding, 4) representation by counsel, 5) pre-hearing discovery, 6) proof by the state of the facts supporting each risk factor by clear and convincing evidence, and 7) a right to appeal.

New York State courts have accepted these fundamental due process rights and have applied them to SORA cases. *See People v. Wells,* 138 A.D.3d 947 (2d Dept. 2016) and *People v. Baxin,* 26 N.Y.3d 6 (2015).

§ 1:13 CHALLENGES TO THE RAI

The RAI created by the Board of Examiners of Sex Offenders and its selection of fifteen risk factors has been the object of extensive criticism, with some experts referring to it as a "pseudo-scientific" instrument. There have been dozens of challenges to the RAI. Despite its many well-documented flaws, there is no reported case that has upheld a constitutional challenge to the RAI.

An important case to read to understand many of the RAI's flaws is *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010). The court agreed with the defendant's challenge to the current procedures by which people are classified under the RAI, finding it devoid of any rational basis and violative of substantive due process. However, the court denied the defendant's challenge feeling constrained by the precedent of prior rulings, particularly by the First Department. The court in *McFarland* listed 19 cases in which courts previously upheld the RAI. *See People v. Ferrer,* 69 A.D.3d 513 (1st Dept. 2010), *People v. Warren,* 152 A.D.3d 551 (2d Dept. 2017), and *People v. Bailey,* 52 A.D.3d 336 (1st Dept. 2008).

§ 1:14 DOUBLE JEOPARDY

Challenges based upon the Fifth Amendment prohibition against being punished for the same crime more than once have not been successful. *People v. Parilla,* 109 A.D.3d 20, (1st Dept. 2013), *People v. Miller,* 77 A.D.3d 1386 (4th Dept. 2010), *People v. Szwalla,* 61 A.D.3d 1289 (3d Dept. 2009).

§ 1:15 DUE PROCESS

Due process challenges to SORA have also failed. *Woe v. Spitzer,* 571 F. Supp. 2d 382 (EDNY 2008), *Doe v. Cuomo,* 755 F.3d 105 (2d Cir. 2014), *Mater of Bush v. New York State Board of Examiners of Sex Offenders,* 72 A.D.3d 1078 (2d Dept. 2010).

The Supreme Court for the State of South Carolina has held that South Carolina's SORA statute was unconstitutional as violative of due process because its mandated lifetime registration does not provide for judicial review of the individual's risk of recidivism and removal from the registry. *Powell v. Keel and The State of South Carolina.* 860 S.E.2d 344 (Sup. Ct. 2021). New York's lifetime registration resulting from one of three designations may be susceptible to a similar challenge.

§ 1:16 EX POST FACTO

One might expect that an Ex Post Facto challenge to the many changes to SORA that applied new restrictions retroactively would be successful. Unfortunately, most of such challenges have been rejected, with the courts almost uniformly concluding that SORA is not punitive and therefore the Ex Post Facto clause is not applicable. The only case that accepted an Ex Post Facto challenge to New York's SORA occurred in the initial litigation of *Doe v. Pataki,* 940 F. Supp. 603 (SDNY 1996), when the District Court enjoined the community notification provisions of SORA. This victory was short-lived, as it was overturned within a year by the Second Circuit in *Doe v. Pataki,* 120 F.3d 1263 (2d

Cir. 1997). Subsequently, the U.S. Supreme Court rejected an Ex Post Facto challenge to Alaska's registry notification and registration requirements, in *Smith v. Doe,* 538 U.S. 84 (2003), setting the stage for additional adverse Ex Post Facto rulings. *See Doe v. Cuomo,* 755 F.3d 105 (2d Cir. 2014), *People v. Parilla,* 109 A.D.3d 20 (1st Dept. 2013), *People v. Szwalla,* 61 A.D.3d 1289 (3d Dept. 2009).

But there are some signs of change. In an amicus brief filed by the Michigan Attorney General in the case of *People v. David Allen Snyder*, the Attorney General acknowledges and supports a shift away from *Smith v. Doe,* 538 U.S. 84 (2003).[6] In her brief, the Attorney General of Michigan concludes that the Michigan registry is punitive and violates the Ex Post Facto Clause. She notes that State Supreme Courts in Alaska, California, Indiana, Kentucky, Maine, Maryland, Ohio, Oklahoma and Pennsylvania have concluded that their registries constitute punishment, and their retroactive application is an Ex Post Facto violation. The Sixth Circuit Court of Appeals reviewed Michigan's registry and found that its 2006 and 2011 amendments were punishment and violated the federal Ex Post Facto Clause. *Does #1-5 v. Snyder,* 834 F.3d 696 (6th Cir. 2016). In *People v. Betts.* ___ N.W.2d ___, 2021 WL 3161828 (2021), a companion case to *People v. David Allen Snyder,* the Supreme Court of Michigan held that the subsequent amendments to Michigan's 1996 SORA transformed it from a regulatory scheme into a punishment scheme such that the retroactive application of those provisions violated the Ex Post Facto Clauses of the Michigan and U.S. Constitutions. *See* also *Doe v. Snyder,* 49 F. Supp.3d 719 (E.D. Michigan, 2020) declaring portions of Michigan's SORA unconstitutional an enjoining enforcement of those provisions.

§ 1:17 ***DOE V. PATAKI* LITIGATION**

The *Doe v. Pataki* litigation is at the heart of the fight against the oppressive and punitive nature of SORA. Six reported cases have resulted from that litigation. Defense counsel practicing in this subject area may find the following overview of this litigation useful:

1) *Doe v. Pataki,* 940 F. Supp. 603 (SDNY 1996) – In this initial challenge, the plaintiffs sought to enjoin the community notification provisions of SORA as violative of the Ex Post Facto Clause as applied to people in prison, on parole or probation as of January 21, 1996. The District Court ruled in favor of the Ex Post Facto claim, concluding that the community notification increased punishment, and issued an injunction against the defendants.

2) *Doe v. Pataki,* 120 F.3d 1263 (2d Cir. 1997) – The Second Circuit reversed, concluding that there was no increased punishment and thus no Ex Post Facto violation, vacated the injunction, and remanded for the District Court to consider plaintiffs' other claims.

3) *Doe v. Pataki,* 3 F. Supp. 2d 456 (SDNY 1998) – The District Court ruled in favor of the plaintiff class on their claim that the SORA statute, as enacted, violated multiple facets of procedural due process that any person would be entitled to

[6] This amicus brief gives an overview of the successful challenges to state registries across the U.S. Available online at **https://www.michigan.gov/documents/ag/Recd.148981_Betts_SORA_br_MSC-FINAL_marked_645819_7.pdf.**

before risk level classification. The court ruled that the plaintiffs had a protected liberty interest that entitled them to the following procedural due process: : 1) a hearing before a court and a judicial determination of the risk level; 2) notice of the classification hearing sufficiently in advance to prepare a challenge; 3) notice of the purpose of the proceeding; 4) representation by counsel; 5) pre-hearing discovery; 6) proof by the state of the facts supporting each risk factor by clear and convincing evidence; and 7) a right to appeal. The court granted plaintiffs' motion to expand the class to include people incarcerated on the effective date of SORA. The court granted summary judgment in favor of the plaintiffs and enjoined the defendants "from classifying members of the class at higher than risk level 1 unless and until they are reclassified by a court in accordance with the procedures that satisfy the requirements of due process." *Doe v. Pataki,* 3 F. Supp. 2d at 479. The class of people protected by this injunction, and who became eligible for redetermination hearings, included registrants on probation or parole on January 21, 1996, or who were incarcerated on January 21, 1996, and assigned a risk level before January 1, 2000.

a. As a result of this ruling, the New York Legislature amended SORA in 1999 to incorporate the necessary procedural due process. The amendment granted the required procedures to risk determination hearings prospectively but did not provide for redetermination of risk levels previously assigned. The parties commenced settlement negotiations that lasted over the next six years. The parties entered into a Stipulation of Settlement that was "so ordered" by the District Court on June 4, 2004. The Notice of Settlement can be found online at SORA Settlement Notice - June 1 2004.rtf (ny.gov). The Stipulation is at https://www.criminaljustice.ny.gov/nsor/sora_settlement.pdf. The Stipulation sets forth the details for the redetermination hearings for level 2 and level 3 plaintiffs. So began the process of redetermination hearings. It should be noted that defense counsel may still come across a member of this class who is entitled to a redetermination hearing instead of a modification proceeding.

4) *Doe v. Pataki,* 427 F. Supp. 2d 398 (SDNY 2006) - Seventeen months after the parties entered into the Stipulation of Settlement, the government amended SORA to effectively alter the terms of the Stipulation. The class moved for an order enforcing the Stipulation as written, which was granted by the District Court. Defendants appealed.

5) *Doe v. Pataki,* 439 F. Supp. 2d 324 (SDNY 2006) – Plaintiffs sought clarification of the previous order and its application to community notification. The court modified the stay contained in its order to permit continued application of the law to level 1 and 2 members of the class, pending appeal, only as the law existed on April 25, 2006. The court enjoined defendants from applying any subsequent amendments to the law to level 1 and 2 members of the class during the pendency of the appeal. Defendants appealed.

6) *Doe v. Pataki,* 481 F.3d 69 (2d Cir. 2007) – The two previous orders of the District Court were consolidated on this appeal. The question on appeal was whether the state was bound by its Stipulation to keep the duration of registration at 10 years for all three risk levels, or whether the state could renege on that stipulation by simply amending SORA, as it did in 2006, to change the duration of registration to 20 years for level 1, and life for levels 2 and 3. The Second Circuit vacated the two stays from the District Court and allowed the state to renege by amending the Act.

§ 1:18 CRITIQUES OF SORA

Several courts and many experts have leveled three broad criticisms at the SORA process:

1) The RAI is a pseudo-scientific instrument that is deeply flawed.
2) Reliance on the RAI without clinical assessment is neither a reliable nor professional way to undertake risk assessment. The courts and Legislature are trailing too far behind research and behavioral science.
3) Registration and notification do not work and are counterproductive.

§ 1:19 FLAWS IN THE RAI

The following is a list of flaws in the RAI gleaned from court decisions, experts, and articles on the subject:

1) The scientific articles and research upon which the RAI is purportedly based are outdated and frozen in time. The Board relied on a handful of studies ranging from 1976 to mid-1995 to create the instrument and write the Guidelines. Since then, empirical research, including large meta-analytic studies, and theoretical-practice literature, have yielded substantial new information about the nature of sexual offending risk assessment. Despite these significant developments, the Board has not incorporated this empirical and theoretical literature to revise the RAI.

2) In the process of developing a so-called "objective assessment instrument" the Board has not assessed the reliability and the validity of the RAI. There is no reason to believe it accurately predicts reoffense risk.

3) The RAI provides for four overrides, however, there are no current empirical or theoretical findings to support the proposition that one risk factor, standing alone, is enough to supplant the results of an entire risk assessment.

4) A number of the risk factors have weak associations with risk for sexual reoffense in the community, and other risk factors have no empirically demonstrated association with an increased risk for sexual reoffense in the community.

5) The predictive validity of the factors is limited, and the RAI total score is likely to produce inaccurate classifications.

6) From current research, critical elements which are now known to be the most potent predictors, are not included in the RAI, including i) time spent offense-

free in the community; ii) age at the time of release; iii) intrafamilial or female victims; iv) having lived with an intimate partner for two years; and v) paraphilic interests.

7) The more contemporary and better validated empirical efforts point to the weaknesses inherent in the RAI.

8) The number of points assessed for each risk factor appear to have been arbitrarily determined.

9) The process for departures is based upon an irrational standard and is made without reliable evidence.

10) The Guidelines fail to be in accord with the legislative directive for risk assessment analysis in the Correction Law. The statute specifically directs the Board to include in the assessment "whether psychological or psychiatric profiles indicate a risk of recidivism." Correction Law § 168-l (5)(f). The statute also indicates that "the sex offender's response to treatment" shall be included in the Guidelines. Correction Law § 168-l (5)(f). The Guidelines make no reference to either criterion.

11) The task of assessing risk of recidivism is made even more difficult where there has been no individualized psychiatric assessment of the defendant.

12) The RAI, unlike actuarial risk assessment instruments, such as the Static-99R, is a generally unaccepted risk assessment instrument.

13) In child pornography cases, the RAI routinely overstates the risk of reoffending, resulting in inaccurate risk level adjudications. The reason for this overassessment of risk is because the RAI was not developed with non-contact, child pornography offenses in mind.

14) Contrary to what the RAI suggests by the use of risk factor 8, more recent empirical research demonstrates that sexual recidivism rates for people who commit sex offenses as juveniles are generally lower than those reported for individuals who commit sex offenses as adults.

§ 1:20 RELIANCE ON THE RAI WITHOUT CLINICAL JUDGMENT

Professionals in the field of sexual offending, when making risk assessment determinations, use multiple tools and do not limit themselves to an actuarial risk assessment. Their assessments include: extensive interviewing of the individual, extensive documentary review of the individual's personal history, mental health, and criminal history, administering the Static-99R if appropriate, administering structured professional judgment instruments, additional testing, IQ if needed, and the exercise of clinical judgment. Clinical professionals who do risk assessments follow standard practices intended to produce the most accurate possible determinations. In the standard SORA case there is no such clinical assessment made available to the court. This caused Judge Conviser to lament in *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010): "In the absence of reliable evidence about the likelihood that an offender will re-offend, however, courts are not equipped to make risk determinations. Risk is not a moral judgment. It is (or should be) an empirical one. It is a determination which seeks to

predict how likely it is that a specific future event – a sex offense – will occur. Professionals in the field of sex offender risk assessment would never make risk level determinations with the information most courts have in ruling on departures. Neither, in the Court's view, should the judiciary."

It is a fool's errand to assess risk the way we currently do. There is a need to use a reliable actuarial risk assessment, not the RAI, and to supplement that assessment with clinical judgment. As Judge Conviser concluded in *People v. McFarland:*

> *If sex offender risk assessment is worth doing (and the Legislature has clearly stated that it is), it is worth doing correctly. The stakes, to our cherished liberties and to our families and children are too high. New York's dedicated prosecutors, defense lawyers and judges are surely more than capable of adjudicating risk levels based on reliable evidence, clearly articulated standards and the exercise of sound discretion. In the view of this Court, we can and must do better.*

§ 1:21 REGISTRATION AND NOTIFICATION DO NOT INCREASE PUBLIC SAFETY AND ARE COUNTERPRODUCTIVE

Even if we can improve our accuracy with risk assessment, there is still the overarching issue of whether registries and community notification serve any legitimate public safety purpose.

> *From the research, however, it appears that the emperor has no (or very few) clothes. The consensus of empirical research is that these sex offender registration and notification laws have no statistically significant effect on sex offender recidivism and thus fail to provide the protection upon which they are premised and which they promise the public.*

Charles Patrick Ewing, JUSTICE PERVERTED, 115 (2011)

SORA and related laws such as the Sexual Assault Reform Act (SARA) limit people's contact with social support networks and create a disincentive for pro-social behavior, thereby impeding reentry and likely enhancing the risk of recidivism. These laws make communities less safe because they engender a false sense of security. Finally, inaccurate risk classification diverts the scarce resources of law enforcement. To the extent police are forced to monitor people who are misclassified as high risk, they cannot allocate resources to other law enforcement priorities. *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010).

To learn about the flaws in the SORA process, the following reading is suggested:

Cases of Interest:

- *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010).
- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)
- *People v. Marrero,* 37 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2012)

- *People v. Oliver,* 37 Misc. 3d 1201(A) (Sup. Ct. Cayuga Co. 2009)

Articles and Documents of Interest:

Laurie Guidry, *Doe v. Pataki: Court Offers 9,000 Sex Offenders Opportunity to Appeal Risk Level,* 7 The Alliance 1 (Winter 2004-2005). Available at https://appellatesquawk.files.wordpress.com/-2016/08/guidry-alliance1.pdf

Affidavit of Kostas Katsavdakis, Ph.D. submitted in *People v. McFarland,* included in Appendix.

New York City Bar Association, *Report on Legislation regarding RAIs.* Available at https://www2.nycbar.org/pdf/report/uploads/20072469-SexOffenderRegistrationActReport.pdf

SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAW: AN EMPIRICAL EVALUATION (Wayne A. Logan & J.J. Prescott eds., 2021).

American Law Institute, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (§ 213.0 to § 213,11J), (Tentative Draft No. 5 and Council Draft No. 11 2021).

Daniel Conviser, *After 25 Years, It Is Time to Reform New York's Sex Offender Risk Assessment System: Part I,* NYLJ (Jan. 5, 2021).

Daniel Conviser, *After 25 Years, It Is Time to Reform New York's Sex Offender Risk Assessment System: Part II,* NYLJ (Feb. 9, 2021).

Chapter 2:

THE SORA HEARING

CHAPTER 2 SECTIONS

§ 2:1 Statutory Principles and Procedures
§ 2:2 Defending at the SORA Hearing
§ 2:3 Preparing the Submission
§ 2:4 Planning and Selecting Documents to Submit
§ 2:5 Documents to Consider Submitting
§ 2:6 Testimony
§ 2:7 Advocacy at the SORA Hearing
§ 2:8 Procedures for a SORA Hearing

Chapter 2
THE SORA HEARING

As noted in the introductory Chapter, the SORA statutes provide only bare-bones requirements for the hearing and give no direction about how the hearing is to be conducted. The first section of this Chapter identifies the statutory principles and procedures set forth in the SORA statutes. The second section addresses defense counsel's role in the proceeding. The final section of this Chapter suggests how an efficient hearing might be conducted.

§ 2:1 STATUTORY PRINCIPLES AND PROCEDURES

The statutes that provide for the three different types of SORA proceedings all contain the same principles. Correction Law §§ 168-n, 168-d and 169-k.

1) The defendant has a "right to a hearing" prior to the court's determination.

2) The court must determine whether the defendant should be designated either as a "sexual predator," a "sexually violent offender," or a "predicate sex offender," or that none of the three designations apply.

3) The court must make a determination as to the level of notification.

4) The defendant has the right to be assigned counsel if found to be financially unable to retain counsel.

5) The defendant is entitled to advance notice from the court of the date of the proceeding. In the case of a Correction Law § 168-n proceeding, the notice must be at least 20 days. In the case of a Correction Law § 168-k proceeding, the notice is at least 30 days, and in the case of a Correction Law § 168-d proceeding, the notice must be at least 45 days. Each of the three statutes [Correction Law §§ 168-d (2), 168-k (2) and 168-n (3)] also requires that the court send notice to the defendant of the nature and purpose of the proceeding, and advise the defendant of the right to a hearing prior to the court's determination, the right to be represented by counsel at the hearing, and the right to the assignment of counsel. The form of this notice is very specific and statutory. The notice must comport with the statute or be substantially similar. *People v. Huntley,* 191 A.D.3d 1261 (4th Dept. 2021).

6) The defendant also has the right to notice from the prosecution in the form of a statement setting forth the determinations sought along with the reasons for seeking such determinations. In proceedings pursuant to Correction Law §§ 168-n and 168-k, the notice required is at least 10 days prior to the hearing and requires notice of those determinations sought by the prosecution that differ from the recommendations of the Board. For proceedings pursuant to Correction Law § 168-d, the notice is at least 15 days prior to the hearing and requires notice of all determinations sought by the prosecution.

7) The prosecution shall bear the burden of proving facts supporting the determinations sought by clear and convincing evidence.

8) The defendant has the right to appear at the hearing and be heard.

9) Where there is a dispute between the parties concerning the determinations, the defendant has a right to an adjournment of the hearing to obtain relevant materials.

10) The defendant has a right to subpoena records if not voluntarily provided from any state or local facility, hospital, institution, office, agency, department or division.

11) The court shall consider the following:
    a. victim's statement;
    b. relevant materials and evidence submitted by both parties; and
    c. recommendations and materials submitted by the Board

12) The court may consider "reliable" hearsay evidence submitted by either party.

13) Facts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated.

14) "The court shall render an order setting forth its determinations and the findings of facts and conclusions of law on which the determinations are based." Correction Law §§ 168- n (3), 168-d (3) and 168-k (2).

Although this seems like a simple requirement, it has led to scores of appellate decisions addressing deficient orders. There must be an order rendered by the court. Without an order there can be no appeal. *People v. Lavelle,* 169 A.D.3d 1127 (3d Dept. 2019), *People v. Scott,* 157 A.D.3d 1070 (3d Dept. 2018), *People v. Lockrow,* 161 A.D.3d 1492 (3d Dept. 2018). The court must set forth findings of fact and conclusions of law in the order. *People v. Leopold,* 13 N.Y.3d 923 (2010), *People v. Dean,* 169 A.D.3d 1414 (4th Dept. 2019), *People v. Burke,* 68 A.D.3d 1175 (3d Dept. 2009), *People v. Villane,* 17 A.D.3d 336 (2d Dept. 2005). Because the language of the statutes seems so clear, it is a wonder that judges had such a difficult time with compliance. Yet many SORA courts found compliance difficult, resulting in a high volume of cases raising this issue in the Appellate Division. Perhaps in frustration, the Appellate Division crafted a work-around. In *People v. Joslyn,* 27 A.D.3d 1033 (3d Dept. 2006), the Third Department created a legal fiction: a hybrid order that incorporated into the written order findings of fact and conclusions of law made on the record at the hearing so as to satisfy the statutory requirements by cobbling together findings of fact and conclusions of law from both the hearing and the order, holding that:

> *[W]hile we recognize the statute directs the sentencing court to "render an order setting forth its determinations and the* ***findings of fact and conclusions of law*** *on which the determinations are based" (Correction Law § 168-n [3] [emphases added]), our Court has reviewed the findings of fact and conclusions of law which were made by County*

> *Court orally, on the record, at the close of the hearing. We find this practice to be in compliance with the statutory directive, provided the record is clear that the court is doing so.*

People v. Joslyn, 27 A.D.3d at 1035

And just like that a new rule was born. Other cases followed. *See People v. Young,* 108 A.D.3d 1232 (4th Dept. 2013), *People v. McCabe,* 142 A.D.3d 1379 (4th Dept. 2016). Even with this order saving work-around, some SORA courts still have not made their oral findings of fact and conclusions of law sufficiently detailed to satisfy even this more relaxed requirement. *People v. Filkins,* 107 A.D.3d 1069 (3d Dept. 2013).

Some SORA courts have given such short shrift to defense arguments for downward departure that they did not bother to even address the defense request at the hearing or in the order. This gave rise to the appellate rule that the SORA court must make a determination on the request for a downward departure and provide findings of fact and conclusions of law relating to such determination. *See People v. Ramos,* 167 A.D.3d 787 (2d Dept. 2018), *People v. Darrah,* 153 A.D.3d 1528 (3d Dept. 2017).

§ 2:2 DEFENDING AT THE SORA HEARING

Once defense counsel has prepared the case as outlined in Chapter 1, §1:9 on Preparing to Defend a SORA Case, it is time to think about the advocacy, documents, and evidence that will constitute the defense case.

§ 2:3 PREPARING THE SUBMISSION

Defense counsel should consider preparing a packet of documents that can be submitted in advance of the hearing in order to give the judge an opportunity to review the defense position. There may be occasions when, for strategic reasons, defense counsel will want to wait to make this submission at the hearing. In most cases, defense counsel will want to submit a Memorandum of Law along with the submission.

One set of documents for submission to the court might include the following:

- Defendant's Exhibits Cover Sheet
- Defendant's Proposed Scoring of RAI
- Actuarial Risk Assessment Instrument or other Assessments
- Defendant's Affidavit
- Attorney's Affirmation
- Report from Clinical Psychologist
- Exhibits (including any social science research and literature)
- Support Letters
- Memorandum of Law

Samples of the above documents, except for exhibits and support letters, are included in Chapter 12 on Sample Documents.

§ 2:4 PLANNING AND SECLECTING DOCUMENTS TO SUBMIT

Defense counsel should systematically think through what documentary proof will be needed. Ask yourself the following four questions:

1) What documentary evidence will help to counter the assessment of points for each risk factor at issue? You will be aided in doing this by a thorough analysis of the contested risk factors. For each risk factor that you wish to contest carefully review that risk factor in the Guidelines and review the case law interpreting that risk factor. A discussion about each risk factor can be found in this Guide in Chapter 3: Scoring the Risk Assessment Instrument. It may be helpful to review them.

2) What mitigating factors can be marshalled to support a downward departure or counter an upward departure in a "totality of the circumstances" analysis? A review of the checklist on mitigating factors in Chapter 11: Charts and Checklists, will be a good place to start. Once you have identified the mitigating factors, review the case law for each in Chapter 5: Departures. This will help you determine what documentary evidence to submit to the court that helps prove the mitigating factor by a preponderance of the evidence.

3) What facts counter the aggravating factors advanced by the prosecution?

4) What facts are at your disposal that will counter any override or designation sought by the prosecution?

§ 2:5 DOCUMENTS TO CONSIDER SUBMITTING

- Clinical evaluations
- Defendant's proposed scoring of RAI
- Other risk assessment instruments
- Records of educational achievement
- Treatment records
- Program records and progress reports
- Records of pro-social activity
- DOCCS disciplinary records
- Support letters
- Social science research and literature
- Medical records

§ 2:6 TESTIMONY

Generally, do not have the defendant testify at the hearing. Bad things can happen during cross-examination (or even on direct). Remember, hearsay is admissible at this hearing and your documents, if reliable and uncontradicted, can meet your burden of proof. On the other hand, there are times when you should carefully consider putting a witness on the stand, particularly one who is empathy-evoking and poses little risk under cross-examination.

There will be facts that defense counsel will want to elicit from the client. This can be done safely with a carefully crafted affidavit sworn to by the client. Consider including in this affidavit the client's statements of remorse, acceptance of responsibility, and insight gained from counseling.

If you have retained an expert psychologist, you will want to carefully consider whether to rely upon a report or to supplement that report with testimony. There is no

right or wrong way to proceed. Knowing the judge, the expert, and the prosecutor will help inform the defense strategy.

§ 2:7 ADVOCACY AT THE SORA HEARING

After fully investigating the facts, reviewing the Guidelines, and researching case law for each of the risk factors, overrides, departures, and designations at issue, as well as the mitigating factors the defense seeks to advance, defense counsel is now prepared to plan the advocacy for most SORA hearings. Additional investigation and research should be undertaken with regard to more specialized issues that could affect the case, including the following:

- The need for an adjournment
- The need to ask the court for a judicial subpoena for specific records
- Registrability
- Preclusion or waiver of an issue by the prosecution
- Provisional order
- If defendant was on the registry in another state and moved to New York, consider the need for a *nun pro tunc* order crediting time on the other state's registry to the time owed on the registry in New York

Defense counsel should be prepared to systematically address each of these issues.

For all of the determinations that the prosecution seeks, defense counsel should be prepared to argue the facts and the law, and to hold the prosecution to its burden of proof of clear and convincing evidence. This is a high burden of proof and the court should be constantly reminded of how high it is. This burden of proof is discussed in detail in Chapter 8: Selected Issues – §8:1 on Burden of Proof.

Defense counsel should find the opportunity, while arguing for a downward departure, to remind the court that the defense only needs to prove the mitigating factors by a mere preponderance of the evidence. This argument is enhanced when you point out that some of the mitigating factors that you have established are uncontradicted by the prosecution.

§ 2:8 PROCEDURES FOR A SORA HEARING

The SORA statutes provide no direction as to the way a SORA hearing is to be conducted. It is left to the court's discretion. Surprisingly, there do not appear to be any appellate cases that have challenged how any court has managed the hearing. Some courts have their own well-worn procedures from which they are unwilling to deviate. One jurist went so far as to prepare not only an Order Directing a Hearing as to how the prosecution must submit its documentary evidence and proceed at the hearing, but also annexed to the Order a hearing script describing in detail exactly how the prosecution and defense counsel should proceed at the hearing. For the more rigid judges, counsel will do well to find out the procedures that they follow in advance and adhere to them. Other judges are more flexible and are open to suggestions from counsel as to how to proceed. This can present an opportunity for defense counsel to take control of the hearing. Below is one such suggestion for a procedural structure.

Step 1: If defense counsel has raised the issue of the need for an adjournment, this should be addressed first, for practical reasons. If defense counsel

has not received the voluntary delivery of documents, records, and materials that were previously requested, a judicial subpoena should be applied for, if needed, to obtain such materials.

Step 2: If defense counsel has raised an issue of registrability, that issue should be addressed because, if decided favorably to the defense, it will render the hearing moot.

Step 3: Since the burden of proof is on the prosecution, the prosecution should be required to submit an initial packet of documents to be offered into evidence. These documents should have been provided to the defense in advance of the hearing in conformance with the statutory notice.

Step 4: Defense counsel is provided an opportunity to object to any exhibits. The court then rules on the objections.

Step 5: The prosecution is given the opportunity to present any sworn testimony subject to cross-examination by defense counsel.

Step 6: Prosecution is asked if they rest on the proof as submitted.

Step 7: The prosecution goes through the 15 risk factors indicating for which of the risk factors it seeks the assessment of points and the amount of points.

Step 8: Defense counsel is given the opportunity to submit any documentary evidence or any sworn testimony. The prosecution is heard as to any objections. The court rules on the objections.

Step 9: Defense counsel presents argument on each of the contested risk factors.

Step 10: If the prosecution has failed to give statutory notice as to any of the risk factors sought, the court should rule on whether the prosecution should be deemed to have waived its right to be heard on that issue.

Step 11: The court rules on the assessment of points for each risk factor and totals the risk factor score.

Step 12: The prosecution presents argument on any override sought. Defense counsel presents argument in opposition.

Step 13: The court rules on whether an override is warranted or if the prosecution has failed to give statutory notice that it was seeking an override. If notice is deficient, the court determines if the prosecution should be deemed to have waived the right to be heard on this issue.

Step 14: The prosecution is given an opportunity to be heard on any request for an upward departure. Defense is permitted to present argument against these aggravating factors.

Step 15: If the prosecution has failed to provide statutory notice that it was seeking a departure, the court determines whether the prosecution should be deemed to have waived the right to be heard on this issue.

Step 16: The defense is given an opportunity to be heard on any request for a downward departure. The prosecution is given an opportunity to be heard on any mitigating factor.

Step 17 The prosecution and then the defense are given an opportunity to be heard on the issue of whether there should be a departure upward or downward based upon a totality of the circumstances.

Step 18 The court rules on the departure requests.

Step 19: The court makes a final determination on the risk level.

Step 20: The prosecution may be heard on the issue of any designation sought. The defense is given the opportunity to be heard in response.

Step 21: The court makes a determination as to whether any one of the three designations is warranted.

Step 22: If it is a case in which the defendant was previously on the registry in another state and moved to New York, the defense requests the court to issue a *nunc pro tunc* order giving the defendant credit for time on the registry in the other state as applied to the time required to be on the registry in New York. The court rules on this issue.

Step 23: The Court issues an order with findings of fact and conclusions of law on all of the determinations made.

Chapter 3

SCORING THE RISK ASSESSMENT INSTRUMENT: RISK FACTORS AND POINT ASSESSMENTS

CHAPTER 3 SECTIONS

§ 3:1 General Principles, Rules and Considerations for Scoring the RAI

§ 3:2 Risk Factor 1: Use of Violence

§ 3:3 Risk Factor 2: Sexual Contact with Victim

§ 3:4 Risk Factor 3: Number of Victims

§ 3:5 Risk Factor 4: Duration of Offense Conduct with Victim

§ 3:6 Risk Factor 5: Age of Victim

§ 3:7 Risk Factor 6: Other Victim Characteristics

§ 3:8 Risk Factor 7: Relationship Between Offender and Victim

§ 3:9 Risk Factor 8: Age at First Sex Crime

§ 3:10 Risk Factor 9: Number and Nature of Prior Crimes

§ 3:11 Risk Factor 10: Recency of Prior Felony and Sex Crime

§ 3:12 Risk Factor 11: Drug or Alcohol Abuse

§ 3:13 Risk Factor 12: Acceptance of Responsibility

§ 3:14 Risk Factor 13: Conduct While Confined or Under Supervision

§ 3:15 Risk Factor 14: Supervision

§ 3:16 Risk Factor 15: Living or Employment Situation

Chapter 3

SCORING THE RISK ASSESSMENT INSTRUMENT: RISK FACTORS AND POINT ASSESSMENTS

GAZING INTO THE SORA CRYSTAL BALL

§ 3:1 GENERAL PRINCIPLES, RULES, AND CONSIDERATIONS FOR SCORING THE RAI

- **SORA's dual concerns** – SORA seeks to capture two factors: (1) the risk of reoffense, and (2) the harm that would be inflicted by a reoffense. Guidelines p. 2. It is important for defense counsel to recognize and address both elements. It is not uncommon for defense counsel to overly focus on showing a low risk of reoffense, only to get whacked by the judge on the second element. Of course, it is easy for a judge to simply rely on the potential harm posed should the defendant reoffend. The risk of reoffense is, to some extent, measurable. Potential harm is much less so, thus giving judges a "go-to" subjective basis to over-assess the defendant's risk level.

- **Purpose of SORA is not punishment** – Although the purpose of SORA is to protect the public from the danger of recidivism, it often feels like the District Attorney or the Court view it as an opportunity to exact additional punishment. It is important to subtly remind the court that neither punishment nor vengeance are the purpose of SORA. SORA is not penal in nature. It has been described as a civil statute,[7] remedial,[8] regulatory,[9] and a collateral consequence.[10] Courts have consistently explained that it is not a penal statute[11] and that SORA's purpose "is not intended to serve as a form of punishment."[12] You might do well to drop this reminder into your memorandum of law.

- **No *per se* rules** – The Guidelines say they eschew *per se* rules, and the risk should be assessed on the basis of all pertinent factors and on an individual basis. Guidelines p. 2.

- **Burden of proof** – The prosecution's burden of proof is clear and convincing evidence. Points should not be assessed for any risk factor unless the prosecution has presented clear and convincing evidence of the existence of that factor. Guidelines p. 5. *People v. Pettigrew,* 14 N.Y.3d 406, 408 (2010); *People v. Wells,* 138 A.D.3d 947, 951 (2d Dept. 2016).

---

[7] *People v. Parilla,* 109 A.D.3d 20, 24 (1st Dept. 3013)
[8] *North v. Board of Examiners*, 8 N.Y.3d 745, 752 (2007)
[9] *Doe v. Pataki,* 120 F.3d 1263, 1277, 1278 (2d Cir. 1997)
[10] *People v. Windham,* 10 N.Y.3d 801, 802 (2008)
[11] *People v. Gravino,* 14 N.Y.3d 546, 556 (2010)
[12] *People v. Wells,* 138 A.D.3 947, 951 (2d Dept. 2016)

- **Clear and convincing evidence** – Clear and convincing evidence can be derived from the defendant's admissions, the victim's statements, the evaluation report of supervising probation officers, parole officers or corrections counselors, or from any reliable source. Guidelines p. 5. Courts have also considered other documents to be reliable hearsay for the purposes of SORA proceedings including grand jury testimony, case summaries prepared by the Board, presentence reports prepared by a probation department (*People v. Mingo,* 12 N.Y.3d 563, 572-573 [2009]), a victim's sworn statement to police, and transcripts of statements by the defendant at plea or sentencing. (*People v. Dominie,* 42 A.D.3d 589 [3d Dept. 2007]). *Care should be taken* not to conflate what courts have referred to as reliable hearsay with clear and convincing evidence. Merely because a document has been referred to as reliable hearsay, does not mean that the facts that it purports to establish cannot be controverted or disproven. Likewise, even though a document is admitted into evidence as reliable hearsay, it does not mean that it is sufficient to prove a particular fact by clear and convincing evidence. See Chapter 8, § 8:1 on Burden of Proof.

- **Facts proven at plea or trial** – Facts previously proven at trial or elicited at the time of entry of a plea are deemed established by clear and convincing evidence and cannot be relitigated. Correction Law §§ 168-d (3), 168-n (3), 168-k (2).

- **Not limited to crime of conviction** – The Board or SORA court is not limited to the crime of conviction but may consider other relevant facts from other reliable sources supported by clear and convincing evidence in determining defendant's risk level. Guidelines p. 5. *People v. Lovelace,* 39 A.D.3d 728 (2d Dept. 2007) *lv denied* 9 N.Y.3d 803 (2007).

- **Arrest or indictment not sufficient** – The fact that a defendant was arrested or indicted for an offense is not, by itself, evidence that the offense occurred. Guidelines p. 5. *People v. Bryant,* 187 A.D.3d 1657 (4th Dept. 2020), *People v. Hinson,* 170 A.D.3d 1385 (3d Dep. 2019).

- **Not indicted as evidence** - The fact that a defendant was not indicted for an offense may be strong evidence that the offense did not occur. Guidelines p. 5.

- **Acquittal not determinative** – Acquittal of charges at a criminal trial does not foreclose the SORA court from finding, by clear and convincing evidence, that the defendant engaged in the acts for which he or she was acquitted. *People v. Britton,* 31 N.Y.3d 1019 (2018).[13]

- **Point assessment** - The SORA court can assess either no points or the points specifically provided for by the RAI. It cannot give fewer points than allocated for by the RAI. *People v. Sincerbeaux,* 27 N.Y.3d 686 (2016). It cannot assess more points than allocated by the RAI. *People v. Saunders,* 156 A.D.3d 1138 (2d Dept. 2017). Be alert because courts have attempted to do both. "Under each risk factor, 'the court should look to the most serious wrongdoing in each category' (Guidelines,

[13] If you are looking for a way around *People v. Britton* see a related analysis challenging the use of acquitted conduct for the purposes of sentencing by Lucius T. Outlaw, *Giving an Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing,* 5 U. Denv. Crim. L. Rev. 189 (2015).

p. 6), and only one of the options is chosen if any are applicable." *People v. Burden,* 6 Misc. 3d 1033(A) (Sup. Ct. Bronx Co. 2008).

- ***Sua sponte* point assessment** – When a court, sua sponte, assesses points for a risk factor that was not requested by the Board or the prosecutor, without providing notice to the defendant, it violates due process and requires reversal. *People v. Hackett,* 89 A.D.3d 1479 (4th Dept. 2011) and *People v. Maus,* 162 A.D.3d 1415 (3d Dept. 2018). It may be that the SORA court can satisfy due process by giving defense counsel notice and providing additional time to respond to this unanticipated basis for the assessment of points.

- ***Alford* plea** – An *Alford* plea, without more, or with equivocal or contrary evidence, cannot serve as a basis to conclude that an element of the crime should be used to assess points (e.g., armed with a dangerous instrument). *People v. Gonzalez,* 28 A.D.3d 1073 (4th Dept. 2006).

- **Accessorial liability** - Under the Guidelines, "traditional principles of accessorial liability" apply. Therefore, a defendant need not personally have engaged in sexual contact with the victim in order to be assessed points for risk factor 2. Guidelines p. 7. However, if the defendant played a lesser role, or did not engage in sexual contact, such that assessing these points would result in an over-assessment of the defendant's risk to public safety, a downward departure may be warranted. Guidelines p. 7. *People v. S.G.,* 4 Misc. 3d 563, 572-573 (Sup. Ct. N.Y. Co. 2004).

- **Check the math** – Always check the math. Basic errors in addition have found their way to the Appellate Division. *People v. Butler,* 161 A.D.3d 1232 (3d Dept. 2018) and *People v. Whalen,* 22 A.D.3d 900 (3d Dept. 2005).

- **Deficiency in proof** – Care should be taken by defense counsel not to inadvertently supply missing evidence. Even where the prosecution has failed to meet its burden of proof, the court can rely upon information supplied by the Board and the defendant to compensate for the deficiency in proof and allocate points for a risk factor. *People v. Carlton,* 307 A.D.2d 763, 764 (4th Dept. 2003).

- **Double counting** – Depending on the circumstances and the particular risk factors involved, it may be improper to assess points for the same conduct or condition for two different risk factors. On the other hand, some, if not most, double counting has been found to be permissible by the courts.

  - Risk factors 5 and 6 – The Guidelines specifically warn against double-counting regarding these two risk factors. "Absent extraordinary circumstances, an offender who has been assessed points for the age of his victim (risk factor 5) should not be assessed points in this category (risk factor 6 – other victim characteristics) in order to avoid double counting." Guidelines p. 11. This Guideline principle was upheld in *People v. Fisher,* 22 A.D.3d 358 (1st Dept. 2005). Yet in both *People v. Smith,* 144 A.D.3d 652 (2d Dept. 2016) and *People v. Rhodehouse,* 88 A.D.3d 1030 (3d Dept. 2011), the courts held there was no improper double counting. There is some logic to the distinction between the courts' differing approaches to victim age (risk factor 5) and victim characteristics (risk factor 6). Where the victim's age is used to assess points for

risk factor 5 and age is also used to assess points for the "physical helplessness" or "mentally incapacitated" component of risk factor 6, it is using the same condition (age) to score both and is thus double counting. In contrast, where the victim's mental disability or incapacity or physical helpless is caused by something other than age, such as being drugged or asleep, it will not be considered double counting. Taking a contrary view, one might argue that a person who preys upon a young child because such crimes are more difficult to detect and prosecute and is thus a greater risk to public safety, poses no greater risk when they target someone for the same reason but because of a different characteristic. They pose the same increased risk either way. The two different characteristics do not combine to increase the risk to public safety and should be considered double counting.

- Risk factors 8 and 9 – Assessing points for these two risk factors was considered double counting by the court in *People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006), however, it was held not to be double counting in *People v. Barney,* 126 A.D.3d 1245 (3d Dept. 2015) (concluding that they were not duplicate factors resulting in the assessment of points for the same conduct, but rather are "cumulative predictors of the likelihood of reoffense"). It was also not considered double counting by the court in *People v. Pietarniello,* 53 A.D.3d 475, 476-477 (2d Dept. 2008).

- Risk factors 12 and 13 – In *People v. Hurlburt-Anderson*, 46 A.D.3d 1437 (4th Dept. 2007), these factors were held not to be improper double counting where they were assessed points for "separate acts or omissions." However, if they were both scored as a result of the same act or omission, the double counting argument might be viable.

- Risk factors 13 and 14 – Assessing points for both "unsatisfactory conduct while supervised" and "release without supervision" has been held not to constitute double counting. *People v. Cruz,* 139 A.D.3d 601 (1st Dept. 2016) and *People v. Corn,* 128 A.D.3d 436 (1st Dept. 2015).

- Risk factor 12 and 14 - The assessment of points under both risk factor 12 and risk factor 14 has been held not to amount to impermissible double counting. *People v. Pinckney,* 129 A.D.3d 1048 (2d Dept. 2015).

- Where a factor was already assessed points, it cannot be used as the basis for an upward departure. *People v. Grady,* 81 A.D.3d 1464 (4th Dept. 2011) and *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017).

- It is improper for a SORA court to assess the defendant points for victims who were not "associated with the current offense." *People v. Duart,* 84 A.D.3d 908 (2d Dept. 2011); *People v. Hoffman,* 62 A.D.3d 976 (2d Dept. 2009). To be counted in the number of victims, they must be associated with the current offense. *People v. Menjivar,* 121 A.D.3d 660, 661 (2d Dept. 2014).

- **Current offenses** – When scoring risk factors 1-7 under the part of the RAI entitled "current offenses," the Guidelines provide the following:

1) The current offenses should be completed on the basis of all the crimes that were part of the instant disposition. Guidelines p. 5.

2) If the defendant pleaded guilty to two indictments in two different counties, both indictments should be considered in scoring the section. If one indictment involved one victim and the other included two victims, and if there is clear and convincing evidence that all three were abused, that would be scored as three victims under risk factor 3. Guidelines pp. 5-6.

- It is improper for a SORA court to assess the defendant points for victims who were not "associated with the current offense." *People v. Duart,* 84 A.D.3d 908 (2d Dept. 2011); *People v. Hoffman,* 62 A.D.3d 976 (2d Dept. 2009). To be counted in the number of victims, they must be associated with the current offense. *People v. Menjivar,* 121 A.D.3d 660, 661 (2d Dept. 2014).

- Age of victim – For the purpose of scoring risk factor 5, the age of the victim must be the age at the time of the current offense, even when it is the same victim from an earlier conviction. In *People v. Hoffman,* 160 A.D.3d 1485, 1486 (4th Dept. 2018) the court held that the SORA court had improperly assessed 30 points for risk factor 5, instead of 20 points, based upon a family court determination that the defendant had sexually abused the same victim twelve years earlier when she was 4 years old, concluding that there was no clear and convincing evidence that the conduct from the 2002 determination constitutes part of the current offenses.

- Two incidents – one registrable and one non-registrable. The question occasionally arises as to how to score risk factors 1-7 when more than one incident occurred, one of which is an offense requiring registration and one that does not require registration. The key to answering this question is found in the Guidelines pertaining to risk factor 3 (number of victims). "Clear and convincing evidence of sexual conduct by the actor against victims may be taken into consideration." Guidelines p. 10. The Court of Appeals was called upon to interpret the meaning of "sexual conduct" in *People v. Izzo,* 26 N.Y.3d 999 (2015), and to determine whether a victim should be counted for the purposes of risk factor 3 who was not the victim of a SORA registrable offense. The court held that "sexual conduct" does not have to amount to a SORA level offense in order to be considered for purposes of determining additional victims. *People v. Izzo,* 26 N.Y.3d at 1002. This overruled a contrary holding by the Fourth Department in *People v. Vasquez,* 49 A.D.3d 1282 (4th Dept. 2008). The "sexual conduct" does not have to involve contact. It can occur when one child is merely present while sexual misconduct occurs with the other. *People v. Darrah,* 153 A.D.3d 1528 (3d Dept. 2017). In *People v. DeDona,* 102 A.D.3d 58 (2d Dept. 2012), it was held that risk factors 3, 5, and 7 do not require actual physical contact between the offender and victim, and that internet communication of a sexual nature was sufficient.

- **Criminal history** – When scoring risk factors 8-11, the Guidelines provide that "prior crimes" as used in this part of the RAI includes criminal convictions, youthful offender adjudications, and juvenile delinquency findings. Guidelines p. 6. The

term "crime" as used in the criminal history section requires a criminal conviction or adjudication. *People v. Current,* 147 A.D.3d 1235, 1237 (3d Dept. 2017).

The Appellate Division in the Second, Third and Fourth Departments have held that juvenile delinquency findings do not count as prior crimes, in light of Family Court Act § 381.2, and that the Board "exceeded its authority by adopting that portion of the Guidelines which includes juvenile delinquency adjudications in its definition of crime for the purpose of determining a defendant's criminal history." *People v. Campbell,* 98 A.D.3d 5, 12 (2d Dept. 2012), *People v. Brown,* 148 A.D.3d 1705 (4th Dept. 2017) and *People v. Shaffer,* 129 A.D.3d 54 (3d Dept. 2015). In so holding, courts have relied upon the Family Court Act § 381.2 (1) prohibition against the use of a juvenile delinquency proceeding as admissible evidence against that individual in any other court. *People v. Campbell,* 98 A.D.3d at 12.

Youthful offender adjudications are considered to be prior convictions by the Board despite the language in CPL § 720.35 (1) that they are "not a judgment of conviction for a crime." *See People v. Francis,* 30 N.Y.3d 737 (2018). However, a youthful offender adjudication cannot be used as a "prior felony conviction" for the purposes of an override. *People v. Cruz,* 38 A.D.3d 740 (2d Dept. 2007).

Where a defendant commits a sex crime that is the basis for the current offense for SORA purposes and has previously entered a plea of guilty to a separate felony, but has not yet been sentenced, that prior plea can serve as a prior conviction for criminal history point assessment purposes. In *People v. Wood,* 60 A.D.3d 1350 (4th Dept. 2009), the court reasoned that the plea falls within the definition of a "conviction" pursuant to CPL § 1.20 (13) and can be considered for the assessment of points as a prior conviction. *See also People v. Franco,* 106 A.D.3d 417 (1st Dept. 2012).

Out-of-state prior crimes are considered for the purpose of scoring prior criminal history factors 8, 9, and 10 so long as they meet the requisite definitions. *People v. Simons,* 157 A.D.3d 1063 (3d Dept. 2018); *People v. Liguori,* 48 A.D.3d 773 (2d Dept. 2008).

- **Proof of prior conviction** - There must be clear and convincing evidence of the prior conviction to sustain the assessment of points. Some cases have held that a certificate of conviction satisfies the clear and convincing evidence requirement. *People v. McClelland,* 38 A.D.3d 1274 (4th Dept. 2007). Another case found that a sentencing commitment order was sufficient to prove a prior violent felony in South Carolina. *People v. Wroten,* 286 A.D.2d 189 (4th Dept. 2001) *lv denied* 97 N.Y.2d 610 (2002). In *People v. Vacanti,* 26 A.D.3d 732 (4th Dept. (2006) *lv denied* 6 N.Y.3d 714 (2006), the court relied on documentation from the certificate of conviction, the presentence report, and the case summary to prove the prior Arizona conviction. In *People v. Lewis,* 45 A.D.3d 1381 (4th Dept. 2007), the court seems to have accepted the case summary and presentence reports as sufficient to establish prior convictions. The better view seems to have come more recently in *People v. Gilbert,* 78 A.D.3d 1584 (4th Dept. 2010), a case in which the differing views on adequate proof of a prior convictions are reconciled. In *People v. Gilbert*, the court held that a prior felony sex crime was established by clear and convincing evidence when the

certificate of conviction was entered into evidence. The court went on to explain that the case summary could also establish the defendant's prior felony conviction for a sex crime, reliable hearsay being sufficient, "where the defendant did not dispute its contents insofar as relevant." *People v. Gilbert,* 78 A.D.3d at 1585. In *People v. Crews,* 127 A.D.3d 491 (1st Dept. 2015), proof of the underlying conviction from Maryland was not the problem, but rather lack of any proof of the conduct underlying the foreign conviction. As a result, the court held that 30 points were incorrectly assessed. *People v. Crews,* 127 A.D.3d at 491. Where the proof of the defendant's sex offense conviction in Puerto Rico consisted of documents entirely in Spanish unaccompanied by an English translation the court held that this did not constitute competent evidence. *People v. Ramos,* 178 A.D.3d 1408 (4th Dept. 2019).

- **Due process challenge to RAI** – Many due process challenges have been raised as to the choice of risk factors made by the Legislature and by the Board, and also to the use of the RAI in SORA proceedings. They have all failed. *People v. Velasquez,* 166 A.D.3d 536 (1st Dept. 2018), *People v. Ferrer,* 69 A.D.3d 513 (1st Dept. 2010), *People v. Hingel,* 50 A.D.3d 501 (1st Dept. 2008), *People v. Nowicki,* 133 A.D.3d 732 (2d Dept. 2015), *People v. Reede,* 113 A.D.3d 663 (2d Dept. 2014) and *People v. Guitard,* 57 A.D.3d 751 (2d Dept. 2008). In *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010), the court provides an extensive list of citations of decisions in which the challenge to the RAI has been raised and rejected.

  If you want to explore the basis for the due process challenges and the flaws in the RAI, see *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010) and *People v. Oliver,* 37 Misc. 3d 1201(A) (Sup. Ct. Cayuga Co. 2009).

PRACTICE TIPS

You may notice that the Board tends to score the fifteen risk factors, designations, and departures more conservatively, or at least more consistently in keeping with the Guidelines, than either the District Attorney or the Probation Department (if you are litigating in a jurisdiction where the District Attorney still relies upon a probation officer to prepare the RAI for them when proceeding under Correction Law § 168-d).[14]

There are several reasons for this differing approach. First, the Board is invariably more familiar with the Guidelines, and as the Guidelines caution: "No one should attempt to assess a sex offender's level of risk without first carefully studying this commentary." Guidelines p. 1. As a result, the Board more closely follows the Guideline directives than Assistant District Attorneys and probation officers who usually only have a passing familiarity with the Guidelines. Second, as the Guidelines indicate, the "Board opted to create an objective assessment instrument." Guidelines p. 3. The drafters "incorporated risk assessment criteria that find support in the academic literature and are commonly used by sex offender experts." Guidelines p. 23.

[14] By statute it is the District Attorney who "shall provide to the court and the sex offender a written statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations." Correction Law § 168-d (3). There is no authority for the Probation Department or any other agency to prepare an RAI for the court. Nor should a probation officer attach an RAI to the PSI. *People v. Freeman,* 67 A.D.3d 1202 (3d Dept. 2009).

The Board, being more familiar with the risk assessment criteria and the academic literature than Assistant District Attorneys and probation officers, is more inclined to fidelity to both the need for objectivity and the faithful and specific application of the risk factors. The Board is in a position to see the big picture, seeing a majority of all SORA cases state-wide, and more readily recognizes the rationale behind the need to stick to the Guidelines. They understand that the further one strays from the rules, the less applicable the research and expertise behind the RAI will be. The Board tends to recognize that in order to benefit from the evidence base that purportedly supports the use of the RAI, one must use the instrument in a way that is consistent with the manual.

Unlike the Board, Assistant District Attorneys and probation officers tend to see each SORA case detached from the big picture, in an adversarial system, subject to their creative advocacy. The objectivity of the RAI is not their primary concern. They seek an enhanced risk level at every turn, playing fast and loose with the risk factors, stretching their purpose and intent where they can.

Be prepared to caution the court that the District Attorney is undermining the objectivity of the RAI and grooming the court to misapply the Guidelines. The prosecution's attempt to stretch the objective meaning of any risk factor misleads the court and is likely to lead to a reversal. People v. Madlin, 302 A.D.2d 751 (3d Dept. 2003).

When the Guidelines and the Board support the defense position, and the prosecution overreaches, this is an effective argument to make. However, defense counsel should not feel constrained to follow the Guidelines or the Board and should be quick to point out to the court that the Guidelines are outdated, are more than fifteen years old, rely upon outdated literature and research, and ignore the advances in research since 1995.

§ 3:2 RISK FACTOR 1: USE OF VIOLENCE

1) The offender used forcible compulsion (10 points)

- The Guidelines adopt the meaning of forcible compulsion as defined in Penal Law § 130.00(8): "to compel by either: (a) use of physical force, or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped."
- "The point in [forcible compulsion] is not what the defendants would have done, but rather what the victim observing their conduct, feared they…might do if she did not comply with their demands." Guidelines p. 8 [quoting *People v. Coleman,* 42 N.Y.2d 500, 505 (1977)].
- Discrepancies in age, size or strength are relevant in determining whether there was such compulsion. Guidelines p. 8.

- The victim's age by itself, however, is not a sufficient basis for a finding of forcible compulsion. Guidelines p. 8. *People v. Jordan,* 62 A.D.3d 1176 (3d Dept. 2009).
- Forcible compulsion was shown by evidence of the defendant dominating his smaller and weaker nine-year-old daughter and preventing her from leaving him. *People v. Yeaden,* 156 A.D.2d 208 (1st Dept. 1989).
- Forcible compulsion is not established where there is no evidence that the defendant overpowered the victim or used any express or implied threat of force. *People v. Hector* 45 A.D.3d 503 (1st Dept. 2007).
- Forcible compulsion is not substantiated where the hearsay statements of the victim are equivocal and inconsistent. *People v. Dominie,* 42 A.D.3d 589 (3d Dept. 2007).
- Forcible compulsion need not be an element of any crime for which the defendant was convicted in order for points to be assessed for forcible compulsion. *People v. Stewart,* 63 A.D.3d 1588 (4th Dept. 2009) and *People v. Wilson,* 117 A.D.3d 1557 (4th Dept. 2014). Where it is not an element of the crime of conviction and there is no evidence in the record establishing that the defendant used forcible compulsion no points should be assessed. *People v. Weber,* 176 A.D.3d 1631 (4th Dept. 2019).

2) The offender inflicted physical injury (15 points)

- The Guidelines adopt the definition of physical injury from Penal Law § 10.00 (9) as meaning "impairment of physical condition or substantial pain."
- It does not include petty slaps, shoves, kicks, and the like. Guidelines p. 8.
- It can be argued that to be assessed points for this subcategory of risk factor 1, there must be both a <u>use</u> of violence and an <u>infliction</u> of a physical injury. After all, the heading of this risk factor is "Use of Violence." The research upon which this risk factor is based is focused on the use of violence and its correlation to the likelihood of reoffending. Guidelines p. 7. The infliction of physical injury cannot be decoupled from the use of violence. If the physical injury was unintentional or incidental, it can be argued that no points should be assessed where there was no actual use of violence.
- A defense challenge to whether "substantial pain" has been proven by clear and convincing evidence is viable when the amount of pain is not substantial on an objective level. The test is not purely a subjective one. *Matter of Philip A.,* 49 N.Y.2d 198 (1980).
- *Matter of Philip A.,* 49 N.Y.2d 198 (1980) – Being hit twice in the face, causing crying, red marks and pain, but the degree of pain was not spelled out, was not sufficient to prove "substantial pain," but was instead consistent with "petty slaps."
- *People v. Jiminez,* 55 N.Y.2d 895 (1982) – That victim suffered a one centimeter cut above her lip, without more, during a rape was not sufficient to prove "substantial pain."

- *People v. Chiddick,* 8 N.Y.2d 445 (2007) – Motive is relevant because an offender more interested in displaying hostility than in inflicting pain will often not inflict much of it.
- *People v. Tabachnik,* 131 A.D.2d 611 (2d Dept. 1987) – The pain about which the complainant testified did not reach the objective level required to be considered substantial although victim was kicked in his upper thigh which "was very sore…it hurt, it stung," was "very black and blue," however, two days later it only felt sore if pressed on.
- *People v. Cooney,* 137 A.D.3d 1665, 1668 (4th Dept. 2016) – "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender." A cut on the finger that the victim described as "very painful," which pain subsided a day after incident and lasted a few days, and that the cut was completely healed in one week, was held not to constitute substantial pain. *See also People v. Leach,* 158 A.D.3d 1240, 1241 (4th Dept. 2018).
- *People v. Uver A.,* 195 A.D.3d 61 (2d Dept. 2021) – Infecting a person with HIV constitutes a physical injury, however, in this case there was insufficient evidence to prove that it was the defendant who infected the victim.
- *People v. Garofolo,* 195 A.D.3d 958 (2d Dept. 2021) – Strangulation and repeated forcible penetration along with victim's account that the defendant's actions "hurt a lot" was held sufficient to establish substantial pain to satisfy this risk factor.

3) The offender was armed with a dangerous instrument (30 points)

- The Guidelines adopt the Penal Law definition of dangerous instrument, which means "any instrument, article or substance, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury." (Penal Law § 10.00 [13]).
- Displaying a gun to the victim and threatening to shoot her is sufficient to prove the gun was a dangerous instrument, without proof that the gun was loaded and operable. *People v. Pettigrew,* 14 N.Y.3d 406 (2010).
- Being armed with a BB gun is not sufficient to support being armed with a dangerous instrument unless there is a showing that the BB gun was loaded and operable or was used as a bludgeoning object. *People v. Swain,* 46 A.D.3d 1157 (3d Dept. 2007) and *People v. Shen Chao Chen,* 144 A.D.3d 1119 (2d Dept. 2016).
- *People v. Bateman,* 59 A.D.3d 788 (3d Dept. 2009) – Striking victim in the head with a rock during commission of the offense is sufficient.
- *People v. Martinez,* 39 A.D.3d 835 (2d Dept. 2007) - Being armed with a knife is sufficient.
- *People v. Gonzalez,* 28 A.D.3d 1073 (4th Dept. 2006) - Points could not be assessed where the defendant entered an *Alford* plea and therefore did not admit during the plea allocution to being armed with a dangerous instrument and the allegation of

the use of a dangerous instrument was supported only by an equivocal statement by the victim and an unreliable hearsay statement in the presentence report.

- *People v. Plunkett,* 19 N.Y.3d 400 (2012) – The use of a body part, such as teeth, or bodily fluid infected with HIV, does not constitute use of a dangerous instrument. *See* also *People v. Uver A.,* 195 A.D.3d 61 (2d Dept. 2021).

§ 3:3 RISK FACTOR 2: SEXUAL CONTACT WITH VICTIM

1) Contact over clothing (5 points)

2) Contact under clothing (10 points)

3) Sexual intercourse, deviate intercourse or aggravated sexual abuse (25 points)

- This means sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual abuse as this conduct is defined in Penal Law Article 130. The old term "deviate intercourse" was amended in the Penal Law to the more descriptive "oral sexual conduct" and "anal sexual conduct" effective November 1, 2003. Although the RAI continues to use the term deviate intercourse, the Guidelines have adopted the terms oral sexual conduct and anal sexual conduct to replace that term. Guidelines p. 9.

- **Consensual Conduct** – In those instances when the victim consents to the sexual contact, defense counsel should request a downward departure. The Guidelines provide that "[t]he Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety."

  Consensual conduct as the basis for a downward departure is discussed in depth in Chapter 5 on Departures.

  Although the Guidelines only address consensual conduct in the context of the 25 points for the category involving sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual abuse, there is no reason to assume that consensual conduct would not apply as a mitigating factor for either of the other two categories – touching over the clothing or touching under the clothing. If consent serves to mitigate the greater transgression, it should obviously mitigate the lesser.

CASES OF INTEREST – Victim's Consent as Basis for Downward Departure

- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. George,* 141 A.D.3d 1177 (4th Dept. 2016)
- *People v. Marsh,* 116 A.D.3d 680 (2d Dept. 2014)
- *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010)
- *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017)
- *People v. Santiago,* 20 A.D.3d 885 (4th Dept. 2005)

- *People v. Garcia,* 53 Misc. 3d 153(A) (App. Term 2d Dept. 2016)
- *People v. Carter,* 138 A.D.3d 706 (2d Dept. 2016)
- *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)
- *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)
- *People v. Secor,* 171 A.D.3d 1314 (3d Dept. 2019)

- **Actual "sexual contact" required** – In order for points to be assessed under this risk factor, there must be actual physical "sexual contact" between the defendant and the victim. "Sexual contact" as defined in Penal Law § 130.00 (3) makes it clear that there must be actual touching of the victim by the actor or vice versa. When the offense of conviction is, for example, promoting prostitution, where there is no actual sexual contact between the defendant and the victim, no points should be assessed under risk factor 2. *People v. Blue,* 186 A.D.3d 1088 (4th Dept. 2020). *People v. Bajek,* 191 A.D.3d 1431, 1432 (4th Dept. 2021) involved a computer communication and the transmission of images. The court held that it was improper to assess 25 points under risk factor 2 because there was no "sexual contact between the defendant and the victim." *See* also *People v. Canady,* 195 A.D.3d 752 (2d Dept. 2021) and *People v. Carmichael,* 192 A.D.3d 924 (2d Dept. 2021). Similar to these cases are the cases cited under risk factor 4 where the continuing course of "sexual contact" is required to be actual physical contact between the defendant and the victim.

- **Intention to engage in a sexual act** – Actual sexual contact is required for a defendant to be assessed points for this risk factor. The Guidelines explain that an intention to commit a sexual act, whether prevented by an external factor or by the defendant's change of mind, should not be the basis for scoring points for this risk factor. Such a *mens rea*-based approach is specifically rejected by the Guidelines, and the focus is on the offender's actual conduct. Guidelines p. 9. In the event that there was no sexual contact, 0 points should be assessed even if the defendant's intent was to have forced sexual intercourse with the victim. Guidelines p. 9. This does not mean the Board has gone soft on this point. The Guidelines go on to state that "where it is evident that an offender intended to rape his victim, the Board or a court may choose an upward departure if it concludes that the lack of points in this category results in an under-assessment of the offender's actual risk to public safety." Guidelines p.9.

  Where the intended rape was thwarted by a third person intervening, courts have held that although the act never occurred, and less than 25 points were assessed, an upward departure was warranted. *People v. Scott,* 85 A.D.3d 890 (2d Dept. 2011) and *People v. Robinson,* 150 A.D.3d 775 (2d Dept. 2017).

  Fictitious victims, created by undercover police, give rise to another form of intended sexual act that is not consummated. Several courts have held that where the defendant intended a statutory rape which never occurred because the intended victim was fictitious, resulting in an under-assessment of point for this risk factor, this may give rise to an upward departure. *People v. DeDona,* 102

A.D.3d 58 (2d Dept. 2015) and *People v. Agarwal,* 96 A.D.3d 1450 (4th Dept. 2012).

However, where the intention to commit the sexual act was abandoned by the defendant of his own volition, this is not sufficient to warrant an upward departure. *People v. Perkins,* 128 A.D.3d 1036 (2d Dept. 2015).

- **Accessorial liability** – Under the Guidelines "traditional principles of accessorial liability" apply, therefore a defendant need not personally have engaged in sexual contact with the victim in order to be assessed points for risk factor 2. Guidelines p. 7. However, if the defendant played a lesser role, or did not engage in sexual contact, such that assessing these points results in an over-assessment of the defendant's risk to public safety, a downward departure may be warranted. Guidelines p. 7. *People v. S.G.,* 4 Misc. 3d 563, 572-573 (Sup. Ct. N.Y. Co. 2004).

- **Burden of proof** – Although one might assume that an acquittal at trial would be cause for celebration, not so says the Court of Appeals when it comes to SORA. In *People v. Britton,* 31 N.Y.3d 1019 (2018), the court held that conduct for which the defendant was acquitted at trial could still serve as a basis for the assessment of points under risk factor 2 if the prosecution presented clear and convincing evidence of such sexual conduct.

PRACTICE TIPS

Defense counsel should think strategically when challenging the scoring of a particular risk factor. As in the case of an intention to engage in a sexual act, the points may be a lesser consequence than an upward departure. For example, if the prosecution seeks to assess 10 points for touching under the clothing that never occurred, you may want to refrain from challenging the points in order to avoid opening the door for an upward departure.

§ 3:4 RISK FACTOR 3: NUMBER OF VICTIMS

1) If there were two victims (20 points).

2) If there were three or more victims (30 points).

- The focus is on the number of people who were victimized in the case (or cases) that ultimately resulted in the instant conviction. Guidelines p. 10. "The victims must be associated with the current offense. However, the court is not limited to consideration of the charges to which the defendant pleaded guilty." *People v. Menjivar,* 121 A.D.3d 660, 661 (2d Dept. 2014).

- The Board is not limited to the crime of conviction but may consider reliable sources in determining an offender's risk level. Guidelines p. 5. *People v. Lovelace,* 39 A.D.3d 728 (2d Dept. 2007).

- The Current Offense[s] section should be completed on the basis of all of the crimes that were part of the instant disposition. Guidelines p. 5.

- In addition to the conduct that resulted in the current conviction for a registrable offense, the other sexual conduct need not be for a registrable offense to be counted as to the number of victims. *People v. Izzo,* 26 N.Y.3d 999 (2015). It is not even clear that the additional sexual conduct must involve a crime. *People v. Darrah,* 61 A.D.3d 1528 (3d Dept. 2017).

- The "sexual conduct" does not have to involve contact. It can occur when one child is merely present while sexual misconduct occurs with the other. *People v. Darrah,* 153 A.D.3d 1528 (3d Dept. 2017). But mere presence may not be enough. In *People v. Menjivar,* 121 A.D.3d 660 (2d Dept. 2014), a two-year old child was present in the room while the defendant was engaged in oral sex with a 14-year-old. Where the prosecution failed to present clear and convincing evidence that the two-year old child was the victim of any sexual misconduct, or that she witnessed or was aware of the sexual conduct between the defendant and the 14-year-old, the court held that she could not be considered a victim for the purpose of assessing points under risk factor 3.

- The other sexual conduct that may increase the number of victims must also be proven by clear and convincing evidence, and where such proof is lacking, the victims of this other sexual conduct cannot be counted for this risk factor. *People v. Tubbs,* 124 A.D.3d 1094 (3d Dept. 2015).

- If the defendant pleaded guilty to two indictments in two different counties, both indictments should be considered in scoring this section. If one indictment involved one victim and the other included two victims, and if there is clear and convincing evidence that all three were abused, that would be scored as three victims under risk factor 3. Guidelines pp. 5-6. In *People v. Miller,* 149 A.D.3d 1279, 1280 (3d Dept. 2017), the court comes to a contrary conclusion regarding two separate indictments in the same court, holding that the victims for each should not be combined for the purpose of risk factor 3.

- **Fictional victims** – Fictional victims, usually undercover police, are considered victims for the purpose of assessing points under risk factors 3, 5 and 7. *People v. DeDona,* 102 A.D.3d 58 (3d Dept. 2012) and *People v. Wise,* 127 A.D.3d 834 (2d Dept. 2015).

- **Child pornography** – The individuals shown in videos or photographs of child pornography have been determined to be victims for the purpose of scoring risk factors 3, 5 and 7. *People v. Johnson,* 11 N.Y.3d 416 (2008) and *People v. Gillotti,* 23 N.Y.3d 841 (2014).

  The Board and the courts take opposite approaches when scoring risk factors 3 and 7 in child pornography cases. Based on Position Statement of 6/1/12 on the scoring of child pornography cases and the Board's subsequent practice, the Board will not recommend assessing points for risk factors 3 and 7. Instead, based upon their Position Statement, the Board will, in most cases, recommend an upward departure. The Court of Appeals in *People v. Gillotti,* 23 N.Y.3d 841 (2014) rejected the Board's approach and held that risk factors 3 and 7 should be assessed points whenever there is clear and convincing evidence to establish the facts of that risk

factor. Also, in contrast to the Board, the *Gillotti* court took the position that a downward departure was the proper way to avoid the anomaly created by using the RAI in child pornography cases since it was not designed for that purpose. For a more complete discussion of child pornography cases see Chapter 8, § 8:10 Child Pornography.

§ 3.5 RISK FACTOR 4: DURATION OF OFFENSE CONDUCT WITH VICTIM

If the facts required to prove this risk factor are established by clear and convincing evidence, the defendant is assessed 20 points.

The more precise description for the conduct covered by this risk factor is "engaging in a continuing course of sexual contact." Guidelines p. 10. In the Guidelines, the Board uses a very specific definition of "continuing course of sexual contact" that includes both the nature and length of the offender's conduct. For the purposes of the Guidelines, a person engages in a continuing course of sexual contact in one of two ways:

1) **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 are separated in time by at least 24 hours, or**

2) **three or more acts of sexual contact over a period of at least two weeks.**

The conduct described above is defined in Penal Law § 130.00.

- **Temporal relationship between acts required** - To assess points for this risk factor, there must be proof that the defendant engaged in multiple sexual acts with the same victim over the specified time periods. *People v. Judson,* 50 A.D.3d 1242, 1243 (3d Dept. 2008). Courts have required specificity and precision as to the temporal relationship between the acts, and where that is lacking, the assessment of points has been held to be improper. Proof of multiple acts of sexual contact within one 24-hour period, without the specificity that any two acts were separated by 24 hours, is not sufficiently specific. *People v. Madlin,* 302 A.D.2d 751 (3d Dept. 2003). Failure to specify when the acts of sexual conduct occurred relative to each other makes such proof insufficient to establish a continuing course of sexual contact. *People v. Farrell,* 142 A.D.3d 1299, 1300 (4th Dept. 2016). It is error to assess points for this risk factor where there is insufficient evidence establishing that the defendant had such contact on three or more occasions over a period of at least two weeks. *People v. Whalen* 22 A.D.3d 900 (3d Dept. 2005). Establishing the temporal relationship between the sexual acts is necessary and without such no points can be assessed. *People v. Edmonds,* 133 A.D.3d 1332 (4th Dept. 2015). Even where the record demonstrates that on at least three occasions during January the defendant had sex with the victim, it was held to be insufficient to establish a continuing course of sexual conduct because the proof was silent as to when these acts occurred relative to each other. *People v. Redcross,* 54 A.D.3d 1116 (3d Dept. 2008). Proof of sexual contact on two consecutive evening without proof that the two acts were separated by at least 24 hours was held insufficient. *People v. Filkins,* 107 A.D.3d 1069 (3d Dept. 2013). *See also People v. Hinson,* 170 A.D.3d 1385 (3d Dept. 2019) and *People v. Jarama,* 178 A.D.3d 970 (2d Dept. 2019).

- **Same victim** - The sexual contact must be with the same victim. Guidelines p. 10. *People v. Judson,* 50 A.D.3d 1242, 1243 (3d Dept. 2008). The continuing misconduct which is the subject of risk factor 4 is misconduct directed at the same victim, not separate instances of similar misconduct directed at multiple victims. *People v. Piznarski,* 46 Misc. 3d 1021 (County Ct. Madison Co. 2014); *People v. Lombardo,* 167 Misc. 2d 942 (County Ct. Nassau Co. 1996).

- **Actual physical contact** - To assess points for this risk factor there must be actual physical sexual contact between the defendant and the victim. Guidelines p. 10. *People v. Dilillo (Lisa),* 162 A.D.3d 915 (2d Dept. 2018); *People v. Canady,* 195 A.D.3d 752 (2d Dept. 2021); *People v. Blue,* 186 A.D.3d 1088 (4th Dept. 2020); *People v. Whalen,* 22 A.D.3d 900 (2005). Although some prosecutors may attempt to seek the assessment of points for this risk factor based upon electronic or internet contact between the defendant and the victim, this is not a proper basis for scoring risk factor 4, and courts have rejected such disingenuous attempts. *People v. Costello,* 35 A.D.3d 754 (2d Dept. 2006); *People v. Boncic,* 15 Misc. 3d 1139(A) (Sup. Ct. N.Y. Co. 2007).

- **Crime of conviction** - Courts are not limited to considering only the crime for which the defendant was convicted when considering the assessment of points for risk factor 4. *People v. June,* 150 A.D.3d 1701 (4th Dept. 2017); *People v Davis,* 145 A.D.3d 1625 (4th Dept. 2016).

- **One act not sufficient** – Where the defendant engaged in only one act of sexual intercourse, this conduct did not meet the definition under the Guidelines for continuing course of sexual misconduct and points should not be assessed. *People v. Dilillo (Tommaso),* 146 A.D.3d 960 (2d Dept. 2016).

- **Burden of proof** – A case summary standing alone is not sufficient to assess points for this risk factor even though it alleges multiple sexual acts with the same victim when the defendant contests the factual allegations related to this risk factor. *People v. Judson,* 50 A.D.3d 1242 (3d Dept. 2008). See discussion in Chapter 8, § 8:1 Burden of Proof.

- **Fictitious victim** - Where there is no direct physical contact with the fictitious victim (undercover detective) the electronic communication is not sufficient to assess points. *People v. Costello,* 35 A.D.3d 754 (2d Dept. 2006).

§ 3:6 RISK FACTOR 5: AGE OF VICTIM

A defendant whose victim was 11 through 16 years old is assessed 20 points. A defendant whose victim was 10 years old or younger is assessed 30 points. That same 30 points is assessed if the victim is elderly. Note that "elderly" is defined by the Guidelines as being 63 years old or more. Guidelines p. 11.

- A challenge to the age of the victim by the defendant must be made at the SORA hearing or it is unpreserved for the purpose of appeal. *People v. Butler,* 157 A.D.3d 727, 730 (2d Dept. 2018).

- For this risk factor, only one victim need be 10 years old or younger to be assessed 30 points. *People v. Butler,* 157 A.D.3d at 731.

- In determining the age of the victim, the SORA court is not limited to the evidence of the crime of which the defendant was convicted. *People v. Vasquez,* 149 A.D.3d 1584 (4th Dept. 2017). However, the victim's age can be considered for the purpose of this risk factor only if the victim was associated with the current offense. *People v. Duart,* 84 A.D.3d 908 (2d Dept. 2011); *People v. Hoffman,* 62 A.D.3d 976 (2d Dept. 2009); *People v. Menjivar,* 121 A.D.3d 660, 661 (2d Dept. 2014). In *People v. Hoffman,* 160 A.D.3d 1485, 1486 (4th Dept. 2018), the court held that the SORA court had improperly assessed 30 points for risk factor 5, instead of 20 points, where the defendant had sexually abused the same victim twelve years earlier when she was 4 years old, as found by the Family Court, concluding that there was no clear and convincing evidence that the conduct from the 2002 determination constitutes part of the current offenses.

- Where the evidence that the victim was 10 years old or less and had not reached her 11th birthday prior to the sexual conduct is not clear and convincing because it is equivocal, 20 points instead of 30 points should be assessed. *People v. Cephus,* 128 A.D.3d 656 (2d Dept. 2015). The charge for which the defendant was convicted, or the presentence report may not be sufficient to constitute clear and convincing evidence that the victim was 10 years old or less. *People v. Spratley,* 175 A.D.3d 962 (4th Dept. 2019).

- **Fictional victims** - Fictional victims, usually undercover police, are considered victims for the purpose of assessing points under risk factors 3, 5 and 7. *People v. DeDona,* 102 A.D.3d 58 (3d Dept. 2012) and *People v. Wise,* 127 A.D.3d 834 (2d Dept. 2015).

- **Child pornography** – Children depicted in pornographic images possessed by the defendant are victims within the meaning of SORA. *People v. Gillotti,* 23 N.Y.3d 841 (2014); *People v. Johnson,* 11 N.Y.3d 416 (2008). These child pornography victims can be considered for the assessment of points under risk factor 5, as well as risk factors 3 and 7. *People v. Perahia,* 57 A.D.3d 865 (2d Dept. 2008).

§ 3:7 RISKS FACTOR 6: OTHER VICTIM CHARACTERISTICS

The Guidelines assess 20 points if the victim suffered from a mental disability, mental incapacity, or physical helplessness. The Guidelines incorporate the definitions of these terms from Penal Law § 130.00 (5), (6) and (7). A person with any of these three characteristics is deemed incapable of consent by the Penal Law. Penal Law § 130.05 (3).

- **Double counting** – The Guidelines warn that assessing points for risk factor 6 should generally be avoided in conjunction with assessing points for risk factor 5. "Absent extraordinary circumstances, an offender who has been assessed points for the age of his victim (factor 5) should not be assessed points in this category in order to avoid double counting." Guidelines p. 11. This Guideline principle was upheld in *People v. Fisher,* 22 A.D.3d 358 (1st Dept. 2005).

  Defense counsel should be mindful that a number of courts have reached a contrary conclusion, holding that assessing points for risk factors 5 and 6 is not improper double counting. *See People v. Smith,* 144 A.D.3d 652 (2d Dept. 2016), *People v. Rhodehouse,* 88 A.D.3d 1030 (3d Dept. 2011), and *People v. Vaughn,* 26

A.D.3d 776 (4th Dept. 2006). There is some logic to the distinction between the courts' differing approaches to victim age (risk factor 5) and victim characteristics (risk factor 6). Where the victim's age is used to assess points for risk factor 5, and again to assess points for the "physical helplessness" or "mentally incapacitated" component of risk factor 6, the same condition (age) is being used to score both and is thus double counting. In contrast, where the victim's mental disability or incapacity or physical helpless is caused by something other than age, such as being drugged, asleep, or mental illness, it will not be considered double counting to also assess points for risk factor 6.

Defense counsel should not concede to the double count for factors 5 and 6, even if their case is one in which there is a distinction between the two incapacities (age and helpless due to sleeping and drugs) as was found in *People v Smith,* 144 A.D.3d 652 (2d Dept. 2016). There is still an argument to be made that this is improper double counting.

Defense counsel might argue that both risk factors 5 and 6 measure the same increase in risk to reoffend. Both measure the risk to reoffend and risk to public safety based upon a defendant who preys upon someone who is vulnerable, unlikely, or unable to resist, and unlikely to report the abuse. The defendant poses the same increased risk either way. The two different characteristics do not combine to increase the risk to public safety or risk to reoffend. One might argue that risk factor 6 is properly assessed points only when the victim is not a child under 17 years of age and has other vulnerable characteristics. Point out to the court that the Guidelines themselves explain that the rationale for scoring risk factor 6 is "[f]or much the same reason as in Factor 5." Guidelines p. 11. It is for this reason that the Guidelines caution that "[a]bsent extraordinary circumstances, an offender who has been assessed points for the age of his victim (factor 5) should not be assessed points in this category in order to avoid double-counting."

PRACTICE TIPS

When confronted with the argument that points should be assessed for the victims age under risk factor 5 and also risk factor 6, there are several approaches to consider. If there is an argument that the victim suffers from some "mental disability," you will want to obtain whatever records you can to determine if indeed there is proof of a mental disease or defect. Police records, medical records, sexual assault support examiners and service provider records all may be informative. You will also want to argue, if warranted, that whatever mental disease or defect the victim suffers from does not render the victim incapable of appraising the nature of his or her conduct and that there is no such proof. This is particularly true if the victim resisted the sexual contact and/or immediately reported it.

Defense counsel might also want to consider the following line of argument regarding double counting. There are three characteristics of a victim that might result in the assessment of points under this risk factor: mental disability, mental incapacity, or physically helpless. The gravamen of these characteristics is a physical or mental inability to consent, or express unwillingness to engage in an act. It is for this reason they are included in the statutory list (Penal Law §130.05

[3]) of circumstances under which a person is deemed incapable of consent when he or she is:

(a) less than seventeen years old; or
(b) mentally disabled; or
(c) mentally incapacitated; or
(d) physically helpless, or…

The Guidelines recognize the commonality of these characteristics being grounded in an inability to resist or consent. It is this recognition that caused the Board to emphasize in the Guidelines that double counting should be avoided for risk factors 5 and 6.

You might also want to argue the facts in this way. Based upon the Bill of Particulars and PSI, the victim did not have an inability to refuse to consent or incapacity to resist a sexual assault or report it to authorities. Simply stated, the victim did not exhibit any of the characteristics to warrant assessing points for this risk factor. Under the standard articulated by the Court of Appeals in People v. Easley, 42 N.Y.2d 50 (1977), the victim was capable of appraising the nature of her own sexual conduct.

- The definition of physically helpless has been held to be broad enough to include a sleeping victim. *People v. Wells*, 138 A.D.3d 947 (2d Dept. 2016); *People v. Harris*, 46 A.D.3d 1445 (4th Dept. 2007); *People v. Guallpa-Lema,* 188 A.D.3d 1108 (2d Dept 2020).

- **Mentally disabled** – Mentally disabled means that a person "suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct." Penal Law §130.00 (5). It would seem self-evident that to assess points for this risk factor the prosecution must prove the nature of the mental disease or defect and its effect on the victim's capabilities. Surely defense counsel should make this argument when such proof is lacking. However, in *People v. Leeks*, 43 A.D.3d 1251 (3d Dept. 2007), the court took a not-so-evident, contrary view, holding that where a staff person of a mental health facility had sexual contact with a 15-year-old inpatient, "the lack of proof regarding the precise nature of her victim's affliction" would not negate assessing points for this risk factor. Despite the holding in *People v. Leek*, defense counsel should argue that such lack of proof makes assessment of points for this risk factor improper.

- **"Mental retardation"** - Proof of mental retardation (intellectual disability), without sufficient proof that the victim with mental retardation is unable to consent to sexual activity or appraise the nature of his or her conduct, does not warrant the assessment of points for this risk factor. *People v. Green*, 104 A.D.3d 1222 (4th Dept. 2013), citing to *People v. Cratsley*, 86 N.Y.2d 81 (1995) for the principle that the law does not presume that a person with mental retardation is incapable of appraising the nature of his or her own sexual conduct.

- **"Physically helpless" does not include animals** – In *People v. Persico,* 68 Misc. 3d 919 (Dist. Ct. Suffolk County 2020) the prosecution unleashed the argument that a defendant who was convicted of the offense of Sexual Misconduct with an Animal should be assessed 20 points because the golden doodle should be considered "physically helpless." In a case of first impression the court rejected the prosecutor's bone of contention, ruling that risk factor 6 does not make consideration for animal victims and no points should be assessed.

§ 3:8 RISK FACTOR 7: RELATIONSHIP BETWEEN OFFENDER AND VICTIM

The Guidelines assess 20 points if the crime was:

1) **directed at a stranger, or**
2) **directed at a person with whom a relationship had been established or promoted for the primary purpose of victimization, or**
3) **arose in the context of a professional or avocational relationship between the "offender" and the victim and was an abuse of such relationship.**

- **Stranger** - As used in the Guidelines, "stranger" includes anyone who is not an actual acquaintance of the victim. Guidelines p. 12. It can include a person living in the same apartment building if the relationship between the offender and the victim is limited to their passing in the hallway or sharing an elevator. Guidelines p. 12.

  - Communications through electronic means over a period of weeks and the sharing of information, before the defendant and the victim actually met in person and had sexual relations, is sufficient for them not be considered strangers. *People v. Helmer,* 65 A.D.3d 68 (4th Dept. 2009).

  - Defendant and 16-year-old victim met at a local bar and over the next five months communicated regularly by text message. It cannot be said that they were strangers at the time of the sexual conduct. *People v. Birch,* 114 A.D.3d 1117 (3d Dept. 2014). Where victim indicated that she had known the defendant as a regular customer at the restaurant where she worked for four years, and he had asked her out on dates over the previous six months, defendant was held not to be a stranger to the victim at the time of the sexual offense nor did the evidence show that he established a relationship with the victim for the primary purpose of victimization. *People v. Lopez,* 192 A.D.3d 1050 (2d Dept. 2021).

  - Only a brief previous internet contact still left the defendant and victim strangers for purposes of risk factor 7. *People v. Tejada,* 51 A.D.3d 472 (1st Dept. 2008).

  - The SORA court properly assessed 20 points for this risk factor, determining that the defendant was a stranger to the victim where he had met the victim only a few hours before the incident, and the victim neither knew his legal name nor any other personal information about him. *People v. Lewis,* 45 A.D.3d 1381 (4th Dept. 2007).

- Defendant, 24 years of age, and victim, a 16-year-old, met while working at the local Red Cross. They exchanged contact information and communicated through social media and by telephone before any sexual contact. The court held that the prosecution failed to establish by clear and convincing evidence that they were strangers at the time of the crime. *People v. Perez,* 165 A.D.3d 1628 (4th Dept. 2018).

- Where the PSI indicated that the defendant was acquainted with the victim as a consequence of going to church with the victim's mother and aunt, it was error for the SORA court to conclude that the victim was a stranger to the defendant. *People v. Johnson,* 93 A.D.3d 1323 (4th Dept. 2012).

- The case summary indicated that the victim and the defendant were strangers. The court held that the case summary, standing alone, will not suffice to satisfy the prosecution's burden of proof where a defendant has contested the factual assertions contained therein, i.e., that they were strangers. *People v. Paladin,* 57 Misc. 3d 130(A) (Sup. Ct. App. Term 2d Dept. 2017).

- No stranger relationship is established when there is no direct evidence concerning the relationship between the defendant and the victim and the circumstantial evidence does not constitute clear and convincing evidence. *People v. Graves,* 162 A.D.3d 1659 (4th Dept. 2018).

- Where the defendant committed his first offense against the victim on the same day he met her, he was held to be a "stranger" to the victim within the meaning of risk factor 7. *People v. Cooper,* 141 A.D.3d 710 (2d Dept. 2016) *lv denied* 28 N.Y.3d 908 (2016). *See also*, *People v. Lewis,* 45 A.D.3d 1381 (4th Dept. 2007).

- **A relationship established or promoted for the primary purpose of victimization** – An uncle who offends against his niece generally would not fall into this category. Guidelines p. 12. A scout leader who chooses his profession or vocation to gain access to victims and "grooms" his victims before actually abusing them would qualify. Guidelines p. 12.

  - It was not proven by clear and convincing evidence that the defendant formed a relationship with a 16-year-old waitress for the primary purpose of victimization. *People v. Birch,* 114 A.D.3d 1117 (3d Dept. 2014).

  - A foster parent who sexually abused his foster child should not be assessed points for risk factor 7 where there is no evidence that he either had a professional relationship with the victim as a foster parent or, that he established his foster care relationship with the victim for the purpose of victimization. *People v. Stein,* 63 A.D.3d 99 (4th Dept. 2009).

  - Where defendant had a familial relationship with his wife's 16-year-old godchild for whom he was a math tutor, it was not established that he established this tutoring relationship for the primary purpose of victimization. *People v. Terdeman,* 175 Misc. 2d 379 (Crim. Ct. Queens Co. 1997).

❍ Where the defendant socialized with four children of his childhood friends over an extended period of time, the court found that he did not establish the relationship with these children in order to victimize them. The court then turned to the question of whether the prosecution had proven that the defendant "promoted" a relationship with the children for the primary purpose of victimization. The court analyzed the term "promote" and concluded that he had not promoted a relationship for the primary purpose of victimization. *People v. Cook,* 29 N.Y.3d 121 (2017). The focus of the inquiry is on the relationship between the defendant and the victim before the crime was committed. *People v. Cook,* 29 N.Y.3d at 126. The court cautioned against conflating the concepts of grooming a victim and promoting a relationship for the purposes of victimization. *People v. Cook,* 29 N.Y.3d at 127.

❍ Defendant, 24 years of age, and victim, a 16-year-old, met while working at the local Red Cross. They exchanged contact information and communicated through social media and by telephone before any sexual contact. The court found that the prosecution presented no evidence that the defendant targeted the victim for the primary purpose of victimizing her. *People v. Perez,* 165 A.D.3d 1628 (4th Dept. 2018).

❍ Defendant met the victim at a party. The court held that the prosecution failed to present any evidence that he targeted the victim for the primary purpose of victimization. *People v. Johnson,* 104 A.D.3 1321 (4th Dept. 2013).

❍ Where the only documents reviewed by the SORA court were the RAI and the PSI, and neither indicated that the defendant's purpose in meeting or developing a relationship with the victim was to subject him to sexual contact, it was error to conclude that the defendant's primary purpose was victimization. Therefore, no points should have been assessed for risk factor 7. *People v. Johnson,* 93 A.D.3d 1323 (4th Dept. 2012).

❍ The Appellate Division concluded that the defendant had engaged in "grooming" behavior for the primary purpose of victimization. Not so says the Court of Appeals. "Given the expert evidence (unrebutted by the People) 'defendant is significantly lacking in sexual and social maturity, has difficulty in understanding and interpreting social cues, functions at the level of a young teenager of roughly the same age as his victims, and would be unable to maintain appropriate relationships with young women of his chronological age,' there was no clear and convincing evidence that he purposefully 'groomed' the victims for the primary purpose of victimizing them…" *People v. Izzo,* 26 N.Y.3d 999, 1003 (2015). Defense counsel should be alert to identifying and developing the argument that the defendant has personal characteristics that counter the prosecution's narrative that the defendant was grooming the victim.

❍ "[F]or the primary purpose of victimization," as used in risk factor 7, requires proof that the defendant knew, when establishing or promoting the relationship for sexual purposes, that the victim was underage. In cases where the SORA offense is a crime because of the victim's age, risk factor 7 does not apply to offenders who may have established the relationship for sexual purposes, but

without having reason to know the victim's age at that time. *People v. Jordan,* 145 A.D.3d 691 (2d Dept. 2016).

- Defendant volunteered in many youth-oriented activities where he met his victims. The court held that was sufficient to establish he did so for the purpose of victimizing them. For reasons that are not clear, the prosecution's proof was wanting, but the Court found that the deficiencies were filled in by the Board and the defendant without saying what they filled in. *People v. Carlton,* 307 A.D.2d 763 (4th Dept. 2003).

- **The offense arose in the context of a professional or avocational relationship between the defendant and the victim and was an abuse of such relationship** – This conduct involves the abuse of a professional relationship and reaches health care providers and others who exploit a professional relationship in order to victimize someone who reposes trust in them. A dentist who sexually abuses his patient while the patient is anesthetized would fall squarely with this category. Guidelines p. 12

  - *Foster parent* - A foster parent who sexually abused his foster child should not be assessed points for risk factor 7 where there is no evidence that he either had a professional relationship with her as a foster parent, or that he established his foster care relationship with the victim for the purpose of victimizing her. *People v. Stein,* 63 A.D.3d 99 (4th Dept. 2009).

  - *Teen camp counselor* - The court rejects the People's view that defendant is chargeable with 20 points for abusing a "professional" relationship with the victim. Defendant was not the victim's priest, her dentist, her teacher, or her pediatrician. He was a 19-year-old employee of a childcare facility: a "camp counselor" responsible for watching his charges and serving them food. There is no evidence that he was licensed or trained for his position, was paid a "professional" salary, or was in possession of any unusual skills. Defendant was, in essence, a babysitter. This court concludes that the Board of Examiners had more in mind, when it found that the community needed extra protection from defendants who abused "professional" relationships with victims. *People v. Houston,* 39 Misc. 3d 1202(A) (Sup. Ct. Kings Co. 2013).

  - *Minister* – Defendant served in a nondenominational Christian ministry. The court held that under these circumstances, the relationship between defendant and the victim was a professional one within the meaning of SORA, thus justifying the assessment of 20 points with respect to risk factor 7. *People v. Briggs,* 86 A.D.3d 903 (3d Dept. 2011).

  - *Coach* – A college soccer coach was deemed by the court to have an avocational relationship with a player he coached for purposes of assessing points for risk factor 7. *People v. Riverso,* 96 A.D.3d 1533 (4th Dept. 2012).

  - *Bus driver* – A bus driver for mentally disabled women was held to have a professional relationship within the meaning of this risk factor. *People v. Carlton*, 78 A.D.3d 1654 (4th Dept. 2010).

- *Teacher* – A teacher who had sexual relations with a 15-year-old student is assessed 20 points for abuse of a professional relationship under risk factor 7. *People v. Cuesta,* 6 A.D.3d 1113 (2d Dept. 2009).

- *Job counselor* - defendant was the former client of a job counselor whom he sexually assaulted, this did not fall within a professional relationship as contemplated by this risk factor. *People v. Kraus,* 45 A.D.3d 826 (2d Dept. 2007).

- **Child pornography victims** – Children depicted in pornographic images possessed by the defendant are victims within the meaning of SORA. *People v. Gillotti,* 23 N.Y.3d 841 (2014); *People v. Johnson,* 11 N.Y.3d 416 (2008). These child pornography victims can be considered for the assessment of points under risk factors 3, 5 and 7. *People v. Perahia,* 57 A.D.3d 865 (2d Dept. 2008). However, because scoring this risk factor creates an anomaly, "particularly strong consideration" to a downward departure should be given. *People v. Gillotti,* 23 N.Y.3d 841 (2014); *People v. Kemp,* 148 A.D.3d 1284 (3d Dept. 2017). They may be considered as strangers.

- **Fictional victim** – Fictional victims, usually undercover police, are considered victims for the purpose of assessing points under risk factors 3, 5 and 7. *People v. DeDona,* 102 A.D.3d 58 (3d Dept. 2012) and *People v. Wise,* 127 A.D.3d 834 (2d Dept. 2015).

§ 3:9 RISK FACTOR 8: AGE AT FIRST SEX CRIME

Risk factor 8 is assessed 10 points if the defendant was 20 years old or less at the time of the commission of his first sex crime.

- **Age 20 or less** – For the purpose of risk factor 8, this refers to a person who is less than 20 years old and includes a person who has not reached his twenty-first birthday. *People v. Faison,* 46 A.D.3d 316 (1st Dept. 2007).

- **Age at commission** – As the Guidelines make clear, it is the age at the time of commission of the first sex crime and not the date of conviction that is to be considered. Guidelines p. 13.

- **First sex crime** – This not only references prior sex crimes, but also includes the defendant's age at the time of the commission of the instant offense for which the SORA proceeding is being conducted. Guidelines p. 13. In *People v. Jusino,* 11 Misc. 3d 470, 477-478 (Sup. Ct. N.Y. Co. 2005), the court rejected the proposition that the current offense should be included in this risk factor, as it is not a part of the criminal history. The court also concluded that this risk factor's premise – that that that a person who offends at a young age is more prone to reoffend – was without support in the research and literature. *People v. Jusino,* 11 Misc. 3d at 478-481.

- **Sex crime** – This includes both felonies and misdemeanors. Guidelines p. 13. Although the age determination is based upon the age at the time of the commission of the sex crime, there must be a resulting conviction or adjudication in order to assess points for this risk factor. *People v. Current,* 147 A.D.3d 1235, 1236, 1237 (3d Dept. 2017).

As discussed in Chapter 4 on Overrides, since we can only assume that "sex crime" means "sex offense" or "violent sex offense" based upon *People v. Horne,* 61 A.D.3d 945 (2d Dept. 2009), the offense must be for one of the offenses listed in either of those two categories, [Correction Law §168-a (2) or (3)], and as a result, must be for an offense for which the defendant is required to register, if the offense was committed in New York. It cannot be a non-registrable offense, even if that offense involved some sexual component. *People v. Balic,* 12 N.Y.3d 563, 569-570 (2009).

- **Sex crime in another jurisdiction** – If the first sex crime committed by the defendant prior to his 21st birthday occurred in another jurisdiction, the court must look to Correction Law §168-a (2)(d) and § 168-a (3)(b) in order to determine if the offense qualifies as either a "sex offense" or a "violent sex offense." If it does, it may be considered for the purpose of risk factor 8.

- **Conviction or adjudication** – This risk factor applies where "[t]he offender committed a sex offense, that subsequently resulted in an adjudication or conviction for a sex crime, at age 20 or less (10 points)." (Guidelines, (Introduction) Criminal History, Factor 8, at what would be p. ii.) *People v. Current,* 147 A.D.3d 1235, 1236 (3d Dept. 2017); *People v. Robertson,* 101 A.D.3d 1671, 1672 (4th Dept. 2012). The court in *Current* went on to explain that where there is no conviction or adjudication, the commission of a sex offense at age 20 or less may serve as the basis for an upward departure. *People v. Current,* 147 A.D..3d at 1237. It should be noted that in *People v. Slotman,* 112 A.D.3d 1332 (4th Dept. 2013), the court allowed for the assessment of points under risk factor 8 even though there was no conviction or adjudication. The court in *Slotman* held that the defendant's admission in the PSR was sufficient. *Current* is the far more well-reasoned decision, and in fact seems to reject the misapplied principles of *Slotman. People v Current,* 147 A.D.3d 1235 at n 2.

- **Youthful offender** – Assessing points for a person who was adjudicated a youthful offender is proper for all of the criminal history risk factors, including risk factor 8. Guidelines pp. 6 and 13. *People v. Francis,* 30 N.Y.3d 737 (2018).

- **Juvenile delinquency** – Despite the Guidelines directive that it is proper to consider offenses committed by persons found to be juvenile delinquents (Guidelines pp. 6 and 13) for the purpose of criminal history risk factors and risk factor 8, the three Departments of the Appellate Division to address this issue have held that it is improper to consider a juvenile delinquency finding for risk factors 8, 9 and 10. *People v. Campbell,* 98 A.D.3d 5, 12 (2d Dept. 2012), *People v. Brown,* 148 A.D.3d 1705 (4th Dept. 2017) and *People v. Shaffer,* 129 A.D.3d 54 (3d Dept. 2015).

- **Endangering the welfare of a child** – A conviction for EWOC was held to be properly considered for the purpose of risk factor 8. *People v. Miller,* 149 A.D.3d 1279, 1281 (3d Dept. 2017).

- **Double counting** - Assessing points for risk factors 8 and 9 was considered double counting by the court in *People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006), however, it was held not to be double counting in *People v. Barney,* 126 A.D.3d 1245

(3d Dept. 2015), where the court held that they are not duplicate factors resulting in the assessment of points for the same conduct, but rather are "cumulative predictors of the likelihood of reoffense." It was also not considered double counting by the court in *People v. Pietarniello,* 53 A.D.3d 475, 476-477 (2d Dept. 2008).

PRACTICE TIPS
You should consider carefully whether you want to challenge the assessment of points for this risk factor. For example, you might consider challenging an assessment of points because there was no conviction or adjudication for the sex crime, in reliance on People v. Current, 147 A.D.3d 1235 (3d Dept. 2017). Before you do so think twice. Do a careful calculation of the math. Will your client be hurt more by the assessment of these 10 points, or by an upward departure? See People v. Current, 147 A.D..3d at 1237.

§ 3:10 RISK FACTOR 9: NUMBER AND NATURE OF PRIOR CRIMES

1) **Prior history – No sex crimes or felonies (5 points)**

2) **Prior non-violent felony (15 points)**

3) **Prior Class A felony of Murder, Kidnapping, or Arson, a violent felony, a misdemeanor sex crime, endangering the welfare of a child, or any adjudication for a sex offense (30 points)**

There are certain rules and principles that apply to all three of the subcategories of risk factor 9 listed above. To avoid repetition, the principles and rules applicable to all three subcategories are addressed first, before addressing each of the three subcategories individually.

- **Prior criminal history** – In order to consider any crime for the purpose of criminal history points assessment, the conviction must have occurred prior to the commission of the offense for which the SORA hearing is being held. Guidelines p. 14. It cannot be a concurrent or a subsequent offense. Guidelines p. 14. *People v. Milks,* 28 A.D.3d 1163 (4th Dept. 2006); *People v. Price,* 31 A.D.3d 1114 (4th Dept. 2006). Even so, a concurrent or subsequent offense may be the basis for an upward departure "if it is indicative that the offender poses an increased risk to public safety." Guidelines p. 14. *People v. Perez,* 158 A.D.3d 1070 (4th Dept. 2018); *People v. Ryan,* 96 A.D.3d 1692 (4th Dept. 2012).

- **Conviction or adjudication** – When scoring all the criminal history risk factors, including the three subcategories of risk factor 9, the crime that is being considered for the assessment of points must have resulted in a subsequent conviction or adjudication. This seems self-evident since the term "crime" as used in the Guidelines "includes criminal convictions, youthful offender adjudications and juvenile delinquency findings." Guidelines p. 6. The heading for risk factor 9 pertaining to each of the three subcategories is entitled "Number and nature of prior crimes," clearly indicating that prior crimes are required in order to be considered, and the meaning of crimes includes convictions and adjudications. The Guidelines further clarify that "[w]here an offender has admitted committing an act

of sexual misconduct for which there has been no such judicial determination, it should *not* be used in scoring his criminal history." Guidelines p. 7. The requirement that there must be a subsequent conviction or adjudication for an offense to be assessed points for any subcategory of risk factor 9 is acknowledged by case law. *People v. Current,* 147 A.D.3d 1235, 1236 (3d Dept. 2017); *People v. Robertson,* 101 A.D.3d 1671, 1672 (4th Dept. 2012). It should be noted that in *People v. Slotman,* 112 A.D.3d 1332 (4th Dept. 2013), the court allowed for the assessment of points under risk factor 8 even though there was no conviction or adjudication. The court in *Slotman* held that the defendant's admission in the PSR was sufficient. *Current* is the far more well-reasoned decision, and in fact seems to reject the misapplied principles of *Slotman. People v. Current,* 147 A.D.3d 1235 at note 2.

Where a defendant commits a sex crime that is the basis for the current offense for SORA purposes and had previously entered a plea of guilty to a felony, but has not yet been sentenced, that prior plea can serve as a prior conviction for criminal history point assessment purposes. In *People v. Wood,* 60 A.D.3d 1350 (4th Dept. 2009), the court reasoned that the plea falls within the definition of a "conviction" pursuant to CPL § 1.20 (13) and can be considered for the assessment of points as a prior conviction. *See also People v. Franco,* 106 A.D.3d 417 (1st Dept. 2012). The court in *Franco* went on to explain that although the Guidelines incorporate the Penal Law definition of "violent felony" (Penal Law § 70.02 [1]), "this does not require the wholesale adoption of the recidivist sentencing statutes contained in Penal Law article 70, including § 70.04 (1)(b)(ii) which requires that a defendant have been sentenced on the prior violent felony before it may be used as a predicate violent felony for sentencing purposes." *People v. Franco,* 106 A.D.3d at 418.

- **Youthful offender** – Assessing points for a person who was adjudicated a youthful offender is proper for all of the criminal history risk factors, including risk factor 8. Guidelines pp. 6 and 13. *People v. Francis,* 30 N.Y.3d 737 (2018).

- **Juvenile delinquency** – Despite the Guidelines directive that it is proper to consider offenses committed by persons found to be juvenile delinquents (Guidelines pp. 6 and 13) for the purpose of criminal history risk factors and risk factor 8, the three Departments of the Appellate Division to have addressed this issue have held that it is improper to consider a juvenile delinquency finding for risk factors 8, 9, and 10. *People v. Campbell,* 98 A.D.3d 5, 12 (2d Dept. 2012), *People v. Brown,* 148 A.D.3d 1705 (4th Dept. 2017) and *People v. Shaffer,* 129 A.D.3d 54 (3d Dept. 2015).

- **Double counting** – Assessing points for risk factors 8 and 9 was considered double counting by the court in *People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006), however, it was held not to be double counting in *People v. Barney,* 126 A.D.3d 1245 (3d Dept. 2015), where the court found that they were not duplicate factors resulting in the assessment of points for the same conduct, but rather are "cumulative predictors of the likelihood of reoffense." It was also not considered double counting by the court in *People v. Pietarniello,* 53 A.D.3d 475, 476-477 (2d Dept. 2008). It is also not considered double counting when the prior felony sex

crime conviction is used both as an override and as a basis upon which to add 30 points for risk factor 9. *People v. Barrier,* 58 A.D.3d 1086, 1087 (3d Dept. 2009).

- **Remoteness of the conviction** – There are instances when the prior criminal conviction is remote in time. This may give rise to two possible arguments. The first argument is that the prior conviction is too temporally remote in time to be a valid predictor of the defendant's likelihood of reoffending and should not be the basis for the assessment of points under any of the three subcategories of risk factor 9. The majority of courts have not been receptive to this argument. *See People v. Oginski,* 35 A.D.3d 952 (3d Dept. 2006). In *People v. Blaylock,* 125 A.D.3d 950 (2d Dept. 2015) the court considered a conviction that was 36 years old and found the remoteness argument without merit. No case law has been found that accepted the remoteness argument to disallow the scoring of a criminal history risk factor. A second argument that can be made is that although the risk factor is scored, the remoteness of the conviction causes the scoring of the risk factor to over-estimate the risk of reoffending, thus requiring a downward departure. In *People v. Scone,* 145 A.D.3d 1327 (3d Dept. 2016), the court opened the door to consideration of a downward departure based upon remoteness of the conviction, only to close the door and deny the downward departure. A minority view is found in *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010), where the court used an old Youthful Offender adjudication to assess points under risk factor 9 as a prior non-violent felony offense, however, the SORA court departed downward, at least in part, based upon the remoteness and questionable relevance of the almost 30-year-old Youthful Offender adjudication. The court in *Taylor* used multiple factors as the basis for the departure. If you make this argument, you should couple the request for downward departure based upon remoteness with several other mitigating factors to support the departure.

- **Out-of-state convictions or adjudications** – An out-of-state conviction or adjudication can be used for assessing points under criminal history and risk factor 9. In *People v. Perez,* 35 N.Y.3d 85 (2020) the Court of Appeals addressed the issue that arises from a gap in the Guidelines and Correction Law, which fail to specifically account for out-of-state convictions when a court considers prior convictions for the purpose of evaluating the risk of reoffense, such as in risk factor 9. The court held that reliance on out-of-state convictions for purposes of assessing points under risk factor 9 was appropriate as a matter of law, provided that the conviction meets the "essential elements" provision of SORA as explained in *North v. Board of Examiners of Sex Offenders of State of New York,* 8 N.Y.3d 745 (2007). The court ruled that the strict equivalency standard had not been met. *See* also, *People v. Bean,* 190 A.D.3d 622 (1st Dept. 2021). For a full discussion of the "essential elements" test to determine if a conviction in another jurisdiction can be considered for SORA purposes refer to Chapter 8 on Selected Issues, § 8:12.

Prior History/ No Sex Crimes or Felonies (5 points)

The defendant may be assessed 5 points if her prior criminal history consists only of convictions or adjudications for misdemeanors that are not sex crimes, and she has no prior felony or sex crime conviction or adjudication. Guidelines p. 13.

- **No prior sex crime** – It cannot be any offense that meets the definition of "sex offense" (Correction Law § 168-a [2]) or "sexually violent offense" (Correction Law § 168-a [3]).

- **No prior felony** – It cannot be a felony. It is assumed for the purpose of SORA that a felony, whether in New York or in any other jurisdiction, means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. Penal Law 10.00 (5).

- **Sufficient proof of nature of prior crime** – When the prosecution seeks to rely upon an out-of-state conviction to assess points under risk factor 9, the prosecution must prove that such conviction was the equivalent of a New York offense and cannot do so without proof of the underlying facts of foreign conviction in the foreign jurisdiction. Without such proof, the prosecution cannot prove that the underlying conduct of the foreign conviction was within the scope of, or equivalent to, the New York offense. *People v. Crews,* 127 A.D.3d 491 (1st Dept. 2015).

- **Sufficient proof of a prior conviction and adjudication** – See discussion of this issue in Chapter 4 on Overrides. When the prosecutor fails to specify the offense for which the defendant was allegedly convicted or adjudicated, and fails to submit any evidence in support of such a conviction or adjudication, no points can be assessed for the prior criminal history. *People v. Ross,* 37 A.D.3d 1117 (4th Dept. 2007). In *People v. Hiram,* 142 A.D.3d 1304 (4th Dept. 2016), the court held that the prior non-violent felony from Texas was sufficiently established by the "reliable hearsay" contained in the case summary and criminal history report. It may be that this was deemed sufficient only because the defendant failed to contest the conviction and submitted nothing in opposition to the "reliable hearsay."

<u>Prior Non-violent Felony (15 points)</u>

- **Non-violent felony** – The Guidelines define "non-violent felony" as a prior felony conviction or adjudication for a crime other than a Class A felony of Murder, Kidnapping, or Arson, a violent felony, or a sex offense. Guidelines p. 13. It cannot be a violent felony. The Guidelines specifically adopt the definition of violent felony provided in Penal Law § 70.02 (1). Guidelines p. 14. It cannot be a sex offense as defined in Correction Law § 168-a (2).

- **Out-of-state convictions as prior crimes**

  - *People v. Galindo,* 107 A.D.3d 603 (1st Dept. 2013) – Where the prior robbery conviction in Pennsylvania did not fall within the scope of a "violent felony" as defined in Penal Law § 70.02 (1), it should not have been assessed 30 points. Instead, it should have been assessed 15 points as a non-violent felony, as the conduct underlying the Pennsylvania conviction fell within the scope of only Robbery in the Third Degree in New York, citing generally to *Matter of North v. Board of Examiners of Sex Offenders of State of N.Y.,* 8 N.Y.3d 745, 752 (2007).
  - *People v. Struble,* 49 A.D.3d 1348 (4th Dept. 2008) – The defendant contended that his Texas non-violent felony should not be assessed points as a felony under risk factor 9, because it did not qualify as a predicate felony for sentencing purposes in New York under Penal Law § 70.06 (1)(b)(i). The court rejected this

argument, holding that Correction Law § 168-l (5)(b)(iii) does not incorporate the definition of a second felony offender set forth in Penal Law § 70.06 (1)(b)(i) in the criteria for determining whether a felony committed in another jurisdiction is a felony with respect to risk factor 9. *See also People v. Barnes,* 6 Misc. 3d 469, 475 (Sup. Ct. Monroe Co. 2004).

- *People v. Simons,* 157 A.D.3d 1063 (3d Dept. 2018) – The Pennsylvania non-violent felony was properly considered to assess 15 points under risk factor 9 because the conduct underlying that conviction was within the scope of Grand Larceny in the Fourth Degree, a New York class E felony.

Prior Violent Felony, or Misdemeanor Sex Crime or Endangering Welfare of a Child (30 points)

- The title of this third subcategory of risk factor 9 on the RAI, "Prior violent felony, or misdemeanor sex crime, or endangering the welfare of a child" does not cover all of the prior crimes for which 30 points are assessed. There are two additional types of crimes that are also included. One is "any adjudication for a sex offense." Guidelines p. 13 and at what should be p. ii. A second is "a prior felony sex offense conviction." Guidelines at what should be p. ii. The scoring of a "prior felony sex offense conviction" was added to the 2006 edition of the Guidelines to make it clear that the same conduct would warrant both an override and a "companion score" of "only 30 points" for risk factor 9. Guidelines at what should be p. ii.

- **Violent felony** – The Guidelines incorporate Penal Law § 70.02 (1) to define "violent felony" for the purposes of risk factor 9. Guidelines p. 14. It is simply a question of whether the prior conviction being considered "is a violent felony offense as a matter of law." *People v. Hurst,* 19 A.D.3d 1165 (4th Dept. 2005). In *People v. Franco,* 106 A.D.3d 417 (1st Dept. 2013), the court held that although the Guidelines incorporated the definition of "violent felony" from Penal Law § 70.02 (1), it did not require the wholesale adoption of the recidivist sentencing statutes, including Penal Law § 70.04 (1)(b)(ii), which requires that a defendant have been sentenced on the prior violent felony before it may be used as a predicate violent felony for sentencing purposes. The court held that the entry of a plea to the violent offense prior to the commission of the current offense, despite there not yet having been a sentence imposed, did not prevent the prior violent conviction being considered for the assessment of 30 points under risk factor 9. *People v. Franco,* 106 A.D.3d at 418.

- **Actual violence not required** – In order to be considered as a prior violent felony for risk factor 9 purposes, the prior felony must fall within the definition of Penal Law § 70.02 (1); it is not required that the offense involve actual violence. *People v. Reyes,* 48 A.D.3d 267, 268 (1st Dept. 2008); *People v. Stacconi,* 81 A.D.3d 1046 (3d Dept. 2011).

- **Endangering the Welfare of a Child (EWOC)** – The Guidelines treat EWOC as a sex crime for the purpose of risk factor 9. Guidelines p. 14. To do so, the Board relies upon the questionable rationale that "it generally involves sexual misconduct, especially when it is part of a plea-bargained disposition." Guidelines p.14. The result of the Board's crystal ball approach is that a non-violent misdemeanor that

may have no sexual component is used by the Board to inflate the presumptive risk factor score by 30 points. The assessment of 30 points is required without regard to whether the underlying offense involved conduct that is sexual in nature. *People v. Sincerbeaux,* 27 N.Y.3d 683 (2016). The Guidelines invite a downward departure. Where a review of the record indicates that there was no sexual misconduct, "a departure may be warranted." Guidelines p. 14. It is significant that the court in *Sincerbeaux* acknowledged that because EWOC did not involve conduct of a sexual nature, consideration of a downward departure should be undertaken. The court did not go beyond consideration, ultimately concluding that under the circumstances a downward departure was not warranted. An important lesson can be drawn from *Sincerbeaux.* The court based its refusal to depart downward on the fact that the defendant only presented one mitigation factor – that the EWOC was not of a sexual nature – and that there were numerous aggravating factors. When asking for a downward departure from the excessive score resulting from a non-sexual EWOC, you must raise additional mitigating factors. Do not stop at just the one. *See People v. Leach,* 158 A.D.3d 1240, 1241 (4th Dept. 2018).

It does seem inappropriate for EWOC to be used to elevate the point score by 30 points when it is not a "sex offense" or a "sexually violent offense" and thus does not subject a person to registration. An assessment of 5 points would seem more appropriate.

- **Attempted EWOC** – Unlike EWOC, which can be considered to assess 30 points for risk factor 9, Attempted EWOC can only be used to assess 5 points. *People v. Lewis,* 178 A.D.3d 971 (2d Dept. 2019). *See* also *People v. Freeman,* 85 A.D.3d 1335, 1336 (3d Dept. 2011). However, be cautious with a challenge to the scoring. The court in *Freeman* went on to consider an upward departure, because the underlying facts of the Attempted EWOC were not adequately taken into account. However, not every Attempted EWOC should give rise to an upward departure. A fair reading of the analysis in *Freeman* limits the invitation to an upward departure only to an Attempted EWOC where there is a "sexual component" or "sexualized conduct." *People v. Freeman,* 85 A.D.3d at 1336.

- **Double counting** – Using the same prior felony sex offense conviction for both an override and the assessment of 30 points for risk factor 9 seems to be condoned by the Guidelines. Guidelines at what should be p. ii. Considering the same conviction both as an override and for the assessment of 30 points under risk factor 9 has been held not to be improper double count. *People v. Johnson,* 46 A.D.3d 1032, 1033 (3d Dept. 2007). See Chapter 4 on Overrides for a more in-depth discussion of this issue.

- **Misdemeanor "sex crime"** – The term "sex crime" is used in risk factor 9, 10 and override 1. The Board chose to use the term "sex crime," yet that term is nowhere defined in SORA (Correction Law article 6-C), the Guidelines or in the Penal Law. Although it would seem reasonable to conclude that by using the term "sex crime," the Board must have meant something different than "sex offense" or "sexually violent offense" or they would have used those terms, this reasoning has been rejected. For example, in *People v. Horne,* 61 A.D.3d 945 (2d Dept. 2009), defense

counsel advanced that theory, arguing that the offense of promoting a sexual performance by a child under Penal Law § 263.15 was not a "sex crime" and should not serve as the basis for an override. The appellate court found defense counsel's argument to be without merit and proclaimed, without explaining, that Correction Law § 168-a (2) defines a "sex crime" to include any offense under article 263 of the Penal, which includes promoting a sexual performance by a child. Of course, Correction Law § 168-a (2) defines a "sex offense" not a "sex crime." Apparently, the court considers them the same. In light of *People v. Horne,* one might assume that "sex crime" refers to either a "sex offense" or a "sexually violent offense" as those terms are defined in Correction Law § 168-a (2) and (3).

One might fairly assume that in order to qualify as a "sex crime" the conviction must be for a registrable sex offense or a sexually violent offense as those terms are defined by statute. (Correction Law § 168-a (2) and (3). However, since the term "sex crime" is not defined, courts have been left to their own devices to fathom the meaning. That is never a good thing.

The question occasionally arises whether a conviction for a first-time forcible touching or sexual abuse in the third degree should be assessed 30 points as a misdemeanor sex crime under risk factor 9 where the victim is not less than 18 years of age, and where there has been no previous conviction for a sex offense, sexually violent offense or any prior conviction for forcible touching or sexual abuse in the third degree. Although the simple answer might seem to be that since the conviction was not for a registrable offense, it should not be assessed points as a misdemeanor sex crime, beware that there are cases to the contrary that may be seized upon by the prosecution. Such was the case in *People v. Yancey,* 66 Misc. 3d 1231(A) (Watertown City Court 2020).

In *People v. Yancey* the court held that even though the defendant's prior conviction for a first-time forcible touching was not a "sex offense" that would require SORA registration, it never-the-less is a misdemeanor sex crime for the purposes of assessing 30 points under risk factor 9. The court went on to cite precedent from several cases, which should be reviewed carefully. *See People v. Valdivia*, 51 Misc. 3d 134(A) (App. Term 1st Dept. 2016); *People v. Syed,* 60 Misc. 3d 129(A) (App. Term, 1st Dept. 2018); *People v. Kraeger,* 42 A.D.3d 944 (4th Dept. 2007).

Defense counsel might use *People v. Horn* and *People v. Balic,* 12 N.Y.3d 563, 570 (2009) to argue that only a registrable sex offense or sexually violent offense is considered a sex crime. In *People v. Balic* the court concluded that in order to be assessed 30 points the misdemeanor must be a "sex offense" as defined in Correction Law § 168-a (2). It is not sufficient when it is a misdemeanor, such as an assault in the third degree, that has a sexual aspect.

- **Out-of-state convictions and adjudications** – Out-of-state convictions or adjudications may be used for the purpose of considering prior criminal history point assessments, including under risk factor 9, so long as they meet the required definition. *People v. Simons,* 157 A.D.3d 1063 (3d Dept. 2018); *People v. Liguori,* 48 A.D.3d 773 (2d Dept. 2008).

❍ A prior robbery conviction in California was found to be appropriate to consider as a prior violent felony for the purpose of assessing 30 points for risk factor 9. *People v. Liguori,* 48 A.D.3d 773 (2d Dept. 2008).

❍ The prior New Jersey convictions for sex crimes, one of which included all the essential elements of New York's offense of rape in the first degree, were held to be properly considered for the assessment of 30 points under risk factor 9 as a prior felony sex offense, even though the defendant was not required to register as a sex offender in New Jersey. *People v. Barrier,* 58 A.D.3d 1086 (3d Dept. 2009).

❍ A prior Pennsylvania felony which was not within the scope of a New York violent felony, could not be assessed for 30 points as a "violent felony," but could be assessed for 15 points, as the foreign conviction was within the scope of a non-violent felony – Robbery in the Third Degree, citing generally to *Matter of North v. Board of Examiners of Sex Offenders of State of N.Y.,* 8 N.Y.3d 745, 752 (2007). *People v. Galindo,* 107 A.D.3d 603 (1st Dept. 2013).

❍ A prior military conviction of assault with intent to commit rape was held insufficient to assess 30 points under risk factor 9 (a prior sex crime) because it did not qualify as a "sex offense" as defined in Correction Law § 168-a (2)(d)(ii) and did not "include all of the essential elements of attempted rape in the first degree under New York law." *People v. Lancaster,* 128 A.D.3d 786, 787 (2d Dept. 2015). The appellate court in *Lancaster* did go on to hold that the military conviction warranted the assessment of 5 points under risk factor 9. *People v. Lancaster,* 128 A.D.3d at 787.

❍ There must be both adequate proof of the prior conviction and sufficient proof of the conduct underlying the out-of-state conviction. In *People v. Crews,* 127 A.D.3d 491 (1st Dept. 2015), proof of the underlying conviction from Maryland was not the problem, but rather lack of any proof of the conduct underlying the foreign conviction. As a result, the court held that 30 points was incorrectly assessed. *People v. Crews,* 127 A.D.3d at 491. It was insufficient for the prosecutor to merely provide the court with a copy of the Maryland statute under which the defendant was previously convicted. *People v. Crews,* 127 A.D.3d at 491.

§ 3:11 RISK FACTOR 10: RECENCY OF PRIOR FELONY OR SEX CRIME

A person is assessed 10 points for risk factor 10 for a prior felony or sex crime within three years of the commission of the offense for which the SORA hearing is being held. The prior conviction cannot be a misdemeanor for a crime, other than a "sex offense." This three-year period is measured "without regard to the time during which the offender was incarcerated or civilly committed." Guidelines p. 14. This is similar to the tolling of time while incarcerated in calculating the ten-year period for a second felony offender [Penal Law § 70.06 (1)(v)]. The Guidelines point out, "[i]t is the offender's behavior during his liberty that is relevant in assessing his likelihood to reoffend." Guidelines p. 14. "[T]his category measures the time from when the offender is released into the community until the date he commits the instant offense." Guidelines p. 14.

- **Start date for measuring back** – The trigger date from which this 3-year look back is measured is "the date he commits the instant offense." Guidelines p. 14. Courts have routinely used the date of the commission of the instant offense as the three-year count back starting point. *People v. Weathersby,* 61 A.D.3d 1382 (4th Dept. 2009); *People v. Pinckney,* 129 A.D.3d 1048 (2d Dept. 2015).

- **End date for measuring back** – In 2006, the Guidelines were amended to include the clarifying language that "this category measures the time from when the offender is released into the community until the date he commits the instant offense." Guidelines p. 14. Clearly, it does not run back to the date of the commission of the prior offense. *People v. Fabian-Lopez,* 160 A.D.3d 536 (1st Dept. 2018); *People v. Neuer,* 86 A.D.3d 926 (4th Dept. 2011). The Board chose not to use the language "commission of the prior offense," and it specifically used the language "released into the community." The "released" language indicates that it is measured back to some point in time when the defendant was taken into custody and then released. Is it "released" after arrest, after plea or after sentencing? In *People v. Johnson,* 151 A.D.3d 1950 (4th Dept. 2017) the court held that the SORA court erred when it calculated the three-year period from the date of the sentencing rather than the date of the plea, citing to *People v. Wood,* 60 A.D.3d 1350 (4th Dept. 2009). *Wood* was the case in which the court held that for purposes of determining a prior criminal history, the conviction would be determined by the date of the plea, not sentencing. So, it would seem the measuring date is the time of the plea. *People v. Neuer,* 86 A.D.3d 926 (4th Dept. 2011). But it remains an open question as to whether the proper measurement of the three-years runs from the date the defendant was arrested, as would be consistent with the notion of being "released" on bail. And if released on bail, this would undoubtedly be an opportunity to assess "an offender's behavior during his time at liberty that is relevant in assessing his likelihood to reoffend." Guidelines p. 14

- **Excluding period of incarceration** – In order to assess points for risk factor 10, the prosecution must prove by clear and convincing evidence that the defendant was not at liberty for more than three years between the date of the prior plea (or arrest) for a felony or sex crime and the date of the commission of the instant offense. *People v. Pendelton,* 50 A.D.3d 659 (2d Dept. 2008). If the prosecution seeks to toll any of the time during these two dates due to incarceration, the prosecution must prove that incarceration by clear and convincing evidence. In *Pendelton,* the prosecution relied upon the tolling provision, however, they failed to prove the period of incarceration for a sufficient period to bring the prior plea within the three-year recency period. As a result, the court held that the SORA court erred when it assessed 10 points for risk factor 10. *People v. Pendelton,* 50 A.D.3d at 659. The court was less exacting in *People v. Weathersby,* 61 A.D.3d 1382 (4th Dept. 2009), when it allowed the prosecution to identify a sufficient tolling period by proof of the sentences imposed during the period between the prior plea and date of commission of the instant offense without any proof of actual incarceration. *People v. Weathersby,* 61 A.D.3d at 1382-1383.

- **Probation violation** – In *People v. Marrero,* 52 A.D.3d 797 (2d Dept. 2008), the defendant pleaded guilty to a prior sex crime more than three and a half years

before the commission of the instant offense. He was sentenced to probation; however, his probation was subsequently violated, and he was resentenced to six months. This still left him with more than three years at liberty during the three-year recency period. The prosecution sought the assessment of 10 points for risk factor 10 on the theory that the probation violation and the resentenced jail term of six months changed the date from which the three-year recency period is measured. The SORA court agreed with the prosecution. The appellate court reversed, finding no basis in law to change the date from which the three years is measured, striking the 10 points, and reducing the defendant's risk level. *People v. Marrero,* 52 A.D.3d at 799.

- **"Sex crime"** – Since the assessment of 10 points depends upon whether there was a prior conviction for a "sex crime" it is essential to know what is considered a "sex crime." As noted in § 3:10 pertaining to risk factor 9, the problem is that the term "sex crime" is nowhere defined in SORA (Correction Law article 6-C), the Guidelines or in the Penal Law. The only definitions we find in SORA are for "sex offense" and "sexually violent offense." For a discussion of whether prior "sex crimes" should be interpreted to mean registrable "sex offenses" and "sexually violent offenses" or take on some broader meaning see the discussion in § 3:10 under the bullet heading "Misdemeanor sex crime."

§ 3:12 RISK FACTOR 11: DRUG OR ALCOHOL ABUSE

The Guidelines provide for the assessment of 15 point if the defendant has a substance abuse history or was abusing drugs or alcohol at the time of the offense. Guidelines p. 15. The focus is on two separate and distinct conditions; either one can result in the assessment of points for this risk factor, independent of the other. First, looking to the past, does the defendant have a history of alcohol or substance abuse? Second, looking at the instant offense, was the defendant abusing drugs or alcohol at the time of the commission of the offense for which the SORA proceeding is being conducted? The Guidelines establish several caveats: "It is not meant to include occasional social drinking. In instances where the offender abused drugs and/or alcohol in the distant past, but his more recent history is one of prolonged abstinence, the Board or court may choose to score zero points in this category. An offender need not be abusing alcohol or drugs at the time of the instant offense to receive points in this category." Guidelines p. 15. There are two ways this risk factor can be assessed points. The prosecution must show by clear and convincing evidence that the defendant used drugs or alcohol in excess either at the time of the crime or repeatedly in the past. *People v. Leon,* 172 A.D.3d 765 (2d Dept. 2019); *People v. Aleman,* 187 A.D.3d 482 (1st Dept. 2020).

- **No nexus required between substance abuse and conviction** – Although this risk factor is placed within Part II "Criminal History," there is no apparent requirement that the drug or alcohol related history be connected in any way to a prior criminal conviction. All that is required is a history of substance abuse. *People v. Reyes,* 48 A.D.3d 267 (1st Dept. 2008); *People v. Shea,* 61 A.D.3d 947, 948 (2d Dept. 2009).

- **Need not be abusing at time of instant offense** – The Guidelines make it clear that a defendant need not be abusing alcohol or drugs at the time of the instant

offense to receive points for risk factor 11. Guidelines p. 15. Case law has followed the Guidelines in this regard. *People v. Shea,* 61 A.D.3d 947, 948 (2d Dept. 2009); *People v. Guitard,* 57 A.D.3d 751, 752 (2d Dept. 2008); *People v. Regan,* 46 A.D.3d 1434, 1435 (4th Dept. 2007).

- **Abuse of drugs or alcohol at the time of instant offense** – The Guidelines provide for the assessment of points if there is clear and convincing evidence that the defendant was abusing drugs or alcohol at the time of the instant offense. As the court in *People v. Rosario,* 164 A.D.3d 625 (2d Dept. 2018) acknowledged, proof of such facts "will generally justify the assessment of points in this category." The surest way to subject oneself to the assessment of points for risk factor 11 is for the defendant to admit to abusing drugs or alcohol at the time of the instant offense. *People v. Lockett,* 67 A.D.3d 1266, 1267 (3d Dept. 2009); *People v. Britt,* 66 A.D.3d 853-854 (2d Dept. 2009). Appellate courts have repeatedly found that the assessment of points was proper in those instances where the defendant admitted to the abuse of drugs or alcohol at the time of the instant offense. *See People v. Villanueva,* 143 A.D.3d 794 (2d Dept. 2016); *People v. Carpenter,* 60 A.D.3d 833 (2d Dept. 2009); *People v. Robinson,* 55 A.D.3d 708 (2d Dept. 2008). In *People v. Roberts,*108 A.D.3d 947 (3d Dept. 2013), the victim's statement about the extent to which she and the defendant had been drinking to the point of passing out was deemed sufficient.

  Although the defendant's admission to alcohol or drug abuse at the time of the instant offense usually leads to the assessment of points, there is some case law to support an argument that moderate use of drugs or alcohol at the time of the offense, or just prior, is not sufficient to assess points under risk factor 11. In cases where the defendant has made an admission about drug or alcohol use just prior to the offense, the defense finds some useful facts and analysis from the Court of Appeals in *People v. Palmer,* 20 N.Y.3d 373 (2013) and its companion case, *People v. Long.* In both cases, the defendants admitted during the PSI to drinking on the evening of the offense. Palmer told the Probation Department that he had been drinking alcohol at an after-work party on the date he committed the offense. Long likewise told the Probation Department that he "had a few beers" between 11:00 p.m. and 12:30 a.m. on the night of the instant offense. In both cases the Court of Appeals found that the SORA court had improperly assessed 15 points for risk factor 11. In *Palmer,* the court accepted the fact that the defendant had been drinking at an after-work party on the day he offended, but went on to explain why the prosecution's proof was insufficient, stating:

> *Palmer's admission that he had been socially drinking before abusing his victim for the first time, is not itself proof of alcohol abuse. Clear and convincing evidence of alcohol abuse at the time of the offense might consist of proof of an excessive quantity of alcohol imbibed, proof that the offender was impaired, or proof that there was a direct link between the offender's drinking and his sex predation.*

People v. Palmer, 20 N.Y.3d at 379.

In *Long,* the court found that the prosecution "failed to demonstrate that defendant's 90 minutes of beer drinking constituted alcohol abuse." *People v. Long,* 20 N.Y.3d at 379. The court went on to explain why the prosecution's proof was deficient, stating:

> *The People failed to demonstrate in Long that defendant's 90 minutes of beer drinking constituted alcohol abuse. The People failed to prove the number of drinks Long imbibed, failed to show that his drinking was excessive, failed to demonstrate that defendant was intoxicated, and failed to provide evidence that his drinking was causally linked to the sexual assault.*

People v. Palmer, 20 N.Y.3d at 379.

With *Palmer and Long* in mind, the defense will want to argue that despite the defendant's admission of some modest drinking prior to the offense, "[t]he court can only speculate regarding whether the defendant abused alcohol on the night in question and whether the drinking led to his deviant behavior," and that such speculation is not sufficient to meet the clear and convincing evidence standard. *People v. Palmer,* 20 N.Y.3d at 379. *See People v. Daniel,* 196 A.D.3d 652 (2d Dept. 2021).

- **History of drug or alcohol abuse** – In addition to focusing on substance abuse at the time of the offense, the alternative focus for this risk factor is on whether the defendant has a history of drug or alcohol abuse. Such a history of abuse will warrant assessment of 15 points. Guidelines p. 15. This history may come from the defendant. In *People v. Guitard,* 57 A.D.3d 751 (2d Dept. 2008), the defendant's admission that he had used marihuana since age 16 was found to be sufficient. Defendant's admission to DOCCS that he had a substance abuse problem was deemed sufficient in *People v. Kelly,* 69 A.D.3d 498 (1st Dept. 2010). Admissions by the defendant to the Probation Department of underage drinking to the point of intoxication were held sufficient in *People v. Murphy,* 68 A.D.3d 832, 833 (2d Dept. 2009). The result of a diagnostic assessment of the defendant may be sufficient basis for a point assessment. *People v. Schlau,* 60 A.D.3d 529 (1st Dept. 2009). In *People v. Lewis,* 37 A.D.3d 689, 690 (2d Dept. 2007), the defendant's substance abuse history was established by the victim's mother's statement in the PSR, along with defendant's prior conviction for a DWI. The mere reference in a PSR to the defendant's prior alcohol and substance abuse has been deemed sufficient basis for an assessment of points under risk factor 11. *People v. Wright,* 53 A.D.3d 963, 964 (3d Dept. 2008). Considering the ease that a drug or alcohol history of abuse can be alleged and accepted by SORA courts, it behooves defense counsel to be familiar with the many cases where the proof of such allegations has been found to be insufficient. Submission of a memorandum of law on this point might prove helpful.

  There is array of circumstances for which the prosecution's proof of a history of drug or alcohol abuse has been deemed to be insufficient:

  - A conviction or convictions for drug or alcohol offenses in the past not sufficient

- *People v. Irizzary,* 36 A.D.3d 473 (1st Dept. 2007)
- *People v. Ross,* 116 A.D.3d 1171 (3d Dept. 2014)
- *People v. Guaman,* 12 Misc. 3d 707 (Sup. Ct. Kings Co. 2005)
- *People v. Coger,* 108 A.D.3d 1234 (4th Dept. 2013)
- *People v. Madera,* 100 A.D.3d 1111 (3d Dept. 2012)
- *People v. Velazquez,* 130 A.D.3d 997 (2d Dept. 2015)
- *People v. Santogual,* 157 A.D.3d 737 (2d Dept. 2018)
- *People v. Marsh,* 116 A.D.3d 680 (2d Dept. 2014)

- Minimal use of marihuana not sufficient

  - *People v. Gerald,* 16 Misc.3d 106,108 (App. Term 2d Dept. 2007)
  - *People v. Collazo,* 7 A.D.3d 595 (2d Dept. 2004)

- PSR contains insufficient evidence of a history of drug or alcohol abuse

  - *People v. Guaman,* 12 Misc. 3d 707 (Sup. Ct. Kings Co. 2005)
  - *People v. Trotter,* 163 A.D.3d 729 (2d Dept. 2018)

- PSR and Case Summary contain insufficient evidence

  - *People v. Coger,* 108 A.D.3d 1234 (4th Dept. 2013)
  - *People v. Madera,* 100 A.D.3d 1111 (3d Dept. 2012)
  - *People v. Rohoman,* 121 A.D.3d 876 (2d Dept. 2014)

- Proof of drug or alcohol use not sufficient if no proof of use to excess

  - *People v. Madison,* 153 A.D.3d 737 (2d Dept. 2017)

- **Recent history of prolonged abstinence** – A recent history of prolonged abstinence after a prior history of substance abuse provides a basis for the Board or court to score this risk factor 0 points. Guidelines p. 15. New York courts have repeatedly held that drug abuse, diagnosis, and treatment in the distant past, when followed by a significant period of abstaining from drugs, makes the assessment of points for risk factor 11 unjustifiable. In *People v. Madonna,* 167 A.D.3d 1488, 1489 (4th Dept. 2018), despite evidence that the defendant smoked marihuana in his teens and early twenties, but then participated in a drug treatment program and abstained from marihuana for four years, the court held that this should be considered a period of prolonged abstinence and the evidence of substance abuse was insufficient to warrant the assessment of points under risk factor 11. Four years is at the lower end of the "prolonged abstinence" spectrum.

  - Other cases of interest regarding prolonged abstinence

    - *People v. Martinez,* 143 A.D3d 563 (1st Dept. 2016) (20 years)
    - *People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006) (8 years)
    - *People v. Abdullah,* 31 A.D.3d 515 (2d Dept. 2006) (15 years)
    - *People v. Ferrer,* 69 A.D.3d 513, 515 (1st Dept 2010) (18 years)
    - *People v. Titmas,* 46 A.D.3d 1308, 1309 (3d Dept. 2007) (6 years)
    - *People v. Romulus,* 189 A.D.3d 553 (1st Dept. 2020)

❍ Several cases have held that the defendant must provide some evidence of his prolonged abstinence. *People v. Regan,* 46 A.D.3d 1434-1435 (4th Dept. 2007); *People v. Kelley,* 64 A.D.3d 1192 (4th Dept. 2009); *People v. Vaughn,* 26 A.D.3d 776, 777 (4th Dept. 2006). These cases are not surprising, and although somewhat confusing, seem to require little more than the obvious. It is not enough to simply allege prolonged abstinence. The defense must submit some evidence of abstinence, which might include an affidavit from the defendant, letters from family and friends, program participation records, treatment records, etc.

❍ Prolonged abstinence while incarcerated insufficient to counter substance abuse history

- *People v. Birch,* 99 A.D.3d 422 (1st Dept. 2012)
- *People v. Lowery,* 93 A.D.3d 1269 (4th Dept. 2012)
- *People v. Parker,* 62 A.D.3d 1195 (3d Dept. 2009)
- *People v. Wilson,* 167 A.D.3d 1192 (3d Dept. 2018)

❍ Treatment in prison not sufficient to counter substance abuse history

- *People v. Warren,* 42 A.D.3d 593 (3d Dept. 2007)
- *People v. Wright,* 37 A.D.3d 797 (2d Dept. 2007)

- **Occasional social drinking not sufficient to support assessment of points** – The Guidelines remind us that this risk factor "is not meant to include occasional social drinking." Guidelines p. 15. If this were not clear enough, the Court of Appeals has further elucidated this point, explaining:

> *Since the Board commented that "occasional drinking" is not counted as alcohol abuse, periodic, moderate drinking of alcoholic beverages does not qualify as abuse under the SORA risk factors and does not warrant the assessment of points.*

People v. Palmer, 20 N.Y.3d at 378.

When confronted with a situation where a defendant has admitted to moderate drinking on the evening of the offense, the defense may want to bring to the court's attention *People v. Long,* where the defendant admitted to probation that on the night in question he had "a few beers" over a ninety-minute period of time, and that he "occasionally drank alcohol and usually consumed two or three beers once a month." The court considered these facts, implicitly finding that this constituted "periodic, moderate drinking," that it was "occasional social drinking" and should not be counted as alcohol abuse within the meaning of risk factor 11. *People v. Palmer,* 20 N.Y.3d at 379.

❍ Cases finding the proof constituted mere occasional social drinking

- *People v. Palmer,* 20 N.Y.3d 373 (2013)
- *People v. Saunders,* 156 A.D.3d 1138 (3d Dept. 2017)
- *People v. Titmas,* 46 A.D.3d 1308 (3d Dept. 2007)

- *People v. Rodriguez,* 130 A.D.3d 897 (2d Dept. 2015)
- *People v. Rohoman,* 121 A.D.3d 876 (2d Dept. 2014)
- *People v. Jusino,* 11 Misc. 3d 470, 484 (Sup. Ct. N.Y. Co. 2005)

❍ Cases finding the proof constituted mere occasional social marihuana use

- *People v. Weber,* 158 A.D.3d 498 (1st Dept. 2018)
- *People v. Saunders,*156 A.D.3d 1138 (3d Dept. 2017)
- *People v. Titmas,* 46 A.D.3d 1308 (3d Dept. 2007)

❍ Prosecution must establish a "pattern of drug or alcohol use in defendant's history"

- *People v. Kowal,* 175 A.D.3d 1057 (4th Dept. 2019)
- *People v. Leach,* 106 A.D.3d 1387 (3d Dept. 2013)
- *People v. Brown,* 178 A.D.3d 1167 (3d Dept. 2019)

- **Upward departure improper** – Several SORA courts have erroneously relied upon the defendant's history of drug and alcohol abuse to justify an upward departure. This has repeatedly been rejected as an aggravating factor that would justify an upward departure, primarily on the rationale that a history of drug and alcohol abuse has already been taken into account in the RAI, thus failing under Step One of the *Gillotti* analysis. *People v. Gillotti,* 23 N.Y.3d at 861.

  - *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)
  - *People v. Grady,* 81 A.D.3d 1464 (4th Dept. 2011)
  - *People v. Perkins,* 35 A.D.3d 1167 (4th Dept. 2006)
  - *People v. Beames,* 71 A.D.3d 1300 (3d Dept. 2010)

PRACTICE TIPS

When you are representing a defendant who was using alcohol prior to or during the instant offense, when appropriate, you will want to emphasize that scoring risk factor 11 requires more than just use; it requires abuse of drugs or alcohol. Make use of the three indicators of alcohol abuse articulated in People v. Palmer, 20 N.Y.3d at 379 to argue that there is no clear and convincing evidence of abuse where the prosecution has failed to show either consumption of excessive quantity, impairment, or sufficient proof that there was a direct link between the defendant's drinking and his sexual predation.

If your defendant has a prolonged period of abstinence, you will want to do more than simply allege this at oral argument or in your affirmation. In order for abstinence to counter the assessment of points for risk factor 11, you will want to submit proof of this prolonged abstinence and that it is recent; that it dates back from the present time for at least four years.[15] *Since reliable hearsay is admissible at a SORA hearing, you can do this by stating the facts in the defendant's affidavit,*

[15] The shortest period of abstinence that a court has recognized as "prolonged abstinence" in a reported case is the four years in *People v. Madonna,* 167 A.D.3d 1488, 1489 (4th Dept. 2018). Defense counsel should not hesitate to raise "prolonged abstinence" of shorter duration, as there have been favorable results for significantly shorter periods of abstinence in unreported cases.

support letters or affidavits from family and friends about the defendant's prolonged period of sobriety and recovery, substance abuse treatment records, and treatment providers' reports.

If you want to establish a prolonged period of abstinence, you will want to obtain from the defendant a signed release at the earliest opportunity so that you can immediately go about collecting the necessary records. Do not wait until the last minute. If you can demonstrate to the court that you have made a diligent effort to obtain such records, it will improve your chances of getting an adjournment of the SORA hearing should you need more time to get these records. Keep in mind that you have a statutory right to an adjournment [Correction Law § 168-d (3), § 168-l (2), § 168-n (3)], all three statutes providing that:

> *Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from any state or local facility, hospital, institution, office, agency, department, or division.*

As noted above, the courts have not been receptive to the argument that the defendant's prolonged abstinence from drug or alcohol use while in prison, precludes the scoring of risk factor 11. That does not mean that you should not provide evidence of such abstinence and treatment while in prison. Even though this may not prevent the assessment of 15 points under this risk factor, it may, along with other mitigating factors, support your request for a downward departure.

§ 3:13 RISK FACTOR 12: ACCEPTANCE OF RESPONSIBILITY

The Guidelines assess 10 points to a defendant who has not accepted responsibility for his conduct. Guidelines p. 15. The Guidelines assess 15 points for a defendant who has refused or been expelled from a sex offender program. Guidelines p. 15. For this risk factor, the focus is on the defendant's "most recent credible statements" seeking "evidence of genuine acceptance of responsibility." Guidelines p. 15. The Guidelines provide an example, pointing out that a defendant "who pleads guilty but tells his pre-sentence investigator that he did so only to escape a state sentence has not accepted responsibility." Guidelines pp. 15-16.

Defense counsel may wonder whether the assessment of 15 points is based upon a failure to accept responsibility and an additional refusal of, or expulsion from, a sex offender program, or whether the refusal or expulsion is sufficient to assess 15 points in and of itself. In 2006, the Guidelines were amended, perhaps in the hope of bringing clarity to this issue. There were two changes. Prior to 2006, the Guidelines read in pertinent part: "and 15 points are assessed to an offender who has not accepted responsibility and has refused or been expelled from a sex offender program." Guidelines (1997 ed.) p. 15. In 2006, the Guidelines were amended to read as follows: "and 15 points are assessed to an offender who has refused or been expelled from a sex offender program." Guidelines p. 15. The 2006 amendment to the Guidelines also added a concluding sentence to risk factor 12 as follows: "If an offender who has historically not accepted

responsibility and historically has refused sex offender treatment but, subsequently participates in such programming, the Board or court should seek to examine whether there is evidence of a genuine acceptance of responsibility." Guidelines p. 16. It would seem the amendment was attempting to create two separate and distinct subcategories. The RAI was also amended. While it previously read, "Not accepted responsibility and refused or expelled from treatment," it was changed after the 2006 amendment slightly to read: "Not accepted responsibility / refused or expelled from treatment."

Contributing to the confusion is the fact that under the two versions of the RAI, the subcategories are listed under the heading, "Acceptance of Responsibility." Further adding to the uncertainty is the sentence in the Guidelines that was held over in the 2006 amendment: "The guidelines add five points if the offender has refused or been expelled from treatment since such conduct is powerful evidence of the offender's continued denial and his unwillingness to alter his behavior." All of this is to say that clarity is still lacking. It is clear that a person can complete the sex offender program and still be assessed 10 points for failure to accept responsibility. It is also clear that a person who fails to accept responsibility and refuses to participate in the sex offender program can be assessed 15 points. But what of the person who fully and completely accepts responsibility, but either refuses or is expelled from the sex offender program? Should that person be assessed 15 points? Since this still seems to be an open question, one might argue that, under these unique circumstances, no points should be assessed under risk factor 12.

- **Court finds failure to accept responsibility** – It is helpful for defense counsel to understand the broad array of circumstances that have led courts to conclude that the prosecution proved a failure to accept responsibility. Listed below are some examples.

  - Defendant blamed the victim in statement to the police and showed no remorse in statement to Probation Department. *People v. Baker,* 57 A.D.3d 1472, 1473 (4th Dept. 2008).

  - Defendant's statement that he was misled as to the ages of the victims. *People v. Ashley,* 19 A.D.3d 882, 883 (3d Dept. 2005).

  - At PSI, defendant denied sexual contact. *People v. Carman,* 33 A.D.3d 1145 (3d Dept. 2006).

  - Defendant's denial of committing the offense was contained in the Case Summary and PSR. *People v. Ferrer,* 69 A.D.3d 513, 515 (1st Dept. 2010).

  - Despite admitting guilt, defendant claimed the victim was a "provocateur" and the sexual acts were consensual. *People v. Lerch,* 66 A.D.3d 1088 (3d Dept. 2009).

  - Defendant denied guilt to Probation Department and indicated he had pleaded guilty just to avoid a trial. *People v. Kennedy,* 160 A.D.3d 671 (2d Dept. 2018).

- Defendant entered an *Alford* plea, but then denied committing the sexual act, and in a letter to the Probation Department denied all guilt and blamed the victim. *People v. Leach,* 158 A.D.3d 1240, 1241 (4th Dept. 2018).

- Defendant continued to assert his innocence during the PSI. *People v. Lewis,* 37 A.D.3d 689, 690 (2d Dept. 2007).

- Based upon the Case Summary, the statement during pre-plea investigation, and statements at the SORA hearing, the court found that the defendant attributed blame to alcohol and marihuana, blamed the victim, and refused to show remorse. *People v. Havens,* 144 A.D.3d 1632, 1633 (4th Dept. 2016) *lv denied* 29 N.Y.3d 901 (2017).

- Defendant's defiance of order of protection. *People v. Current,* 147 A.D.3d 1235, 1238 (3d Dept. 2017).

- After admitting to sexual acts, defendant repudiated the crime and contended he pleaded guilty only because of the advice of defense counsel. *People v. Tubbs,* 124 A.D.3d 1094, 1095 (3d Dept. 2015).

- After conviction, the defendant maintained his innocence. Admission of guilt as a condition of entry into a sex offender program was found not to be tantamount to a voluntary acceptance of responsibility. *People v. Fortin,* 29 A.D.3d 765, 766 (2d Dept. 2006).

- Defendant's attempt to withdraw his plea, and consistently maintaining innocence after entry of plea. *People v. Walker,* 15 A.D.3d 692 (3d Dept. 2005).

- **Court finds acceptance of responsibility** – When defense counsel prepares to counter the prosecution's attempt to assess points for this risk factor, it is helpful to review what factors courts have considered in finding acceptance of responsibility.

  - A plea of guilty is some evidence of acceptance of responsibility. It is not determinative, but it is a good first step. *People v. Chilson,* 286 A.D.2d 828 (3d Dept. 2001); *People v. Neish,* 281 A.D.2d 817 (3d Dept. 2001); *People v. MacNeil,* 283 A.D.2d 835 (3d Dept. 2001).

  - Completed treatment while on parole and showed acceptance of responsibility at SORA hearing. The SORA courts reliance on the old PSR, which reflected defendant's failure to accept responsibility, was not persuasive in light of more recent indicators. *People v. Ireland,* 50 A.D.3d 1592 (4th Dept. 2008).

  - Pursuant to SORA, a defendant's post-offense conduct is properly considered for risk factor 12. *People v. Bove,* 52 A.D.3d 1124, 1125 (3d Dept. 2008).

  - Previous statement casting doubt on acceptance of responsibility can be overcome by more recent sincere statements. *People v. Whalen,* 22 A.D.3d 900 (3d Dept. 2005). This is consistent with the Guidelines, which advise that the "court should examine the offender's most recent credible statements and seek evidence of genuine acceptance of responsibility." Guidelines p. 15.

- An array of factors was identified by the court in *Vandover v. Czajka,* 276 A.D.2d 945 (3d Dept. 2000), including reports from a psychologist and family therapist finding remorse, PSR, participation in various treatment programs while in prison, and receptivity to counselling.

- No evidence in the record that defendant attempted to deny or downplay his commission of the acts, plea, and PSR describing defendant's commission of the act and expression of remorse. *People v. Mallory,* 293 A.D.2d 881 (3d Dept. 2002).

- That the Parole Board granted parole is an indicator of defendant's acceptance of responsibility. *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010).

- The court looked to an array of factors including the plea, admission of guilt, remorsefulness during PSI, apology to victim, and the absence of denial or minimization. *People v. Chiu,* 123 A.D.3d 896 (2d Dept. 2014).

- A plea of guilty, appearance of remorsefulness during preparation of a presentence report and apology for his conduct were all indicators of acceptance of responsibility. *People v. Kowal,* 175 A.D.3d 1057 (4th Dept. 2019). The SORA court used Kowal's explanation that he was initially unaware of the victim's age as an indicator of attempting to shift the blame and failure to accept responsibility. The Appellate Division rejected that reasoning noting that "[i]n context, [defendant's] description of how his relationship with the underage victim commenced was not an attempt to shift blame or minimize guilt" and that "pointing out a mitigating aspect of one's conduct is not necessarily inconsistent with accepting responsibility for that conduct." *People v. Kowal,* 175 A.D.3d at 1059.

- **Court rejects prosecution attempt to prove failure to accept responsibility** – When the prosecution has attempted to prove the defendant's failure to accept responsibility, the courts have rejected such attempts to assess points for this risk factor on several different grounds.

  - Reliance on PSR - It is both easy and common for SORA courts to rely on statements about the defendant's lack of remorse and failure to accept responsibility in the PSR. The PSR rarely provides any basis for its negative conclusion. It is also common for the Case Summary to simply repeat the conclusions from the PSR. As a result, these two documents, which courts consider to be reliable hearsay, can damn the defendant. Occasionally, a SORA court will rise to challenge baseless conclusions contained in the PSR, rather than blithely relying upon them for a point assessment. Such was the case in *People v. Sumpter,* 177 Misc. 2d 492 (Crim. Ct. City of N.Y., Queens Co. 1998). Although it is a lower court case, its thoughtful analysis both as to the burden of proof and unsupported conclusions is worth considering.

    In the evaluative summary of the probation report at issue in *Sumpter,* the assigned probation officer concluded: "He superficially verbalized remorse for his behavior. It appears that the defendant was self-absorbed in fulfilling his own

needs. He had no regard for the devastating effect that his behavior would have on the victim." The court astutely noted that the report does not set forth the basis for these conclusions which are inconsistent with the statements of the defendant. The court found that [s]ince the People failed to show any factual basis for the conclusions set forth in the probation report, the court will not consider the 10 points assessed by the Board of Examiners." *People v. Sumpter,* 177 Misc. 2d at 501.

❍ An *Alford* plea, without more, not sufficient – The prosecution cannot rely upon the fact that the defendant entered an *Alford* plea, without more, to prove that the defendant has failed to accept responsibility for his conduct. *People v. Gonzalez,* 28 A.D.3d 1073 (4th Dept. 2006). The court in *Gonzalez* found this to be particularly true considering the evidence to the contrary presented at the hearing. *People v. Gonzalez,* 28 A.D.3d at 1074. It should be noted that the converse has also been judicially approved. Although courts have rejected the notion that an *Alford* plea negates an acceptance of responsibility, the *Alford* plea can be used as some evidence, when presented in combination with other evidence, of defendant's failure to accept responsibility for his conduct. For example, in *People v. Mathie,* 34 A.D.3d 987, 990 (3d Dept. 2006), the court found there was a failure to accept responsibility based upon the *Alford* plea, along with defendant's attempt to vacate his plea and subsequently consistently maintaining his innocence. *People v. Mathie,* 34 A.D.3d at 990. *See also People v. Leach,* 158 A.D.3d 1240, 1242 (4th Dept. 2018).

- **Refusal or expulsion from sex offender treatment** – Courts have routinely upheld the assessment of 15 points based upon the defendant's refusal to participate in or expulsion from the program.
  - *People v. Cosby,* 154 A.D.3d 789 (2d Dept. 2017)
  - *People v. Garcia,* 47 A.D.3d 428, 430 (1st Dept. 2008)
  - *People v. Donhauser,* 37 A.D.3d 1053 (4th Dept. 2007)

❍ The reasons that a defendant may have for not participating in a program have generally (but not always – see below) been found irrelevant to the assessment of points. *People v. Rosario,* 164 A.D.3d 625 (2d Dept. 2018).

❍ Since there may be times when a defendant has a legitimate reason not to participate in a treatment program, courts have held that the appropriate way to address this is by a request for a downward departure. *People v. Graves,* 162 A.D.3d 1659 (4th Dept. 2018); *People v. Grigg,* 112 A.D.3d 802 (2d Dept. 2013); *People v. Thousand,* 109 A.D.3d 1149 (4th Dept. 2013); *People v. Diaz,* 169 A.D.3d 727 (2d Dept. 2019).

- **Fifth Amendment reason not to accept responsibility or participate in treatment** – There are times when a defendant may invoke his Fifth Amendment right against self-incrimination, on advice of defense counsel, to explain his refusal to accept responsibility or participate in a treatment program. Courts have been all over the board on this issue, lining up behind one of three basic holdings: 1) don't assess the points [*People v. Britton,* 148 A.D.3d 1064 (2d Dept. 2017) *aff'd* 31 N.Y.3d

1019 (2018)]; 2) assess the points but depart downward [*People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009)]; and 3) assess the points and cavalierly minimize the Fifth Amendment danger as "trifling or imaginary." [*People v. Palladino,* 46 A.D.3d 864 (2d Dept. 2007)]. Despite these puzzlingly inconsistent holdings, it is possible that they can be reconciled based upon the differing circumstances. Was an appeal pending at the time the defendant refused to participate in a treatment program, thereby properly invoking a Fifth Amendment privilege?

- Appeal pending – In *People v. Britton,* 148 A.D.3d 1064 (2d Dept. 2017) *aff'd People v. Britton,* 31 N.Y.3d 1019 (2018), the defendant professed his innocence while testifying at trial, but was found guilty. At a SORA hearing that was held simultaneously with the defendant's sentencing, he invoked his Fifth Amendment privilege against self-incrimination, informing the court of his intention to appeal. The Appellate Division recognized the unique situation, giving the defendant "the choice of either exercising his Fifth Amendment privilege against self-incrimination and appealing his conviction with the hope of dismissal of the remaining criminal charge against him or a new trial on that charge but being assessed 10 points under risk factor 12, or, on the other hand, accepting responsibility and possibly incriminating himself if his conviction was reversed on appeal resulting in a new trial." *People v. Britton,* 148 A.D.3d at 1065. The court concluded no points should be assessed. In *People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009), there were similar facts. Defendant's appeal was also pending, apparently having been found guilty after trial. He refused to participate in sex offender treatment while incarcerated, explaining that it was on the advice of defense counsel and that his participation in treatment would have required him to make admissions against his interest, in violation of his Fifth Amendment privilege, which would be harmful should he be successful on appeal and be granted a new trail. The court in *Kearns* agreed with the assessment of 15 points, relying on the strict interpretation that the Guidelines do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment. However, the court recognized that it was unfair to force the defendant to make a "Hobson's choice." As a result, the court ordered a downward departure, holding that the SORA court improvidently exercised its discretion not to downwardly depart. *People v. Kearns,* 68 A.D.3d at 1714.

- No appeal pending – In *People v. Palladino,* 46 A.D.3d 864 (2d Dept. 2007), the defendant maintained his innocence at trial but was convicted. At his SORA hearing, held in 2006, he was assessed 15 points for his refusal to participate in a treatment program, despite his explanation that it was violative of his Fifth Amendment privilege against self-incrimination. The Appellate Division rejected this argument as being without merit, holding that the point assessment was proper. The court gave two reasons. "The right [Fifth Amendment] is applicable where a person is confronted with a substantial and real hazard of self-incrimination, not where the danger is trifling and imaginary." *People v. Palladino,* 46 A.D.3d at 865. The court further reasoned that "[s]ince the defendant has already been prosecuted for the offenses that he claims he is being required to admit and is therefore protected by the double jeopardy clause from further prosecution, he faces no such substantial or real

hazard of self-incrimination." *People v. Palladino,* 46 A.D.3d at 865, 866. Oddly, the court made no reference to any appellate history. The reference to double jeopardy certainly would lead one to conclude that the appeal was no longer pending, since it can be assumed that an appellate court would realize that a reversal on appeal could lead to a new prosecution. Yet, it is the fact that no appeal was pending that is critical to understanding the limited implications of the holding in *Palladino.*[16] *Palladino* should be given no precedential value in a case when the defendant still has a viable appeal. Several cases that have cited to *Palladino* have recognized the importance of determining, and identifying, whether the defendant had maintained his innocence at trial and had an appeal pending at the time of the SORA hearing. In *People v. Noyes,* 108 A.D.3d 1202, 1203 (4th Dept. 2013), the court recognized the importance of determining that the defendant had previously entered a guilty plea before rejecting his Fifth Amendment claim and affirming the assessment of 15 points for risk factor 12. Likewise, in *People v. Johnston,* 31 Misc. 3d 1221(A)(Co. Ct. Madison Co. 2011), the court, at a SORA proceeding held in 2011, went to great lengths to satisfy itself that the defendant did not have an appeal pending when considering his Fifth Amendment reason for refusing to participate in a treatment program. After doing so the court concluded "[t]hus at no time after June 2000 (the date defendant's conviction was affirmed on appeal) would this be considered a plausible explanation for refusing to acknowledge responsibility."

- **Exception to assessment of points for refusal or expulsion from treatment program** – In *People v. Ford,* 25 N.Y.3d 939 (2015), the Court of Appeals carved out an exception to the assessment of points for a refusal or expulsion from a sex offender program, when the inability to participate in sex offender treatment is due to disciplinary violations that make the defendant unable to participate. The court held that "[c]onduct that places a defendant in a position where he or she could not receive treatment is not equal to refusal to participate in treatment." *People v. Ford,* 25 N.Y.3d at 941. Several cases have also applied this reasoning. *People v. Loughlin,* 145 A.D.3d 1426 (4th Dept. 2016); *People v. Anderson,* 151 A.D.3d 767 (2d Dept. 2017); *People v. Fowler,* 145 A.D.3d 437 (1st Dept. 2016); *People v. Thomas,* 179 A.D.3d 444 (1st Dept. 2020). This exception does have some limitations as can be seen in *People v. Wilson,* 167 A.D.3d 1192 (3d Dept. 2018). Despite the *Ford* disciplinary exception, where the expulsion from treatment was for both disciplinary reasons and also poor participation and progress the exception may not apply. *People v. Zachary,* 188 A.D.3d 935 (2d Dept. 2020). But *Ford* is not all good news. The Court of Appeals did invite the prosecution to seek an upward departure based upon the considerable number of disciplinary violations incurred by a defendant or for failure of the defendant to receive sex offender treatment. You may want to think carefully before you fight over this risk factor, particularly when the

[16] In fact, no appeal was pending at the time of Palladino's SORA hearing in 2006. The appellate history for Palladino is found in his federal habeas corpus proceeding denial. *Palladino v. Perlman,* 269 F.Supp.2d 36 (E.D.N.Y. 2003). Palladino was convicted on May 6, 1998. His conviction was affirmed by the Appellate Division on April 12, 1999. Palladino did not seek leave to appeal and so his conviction became final on May 12, 1999.

difference may be the assessment of 15 points instead of 10 points. Depending upon the total risk score, you may not want to open the door to an upward departure.

- **Evidence of refusal or expulsion held not sufficient.**

  - Case Summary not sufficient to prove removal from sex offender treatment program – In *People v. Pietarniello,* 53 A.D.3d 475, 477 (2d Dept. 2008), the court refused to rely upon a statement in the Case Summary offered by the prosecution which alleged that the defendant "was removed from a sex offender program as he was not amenable to treatment." The court felt constrained by the fact that the source of the allegation was not indicated or apparent, and the defendant presented a document from N.Y.S. DOCCS indicating that, in fact, he did not refuse any recommended program while in prison. *People v. Pietarniello,* 53 A.D.3d at 477. *See* also *People v. Hagen,* 193 A.D.3d 991 (2d Dept. 2021).

  - Proof not sufficient to prove that the defendant was either expelled from, or explicitly refused to participate in, a sex offender program. *People v. Anderson,* 151 A.D.3d 767, 769 (2d Dept. 2017).

- **Not double counting** – Where the conduct that serves as the basis for assessing points for risk factors 12 and 13 is for separate acts and omissions, and is therefore not duplicative, it has been held not to constitute improper double counting. *People v. Hurlburt-Anderson,* 46 A.D.3d 1437 (4th Dept. 2007).

PRACTICE TIPS

This risk factor, unlike most of the others, is highly subjective, giving rise to the borrowed expression: "Acceptance of responsibility is in the eyes of the beholder." It is also one of the few risk factors that you, as the criminal defense attorney on the initial charge or as the defense attorney defending on the SORA proceeding, can prepare the defendant. In doing so, you can have a direct impact on the assessment of some points. Consider doing all or some of the following:

1. Thoroughly prepare the defendant for the PSI with particular attention to acceptance of responsibility and being remorseful. Warn the defendant against disputing conduct that has already been admitted during the plea. Attend the PSI.

2. Help prepare the defendant to give a statement at sentencing in which he accepts responsibility, is remorseful and apologizes to the victim.

3. Obtain a copy of the plea and sentencing minutes and prepare to submit them as evidence of acceptance of responsibility at the SORA hearing, if indeed that is what they reflect.

4. Discuss with the defendant the pros and cons of taking the sex offender program during incarceration. It will be helpful for defense counsel to review the New York State DOCCS program publication, Sex Offender Counseling and Treatment Program (SOCTP) Guidelines (April 2018).[17] *Of particular interest to*

[17] The document can be found online at https://doccs.ny.gov/system/files/documents/2019/05/SOCTP_Procedures_and_Guidelines.pdf. Refusal to participate in the SOCTP has potential consequences including loss of good time allowance, denial of parole, denial of Limited Credit Time

defense counsel will be the discussion of legal concerns at pages 20-21 and the effect that a program refusal will have at page 22.

5. If the defendant had an appeal pending at the time he refused a treatment program, make sure he explains to DOCCS that the refusal is on the advice of counsel and that he is invoking his Fifth Amendment privilege. DOCCS will still treat this as a refusal. At the SORA hearing, make it known to the court that the defendant did have an appeal pending at the time of the refusal, and that he refused based upon the advice of counsel and his Fifth Amendment privilege.

6. If the defendant was serving an indeterminate sentence and made parole, bring that to the court's attention as an indication that the parole board concluded that he had accepted responsibility. Obtain the parole hearing minutes if the defendant has addressed acceptance of responsibility and remorse.

7. Prepare to submit exhibits at the SORA hearing that substantiate the defendant's acceptance of responsibility:

a) An affidavit from the defendant

b) Support letters from family and friends to whom the defendant has professed acceptance of responsibility ad remorse

c) PSR if helpful and Defendant's Presentence Memorandum

d) Sentencing and plea minutes if helpful

e) Report from treatment provider addressing acceptance of responsibility

f) DOCCS treatment program records if helpful

8. Keep in mind that if the defendant previously denied misconduct and failed to accept responsibility, you can still overcome this with more recent or current statements. If the defendant participated in counseling, use this to explain how counseling helped the defendant gain a new perspective and accept responsibility.

§ 3:14 RISK FACTOR 13: CONDUCT WHILE CONFINED OR UNDER SUPERVISION

The Guidelines assess 10 points if the defendant's disciplinary record in prison is unsatisfactory. Guidelines p. 16. This is a subjective category. The Guidelines give some examples of conduct that might warrant a point assessment as unsatisfactory, including numerous citations for disciplinary violations, or disciplinary dispositions of a serious nature, such as attempting to contact the victim. A recent Tier Three disciplinary violation (most serious) can be considered unsatisfactory adjustment to confinement in prison. Guidelines p. 16. The Guidelines also provide for the assessment of 10 points for unsatisfactory adjustment to probation or parole, which is evidenced by a violation of a condition of release. Guidelines p. 16.

The Guidelines allow for the assessment of 20 points for "inappropriate sexual behavior" while in custody or under supervision or if the defendant receives dispositions

---

Allowance, and SORA classification. On the other hand, all documentation of the defendant's participation in the SOCTP including statements, written assignments and evaluations will be provided to the Board of Examiners of Sex Offenders, and to OMH and the Attorney General for civil commitment purposes.

for behavior such as possessing pornography, or any factor related to "sexual acting out." Guidelines p. 17.

- **Unsatisfactory conduct while confined** – 10 Points

  - Recent Tier III – The Guidelines allow for the assessment of 10 points for a recent tier III disciplinary violation. Guidelines p. 16. A number of appellate cases have affirmed the assessment of points for a recent tier III or made clear that recency is required:

    - *People v. Holmes,* 166 A.D.3d 821 (2d Dept. 2018)
    - *People v. Williams,* 100 A.D.3d 610 (2d Dept. 2012)
    - *People v. Kaff,* 149 A.D.3d 783 (2d Dept. 2017)
    - *People v. Chabrier,* 38 A.D.3d 355 (1st Dept. 2007)
    - *People v. Leach,* 158 A.D.3d 1240 (4th Dept. 2018)
    - People v. Ealy, 55 A.D.3d 1313 (4th Dept. 2008)
    - *People v. Mabee,* 69 A.D.3d 820 (2d Dept. 2010)

  - General misbehavior – Some cases have found unsatisfactory behavior for prison disciplinary violations without reference to recent Tier III violations.

    - *People v. Peterson,* 8 A.D.3d 1124 (4th Dept. 2004)
    - *People v. Catchings,* 56 A.D.3d 1181 (4th Dept. 2008)

  - Loss of good behavior allowance – A prisoner can earn good behavior allowance pursuant to Correction Law § 803 and can also lose this time allowance for "bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Correction Law § 803 (1)(a). In *People v. Regan,* 46 A.D.3d 1434 (4th Dept. 2007) the court held that the "defendant lost all of his good time credits while confined, which in itself is clear and convincing evidence that his conduct while confined was unsatisfactory."

  - Misconduct post-current sex offense – The unsatisfactory behavior that may give rise to a point assessment under this risk factor includes any unsatisfactory conduct while confined if it occurs after the current sex offense. This includes time in jail prior to sentencing. In *People v. Warren,* 42 A.D.3d 593, 594-595 (3d Dept. 2007), the court held that 10 points were properly assessed for the defendant's attempted escape and assault on a correction office while confined in jail prior to defendant's guilty plea to the sex offense. The court further held that such unsatisfactory conduct includes time in jail prior to a plea or sentencing. *People v. Warren,* 42 A.D.3d at 595. This unsatisfactory conduct has been held to include defendant's unsatisfactory conduct while in confinement for an offense committed after his confinement/supervision on his conviction for the sex offense for which the SORA hearing is being held. *People v. Velez,* 100 A.D.3d 847 (2d Dept. 2012). This risk factor does not allow for the assessment of points for conduct while under supervision or confinement that occurred prior to the commission of the current sex offense. *People v. Neuer,* 86 A.D.3d 926 (4th Dept. 2011).

- **Unsatisfactory conduct while under supervision** – 10 points are assessed for unsatisfactory conduct while under supervision. Guidelines p. 16. Adjustment on parole or probation is deemed unsatisfactory if a condition of release is violated. Guidelines p. 16.

  - Parole – Defendant's admission to parole violations during the SORA hearing, as well as the testimony of a parole officer regarding numerous parole violations, including absconding from parole, was found to be ample evidence of defendant's unsatisfactory conduct during supervision to warrant assessment of 10 points for risk factor 13. *People v. Bateman,* 59 A.D.3d 788 (3d Dept. 2009). *See also People v. Roney,* 80 A.D.3d 909 (3d Dept. 2011) a case in which the assessment of points for risk factor 13 for misconduct while under supervision was upheld based on the defendant's status as a violator of his supervision. The appellate court did not make clear whether the assessment of points was for a parole or probation violation, oddly using the terms interchangeably, but was certain it was unsatisfactory, whatever it was.

  - Probation – The court held that the defendant was properly assessed 10 points under risk factor 13 where the case summary indicated that the defendant was charged with a probation violation five days after his release from incarceration and was subsequently convicted of additional criminal activity. *People v. Young,* 108 A.D.3d 1232, 1233 (4th Dept. 2013). In *People v. Belanger,* 60 A.D.3d 1398 (4th Dept. 2009), the court upheld the assessment of 10 points for risk factor 13 based upon the defendant's plea of guilty to violating the terms of his probation.

- **Unsatisfactory conduct with sexual misconduct while confined or under supervision** – The Guidelines provide for the assessment of 20 points for inappropriate sexual behavior or being the recipient of dispositions for behavior such as possessing pornography, or any factor related to sexual acting out. Guidelines p. 16-17.

  - Lewd conduct – This type of conduct has been held sufficient to warrant the assessment of 20 points for unsatisfactory sexual conduct. A tier II "Lewd Exposure" violation for exposing "the private parts of his or her body" in the presence of an employee except for an authorized purpose was held to be sufficient basis for the assessment of points. *People v. Ferguson,* 39 A.D.3d 1258 (4th Dept. 2007). The defendant's prison disciplinary record, which included lewd behavior directed at female prison personnel was deemed sufficient to warrant the assessment of points in *People v. Birch,* 99 A.D.3d 422 (1st Dept. 2012). *See* also *People v. Thomas,* 179 A.D.3d 444 (1st Dept. 2020). In *People v. Lawson,* 90 A.D.3d 1006, 1007 (2d Dept. 2011), the court upheld the assessment of points for sexual misconduct while confined. Apparently, the misconduct was so serious that the court dared not speak of it, but only referenced it in relative terms by saying that this tier II infraction "was far more serious than these examples" given in the Guidelines.

  - Lewd but remote – As noted above, a single tier III disciplinary violation can give rise to the assessment of points if it is recent. In *People v. Kaff,* 149 A.D.3d

783 (2d Dept. 2017) the defendant raised the issue of whether a tier III disciplinary infraction for sexual misconduct that is remote can be the basis for the assessment of 20 points because it does not meet the requirement of recency. The court held that the recency requirement only applies to unsatisfactory conduct evidenced by a tier III disciplinary infraction, but that the "recency" requirement did not apply to a tier III disciplinary infraction based upon sexual misconduct. *People v. Kaff,* 149 A.D.3d at 784.

Basing a point assessment on remote conduct or remote sexual conduct seems inappropriate. Defense counsel should argue that remote conduct of any type is not indicative of a heightened risk of recidivism if it was followed by a substantial period of satisfactory conduct. Since risk factor 13 is framed in terms of "adjustment" to confinement in prison, the defendant's positive adjustment in conforming to the prison rules over a more recent extended period of time underscores his or her ability to adjust and his decreased likelihood of recidivism.

❍ Inappropriate sexual behavior – Several cases have held that unsatisfactory sexual conduct as considered under this risk factor includes conduct that does not rise to the level of "sexual misconduct" as that phrase is defined in Penal Law § 130.20. *People v. Hawthorne,* 158 A.D.3d 651 (2d Dept. 2018) and *People v. Lawson,* 90 A.D.3d 1006 (2d Dept. 2011). This seems to be consistent with the Guidelines, where examples of inappropriate sexual behavior include "possessing pornography" or "sexual acting out." Guidelines p. 17. A defendant's tier II disciplinary infraction for his attempt to initiate sexual contact with an on-duty corrections officer while he was incarcerated was found to be sufficient to assess 20 points under risk factor 13. *People v. Hawthorne,* 158 A.D.3d at 652-653. Sexual harassment of a prison nurse was held sufficient to warrant 20 points under risk factor 13. *People v. Faulkner,* 151 A.D.3d 601 (1st Dept. 2017). Engaging in sexual misconduct while in prison, which resulted in a tier III disciplinary proceeding, was held sufficient to assess 20 points. *People v. Bunger,* 78 A.D.3d 1433, 1434 (3d Dept. 2010).

There is a limit as to what can be deemed "inappropriate sexual behavior" and when the prosecution's allegation blurs the line, the additional 10 points for unsatisfactory conduct with sexual misconduct should not be assessed. In *People v. Dilillo,* 162 A.D.3d 915, 917 (2d Dept. 2018), the court reversed the assessment of 20 points, holding that under the circumstances of this case, the "physical contact" did not constitute "inappropriate sexual behavior" for the purposes of risk factor 13, and was not relevant to the defendant's potential for recidivism.[18]

❍ Inappropriate sexual behavior includes consensual acts – The fact that the behavior is consensual, and that it would not be unlawful conduct outside the context of prison, does not bar the assessment of points for this risk factor. In

[18] The disciplinary rule violated in *Dilillo* was Rule 101.21. "An inmate shall not engage in physical contact with another inmate. Prohibited conduct includes but is not limited to, kissing, embracing, or hand-holding." It is not clear from the decision in *Dilillo* what the specific conduct in question was.

several cases the defendants have raised the argument that the conduct was consensual, only to have the appellate court reject that argument, finding that the assessment of points was still proper. For example, in *People v. Littles,* 155 A.D.3d 979, 980 (2d Dept. 2017), the court approved the assessment of 20 points for sexual misconduct, reasoning that although consensual, "it nevertheless violated prison disciplinary rules, and his 'inability to refrain from forbidden sexual conduct …was relevant to his potential sexual recidivism,'" citing to *People v. Salley,* 67 A.D.3d 525 (1st Dept. 2009). *See also People v. Perez,* 104 A.D.3d 403 (1st Dept. 2013).

- **Improper assessment of points by SORA court** – The Appellate Division has held that the assessment of points for risk factor 13 was improper under a number of different circumstances. Defense counsel should be aware of the judicial limitations placed on the assessment of points under this risk factor.

  - Subsequent good behavior – In *People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006), the court relied in part on the defendant's exemplary behavior while on probation and thereafter to overcome "some physical altercations while incarcerated," concluding that the prosecution failed to present clear and convincing evidence to warrant the assessment of 10 points for unsatisfactory conduct.

  - Consider nature of misconduct – In *People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006), the court, faced with some misconduct involving physical altercations while incarcerated, found that no points were warranted, at least in part based upon the fact that the defendant's "participation was defensive in nature."

  - Misconduct neither recent nor repeated – Four years before the SORA hearing Hernandez was convicted of a class A misdemeanor of promoting prison contraband in the second degree which was his sole act of misconduct while confined and occurred prior to his transfer to State prison. Under these circumstances the Appellate Division found that the SORA court had improperly assessed 10 points for unsatisfactory conduct, holding that "defendant's misconduct was neither recent nor repeated." *People v. Hernandez,* 187 A.D.3d 1227, 1228 (2d Dept. 2020).

  - Unsatisfactory conduct must occur after the instant offense – The fact that the defendant engaged in sexual misconduct while under supervision for a prior offense cannot be the basis for the assessment of points. There must be clear and convincing evidence that the defendant engaged in inappropriate behavior while confined or supervised for the present offense (for which the SORA proceeding is being held). *People v. Neuer,* 86 A.D.3d 926 (4th Dept. 2011). *See also People v. Asfour,* 148 A.D.3d 1669 (4th Dept. 2017).

  - Proof of misconduct but not sexual misconduct - Where the prosecution proves misconduct, but not sexual misconduct, while incarcerated by clear and convincing evidence, only 10 points rather than 20 points should be assessed. *People v. Wellman,* 142 A.D.3d 879 (1st Dept. 2016).

- Physical contact did not rise to level of "inappropriate sexual behavior" – Where the defendant's misconduct has been proven, but that conduct does not constitute "inappropriate sexual behavior" for risk factor 13 purposes, 10 points and not 20 points should be assessed. *People v. Dilillo,* 162 A.D.3d 915, 917 (2d Dept. 2018).

- **Board considered the defendant's conduct "acceptable"** – There are occasions when the defendant has a number of disciplinary infractions over an extended period of time, yet the Board still recommends assessing 0 points for risk factor 13, finding the defendant's conduct to be "acceptable." This is understandable since a person's conduct in prison is relative. Since the Board has seen thousands of prison disciplinary records from all over the state, it has an objective sense of where on the spectrum of acceptable behavior a particular defendant falls. The prosecution may access the defendant's disciplinary record and use it to argue that the SORA court should ignore the Board's recommendation and find the defendant's conduct unsatisfactory. In these circumstances, defense counsel will want to argue that for good reason, deference should be given to the Board's expert opinion regarding risk factor 13. However, the SORA court is not bound by the Board's recommendation on this factor. In *People v. Bush,* 105 A.D.3d 1179 (3d Dept. 2013), the court relied upon seven tier II violations a one tier III violation that resulted in 60 days of keeplock.

- **Not double counting** – The argument that both unsatisfactory conduct (risk factor 13) and release without supervision (risk factor 14) constitute impermissible double counting has been found to be without merit. *People v. Farahat,* 78 A.D.3d 805 (2d Dept. 2010); *People v. Corn,* 128 A.D.3d 436 (1st Dept. 2015).

PRACTICE TIPS

It is not unusual for the prosecution to rely solely upon the case summary to attempt to prove this risk factor. The case summary, however, is often conclusory and short on specifics. Defense counsel can argue that the prosecution has failed to obtain and present defendant's actual prison disciplinary record, that the case summary is conclusory, that the defendant controverts those conclusions, and that the case summary, although admissible hearsay, is not sufficient to establish the misconduct by clear and convincing evidence.

Defense counsel will want to obtain the defendant's disciplinary record, including the disciplinary tickets, reports, and determinations. These documents may be useful to support the argument that the disciplinary infractions were minor, remote, or defensive in nature. These records may also help to establish that the defendant's disciplinary record is unblemished for the past several years and is evidence of his or her adjustment to prison rules and regulations. These records may also help to argue that there has been no loss of good behavior allowance, no placement in SHU, and no keeplocks, all evidencing that the disciplinary infractions were relatively minor.

If the Board has found the defendant's conduct to be "acceptable" although not unblemished, yet the prosecution is arguing for the assessment of points for unsatisfactory behavior, defense counsel should argue that deference should be given to the Board's recommendation, using the argument set forth above. The Board is in a position to be more objective, as they see the big picture of prison conduct in relative terms.

It should be noted that in People v. Bush, 105 A.D.3d 1179 (3d Dept. 2011), neither the Board nor the prosecution recommended the assessment of points for risk factor 13. The SORA court assessed the points sua sponte. As noted in the appellate decision, when the court indicated its intent to assess points for this risk factor, defense counsel should have sought an adjournment or otherwise requested additional time to respond. Failure to do so resulted in the issue not being preserved for appellate review. If the prosecution asks for the assessment of points for this risk factor, despite the Board's recommendation of 0 points, and if the prosecution fails to provide statutory notice that it seeks a determination that differs from the Board as to this risk factor or fails to give reasons, defense counsel should move to preclude and argue that the points assessment has been waived. See Chapter 7 Tools for Defending a SORA Case, section on Preclusion and Waiver.

§ 3:15 RISK FACTOR 14: SUPERVISION

What should be the simplest of the risk factors has been made more difficult by confusing case law and a lack of explanation in the Guidelines. In the "Specific Guidelines" section of the Guidelines, the discussion of risk factor 14 is somewhat cursory, and fails to actually provide for point assessments. Guidelines p. 17. However, the introductory section at what would be p. iii of the Guidelines explains in detail what is meant by each subcategory and the point assessment for each. It provides as follows:

1) The offender will be released under the supervision of a probation, parole, or mental health professional who specializes in the management of sexual offenders or oversees a sex offender caseload – (0 points)

2) The offender will be released under the supervision of a probation, parole, or mental health professional, but not one who specializes in the management of sexual offenders or oversees a sex offender caseload – (5 points)

3) The offender will be released with no official supervision – (10 points)

- **Supervision in another jurisdiction** – The Guidelines anticipate that there will be cases in which the defendant was convicted in another jurisdiction and relocates to New York. In such an event, if the defendant has satisfactorily completed the terms of that jurisdiction's community supervision, he will be scored 0 points for risk factor 14. Guidelines p. 17. This appears to be true regardless of whether the nature of the foreign jurisdiction's supervision was "regular," "intensive" or "specialized."

  Although the Guidelines seem straightforward as to how supervision from a foreign jurisdiction should be considered, some case law on this issue is misleading and inconsistent with the Guidelines. Three cases illustrate the care that defense

counsel must take so as not to allow the SORA court to be misled by the prosecution in reliance on *People v. Leeks,* 43 A.D.3d 1251 (3d Dept. 2007).

- *People v. Leeks,* 43 A.D.3d 1251 (3d Dept. 2007) – Care should be taken to understand what the court in *Leeks* does and does not say so that the case is not cited for a misleading proposition. *Leeks* was convicted in Florida for various sex crimes. He was incarcerated for five years. In the decision, the court recites only the very limited facts that "[h]e was incarcerated for five years, served a period of probation and then moved to New York where he registered as a sex offender." *People v. Leeks,* 43 A.D.3d at 1251. The appellate court never made clear whether *Leeks* "satisfactorily completed the terms of that jurisdiction's (Florida's) community supervision." Had *Leeks* satisfactorily completed that supervision before moving to New York, the Guidelines specifically provide that he should be scored 0 points. Guidelines p. 17. Unfortunately, the appellate court went on to make a sweeping conclusion that has been used by other courts to support conclusions in direct contradiction to the Guidelines. The court in *Leeks* concluded: "Inasmuch as it is undisputed that defendant was no longer under probation supervision at the time he moved to New York, the imposition of 15 points attributable to this factor was appropriate." Since it is unclear from the facts in *Leeks* whether he had satisfactorily completed his probation in Florida, *Leeks* should not be held up as precedent for the proposition that if a person moves from another jurisdiction and is not under community supervision in New York, he should be assessed 15 points. Clearly the Guidelines take a contrary position if the defendant successfully completed community supervision in the other jurisdiction, despite being unsupervised after moving to New York.

- *People v. English,* 60 A.D.3d 923 (2d Dept. 2009) – In *People v. English,* the appellate court stayed true to the Guidelines and assessed 15 points for a defendant who moved from Florida. The court very specifically pointed out that the defendant was not under supervision in New York "and did not successfully complete his probation in Florida." *People v. English,* 60 A.D.3d at 923. Implicit in this decision is the recognition that had the defendant successfully completed his probation in Florida before moving to New York, he would not be assessed any points under risk factor 14.

- *People v. Farahat,* 78 A.D.3d 805 (2d Dept. 2010) – The court in *People v. Farahat* brings full clarity to this issue and leaves no doubt that the blanket statement in *People v. Leeks* should not be so broadly construed. *Farahat* was assessed points after moving from Florida to New York while on probation in Florida. The court explained how to properly analyze risk factor 14. "While a sex offender convicted in another jurisdiction who subsequently relocates to New York should not be assessed any points for this factor if he or she has 'satisfactorily completed' the terms of that jurisdiction's community supervision, the defendant in this case did not satisfactorily complete the terms of Florida's supervision." *People v. Farahat,* 78 A.D.3d at 805.

Defense counsel should point out to the SORA court that it is *People v. Farahat* and the Guidelines, not *People v. Leeks,* that provide a clear and correct statement of the law as to this risk factor.

- **Release with specialized supervision** – The RAI provides for the assessment of 0 points for this subcategory. Although the RAI uses the cryptic title "Release with specialized supervision" for this subcategory, it is more fully described in the introductory section of the Guidelines, as well as in the Guidelines themselves, as simply requiring that the defendant be "released under the supervision of a probation, parole or mental health professional who specializes in the management of sexual offenders or oversees a sex offender caseload." Guidelines at what would be p. iii and p. 17. The Guidelines point out that this subcategory is premised on the theory that the supervision should be by a professional who oversees or specializes in the management of people who have sexually offended. Guidelines p. 17. But the Guidelines do not make "intensive supervision" or "treatment" a requirement to satisfy a 0 point assessment.

  It would appear to be self-evident that in this day and age of specialized supervision, any person who is under community supervision as the result of a sex offense conviction, be it parole or probation, will be supervised by a person who "oversees a sex offender caseload" or "specializes in the management of such offenders." Guidelines p. 17.

  Case law is all over the board on the issue of what constitutes specialized supervision and regular supervision, and whose responsibility it is to prove that the defendant's probation or parole is "regular" or "specialized." It is critical for defense counsel to understand this body of case law to help bring clarity to the issue and to avoid judicial confusion.

  - Clear statement on this issue – Defense counsel will want to point out to the SORA court that in at least two cases the Appellate Division has provided clarity on this issue, particularly on the issue of who has the burden of proving that the supervision is not "specialized." As early as 2006, the Appellate Division First Department succinctly addressed this issue. In *People v. Wilson,* 33 A.D.3d 488, 489 (1st Dept. 2006), the court held that the SORA court erred when it assessed 5 points for regular supervision rather than 0 points for specialized supervision, explaining that "the People failed to present clear and convincing evidence that he received regular parole supervision." This issue was addressed with equal clarity in *People v. Rodriguez,* 130 A.D.3d 897, 898 (2d Dept. 2015), where the court held that "[t]he People also failed to meet their burden of proving, by clear and convincing evidence, that the defendant was released to supervision that was not 'specialized,' so as to warrant the assessment of five points under risk factor 14 (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]). The People failed to submit any evidence at the SORA hearing to establish that the supervision to which the defendant was subject would not be considered 'specialized' (id.)."

    Undoubtedly, these cases got it right. The prosecution bears the burden of establishing, by clear and convincing evidence, the facts supporting the

assessment of points under the Guidelines. *People v. Chiu,* 123 A.D.3d 896 (2d Dept. 2014). Points should not be assessed for any risk factor unless there is clear and convincing evidence of the existence of that factor. Guidelines p. 5. Since the burden of proof rests with the prosecution, the burden of proving this risk factor is also on the prosecution to demonstrate that there is no supervision or no "specialized supervision" by clear and convincing evidence. In this era of specialized supervision caseloads, it is hard to imagine that any defendant convicted of a sex offense would not be on a specialized caseload.

This issue is raised for a reason. There is a line of cases that could be cited by the prosecution for a contrary proposition. Defense counsel should be familiar with this line of contrary cases and be prepared to argue against their precedential value in light of the burden of proof placed on the prosecution by SORA and the decisions in *People v. Wilson,* 33 A.D.3d 488, 489 (1st Dept. 2006) and *People v. Rodriguez,* 130 A.D.3d 897, 898 (2d Dept. 2015).

❍ Misleading cases on this issue - In *People v. Miller,* 77 A.D.3d 1386 (4th Dept. 2010), the court held that the SORA court correctly assessed 5 points for regular supervision, instead of 0 points for specialized supervision. The court used unfortunate and misleading language to explain its holding: "There is no evidence in the record demonstrating that the sentencing court ordered specialized supervision when imposing the sentence of probation." *People v. Miller,* 77 A.D.3d at 1387. This language appears to shift the burden of proof to the defendant. The Appellate Term, First Department, appears to have seized upon the language from *Miller* to further shift the burden of proof off the prosecution. In *People v. Lopez,* 62 Misc. 3d 146(A) (App. Term, 1st Dept. 2019), the court upheld the assessment of 5 points for regular supervision, instead of 0 points for specialized supervision, reasoning that this was warranted "since there is no evidence in the record demonstrating that the sentencing court ordered "specialized supervision" when imposing the sentence of probation." The Appellate Term cited to *People v. Miller.* In an even more tortured and apparently confused reliance on *People v. Miller,* the Appellate Term held that the defendant was properly assessed 5 points for normal supervision, "since he was not sentenced to any post-release supervision by the sentencing court when it imposed probation." *People v. Syed,* 60 Misc. 3d 129(A) (App. Term 1st Dept. 2018).

- **Supervision must be for SORA qualifying offense** – Not just any supervision will avoid the assessment of 15 points. Several cases have held that even when the defendant is under supervision at the time of the SORA hearing, it must be supervision for a SORA qualifying offense, and cannot be for some other offense. *People v. Reid,* 141 A.D.3d 156 (1st Dept. 2016); *People v. McNeil,* 59 Misc. 3d 128(A) (App. Term, 1st Dept. 2018).

- **Release without supervision** - The RAI allows for the assessment of 15 points when a defendant is released without supervision. Case law is in accord with the Guidelines and courts have repeatedly rejected defense-proffered reasons why the lack of supervision in a particular case should not result in the assessment of points.

- Once the SORA court determines that the defendant would be released without supervision, its inquiry should end, and 15 points should be assessed. *People v. Lewis,* 37 A.D.3 689 (2d Dept. 2007); *People v. Donhauser,* 37A.D.3d 1053 (4th Dept. 2007); *People v. McNeil,* 116 A.D.3d 1018 (2d Dept. 2014).

- Defendant's willingness to accept the imposition of post-release supervision was irrelevant when there was none imposed. *People v. Lewis,* 37 A.D.3 689 (2d Dept. 2007).

- Points assessed even though that circumstance resulted from defendant's having fully served his sentence. *People v. Johnson,* 77 A.D.3d 548, 549 (1st Dept. 2010); *People v. Davenport,* 38 A.D.3d 634 (2d Dept. 2007).

- Points assessed even though this was a matter beyond defendant's control. *People v. Tejada,* 51 A.D.3d 472 (1st Dept. 2008); *People v. Diaz,* 61 A.D.3d 465 (1st Dept. 2009).

- Points properly assessed even though defendant's sentence was a conditional discharge in the instant matter, and he would be released to parole on non-sex offense conviction. *People v. McEvoy,* 57 Misc. 3d 1201(A) (Sup. Ct. Kings Co. 2017).

- Points assessed even though the plea agreement, a six-month definite sentence, contained no requirement of treatment or supervision. *People v. Sumpter,* 177 Misc.2d 492, 501 (Crim. Ct. City of N.Y. Queens Co. 1998).

- **Parole completed before SORA hearing** – Where the defendant was released to parole, served 18 months on parole, and was discharged from parole prior to his SORA hearing, the court held that no points should be assessed for lack of supervision, taking the position that risk factor 14 "is clearly intended to apply only to the immediate circumstances at the time of release from incarceration when the offender reenters the community." *People v. Jiminez,* 178 Misc.2d 319, 331 (Sup. Ct. Kings Co. 1998).

- **Redetermination** hearing – Under the terms of the Stipulated Settlement in *Doe v. Pataki,* no person who is a member of that class "who has completed parole or probation," and who avails himself or herself of a redetermination hearing as provided by the settlement "shall be assessed points in the release environment category for not being subject to supervision." (Paragraph 10 of the Stipulated Settlement).

- **Not double counting** – The argument that both unsatisfactory conduct (risk factor 13) and release without supervision (risk factor 14) constitute impermissible double counting has been found to be without merit. *People v. Farahat,* 78 A.D.3d 805 (2d Dept. 2010); *People v. Corn,* 128 A.D.3d 436 (1st Dept. 2015).

PRACTICE TIPS

Some defendants will be released without being sentenced to probation or post-release supervision. Consider the low-risk defendant who is convicted and sentenced merely to a definite sentence. They should be considered low risk but will likely be assessed 15 points for risk factor 14. The Guidelines accept that a critical component of specialized supervision is that the defendant will be directed to enroll in a treatment program. Therefore, defense counsel should consider arguing that since the defendant has self-enrolled in a treatment program, he or she should not be assessed points for this risk factor, as he or she is under the supervision of a mental health professional, or that his or her enrollment in treatment should be considered as a mitigating factor in support of a downward departure.

§ 3:16 RISK FACTOR 15: LIVING OR EMPLOYMENT SITUATION

A defendant is assessed 10 points under this risk factor if either his work or living environment is inappropriate. Guidelines p. 18. The Guidelines break this down into two categories: 1) living environment, and 2) employment environment. Each will be discussed below. The Guidelines provide an example of what would be considered inappropriate for each situation. There is a paucity of case law to help guide defense counsel, especially regarding employment. This is not surprising considering how difficult it is for our clients to obtain employment.

- **Employment situation**

  - Guideline's example – An example of a defendant in an "inappropriate work situation is a child molester employed in an arcade or a as school bus driver." Guidelines pp. 17-18.

  - Inappropriateness not proven – In *People v. Martinez,* 143 A.D.3d 563 (1st Dept. 2016), the court held that the prosecution failed to present clear and convincing evidence to support an assessment of 10 points for inappropriate employment where defendant's trial testimony acknowledged that he had previously been a breakdance instructor with students mostly under 18 years old two years prior to his SORA hearing, but prosecution did not establish that defendant's employment upon his release in 2012 would involve exposure to children.

  - Inappropriateness proven – Not surprisingly, the SORA court in *People v. Burden,* 6 Misc. 3d 1033(A) (Sup. Ct. Bronx Co. 2008) found defendant's employment inappropriate where his current offense involved sexual abuse of women while he was employed as a masseuse, and defendant provided letters to the court indicating that he continued to be employed as a masseuse or in a health club. The court focused on the fact that he is seeking employment in a field where he would have "solitary access to women."

- **Living situation**

  - Guideline's example – The example of an inappropriate living situation is when the defendant (a "child molester") "live[s] near an elementary school playground." Guidelines p. 18.

  - Inappropriateness not proven

    - *People v. Rodriguez,* 130 A.D.3d 897 (2d Dept. 2015) – The court held it was improper to assess points because "even if the defendant's living situation was uncertain at the time of the SORA hearing (resided in a homeless shelter), the People failed to produce clear and convincing evidence that the defendant is undomiciled and lacks any history of living in shelters or community ties." The court cited to *People v. Alemany,* 13 N.Y.3d 424 (2009), which contains some helpful language regarding men and women who might have to rely upon homeless shelters for their residence upon release from prison. The court in *Alemany* emphasized that they were not creating a per se rule such that a sex offender who is homeless must always be assessed points under risk fact 15. *People v. Alemany,* 13 N.Y.3d at 431. "In an individual case, there may be evidence that a sex offender has a history of living in shelters, or community ties."

    - *People v. Alemany,* 13 N.Y.3d at 431 – The Court of Appeals cited to *People v. Ruddy,* 31 A.D.3d 517 (2d Dept. 2006) as a case in which living in a shelter was not an inappropriate living situation because "there was no evidence showing that he would likely live on the streets after he left prison, as was the case here." *People v. Alemany,* 13 N.Y.3d at 432.

    - *People v. Ruddy,* 31 A.D.3d 517 (2d Dept. 2006) – The SORA court erred in assessing 10 points for inappropriate living situation. Although the defendant's living situation was uncertain in that he may have been homeless or was living in a "sober house" in Long Island, this was held to be "insufficient as a matter of law to meet the burden of showing, by clear and convincing evidence, that the defendant's living situation was inappropriate." *People v. Ruddy,* 31 A.D.3d at 518.

    - *People v. McLean,* 55 A.D.3d 973 (3d Dept. 2008) – Merely because it is uncertain what a living situation will be or that the defendant may be homeless is not sufficient reason to assess points for an inappropriate living situation.

    - *People v. Nichols,* 52 A.D.3d 799 (2d Dept. 2008) – The SORA court erred when it assessed the defendant 10 points for an inappropriate living situation based solely on the fact that he was living in a trailer park.

    - *People v. Buggs,* 25 Misc. 3d 130(A) (App. Term, 2d Dept. 2009) – The prosecution argued for the assessment of points based upon its allegation that the defendant lived two blocks from a park. Defense counsel argued that this was not an inappropriate living situation. Appellate Term held the prosecution failed to prove by clear and convincing evidence that the

defendant in fact lived two blocks from a park where children played. The court could not bring itself to hold that living two blocks from a park was not inappropriate as defendant argued, but instead relied upon the prosecution's failure to meet its burden of proof.

- *People v. Jusino,* 11 Misc. 3d 470, 487 (Sup. Ct. N.Y. Co. 2005) – No points assessed as appropriate support had been arranged for defendant on his reentry into the community.
- *People v. Patel,* 192 A.D.3d 1052 (2d Dept. 2021) – The SORA court improperly assessed 10 points for inappropriate living situation where the evidence presented at the hearing showed, at most, the defendant's living situation was uncertain.

- Held inappropriate
  - *People v. Alemany,* 13 N.Y.3d 424 (2009) – A SORA court may assess points under risk factor 15 where there is clear and convincing evidence that the defendant is undomiciled and lacks any history of living in shelters or community ties. (Although this seems a bit odd, the court apparently assumes that a homeless shelter is stable and appropriate for those who have resided there previously). The court did concede that if there was no clear and convincing evidence that the defendant would likely live on the streets after leaving prison, but just an uncertainty as to his living situation, that would not be sufficient to assess points.
  - *People v. Gerald,* 16 Misc. 3d 106, 108 (App. Term, 2d Dept. 2007) – Assessment of points upheld where the PSR noted that the defendant resided on the second floor of a home and that the first floor was occupied by young children. The court made this determination despite defendant's claim that he had his own apartment with a separate entrance, apparently because the Probation Department was unable to verify the defendant's statement due to the defendant not being home on the three occasions when prearrangements for home visits had been made. It seems the court shifted the burden of proof because it was piqued with the defendant's failure to make his apartment available for inspection, rather than on solid evidentiary grounds.
  - *People v. Heichel,* 20 A.D.3d 934, 935 (4th Dept. 2005) – Points assessed because of the proximity of defendant's apartment to a park where children played.
  - *People v. DiJohn,* 48 A.D.3d 1302 (4th Dept. 2008) - The court's assessment of 10 points for risk factor 15 was upheld based upon a presentence report alleging that defendant resided with his four-year-old son and 10-year-old stepson.
  - *People v. Hoffman,* 160 A.D.3d 1485 (4th Dept. 2018) – Living with his 19-year-old stepdaughter and her child held inappropriate.

PRACTICE TIPS

Take a hint from People v. Jusino, 11 Misc. 3d 470, 487 (Sup. Ct. N.Y. Co. 2005) and, if possible, arrange for reentry support. It may tip the scale in your client's favor as to risk factor 15 or it may serve as a mitigating factor for a downward departure.

Employment can cause problems. It is better to be unemployed or uncertain about one's employment prospects, than to profess hope to be working at a job that will raise questions.

Chapter 4

OVERRIDES

CHAPTER 4 SECTIONS

§ 4:1 Automatic but Not Mandatory

§ 4:2 Burden of Proof

§ 4:3 An Override Does Not Obviate the Need for Scoring the Entire RAI or Considering Pertinent Factors

§ 4:4 Downward Departure from the Override Presumptive Level 3

§ 4:5 Defendant's Burden of Proof for a Downward Departure

§ 4:6 Challenge to Overrides Generally

§ 4:7 Override 1: A Prior Felony Conviction for a Sex Crime

§ 4:8 Override 2: The Infliction of Serious Physical Injury or the Causing of Death

§ 4:9 Override 3: A Recent Threat to Reoffend by Committing a Sexual or Violent Crime

§ 4:10 Override 4: A Clinical Assessment that the Person Has a Psychological, Physical or Organic Abnormality that Decreases his Ability to Control Impulsive Sexual Behavior

Chapter 4

OVERRIDES

Generally, an individual's risk category [level 1 (low), level 2 (moderate), or level 3 (high)] is presumptively scored by points on the SORA Risk Assessment Instrument (RAI). *People v. Brown*, 302 A.D.2d 919 (4th Dept. 2003). However, there are four override factors "that automatically result in a presumptive assessment of level 3." Guidelines p. 3. This is true regardless of the point score.

The four override factors are set forth in the Guidelines (pp. 3-4 and p. 19) and in the RAI (Column 3, "A"), and are also referenced in the Guidelines in the introductory section under risk factor 9 (3) and at pp. 13-14. The four override factors are:

1) A prior felony conviction for a sex crime.
2) The infliction of serious physical injury or the causing of death.
3) A recent threat to reoffend by committing a sexual or violent crime.
4) A clinical assessment that the person has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior.

These four overrides will be discussed in detail below.

Overrides are not established or authorized by any statute, and cannot be found in Correction Law Article 6-C. Overrides are a creation of the Board, perhaps falling within its authority to develop guidelines and procedures to assess the risk of a repeat offense and the threat posed to the public safety, as mandated by Correction Law §168-l (5).

An override can be applied to a person whose total risk factor point score is between 0 to 70 (making them a presumptive risk level 1) or between 75 to 105 (making them a presumptive risk level 2). Although no points are added by the override, the practical impact is as if as many as 110 points or as few as 5 points have been added to the total risk factor score, in order to presume the person to be a risk level 3. The effect of the override is to move people whose point score is a presumptive level 1 or 2 up one or two levels to a level 3, thus making them a presumptive high risk to reoffend.

§ 4:1 <u>AUTOMATIC BUT NOT MANDATORY</u>

Once the facts establishing the override are proven by clear and convincing evidence "the application of the override is automatic" and "a SORA court is not possessed of any discretion in determining whether to apply the override." *People v. Gordon,* 133 A.D.3d 835, 836 (2d Dept. 2015). *See People v. McCurdy,* 2021 NY Slip Op 05880 (2d Dept. 2021). The defense counter to an override is to move for a downward departure.

Some confusion has been caused by the terminology used in the Guidelines that refers to overrides as automatic. As indicated in the Guidelines at page 19, "the guidelines contain four overrides that automatically result in a presumptive assessment of level 3." This terminology has caused some courts to mistakenly conclude that the override is mandatory, cannot be rebutted, and must result in the court classifying the individual as a risk level 3. When appealed, these decisions have been reversed. Appellate courts have

made it clear that the override creates the presumption that the person is a risk level 3 however, it does not mandate that the court determine that a level 3 classification must be imposed. See for example, *People v. Reynolds*, 68 A.D.3d 955 (2d Dept. 2009); *People v. Edney*, 111 A.D.3d 612 (2d Dept. 2013); *People v. Scone*, 145 A.D.3d 1327 (3d Dept. 2016); *People v. Mabb*, 32 A.D.3d 1135 (3d Dept. 2006); *People v. Edmonds*, 133 A.D.3d 1332 (4th Dept. 2015). It is now well settled that the override does not mandate the imposition of a level 3, and it is error for a court to interpret an override as preventing the court's exercise of discretion to impose a lower classification. *People v. Denny*, 87 A.D.3d 1230 (3d Dept. 2011); *People v. Jones,* 172 A.D.3d 1786 (3d Dept. 2019). In *Jones* the court found it to be ineffective assistance of counsel to fail to seek a downward departure from the presumptive risk level created by the override, when such failure was caused by defense counsel's mistaken belief that the classification as a risk level 3 was "automatic." *People v. Jones,* 172 A.D.3d at 1787

§ 4:2 BURDEN OF PROOF

An override cannot be applied to create a presumptive risk level 3 unless the prosecution proves the facts establishing the particular override by clear and convincing evidence. "The People bear the burden of proving the applicability of a particular override by clear and convincing evidence." *People v. Long*, 129 A.D.3d 687 (2d Dept. 2015), *People v. Locklear,* 154 A.D.3d 888, 889 (2d Dept. 2017), *People v. Lobello*, 123 A.D.3d 993, 994 (2d Dept. 2014). The Fourth Department is in accord with these decisions. *People v. Boan*, 11 A.D.3d 956 (4th Dept. 2004) *lv denied* 4 N.Y.3d 702 (2004). These cases reasoned that placing the burden of proof on the prosecutor is required by Correction Law § 168-d (3), § 168-n (3) and § 168-k (2). Given the fact that the prosecutor must establish the defendant's risk level by clear and convincing evidence, it is axiomatic that an override which raises the presumptive risk level must be held to that same standard.

Defense counsel must vigorously hold the prosecutor to this burden of proof. Simply alleging the facts that meet the criteria for any one of the four overrides is not sufficient and the override should not be automatically applied. Do not let the judge simply apply the override without placing the burden of proof in issue.

§ 4:3 AN OVERRIDE DOES NOT OBVIATE THE NEED FOR SCORING THE ENTIRE RAI OR CONSIDERING PERTINENT FACTORS

When SORA started in 1996, the Board initially took the position that, once it concluded that an override was applicable, it did not have to complete the scoring of the RAI. Probation Departments and prosecutors also adopted that position. Starting in 2005, that position was soundly rejected by the courts. *People v. Sanchez*, 20 A.D.3d 693 (3d Dept. 2005), *People v. Sass*, 27 A.D.3d 968 (3d Dept. 2006), *People v. Torchia*, 39 A.D.3d 1137 (3d Dept. 2007). When the Board issued the 2006 edition of the Guidelines, it acquiesced to the court's ruling in *Sanchez*, acknowledging that in the future the Board would provide a fully scored instrument. (Guidelines, Introductory Section, Criminal History, Factor 9, section 3).

The *Sanchez* court's rationale for requiring a fully scored RAI, even when an override is applicable, should be used by the defense to prevent a court from simply rubberstamping the override and refusing to consider all the additional factors that the defense has to offer.

> *Significantly, the guidelines and commentary to the Sex Offender Registration Act note that the presence of an override factor does not mandate an automatic risk level III designation inasmuch as a "careful reading of [the statutory scheme] supports the conclusion that the guidelines should eschew per se rules and the risk should be assessed on the basis of a review of all pertinent factors (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, At 2 [Nov. 1997]; see Correction Law §168-n [3]; see generally People v. David W., 95 NY2d 130, 135, 733 NE2d 206, 711 NYS2d 134 [2000]).*

People v. Sanchez, 20 A.D.3d 693, 694 (3d Dept. 2005)

SORA courts cannot simply rely upon the override but must consider "all pertinent factors." In *People v. Sass*, 27 A.D.3d 968, 969 (3d Dept. 2006), the court made it clear that an override did not obviate the need to have the RAI properly filled out "and all pertinent factors considered by County Court." Undoubtedly, the pertinent factors include all the factors in the instrument and those that might raise questions about the applicability of the override in a specific case. Only after the presumptive risk level is determined can the court consider whether mitigating factors exist that might warrant a downward departure.

Before the SORA court considers whether a downward departure is warranted, the court must first determine whether there is clear and convincing evidence to establish the presumptive risk level or the applicability of a particular override. *People v. Brown*, 302 A.D.2d 919 (4th Dept. 2003), *People v. Locklear*, 154 A.D.3d 888 (2d Dept. 2017). From several of the cases that addressed the override when the SORA instrument was not completed, it is clear that the SORA court must consider the scoring of the fifteen risk factors in its determination of the applicability of an override. *People v. Sanchez*, 20 A.D.3d 693 (3d Dept. 2005), *People v. Sass*, 27 A.D.3d 968 (3d Dept. 2006). This is particularly true because there have been override cases that did not involve a request for a departure and yet the appellate courts held that there were "pertinent factors" or "statutory factors" (departure not being a statutory factor) that the court must consider before concluding that the override warranted a person to be classified as a level 3. *People v. Brown*, 302 A.D.2d 919 (4th Dept. 2003), *People v. Torchia*, 39 A.D.3d 1137 (3d Dept. 2007).

People v. Barnes, 6 Misc. 3d 469, 473-474 (Sup. Ct. Monroe Co. 2004) provides a very clear and helpful analysis. "[T]he presumptive override cannot defeat the defendant's statutory right 'to appear and be heard' at the SORA hearing (Correction Law § 168-n [3]), or render that right meaningless by requiring a level three classification no matter what evidence might be produced to the contrary." *People v. Barnes,* 6 Misc. 3d at 473. The court went on to clarify that "[e]ven with the presumptive override, therefore, a defendant may rebut the same by the provision of contrary evidence on his behalf, and the burden of proof remains with the People to prove the proposed risk level by clear and convincing evidence by reference, inter alia, to all of the statutory and guideline factors." *People v. Barnes,* 6 Misc. 3d at 473.

It is only after the court has considered the defendant's rebuttal to the override, and determined that the override has been established by clear and convincing evidence, that the analysis turns to whether there should be a downward departure.

§ 4:4 DOWNWARD DEPARTURE FROM THE OVERRIDE PRESUMPTIVE LEVEL 3

Both case law and the Guidelines make it clear that even after an override is found to be applicable, the court is required to consider the mitigating factors offered by the defense as warranting a downward departure. Guidelines p. 4. The analytical steps that a court must take to determine whether to depart from the presumptive risk level apply "whether the presumptive risk level has been determined by the assessment of points or the application of an override." *People v. Locklear*, 154 A.D.3d 888, 889 (2d Dept. 2017). *See People v. McCurdy,* 202 NY Slip Op 05880 (2d Dept. 2021).

In two different sections, the Guidelines authorize a downward departure after the court accepts the applicability of an override. In the introductory section of the Guidelines, at what would be p. ii, if numbered, while addressing factor 9, it is explained that an automatic override to risk level 3 is controlling "unless there is some cause for departure from that level." At page 4 of the Guidelines, this issue is further clarified by explaining exactly what "presumptive" risk score means. "The risk level calculated from aggregating the risk factors and from applying the overrides is 'presumptive' because the Board or court may depart from it if special circumstances warrant." The Guidelines go on to explain the need for allowing departure from a presumptive score created by an override: "Not to allow for departures would, therefore, deprive the Board or a court of the ability to exercise sound judgment and to apply its expertise to the offender." (Guidelines p. 4).

It is well settled that a court has the authority to depart downward from a risk level 3 created by an override. *People v. Howard,* 27 N.Y.3d 337 (2016), *People v. Johnson*, 135 A.D.3d 720 (2d Dept. 2016), *People v. Taylor*, 103 A.D.3d 867 (2d Dept. 2013). With that authority comes the responsibility to consider defendant's arguments for a downward departure. Several courts have reversed and remitted because the SORA court failed to consider defendants' assertions of mitigating circumstances warranting a downward departure. *People v. Johnson*, 135 A.D.3d 720 (2d Dept. 2016), *People v. Denny*, 87 A.D.3d 1230 (3d Dept. 2011).

Case law makes it clear that a court's conclusion that an override is applicable, resulting in a presumptive risk of level 3, is only the beginning of the analysis that courts must undertake in order to ultimately make a final determination of the defendant's risk level. *People v. Locklear*, 154 A.D.3d 888 (2d Dept. 2017); *People v. Scott*, 111 A.D.3d 1274 (4th Dept. 2013). A court cannot make the determination that an override is applicable and stop there. Likewise, defense counsel should not stop advocating merely because an override has been applied. Note that defense counsel made this error in *People v. Reynolds,* 68 A.D.3d 955 (2d Dept. 2009), wrongly assuming that the override was mandatory.

It is error for a court to simply find that a presumptive override is applicable and conclude, as a result, that a downward departure is not warranted. *People v. Sass,* 27 A.D.3d 968 (3d Dept. 2006). It was also error, requiring that the matter be remitted, when

the SORA court applied an override but then "deprived the defendant of the opportunity to present mitigating circumstances in support of his application for a downward departure." *People v. Reynolds,* 68 A.D.3d 955, 956 (2d Dept. 2009). Once the presumptive risk level is established, the defendant must be given the opportunity to seek a downward departure from the presumptive risk level. *People v. Scott*, 111 A.D.3d 1274 (4th Dept. 2013).

In *People v. Schwartz*, 145 A.D.3d 1548 (4th Dept. 2016), the Fourth Department approved a downward departure to a risk level 2 from a presumptive risk level 3 that resulted from the application of an override. It can be inferred from this that with additional mitigating factors, a two-level downward departure might have been warranted. In *People v. Fiol,* 49 A.D.3d 834 (2d Dept. 2008), the court held that a two-level departure is permissible, albeit a two-level upward departure. *See also People v. DeBiaso,* 49 A.D.3d 1280 (4th Dept. 2008).

§ 4:5 DEFENDANT'S BURDEN OF PROOF FOR A DOWNWARD DEPARTURE

Once a court has determined that the prosecution has sustained the burden of proving the applicability of an override by clear and convincing evidence, the burden of proof then shifts to the defendant to demonstrate that a downward departure is warranted by proving by a preponderance of the evidence that there are mitigating circumstances. *People v. Scone*, 145 A.D.3d 1327 (3d Dept. 2016). The analytical steps for a downward departure from a presumptive risk level established as the result of an override are the same three steps required by the Court of Appeals in *People v. Gillotti*, 23 N.Y.3d 841 (2014) for a downward departure based solely on a presumptive RAI point score. *People v. Locklear*, 154 A.D.3d 888 (2d Dept. 2017).

The three analytical steps that a court must follow to determine whether a departure is warranted were explained in *Gillotti*, and are discussed in the Guidelines in Chapter 5 on Departures, however, they bear repeating here:

1) "At the first step, the court must decide whether the…mitigating circumstances alleged…are, as a matter of law, of a kind or to a degree not adequately taken into account by the [G]uidelines." *People v. Gillotti*, 23 N.Y.3d at 861.

2) "At the second step, the court must decide whether the [defendant] has adduced sufficient evidence to meet [his or her] burden of proof in establishing that the alleged … mitigating circumstances actually exist in the case at hand." *People v. Gillotti,* 23 N.Y.3d at 861. "[A] defendant must prove the existence of the mitigating circumstances … by a …preponderance of the evidence." *People v. Gillotti,* 23 N.Y.3d at 864. "If the [defendant] … surmounts the first two steps, the law permits a departure, but the court still has the discretion to refuse to depart or to grant a departure." *People v. Gillotti,* 23 N.Y.3d at 861.

3) "Thus, at the third step, the court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism." *People v. Gillotti*, 23 N.Y.3d at 861.

§4:6 CHALLEGE TO OVERRIDES GENERALLY

Since there is no reference to the concept of an override anywhere in Correction Law Article 6-C, several defendants have challenged the validity of the use of an override to raise one's risk to a level 3. To date there has been no successful challenge along these lines. In *People v. Edmonds,* 133 A.D.3d 1332 (4th Dept. 2015), the court specifically rejected the argument that the override is unconstitutional or is otherwise invalid. In *People v. Scott,* 288 A.D.2d 763 (3d Dept. 2001), the defendant argued the Act does not permit any overriding factors in the risk level assessment. The court held that overrides were consistent with the statutory provisions.

§ 4:7 OVERRIDE 1: A PRIOR FELONY CONVICTION FOR A SEX CRIME

Sex Crime:

The Board chose to use the term "sex crime," yet that term is nowhere defined in SORA (Correction Law article 6-C), the Guidelines or in the Penal Law. Although it would seem reasonable to conclude that by using the term "sex crime," the Board must have meant something different than "sex offense" or "violent sex offense" or they would have used those terms to define Override 1, this argument has been rejected. For example, in *People v. Horne,* 61 A.D.3d 945 (2d Dept. 2009), defense counsel advanced that theory, arguing that the offense of promoting a sexual performance by a child under Penal Law § 263.15 was not a "sex crime" and should not serve as the basis for an override. The Appellate Court found defense counsel's argument to be without merit and proclaimed, without explaining, that Correction Law § 168-a (2) defines a "sex crime" to include any offense under article 263 of the Penal, which includes promoting a sexual performance by a child. Of course, Correction Law § 168-a (2) defines a "sex offense" not a "sex crime." Apparently, the court considers them the same. Considering *People v. Horne,* one might assume that "sex crime" refers to either a "sex offense" or a "sexually violent offense" as those terms are defined in Correction Law § 168-a (2) and (3).

"Prior" Felony Conviction

This override, by its terms, specifically requires that to be applicable, the felony conviction for a sex crime must have occurred "prior" to the current offense for which the SORA hearing is being held. In *People v. Wilkes,* 53 A.D.3d 1073 (4th Dept. 2008), the court ruled that the SORA court erred in relying on a subsequent conviction to invoke a presumptive override. Requiring the conviction to be "prior" to the current offense would seem to also rule out relying on concurrent convictions for a felony sex offense to invoke Override 1. A strong argument can be made for that interpretation in light of the use of the term "prior" criminal record in risk factor 9, and the Guidelines instruction that concurrent or subsequent criminal history is not covered by this particular category. Guidelines p. 14.

Prior Felony "Conviction"

For Override 1 to be applicable there must be a prior felony "conviction" for a sex crime. That leads to the question of whether a Youthful Offender Adjudication for a felony sex offense can be used to invoke this override since it is not a conviction. It is important to note that in the original 1996 edition of the Guidelines the override required "a prior felony conviction **or adjudication** for a sex offense." Unquestionably, the original edition of the Guidelines contemplated that a YO would invoke Override 1. However, by the time

the 1997 edition of the Guidelines was published, the text of Override 1 had been amended to remove any reference to "adjudication," and the override was solely for a prior "conviction." The elimination of the term "adjudication" from the definition of this override was carried forward in the 2006 edition of the Guidelines.

To date only one appellate court has taken up this issue, and as a result, it is binding throughout the entire state. In *People v. Cruz,* 38 A.D.3d 740 (2d Dept. 2007), the court held that the SORA court erred when it treated the defendant's prior YO as a prior felony conviction for purposes of invoking the presumptive override. The court pointed out that the Criminal Procedure Law explicitly provides that "a youthful offender adjudication is not a judgment of conviction for a crime or any other offense." CPL 720.35(1). "Once the defendant was adjudicated a youthful offender, his conviction was deemed vacated and replaced by a youthful offender finding, and thus, it may not later be used as a 'prior felony conviction for a sex crime' to support a presumptive override." *People v. Cruz,* 38 A.D.3d at 740.

Although a YO cannot be used for the purpose of a presumptive override, the Court of Appeals has recently ruled that it can be used to allocate risk points in the category of criminal history under risk factor 9. *People v. Francis,* 30 N.Y.3d 737 (2018).

Some cases have focused on the term "conviction" to hold that a prior plea, although sentencing had not yet occurred prior to the current sex offense, is sufficient to be counted as a proper basis to assess points under risk factor 9. *People v. Wood,* 60 A.D.3d 1350 (4th Dept. 2009); *People v. Franco,* 106 A.D.3d 417 (1st Dept. 2013). These courts reasoned that a plea falls within the definition of a "conviction" pursuant to CPL § 1.20 (13). This reasoning may be applicable to Override 1. But the plea must occur before the commission of the instant offense or it cannot be considered for criminal history assessment of points. *People v. Neuer,* 86 A.D.3d 926 (4th Dept. 2011).

Conviction from Another Jurisdiction

This override becomes a little more problematic when the prior felony conviction for a sex crime is from another jurisdiction.

There are two distinct elements that must be satisfied to invoke this override. First, the prior conviction must be a felony. Second, the prior conviction must be either a "sex offense" or a "sexually violent offense" as those terms are defined in Correction Law § 168-a (2 and (3). (See discussion above as to the meaning of "sex crime.")

One might argue that it is not enough to prove that the offense is designated as a felony in the other jurisdiction. To be considered a felony, it must meet the definition of felony found in Penal Law § 10.00 (5), meaning that it is a conviction for an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.

The second element requires that the conviction from the other jurisdiction must be for a "sex crime." As explained above, a "sex crime" is either a "sex offense" or a "sexually violent offense" and must meet the requirements of either Correction Law § 168-a (2)(d) or § 168-a (3)(b). To be considered a felony "sex offense" conviction from another jurisdiction, it must either meet the "essential elements" test, be a conviction for a felony in any other jurisdiction for which the person is required to register as a sex offender in the jurisdiction in which the conviction occurred, or be one of the federal offenses listed in Correction Law

§ 168-a (2)(d)(iii), provided that the elements of such crime of the conviction are "substantially the same" as those which are a part of such offense as of the date on which this subparagraph takes effect. Correction Law § 168-a (2)(d) (i, ii and iii).

To be considered a felony "sexually violent offense" conviction from another jurisdiction, it must meet either the "essential elements" test for any such felony provided for in paragraph (a) of subdivision (3) of Correction Law § 168-a or be a conviction of a felony in any other jurisdiction for which the person is required to register as a sex offender in the jurisdiction in which the conviction occurred. See Correction Law §168-a (3)(b). *See* Chapter 6 on Designations for a discussion of whether this latter alternative definition of "sexually violent offense" for out-of-state convictions is a drafting error.

The "essential elements" test referred to in Correction Law § 168-a (2) and (3) is not the same as the test of the same name used to determine a prior violent felony from another jurisdiction for sentencing purposes in Penal Law § 70.04 (1)(b)(i). It is a less rigid test. This issue was the subject of split opinions until resolved by the Court of Appeals in *North v. Board of Examiners of Sex Offenders,* 8 N.Y.3d 745 (2007). *See* Chapter 6 on Designations for a discussion of the essential elements test.

Several courts have addressed the issue of whether a conviction in another jurisdiction can serve as a prior felony conviction for a sex crime for the purpose of Override 1. In *People v. Steinke,* 26 Misc. 3d 134(A) (Sup. Ct., App. Term, 2d Dept. 2010), the defendant had a prior Florida felony sex offense conviction. The court held that the Florida conviction could serve as the basis for an override because it was a felony conviction in Florida for which the defendant was required to register as a sex offender in that jurisdiction. Although that court concluded that the Florida conviction supported the override, it added to the confusion by conflating the designation "predicate sex offender" [Correction Law § 168-a (7)(c)] which does not require the predicate or current offense be a felony, with Override 1, which requires the person to have a prior felony conviction for a sex crime. This same analysis was applied by the court in *People v. Porrata,* 62 Misc. 3d 138(A) (App. Term 1st Dept. 2019) to find that a New Jersey felony conviction of endangering the welfare of a child, which required the defendant to register in New Jersey, could serve as a basis for an override based upon a prior felony conviction for a sex crime. In *People v. Johnson,* 32 Misc. 3d 138(A) (App. Term 2d Dept. 2011), the court held that a Maryland conviction for a prior felony sex offense would support Override 1 based upon the fact that the Maryland offense included all the essential elements of an offense that is subject to registration in New York, i.e., the crime of sexual abuse in the second degree.

Proof of Prior Conviction

There must be clear and convincing evidence of the prior conviction to sustain the override. Some cases have held that a certificate of conviction satisfies the clear and convincing evidence requirement. *People v. McClelland,* 38 A.D.3d 1274 (4th Dept. 2007). Another case found that a sentencing commitment order was sufficient to prove a prior violent felony in South Carolina. *People v. Wroten,* 286 A.D.2d 189 (4th Dept. 2001) *lv denied* 97 N.Y.2d 610 (2002). In *People v. Vacanti,* 26 A.D.3d 732 (4th Dept. (2006) *lv denied* 6 N.Y.3d 714 (2006), the court relied on documentation from the certificate of conviction, the presentence report, and the case summary to prove the prior Arizona

conviction. In *People v. Lewis,* 45 A.D.3d 1381 (4th Dept. 2007), the court seems to have accepted the case summary and presentence reports as reliable hearsay sufficient to establish the prior convictions by clear and convincing evidence. The better view seems to have come more recently in *People v. Gilbert,* 78 A.D.3d 1584 (4th Dept. 2010), a case in which the differing views on adequate proof of a prior convictions are reconciled. In *People v. Gilbert* the court held that a prior felony sex crime was established by clear and convincing evidence when the certificate of conviction was entered into evidence. The court went on to explain that the case summary, being reliable hearsay, was sufficient to establish the defendant's prior felony conviction for a sex crime "where the defendant did not dispute its contents insofar as relevant." *People v. Gilbert,* 78 A.D.3d at 1485. Where the proof of the defendant's sex offense conviction in Puerto Rico consisted of documents entirely in Spanish unaccompanied by an English translation, the court held that this did not constitute competent evidence. *People v. Ramos,* 178 A.D.3d 1408 (4th Dept. 2019).

Double Counting – Not Prohibited

When a person has a prior felony sex crime conviction, it is accounted for twice by the RAI. First, it is used as an override to raise the presumptive risk level to a level 3. That override might be the equivalent of adding as many as 110 points. Second, the Guidelines provide for scoring risk factor 9 (prior crimes) "conservatively" as 30 points for a prior felony sex crime, termed a "companion score" by the Guidelines. (Introductory section on Criminal History, factor 9, at what would be p. ii). *See also* Guidelines p. 13.

Despite the double use of the same offense by the RAI, courts have consistently rejected arguments that when a prior conviction has already been scored by the addition of 30 points for risk factor 9 on the RAI, it is improper "double counting" to use this same conviction as an override factor.

Judicial acceptance of this type of "double counting" surfaced in *People v. Johnson,* 46 A.D.3d 1032, 1033 (3d Dept. 2007), holding that "defendant's 'double-counting' argument is explicitly addressed and refuted by the guidelines when the prior felony is a sex crime." Subsequent cases provided no further analysis, simply citing to *People v. Johnson* or cases relying upon *People v. Johnson*. *People v. Barrier,* 58 A.D.3d 1086 (3d Dept. 2009) *lv denied* 12 N.Y.3d 707 (2009), *People v. Scone,* 145 A.D.3d 1327 (3d Dept. 2016), *People v. Gilbert,* 78 A.D.3d 1584 (4th Dept. 2010).

Prior Conviction Too Remote

One might suppose that a prior conviction for a felony sex crime can be too remote in time to have any predictive value about risk of reoffense and should therefore not serve as basis for Override 1. Apparently, no court has directly addressed this issue, leaving this argument open to explore.

In several override cases, courts have been confronted with old prior convictions. Instead of addressing whether the prior convictions were too old to serve as a basis for an override, the courts have simply addressed the issue of remoteness as a mitigating factor to be considered for a downward departure. Absence of criminal activity for periods of 14, 15 and 21 years have not been found to be sufficient to warrant a downward departure from the override risk level 3. *People v. Scone,* 145 A.D.3d 1327 (3d Dept. 1327) and *People v. Judd,* 29 A.D.3d 431 (1st Dept. 2006).

§ 4:8 OVERRIDE 2: THE INFLICTION OF SERIOUS PHYSICAL INJURY OR THE CAUSING OF DEATH

According to the Guidelines (p. 19), the term "serious physical injury," as used in this override, has its Penal Law meaning: "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ." Penal Law § 10.00(10).

Like all four of the overrides, the prosecution must prove the override by clear and convincing evidence. *People v. Brown,* 302 A.D.2d 919, 920 (4th Dept. 2003). The prosecution gets assistance from two statutory provisions which provide that "[f]acts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated" (Correction Law § 168-n [3] and §168-k [2]). *People v. Rollins,* 33 A.D.3d 398 (1st Dept. 2006).

The hearing court has the discretion to depart downward from the presumptive risk level created by the override. *People v. Howard,* 27 N.Y.3d 337 (2016).

It is error for the SORA court to apply this override based upon the defendant's actions against a woman who is the victim of another of his offenses but who was not "the victim" involved in the current offense being addressed at the SORA hearing. *People v. Garofolo,* 195 A.D.3d 958 (2d Dept. 2021).

Although this override seems to overlap with risk factor 1 (use of violence), courts have held that this results in "no improper double assessment." *People v. Dorsett,* 35 A.D.3d 279 (1st Dept. 2006). In *Dorsett,* the court reasoned that "the assessment for use of violence did not reflect the fact that defendant caused serious physical injury, a circumstance reflecting defendant's enhanced risk to public safety." *People v. Dorsett,* 35 A.D.3d at 280.

§ 4:9 OVERRIDE 3: A RECENT THREAT TO REOFFEND BY COMMITTING A SEXUAL OR VIOLENT CRIME

Case law establishes that the threat required to establish this override is not limited to verbal threats. It can also be an act, including the commission of a new sexual or violent crime. *People v. Woods,* 45 A.D.3d 408 (1st Dept. 2007) *lv denied* 10 N.Y.3d 704 (2008). In *People v. Woods,* the court rejected defendant's argument that this override only encompasses verbal threats, reasoning that "an actual crime poses an equal, if not greater, risk than a verbal threat." *People v. Woods,* 45 A.D.3d at 409. In *People v. Spivey,* 88 A.D.3d 459 (1st Dept. 2011), the court accepted the commission of a robbery in the first degree as sufficient to establish a threat.

The threat, whether verbal or by the commission of an act, must be recent. Of course, what is meant by recent can be problematic. Is it a threat within a week, month, year? Courts have an interesting way of expanding definitions when it comes to sex offenses. The Guidelines point out that the Board "initially considered a requirement that the threat to reoffend must have occurred within the previous year. It decided, however, not to impose such a rigid time limit; if the threat is recent enough that there is cause to believe that the offender may act upon it, an override is warranted." Guidelines p. 19.

In *People v. Thompson,* 34 A.D.3d 661 (2d Dept. 2006), the court emphasized that the prior convictions, in order to constitute a threat under Override 3, must be recent. In that case, the lower court found that two convictions which had occurred 5 and 12 years previously were sufficiently recent to constitute a recent threat. The Appellate Division reversed, finding that the lapse of 12 or even 5 years from the time of the incident to the time of the SORA hearing, could not be construed as recent. In contrast, the court in *People v. Johnson,* 44 A.D.3d 571 (1st Dept. 2007) seems to have concluded that the commission of a sex crime while on parole in 1985 (20 years prior to the SORA hearing) constituted a recent threatening act when considered as the basis for an override at a SORA hearing held in 2005.

§4:10 OVERRIDE 4: A CLINICAL ASSESSMENT THAT THE PERSON HAS A PSYCHOLOGICAL, PHYSICAL, OR ORGANIC ABNORMALITY THAT DECREASES ABILITY TO CONTROL IMPULSIVE SEXUAL BEHAVIOR

The Guidelines indicate that the Board chose to require a "clinical assessment" so that the loose language in a pre-sentence report would not become the basis for an override. Guidelines at p. 19. The Guidelines also give examples of the types of clinical assessments that would support this override, including pedophilia and sexual sadism. Guidelines at p. 19. This override cannot be established without a clinical assessment. *People v. Riley,* 85 A.D.3d 1141 (2d Dept. 2011).

Although the Guidelines provide only two examples of psychological abnormalities, pedophilia and sexual sadism, it has been held that there is no requirement that a psychological abnormality must be inherently sex-related in order for the fourth override to apply. *People v. Odiari,* 188 A.D.3d 39 (2d Dept. 2020). In *People v. Odiari* the court held that the fourth override may be applied based on a clinical assessment indicating that a defendant has a schizoaffective disorder and that this disorder decreases his or her ability to control impulsive sexual behavior.

Care should be taken to determine who has made the clinical assessment and what credentials he or she actually possesses. Clearly, a probation officer will not suffice. In *People v. Compasso,* 35 Misc. 3d 1201(A) (County Ct., Suffolk Co. 2012), the court found that a DOCCS employee, who was a Licensed Master Social Worker, was not qualified to make such a diagnosis, but a Clinical Social Worker might qualify. The precision of the diagnosis should also be considered. In *People v. Chandler,* 48 A.D.3d 770 (2d Dept. 2008), a general diagnosis of mental retardation and impulse control disorder, made by a DOCCS Mental Health Unit, was not sufficient to establish this override.

Defense counsel should hold the prosecution to this standard. This override cannot be established when the evidence is not clear and convincing that the defendant has a psychological, physical, or organic abnormality. *People v. McCollum,* 41 A.D.3d 1187 (4th Dept. 2007), *People v. Orengo,* 40 A.D.3d 609 (2d Dept. 2007).

PRACTICE TIPS

Although overrides are "automatic," you should not automatically give up when confronted with an override. Your client is not doomed to be a risk level 3 unless you make it automatic.

In light of the appellate court decisions that have held that, at times, the Board, prosecutors, and SORA hearing courts have incorrectly applied an override, defense counsel should be meticulous in reviewing any recommended override for fatal flaws.

A quick mental checklist is helpful when considering an override:

- *Does it meet the applicable standard for that particular override?*
- *Has the District Attorney met the burden of proof to establish the override by clear and convincing evidence?*
- *What risk factors militate against imposition of the override?*
- *What mitigating factors can be advanced for a downward departure? These mitigating factors can be either particular to the override, general mitigating factors, or both.*

Do not limit your request for downward departure merely one level to a risk level 2. Courts can make both upward and downward departures of two levels. In People v. Schwartz, 145 A.D.3d 1548 (4th Dept. 2016), the court considered such a two-level departure before concluding that to do so would require additional mitigating factors. See also People v. Fiol, 49 A.D.3d 834 (2d Dept. 2008); People v. DeBiaso, 49 A.D.3d 1280 (4th Dept. 2008).

The Gillotti three-step analysis and preponderance of the evidence burden of proof standard for a downward departure are applicable to downward departures from a level 3 presumptive risk level created by an override. Do not be confused by case law you find during your research that applies the clear and convincing evidence standard to downward departures. Although the law in cases regarding mitigating factors may still be good law worth citing to, the clear and convincing evidence standard has not been applicable since the Court of Appeals decision in People v. Gillotti, 23 N.Y.3d 841 (2014). If you are confused by the applicable standard for the burden of proof, it is probably because you are looking at an appellate decision pre-dating 2014.

If you are confronted with Override 1, you may want to consider pressing the issue as to the sufficiency of proof regarding the prior felony sex crime conviction. If you are contesting the prior conviction, you may want to argue that the prosecution cannot sustain its burden of proof without submitting a certificate of conviction or like document. Argue that the presentence report and the case summary are not sufficient to prove the prior conviction by clear and convincing evidence.

Consider the two R's – remoteness and recency. For Override 1, consider arguing that the prior conviction is so remote in time as to make the override inapplicable. Case law has focused on this issue for mitigating factor purposes. There may still be an opportunity to argue that remoteness goes to the applicability of the override itself. When confronted with Override 3, consider arguing that the threat to reoffend, whether verbal, or by actual conduct, is not sufficiently recent to support the belief that the person might act upon it.

Chapter 5

DEPARTURES

CHAPTER 5 SECTIONS

§ 5:1 Introduction

§ 5:2 Standard for Departure

§ 5:3 Three Step Analysis

§ 5:4 Identifying Aggravating and Mitigating Factors

§ 5:5 Burden of Proof for Departures

§ 5:6 Mitigating Factors

§ 5:7 Victim's Consensual Participation

§ 5:8 Lived with Intimate Partner for Two or More Years

§ 5:9 Cumulative Impact of Mitigating Factors

§ 5:10 Sexual Recidivism Decreases with Advancing Age

§ 5:11 Child Pornography Cases – Statistically Low Risk to Reoffend

§ 5:12 Autism Spectrum Disorder as a Mitigating Factor

§ 5:13 Arguing for a Downward Departure

§ 5:14 Defending Against an Upward Departure

§ 5:15 Court's Determination on Departure Must Provide its Basis for Granting or Denying

Chapter 5

DEPARTURES

Withstanding a request by the prosecution for an upward departure, or prevailing on your own request for a downward departure, lies at the heart of the defense of a SORA case.

§ 5:1 INTRODUCTION

Whether defending against an upward departure or advocating for a downward departure, this is the most critical aspect of representation in a SORA case. Your departure arguments will, at times, serve both as a sword and a shield. Mastery of the mitigating factors that support a downward departure will allow you to successfully accomplish both. With the stroke of a pen, a SORA judge can change the presumptive risk level upward or downward as much as two levels. *People v. Fiol,* 49 A.D.3d 834 (2d Dept. 2008); *People v. DeBiaso,* 49 A.D.3d 1280 (4th Dept. 2008). Two recent cases implicitly acknowledge that courts can depart two levels. *People v. Sanchez*, 192 A.D.3d 409 (1st Dept. 2021) and *People v. Romulus,* 189 A.D.3d 553 (1st Dept. 2020). All your jousting over a risk factor point score may be rendered meaningless by an upward departure. Never undertake the defense of a SORA case without preparing, developing, and presenting mitigating factors at the determination hearing. Always prepare to challenge an upward departure.

The Board's and the SORA court's authority to depart from a presumptive risk level is not statutory. Instead, it is a creation of the Board as set forth in the Guidelines, (Guidelines pp. 4-5) and endorsed by case law. It is essential for defense counsel to fully understand how and why the Guidelines provide for departures. Proficiency in both the Guidelines and the body of case law addressing departures is necessary for effective representation.

The Board created a purportedly objective risk assessment instrument to determine a risk level, combining risk of reoffense and danger posed by the individual. The instrument assigns numerical values for each of fifteen risk factors, between 0 and 30 points. The points are totaled to provide a total risk score and a presumptive risk level. There are three levels. Level 1 is low, level 2 is moderate, and level 3 is high.

The risk level is presumptive because it can be changed by any of the four "overrides" that automatically result in a presumptive risk level 3. It is also presumptive because it can be changed by a departure upward or downward. A SORA court may depart whether the risk level is created purely by the total risk factor point score or by an override. *People v. Locklear,* 154 A.D.3d 888 (2d Dept. 2017), Guidelines p. 4.

A departure is a deviation from a presumptive risk level to a higher or lower risk level, notwithstanding the total risk factor score or an override. It is discretionary but allowed only "if special circumstances warrant." Guidelines p. 4. A special circumstance

is present when "there exits an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines." Guidelines p. 4. As the Guidelines indicate, the concept of departure as used in SORA risk assessment determinations is borrowed from the federal sentencing guidelines. Guidelines p. 4.

The Guidelines do not explain what makes a factor appropriate for consideration by a court as either an aggravating or mitigating circumstance. Courts have provided some explanation. "[A]n appropriate aggravating factor is one which tends to establish a higher likelihood of reoffense or danger to the community, and an appropriate mitigating factor is one which tends to establish a lower likelihood of reoffense or danger to the community than the presumptive risk level calculated on the RAI." *People v. Wyatt,* 89 A.D.3d 112, 121 (2d Dept. 2011) *lv denied* 20 N.Y.3d 803 (2012).

The Board's rationale for granting to itself and the courts the ability to depart "is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case." Guidelines p. 4. The purpose is to provide "the Board or a court…the ability to exercise sound judgment and to apply its expertise to the offender." Guidelines p. 4. The Guidelines caution that "[t]he expectation is that the instrument will result in the proper classification in most cases so that departure will be the exception – not the rule." Guidelines p. 4.

Despite this caution, the Board and the courts seem to have identified some recurring circumstances for which departure is the rule, not the exception. These will be discussed later in this Chapter.

§ 5:2 STANDARD FOR DEPARTURE

The SORA statutes provide no standard for the courts to follow in order to depart from the presumptive risk level. As previously noted, the concept of departure is nowhere to be found in Article 6-C of the Correction Law.

The Guidelines provide some help, faintly explaining when and under what circumstances a court may exercise a departure. In the Guidelines, we find that "[d]epartures may be upward or downward" (Guidelines pp. 4-5), but a court may exercise its discretionary ability to depart from the presumptive risk level only "if special circumstances warrant." Guidelines p. 4. The Guidelines also prohibit a court from departing above or below the presumptive risk level "unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines." Guidelines p. 4. The Guidelines leave us to wonder whether "special circumstances" and "aggravating and mitigating factors" mean the same thing. The court in *People v. Wyatt,* 89 A.D.3d 112, 120 (2d Dept. 2011) tells us they do.[19]

The Guidelines provide no standard for the court to use to determine under what circumstances an aggravating or mitigating factor can provide sufficient weight to warrant a departure. Several questions are left begging by the Guidelines. Is the fact that an aggravating or mitigating factor has been proven to exist in a particular case sufficient to

[19] "The term 'special circumstances' in the commentary to the Guidelines, taken in context, is a shorthand version of the phrase 'aggravating or mitigating factor of a kind or to a degree, that is not otherwise adequately taken into account by the guidelines." *People v. Wyatt* 89 A.D.3d at 120.

warrant departure? What is the court to do if there are both aggravating and mitigating factors in the same case? How are the aggravating and mitigating factors to be balanced? By what standard is the sufficiency of the factor to be measured to warrant a departure? What qualifies a particular set of circumstances as an aggravating or mitigating factor?

Without answers to these questions, the courts have no standard by which to guide their departure determinations. Several courts have taken up the challenge, providing both standards for departure and answers to the questions left unanswered by the Guidelines. *See People v. Gillotti,* 23 N.Y.3d 841 (2014) and *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011). The Guidelines imply, but nowhere expressly state, that, in order for a court to depart, there must be a determination that in light of the "special circumstances" the presumptive risk level would result in an over-assessment or under-assessment of the risk of reoffense or danger posed. At only two places in the Guidelines is this concept of over- or under-assessment referenced. Both references appear in regard to risk factor 2 (Guidelines p. 9), and nowhere else. Both references are only with regard to this one particular risk factor, not in regard to a general risk level determination. In one instance, the Guidelines reference a downward departure if 25 points for this risk factor "results in an over-assessment of the offender's risk to public safety." Guidelines p. 9. In the other instance, the Guidelines reference an upward departure if assessing 0 points for the risk factor "results in an under-assessment of the offender's actual risk to public safety." Guidelines p. 9. Could this passing reference pertaining to just one risk factor in the Guidelines be the standard for all departure determinations?

§ 5:3 THREE STEP ANALYSIS

The Court of Appeals in *People v. Gillotti,* 23 N.Y.3d 841, 861 (2014) fleshed out the Guidelines, requiring courts to follow "three analytical steps" to determine whether to depart from the presumptive risk level.

> **Step One**: "[D]ecide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines."
>
> **Step Two**: "[D]ecide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand."
>
> **Step Three**: "[T]he court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism."

Although most courts will recognize and apply this three-step analysis, there is a bit more to Step One than meets the eye. The meaning of the term "as a matter of law," in the context of Step One, is unclear. Also lacking in clarity is the manner by which aggravating and mitigating factors are to be defined and identified. In a case pre-dating *Gillotti,* the court in *People v. Wyatt,* 89 A.D.3d 112, 121 (2d Dept. 2011) addressed both issues. First, the court explained what are to be considered appropriate aggravating and mitigating factors for the purpose of departure. "[A]n appropriate aggravating factor is one which tends to establish a higher likelihood of reoffense or danger to the community,

and an appropriate mitigating factor is one which tends to establish a lower likelihood of reoffense or danger to the community than the presumptive risk level calculated by the RAI." *People v. Wyatt*, 89 A.D.3d at 121. Second, the issue to be decided as a matter of law is "[w]hether a particular factor falls within the definition of 'an aggravating or mitigating factor'" that is both "'of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines'" and being "related to the risk of reoffense and danger to the community." *People v. Wyatt,* 89 A.D.3d at 121.

In a recent post-*Gillotti* case, the fuller and more complete language from *People v. Wyatt* for Step One was cited with approval. The appellate court required the SORA court to decide if a party seeking a "departure from the presumptive risk level has met the initial burden of identifying, as a matter of law, an appropriate (aggravating or) mitigating factor, namely, a factor which tends to establish a (higher or) lower likelihood of reoffense or danger to the community, and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines." *People v. Brown,* 161 A.D.3d 1201 (2d Dept. 2018). This would appear to be the clearer and more complete way to state Step One of the three step analysis for determining departures.

If the prosecution fails to meet the burden of Step One or Step Two, "the SORA court may not upwardly depart and must impose the presumptive risk level." *People v. Wyatt,* 89 A.D.3d at 123. In such a situation, the SORA court has no authority to exercise its discretion to depart upward. *People v. Wyatt,* 89 A.D.3d at 123.

On the other hand, even if the prosecution has met the threshold of the first two steps, an upward departure is not required. *People v. Wyatt* 89 A.D.3d at 123. "If the party applying for a departure surmounts the first two steps, the law permits a departure, but the court still has the discretion to refuse to depart or to grant a departure." *People v. Gillotti,* 23 N.Y.3d at 861.

§ 5:4 IDENTIFYING AGGRAVATING AND MITIGATING FACTORS

Certain mitigating or aggravating factors may not be appropriate for a departure. "Where the alleged factor is taken into account by the Guidelines, or is not related to the risk of reoffense and danger to the community, as a matter of law a departure is not warranted." *People v. Wyatt,* 89 A.D.3d 112, 121 (2d Dept. 2011). There are three places to find appropriate aggravating or mitigating factors. They are found in the Guidelines, case law, and sexual behavior research and literature.

The Guidelines give examples of five mitigating factors that may warrant a downward departure and three aggravating factors that may warrant an upward departure. In addition, the Board's *Scoring of Child Pornography Cases Position Statement 6/1/12* (Position Statement) identifies nine additional aggravating factors that the Board intends to rely upon for upward departures in child pornography cases. The five mitigating factors identified in the Guidelines are:

1) A physical condition that minimizes the risk of reoffense such as advanced age or debilitating illness, Guidelines p. 5.

2) The defendant played a lesser accessorial role in the crime and scoring 25 points for risk factor 2 (sexual conduct), by applying traditional principles of accessorial

liability, results in an over-assessment of the offender's risk to public safety, Guidelines p. 7.

3) The victim's lack of consent is due only to inability to consent by virtue of age, and the scoring of 25 points for risk factor 2 results in an over-assessment of the person's risk to public safety, Guidelines p. 9.

4) The assessment of points under risk factor 9, for a prior conviction of endangering the welfare of a child, is based upon an offense which did not involve sexual misconduct, Guidelines p. 14.

5) The individual exhibited an exceptional response to a sex offender treatment program, Guidelines p. 17.

The Guidelines' three examples of aggravating factors are:

1) Clear and convincing evidence of the person's commission of a sex crime which does not appear in his or her criminal record, Guidelines p. 7.

2) Under-assessment of the person's risk to public safety by a score of zero for risk factor 2, because there was no sexual contact, where the person actually intended to rape the victim, Guidelines p. 9.

3) The commission of concurrent or subsequent crimes which are not adequately reflected in the person's criminal record under risk factor 9, Guidelines p. 14.

The Position Statement of 6/1/12 references nine aggravating factors which purport to be drawn from research and the literature on the subject of sexual offending. Likewise, you will find mitigating factors in the research and literature that can be used in the appropriate case. The section on Mitigating Factors in this chapter catalogues many of the mitigating factors that are referenced in case law.

§ 5:5 BURDEN OF PROOF FOR DEPARTURES

Upward Departure - Clear and Convincing Evidence

The burden of proof placed on the prosecution for an upward departure is clear and convincing evidence.

This burden of proof is found in the Guidelines p. 7, in the SORA statutes (Correction Law §§ 168-n [3], 168-d [3] and 168-k [2]), and in case law. [*People v. Gillotti,* 23 N.Y.3d 841, 861-862 (2014) and *People v. Wyatt,* 89 A.D.3d 112 123 (2d Dept. 2011)]. The Court of Appeals explained that "because Correction Law § 168-n (3) compels the People to prove the existence of facts supporting a defendant's overall risk level classification by clear and convincing evidence, the People cannot obtain an upward departure pursuant to the guidelines unless they prove the existence of certain aggravating circumstances by clear and convincing evidence." *People v. Gillotti,* 23 N.Y.3d at 861-862.

Downward Departure - Preponderance of the Evidence

The burden of proof placed on a person seeking a downward departure is a mere preponderance of the evidence.

Unlike the burden of proof placed on the prosecution for an upward departure, neither the Guidelines nor the SORA statutes impose an evidentiary burden on the person seeking a downward departure. This absence of direction from the Board and the Legislature initially led to judicial confusion as to the burden of proof required for a downward departure. In *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011), the court recognized that confusion on this issue abounded, and therefore took the opportunity to clarify the different standards to be applied for an upward and downward departure. The analysis was clear and insightful, but, despite the great lengths to which the court went to elucidate this issue, confusion of the standards continued. Until 2014, the departments of the Appellate Division continued to be split as to whether the defendant must prove the existence of mitigating factors by a preponderance of the evidence or by clear and convincing evidence.

Any doubt about the appropriate burden of proof was removed when the Court of Appeals concluded that, "[c]onsistent with that legislative intent and the general practice in civil cases, we hold that a defendant must prove the existence of mitigating circumstances upon which he or she relies in advocating for a departure by a mere preponderance of the evidence." *People v. Gillotti* 23 N.Y.3d at 864.

Despite the clarity brought to this issue by the Court of Appeals, SORA courts continue to botch the burden of proof. It behooves defense counsel to submit a memorandum of law to the SORA court to increase the chances that the correct standard is applied.

For a more in-depth discussion of the burden of proof in all aspects of SORA proceedings, see Chapter 8, § 8:1 on Burden of Proof. In that chapter, the evidentiary issues pertaining to burden of proof are discussed, as well as an explanation of the two standards for the burden of proof. See Chapter 11 on Charts and Checklists for a chart on the Burden of Proof for SORA proceedings.

§ 5:6 MITIGATING FACTORS

A mitigating factor appropriately serves as a basis for a downward departure if it is one that "as a matter of law" is "a factor which tends to establish a lower likelihood of reoffense or danger to the community, and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines." *People v. Brown,* 161 A.D.3d 1201 (2d Dept. 2018). Mitigating factors are found in the Guidelines, where five examples are given, in case law, and in research and literature on sexual behavior. There is no magic formula. If the circumstance you submit meets the above definition, it is sufficient. You are only limited by your research and creativity. However, you should provide a persuasive argument that the factor you are proposing tends to lower either the likelihood of reoffense or danger to the community, and that it is not adequately taken into account by the Guidelines.

A non-exhaustive list of mitigating factors is enumerated below, along with notations as to where they can be found in the Guidelines, statutes, case law or research. At the end of this list is a discussion of some of those mitigating factors that are not self-explanatory or where explication may be helpful. A checklist of mitigating factors can be found in Chapter 11 on Charts and Checklists.

● Exceptional response to treatment for sexual offending.

- *People v. Shiley,* 54 Misc. 3d 1220(A) (Monroe Co. Ct. 2016)
- *People v. Migliaccio,* 90 A.D.3d 879 (2d Dept. 2011)
- *People v. Lewis,* 140 A.D.3d 1697 (4th Dept. 2016)
- *People v. Bethel,* 165 A.D.3d 712 (2d Dept. 2018)
- *People v. Lagville,* 136 A.D.3d 1005 (2d Dept. 2016)
- *People v. Washington,* 84 A.D.3d 910 (2d Dept. 2011)
- *People v. Martinez,* 92 A.D.3d 930 (2d Dept. 2012)
- *People v. Rodriguez,* 33 Misc. 3d 1236(A) (Sup. Ct. Kings Co. 2011)
- Guidelines p. 17
- Correction Law § 168-l (5)(f)

● Willingness to seek treatment.

- *Vandover v. Czajaka,* 276 A.D.2d 945 (3d Dept. 2000)
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)

● When risk factor 9 is scored points because of a prior conviction for Endangering the Welfare of a Child and a review of the record indicates that there was no such sexual conduct.

- Guidelines p. 14

● Advanced age.

- Correction Law § 168-l (5)(d)
- Guidelines p. 5
- *Vandover v. Czajaka,* 276 A.D.2d 945 (3d Dept. 2000)
- *People v. Santiago,* 137 A.D.3d 762 (2d Dept. 2016)
- *People v. Littles,* 155 A.D.3d 979 (2d Dept. 2017)
- *People v. Mota,* 165 A.D.3d 988 (2d Dept. 2018)

● Debilitating or physical condition that minimizes the risk of roffending.

- Correction Law § 168-l (5)(d)
- Guidelines p. 5
- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. Mota,* 2018 NY Slip Op 06950 (2d Dept. 2018)
- *People v. Stevens,* 55 A.D.3d 892 (2d Dept. 2008)
- *People v. Hosear,* 134 A.D.3d 633 (1st Dept. 2015)

● Consensual participation by the victim. Departure may be justified when the victim's lack of consent is due only to the inability to consent by virtue of age and scoring 25 points for risk factor 2 results in an over-assessment.

- Guidelines p. 9
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. George,* 141 A.D.3d 1177 (4th Dept. 2016)
- *People v. Marsh,* 116 A.D.3d 680 (2d Dept. 2014)
- *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010)
- *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017)
- *People v. Santiago,* 20 A.D.3d 885 (4th Dept. 2005)
- *People v. Garcia,* 53 Misc. 3d 153(A) (App. Term 2d Dept. 2016)
- *People v. Carter,* 138 A.D.3d 706 (2d Dept. 2016)

- *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)
- *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)
- *People v. Secor,* 171 A.D.3d 1314 (3d Dept. 2019)
- *People v. Fisher,* 177 A.D.3d 615 (2d Dept. 2019)
- *People v. Brocato,* 188 A.D.3d 728 (2d Dept. 2020)
- *People v. Maldonado-Escobar,* 196 A.D.3d 655 (2d Dept. 2021)

● Accessorial conduct. Courts may depart downward where the defendant played a lesser role in the sexual conduct than a co-defendant.

- Guidelines p. 7

● Child pornography – non-contact offense. Low risk to reoffend. See *People v. Gillotti,* 23 N.Y.3d 841 (2014).

- *People v. Johnson,* 11 N.Y.3d 416 (2009)
- *People v. Marrero,* 37 Misc. 3d 429, 442 (Sup. Ct. N.Y. Co. 2012)
- *People v. Cosby,* 154 A.D.3d 789 (2d Dept. 2017)
- *People v. Tutty,* 156 A.D.3d 1444 (4th Dept. 2017)
- *People v. Kemp,* 148 A.D.3d 1284 (3d Dept. 2017)
- *People v. Sestito,* 195 A.D.3d 869 (2d Dept. 2021)
- *People v. Gonzalez,* 189 A.D.3d 509 (1st Dept. 2020)

● Significant time offense-free in the community.

- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Col. 2005)
- *People v. George,* 142 A.D.3d 1059 (2d Dept. 2016)
- *People v. Witchley,* 9 Misc. 3d 556 (County Ct. Madison Co. 2005)
- *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010)
- *People v. Santos,* 25 Misc. 3d 1212(A) (Sup. Ct. NY Co. 2009)
- *People v. Sotomayer,* 143 A.D.3d 686 (2d Dept. 2016)
- *People v. Gonzalez,* 138 A.D.3d 814 (2d Dept. 2016)
- *People v. Hawkins,* 66 Misc. 3d 145(A) (App. Term, 2d Dept. 2020)

● Evidence of rehabilitation and upstanding lifestyle.

- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. Abdullah,* 31 A.D.3d 515 (2d Dept. 2006)
- *People v. Madison,* 98 A.D.3d 573 (2d Dept. 2012)
- *People v. Santogual,* 157 A.D.3d 737 (2d Dept. 2018)

● Engagement in sex offense treatment either while in prison or upon release.

- *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)

● Lived with an intimate partner for a period of two or more years.

- *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010)
- *People v. Marrero,* 37 Misc. 3d 429, 441 (Sup. Ct. N.Y. Co. 2012)
- Static 99-R Coding Rules p. 49

● Current age, such that the risk of recidivism is diminished.

- *People v. Littles,* 155 A.D.3d 979 (2d Dept. 2017)

- *People v. Santiago,* 137 A.D.3d 762 (2d Dept. 2016)

● Significant stabilizing factors, including family.
- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012)
- *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)

● Significant stabilizing factors, including employment.
- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012)

● Significant stabilizing factors, including pro-social activities.

● Recent assessment by a clinical psychologist or LCSW exercising professional judgment that defendant is a low risk to reoffend.
- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. King Co. 2012)
- *People v. Yen,* 33 Misc. 3d 1234(A) (Supt. Ct. Kings Co. 2011)
- *People v. Jusino,* 11 Misc. 2d 470 (Sup. Ct. N.Y. Co. 2005)
- *People v. Oliver,* 37 Misc. 3d 1201(A) (Sup. Ct. Cayuga Co. 2009)
- *People v. Darrah,* 153 A.D.3d 1528 (3d Dept. 2017)
- *People v. Seils*, 28 A.D.3d 1158 (4th Dept. 2006)
- *People v. Champagne,* 140 A.D.3d 719 (2d Dept. 2016)
- *People v. Kennedy,* 79 A.D.3d 1470 (3d Dept. 2010)
- *People v. Marrero,* 37 Misc. 3d 429, 443 (Sup. Ct. N.Y. Co. 2012)
- *People v. McFarland,* 29 Misc. 3d 1206(A) Sup. Ct. N.Y. Co. 2010)
- *People v. Shiley,* 54 Misc. 3d 1220(A) (Monroe Co. Ct. 2016)
- *People v. Williams,* 24 A.D.3d 894 (3d Dept. 2005)
- *People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009)
- *People v. Chrisley,* 194 A.D.3d 1422 (4th Dept. 2021)
- Correction Law § 168-l (5)(e)

● Educational accomplishments while incarcerated or post-conviction.
- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. 2005)
- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)

● Participation in drug or alcohol counseling or other programming in prison or post-conviction.
- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. McCormick,* 21 A.D.3d 1221 (3d Dept. 2005)

● Excellent prison record.
- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)

● Supportive housing.
- Correction Law §168-l (5)(c)

● Has not previously been convicted of a sex offense.
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010)
- *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)

● No prior criminal convictions.

- *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)

● There was no use of forcible compulsion.
- *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)

● Participation in volunteer activities that demonstrate empathy and good character.
- *People v. Gillotti,* 23 N.Y.3d 841 (2014)

● If the SORA hearing is the result of a federal conviction, check the sentencing transcript to determine if the Judge found sufficient mitigation to warrant a non-guideline sentence and acceptance of responsibility.
- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012)

● No history of drug or alcohol abuse.
- Correction Law § 168-l (5)(a)(ii)
- *People v. Shiley,* 54 Misc. 3d 1220(A) (Co. Ct. Monroe Co. 2016)

● Sought out treatment for mental health related issues and made efforts at rehabilitation and self-improvement.
- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)

● Clinical diagnosis that defendant is neither a pedophile nor a hebephile and has no chronic and persistent sexual arousal to pubescent or prepubescent children.
- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)
- *People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009)
- Correction Law § 168-l (5)(a)(i)

● Under the totality of the circumstances, or all relevant circumstances, a downward departure is warranted.
- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. Shiley,* 54 Misc. 3d 1220(A) (Co. Ct. Monroe Co. 2016)

● Antisociality and sexual deviance have been ruled out by a clinician.
- Michael C. Seto, INTERNET SEX OFFENDERS 196 (2013)

● Clinician's expert opinion that the defendant shows lack of social and sexual maturity and functions at the level of a young teenager.
- *People v. Izzo,* 26 N.Y.3d 999 (2015)

● Acceptance of responsibility.
- *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. King Co. 2012)

● Outstanding program participation.
- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. Gillotti,* 23 N.Y.3d 841 (2014)

● Recent good behavior.

- *People v. George,* 142 A.D.3d 1059 (2d Dept. 2016)
- Correction Law § 168-l (5)(g)

● Risk factor 12 overstates risk – refusal to take SOCTP for valid reason.
- *People v. Graves,*162 A.D.3d 1659 (4th Dept. 2018)
- *People v. Thousand,* 109 A.D.3d 1149 (4th Dept. 2013) *lv denied* 22 N.Y.3d 857 (2013)
- *People v. Grigg,* 112 A.D.3d 857 (2d Dept. 2013) *lv denied* 22 N.Y.3d 19 (2014)
- *People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009)

● Defendant had been a victim of sexual abuse as a child.
- *People v. Jusino,* 11 Misc.3d 470 (Sup. Ct. N.Y. Co. 2005)

● Conditions of release that minimize risk of reoffense.
- Correction Law § 168-l (5)(c)

● Total risk factor score is at low-end of range and close to the level to which departure is sought.
- *People v. Carter,* 138 A.D.3d 706 (2d Dept. 2016)
- *People v. Filkins,* 107 A.D.3d 1069 ((3d Dept. 2013)

● Risk factor 9 overstates risk – remote convictions.
- *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010)

● Risk factor 9 overstates risk – violent conviction in name only.

● Victim chose to continue relationship with defendant into adulthood.
- *People v. Timeo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)
- *People v. Goosens*, 75 A.D.3d 1171 (4th Dept. 2012)

● Conduct while incarcerated acceptable.
- *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017)

● Completed at least one treatment program.
- *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017)

● Currently involved in an age-appropriate adult sexual relationship.
- *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010)
- *People v. Marrero,* 37 Misc. 3d 429, 441 (Sup. Ct. N.Y. Co. 2012)

● Exploited by the commercial sex industry
- *People v. Snyder,* 175 A.D.3d 1331 (2d Dept. 2019)

● Defendant suffers from an autism spectrum disorder (*See* § 5:12).

§ 5:7 VICTIM'S CONSENSUAL PARTICIPATION

The victim's consensual participation in the sexual conduct, regardless of age, is a recognized basis for downward departure both in the Guidelines (p. 9) and in case law.

Even though New York's Penal Law § 130.05 (3) deems a person incapable of consent when he or she is less than seventeen years old, it is well recognized that departure may be appropriate when the victim has willingly participated in the sexual act,

and the victim's lack of consent is due only to the legal inability to consent by virtue of age as proscribed by the statute.

The Guidelines support such a departure. "The Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety." Guidelines p. 9.

This mitigating factor is addressed in the Guidelines regarding risk factor 2, pertaining to contact offenses. However, it can be argued that the use of this mitigating factor should not be limited to instances when risk factor 2 is scored 25 points, or to instances when risk factor 2 is scored at all. Of course, such consent would have equal implications in a non-contact offense. For example, what if the 15-year-old victim consensually modeled for sexually explicit photographs? That it is not specifically addressed in the Guidelines as it relates to child pornography or non-contact offenses is easily accounted for. First, the Guidelines were written before New York had even enacted the child pornography Penal Law statutes. Second, it is the rare instance when the circumstances are such that the victim's participation in child pornography is a willing act.

There is a substantial line of cases that supports a downward departure when an underage victim is a willing participant in the sexual conduct. For more than a decade, the Fourth Department has found support for a downward departure based upon a victim's willing participation in the sexual conduct even though the victim was under the age of legal consent. This was deemed a special circumstance warranting a downward departure as early as *People v. Santiago,* 20 A.D.3d 885 (4th Dept. 2005) and has been reaffirmed as recently as *People v. George,* 141 A.D.3d 1177 (4th Dept. 2016), *People v. Walker*, 146 A.D.3d 824 (2d Dept. 2017) and *People v. Fisher,* 177 A.D.3d 615 (2d Dept. 2019). Many cases are in accord with "willing participation" as a basis for downward departure. See the list above for additional cases.

This mitigating factor is usually accepted by the courts as a basis for downward departure when presented in conjunction with other mitigating factors indicative of reduced risk to public safety, such as no evidence of forcible compulsion, no prior sex offense conviction, and enrollment in a counseling program for people who have sexually offended. *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007). In *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011), the court came close to requiring a showing of additional factors (no forcible compulsion, minimal age disparity) for the defendant to prevail on a downward departure. On the other hand, the court in *People v. Garcia,* 53 Misc. 3d 153(A) (App. Term 2d Dept. 2016) approved a downward departure to a risk level 1 based on the sole mitigating factor of the victim's willing participation in the sexual conduct as did the Second Department in *People v. Fisher,* 177 A.D.3d 615 (2d Dept. 2019).

It was error for County Court to decline to grant a downward departure on the basis that the defendant had already benefited from the victim's consent by obtaining a "light criminal sentence." The appellate court acknowledged that the criminal sentence was not an appropriate factor to be considered under the guidelines. *People v. Secor,* 171 A.D.3d 1314 (3d Dept. 2019). Although the "light sentence" apparently aggravated the judge, the

"light sentence" cannot be an aggravating factor to offset the mitigating factor and deny a downward departure. Note that in *People v. Secor* the age disparity was 10 years.

Many of the Appellate Division cases express concern that this mitigating factor may only be applicable when there is a minimal age disparity between the defendant and the victim. The less the age disparity, the more the court seems inclined to grant the downward departure. In *People v. Marsh,* 116 A.D.3d 680 (2d Dept. 2014), there was a significant age disparity about which the court expressed concern, however, the court still granted the downward departure. (Defendant was 26 years old and the victim was 15 years old.) Several cases have rejected this mitigating factor as a basis for downward departure when there was, what the court considered, too great an age disparity. In *People v. Modica,* 80 A.D.3d 590 (2d Dept. 2011), the age disparity was 25 years, and in *People v. McEvoy,* 57 Misc. 3d 1201(A) (Sup. Ct. Kings Co. 2017), the defendant was 32 years old and the victim was 16 years old. In *People v. Mejia,* 189 A.D.3d 900 (2d Dept. 2020) the Second Department rejected consent as a mitigating factor apparently because of the age disparity, and that the victim was 12 years old. Likewise, the age disparity was deemed to great where the defendant was 27 years old and the victim was 14 years old. *People v. Romulus,* 189 A.D.3d 553 (1st Dept. 2020).

The Guidelines nowhere reference a limited age disparity as the lynchpin of this mitigating factor. One might reasonably argue that a limited age disparity is not required in order to prevail on a downward departure for this mitigating factor. The limited age disparity is simply an additional factor that weighs in favor of establishing that the presumptive risk level over-assesses the defendant's risk level. In *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012), the court held that a downward departure should have been granted because the defendant's relationship with the victim was consensual, with no reference whatsoever to the age disparity, but with additional references to other mitigating factors. This case along with *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011) support an argument that where there is more than an 11-year age disparity, the victim's consent can still serve as a basis for a downward departure, if there are other factors presented that support a conclusion that there has been a point assessment that over-assesses the defendant's risk to public safety.

§ 5:8 LIVED WITH AN INTIMATE PARTNER FOR TWO OR MORE YEARS

Researchers have found that an individual's risk of sex reoffending is lessened if the individual has lived with an intimate partner for a period of more than two years. This is one of the 10 significant items on the Static-99R risk assessment instrument. The Static-99R Coding Rules, Revised-2016, includes a basic principle that addresses this factor. "Research suggests that having a prolonged intimate connection to someone may be a protective factor against sexual reoffending. On the whole, we know that the relative risk to sexually reoffend is lower in men who have been able to form and maintain intimate partnerships." Static 99-R uses the basic benchmark of "an intimate adult relationship of two years' duration." Static-99R Coding Rules p. 49. The significance of this mitigating factor and its corollary, having had an age-appropriate adult sexual relationship, are recognized in *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010) and *People v. Marrero,* 37 Misc. 3d 429, 441 (Sup. Ct. N.Y. Co. 2012).

It is important to note that several courts have held that a low risk score on the Static-99 R or any other risk assessment instrument is not enough, in and of itself, to serve as a mitigating factor to support a downward departure. *People v. Curry,* 158 A.D.3d 52, 61 (2d Dept. 2017); *People v. Rodriguez,* 145 A.D.3d 489 (1st Dept. 2016); and *People v. Cruz,* 154 A.D.3d 610 (1st Dept. 2017). However, though the Static 99-R cannot serve as a mitigating factor, the risk factors contained within it that are not duplicative of the SORA RAI can be used to support a downward departure. "Our conclusion that an offender's lower risk score on an alternate risk assessment instrument is not itself a mitigating factor that can support a downward departure does not necessarily mean that an offender cannot rely upon one or more of the individual risk factors included on such instrument to demonstrate that he or she is at a lower risk of reoffense or poses less of a danger to the community." *People v. Curry,* 158 A.D.3d 52, 61 (2d Dept. 2017). It may also be that the Static-99R can be used to counter the prosecution's request for an upward departure.

§ 5:9 CUMULATIVE IMPACT OF MITIGATION FACTORS

Courts rarely depart downward based on only one mitigating factor. With that in mind, defense counsel should not economize when it comes to alleging and proving mitigating factors. A good general rule of thumb is that the more the better, as there is a cumulative impact of mitigating factors. As noted in *People v. Williams,* 148 A.D.3d 540, 544 (1st Dept. 2017), the RAI may "fail to provide a complete picture" and the several mitigating factors may provide a complete and more compelling picture. The Third Step of the *Gillotti* analysis requires the court to determine "whether the totality of the circumstances warrants a departure." *People v. Gillotti* 23 N.Y.3d at 861.

Getting past Steps One and Two of the *Gillotti* analysis only opens the door to the court's exercise of its discretion. The court must then engage in a weighing test. This is true whether it is just the weighing of the totality of the mitigating circumstances, or whether it is the totality of the mitigating circumstances weighed against the totality of the aggravating circumstances. Defense counsel wants not only strong circumstances, but also multiple circumstances. Often it is the "abundance" of mitigating circumstance that carries the day. *People v. Shiley,* 54 Misc.3d 1220(A) (County Ct. Monroe Co. 2016). Frequently, the cumulative effect of multiple mitigating factors overcomes the court's concern about the seriousness of the offense which courts frequently use as justification for denying a downward departure, or for granting an upward departure. The passage of time, evidence of rehabilitation and transformation, and multiple mitigating factors are defense counsel's best weapons.

§ 5:10 SEXUAL RECIDIVISM DECREASES WITH ADVANCING AGE

This principle can be broken down into two distinct mitigating factors. The first mitigating factor is "advanced age." The second mitigating factor is "advancing age." Sexual recidivism decreases as a function of "advancing age" as opposed to just old age or "advanced age."

Advanced Age

Advanced age is clearly acknowledged as a mitigating factor both statutorily [Correction Law § 168-l (5)(d)] and in the Guidelines (Guideline p. 5). Research on recidivism clearly shows that advanced age puts a person at a very low risk to reoffend. Advanced age is also accepted as a mitigating factor and "may constitute a basis for a downward departure" in case law. *People v. Littles,* 155 A.D.3d 979, 980 (2d Dept. 2017) and *People v. Santiago,* 137 A.D.3d 762, 765 (2d Dept. 2016). Since both of those cases involved defendants who were respectively 49 and 42 years old at the time of their SORA hearing, and in neither case was a downward departure granted, we do not know what marks the lower limit of "advanced age." One might reasonably assume that it would be 60 years of age, at least. After age 60, recidivism rates decline dramatically. Hanson, R.K., *Does Static-99 Predict Recidivism Among Older Sex Offenders?,* 18 Sexual Abuse 343 (2006). However, even at an age of less than 60 years, one might still raise the issue of being statistically unlikely to reoffend, while still not being of an "advanced age." But *see People v. Collazo,* 179 A.D.3d 1103 (2d Dept. 2020) where the court held that the defendant failed to demonstrate that his age (55 years old) would, in and of itself, reduce the risk of reoffending.

Courts have consistently held that a defendant's advanced age (70 or older) is not a mitigating factor supporting a downward departure where the defendant was also of advanced age at the time of the sexual offense. *See People v. McFarland,* 120 A.D.3d 1121 (1st Dept. 2014); *Vandover v. Czajka*, 276 A.D.2d 945 (3d Dept. 2000); *People v. Rodriguez,* 146 A.D.3d 452 (1st Dept. 2017); *People v. Rivera,* 188 A.D.3d 609 (1st Dept. 2020) and *People v. Mota,* 165 A.D.3d 988 (2d Dept. 2018). It was not because any court determined that 70 years old was not "advanced age." The courts were dismissive of "advanced age" as a mitigating factor, reasoning that each of the defendant's underlying sex offenses was committed while the defendant was of "advanced age," thus undermining the argument of reduced risk. Obviously, the argument for a downward departure based upon "advanced age" is much stronger when the underlying sex offense occurred at a younger (not advanced) age.

This same problem arises when defense counsel argues that defendant's debilitating illness constitutes a mitigating factor warranting a downward departure. Courts have rejected this argument where many of the health problems existed at the time of the underlying offense. *People v. Rodriguz,* 179 A.D.3d 957 (2d Dept. 2020).

Advancing Age

One does not have to be of "advanced age" to be statistically subject to a reduced risk of reoffending as a result of his or her age at the time of release from prison.

Age at the time of release from prison can be an important mitigating factor. This basic concept is addressed in Static-99R Coding Rules (p. 46), which states, "The rates of almost all crimes decrease as people age. Sexual offending does not appear to be an exception. Most studies have found that older sex offenders are at lower risk to reoffend than younger sex offenders." In most of the research, the age groups are broken into age cohorts. It is in the cohort of age 40 to 59 that the risk of sexual reoffending begins to fall as one ages. The sexual recidivism is significantly greater in the cohorts aged 18 to 34.9 and 35 to 39.9. The lowest rate of reoffending is found in the cohort aged 60 and older.

Research on age and recidivism has been incorporated into the Static-99R risk assessment instrument as risk factor 1 (age at time of release [from custody]) of the 10 risk factors used in that instrument because it is a highly significant risk factor. Even though age has been determined to be a highly significant risk factor, the SORA RAI has not incorporated this factor at all.

Numerous studies have concluded that sexual recidivism declines with age. Hanson found that "there was a steady decline in recidivism rates for offenders after the age of 40 years. The five-year recidivism rates of people who sexually reoffend at over 60 years of age was 2%, compared with 14.8% for those less than 40." R.K. Hanson, *Does Static-99 Predict Recidivism Among Older Sex Offenders?,* 18 Sexual Abuse 343, 351 (2006). See also Hanson's earlier article on recidivism and age. R. Karl Hanson, *Recidivism and Age: Follow-Up Data From 4,673 Sexual Offenders,* 17 Journal of Interpersonal Violence 1046-1062 (2002).

In another study, the results indicated that people who have sexually offended and are later released from prison at an older age were less likely to recommit sexual offenses and that sexual recidivism decreased as a linear function of age-at-release. Howard E. Barbaree, Ray Blanchard & Calvin M. Langston, *The Development of Sexual Aggression Through the Life Span: The Effect of Age on Sexual Arousal and Recidivism Among Sex Offenders,* 989 ANN. N.Y. ACAD. SCI., 59, 59-71 (2003).

In a study that examined the relationship between age at the time of release and sexual recidivism, David Thornton found that "[o]verall the odds of being sexually reconvicted declined by about 0.02 with each year of increasing age." David Thornton, *Age and Sexual Recidivism: A Variable Connection,* 18 Sexual Abuse 123-135 (2006).

A 2012 multi-state recidivism study funded by the National Institute of Justice confirmed earlier research that "sexual recidivism declined with age," and the results of the study "indicate that increased age is protective of future reoffending." Kristen Zgoba, Michael Miner, Raymond Knight, Elizabeth Letourneau, Jill Levenson, and David Thornton, *A Multi-State Recidivism Study Using Stati-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act* at 4 (2012). These researchers go on to make the simple point that as people who sexually offend get older, they are less likely to be arrested for a new sexual crime, explaining that "the long-term risk posed by convicted sex offenders significantly declines with age." *Multi-State Recidivism Study* at 29.

The New York State DOCCS compiles recidivism data based upon age at the time of release. This data is based upon the aggregation of all crimes, not just sex offenses, correlated to age at time of release from prison. In the most recent compilation of data, DOCCS published the recidivism data for all releasees between 1985 – 2012. The overall recidivism rate for releasees of all ages, based on new commitments after release was 14.5%. For comparative purposes, when we look at different age cohorts the effect of aging becomes obvious. For the cohort ages 21-24, the recidivism rate was 18.6%. For the cohort 50-64 years of age, the recidivism rate falls all the way down to 6.6%. In the cohort 65+ the recidivism rate is 3.9%. The DOCCS data is consistent with national data such that recidivism rates generally decline as age of release increases. *See, 2012 Inmate Releases: Three Year Post-Release Follow-Up,* New York State DOCCS, Appendix F, Part I, p. 50.

If you are going to argue that your client's age makes him or her statistically a low risk to reoffend, and that age is a mitigating factor, there is an important practice tip buried in *People v. Santiago,* 137 A.D.3d 762, 765 (2d Dept. 2016), which warrants attention. It is not enough to merely reference the statistical data, research, and literature. It may not be enough to just cite to the literature. In *Santiago,* the court held that "these materials (published works and scientific studies) were not admitted into evidence or otherwise submitted to the Supreme Court for the SORA hearing (cf. Jerome Prince, Richardson on Evidence § 7-311 at 475-477 (Farrell 11th ed 1995)" and "[a]ccordingly…these materials constitute matter dehors the record and the defendant may not rely upon them to sustain his evidentiary burden." *People v. Santiago,* 137 A.D.3d at 765. *See also People v. Cosby,* 154 A.D.3d 789, 790 (2d Dept. 2017). You may want to submit your supporting data, literature, and research as exhibits at the SORA hearing.

§ 5:11 CHILD PORNOGRAPHY CASES – STATISTICALLY LOW RISK TO REOFFEND

The issues involved with child pornography cases and SORA proceedings are addressed in depth at Chapter 8, § 8:10 on Child Pornography. For the purpose of this section, the discussion is limited to the use of mitigating factors in SORA cases involving child pornography.

That the conviction at issue is for child pornography, in and of itself, is, of course, not a mitigating factor. However, judicial concerns about the inadequacy of the SORA RAI to accurately predict the risk of reoffense and its tendency to overstate the risk of reoffense in child pornography cases, has led courts to endorse downward departures in such cases as a way of avoiding the over-assessment of risk.

The primary concern in the case of a child pornography offense is that, by scoring the RAI with points for risk factor 3 (number of victims) and risk factor 7 (strangers), that the scoring will result in an anomaly such that low risk child pornography offenders would incorrectly be categorized as level 2 moderate risk. The Court of Appeals in *People v. Gillotti,* 23 N.Y.3d 841, 860 (2014) recognized "that the scoring of points under risk factors 3 and 7 may overestimate the risk of reoffense and danger to the public posed by quite a few child pornography offenders" and therefore encouraged the use of downward departures. The court instructed that when deciding child pornography cases, "a SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score, and without departing downward might lead to an excessive level of registration." *People v. Gillotti,* 23 N.Y.3d at 860.

While the Court of Appeals endorsed downward departure in child pornography cases, it did not dispense with the need for defense counsel to submit mitigating factors. Defense counsel must still meet Steps One and Two of the *Gillotti* three-step analysis. It is at Step Three that the Court of Appeals beckons courts to exercise their discretion to downwardly depart.

In *Gillotti,* the court found that the defendant had satisfied the first step of the departure analysis by identifying three mitigating factors that are, as a matter of law, of a kind or to a degree not adequately considered by the Guidelines. *People v. Gillotti,* 23

N.Y.3d at 864. The three mitigating factors included "the statistically low likelihood that a child pornography offender will commit hands-on offenses in the future," "completion of an anger management program," and "participation in volunteer activities reflective of his empathy and good character." *People v. Gillotti,* 23 N.Y.3d at 864. It is that first mitigating factor that is worth special attention. It is a mitigating factor common to all non-contact child pornography offenses and should be alleged as a matter of course. Not only should it be proffered in every child pornography SORA case in support of a request for a downward departure, but also the supporting data, research, and literature should be submitted to the SORA Court at the SORA hearing. Copies of the literature and studies were held to be required inclusions in defense counsel's submission to the court in *People v. Wallace,* 144 A.D.3d 775 (2d Dept. 2016), *People v. Cosby,* 154 A.D.3d at 790, *People v. Santiago,* 137 A.D.3d at 765, and *People v. Smith,* 158 A.D.3d 654 (2d Dept. 2018).

Below are some articles and research to support the proposition that child pornography non-contact offenders are statistically low risk to reoffend.

LITERATURE

Thomas H. Cohen & Michelle Spidell, *How Dangerous Are They? An Analysis of Sex Offenders Under Federal Post-Conviction Supervision,* 80(2) Federal Probation 21-32 (2016).

Erik Faust, William Bickart, Cheryl Renaud & Scott Camp, *Child Pornography Possessors and Child Contact Sex Offenders,* 27(5) Sexual Abuse: A Journal of Research and Treatment 460-478 (2015).

U.S. Department of Justice, *Sex Offender Management Assessment and Planning Initiative* (2013) p. 85.

Michael C. Seto, INTERNET SEX OFFENDERS 195 (2013).

Michael C. Seto, *Child Pornography Offender Characteristics and Risk to Reoffend,* prepared for the United States Sentencing Commission, Draft dated February 6, 2012.

Michael C. Seto, R. Karl Hanson & Kelly M. Babchishin, *Contact Sexual Offending by Men with Online Sexual Offenses,* 23(1) Sexual Abuse: A Journal of Research and Treatment 124 (2011).

Robert Wollert, Jacqueline Waggoner & Jason Smith, F*ederal Internet Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate,* Chapter X in "The Sex Offender: Current Trends in Policy and Treatment Practice, Vol. II Ed. Barbara Schwartz (2012).

Kelly M. Babchishin, R. Karl Hanson & Chantal A. Hermann, *The Characteristics of online Sex Offenders: A Meta-Analysis,* 23(1) Sexual Abuse: A Journal of Research and Treatment 92-123 (2011).

Jerome Endrass, Frank Urbaniok, Lea C. Hammermeister, Christian Benz, Thomas Elbert, Arja Laubacher & Astrid Rossegger, *The Consumption of Internet Child Pornography and Violent and Sex Offending,* 9 BMC Psychiatry 43 (2009).

Ian A. Elliott, Anthony R. Beech, Rebecca Mandeville-Norden & Elizabeth Hayes, *Psychological Profiles of Internet Sex Offenders: Comparison with Contact Sex Offenders,* 21 Sex Abuse: A Journal of Research and Treatment 76-92 (2009).

L. Webb, Jackie Craissati, & S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters,* 19 Sex Abuse: A Journal of Research and Treatment 449-465 (2007).

Anne Goller, Roland Jones, Volker Dittman, Pamela Taylor & Marc Graf, *Criminal Recidivism of Illegal Pornography Offenders, in the Overall Population – A National Cohort Study of 4612 Offenders in Switzerland,* 6 Advances in Applied Sociology 48-56 (2016).

§ 5:12 AUTISM SPECTRUM DISORDER AS A MITIGATING FACTOR

Occasionally you will represent a person who has been diagnosed with an autism spectrum disorder (ASD) for a SORA hearing. The prevalence of ASD makes this statistically likely. According to the CDC's Autism and Developmental Disabilities Monitoring Network about 1 in 54 children has been identified with ASD and it is 4 times more likely among boys than girls. This may often occur in a case involving child pornography or inappropriate touching.

Thanks to the pioneering work of Buffalo-based attorney, Mark J. Mahoney, defense lawyers around the county are now better equipped to represent clients with ASD in prosecutions for sex offenses. Mahoney's work, which provides defense lawyers with the tools to effectively advocate for diversion by convincing the prosecutor to forgo prosecution or prosecute for a non-sexual offense, is required reading for every defense lawyer working with an ASD client, whether for the purposes of a criminal defense or a SORA hearing. Though he focuses on defending the client charged with a sex offense, much can be extrapolated from Mahoney's work to apply in defending at a SORA risk level hearing.[20]

Generally, a person with ASD should not be classified at the same risk level as the neurotypical person with the same point score on the RAI. This is because such an ASD individual may not be as high a risk to reoffend and not as great a danger to public safety because of his disorder. The point score on the RAI will often over-assess his dangerousness and risk of sexual recidivism.

ASD is a mitigating factor not otherwise adequately taken into account by the guidelines, and it tends to establish a lower likelihood of reoffense or danger to the community than the presumptive risk level numerically calculated on the RAI. To adjust for this, there must be a downward departure from the presumptive risk level.

To effectively represent the client with ASD it is necessary for defense attorneys to educate themselves about this disorder to better understand their client's behavior and equip themselves to convince the judge that ASD is indeed a mitigating factor.

---

[20] Mahoney, Mark, *Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography.* Online at https://www.harringtonmahoney.com/content/Publications/AspergersSyndromeandtheCriminalLawv26.pdf. See also two chapters by Mahoney entitled "Defending Men with Autism Accused of Online Sexual Offenses" and "Neuroscience of Autism in the Legal Context" in Handbook of Autism Spectrum Disorder and the Law, Fred R. Volkmar, Rachel Loftin, Alexander Westphal and Marc Woodbury-Smith, Eds. (2021).

The task is to demonstrate how, despite the client being average or above average intelligence, autism causes characteristics that are a basis for a downward departure, and that the client is very unlikely, with appropriate therapy, to be involved in similar behavior in the future

About ASD

According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), ASD is one of the neurodevelopmental disorders that are a group of conditions with onset in the developmental period. The disorders typically manifest early in development, often before the child enters grade school, and are characterized by developmental deficits that produce impairments of personal, social, academic, or occupational functioning.[21]

Autism spectrum disorder is characterized by persistent deficits in social communication and social interaction across multiple contexts. This includes deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or activities.[22] There may be an apparent preference for solitary activities or for interacting with much younger or older people. Frequently, there is a desire to establish friendships without a complete or realistic idea of what friendship entails (e.g., one-sided friendships or friendships based solely on shared special interests.[23]

Other characteristics of ASD include:

- odd, pedantic, and monotonic speech
- poor verbal and nonverbal communication
- collector/completer
- naïve, gullible, credulous – lacking in "common sense"
- lack of inhibition
- fixation or preoccupation with certain idiosyncratic interests
- abnormalities in eye contact
- lack of facial expression
- repetitive motor movements
- insistence on sameness and difficulty adapting to change
- clumsy and ill-coordinated movements and gestures
- delay in emotional and social development – social immaturity
- being overly literal
- problem in organization and executive functioning
- overreliance on rules
- gestalt learning styles make it difficult to generalize knowledge across situations

Manifestations of the disorder vary greatly depending on the severity of the autistic condition, developmental level, and chronological age; hence, the term *spectrum*. Autism

[21] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (2013) at 31.
[22] DSM-5 at 31.
[23] DSM-5 at 54.

spectrum disorder encompasses disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder.[24]

The Effects of ASD in Context

ASD is a pervasive developmental disorder. Because it is a neurological condition that severely impairs the social learning skills of affected persons, it is often referred to as a "social learning disorder." It is important to understand how this disorder affects an individual's behavior. Beginning at birth, neurotypical individuals perceive nonverbal social cues that convey the actual meaning of social interactions. These social interactions help our minds learn how to instantly "read" other people through nonverbal cues, facial expressions, intonations, and body language. We develop the intuitive ability to conceptualize how other people feel, and what their intentions are. We can predict what others will do, and we can imagine what their experience feels like. We develop intuition as to how the social rules we learn will be applied to different situations. It is from thousands of reciprocal social interactions, from birth to adulthood, that we learn social mores, taboos, and develop "commonsense" as to what is appropriate and inappropriate behavior.

For the ASD individual there is none of that social learning input. The "mind-blindness"[25] in autism is the result of the brain filtering out the social cues essential to social competence that we take for granted and assume to be innate. Without those social learning skills, those with ASD can be completely clueless regarding social and legal taboos, especially when it comes to rules that apply to sexuality and the internet. Individuals with ASD can be oblivious to concepts such as "consent," "age of consent," and "age difference."

It is important to recognize the distinction between the sexually inappropriate behavior of a person with ASD, whose behavior is reflective of a neurodevelopmental disorder, and a neurotypical person whose behavior may be reflective of a social pathology such as a paraphilia. It is possible for a person with ASD to also have paraphilia.[26]

People with ASD have limited ability to understand the thinking and feelings of others, which further impairs their social skills and ability to understand societal norms and expectations of behavior. Some clinicians describe this as lacking "empathy." This "lack of empathy" is not meant to describe a callous or sadistic condition, and for a person with ASD it is not a personality disorder. It is a "brain-based" disorder. "Lacking empathy" is a reference to the fact that individuals with ASD have difficulty viewing the world through the eyes of others. As a result, some people with ASD don't notice when their own family members or other children are hurt, sick, angry, or sad, and they have difficulty talking about their own feelings.

---

[24] DSM-5 at 53.

[25] Baron-Cohen, Simon, Mindblindness: An Essay on Autism and Theory of Mind (1995).

[26] There are two basic categories of people with ASD who commit sexual offenses. One category offends based upon a failure to understand social and sexual norms. The other category is made up of individuals with ASD whose conduct may be caused by a paraphilia. It is important to assess and distinguish between the two for purposes of the mitigation argument as well as for treatment purpose, as each requires different treatment.

Because of their difficulty absorbing social norms, individuals with ASD may engage in socially disapproved or unacceptable behavior, with no awareness of wrongdoing or sense of how it is viewed by others. Their social isolation leaves them often with very limited sociosexual understanding, oblivious to the sexual boundaries and romantic protocols their typically developed peers take for granted.

The problem is not that these individuals do not "know right from wrong," but rather that what is regarded as right and wrong is often unwritten, untaught, and implicit, and therefore not apparent to many young people with autism whose social leaning is most severely affected.[27]

Typically described as "rule bound" by therapists and others who work with them, individuals with ASD are eager to learn the social rules of behavior needed to "fit in," and tend to strictly follow those rules once understood. This dependency on social rules is important to consider when assessing an ASD individual's risk of reoffending. The risk of reoffending for ASD individuals can be effectively addressed by education about the rules and behaviors rather than cognitive interventions and traditional treatment for people who have sexually offended. Concrete rules and explicit sex education are effective tools in preventing reoffending for ASD individuals, making them less likely to reoffend than their neurotypical counterparts who have exhibited the same criminal behavior. While neurotypical teens can evaluate social mores at large and accept them instead of learning strict legal codes, and may choose to disregard them, ASD teens must be taught specific rules because they cannot understand what makes an action socially appropriate or inappropriate. Once the rules are clearly understood, they are unlikely to reoffend.[28]

ASD and Child Pornography

The computer aptitude and competence of many ASD individuals, ready access to online pornography and the features of ASD create the "perfect storm" for criminal charges and registration requirements despite the ASD individual's lack of appreciation of the "wrongfulness" of inappropriate conduct. Some people with ASD use online pornography as a socialization tool because of their social isolation, and being socially inept

Individuals with ASD tend to have the technical skills for computer use, to which they gravitate because computers are predictable, logical, and syntax-guided, unlike social interactions. The internet provides a means of communicating with others that emphasizes technology proficiency and de-emphasizes the subtlety of social interaction, making it attractive to people with ASD.

The internet provides the opportunity for people with ASD to try to learn about sexuality and romance, two topics that neurotypical youth learn from social interactions. Their curiosity, unrestrained by social or legal taboos, can lead them to view images of "underage" children.

For both ASD individuals and their neurotypical counterparts, the path to child pornography often starts with readily accessible pornography. For the typically developed

[27] Handbook of Autism Spectrum Disorder and the Law at 77.
[28] *Id.* at 79.

young man, because of his socialization experience, when he comes across sexual images of young teens, not on "legitimate" porn sites, a "yellow flag" goes up in his mind. He may hesitate because he knows that he is nearing a boundary. If he sees images of young teens or prepubescent children engaged in sexual activity or in sexually provocative poses, a "red flag" will go up in his mind.[29]

In contrast, the young man with ASD may be oblivious to the taboos implicated and does not see the boundaries. No mental yellow or red flags go up. He may be completely unaware of any moral or legal boundaries when it comes to looking at sexual images of young adolescents or children.[30]

Failure to intuit the social taboos related to viewing child pornography explains why a "red flag" would not go up for a young man with ASD. But when typically developed persons see child pornography feelings of disgust and revulsion are the rule. One who seems to be seeking out this material appears pathologically callous to the abuse, pain, and harm it depicts. Those with ASD are simply not seeing the social attributes and implications of the entire scenes presented in these images.[31] Mahoney makes an excellent point about his experience with such cases. "Time after time in these cases the answer is the same: until asked about it after arrest, these young men likely never gave a thought to how these images came about or why they were made or how the children in them might feel about this or be hurt by it. When it is all explained to them, they are generally horrified at what they have done, even though they do not naturally display this. The disgust and revulsion experienced by the typically developed person looking at these images is not innate. It is the product of a lifetime of seeking social information, and the resulting internalization of social norms, something those with ASD have missed."[32]

Explaining Why ASD Is a Mitigating Factor

Establish that ASD should be considered a mitigating factor warranting a departure down to a risk level 1, requires following the three analytical steps set out in *People v. Gillotti*. Keep in mind that "an appropriate mitigating factor is one which tends to establish a lower likelihood of reoffense or danger in the community than the presumptive risk level calculated by the RAI." *People v. Wyatt,* 89 A.D.3d at 121.

Approach this from the perspective that autism is so different, misunderstood, or underappreciated, that if effectively explained, it can change the minds of prosecutors and judges.

Below are some suggested arguments for establishing that your client's ASD warrants the court's downward departure in order to properly assess the appropriate risk level under the circumstances.

1) The RAI was not created for, normed against, or validated for individuals with ASD. As a result, the RAI's presumptive numerical score tends to over-assess the risk level for individuals with ASD.

---

[29] *Id.* at 291.
[30] *Id.* at 291.
[31] *Id.* at 291-2.
[32] *Id. at 292*

2) The RAI may have scored the ASD individual significantly, but erroneously, higher solely due to the individual's symptomatic impairments.
3) ASD is the result of a neurological disorder that affects the functioning of the brain and is not a social pathology.
4) ASD is not a predictor of pedophilia or any other paraphilia. Rather, ASD is a neurodevelopmental disorder (brain disorder of early onset) impairing a person's ability to meet the demands of everyday life including having "street smarts." These impairments can be overcome by specific and structured education on sexual subject matters.
5) Because of the very rigid way in which many people with ASD tend to keep rules and regulations, they may well be more "law abiding" than the population generally as long as they know the "law." Once rules are explained and understood, individuals with ASD are loathe to violate the rules. Because of the rigidity associated with ASD, individuals with ASD are extremely reliable in following rules once those rules are clear, and as a result pose no meaningful risk.
6) What gets ASD young adults into legal trouble is not abnormal sexual desires, but their tendency to express or pursue normal interests in a manner outside social conventions. Once social and legal rules governing sexual conduct and interaction are explicitly explained to the individual with ASD the problem is generally solved. This is the reason why many clinicians and advocacy groups conduct sexual education and socialization training. While observing social norms does not come intuitively, they can be learned.
7) For neurotypical people, a voluminous collection of child pornography may be indicative of a sexual perversion, but that is not so for an individual with ASD. Once introduced to collecting child porn images an ASD individual may become obsessed with collecting more images. But this has more to do with their characteristic repetitive conduct than an interest in the subject matter. Like the ASD individual who obsessively collects information about a discrete subject such as a camera while having no interest in photography, it is the collection of the images and not the erotic interest in the subject matter that is the driving force.
8) ASD is not, in and of itself, a risk factor that leads to an increase in future offending.
9) A treatment program for an ASD individual that offers concrete rules and explicit instructions, and that is tailored to an individual's lifestyle and environment, is likely to be effective. Effective treatment of a person with ASD who has sexually offended requires an individualized treatment program focusing on sexuality training and education on sociosexual boundaries and tools they can use to assess social situation.[33]
10) Typical repetitive or compulsive behaviors and rigidity of thinking, common features of autism, are mistakenly associated with repeat offending.
11) ASD individuals are often incorrectly diagnosed as having an anti-social personality disorder, and as a result are incorrectly deemed to be more dangerous and more likely to reoffend. Attributing a perverse sexual motivation

[33] *Id.* at 510.

to an act, or misperception of intention, is known as "counterfeit deviance" and is recognized in the autism literature.[34]

12) In assessing the behavior of a person who has committed a sex offense it is necessary to draw a fundamental distinction between the social deficits of a person with ASD and those associated with psychopathy.
13) A characteristic of ASD is "lack of empathy" which is often mistakenly associated with risk factor # 12 and scored as a failure to accept responsibility. This same risk factor may over-assess the ASD individual's risk regarding failure to participate in treatment. Treatment programs for neurotypical individuals and group counseling are not appropriate for ASD individuals and may result in their failure to participate being perceived as a refusal.
14) The behavior of an individual with ASD while in prison may, because of the features of this disability, cause their "unsatisfactory" conduct while confined in to be overscored under risk factor #13.
15) What appears as anti-social behavior involving criminal or malicious intent to the "regular" world is often simply the manifestation of the ASD person's social misunderstanding.
16) The unique diagnosis of ASD calls upon defense counsel, prosecutors, and judges to distinguish between low and high-risk individuals and between those who may knowing offend and those who simply do not know any better.

Literature

Fred R. Volkmar, Rachel Loftin, Alexander Westphal and Marc Woodbury-Smith, Eds., HANDBOOK OF AUTISM SPECTRUM DISORDER AND THE LAW (2021).

Mark Mahoney, *Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography,* online at https://www.harringtonmahoney.com/content/Publications/AspergersSyndromeandtheCriminalLawv26.pdf.

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION (2013).

Simon Baron-Cohen, MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND (1995).

Simon Baron-Cohen, UNDERSTANDING OTHER MINDS (2013).

Amanda Sullivan and Linda C. Caterino, *Addressing the Sexuality and Sex Education of Individuals with Autism Spectrum Disorders,* 31 Education and Treatment of Children 381 (2008).

Denise C. Kellaher, *Sexual Behavior and Autism Disorders: An Update and Discussion,* 17 Current Psychiatry Reports 562 (2015).

[34] *Id.* at 264.

PRACTICE TIPS

Mahoney convincingly advocates for raising the bar for what constitutes effective representation for the client with ASD. He points out that because ASD has such a profound impact on a person's moral culpability in a sex offense case, defense attorneys must not view it as an otherwise "typical" mitigating factor that merely calls for a lesser charge or sentence. Mahoney warns that "[s]uch an approach may yield appreciable results in the form of charges and sentences, but it does not address the annihilating effects of sex offender registration for disabled persons and their families. While most attorneys have difficulty envisioning even asking for diversion in these cases, it must be the primary objective, putting aside all 'local wisdom' about what prosecutors are willing to do to accommodate those with ASD."[35]

Mahoney's approach is undoubtedly correct based upon his expertise and experience and all defense lawyers would do well to adopt this practice. However, if you have reached the point where you are facing a SORA hearing, diversion is no longer an option. At this point you must consider using ASD as a mitigating factor that justifies a downward departure to a risk level 1. Mahoney compellingly argues that treating ASD defendants the same as neurotypical defendants would result in a grave injustice. He logic of Mahoney's argument applies with equal force in SORA proceedings, and a downward departure is necessary to ensure fairness, to meaningfully assess risk, and to help avoid the more severe effects of registration.

If you are going to argue for a downward departure and one of the mitigating factors is your client's ASD or suspected ASD, you will want to engage the services of a clinical psychologist. Carefully select an expert with specific expertise in ASD. You will want your expert to provide an accurate diagnosis of autism to the court, to explain the effects of autism on the sexual offense and to assess the individual's adaptive skills. You will also want your expert to rule out pedophilia and any paraphilic interest in child pornography and the presence of antisocial personality disorder or sexual deviance. This is important because it is universally understood that the presence of antisocial features and sexual deviance are two of the most significant indicators of future offending.[36] *In addition, have your expert rule out any features of psychopathy. The expert should be able to place the sexual behavior in context as a product of ASD rather than sexual deviance. Finally, you will want your expert to explain that the treatment for your client would differ from the treatment of a person who suffers from a social pathology, and that with very specific and structured sex education there is a positive prognosis that your client to be unlikely to reoffend.*

§ 5:13 ARGUING FOR A DOWNWARD DEPARTURE

Always request a downward departure unless your client is presumptive risk level 1 and there is no request for an upward departure.

[35] *Id.* at 270-1, 287.

[36] Michael C. Seto, INTERNET SEX OFFENDERS at 196 (2013).

The first step in arguing for a downward departure is to identify and allege a factor or factors which, as a matter of law, tend to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines. *People v. Brown,* 161 A.D.3d 1201 (2d Dept. 2018). The checklist entitled "Arguments for a Downward Departure" should help identify several mitigating factors that apply to your case. (This checklist is found in Chapter 11 on Charts and Checklists.)

At the second step, the proponent of the downward departure must prove that this factor exists in the case before the court by a preponderance of the evidence. You must produce evidence, testimonial or documentary, and offer it into evidence at the SORA hearing. There are many ways to do this. You will want to accumulate all of your documentation in advance of the hearing. It might be helpful to pre-mark them as exhibits and bind them under the cover of an Exhibit Table. For tactical reasons, you may choose to submit these documents to the court and serve them on the District Attorney in advance of the hearing or submit them at the beginning of the hearing.

Below are some examples of documents that you may want to submit:

1) Defendant's affidavit
2) Attorney's affirmation
3) Prison disciplinary records
4) Prison programming records
5) Prison volunteer activities records
6) Sex Offender Counseling and Treatment Program (SOCTP) records
7) Other risk assessment instruments
8) Support letters – family, friends, employer
9) Documentation of academic enrollment and/or achievement
10) Progress in counseling programs for sex offending
11) Psychologist's assessment
12) Documentation of housing and employment
13) Treatment provider records
14) Research or literature documenting that a condition (age, non-contact offense etc.) that applies to your client makes him a low risk to reoffend

Finally, you will need to present oral argument or a memorandum of law to convince the court that, under a totality of the circumstances, the court should exercise its discretion to depart downward. Some arguments that may help you advance this proposition are as follows:

1) The mitigating factors outweigh the aggravating factors presented by the prosecution.
2) The prosecution has presented no aggravating factors to counter the mitigating factors you have presented.
3) The aggravating factors presented by the prosecution do not meet Step One or Step Two of the *Gillotti* three-step analysis.
4) In light of the mitigating factors, the presumptive risk level over-assesses the defendant's risk of reoffense and dangerousness.
5) The scoring of one or more of the risk factors results in an over-assessment of the defendant's risk of reoffense and dangerousness.

6) The override applied by the court results in an over-assessment of the defendant's risk of reoffense and dangerousness.
7) The SORA RAI does not present a complete picture of the defendant and does not account for the rehabilitation and transformation that has occurred since initial incarceration. In this regard you may want to present other information about the defendant, which may not qualify as mitigating factors, but that helps present a fuller and more complete picture of the person he or she has become.

As noted above, the mitigating factor must be one that is not adequately taken into account by the Guidelines. There is logic to this. Defense counsel should be aware of several cases that use factors already taken into account by the Guidelines to thwart a downward departure. *See People v. Collins,* 188 A.D.3d 1107, (2d Dept. 2020) citing to *People v. Robinson,* 186 A.D.3d 759 (2d Dept. 2020). In both of those cases the court used factors for which it already assessed points as a basis to deny the downward departure. Defense counsel should be prepared to argue that if the mitigating factor must be one not taken into account by the Guidelines, it certainly cannot be rejected based only on the risk factors in the RAI that have already been used to assess points.

PRACTICE TIPS

People v. Gillotti, 23 N.Y.3d 841 (2014) and People v. Wyatt, 89 A.D.3d 112 (2d Dept. 2011) are essential reading to help you master departures.

You should present mitigating factors in every case and request a downward departure in most cases. The only reason to refrain from a request for a downward departure is when your client is a presumptive risk level 1 and there is no request for an upward departure by the Board or the prosecution. Even in such a case, you should be prepared to argue for a downward departure should the judge sua sponte decide to upwardly depart. If the judge does indicate an inclination to depart upward, you should request an adjournment since you had no advance notice; this will give you have time to prepare to rebut the reason for an upward departure and to present mitigating factors to counter the judge's predisposition to depart upward.

The request for a downward departure should be made for at least three reasons. First, if you lose your argument that the total risk score should be 70 points or less, you will want to have preserved your right to move for a downward departure so as to get to a level 1. Second, if you have not moved for a downward departure and presented mitigating factors, that issue is not preserved for appeal. Third, you need to present mitigating factors and a request for a downward departure in order to fend off a request for an upward departure.

You must make a request for a downward departure and present mitigating factors or the appellate court will deem the issue unpreserved for appeal. People v. Clark, 66 A.D.3d 1366 (4th Dept. 2009), People v. Morales, 159 A.D.3d 841 (2d Dept. 2018), People v. Lin, 188 A.D.3d 1109 (2d Dept. 2020). *People v. Rodriguez,* 194 A.D.3d 864 (2d Dept. 2021).

You cannot simply rely on legal arguments to support your mitigating factors, whether in seeking a downward departure or countering an upward departure. You must establish your mitigating factors by the presentation of evidence. This may be by affidavit from your client, prison documents, risk assessments, program progress reports, research papers and literature, or other documentation. The court's departure decision can only be based on facts in the record. People v. Abdullah, 31 A.D.3d 515 (2d Dept. 2006).

Even a self-evident factor such as family support requires development if defense counsel hopes for a downward departure. A good example of a case where failure to develop and explain proved fatal is People v. Thorpe, 186 A.D.3d 629 (2d Dept. 2020) where the court rejected the defendant's family support as a mitigating factor because the defense had failed to establish the alleged family support and failed to demonstrate how having support from his family established a lower likelihood of reoffense or danger to the community. See also *People v. Medina,* 180 A.D.3d 818 (2d Dept. 2020).

An exceptional response to treatment for sexual offending is recognized by the Guidelines (at p. 7), Correction Law § 168-l (5)(f) and a legion of Appellate Division cases as a mitigating factor. The problem faced by defense counsel is that the Appellate Division has apparently never seen a case where it was satisfied that the response to treatment was exceptional. It leaves defense counsel wondering what it takes to satisfy the Appellate Division's sense of the exceptional. Their mantra on this mitigating factor seems to invariably be that "defendant failed to establish by a preponderance of the evidence that his response to treatment was exceptional." Such was the decision in People v. Gerros, 175 A.D.3d 1111 (4th Dept. 2019) *even though the sex offender treatment provider, required by the county probation department, specifically entered into her report that Mr. Gerro's response to treatment was exceptional. It is hard to know what more it would take. Since there appears to be only two reported court cases that have granted a downward departure on these grounds, both lower court cases, defense counsel should take careful note of the analysis of each. See People v. Shiley, 54 Misc. 3d 1220(a) (Co. Ct. Monroe County 2016) and People v. Rodriguez, 33 Misc. 3d 1236(A) (Sup. Ct. Kings County 2011).*

Several cases have held that the defense cannot rely upon a Static-99R risk score, or any other risk assessment instrument as a mitigating factor to support a downward departure. People v. Roldan, 140 A.D.3d 411 (1st Dept. 2016) lv denied 28 N.Y.3d 904 (2016), People v. Cruz, 154 A.D.3d 610 (1st Dept. 2017), People v. Rodriguez, 145 A.D.3d 489 (1st Dept. 2016), People v. Curry, 158 A.D.3d 52 (2d Dept. 2017). This does not mean that you should not submit the risk level score from Static-99R or any other instrument. The cases do not say it is irrelevant or that it cannot be given some weight. They simply say it is limited because it does not take into account the nature of the sexual contact or the potential harm in the event of reoffense. This should not discourage you from using the score from an alternative risk assessment instrument along with other mitigating factors or highlighting the risk factors on an alternative instrument that decrease the risk of reoffense.

If a more reliable and recognized risk assessment instrument need not be considered, what about expert testimony? In § 5:6, among the mitigating factors courts have considered are the clinical evaluations of experts and cases to that effect. Despite those cases, prosecutors may argue that that such expert testimony need not be considered, citing People v. Romulus, 189 A.D.3d 553, 555 (1st Dept. 2020) where the court stated that "we need not rely on a defendant's retained psychiatrist when determining a defendant's risk level." The court in Romulus cited to People v. Ferrer, 69 A.D.3d 513 (1st Dept. 2010). Defense counsel should be prepared to respond to this argument. First, point out that People v. Ferrer did not address the weight or consideration to be given to an expert's testimony. Second, argue that People v. Romulus is limited in its holding. Although the court did say "we need not rely on a defendant's retained psychiatrist," the court did not say the court could not or should not rely on or consider such expert testimony.

A recent decision from the Fourth Department should be noted because it goes against the trend referenced above. In People v. Chrisley, 193 A.D.3d 1422, 1425, 193 A.D.3d 1422 (4th Dept. 2021) the court held that "[w]e agree with the defendant and the court that the letter from defendant's counselor [opining that he was low risk] and the risk assessment instruments evaluations [Static-99R, STABLE-2007 and ACUTE-2007] scoring him to be the lowest risk of reoffending constituted mitigating circumstances that, as a matter of law, were of a kind or degree that were not adequately taken into account by the Guidelines. In People v. Gonzalez, 189 A.D.3d 509 (1st Dept. 2020) the court gave weight to a psychological evaluation finding the risk of reoffense "incredibly low," among other factors and departed downward. *In People v. Landa, 179 A.D.3d 432 (1st Dept. 2020) the court gave weight to an evaluating psychiatrist to depart upward.*

Don't let the judge's shortage of patience cut off your presentation of evidence in support of your request for a downward departure. Remind the judge that you have a right to fully present evidence in support of a downward departure. You may want to cite to People v. Williams, 159 A.D.3d 844 (2d Dept. 2018) wherein it was found to be reversible error for the SORA court to, sua sponte, curtail the defendant's testimony and arguments in support of his request for a downward departure. At the very least, make a record that you have more evidence and arguments to make, and that you object to being foreclosed.

§ 5:14 DEFENDING AGAINST AN UPWARD DEPARTURE

Always prepare to challenge a request for an upward departure.

There are essentially two ways to defend against an upward departure. The first way is to present mitigating factors sufficient to outweigh the aggravating factors under the totality of the circumstances. The second way is to challenge the prosecutor's aggravating factors as being either procedurally flawed or substantively inappropriate.

Listed below are some of the arguments that you can make to combat the prosecutor's request for an upward departure. A checklist with these possible arguments can be found in Chapter 11 on Charts and Checklists.

- The prosecutor has given no reason for an upward departure and has failed to identify an aggravating factor.
    - There must be "special circumstances" and an articulated "aggravating factor." Guidelines p. 4.
    - *People v. Kotler,* 123 A.D.3d 992 (2d Dept. 2014)
    - *People v. Hayward,* 52 A.D.3d 1243 (4th Dept. 2008)
    - *People v. October,* 101 A.D.3d 975 (2d Dept. 2012)
- The prosecutor, who is seeking an upward departure that was not requested by Board, and has not given the statutory 10 days' notice (Correction Law § 168-k or § 168-n) or 15 days' notice (Correction Law § 168-d) or reasons for such departure, should be precluded from making such a request, or the request should be deemed to have been waived.
    - *People v. Davilla,* 299 A.D.2d 573 (3d Dept. 2002)
    - *People v. MacNeil,* 283 A.D.2d 835 (3d Dept. 2001)
    - *People v. Neish,* 281 A.D.2d 817 (3d Dept. 2001)
    - *People v. George,* 142 A.D.3d 1059 (2d Dept. 2016)
    - *People v. Medina,* 84 N.Y.S.3d 376 (2d Dept. 2018)
    - *People v. S.G.,* 4 Misc. 3d 563 (Sup. Ct. N.Y. Co. 2004)
    - *People v. Current,* 147 A.D.3d 1235 (3d Dept. 2017)
- If preclusion is not granted for failure of the prosecution to give notice, you should at the very least ask for an adjournment in order to prepare a response.
    - *People v. Owens,* 126 A.D.3d 1512 (4th Dept. 2015)
    - *People v. Gardner,* 59 A.D.3d 604 (2d Dept. 2009)
    - *People v. Ferguson,* 53 A.D.3d 571 (2d Dept. 2008)
    - *People v. Cruz,* 132 A.D.3d 554 (1st Dept. 2015)
- The court cannot depart upward sua sponte without giving defense counsel an adjournment upon request and the opportunity to prepare a response to the contemplated upward departure.
    - *People v. Segura,* 136 A.D.3d 496 (1st Dept. 2016)
    - *People v. Maus,* 162 A.D.3d 1415 (3d Dept. 2018)
    - *People v. Hackett,* 89 A.D.3d 1479 (4th Dept. 2011)
    - *People v. Howell,* 82 A.D.3d 857 (2d Dept. 2011)
- Although the prosecutor has articulated an aggravating factor, under the facts and circumstances of this case it does not apply.
    - *People v. Robinson,* 160 A.D.3d 1441 (4th Dept. 2018)
    - *People v. Logsdon,* 169 A.D.3d 1466 (4th Dept. 2019)
- The aggravating factors alleged by the prosecutor are, as a matter of law, not of a kind or to a degree not adequately taken into account by the Guidelines. (*Gillotti* step one).
    - *People v. Gillotti,* 23 N.Y.3d 841 (2014)
    - *People v. Cardinale,* 160 A.D.3d 1490 (4th Dept. 2018)

- *People v. October,* 101 A.D.3d 975 (2d Dept. 2012)
- *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)
- *People v. Mota,* 84 N.Y.S.3d 569 (2d Dept. 2018)
- *People v. Mott,* 195 A.D.3d 756 (2d Dept. 2021)

- The aggravating factors alleged by the prosecutor are, as a matter of law, not factors which tend to establish a higher likelihood of reoffense or danger to the community.

  - *People v. Brown,* 161 A.D.3d 1201 (2d Dept. 2018)
  - *People v. Wyatt,* 89 A.D.3d 112, 121 (2d Dept. 2011)

- The prosecutor has not adduced sufficient evidence to meet the burden of proof to establish by clear and convincing evidence that the alleged aggravating circumstances actually exist in the case at hand. (Gillotti step two).

  - *People v. Gillotti,* 23 N.Y.3d 841 (2014)
  - *People v. Cardinale,* 160 A.D.3d 1490 (4th Dept. 2018)
  - *People v. Lewis,* 173 A.D.3d 913 (2d Dept. 2019)

- If the prosecution fails to satisfy steps one and two of the *Gillotti* analysis, the court does not have the discretion to depart from the presumptive risk level.

  - *People v. Mota,* 165 A.D.3d 988 (2d Dept. 2018)

- Even if the prosecution has satisfied steps one and two of the *Gillotti* analysis, the prosecutor has failed to present sufficient aggravating factors that outweigh the mitigating factors presented by the defense; consequently, the prosecutor has not established, under a totality of the circumstances test, sufficient evidence to warrant a departure to avoid an under-assessment of the defendant's dangerousness and risk of recidivism.

  - *People v. Gillotti,* 23 N.Y.3d 841 (2014)
  - *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)

- The aggravating factor or factors relied upon by the prosecution are not supported in either research or in the literature that indicate an increased risk to reoffend.

- When the prosecution argues that the familial relationship between the defendant and the victim is an aggravating factor defense counsel should use the holding in *People v. Rodriguez,* 196 A.D.3d 43 (2d Dept. 2021) to defeat this argument.

- There is case law that rejects this aggravating factor as a basis for an upward departure.

- The prosecutor has failed to comply with a discovery request related to this aggravating factor and should be precluded from presenting evidence on this factor because of a due process violation. (Failure to provide prehearing discovery is a due process violation. *See Doe v. Pataki*, 3 F.Supp.2d 456 (1998); *People v. David W.*, 95 N.Y.2d 130 (2000). However, this author is unaware of any court decisions that have precluded on this basis.)

- Although courts have accepted that, where the crime is so brutal, heinous, extreme or depraved it may amount to an aggravating factor, defense counsel should argue that in the instant case the prosecution has failed to establish that the conduct arose to that standard such that it was not adequately taken into account by the Guidelines. *People v. Murray,* 184 A.D.3d 882 (2d Dept. 2020).

- The prosecutor's argument for upward departure based on defendant's mental illness is without basis where there is no causal relationship between the mental illness and increased risk to sexually reoffend.

  - *People v. Robinson,* 160 A.D.3d 1441 (4th Dept. 2018)
  - *People v. Zehner,* 24 A.D.3d 826 (3d Dept. 2005)
  - *People v. Grady,* 81 A.D.3d 1464 (4th Dept. 2011)
  - *People v. McKelvin,* 127 A.D.3d 440 (1st Dept. 2015)
  - *People v. Burgos,* 39 A.D.520 (2d Dept. 2007)
  - *People v. Perkins,* 35 A.D.3d 1167 (4th Dept. 2006)
  - *People v. Jamison,* 96 A.D.3d 1237 (3d Dept. 2012)
  - *People v. Diaz,* 100 A.D.3d 1491 (4th Dept. 2012)
  - *People v. Logsdon,* 169 A.D.3d 1455 (4th Dept. 2019)

- An assessment by your forensic psychologist, psychiatrist, or treatment provider concludes that the person is a low risk to reoffend. This should be sufficient to prevent the prosecution from meeting the clear and convincing evidence standard for an upward departure.

  - *Vandover v. Czajka,* 276 A.D.2d 945 (3d Dept. 2000)

- An assessment by your forensic psychologist or psychiatrist rules out antisociality or sexual deviance, two of the most significant indicators of risk of recidivism, thus combating proof by clear and convincing evidence.

  - Michael C. Seto, INTERNET SEX OFFENDERS 196 (2013)

- An assessment by your forensic psychologist or treatment provider concludes that defendant does not exhibit a predatory pattern.

  - *Vandover v. Czajka,* 276 A.D.2d 945 (3d Dept. 2000)

- The aggravating factors used to justify the upward departure were ones for which the person was already assessed points. They are aggravating factors already taken into account by the Guidelines.

  - *People v. Cohen,* 73 A.D.3d 1003 (2d Dept. 2010)
  - *People v. Lyons,* 72 A.D.3d 776 (2d Dept. 2010)
  - *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011)
  - *People v. Mount,* 17 A.D.3d 714 (3d Dept. 2005)
  - *People v. Cardinale,* 160 A.D.3d 1490 (4th Dept. 2018)
  - *People v. Foley,* 35 A.D.3d 1240 (4th Dept. 2006)
  - *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)
  - *People v. Logsdon,* 169 A.D.3d 1466 (4th Dept. 2019)

- The aggravating factors relied upon by the prosecution are not "probative on the issue of the defendant's risk of reoffense."
    - *People v. Cohen,* 73 A.D.3d 1003 (2d Dept. 2010)
    - *People v. Lyons,* 72 A.D.3d 776 (2d Dept. 2010)
    - *People v. Wyant,* 86 A.D.3d 754 (3d Dept. 2011)
- The aggravating factor relied upon by the prosecution is not sufficiently weighty to warrant an upward departure and a departure would overvalue the gravity of the facts on which it is based. The aggravating factor does not indicate that the presumptive risk level would result in an underassessment of the risk of sexual reoffense.
    - *People v. Barody,* 54 A.D.3d 1109 (3d Dept. 2008)
    - *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)
- Defendant's total risk factor score placed him at the extreme low end of level 2 and so an upward departure would be an improvident exercise of discretion.
    - *People v. October,* 101 A.D.3d 975 (2d Dept. 2012)
    - *People v. Aguilar,* 92 A.D.3d 401 (1st Dept. 2012)
- The prosecution cannot rely upon a charge that was ultimately dismissed for an upward departure (unless they can independently prove the facts by clear and convincing evidence). However, reliance on *People v. Coffey* seems to be undermined by the Court of Appeals cryptic decision in *People v. Britton,* 31 N.Y.3d 1019 (2018), a case in which the court held that even though the jury acquitted the defendant of certain felony sexual conduct, that same conduct could be used by the SORA court to find that the conduct occurred for the purposes of risk factor 2 by clear and convincing evidence.
    - *People v. Coffey,* 45 A.D.3d 658 (2d Dept. 2007)
- In a child pornography case in which the prosecution argues that the court should follow the Board's recommendation for an upward departure, this should be refuted by using the *Gillotti* analysis and rejection of the Board's 6/1/12 Position Statement. See Chapter 8, § 8:10 on Child Pornography and SORA.
- Prosecution's argument that the defendant's "danger to the community" is an aggravating factor has been rejected by the courts.
    - *People v. Grady,* 81 A.D.3d 1464 (4th Dept. 2011)
- Commission of uncharged sex crimes can be an aggravating factor warranting an upward [*see People v. DeWoody,* 127 A.D.3d 831 (2d Dept. 2015 and *People v. Patel,* 192 A.D.3d 1052 (2d Dept. 2021)]. Defense counsel should argue, where appropriate, that the prosecution has failed to prove those uncharged crimes by clear and convincing evidence. *People v. Pittman,* 179 A.D.3d 955 (2d Dept. 2020) and *People v. Torres,* 176 A.D.3d 1125 (2d Dept. 2019).

- Where the prosecution has argued for an upward departure based upon the defendant's criminal history, defense counsel should argue that this factor was adequately taken into account by the risk assessment instrument. *People v. Pittman,* 179 A.D.3d 955 (2d Dept. 2020).

PRACTICE TIPS

You must oppose the request for an upward departure by the Board or the prosecution or it will not be preserved for appellate review. People v. Staples, 37 A.D.3d 1099 (4th Dept. 2007), People v. Jardin, 57 A.D.3d 229 (1st Dept. 2008), People v. Nater-Vazquez, 94 A.D.3d 1572 (4th Dept. 2012).

A defense contention on appeal that an upward departure was not warranted because of certain mitigating factors will be deemed unpreserved for appellate review if not raised at the SORA hearing. People v. Davis, 166 A.D.3d 820 (2d Dept. 2018).

If the prosecutor has failed to provide the statutory notice of 10 or 15 days, and has not indicated that they seek a different determination than was requested by the Board (whether on a risk factor point score, or on a departure), you must object to a late request. You should argue that the prosecutor waived the right to make such a request and should be precluded from doing so. Cases to support your motion to preclude are listed above. Failure to raise an objection to a request for an upward departure without proper notice will be deemed waived on appeal. People v. Charache, 9 N.Y.3d 829 (2007).

If the prosecutor is relying on literature or research for an upward departure or is simply following the Board's recommendation for an upward departure based upon the literature referenced in the Policy Statement pertaining to child pornography, be sure to check the literature, critique it, and submit research to the contrary. For an example of a court's appropriate skepticism of the literature relied upon in the Board's Position Statement, see People v. Marrero, 37 Misc. 3d 429, 440-443 (Sup. Ct. N.Y. County 2012).

§ 5:15 COURT'S DETERMINATION ON DEPARTURE MUST PROVIDE A BASIS FOR GRANTING OR DENYING

All three of the SORA hearing statutes require the court to issue an order with specificity. "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." Correction Law §168-n (3), §168-k (2), and § 168-d (3). *People v. Kraeger,* 27 A.D.3d 1160 (4th Dept. 2006). This applies to all the decision-making for the SORA proceeding, be it a risk factor, override, designation, or departure.

Appellate courts initially interpreted these statutes to require that these findings of fact and conclusions of law be set forth in a written order. The rule was straightforward. If there were no findings of fact and conclusions of law in the written order, the appellate court would hold the order to be insufficient and make the determinations itself, if the

record was sufficient, or remit to the lower court. *People v. Smith,* 11 N.Y.3d 7978 (2008), *People v. Leopold,* 13 N.Y.3d 923 (2010).

Apparently once appellate courts realized how difficult it was for the SORA judges to actually prepare a written order that contained findings of facts and conclusions of law, and how frequently judges failed to do so, the interpretation of the statutes' requirements was relaxed. It now appears to be the accepted rule that the requirement that the SORA court issue an order containing findings of facts and conclusions of law is satisfied by a written order, oral findings of fact and conclusions of law made on the record at the SORA hearing, or a combination of both, so long as they combine to set forth findings of facts and conclusions of law that support the court's determinations. *People v. McCabe,* 142 A.D.3d 1379 (4th Dept. 2016), *People v. Kennedy,* 79 A.D.3d 1470 (3d Dept. 2010).

Appellate courts have repeated the rationale for requiring findings of fact and conclusions of law, whether in the written order or in the hearing record. The reason is quite practical. Meaningful appellate review of the SORA court's determinations as to the defendant's risk level, risk factor point scores, overrides, designations, and departures "is not possible" without the court "setting forth…the findings of fact and conclusion of law on which the determination is based." *People v. Sanchez,* 20 A.D.3d 693, 695 (3d Dept. 2005), *People v. Torchia,* 39 A.D.3d 1137 (3d Dept. 2007).

SORA court determinations granting an upward departure will be reversed and remitted when the judge fails to set forth findings of fact and conclusions of law on which the judge based a decision to depart. *People v. Flax,* 71 A.D.3d 1451 (4th Dept. 2010), *People v. Villane,* 17 A.D.3d 336 (2d Dept. 2005), *People v. Hubel,* 70 A.D.3d 1492 (4th Dept. 2010).

Likewise, SORA court determinations denying a downward departure will be reversed and remitted when the judge fails to set forth finding of fact and conclusions of law upon which the judge based a denial of the defense request to depart. *People v. Burke,* 68 A.D.3d 1175 (3d Dept. 2009), *People v. Filkins,* 107 A.D.3d 1069 (3d Dept. 2013), *People v. Ramos,* 167 A.D.3d 787 (2d Dept. 2018).

On occasion, a SORA court will simply ignore the request for a downward departure, providing no determination, and failing to address the merits of the application. Appellate courts have found such judicial inaction to be error and have reversed. In *People v. Darrah,* 153 A.D.3d 1528 (3d Dept. 2017), the SORA Court "failed to address defendant's request for a downward departure." The Appellate Division reversed and remitted. In *People v. Ramos,* 167 A.D.3d 787, 788 (2d Dept. 2018), the appellate court held that it was error for the SORA court to deny the defendant's application for a downward departure as premature, without addressing the merits, and that if the defendant satisfied the first two steps of the *Gillotti* departure analysis, "the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an over-assessment of the defendant's dangerousness and risk of sexual recidivism." *See* also *People v. Powell,* 173 A.D.3d 1228 (173 A.D.3d 1228 (2d Dept. 2019) and *People v. Conrad,* 193 A.D.3d 1187 (3d Dept. 2021). In *People v. Conrad* the hearing court implicitly denied the downward departure without reasons. On appeal it was remitted.

The standardized form order is not sufficient. As the court pointed out in *People v. Delles,* 19 A.D.3d 1434 (4th Dept. 2021), "[t]he standardized form order merely lists the court's risk factor point assessments, identifies without elaboration the factors supporting an upward departure, and denies in conclusory fashion defendants request for a downward departure. That is plainly inadequate to fulfill the statutory mandate." The case was remitted. *See* also *People v. Gattling,* 188 A.D.3d 1765 (4th Dept. 2020) and *People v. Kwiatkowski,* 150 N.Y.S.3d 903 (3d Dept. 2021).

Note that the SORA court must also make findings of fact and conclusions of law as to the assessment of points on each individual risk factor. *People v. Smith,* 11 N.Y.3d 797 (2008), *People v. Villane,* 17 A.D.3d 336 (2d Dept. 2005)

Chapter 6

DESIGNATIONS

CHAPTER 6 SECTIONS

§ 6:1 Definitions

§ 6:2 Consequences of a Designation

§ 6:3 Effective Date

§ 6:4 Sexually Violent Offender – Correction Law § 168-a (7)(b)

§ 6:5 Predicate Sex Offender – Correction Law § 168-a (7)(c)

§ 6:6 Sexual Predator – Correction Law § 168-a (7)(a)

§ 6:7 Burden of Proof

§ 6:8 Appeal, Relief from Registration and Modification

Chapter 6
DESIGNATIONS

On March 11, 2002, amendments to SORA became effective that were mandated by federal law. Included among the changes, were requirements that the Board and SORA courts adopt the use of the designation of three new categories. The three categories are sexual predator, sexually violent offender, and predicate sex offender. Correction Law § 168-a (7).

The Board is required to make a recommendation to the sentencing court as to whether a person warrants the designation of any of the three categories. Correction Law § 168-l (6).

The sentencing court is required by three different statutes to make a determination whether a person is a sexual predator, sexually violent offender, or a predicate offender. The three statutes that impose this requirement are Correction Law § 168-n (3) (applicable to jailed defendants), §168-k (2) (applicable to defendants from any other jurisdiction), and § 168-d (3) (applicable to defendants released by the court to probation or discharged upon payment of a fine, conditional discharge or unconditional discharge).[37]

Only if the court is following the procedures applicable to jailed defendant's pursuant to Correction Law § 168-n must the designation be made prior to the person's release. Correction Law § 168-n (1).

§ 6:1 DEFINITIONS

The definitions for the three designations are found in Correction Law § 168-a (7).

"Sexual predator" means a "sex offender" who has been convicted of a sexually violent offense defined in Correction Law § 168-a (3) who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent behavior.

"Sexually violent offender" means a "sex offender" who has been convicted of a sexually violent offense defined in Correction Law § 168-a (3).

"Predicate sex offender" means a "sex offender" who has been convicted of an offense set forth in Correction Law § 168-a (2) or (3) when the offender has been previously convicted of an offense set forth in Correction Law § 168-a (2) or (3).

[37] Note that for the purposes of SORA, probation is defined as a sentence imposed pursuant to Article 65 of the Penal Law and includes a split sentence. Correction Law § 168-a (12). For that reason, a person serving a split sentence will be subject to the procedures of Correction Law §168-d (3) and not Correction Law §168-n (3).

§ 6:2 CONSEQUENCES OF A DESIGNATION

None of the three designations will have any effect on the individual's risk level. However, designation does affect duration of registration and verification as follows:

1) Regardless of the risk level determination made by the court, whether level 1, 2, or 3, the duration of registration and verification for a person who is designated as a sexual predator, a sexually violent offender, or a predicate sex offender is life. Correction Law § 168-h (2).

2) A person designated as a sexual predator is required to personally verify their address every 90 days for life, as is a person determined to be a risk level 3. Correction Law § 168-f (3).

§ 6:3 EFFECTIVE DATE

The process of designation only applies to people who appear for an initial SORA hearing on or after March 11, 2002. Correction Law § 168-h (2). There is no authority to designate a person who was released prior to March 11, 2002. *People v. Thornton,* 16 A.D.3d 1169 (4th Dept. 2005) *lv denied* 5 N.Y.3d 702 (2005). In addition, the designations will not apply to hearings conducted after March 11, 2002, if the defendant was included in the plaintiff class in *Doe v. Pataki,* 3 F. Supp. 2d 456 (S.D.N.Y. 1998).[38]

If the hearing is a redetermination proceeding held pursuant to the stipulation in *Doe v. Pataki*, even though held after March 11, 2002, the court making the redetermination cannot consider or make a determination on the issue of designation.[39] In several cases involving redetermination hearings held long after the March 11, 2002, effective date, the SORA courts' determinations that a defendant should be designated were reversed. *People v. Johnson,* 130 A.D.3d 454 (1st Dept. 2015) and *People v. Velez,* 100 A.D.3d 847 (2d Dept. 2012).

A petition for modification does not open the designation process for a person who was not designated prior to March 11, 2002. It might also be argued that if a SORA court failed to designate a person at their initial SORA hearing held after March 11, 2002, they cannot subsequently be designated during a modification proceeding on the theory that the designation can only be made prior to the time the person is released from incarceration. Correction Law §168-n (1).

If you are involved with a case where the initial SORA hearing occurred prior to March 11, 2002, you may be confused by a designation known as "sexually violent predator." This terminology was repealed with the enactment of the three designations discussed in this chapter. A prior designation as a "sexually violent predator" has no bearing on lifetime registration nor does it have any bearing on a subsequent designation in any of the three designation categories enacted in 2002. The initial statutory definition

---

[38] The Bill enacting the procedures for designations made clear to whom it would apply, stating that it "shall apply to sex offenders for whom an initial risk level determination has not been made prior to such effective date (3/11/2002) or who, on the effective date of this act, are not members of the plaintiff class in the U.S. District Court, Southern District of New York case entitled DOE V. PATAKI, Index Number 96 CIV 1657 (DC)." (L. 2002, ch 11, § 24 [c]).

[39] The Stipulation of Settlement in *Doe v. Pataki* dated June 2, 2004, in paragraph "13" specifically provides that at a redetermination proceeding "[t]he court shall neither consider nor render a determination on the question of whether the plaintiff shall be designated a sexual predator, sexually violent offender or predicate sex offender. The court order shall indicate that it is a redetermination proceeding pursuant to the Stipulation."

of "sexually violent predator" meant "a person who has been convicted of a sexually violent offense defined herein, or a sex offender defined herein who suffers from a mental abnormality that makes such person likely to engage in predatory sexual conduct." (Correction Law § 168-a (7). In 1999 that definition was amended to mean "a sex offender for whom the risk of repeat offense is high and there exists a threat to the public safety as determined pursuant to paragraph (c) of subdivision six of section one hundred sixty-eight – L of this article." (Correction Law § 168-a (7) as amended in 1999). *People v. David W.,* 95 N.Y.2d 130 (2000) is an example of a case in which the old term "sexually violent predator" was used.

§ 6:4 <u>SEXUALLY VIOLENT OFFENDER – CORRECTION LAW § 168-a (7)(b)</u>

For the purposes of SORA, a "sexually violent offender" means a person who has been convicted of a sexually violent offense defined in Correction Law § 168-a (3). Correction Law § 168-a (7)(b).

The definition in Correction Law § 168-a (3) breaks down into two sections, pertaining to convictions for New York offenses and convictions for offenses in other jurisdictions. Correction Law § 168-a (3)(a) lists all the offenses that are considered to be sexually violent offenses under the New York Penal Law. Correction Law § 168-a (3)(b) addresses convictions from other jurisdictions and explains under what two circumstances a foreign conviction will be considered a sexually violent offense for purposes of New York SORA.

To determine whether your client's New York conviction subjects him to be designated as a sexually violent offender, you must carefully consider whether the conviction is on the list of qualifying offenses in Correction Law §168-a (3)(a)(i, ii or iii). This list should be reviewed carefully because occasionally an offense is assumed to be a sexually violent offense when it is not. Do not allow the court or prosecutor to confuse this issue by using the definition of violent felony offense found in Penal Law § 70.02 (1). A good example of how this kind of error can occur is found in *People v. Slotman,* 112 A.D.3d 1332 (4th Dept. 2013). Mr. Slotman was convicted of Rape in the Second Degree (Penal Law § 130.30), a violent felony. The SORA court erroneously designated Mr. Slotman a "sexually violent offender." Fortunately, this error was caught on appeal. Although Rape in the Second Degree is a violent felony and is also a "sex offense" as defined in Correction Law §168-a (2)(a)(i), the appellate court correctly pointed out that "the (SORA) court incorrectly designated him a 'sexually violent offender' inasmuch as he was not convicted of a sexually violent offense within the meaning of Correction Law §168-a (7)(b)." A further lesson can be drawn from *Slotman.* At his SORA hearing, Mr. Slotman's counsel failed to challenge the erroneous designation as a "sexually violent offender." As a result, as the appellate court pointed out, the "defendant failed to preserve that contention for our review." Good fortune was smiling on Mr. Slotman. The appellate court took pity on him and modified the order to correct the improper designation. Do not rely on such good fortune. Preserve issues such as this for appeal.

Apparently confusing or simply failing to distinguish between a "sexually violent offense" and a "violent felony offense" is a common error for both prosecutors and judges. Defense counsel must be alert to the difference between the two. Not all violent felony offenses of a sexual nature are "sexually violent offenses" and may simply be "sexual

offenses." This was the cause of the SORA court's error in *People v. Shaynak,* 178 A.D.3d 1105 (2d Dept. 2019), and the improper designation was corrected on appeal. The defendant was convicted of Kidnapping in the second degree, a class B violent felony. The SORA Court jumped to the incorrect conclusion that it must be a sexually violent offense without checking the Correction Law and so designated the defendant. However, Kidnapping in the second degree is not among the listed offenses under the definition of "sexually violent offense" in Correction Law § 168-a (3), but is instead listed under the definition of "sex offense" in Correction Law § 168-a (2).

It is a bit more challenging to determine whether a conviction from a foreign jurisdiction qualifies as a sexually violent offense. The two alternative definitions of a "sexually violent offense" for purposes of SORA are set forth in Correction Law § 168-a (3)(b):

> *A conviction of an offense in any other jurisdiction which includes all of the essential elements of any such felony provided for in paragraph (a) of this subdivision, or conviction of a felony in any other jurisdiction for which offender is required to register as a sex offender in the jurisdiction in which the conviction occurred.*

The "essential elements" test to be applied for SORA purposes is not the strict equivalency standard that the courts have applied when determining whether a conviction in a foreign jurisdiction qualifies as a predicate violent felony for purposes of sentencing as a second violent felony offender pursuant to the "essential elements" test of Penal Law § 70.04 (1)(b)(i). It is a different "essential elements" test despite the same terminology. For the purposes of SORA, it is a more relaxed test. The distinction between the two tests was explained by the Court of Appeals in *Matter of North v. Board of Examiners of Sex Offenders of State of N.Y.,* 8 N.Y.3d 745 (2007). The court explained that, unlike the "essential elements" test for the purposes of enhanced sentencing, where the court looks to determine if the elements of the offense in the foreign jurisdiction are virtually identical to the elements of the comparable New York State offense, for the purposes of SORA the "essential elements" test only "requires registration whenever an individual is convicted of criminal conduct in a foreign jurisdiction that, if committed in New York, would have amounted to a registrable New York offense." *Matter of North v. Board of Examiners of Sex Offenders of State of N.Y.,* 8 N.Y.3d at 753. In other words, the "essential elements" test is satisfied when the "conduct underlying the foreign conviction… is, in fact, within the scope of the New York offense." *Matter of North,* 8 N.Y.3d at 753.

For SORA purposes, the "essential elements" test as outlined in *Matter of North* requires a two-step analysis:

Step 1

Compare the statute in the foreign jurisdiction with the analogous New York statute. Compare the elements of each to identify points of overlap. If "the two offenses cover the same conduct, the analysis need procced no further for it will be evident that the foreign jurisdiction is the equivalent of the registrable New York offense for SORA purposes." *Matter of North,* 8 N.Y.3d at 753.

Step 2

In circumstances where the two statutes overlap but the foreign statute also criminalizes conduct not covered under the New York statute, the defendant's actual conduct underlying the foreign conviction must be reviewed "to determine if that conduct is, in fact, within the scope of the New York offense. If it is, the foreign jurisdiction is a registrable offense under SORA's essential elements test." *Matter of North,* 8 N.Y.3d at 753.

It is not sufficient for the prosecution to merely provide the court with a copy of the out-of-state statute that was the basis for the foreign conviction and identify an analogous New York statute if the elements are not identical. The prosecution must provide proof of the underlying facts of that case. The SORA court cannot conduct the "essential elements" analysis without proof of the conduct underlying the out-of-state conviction; as a result, the prosecution invariably fails to prove by clear and convincing evidence that the defendant's out-of-state conviction was the equivalent of a New York offense. *People v. Crews,* 127 A.D.3d 491 (1st Dept. 2015). Where the prosecution lacks the facts underlying the conviction in the foreign jurisdiction, it cannot serve as a basis for registration in New York. No points can be assessed for that conviction, nor can it serve as a basis for a designation or an override unless it meets the alternative definition for "sex offense" [Correction Law § 168-a (2)(d)(ii)] or "sexually violent offense" [Correction Law § 168-a (3)(b)] in another jurisdiction. In *People v. Burden,* 176 A.D.3d 524 (1st Dept. 2019) the court applied the essential elements test to conclude that the Connecticut conviction for sexual assault in the fourth degree did not meet the essential elements test of New York's sexual abuse in the first degree and held that the defendant was not required to register as a sex offender in New York on the basis of his Connecticut misdemeanor conviction.

The alternative definition for an out-of-state "sexually violent offense" is more problematic. It requires the defendant have been convicted of any felony (not limited to a violent felony) in any other jurisdiction for which he is required to register as a sex offender in the other jurisdiction where the conviction occurred. Since it does not require that the felony be a violent felony, it seems odd that the legislature would have decided to make this a "violent sex offender" designation. This appears to be a legislative drafting error. Apparently, the drafters mistakenly took the identical definition for a "sex offense" in Correction Law § 168-a (2)(d)(ii) and repeated it for a "violent sex offense" in Correction Law § 168-a (3) (b) (second phrase). This obviously makes no sense. This legislative error was identified in the *Report of the Advisory Committee on Criminal Law and Procedure to the Chief Judge of the Courts of the State of New York 2021*, recommending the removal of this alternative definition for out-of-state "violent felony offenses."[40] Unfortunately, the Legislature has not yet acted on this recommendation although corrective legislation was introduced in the 2021-2022 legislative session in the Senate (S2896) and in the Assembly (A8256).

[40] "The Committee believes that the likely intention was to reserve the more serious 'sexually violent offense' category to out-of-state convictions under statutes that match the elements of sexually violent felonies under New York law, and that situation is covered by the first part of Correction Law section 168 (3)(b). The second part of the sentence, which tracks the language of section 168-a (2)(d)(ii), was presumably included in error. This measure therefore corrects that error by deleting the errant phrase." Report at 128-9.

The issue of whether this alternative definition should be used by courts to condemn a person who moves from another state to the designation of "sexually violent offender" simply because they were convicted of a felony in another jurisdiction for which registration is required was decided in the affirmative in a split 3-2 decision by the Fourth Department in *People v. Talluto.* 2022 NY Slip Op 00575 (4th Dept. 2022).

The Board has recognized this problem, perhaps acknowledging the legislative flaw, and does not recommend that a person be designated a "violent sex offender" under this test, and only does so if the person meets the "essential elements" test. Such was the case in *People v. Macchia,* 126 A.D.3d 458 (1st Dept. 2015). The Board did not recommend to the SORA court that the defendant be designated as a "sexually violent offender," apparently because his Florida conviction did not meet the essential elements test. The Board did not apply the felony registration test. The court disagreed with the Board's recommendation and designated the defendant as a "sexually violent offender" because of his Florida felony conviction for which he was required to register in that state. In *People v. Bynum,* 140 A.D.3d 501 (1st Dept. 2016), the court applied both tests to conclude that the defendant should be designated as a "sexually violent offender."

If your client's foreign conviction does not meet the essential elements test, the Board will likely not recommend a designation. The prosecutor and the court may rely upon the Board and overlook the alternative test for foreign convictions. If they do not inject the *People v. Macchia* analysis into the SORA proceeding, you should remain silent.

Since the Board will likely not recommend a "sexually violent offender" designation unless the foreign conviction meets the "essential elements" test, if the prosecution seeks this designation based on the felony registration test, they are required to give notice to the defendant of their intention to seek a determination that differs from the Board at least ten days prior to the SORA proceeding. Correction Law § 168-n (3). Failure to provide this notice may be deemed a waiver or may warrant preclusion. At the very least it should provide the basis for a request for an adjournment for defense counsel to adequately prepare to address this issue. See Chapter 7, §7:9 on Preclusion and Waiver.

There is a question that remains. Can the SORA court, sua sponte, order a designation, even though neither the Board nor the prosecution recommended it? This issue was addressed in *People v. Medina,* 165 A.D.3d 1184 (2d Dept. 2018). Even the prosecution conceded that the SORA court had erred in, sua sponte, designating the defendant as a sexual predator, and the appellate court deleted the designation, reasoning that "the defendant was never afforded an opportunity to be heard on the issue of whether he should be so designated." *People v. Medina,* 165 A.D.3d 1184 (2d Dept. 2018). It still leaves open the question of whether a sua sponte designation is improper per se, or whether it is only improper if the SORA court fails to give the defendant the opportunity to be heard on the issue of designation.

Once it is determined that a person meets the definition of a "sexually violent offender," does the court have the discretion to refrain from making that designation? The answer seems to be no, the court does not have that discretion, unlike the court's discretion to depart. In *People v. Lockwood,* 308 A.D.2d 640 (3d Dept. 2003), the court adopted a "definitional approach" and held that the SORA court does not have the

discretion to refuse to make a designation, in that case a designation of "sexually violent offender."

People v. Lockwood should not be read to mean that a court cannot refuse to designate upon a request, but instead that if the court is satisfied that the prosecution has met its burden of proof as to all the elements of the definition, that it must designate. The court still has the responsibility to hold the prosecution to its burden of proving the qualifying conviction and, if the conviction is from another jurisdiction, proof that either the "essential elements" test is satisfied or that a felony conviction requiring registration has been established by clear and convincing evidence.

Whether this non-discretionary definitional approach is limited only to the "sexually violent offender" designation was answered in *People v. Bullock,* 125 A.D.3d 1 (1st Dept. 2014). In that case, the court first applied the "essential elements" analysis to determine whether the defendant's North Carolina conviction conduct for sexual battery was covered by New York' sexual abuse in the first degree, a sexually violent offense. Once the court concluded that the "essential elements" test had been satisfied, thus meeting the definition of "sexually violent offender," it went on to conclude that "there is nothing in the language of the Correction Law that states that the court has discretion not to designate as sexual predators, sexually violent offenders or predicate sex offenders those defendants who meet the respective statutory definitions." *People v. Bullock,* 125 A.D.3d at 7. The court held that once the definition is satisfied, designation is not discretionary.

§ 6:5 PREDICATE SEX OFFENDER – CORRECTION LAW § 168-a (7)(c)

For the purposes of SORA, a predicate sex offender means a person who has been convicted of an offense set forth in subdivision two or three of Correction Law § 168-a when that person has been previously convicted of an offense in those same two subdivisions. Those two subdivisions are the definitional sections for a "sex offense" and a "sexually violent offense."

As with the definition of a "sexually violent offender," it is very important to double check that the offense serving as the predicate is indeed among the offenses listed as a "sex offense" or "sexually violent offense." *People v. Verdelli,* 44 Misc. 3d 144(U) (App. Term, 1st Dept. 2014) is a case on point. The SORA court designated the defendant as a "predicate sex offender," apparently based upon a prior conviction for forcible touching of an adult, Penal Law § 130.52, which is not included on the statutory list as a "sex offense" or a "sexually violent offense." The Appellate Term vacated the designation.

Another example of a SORA court's erroneous reliance upon an improper predicate offense is found in *People v. Lancaster,* 128 A.D.3d 786 (2d Dept. 2015). The SORA court relied upon a prior conviction by a military tribunal to serve as the predicate and to designate the defendant as a "predicate sex offender." The appellate court held that this was error and deleted the designation, finding that the military conviction did not qualify to meet the definition of a "sex offense" as defined in SORA.

If the prosecution has failed to establish by clear and convincing evidence that prior to the instant conviction that is the subject of the SORA hearing the defendant had been convicted of a sex offense or sexually violent offense, the designation is improper. *People v. Hatton,* 72 Misc. 3d 141(A) (App. Term, 2d Dept. 2021).

It seems beyond argument that a defendant may be designated as a predicate sex offender based upon a conviction in a foreign jurisdiction where the individual was convicted of an offense that includes all the essential elements of an offense that is subject to registration in New York. *People v. Kruger,* 88 A.D.3d 1169, 1170-1171 (3d Dept. 2011).

In *People v. Smith,* 175 A.D.3d 572 (2d Dept. 2019) the prosecution convinced the SORA court to designate the defendant as a predicate sex offender based upon a 1983 Michigan conviction for breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct in the second degree. The Appellate Division ruled that the designation was improper. The court reasoned that, in order for the prior out-of-state conviction to be considered as the predicate offense. "the offense in the other jurisdiction must include all of the essential elements of a crime enumerated as a 'sex offense' or 'sexually violent offense' in the Correction Law or must require registration as a sex offender in the jurisdiction in which the conviction occurred." *People v. Smith,* 175 A.D.3d at 573. In this case the Michigan conviction was equivalent to New York's Burglary in the second degree which is neither a "sex offense" nor a "sexually violent offense," and the prosecution did not rely on the Michigan conviction as constituting a sexually motivated felony. In addition, the Michigan conviction was not considered by that state to be a sex offense requiring registration as a sex offender in Michigan.

In *People v. Anderson,* 53 Misc. 3d 144(A) (App. Term, 1st Dept. 2016) the appellate court held that the SORA court had erred when it designated the defendant as a "predicate sex offender" based upon a New Jersey conviction of criminal sexual contact. Apparently, the prosecution failed to meet its burden of proof in establishing that this conviction met the requisite definition. The court found that it was "unclear" whether the New Jersey offense met the "essential elements" test or if the defendant was required to register as a sex offender in New Jersey because of his conviction in that state.

The takeaway from these cases is that it is important to be attentive to detail. Although courts must make a "definitional approach" to designations, and do not have the discretion not to designate if the definition is met, it is incumbent on defense counsel to meticulously review whether the predicate offense meets the definition of "sex offense" or "sexually violent offense," whether it is a prior conviction in New York or in any other jurisdiction.

§ 6:6 SEXUAL PREDATOR – CORRECTION LAW § 168-a (7)(a)

A "sexual predator" means a person who has been convicted of a sexually violent offense as defined in Correction Law § 168-a (3) and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses.

There are three key elements to this definition to be carefully considered. First, and most straightforward, is to determine if the conviction qualifies under Correction Law § 168-a (3) as a sexually violent offense. Second, the prosecution must prove that the defendant suffers from a mental abnormality or personality disorder. Mental abnormality has a very specific definition found in Correction Law § 168-a (8). Third, the prosecution must prove that the mental abnormality or personality disorder makes the defendant "likely to engage in predatory sexually violent offenses." The term "predatory" is defined in Correction Law § 168-a (9) as an act directed at a stranger, or a person with whom a

relationship has been established or promoted for the primary purpose of victimization. It is reversible error for a SORA court to designate a person as a sexual predator when the statutory definition has not been met. *People v. Briscoe,* 172 A.D.3d 1788 (3d Dept. 2019) and *People v. Stein*, 194 A.D.3d 1201 (3d Dept. 2021).

Defense counsel should vigorously hold the prosecution to it burden of proof to establish all of these elements. In this regard, *People v. Moore,* 32 A.D.3d 692 (1st Dept. 2006) is very helpful. In *Moore,* the court held that a designation of "sexual predator" cannot be made without the requisite diagnosis of mental disease.

Two important points should be made in this regard. First, if there is no clinical report, the prosecution cannot prevail on this designation. Second, even if the prosecution has a clinical diagnosis, that is only step one. You will want to engage your own expert to refute the prosecutor's contention that the defendant suffers from a mental abnormality or personality disorder that make him or her likely to engage in predatory sexually violent offenses. When it comes to dueling experts, it should be very difficult for the prosecution to meet its burden of proof by clear and convincing evidence in light of the holding in *Solomon v. New York,* 146 A.D.2d 439, 440 (1st Dept. 1989) that clear and convincing evidence "means evidence that is neither equivocal nor open to opposing presumptions." See Chapter 8, §8:1 on Burden of Proof.

§ 6:7 BURDEN OF PROOF

The prosecutor bears the burden of proving that the defendant meets the definition of any category of designation by clear and convincing evidence. This standard is set by the SORA proceedings statutes [Correction Law §§ 168-n (3), 168-k (2), and 168-d (3)]. Each of these statutes requires that the prosecution "shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence." Since a designation is one of the determinations required to be made by the court as part of a SORA proceeding, it is subject to the clear and convincing standard.

One of the few cases to address the burden of proof in the context of a designation did so without specific reference to the burden of proof. In *People v. Anderson,* 53 Misc. 3d 144(A) (App. Term 1st Dept. 2016), the court held that the SORA court had erred when it designated the defendant as a predicate sex offender because it was "unclear" whether he met the definitional criteria as a predicate based upon his New Jersey conviction. It would seem a fair interpretation of this case that the court was applying the clear and convincing evidence burden of proof by vacating the designation based upon its finding that it was "unclear" whether the New Jersey offense contains the essential elements of a New York offense that is subject to registration or that the defendant was required to register as a sex offender in New Jersey. Finding evidence "unclear" seems to be the court's way of saying that the prosecution's evidence was not clear and convincing.

§ 6:8 APPEAL, RELIEF FROM REGISTRATION AND MODIFICATION

Appeal of a designations as well as all other determinations made by a judge during a SORA proceeding, such as risk level and override, are appealable as of right from an order setting forth the determinations pursuant to Articles 55, 56, and 57 of the CPLR. This right to appeal is statutory. Correction Law §§ 168-n (3), 168-k (2), and 168-d (3). No case has been identified in which the court directly addressed the appealability of a designation, perhaps because the answer is obvious, and no one has challenged the appeal

of the other party on that basis. However, there are any number of cases in which a designation, or failure to designate, has been raised on appeal and been addressed on its merits in the Appellate Division. In *People v. Lockwood,* 308 A.D.2d 640 (3d Dept. 2003), the prosecution successfully appealed the SORA court's denial of their request to designate the defendant as a sexually violent offender. The defendant has similarly prevailed on appeal when challenging an improper designation by the SORA court. *People v. Medina,* 165 A.D.3d 1184 (2d Dept. 2018), *People v. Moore,* 32 A.D.3d 692 (1st Dept. 2006), and *People v. Urbanski,* 74 A.D.3d 1882 (4th Dept. 2010).

Relief from registration provided for in Correction Law § 168-o (1) is not available to any person designated as a sexual predator, sexually violent offender, or a predicate sex offender. Although this relief is available to any person classified as a level two risk, the statute specifically excludes any designated person from this relief.

Modification of a prior order of a SORA court is controlled by Correctional Law § 168-o (2), (3) and (4). A designation is for life (unless vacated on appeal) and the designation itself may not be modified. A modification is limited to a review of the "level of notification." A designation does not have any effect on the level of notification. A person who is designated, whose level of notification is a risk level 2 or 3, may still seek to modify the risk level downward, despite the designation. However, even if they are successful with modifying their risk level downward, they will still be subject to lifetime registration and verification. See Chapter 8, § 8:8 on Modification.

PRACTICE TIPS

If the prosecutor seeks a designation that was not recommended by the Board, this is a determination for which the prosecutor must give ten days' notice pursuant to Correction Law § 168-k (2) or § 168-n (3). If you do not receive this notice timely, you should prepare to ask the court to preclude the prosecution's request for the designation, and if you do not prevail on preclusion, you should request an adjournment to prepare a response. The court's failure to grant the adjournment is then preserved for appeal, as well as the preclusion issue. See Chapter 7, §7:9 on Preclusion and Waiver.

If you receive no notice at all from the prosecution prior to the proceeding, you will not be able to make your motion for preclusion prior to the hearing. However, you should anticipate a request for a designation or an upward departure and have a memorandum of law available to submit on the issue of notice and preclusion. If you received notice, but the notice is not timely, you will want to make a strategic decision as to whether to make your motion to preclude in advance of the proceeding or on the day of the hearing.

As explained above, courts do not have the discretion to deny a designation if the prosecution has proven that the circumstances meet the definition of either sexual predator, sexually violent offender, or predicate sex offender. That does not mean that designations should be given short shrift by defense counsel. It is important to be attentive to details, whether it is to review if a conviction is included on the list of *"sex offenses" or "sexually violent offenses" or to carefully examine if a conviction from a foreign jurisdiction actually qualifies to be treated as a "sex offense" or*

"sexually violent offense" under the essential elements test or the "felony required to register in the other jurisdiction" test.

According to Correction Law § 168-a (3) (b), a conviction from a foreign jurisdiction may result in the designation as a "sexually violent offender" in one of two ways. First, under the "essential elements" test, and second, if the conviction was for "a felony in any other jurisdiction for which the offender is required to register as a sex offender." It is important to be aware that the Board has refrained from using the second test, apparently questioning its logic. It does seem questionable that any felony, even a non-violent sex offense, can serve as the basis for a "sexually violent offender" designation. This has not stopped prosecutors and courts from embracing this illogic. Be aware of the different approaches as you might want to strategically plan with this in mind. Defense counsel should also be aware of the Court of Appeals decision in People v. Diaz, 32 N.Y.3d 538 (2018). In Diaz the court held that if a defendant is required to register for a felony committed in a foreign jurisdiction, but not "as a sex offender," SORA does not apply. In the case of Diaz, the offense was the murder of a juvenile which had no sexual component.

It is likely that you will want to consult with an expert in the event that the prosecution is seeking a designation of your client as a "sexual predator." Since the prosecutor will rely upon a diagnosis of your client as suffering from "a mental abnormality or personality disorder," you will want your expert to refute that diagnosis. In addition, to prevail, the prosecutor will have to prove though an expert, or through prior clinical evaluations, that this mental abnormality or personality disorder "makes him or her (the defendant) likely to engage in predatory sexually violent offenses." You will want your expert to rule this out. In People v. Linton, 94 A.D.3d 962 (2d Dept. 2012), the court found that "a defendant in a SORA proceeding may be entitled to an expert upon a court's finding that expert services are necessary (see County Law § 722-c)." In Linton, the expert being considered was a psychiatrist. The court went on to affirm the denial of the appointment of the expert by the SORA court because the "defendant did not establish that appointment of an expert was necessary." People v. Linton, 94 A.D.3d at 963; see also People v. Medina, 165 A.D.3d 1184 (2d Dept. 2018). In Linton and Medina, both cases apparently involved a request for an expert psychologist or psychiatrist for the generalized purpose "to assist him in seeking a downward departure." These two cases can readily be distinguished as involving generalized and not specifically necessary requests. When facing a "sexual predator" designation, where the lynchpin of the designation is an expert diagnosis, the argument that the appointment of an expert is necessary is very strong. If possible, you may want to ask your proposed expert to assist you with an affirmation explaining why an expert is necessary when the "sexual predator" definition and diagnosis is to be addressed.

Chapter 7

TOOLS FOR DEFENDING A SORA CASE

CHAPTER 7 SECTIONS

§ 7:1 Obtaining Documents

§ 7:2 Discovery

§ 7:3 Authorization for Release of Documents

§ 7:4 Subpoena

§ 7:5 Request an Adjournment

§ 7:6 Request a Provisional Order

§ 7:7 Nunc Pro Tunc Order – Credit for Time on Registry in Another State

§ 7:8 Responding to Inadequate Notice by Statement from the Prosecution

§ 7:9 Motion to Preclude or Prosecution's Right to Be Heard Be Deemed Waived

§ 7:10 Accepting an Adjournment

§ 7:11 Sua Sponte Ruling by the Court

§ 7:12 Submission to the Board

§ 7:13 Appeal

§ 7:14 Principles of Appeals in SORA Cases

§ 7:15 Reconsideration

Chapter 7
TOOLS FOR DEFENDING A SORA CASE

There are several legal tools or procedures that can be used by defense counsel to address issues as they arise during a SORA case. This chapter will address a few of the tools that can be used to help resolve some of the most common problems and circumstances.

§ 7:1 OBTAINING DOCUMENTS

A lack of documentary evidence and information about a client invariably places a defense attorney at a disadvantage when trying to formulate arguments against the prosecution's proposed scoring of any particular risk factor on the RAI, or the prosecution's attempt to invoke an override, designation, or upward departure. A dearth of documents also makes it difficult for defense counsel to establish mitigating factors that support a downward departure.

There are several ways a defense attorney can obtain documents necessary to adequately represent a client at a SORA hearing including discovery, subpoena, or a written authorization.

§ 7:2 DISCOVERY

Although in some counties discovery is seldom used, there is substantial authority for the use of pre-hearing discovery in SORA proceedings grounded in both due process protections and in the SORA statutes (Correction Law §§ 168-n (3), 168-d (3), 168-k (3) and 168-m).

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Within two years of the enactment of SORA, a federal court in the Southern District of New York was called upon to determine what process the defendant is due in the context of a SORA risk classification hearing. In *Doe v. Pataki,* 3 F. Supp. 2d 456 (SDNY 1998), the court held that there were seven due process procedures that were required.[41] Among the required procedures is that "the offender must be given pre-hearing discovery of the evidence on which the Board's risk level recommendation is based." *Doe v. Pataki,* 3 F. Supp. 2d at 472. "[A] classification hearing can take place only after a registrant has received 'extensive pre-hearing discovery' of all papers, documents, and other material relating to his proposed level and manner of notification." *Doe v. Pataki,* 3 F. Supp. 2d at 472. The seven procedural requirements for a SORA hearing have been accepted by New York courts. *People v. Wells,* 138 A.D.3d 947 (2d Dept. 2016); *People v. Gutierrez-Lucero,* 103 A.D.3d 89 (2012); *People v. Black,* 33 A.D.3d 981 (2d Dept. 2006). In particular, the due process requirement of pre-hearing discovery has been recognized and

[41] The seven procedures required by due process for a SORA hearing are: 1) a hearing before a court and a judicial determination of the risk level, 2) notice of the classification hearing sufficiently in advance to prepare a challenge, 3) notice of the purpose of the proceeding, 4) representation by counsel, 5) pre-hearing discovery, 6) proof by the state of the facts supporting each risk factor by clear and convincing evidence, and 7) a right to appeal.

reaffirmed. "In an initial risk level determination, where the People carry the burden, the due process rights of a petitioner include, among other things, prehearing discovery." *People v. Lashway,* 25 N.Y.3d 478, 483 (2015). In *People v. Baxin,* 26 N.Y.3d 6 (2015), the Court of Appeals recognized that due process entitled a defendant in a SORA proceeding "to broad discovery of the evidence that is used against him in order to defend himself." *People v. Baxin,* 26 N.Y.3d at 11.

In *Baxin,* it was disclosure of the grand jury minutes that was sought by the defense. In the context of the issues in that case, the Court of Appeals held that "the failure to disclose the grand jury minutes was a due process violation." *People v. Baxin,* 26 N.Y.3d at 11. Defense counsel should be mindful that when seeking grand jury minutes, there is a requirement that the requester must establish "a compelling and particularized need for them." *People v. Robinson,* 98 N.Y.2d 755 (2002).

From the decision in *Doe v. Pataki,* it is clear that due process requires the disclosure of all materials relied upon by the Board in making its recommendation. The same due process protections bind the prosecution to disclosure of materials in their possession. In *People v. Baxin,* 26 N.Y.3d 6 (2015), the Court of Appeals made clear that the documents in the possession of the prosecution relating to the risk level must be disclosed.

> *Although the statute may not expressly state that defendant is likewise entitled to any materials submitted by the District Attorney in meeting its burden of establishing the facts supporting a risk level determination by clear and convincing evidence, the same due process concerns are presented in that context. Moreover, broad disclosure is consistent with Doe's recognition that an offender should be accorded discovery "of all papers, documents, and other material relating to his proposed level and manner of notification." (3 F Supp 2d at 472).*

People v. Baxin, 26 N.Y.3d at 10.

In addition to the due process basis for defense counsel's request for pre-hearing discovery, the Correction Law entitles the defendant to pre-hearing access to materials that are relevant to the risk level determination. *People v. Baxin,* 26 N.Y. 3d at 10. The same requirements set out in §168-n for people returning home from prison for their hearings are also found in Correction Law §§ 168-d (3) and 168-k (2) regarding SORA proceedings for people on probation or moving from other states. All three of these SORA statutes require that the prosecution provide "reasons" for the determinations sought, and that "materials may be obtained by subpoena if not voluntarily provided." It is axiomatic that these "reasons" carry with them the requirement of providing the underlying documentation for the reasons. As the court recognized in *People v. Ferguson,* 53 A.D.3d 571 (2d Dept. 2008), what must be disclosed is the "factual predicate" for the recommendation. "Indeed, the factual predicate for the Board's recommendation is the heart of the RAI, which frequently provides the ground upon which a defendant may find a basis to challenge a recommendation. This necessarily implicates the exact risk factor categories under which points are assessed." *People v. Ferguson,* 53 A.D.3d at 572. The

statute also contemplates that the documents will be voluntarily provided. Finally, it is clear from Correction Law § 168-m that the defendant is entitled to any documents received by the Board, even if the records were previously sealed. Several cases have held that the seven due process requirements set forth in *Doe v. Pataki,* including pre-hearing discovery, "have been incorporated into Correction Law § 168-n (3)." *People v. Black,* 33 A.D.3d 981, 982 (2d Dept. 2006) and *People v. Gutierrez-Lucero,* 103 A.D.3d 89, 98 (2d Dept. 2012).

Although the SORA statutes do not explain how this pre-hearing discovery is to be effectuated, a simple written demand to produce by defense counsel to the prosecution should be sufficient. A sample of a basic Demand for Disclosure is included in Chapter 12 on Sample Documents. The demand should be served on the prosecution sufficiently in advance of the hearing to make the date by which production of documents is demanded coincide with the statutory date by which the prosecution must provide a "written statement setting forth the determinations sought" and "reasons." The requested date of disclosure should therefore be 15 days in advance of the hearing for a Correction Law §168-d (3) proceeding and 10 days for a Correction Law § 168-k (2) or § 168-n (3) proceeding.

§ 7:3 AUTHORIZATION FOR RELEASE OF DOCUMENTS

Defense counsel should not rely solely on the documents accumulated by the Board or the prosecution. The defense investigation should be broader than that of the prosecution. Since a defense attorney is in a position to get signed authorizations from the client, there is a wide array of documents that can be obtained and reviewed. Not all of these documents will be helpful, but defense counsel will want to be forewarned as to what the potential harmful evidence is. Some of the documents that defense counsel might want to obtain with an authorization are:

- DOCCS Sex Offender Counseling and Treatment Program (SOCTP) records
- DOCCS disciplinary records
- DOCCS medical records
- DOCCS program assignments and progress reports
- DOCCS Chronological Entry Sheet
- DOCCS risk and needs assessments
- Treatment records
- OMH records
- Psychiatric records
- Medical records

If defense counsel has any concerns about the assessment of points for risk factor 13 (conduct while confined), all disciplinary records should be requested and reviewed. These records may help to explain and mitigate disciplinary actions for relatively minor matters. Among the disciplinary records that defense counsel wants to review are:

- Inmate Disciplinary History
- Disciplinary Hearing Disposition Rendered
- Hearing Record Sheet
- Inmate Misbehavior Report

- Case Data Worksheet
- Superintendent Hearing Disposition Rendered
- Fight Investigation Form
- Inmate Injury Report
- Current Sanctions Report

For all DOCCS records the request and authorization should be sent to the Inmate Records Coordinator's (IRC) Office at the prison where the client is confined. The one exception is for SOCTP records. For SOCTP records the request and authorization should be sent to the IRC at the prison where the client participated in the SOCTP. Those records stay at the prison where the treatment occurred. Before a request is made, a call to the IRC to confirm their request procedure is advisable. If you are seeking records for a client who has already been released, many of the records will no longer be stored at the prison, but instead should be sought from DOCCS central office in Albany.

For the release of the records of the Board a written request along with a signed authorization by the defendant is likely not enough.[42] It will require a judicial subpoena.

§ 7:4 SUBPOENA

The three SORA hearing statutes [Correction Law §§ 168-d (3), 168-n (3) and 168-k (2)] make the same provision for defense counsel to obtain materials using a subpoena. "Such materials may be obtained by subpoena if not voluntarily provided to the requesting party." In most instances defense counsel will make use of a judicial subpoena duces tecum because documents of a department or bureau of the state are being sought. This will require following the procedure set out in CPLR § 2307. Keep in mind that this is a civil proceeding and the recent statutory changes with regard to the use of subpoenas in criminal cases effective January 1, 2020, do not affect civil proceedings.

A sample of a judicial subpoena is included in Chapter 12 on Sample Documents.

§ 7:5 REQUEST AN ADJOURNMENT

It is not unusual for defense counsel to be rushed by the judge to go forward with the SORA proceeding even though there has not been sufficient time to prepare. With as little as two weeks' notice, it is the expectation of some judges that counsel must be ready for the SORA hearing. In many cases this is simply not adequate time. Defense counsel should not hesitate to ask for an adjournment, carefully make a record of the request, and explain the need for the adjournment. The request for an adjournment is strengthened when more time is needed to obtain the documents that are guaranteed by due process.

The argument for an adjournment should be predicated on the SORA statutes as well as due process. In a case where the court has failed to provide notice of the hearing in compliance with the statute, this should be pointed out as a basis for an adjournment. By statute the defendant is entitled to 20 days' notice in the case of a Correction Law § 168-n(3) proceeding, 30 days' notice in the case of a § 168-k (2) proceeding, and 45 days' notice in the case of a § 168-d (3) proceeding. If the prosecution has failed to provide timely

[42] In a telephone conference with the Chairperson of the Board, this author was informed that the Board would not voluntarily comply with a request for documents even with an authorization executed by the defendant. This despite the pronouncements of the Court of Appeals that such documents are required by due process and the apparent intent of Correction Law § 168-m that such documents be provided.

"statement," "reasons," or disclosure of documents, this should be pointed out as an additional basis for the adjournment. Finally, the SORA statutes' provisions for an adjournment should also be used to support the adjournment. Each of the three SORA proceedings statutes similarly state:

> *Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations….*

Where the defendant is entitled to certain documentary disclosure as a matter of due process, it is a denial of due process to deny an adjournment to the defense in order to obtain such documents. *See* the dissent of Judge Spain in the Appellate Division decision in *People v. Lashway,* 112 A.D.3d 1235, 1242 (3d Dept. 2013). The SORA court should be reminded that "[t]he need for expediency cannot overshadow the fact that a critical decision [is] being made about defendant…." *People v. David W.,* 95 N.Y.2d 130, 139 (2000). Although the Court of Appeals excused a denial of an adjournment to obtain records under the unique facts of *People v. Lashway,* 23 N.Y.3d 478 (2015), it has been held that "the court abused its discretion by denying defendant's second request for a brief adjournment in order to obtain documentation from the Department of Corrections and Community Supervision that was relevant to the determination of his risk, especially with regard to the issue of downward departure." *People v. Cameron,* 114 A.D.3d 522, 523 (1st Dept. 2014).

§ 7:6 REQUEST A PROVISIONAL ORDER

On occasion, a judge will try to leverage the defendant to withdraw a request for an adjournment and proceed immediately with the hearing by threatening that if the hearing is adjourned, it will be adjourned past the defendant's release date, and the defendant cannot be released until an order regarding the risk level is entered. This type of coercion has thwarted many requests for an adjournment and undermined the will of a number of defendants to resist the recommended risk level of the Board or the prosecutor. What can defense counsel do about this practice?

For this arm-twisting to work, it requires the judge to convince the defendant that without completion of the SORA hearing, the defendant cannot be released at his or her upcoming scheduled release date. Many defendants will succumb to this game of release roulette. Some judges honestly believe this when they say it to the defendant, and others are aware of the ruse. Defense counsel often does not know if the threat is real. But there is a way to call the bluff.

Defense counsel should first bring to the judge's attention that there is a provision in the SORA statutes that specifically provides for the release of a defendant during the pendency of a SORA proceeding. Correction Law § 168-l (8) provides that "[w]here a court is unable to make a determination prior to the date scheduled for a sex offender's discharge, parole, release to post-release supervision or release, it shall adjourn the hearing until after the offender is discharged, paroled, released to post-release supervision or released, and shall then expeditiously complete the hearing and issue its determination." If that gets the judge's attention, there is still a second hurdle. DOCCS will typically not release a person to any form of parole supervision without a risk level

determination. However, DOCCS will accept a provisional order, and so step two is to ask the judge for a provisional order. A provisional order temporarily sets a registrant's risk level but stays any internet posting until a final determination is made of the actual risk level.

Provisional orders are frequently used in some jurisdictions. In other jurisdictions, they are flatly rejected or have simply never been considered. A copy of a provisional order that has commonly been used can be found in Chapter 12 on Sample Documents. Have a provisional order with you when you go to the hearing if you anticipate either a problem with getting an adjournment or the hearing extending beyond the client's release date.

This issue has been addressed in the *Report of the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York, January 2019.*[43] The Committee recognized that "[c]ourts have issued such temporary risk levels in multiple cases" and recommended that "Article 6-C of the Correction Law be amended to provide for provisional sex offender risk-level orders" to avoid detention by DOCCS beyond the scheduled date for release.

§ 7:7 *NUNC PRO TUNC* ORDER – CREDIT FOR TIME ON REGISTRY IN ANOTHER STATE

When registrants move from another state to New York, and if they were convicted of an offense that requires registration in New York, they are required to notify DCJS of their new address within 10 days of establishing residence in New York. This will trigger a SORA hearing pursuant to Correction Law § 168-k. Such a hearing commonly arises in one of two contexts. One context involves people who were convicted in another jurisdiction such as in Federal Court or Military Court, who have served their sentence, and are returning to their home in New York. In that case they have not previously been on the registry in another state. A second context under Correction Law § 168-k occurs when people have been convicted in another state and have been placed on that other state's registry for some period of time. They then move to New York. Defense counsel needs to proceed with care in this latter situation.

The client will be surprised to learn that the duration of time on the registry varies from one state to another. New York is not bound by the risk level or duration of time required by the other state. *People v. Arotin,* 19 A.D.3d 845 (3d Dept. 2005). The length of time a person is required to be on another state's registry may be far less than that in New York. Clients will also be dismayed to learn that even if they had been discharged from the registry in their home state, they could have to go back on the registry in New York for an additional period of time. *People v. Hlatky,* 153 A.D.3d 1538 (3d Dept. 2017). Clients will then want to know if they will receive credit for the time that they were on the registry in the state from which they just moved.

The controlling statute seems to be Correction Law § 168-h. For a person who is a risk level 1 and is not designated, the period of registration is "twenty years from the initial date of registration." That still leaves open the question as to whether "initial" means as first registered in the sister state, or as first registered in New York. DCJS legal counsel takes the position that for people who move from another state after being on that

[43] Online at https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-CriminalLaw.pdf at pp. 14-18.

other state's registry, their 20 years time period starts to run all over again upon registration in New York. For DCJS, the term "initial" means registering for the first time in New York. However, if the New York SORA court's risk level order includes an order that the time on the registry in a sister state should be credited towards the 20 years in New York, DCJS will honor that order. SORA courts have frequently issued such *nunc pro tunc* orders, and defense counsel should not hesitate to ask for such credit.

When defense counsel asks the court to credit the time on the registry from another state, the request should be supported by several arguments as follows:

1) It has become a commonly accepted judicial practice.

2) The Supreme Court in Rensselaer County has addressed this issue and issued an unreported decision. In that case, the court held that the registrant was entitled to credit for the time he was on the registry in Florida towards the 20 years he was required to be on the registry in New York, as his "initial date of registration" started while in Florida. *Matter of James Hubert v. Michael C. Green, as the Executive Deputy Commissioner of the NYS DCJS,* Index No. 258275 (Sup. Ct. Rensselaer Co. Sept. 7, 2018). Available at https://www.ocbaacp.org/wp-content/uploads/2018/09/Hubert-v-Green.Decision-and-Order.pdf. The reasoning of the court was as follows:

   > *The Court has reviewed the statute and finds that "initial date of registration" is not defined (Article 6-C Sex Offender Registration Act §§ 168-168-w). That being said, the language at issue is unambiguous. The word "initial" is commonly understood to mean and is defined as "placed at the beginning: first" (see Merriam-Webster Online Dictionary, [https://www.merriamwebster.com/dictionary/initial]). Thus, "initial date of registration" must mean the first time a convicted sex offender registers as a sex offender with the required state and local authorities.*

3) The court in *People v. McGarghan,* 83 A.D.3d 422 (1st Dept. 2011) indirectly addressed this issue. McGarghan was required to be on the registry in his home state of Vermont for 10 years as a level 1 and challenged the 20 years that New York imposed on him. The Court rejected the challenge to the 20 years but seemingly pointed with approval to the fact that Supreme Court of New York County "gave defendant full credit toward the 20-year period for all the time that he had been registered in Vermont, as well as the time in which he had registered in New York while these proceedings were pending." *People v. McGarghan,* 83 A.D.3d at 423.

4) Receiving credit for time spent on another state's registry is permitted under Federal law. New York's SORA, like almost all state registration laws, was enacted and amended in response to Federal legislation that required all states to establish registries for people convicted of sex offenses. One such Federal law was the Jacob Wetterling Crimes Against Children and Sexually Violent

Offender Registration Act (the "Wetterling Act"). On January 5, 1999, the Office of the Attorney General, through the U.S. Department of Justice, issued Guidelines, published in the Federal Register, for the implementation of the Wetterling Act as amended by Megan's Law, the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, and section 115 of the General Provisions of Title I of the Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1998. Those Guidelines addressed the durational requirements of registration and the issue of a registrant moving from one state to another as follows:

> *If a portion of the applicable registration period has run while the registrant was residing in another state, a new state of residence* ***may give the registrant credit for that period.*** *For example, if a person required to register for 10 years under the Act's standards has lived for six years following release in the state of conviction, another state to which the registrant moves at that point does not have to require registration for more than the four remaining years.*[44]

A sample memorandum of law is found in the chapter 12 on Sample Documents.

Once defense counsel has convinced the SORA court to credit the defendant with time on the registry in a sister state, this needs to be communicated to DCJS or DCJS will simply treat the registration duration as starting from the time the defendant entered New York. To secure the time credit, defense counsel should suggest to the court that the best way to ensure that the time is credited is for the judge to write the time credit on the short form order provided by the Board and also on the order that is sent to DCJS Registry Unit by the court. Here is some proposed language that courts have used:

> *This order is nun pro tunc to _____, 20__, that is, from the initial date of registration by the defendant in the State of _____, so as to credit the defendant's time on the registry in the State of ____ towards the time he is required to be on the registry in New York.*

§ 7:8 RESPONDING TO INADEQUATE NOTICE BY STATEMENT FROM THE PROSECUTION

The prosecution is required to provide the defendant and the court with a statement setting forth "the determinations sought by the district attorney together with the reasons for seeking such determinations." Correction Law §§ 168-n (3), 168-k (2) and 168-d (3). "[T]he plain language of the statute now requires notice if the People's recommendation on *any* determination differs from that of the Board, including the determinations of any particular risk factor." *People v. S.G.,* 5 Misc. 3d 563 (Sup. Ct. N.Y. Co. 2004). This includes determinations of each risk factor score, override, designation, and departure.

The procedure is slightly different for a person who has been sentenced to probation [Correction Law § 168-d (3)] than it is for a person who has been sentenced to straight

[44] *Megan's Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended,* 64 Fed. Reg. 2 at 578 (January 5, 1999).

incarceration [Correction Law § 168-n (3)] or a person moving to New York from another state [Correction Law § 168-k (2)]. For Correction Law §§ 168-n and 168-k proceedings, the statement required of the prosecution must be provided 10 days in advance of the hearing. Because these proceedings will have a recommendation from the Board and a Board-prepared RAI, the District Attorney is only required to give the statutory statement "if the district attorney seeks a determination that differs from the recommendation submitted by the board." For a Correction Law § 168-d (3) proceeding, the prosecution must provide its written statement 15 days in advance of the hearing. Because there is no Board recommendation in probation cases, the prosecution must provide the statutory statement for all determinations that it seeks.

It is not uncommon for the prosecution to fail to give a statement of all the determinations that it seeks that are contrary to the determinations recommended by the Board, or for the statement not to be provided in timely fashion. It is also not uncommon for the prosecution to fail to ask for a conditional upward departure if the court assesses the defendant with fewer points than the prosecution expected and ends up as a level lower than the prosecution anticipated. Defense counsel must be prepared to capitalize on the prosecution's shortcomings and protect the rights of the defendant. "A defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment." *People v. Griest,* 143 A.D.3d 1058, 1059 (3d Dept. 2016). This includes notice of the proposed assessment of points for each of the fifteen risk factors. *People v. Ferguson,* 53 A.D.3d 571, 572 (2d Dept. 2008).

Defense counsel should vigorously insist on the prosecution's strict compliance with the statutory notice requirement. This includes compliance with timeliness and content. Late notice is insufficient. And notice that does not sufficiently provide the reasons for the determination sought, and the documents upon which the reasons are based is not sufficient. "The fact that petitioner had some notice, rather than none at all, in advance of the…hearing is irrelevant; the issue is the adequacy of that notice…because petitioner is entitled to not only *timely* notice, but also *informative* notice, detailing the charges against him." *People ex rel. Levy v. Walters,* 87 A.D.3d 620 (2d Dept. 1982). In *Levy v. Walters,* at issue was notice of the charges for a parole violation. Information about the scoring of a risk factor carries no less of a notice requirement. "Notice which is insufficient to provide defendant with a meaningful opportunity to respond is tantamount to no notice." *Marciano v. Goord,* 2006 N.Y. LEXIS 2656, at 23-24 (Sup. Ct. N.Y. Co. 2006).

What is defense counsel to do when the prosecution has given inadequate notice in the statement they are required to provide? There are basically two remedies. One is to ask the court to preclude the prosecution from submitting proof on the issue, or deem that the prosecutor's right to be heard on a particular risk factor, departure, designation, or override has been waived. If the Judge denies this request, move to Plan B. The second remedy is to request an adjournment to provide the defense a meaningful opportunity to respond. These remedies are discussed below.

§ 7:9 MOTION TO PRECLUDE OR DEEM PROSECUTION'S RIGHT TO BE HEARD AS WAIVED

When the prosecutor's statement is not given at all until the day of the SORA hearing, or does not meet the 10- or 15-days' notice requirement of the statute, or if the reasons and supportive documentation are inadequate, defense counsel should either make a motion to preclude or ask that the prosecution be deemed to have waived their right to be heard on the particular issue. There is case law support for either request. However, failure to raise an objection to the lack of notice or adequacy of the notice may be deemed a waiver of this issue by the defendant and will not preserve it for appeal. *People v. Charache,* 9 N.Y.3d 829 (2007).

In *People v. Neish,* 281 A.D.2d 817 (3d Dept. 2001), the prosecution failed to provide notice that they were seeking the assessment of points for risk factor 12 that would make the defendant a risk level 2. County Court denied the prosecution's request and determined the defendant to be a risk level 1. The Appellate Division held as follows:

> *[W]e are persuaded that the prosecution's right to be heard was waived by its failure to provide the court and defendant with prior notice of the assessment sought…. Without such notice, the offender's opportunity to be heard in response, which SORA expressly recognizes, cannot be a meaningful one (see, e.g., Matthews v. Eldridge, 424 US 319, 348-349). As this due process prerequisite was not satisfied here, the prosecution's request was properly denied.*

People v. Neish, 281 A.D.2d at 817.

In *People v. MacNeil,* 283 A.D.2d 835 (3d Dept. 2001), the court held that the prosecution's late notice, coming one day before the SORA hearing, was "insufficient to provide defendant with a meaningful opportunity to respond." The prosecution's right to be heard was deemed "waived by its failure to provide the court and defendant with sufficient prior notice of the assessment sought." *People v. MacNeil,* 283 A.D.2d at 836.

The statutory requirement that the prosecution provide 10 days' notice of its intention to argue for any determinations that differ from the Board's recommendation serves to provide the defendant with a meaningful opportunity to be heard. Where no notice was given that the prosecution sought 10 points for risk factor 1, an assessment of points not sought by the Board, the court held that "the People have waived their right to be heard regarding defendant's risk assessment." *People v. S.G.,* 4 Misc. 3d 563, 567 (Sup. Ct. N.Y. Co. 2004). "In order to avoid the resulting denial of due process to the offender in the absence of compliance with this notice requirement, the People's failure to serve a timely statutory notice of the determinations they seek has been held to constitute a waiver of their right to advance them at the hearing." *People v. S.G.,* 4 Misc. 3d at 567.

There are times when the defense and prosecution are at odds over the assessment of points for one or two risk factors. How the court decides the assessment of those points may make a difference as to the presumptive risk level. Since neither party knows how the court will assess those points, it is incumbent upon both the defense and the prosecution to make a conditional or alternative request for downward or upward

departure respectively. The prosecution may assume that the court will assess the points it seeks in order to make the defendant a presumptive risk level 2 only to find out at the hearing that the judge denied the points assessments and the defendant is a presumptive risk level 1. Suddenly, the prosecution is scrambling and makes a belated request for an upward departure at the close of the hearing, after the judge rules on the point assessment for all of the risk factors. Since the prosecution is required by statute and due process to provide notice of a request for an upward departure, it should not be allowed to shed that notice requirement merely because it did not anticipate the court might ruling in favor of the defendant on one or two controverted risk factors. The prosecution should still be held to timely notice of their intention to seek the alternative or conditional relief of an upward departure.

Defense counsel should anticipate those instances when a court ruling on point assessments might disappoint the prosecution and lead to a belated request for an upward departure. Argue that the prosecution should have reasonably anticipated that, because the defendant disputed the point assessments for several risk factors, the court might determine the defendant to be a presumptively lower risk level than the prosecution requested. Therefore, the prosecution should have given notice of their intention to seek an upward departure in the event that the court disagreed with its position on the assessment of points.

Support for this defense argument is found in *People v. Current,* 147 A.D.3d 1235 (3d Dept. 2017). In *Current,* the prosecution argued for an assessment of 10 points for risk factor 8, anticipating that with this 10 points the defendant's total risk scored would be 110 points, making him a presumptive level 3. County Court denied the prosecution's proposed assessment of points and determined the defendant to be a level 2. On appeal, the prosecution sought a remand to argue for the upward departure. The Appellate Division ruled that the prosecution had failed to request this "alternative relief" from County Court and had "failed to preserve this claim" for an upward departure. *People v. Current,* 147 A.D.3d at 1237, 1238. Further support for this argument is found in *People v. Bajek,* 191 A.D.3d 1431 (4th Dept. 2021) and *People v. Bryant,* 187 A.D.3d 165 (4th Dept. 2020). Prosecutors have been given fair notice that they must give a conditional or alternative request for an upward departure as part of their statutory statement in anticipation of the court not assessing points for contested risk factors.

If the court does not preclude the prosecution or deem that they have waived their right to be heard on the upward departure based upon their failure to provide the statutory notice, defense counsel should argue for an adjournment to adequately prepare a response to this unanticipated request. Even if defense counsel could have anticipated a request for an upward departure, defense counsel could not anticipate the aggravating factors that the prosecution would propound.

§ 7:10 ACCEPTING AN ADJOURNMENT

As any defense counsel knows, there are some judges who are loath to utter the words "preclusion" or "waiver" against a prosecutor. Such judges must come up with a "workaround" in order to avoid ruling that the prosecution's defective notice denied the defendant due process and a meaningful opportunity to be heard warranting preclusion of

an issue. The "workaround" is to either offer or agree to grant an adjournment to defense counsel to provide an opportunity to prepare a response.

When defense counsel moves to preclude or have a prosecution issue be deemed waived and is denied, several strategic decisions must be made. Some judges, anticipating the problems that this notice issue presents, will on their own initiative offer to adjourn the hearing in order to give defense counsel the opportunity to prepare a response. If defense counsel rejects the offer of an adjournment, this will likely foreclose this issue on appeal. After all, defense counsel was given the opportunity to prepare a meaningful response by the offer of adjournment. If defense counsel is indeed caught by surprise and needs time to prepare, not only should the adjournment be accepted, but an argument should also be made for a significant adjournment, particularly if time is needed to obtain documentation to rebut the prosecution's position on the issue. However, there may be some good reasons to turn down the offer. If the prosecution's arguments and proof are weak, and if defense counsel has anticipated this issue and is prepared, it might be strategic to address this issue right then and there. An adjournment may benefit the prosecution more than the defense.

If the court does not take the initiative to offer an adjournment, defense counsel must make the strategic decision of whether to ask for the adjournment. Undoubtedly, if defense counsel asks for an adjournment and it is denied by the SORA court, it is reversible error. Where the prosecution gave no statutory notice and the SORA court did not grant an adjournment, the resulting determination was reversed. *People v. Gardner,* 59 A.D.3d 605 (2d Dept. 2009) and *People v. Owens,* 126 A.D.3d 1512 (4th Dept. 2015). Unfortunately, these cases resulted in a reversal and a remand for new notice and a meaningful opportunity for the defense to be heard on the issue. No preclusion. No waiver. It is not clear whether that relief was requested on appeal. In *People v. Inghilleri,* 21 A.D.3d 404 (2d Dept. 2005), the prosecution failed to provide notice of its intention to seek an upward departure. The defense made a motion to preclude, which the SORA court denied, but the court did grant an adjournment. On appeal the court ruled that, by granting the adjournment, "the defendant was afforded a meaningful opportunity to respond to the District Attorney's request for an upward departure." *People v. Inghilleri,* 21 A.D.3d at 405. *See also People v. Warren,* 42 A.D.3d 593 (3d Dept. 2007).

Defense counsel needs to take care that the adjournment provides sufficient time to prepare. Care should be taken not to fall for the "brief adjournment" trap. In *People v. Myers,* 87 A.D.3d 1286 (4th Dept. 2011), the prosecution failed to provide timely notice of its intention to seek the assessment of points for risk factor 13. Defendant objected. The court granted defense counsel a brief adjournment to review the "documentary evidence" sought to be admitted by the prosecution with respect to risk factor 13. Defense counsel availed himself of the adjournment, returned to the courtroom, and proceeded with the hearing. The defendant raised lack of notice on appeal. The Appellate Division ruled that, because defense counsel proceeded with the hearing and raised no request for "a further adjournment or any other corrective action," "defendant is deemed to have waived his present contention" concerning lack of notice and risk factor 13. *People v. Myers,* 87 A.D.3d 1287.

An exception to the adjournment "workaround" is addressed in *People v. Cruz,* 132 A.D.3d 554 (1st Dept. 2015). The prosecution failed to provide the statutory 10-day notice, yet sought the assessment of points for risk factor 4 at the SORA hearing. The Board had not recommended the assessment of points for that risk factor. The court recognized that the usual remedy for failure of the prosecution to provide notice "is to grant the defendant an adjournment." *People v. Cruz,* 132 A.D.3d at 554. The court went on to carve out an exception to the adjournment remedy. The rationale is worthy of note:

> *Here, however, defendant was overdue to be released from incarceration but remained in prison pending his SORA hearing. Under the circumstances, an adjournment would not have provided "a meaningful opportunity to respond…because defendant had to choose between the adjournment and release from custody."*

People v. Cruz, 132 A.D.3d at 554.

The court went on to rule that the 20 points assessed for risk factor 4 should not have been assessed and the defendant's risk level was reduced to a level 1. In effect, the court had precluded the prosecution's right to be heard as to risk factor 4 without using the words "preclusion" or "waiver." The takeaway from *People v. Cruz* is that, under the circumstances of such a case (client close to release date and adjournment would prevent release), defense counsel may not want to alert the court to the use of a "provisional order," instead asking the court to follow the ruling in *People v. Cruz* and deem the prosecution to have waived its right to be heard on the issue.

§ 7:11 ***SUA SPONTE* RULING BY THE COURT**

You are not always home-free when the Board recommends a risk level 1 and the prosecution gives no notice that it intends to seek a determination different from that recommended by the Board – not even when the prosecution appears at the SORA hearing and agrees with the Board's recommendation. A SORA court can act on its own initiative in making any determination even though not requested to do so by the Board or the prosecution. And if the court provides advance notice of its intention to consider a particular issue and grant an adjournment to the defense before making the determination, thus providing time to prepare a meaningful response, the court can apparently do so. Of course, defense counsel may want to remind the court that since neither the Board nor the prosecution has submitted any evidence relevant to the issue, that the record lacks in "clear and convincing evidence."

As explained above, SORA provides a defendant with due process rights that require written notice, 10 or 15 days prior to the hearing. The purpose of such written notice is to afford the defendant a meaningful opportunity to respond at the hearing. This due process protection applies equally to any failure by the prosecution to give notice and when a court's *sua sponte* determination, without notice, deprives the defendant of a meaningful opportunity to respond. *People v. Segura,* 136 A.D.3d 496, 497 (1st Dept. 2016). In *People v. Hackett,* 89 A.D.3d 1479, 1480 (4th Dept. 2011), the court held that the SORA court "violated his due process rights by *sua sponte* assessing those additional points." In both *Segura and Hackett,* the Appellate Division reversed the improper action of the SORA court based upon the court's failure to provide the defendant a meaningful

opportunity to respond, not because it acted *sua sponte*. The remedy on reversal in both cases was to remand for a new hearing, thus providing the defendant an opportunity to respond, albeit a year later. *See* also *People v. Maus,* 162 A.D.3d 1415 (3d Dept. 2018), *People v. Griest,* 143 A.D.3d 1058 (3d Dept. 2016), *People v. Chrisley,* 172 A.D.3d 1914 (4th Dept. 2019), *People v. Montufar-Tez.* 195 A.D.3d (2d Dept 2021) and *People v. Wilke,* 181 A.D.3d 1324 (4th Dept. 2020).

In short, the SORA court can act *sua sponte* if the court provides the defendant notice of its intention to so act and grants an adjournment to give defense counsel the opportunity to be heard before making the determination. This was what happened in County Court in *People v. Wheeler,* 59 A.D.3d 1007 (4th Dept. 2009) *lv denied* 12 N.Y.3d 711 (2009). The Appellate Division approved of such a procedure, ruling that the SORA court was "protecting his due process rights by affording him [defendant] notice and a meaningful opportunity to respond." *People v. Wheeler,* 59 A.D.3d at 1008.

Defense counsel should take note of a poorly reasoned case that runs contrary to the majority of decisions that have held that, for a court's *sua sponte* ruling to be upheld, the court must provide notice to the defendant of its intention to *sua sponte* depart upward and give the defense the opportunity to prepare a response. In *People v. Palmer*, 68 A.D.3d 1364 (3d Dept. 2009), the court held that the defendant had received "all of the due process to which he was entitled" despite the fact that the SORA court had departed upward *sua sponte*, reasoning that "[w]hile county court could have advised defendant that it was considering an upward departure, there is no requirement that it do so." *People v. Palmer*, 68 A.D.3d 1365-1366.

There are several Appellate Division decisions that apply the principles of preclusion, without using that term, to a *sua sponte* determination of points or a designation. In *People v. Medina,* 165 A.D.3d 1184 (2d Dept. 2018), a case in which neither the Board nor the prosecution sought a designation of the defendant as a "sexual predator," the court did so *sua sponte*. The appellate court held that, because "the defendant was never afforded an opportunity to be heard on the issue of whether he should be so designated," the order should be modified "so as to delete the provision thereof designating the defendant a sexual predator." There was no attempt to salvage the *sua sponte* designation by remanding for a new hearing to give the defendant the opportunity to respond. The Appellate Division simply precluded the issue by deleting the designation. Likewise, in *People v. Pittman,* 179 A.D.3d 955 (2d Dept. 2020) the Appellate Division ruled that the Supreme Court should not have assessed the defendant point under risk factor 12 since the prosecution neither requested those points nor proved by clear and convincing evidence facts supporting such an assessment. These cases raise the question of whether a *sua sponte* ruling by the court is ever proper.

PRACTICE TIPS

Defense counsel must object to the court's or prosecution's lack of notice, late notice or insufficient notice or run the risk that the issue will be deemed waived and not preserved for the purpose of appeal. People v. Charache, 9 N.Y.3d 829 (2007).

Failure to object to the lack of notice may result in this issue being unpreserved for appellate review. Don't leave yourself at the fickle mercy of the appellate court to exercise its interest of justice jurisdiction as it did in People v. Montufar-Tez.

When considering how to frame your objection, either as a motion to preclude the prosecution on the issue or as a request that the court find that the prosecution's right to be heard on the issue be deemed waived, think about this in practical terms. Although preclusion sounds more impressive, it may be a heavier psychological lift for the judge. For some judges it might seem much easier to arrive at the right decision based on the prosecution having waived the right to be heard on the issue, rather than the bolder action of the court affirmatively issuing an order precluding the prosecution from proceeding with an issue. In addition, almost all the appellate cases address this issue in terms of waiver, not preclusion.

When appropriate, argue that notice provided by the prosecution is inadequate if it merely gives notice of the determinations it is seeking that differ from the Board but does not give the reasons and supporting documentation. People ex rel. Levy v. Walters, 87 A.D.3d 620 (2d Dept. 1982).

If the judge offers defense counsel an adjournment to give sufficient time to prepare a response in light of the inadequate notice of the issue given by the prosecution, be aware that a refusal to accept the adjournment may mean that this issue may be waived for purpose of appeal.

Defense counsel might anticipate that the court will rule in favor of the defendant and deny the assessment of points on a risk factor or two, thereby lowering the presumptive risk level. Defense counsel might also anticipate that if that happens, the prosecution will make a last-ditch effort to move for an upward departure. Although anticipated, for strategic reasons, defense counsel may not want to make this argument in advance of the hearing. Do not reveal the defense objection or request that the issue be waived for lack of notice until the prosecution has shown their hand. Have a short memorandum of law prepared on the issue of preclusion and issue-waiver ready for submission at the hearing if needed.

If the court gives any indication that it will act sua sponte on an issue, defense counsel should object by requesting an adjournment of sufficient time to prepare to respond. If denied, this should preserve the issue for appeal and be the basis for a reversal. Defense counsel may also want to object to the very notion of a sua sponte determination, arguing that there is no factual basis in the record to support a finding of clear and convincing evidence since neither the Board nor the prosecution has offered any evidence.

§ 7:12 SUBMISSION TO THE BOARD

In most SORA cases involving defendants who are returning from jail or prison (Correction Law § 168-n [3]), or have been convicted in another jurisdiction or are moving to New York from another state (Correction Law § 168-k [2]), defense counsel is not assigned by the court until after the court has received a recommendation from the Board. This is an unfortunate shortcoming of the SORA statutory procedures. By the time defense counsel has been assigned, the opportunity to make a submission to the Board to try to affect the recommendation has passed. If the defense attorney doesn't get into the case until after the Board has made its recommendation, it is important to find out from the client if he or she has made a submission to the Board, and if so, to obtain copies.

For retained counsel, who become involved well in advance of the defendant's expected release date, it is ideal to enter the case about six months prior to the defendant's release. This will provide counsel sufficient time to prepare for a submission to the Board. An assigned counsel program or an institutional defender could take a proactive approach. Rather than wait for assignment from the court, defense counsel could establish a procedure whereby the upcoming release of defendants facing SORA hearing could be identified. Defendants could then be contacted well in advance of the Board's review of the cases. This would require working out the logistics of assignments.

Correction Law § 168-n (3) and § 168-k (2) both provide that the Board must notify the defendant no later than 30 days prior to the Board's recommendation that a review of his or her case is being undertaken, and that the defendant is permitted to submit to the Board any facts relevant to the review. Since the Board makes its recommendation to the court 60 days prior to the defendant's release, the notice from the Board to defendant that the case is under review and that they may make a submission comes approximately 90 days prior to their scheduled release date. The notice from the Board to defendants in jail or prison reads as follows:

> *At this time, you are permitted to send any information you would like the Board to take into consideration as it prepares a risk level recommendation which will be forwarded to the original sentencing court…If you wish to submit materials for review, such information must be forwarded to the Board within 15 days of receipt of this letter.*

The notice from the Board to people subject to Correction Law § 168-k proceedings is very similar to the above notice however, it allows the defendants to submit such information within 30 days of receipt of the notification.

Since people coming home from prison or jail will receive this letter approximately 90 days prior to release, defense attorneys will ideally want to be in contact with their client at least six months prior to the expected release date. This will afford defense counsel time to thoroughly interview the client, obtain all supporting documentation, and if appropriate, have the client assessed by a clinical psychologist or other clinical expert. This will also allow sufficient time to prepare a submission to the Board.

A submission to the Board provides defense counsel an opportunity to influence the Board's recommendation. But making a submission is not always in the client's best interest. Whether or not to make a submission, and what should be included in the submission are strategic decisions. Such decisions may depend upon the type of case, particular issues, nature of the supporting documentation, mitigating factors, and more.

In the submission to the Board, defense counsel might want to consider including the following:

- Progress in the SOCTP
- Other programmatic accomplishments
- Letters of support
- Arguments addressing particular risk factors of concern
- Mitigating factors that would warrant either a downward departure or weigh against an upward departure
- Clinical documentation of low risk to reoffend
- Medical records if relevant
- If there is an issue of registrability regarding a conviction in another state, make this argument to the Board
- If appropriate, present arguments against a designation or an override

In a case involving child pornography, it is important for defense counsel to keep in mind that the Board has one methodology for scoring the RAI (Positions Statement 6/1/12) and the courts follow an entirely different methodology established by the Court of Appeals in *People v. Gillotti,* 23 N.Y.3d 841 (2014). It could undermine your strategy to make a *Gillotti* argument in your Board submission.

Defense counsel should also take care not to include information or an argument in the Board submission that might alert the prosecution to an issue of which they may not otherwise be aware.

A sample of a submission to the Board is included in Chapter 12 on Sample Documents.

§ 7:13 APPEALS

The three procedural SORA statutes, Correction Law §§ 168-n (3), 168-d (3) and 168-k (2), contain identical provisions when it comes to appeals. Both the defendant and the prosecutor may appeal as of right. Since SORA is a civil proceeding, the statutes provide that the appeal is pursuant to CPLR articles 55, 56 and 57.

These same three statutes provide for the assignment of counsel, stating as follows:

> *Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.*

Correction Law §§ 168-n (3), 168-d (3) and 168-k (2).

Procedure

A SORA proceeding is civil, not criminal, in nature, and the procedures to be followed are those for a civil appeal, including the filing of an order, notice of entry, notice of appeal, and the time to appeal.

- **Order** – To appeal a SORA determination, there must be a written order and that order must be filed and entered. If the document purporting to be the order is not denominated an "order" or does not have the necessary "so ordered" language on it, it will not be treated by the appellate court as an appealable order, and the appeal will be dismissed as not properly being before the court. *People v. Lavelle,* 169 A.D.3d 1127 (3d Dept. 2019), *People v. Lockrow,* 161 A.D.3d 1442 (3d Dept. 2018) and *People v. Joslyn,* 27 A.D.3d 1492 (3d Dept. 2006). Where County Court directed that the SORA hearing be transcribed with a so-ordered provision at the bottom, but the transcript did not include any such so-ordered provision, an appeal was held not to be proper, and a filed risk assessment instrument which does not contain "so ordered" language does not constitute an appealable order. *People v. Wassilie,* 193 A.D.3d 1193 (3d Dept. 2021). The decision must contain language indicating that it is an order or judgment, and a written order must be entered and filed in the office of the clerk of the court where the action is triable. *People v. Porter,* 178 A.D.3d 1159 (3d Dept. 2019) and *People v. Johnson,* 179 A.D.3d 1159 (3d Dept. 2020). The three above referenced SORA statutes require the SORA court to render an order setting forth its determinations and the findings of fact and conclusions of law. An order is also required to proceed with an appeal by CPLR § 5512 (a), § 5513 and § 5515. If the court does not issue an order, your appeal will be stalled. You will need to bring a proceeding to force the court to issue an order.

- **Filing and entry of order** – In order for the order to be appealable, it must be filed and entered in the office of the clerk of the court whose order is sought to be reviewed pursuant to CPLR 5512 (a) and CPLR 2220 (a). *People v. Lockrow,* 161 A.D.3d 1442 (3d Dept. 2018). The office of the clerk of the court for SORA proceedings conducted in County Court and Supreme Court is the county clerk within the county. County Law § 525 (1). Care must be taken to make sure the order is filed with the proper clerk of the court, or the appeal may be dismissed. *People v. Davis,* 130 A.D.3d 1131 (3d Dept. 2015) and *Matter of Merrell v. Sliwa,* 156 A.D.3d 1186 (3d Dept. 2017).

- **Notice of Entry** – Since this is a civil proceeding, the prevailing party will need to serve a copy of the order appealed from and written notice of entry upon the opposing party. This is what triggers the appellant's time to appeal. CPLR § 5513 (a). A sample Notice of Entry is included in Chapter 12 on Sample Documents.

- **Time to Take Appeal as of Right** – Pursuant to CPLR § 5513, an appeal as of right must be taken within 30 days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry. The 30 days does not start to run until service of the order and notice of entry. If the defendant has prevailed, defense counsel will want to make sure that the order gets filed and that service of a copy of the order with notice of entry is made on the prosecutor. This will start the running. On the other hand, the prosecution's delay,

or failure to serve the notice of entry will extend the defendant's time to appeal. Note that the defendant does not have to wait until being served with the notice of entry to take an appeal, however an appeal cannot be taken until the order is filed and entered in the clerk's office.

- **Taking an Appeal; Notice of Appeal** – An appeal is taken by serving on the prosecution a notice of appeal and filing it in the office where the order of the court of original instance is entered. The notice of appeal must designate the party taking the appeal, the order or specific part of the order appealed from, and the court to which the appeal is taken. CPLR § 5515. A sample Notice of Appeal is included in Chapter 12 on Sample Documents. Care should be taken when drafting the Notice of Appeal to include all the issues appealed from. Failure to include a specific issue may be treated by the appellate court as limiting the scope of the appeal and may result in a refusal to address the issue. *People v. Cantrell,* 37 A.D.3d 1183 (4th Dept. 2007). Do not file the Notice of Appeal before the filing and entry of the order appealed from or the defense will run the risk of dismissal of the appeal as premature. *People v. Cantrell,* 37 A.D.3d at 1184. If appealing in a case where there was an amended order, the amended order triggers the appeal, and is the order from which the appeal is taken. This will require filing and entry, service and notice of entry, and filing a notice of appeal, all with respect to the amended order. *People v. Donk,* 39 A.D.3d 1268 (4th Dept. 2007). In addition to filing the Notice of Appeal, defense counsel should file a motion for permission to proceed as a poor and for the assignment of counsel.

- **Appeals Court** – An appeal of a SORA determination in Supreme Court or County Court is taken to the Appellate Division. In the Third and Fourth Departments appeals from a lower court such as City Court, Town or Village Court are taken to County Court. In the First and Second Departments, appeals from Criminal Courts of the City of New York are taken to the Appellate Term. In the Second Department, the Appellate Terms also have jurisdiction over appeals from SORA determinations originating in District, City, Town, and Village Courts, as well as non-felony appeals from the County Court. An appeal may be taken to the appellate division, from an order of the appellate term which determines an appeal from a judgment or order of a lower court, by permission of the appellate term or, in the case of refusal, of the appellate division. An appeal may be taken to the appellate division as of right from an order of county court or a special term of the supreme court which determines an appeal from a judgment of a lower court. CPLR § 5703.

§ 7:14 PRINCIPLES OF APPEALS IN SORA CASES

There are certain principles that have developed through case law that apply to appellate practice. Defense counsel undertaking representation in SORA cases should be aware of these case law developments in order to preserve issues for appeal that might otherwise be waived.

- **Certification** – Pursuant to Correction Law § 168-d (1)(a), at the time of sentencing the court is supposed to certify that the defendant is a sex offender and include the certification in the order of commitment. Courts have treated this certification as part of the judgment of conviction and, as such, it may only be

challenged on the direct appeal of the judgment of sentence and conviction. It cannot be raised as part of the appeal from the SORA determinations. *People v. Hernandez,* 93 N.Y.2d 261 (1999), *People v. Gonzalez,* 157 A.D.3d 409 (1st Dept. 2018), and *People v. Lema,* 157 A.D.3d 406 (1st Dept. 2018).

- **SORA Determination Appealable but Not with Direct Appeal** – A SORA determination is appealable; however, it cannot be appealed as part of the direct appeal from the judgment of conviction. It is a separate and distinct appeal. *People v. Stevens,* 91 N.Y.2d 270 (1998), *People v. Cortez-Moreno,* 194 A.D.3d 953 (2d Dept. 2021), and *People v. Kelemen,* 44 A.D.3d 687 (2d Dept. 2007).

- **Deportation** – The deportation of the defendant does not result in the dismissal of an appeal. *People v. Rosario,* 36 N.Y.3d 964 (2020), *People v. Rodriguez,* 196 A.D.3d 43 (2d Dept. 2021); *People v. Shim,* 139 A.D.3d 68 (2d Dept. 2016), *People v. Calix,* 191 A.D.3d 442 (1st Dept. 2021), and *People v. Scott,* 113 A.D.3d 491 (1st Dept. 2014).

- **Absconding from Parole** – Contrary to the rule on deportation, where the defendant absconds from parole supervision, courts have applied the fugitive disentitlement doctrine to dismiss the appeal on the theory that the right to appeal is forfeited. *People v. Acevedo,* 195 A.D.3d 528 (1st Dept. 2021).

- **Discretion** - Even in the absence of abuse of discretion, the Appellate Division can substitute its own discretion when the lower court has improvidently exercised its discretion. *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007) and *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009).

- **Preservation of Issues** – A challenge to registrability, a constitutional or procedural challenge to SORA or a challenge to the scoring of any risk factor, departure, or override all must be raised before the SORA court or they will be treated on appeal as not being preserved, and the appellate court will not address the issues. *People v. Howard,* N.Y.3d 337 (2016) and *People v. Windham,* 10 N.Y.3d 801 (2008). Defense counsel's failure to object to the assessment of points for particular risk factors will be treated as not preserving the issue for the purpose of appeal. *People v. Lucero,* 188 A.D.3d 1111 (2d Dept. 2020). Objecting to some risk factors and not others will not preserve for review those factors that were not objected to at the time of the SORA hearing. *People v. Roland,* 292 A.D.2d 27 (1st Dept. 2002) and *People v. Kyle,* 64 A.D.3d 1117 (4th Dept. 2009). Defense counsel's failure to object to the prosecutor's non-compliance with timely notice or insufficient notice of a statutory statement will be treated as unpreserved on appeal if not raised at the SORA hearing. *People v. Charache,* 9 N.Y.3d 82 (2007).

- **Prosecution Failure to Preserve** – Where the prosecution failed to move for an upward departure at the SORA hearing, a Prosecution request to the appellate court to remit for further proceedings to determine whether an upward departure may be warranted is "unpreserved and beyond our review," and remittal was denied. *People v. Bajek,* 191 A.D.3d 1431 (4th Dept. 2021) and *People v. Bryant,* 187 A.D. 1657 (4th Dept. 2020). *People v. Bajek* is a good example of the prosecution assuming that a contested point assessment would go their way both at the trial

level and on appeal and so did not bother to make a conditional request for an upward departure to the SORA court. When the Appellate Division ruled that 25 points were incorrectly assessed for risk factor 2, bringing the defendant's risk level down to a level 1, the issue was not preserved for appeal or remittal.

§ 7:15 RECONSIDERATION

After the SORA hearing is over, defense counsel may need to address an issue that was erroneously decided. The error may be as simple as a mathematical error. The error may be the result of a fact or law overlooked or misapprehended by the court, or may be the result of new facts not previously considered. Whatever the issue, if it is something that can be corrected without the time and expense of an appeal, defense counsel should consider filing a motion addressed to the SORA court. Defense counsel can proceed with such a motion while at the same time filing the Notice of Appeal.

There is ample authority for a motion to the SORA court requesting reconsideration. Such motions have been referred to in various decisions as a motion to "reopen" [*People v. Pendergrast.* 48 A.D.3d 356 (1st Dept. 2008)]; request to "revisit" [*People v. Lockrow,* 161 A.D.3d 1492 (3d Dept. 2018)]; motion to "renew" or "reargue" [*People v. Wroten,* 286 A.D.2d 189 (4th Dept. 2001)]; "reconsideration" [*People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011)]; Court's "inherent power" to correct its own order to rectify a mistake of law or fact [*People v. Wroten,* 286 A.D.2d 189 (4th Dept. 2001)], [*People v. Harris,* 178 Misc. 2d 858 (Crim. Ct. N.Y.C, Queens Co. 1998). Such a motion for reconsideration is either based on CPLR 2221 or on the court's "inherent power," or both. *People v. Wroten,* 286 A.D.2d at 196. Regardless of the authority for the motion or how it is referred to, what is clear is that there is a judicial openness to such motions based upon an interest in seeing that such errors are corrected sooner rather than later. Finding an expeditious way to get the correct risk assessment is in everyone's best interest and should not have to wait a year or more for an appellate decision. *People v. Wroten,* 286 A.D.2d at 196.

Such motions for reconsideration have been used to ask the SORA court to change the total point score, a point assessment for a risk factor, a risk level, and a designation. If defense counsel can identify an obvious error based upon new or misunderstood facts or a principle of law that was not considered, thought should be given to proceeding by motion back to the SORA court before pursuing the longer road to an appeal.

Chapter 8

SELECTED ISSUES

CHAPTER 8 SECTIONS

§ 8:1 Burden of Proof

§ 8:2 Reliable Hearsay

§ 8:3 Waiver of Presence at Hearing

§ 8:4 Waiver of a Right to a Hearing

§ 8:5 Waiver of the Right to Counsel

§ 8:6 Fictional Victims

§ 8:7 How Many RAIs? (Multiple Cases)

§ 8:8 Modification

§ 8:9 *Doe v. Pataki* – Redetermination Hearing

§ 8:10 Child Pornography

§ 8:11 Expert Testimony

§ 8:12 Registrability

§ 8:13 Court's Failure to Provide Proper Notice to Defendant

§ 8:14 Kidnapping and Unlawful Imprisonment

Chapter 8

SELECTED ISSUES

There are issues that recur in SORA cases that should be mastered by defense counsel. Some issues are present in every case such as the burden of proof. Other issues are case-specific. Below are some of the issues that you will encounter during your SORA practice.

§ 8:1 BURDEN OF PROOF

During a SORA proceeding, the prosecution may seek determinations regarding some or all of the following issues: level of classification, facts supporting the determination sought, assessment of points for each risk factor, upward departure, designation (as a "sexual predator," "sexually violent offender," or "predicate sex offender"), and overrides. For each of these six determinations, the burden is on the prosecution to submit proof to support the determination sought by clear and convincing evidence. This is well established by the Guidelines, the SORA statutes (Correction Law §§ 168-n (3), 168-d (3) and 168-k [2]) and case law.

In addition, the same three SORA statutes require the SORA court to make two determinations that encompass the six issues for which the prosecution may seek determination: "determine the level of notification" and determine "whether such sex offender shall be designated."

The statute for each of the three types of SORA proceedings establishes the exact same requirement as to the burden of proof.

> *The state shall appear by the district attorney, or his designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence.*

Correction Law §§ 168-n (3), 168-d (3) and 168-k (2).

As a result of these statutory requirements, each of the six determinations that the prosecution may seek must be supported by facts proven by clear and convincing evidence.

Not only is support for placing this burden of proof on the prosecution for each of the determinations found in the statute, it is also established by the Guidelines and by case law. Below is a list of the six determinations along with the authority for imposing a clear and convincing evidence burden of proof on the prosecution as to each.

1) Facts supporting the determinations sought – *See People v. Mingo,* 12 N.Y.3d 563, 571 (2009), *People v. Wells,* 138 A.D.3d 947, 950 (2d Dept. 2016).
2) Level of classification – *See People v. Seabolt,* 148 A.D.3d 1650 (4th Dept. 2017), *People v. Stewart,* 61 A.D.3d 1059 (3d Dept. 2009), *People v. Dominie,* 42 A.D.3d 589, 590 (3d Dept. 2007).

3) Override – *See People v. Long,* 129 A.D.3d 687 (2d Dept. 2015), *People v. Boan,* 11 A.D.3d 956 (4th Dept. 2004).
4) Designation – *See People v. Anderson,* 53 Misc. 3d 144(A) (App. Term 1st Dept. 2016).
5) Upward departure – *See People v. Gillotti,* 23 N.Y.3d 841, 862 (2014) and Guidelines p. 7.
6) Each risk factor – *See People v. Pettigrew,* 14 N.Y.3d 406, 408 (2010), *People v. Wells,* 138 A.D.3d 947 (2d Dept. 2016), *Doe v. Pataki,* 3 F. Supp. 2d 456, 472 (SDNY 1998), Guidelines p. 5.

This high burden of proof is placed on the state "largely to create an extra procedural protection against an excessive risk level classification and the resulting deprivation of the defendant's liberty." *People v. Gillotti,* 23 N.Y.3d 841, 862 (2014).

In contrast, the defendant's burden of proof to establish mitigating circumstances warranting a downward departure or to counter an upward departure is "by a mere preponderance of the evidence." *People v. Gillotti,* 23 N.Y.3d 841, 864 (2014). The Court of Appeals has explained that this is the appropriate burden of proof for defendants because they have a "statutorily protected interest in being free from excessive government monitoring and stigmatization." *People v. Gillotti,* 23 N.Y.3d at 863.

When defense counsel is arguing against any determination that the prosecution seeks, it is important to be able to explain to the court that the proof offered to support such a determination is lacking because it does not meet the high standard required. Since most defense counsel are much more familiar with the burden of proof in a criminal case – "proof beyond a reasonable doubt" – and less familiar with the "clear and convincing" standard, it is worth reviewing what this standard means in practice.

"Clear and convincing" is a heightened and exacting standard. It is "significant since it is a higher more demanding standard than the preponderance standard." *Solomon v. New York,* 146 A.D.2d 439, 440 (1st Dept. 1989); *In re Gail R.,* 67 A.D.3d 808, 811-812 (2d Dept. 2009). The evidence must rise to such a level as to create a "high degree of probability" that the proposition alleged is in fact true. *See* NY PJI – Civil 1:64; *Krol v. Eckman,* 256 A.D.2d 945, 947 (3d Dept. 1998), *In re Gail R.,* 67 A.D.3d at 811-812. The Appellate Division, Fourth Department, has applied this "highly probable" standard in the SORA context in determining that the prosecution had not met its burden of proof. *People v. Warrior,* 57 A.D.3d 1471, 1472 (4th Dept. 2008). "The clear and convincing standard requires evidence that 'makes it highly probable that the alleged activity actually occurred.'" *People v. Chrisley,* 193 A.D.3d 1422, 1424 (4th Dept. 2021) citing *People v. Warrior*. Clear and convincing evidence "means evidence that is neither equivocal nor open to opposing presumptions." *Solomon v. New York,* 146 A.D.2d at 440. Stated in yet another way, "the evidentiary requirement [operates] as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." *George Backer Mgt. Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 220 (1978). It is the "most rigorous standard of burden of proof in civil cases," and is applied to cases including decisions literally affecting a party's life or death. *Matter of Westchester Cty. Med. Ctr. On Behalf of O'Connor,* 72 N.Y.2d 517, 531 (1988). The U.S. Supreme Court has cited with approval a description of the "clear and convincing" standard as one that

requires evidence that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cruzan by Cruzan v. Dir., Missouri Dept. of Health,* 497 U.S. 261, 285 n. 11 (1990).

Placing the higher "clear and convincing" standard of proof on the District Attorney is "more than an empty semantic exercise." *Addington v. Texas,* 441 U.S. 418, 425 (1979). As the Supreme Court instructed, we must be mindful that the function of imposing the legal process of the "clear and convincing" standard "is to minimize the risk of erroneous decisions." *Id.* at 425. When a statute requires proof by "clear and convincing" evidence, such as in a SORA proceeding, civil commitments, deportation, denaturalization, and life support terminations proceedings, it represents a legislative determination that "the individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than harm to the state." *Addington v. Texas,* 441 U.S. at 427.

In most SORA cases, to meet its burden of proof, the prosecution relies on hearsay and facts previously proven at trial. The SORA statutes allow the court to consider both types of evidence, stating in relevant part: 1) "Facts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence," and 2) "the court may consider reliable hearsay evidence submitted by either party." Correction Law §§ 168-n (3), 168-d (3) and 168-k (2]). The same statutes also authorize the court to review "victim's statements," "relevant materials and evidence" submitted by either party, and the "recommendation and materials" submitted by the Board.

Although reliable hearsay may be considered, it is helpful to understand how this rule is applied in practice.

§ 8:2 RELIABLE HEARSAY

It is well-settled that the court may admit into evidence documents that are "reliable hearsay." For admissibility purposes, courts have found admissible as reliable hearsay such documents as the RAI, Grand Jury testimony, case summary, PSR, plea and sentencing minutes, and victim's sworn statements to police, among other documents. *People v. Mingo,* 12 N.Y.3d 563, 572-573 (2009), *People v. Dominie,* 42 A.D.3d 589, 590 (3d Dept. 2007), *People v. Stewart,* 61 A.D.3d 1059 (3d Dept. 2009) and *People v. Lema-Caguna,* 179 A.D.3d 953 (2d Dept 2020). The Guidelines also condone the consideration of documents such as admissions of the defendant, and evaluative reports of the supervising probation officer, parole officer, or corrections counselor. Guidelines p. 5. In *People v. Jacinto-Ordonez,* 194 A.D.3d 862 (2d Dept. 2021) the court treated a report from the sex offender treatment program of the defendant's admission of sexual intercourse as reliable hearsay to assess 25 points for sexual intercourse under risk factor 2.

Although courts have routinely found these kinds of documents to be admissible as reliable hearsay, that is only the beginning of the inquiry. There are two additional steps that a court must take when making a determination based upon reliable hearsay that has been received into evidence. Once admitted into evidence, the court must next determine what weight and credibility to give to the document. Simply because reliable hearsay is

admitted into evidence does not mean that it is necessarily credible. As the Court of Appeals has emphasized as to this point, "[o]f course, information found in a case summary or presentence report need not always be credited – it may be rejected when it is unduly speculative, or its accuracy is undermined by other more compelling evidence." *People v. Mingo,* 12 N.Y.3d at 573. Even if the document is credible in terms of the information contained therein, the court must finally determine if this reliable hearsay constitutes clear and convincing evidence. "[H]earsay statements that are vague, inconsistent or equivocal, and otherwise unsubstantiated, do not qualify as 'reliable' and, hence, cannot rise to the level of clear and convincing evidence," and the court may not uphold the determination sought by the prosecution. *People v. Stewart,* 61 A.D.3d 1059 (3d Dept. 2009). *See* also *People v. Oliver,* 37 Misc. 3d 1201(A) (Sup. Ct. Cayuga Co. 2009), and *People v. Dominie,* 42 A.D.3d 589 (3d Dept. 2007). If it does not meet the "clear and convincing" standard of being "highly probable," the prosecution cannot prevail on the issue. "[E]vidence that is admissible and sufficient need not be credited by the SORA court, the fact-finder charged with weighing the evidence and determining whether the People met their burden of proof. *People v. Diaz,* 34 N.Y.3d 1179, 1181 (2020).

A helpful case to review on the issue of reliable hearsay is *People v Uver A.,* 195 A.D.3d 61 (2d Dept. 2021). The court considered reports through the lens of reliable hearsay and concluded that "where the information submitted is derived from unsigned reports which were not independently verified, the information may be insufficient to satisfy the People's burden of proof by clear and convincing evidence." *People v. Uver A.,* 195 A.D.3d at 67. The court went on to explain that a statement from a victim about his or her medical condition would not be sufficient to establish an impairment without medical records or when the impairment would not be apparent to a layperson. *People v. Uver A.,* 195 A.D.3d at 68.

Even when the reliable hearsay is clear and unequivocal as to a particular risk factor, where the defendant denies or challenges the fact at issue, there must be other proof substantiating that fact, or the clear and convincing evidence standard will not be met. A good example of this principle is found in *People v. Warrior,* 57 A.D.3d 1471 (4th Dept. 2008). That case concerned the proper scoring of risk factor 3. The prosecution sought to prove that there were two victims instead of one. The prosecutor offered his prior *Molineux* notice alleging the existence of a second victim. The Appellate Division held that "[i]n light of the defendant's denial of the allegations concerning the second victim and the absence of any proof substantiating *Molineux* notice or the Assistant District Attorney's oral assertions, we conclude that the hearsay evidence presented by the People does not rise to the level of clear and convincing evidence." *People v. Warrior,* 57 A.D.3d at 1472.

Moreover, a case summary, standing alone, will not suffice to satisfy the prosecution's burden of proving a risk level assessment by clear and convincing evidence where a defendant has contested the factual assertions contained therein. *People v. Paladin,* 57 Misc. 3d 130(A) (App. Term, 2d Dept. 2017). In *People v. Judson,* 50 A.D.3d 1242 (3d Dept. 2008), the prosecution sought to have points assessed under risk factor 4 for a "continuing course of sexual misconduct." The defendant challenged the assessment of points for that risk factor. The prosecution relied upon the case summary. The Appellate Division ruled that points should not be assigned to risk factor 4, holding that

"the case summary alone is not sufficient to satisfy the People's burden of proving the risk level assessment by clear and convincing evidence where, as here, defendant contested the factual allegations related to this risk factor." *People v Judson,* 50 A.D.3d at 243. *See also, People v. Coger,* 108 A.D.3d 1234 (4th Dept. 2013) and *People v. Maund,* 181 A.D.3d 1331 (4th Dept. 2020).

Regarding hearsay, even reliable hearsay, there is a very basic and long-standing rule which applies whether the burden of proof is merely a preponderance of the evidence or the more exacting standard of clear and convincing evidence. This rule has been applied in numerous civil and criminal law contexts. Stated simply, this basic principle requires that no decision by a court or administrative tribunal may be based solely on hearsay, even though admitted into evidence as reliable hearsay. In other words, the People's contention cannot rest entirely on hearsay. *People v. Pettway,* 286 A.D.2d 865 (4th Dept. 2001); *People v. Ramos,* 232 A.D.2d 433 (2d Dept. 1996). This rule was acknowledged as long ago as *Altschuler v. Bressler,* 289 N.Y. 463 (1943) and as recently as *People v. Hubel,* 158 A.D.3d 539 (1st Dept. 2018).

§ 8:3 WAIVER OF PRESENCE AT HEARING

A person facing a SORA proceeding has a due process right to be present at the hearing. *People v. Barney,* 168 A.D.3d 774 (2d Dept. 2019), *People v. Hunt,* 158 A.D.3d 730 (2d Dept. 2018), and *People v. Jenkins,* 151 A.D.3d 891 (2d Dept. 2017). Although a defendant may waive the right to be present at the SORA hearing, to establish a valid waiver it must be shown that "the defendant was advised of the hearing date, of his right to be present, and that the hearing would be conducted in his absence." *People v. Hunt,* 158 A.D.3d at 730, *People v. Gutierrez-Lucero,* 103 A.D.3d 89 (2d Dept. 2012), *People v. Barney,* 168 A.D.3d at 774.

A defendant's failure to appear is, standing alone, an insufficient basis to conclude that there has been a voluntary waiver of the right to be present at the hearing. Without evidence that the defendant received notice of the hearing, a voluntary waiver cannot be deemed to have occurred. *People v. Hunt,* 158 A.D.3d at 730. It is also not sufficient to conclude there has been a voluntary waiver merely because there is "no evidence to indicate that the defendant did not receive notice of the hearing." *People v. Barney,* 168 A.D.3d 774 (2d Dept. 2019). An acceptable waiver of a right to be present at a hearing while represented by one counsel, could not be construed as a voluntary waiver of the right to be present at a subsequent hearing when represented by different counsel. *People v. Souverain,* 137 A.D.3d 765 (2d Dept. 2016).

In *People v. Parris,* 153 A.D.3d 68 (2d Dept. 2017), a defendant suffering from mental illness was removed from the SORA hearing after several outbursts. Defense counsel asked that a competency hearing be held before the SORA hearing proceeded. The Supreme Court denied the competency hearing and completed the SORA hearing in the defendant's absence. On appeal, the Appellate Division held that the SORA court "did not violate the defendant's right to due process by conducting the SORA hearing in his absence, without conducting a competency hearing." *People v. Parris,* 153 A.D.3d at 81. Perhaps recognizing that there was something fundamentally wrong with that conclusion, the appellate court also held that, if the defendant is mentally competent to understand

the nature of the SORA proceeding, a de novo SORA risk assessment hearing may be held. *People v. Parris,* 153 A.D.3d at 82.

§ 8:4 WAIVER OF THE RIGHT TO A HEARING

A person subject to a risk level determination has a due process right to a hearing before that determination is made. *People v. Erb,* 59 A.D.3d 1020 (4th Dept. 2009) and *Doe v. Pataki,* 3 F. Supp. 2d 456 (SDNY 1998). Although a person can consent to the waiver of a right to a hearing, that consent must be knowing, intelligent and voluntarily given. *People v. Huyler,* 171 A.D.3d 1409 (3d Dept. 2019), *People v. Smith,* 92 A.D.3d 1045 (3d Dept. 2012). Even when a person is given notice of an upcoming hearing and fails to appear without sufficient excuse, thereby waiving the right to be present at the hearing, that does not give the court a basis to make its determination without holding a hearing. In *People v. Erb,* the SORA court incorrectly deemed that the defendant's failure to appear was a waiver of the right to a hearing. Under these circumstances, the defendant's right to due process was violated because the court failed to conduct a hearing before making a risk level determination. *People v. Erb,* 59 A.D.3d at 1020.

§ 8:5 WAIVER OF THE RIGHT TO COUNSEL

A defendant in a SORA proceeding has a statutory and constitutional right to counsel. *People v. Griffin,* 148 A.D.3d 735 (2d Dept. 2017) and *Doe v. Pataki,* 3 F. Supp. 2d 456 (SDNY 1998). The right to effective assistance of counsel applies in the SORA context. *People v. Collins,* 156 A.D.3d 830 (2d Dept. 2017) and *People v. Jones,* 172 A.D.3d 1786 (3d Dept. 2019). A defendant may waive the right to counsel, and a defendant's right to proceed *pro se* is also well settled. *People v. Wilson,* 103 A.D.3d 1178 (4th Dept. 2013). In order to forgo the right to counsel, the waiver must be knowing, intelligent and voluntary. *People v. Griffin,* 148 A.D.3d at 735 and *People v. Wilson,* 103 A.D.3d at 1179. However, for a waiver of the right to counsel to be upheld, the trial court is obligated to conduct a "searching inquiry" to make sure that the waiver is voluntary. *People v. Griffin,* 148 A.D.3d at 735, *People v. Middlemiss,* 125 A.D.3d 1065 (3d Dept. 2015) and *People v. Wilson,* 103 A.D.3d at 1179. When the court fails to conduct a searching inquiry, this renders the defendant's waiver of the right to counsel invalid and requires reversal. *People v. Griffin,* 148 A.D.3d at 735, *People v. Huntley,* 191 A.D.3d 1261 (4th Dept. 2021). When the defendant is not properly advised of his or her right to counsel, the waiver is invalid. *People v. Edney,* 111 A.D.3d 612 (2d Dept. 2013).

PRACTICE TIPS

Defense counsel needs to take particular care to ensure that the defendant does not waive the right to be present at the hearing or to waive the hearing altogether under less than voluntary circumstances. The rumor mill in prison can be deadly. As your client approaches their release date, he or she may hear stories that the release will be delayed if he or she exercises the right to have a hearing and be present. DOCCS will also encourage him or her to waive his presence and facilitates waivers by preparing a form for prisoners. This saves DOCCS transportation costs. Judges also engage in arm-twisting to get defendants to stipulate to the Board's recommended risk level and waive a hearing by threatening that, if the hearing must be delayed while defense counsel prepares for the hearing, the defendant's release will be deferred.

Immediately upon entering the case, contact your client at the prison. If possible, go to the prison to conduct an interview. Explain to your client what the SORA hearing is all about and why it is in their best interest to attend the hearing. Also explain how they can be helpful to you in the preparation and conducting of the hearing. Finally, explain to your clients the steps you are prepared to take, including preparation of a provisional order, to avoid their release being delayed.

§ 8:6 FICTIONAL VICTIMS

The first time a defense attorney encounters a case in which their client's "victim" is an undercover agent posing as an adolescent on some form of social media, an immediate question comes to mind. Can a fictional person be used to score the RAI as a victim for the purpose of risk factors 3, 5 and 7? The answer is "yes."

Had this question been posed in 2011, the answer would have been "no." There was a line of County Court cases, and nothing more, that concluded that a fictional victim, created by an undercover agent posing as an adolescent in online communication with the defendant, should not be considered a victim for RAI point assessment purposes. *See People v. Jones,* 24 Misc. 3d 1224(A) (Co. Ct. Suffolk Co., 2009) and *People v. Holland,* 32 Misc. 3d 926 (Co. Ct. Rockland Co. 2011).

In 2012, the Appellate Division took up this issue for the first time. In *People v. DeDona,* 102 A.D.3d 58 (3d Dept. 2012), the court concluded that a fictional victim, created by an undercover agent acting as an adolescent, for example in an internet chat room conversation, can be considered a victim for the assessment of points for risk factors 3, 5 and 7 of the RAI. *See also People v. Hemmes,* 110 A.D.3d 1387 (3d Dept. 2013) and *People v. Wise,* 127 A.D.3d 834 (2d Dept. 2015).

§ 8:7 HOW MANY RAIs? (MULTIPLE CASES)

The answer to the question of how many RAIs there can be, depends on the circumstances. Several different circumstances will be addressed below including: 1) two different indictments in two different counties prosecuted at the same time, both for current offenses; 2) a second and subsequent new conviction for a sex offense after the person had previously been classified as to the risk level for a prior sex offense; 3) a parole violation that occurs after conviction, classification, and incarceration; and 4) a person

moving to New York from another jurisdiction where they had two separate, unrelated, and non-contemporaneous sex offense convictions.

In *People v. Cook,* 29 N.Y.3d 114 (2017), the Court of Appeals addressed the question of whether SORA courts in two different counties may each render SORA risk level determinations upon current offenses committed in Queens and Richmond Counties against different victims. The charges were filed, and pleas negotiated in each county. The state prison sentences were ordered to run concurrently. As Mr. Cook approached his release, the Board prepared one risk assessment instrument and sent it to the sentencing courts of both counties. A SORA hearing was first held in Richmond County and a risk level determination made. A subsequent Queens County SORA hearing was held over the objection of the defendant.

The Appellate Division held that there should only be one SORA RAI made per "Current Offense or group of Current Offenses and that the doctrine of res judicata barred the Queens County SORA proceeding." *People v. Cook,* 128 A.D.3d 928, 931 (2d Dept. 2015). The Appellate Division further held that the Queens SORA proceeding should have been dismissed. Affirming, the Court of Appeals pointed out that the Guidelines required only one RAI, citing to Guideline pp. 5-6, General Principles No. 8. "The Current Offense[s] section should be completed on the basis of all of the crimes that were part of the instant disposition. For example, if the offender pleaded guilty to two indictments in two different counties, both indictments should be considered in scoring the action." *People v. Cook,* 29 N.Y.3d at 119. *See also People v. Katz,* 150 A.D.3d 1160 (2d Dept. 2017). The Court went on to give fair warning to prosecutors that in the future they should coordinate their SORA efforts, instructing that:

> *In light of our holding, it is imperative that prosecuting offices coordinate their submissions to the sentencing court that is adjudicating an offender's risk level in order to ensure that all relevant information – from all relevant jurisdictions – is before that court (see Correction Law § 168-n [3]).*

People v. Cook, 29 N.Y.3d at 120.

The principles enunciated in *Cook* were applied in *People v. Miller,* 179 A.D.3d 1517 (4th Dept. 2020). Upon Miller's release from state prison, two SORA hearings were held in two different counties. The first SORA hearing was held in Allegany County, where Miller was determined by the court to be a risk level two. Cattaraugus County Court subsequently held a second SORA hearing using a substantively identical risk assessment instrument and determined Miller to be a risk level three. The Appellate Division reversed the Cattaraugus County order and vacated that risk level determination, even though it was the higher of the two risk determinations. All that appellate work could have been avoided had defense counsel simply moved to dismiss the Cattaraugus County SORA proceeding. Such motions are routinely granted based upon *Cook.* Defense counsel have been successful in arguing for a dismissal of the second SORA proceeding, either by way of an informal letter to the judge and prosecutor requesting a conference, or by formal motion. A sample letter request for dismissal that was successful is attached in the chapter on Sample Documents.

The question remains, if the sentences in both counties were for probation, and there was no Board RAI, should there be two SORA hearings and determinations? The Court of Appeals' caution to prosecutors to coordinate their efforts for SORA purposes would certainly argue in favor of one SORA hearing, even if the prosecutors in both counties prepare their own proposed RAI. For efficiency of prosecutorial and judicial resources, a single SORA hearing would seem to be warranted under these circumstances.

When there are two separate and distinct sex offense convictions, separated significantly in time, there can and should be two risk level classification hearings and two RAIs. *People v. Iverson,* 90 A.D.3d 1561 (4th Dept. 2011) and *People v. Hirji,* 170 A.D.3d 412 (1st Dept. 2019).

When a person's risk level is determined by a SORA court, and that person is subsequently violated while on probation and is resentenced to imprisonment, there is no new risk classification hearing. Instead, the prosecution must proceed by way of a petition for modification under Correction Law § 168-o (3) if they seek an increase in the risk level. *People v. Damato,* 58 A.D.3d 819 (2d Dept. 2009).

This issue may also come up when a person moves to New York State after having been convicted in another state of two sex offense convictions. Suppose the convictions in the other state were separated by five years. Prior to the SORA hearing in New York, the Board will prepare two separate RAIs with recommendations in each. The Board scores them separately because they are not part of the same current offense or group of current offenses. One way to proceed would be for the SORA court to select the RAI that scored the highest presumptive risk level and hold a hearing as to that RAI. Another way to proceed would be for the SORA court to hold a separate SORA hearing for each of the RAI's. Although no reported case has addressed this issue, it would seem that the prosecutor cannot combine the two prepared RAIs into one prosecution-prepared RAI and proceed in one hearing as if the two convictions were one current offense.

§ 8:8 MODIFICATION

Correction Law § 168-o refers to three different types of proceedings that may be commenced after the initial SORA determination: 1) a petition for relief by the registrant; 2) a petition for downward modification by the registrant; and 3) a petition for upward modification by the prosecutor. These are not mutually exclusive proceedings.

1) Petition for Relief – Correction Law § 168-o (1) provides procedures for obtaining relief from SORA. If such a petition is granted, it will allow the petitioner to "be relieved from any further duty to register." This relief is only available to a person who is classified as a risk level 2 and has not been designated as a "sexual predator," a "sexually violent offender" or a "predicate sex offender." It is not available for a person who is classified as a level 1 or a level 3 risk. This relief allows registrants who are level 2 to be relieved of their lifetime registration. However, they must complete at least thirty years of registration before petitioning for this relief.

2) Petition for Modification by Registrant – Correction Law § 168-o (2) authorizes any person required to register or verify under SORA to petition for an order modifying his or her level of notification. As a practical matter, this only applies to people who

have been classified as risk level 2 or 3. A person with a risk level 1 cannot modify below that level and cannot petition to get off early. *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011) and *Doe v. Cuomo,* 755 F.3d 105 (2d Cir. 2014). A person who is designated as a "sexual predator," a "sexually violent offender" or a "predicate sex offender" must register for life. There is no right to modification available for any of the three designations: life means life. People classified as a risk level 2 or 3 can modify their risk level downward, thus reducing the community notification that they are subject to, but they still must register for life, if designated, regardless of the reduction in risk level.

3) Petition for Modification by Prosecutor – Correction Law § 168-o (3) authorizes the prosecutor to file a petition to modify a risk level. Undoubtedly, this will be a petition for upward modification. The statute only allows the prosecutor to petition for modification under aggravating, not mitigating circumstances. Filing for an upward modification is limited to the statutory circumstances, and filing is discretionary, not mandatory.

A Defense Attorney's Guide to SORA Modification Proceedings, by this author, is a separate Guide available at:
https://www.ils.ny.gov/files/SORA%20Modification%20Proceeding%202019.pdf

§ 8:9 ***DOE V. PATAKI* – REDETERMINATION HEARING**

As a result of the litigation described in Chapter 1 at §1:20, and particularly *Doe v. Pataki,* 3 F. Supp. 2d 456 (SDNY 1998), after six years of settlement negotiations the parties entered into a Stipulation of Settlement on June 4, 2004. This Stipulation of Settlement is included in the Appendix. As a result of this Stipulation, members of this class action are entitled to a risk level redetermination hearing with due process protections, which were not in place at the time of their original risk level determination. All members of this class action were to receive notice of their right to a redetermination hearing from the Office of Court Administration (OCA). For various reasons, there are to this day some people who are entitled to a redetermination hearing who have never received notice of their right to a redetermination hearing.

Defense counsel may be contacted by a client seeking a modification. On further investigation, you may discover that this person is entitled to a redetermination hearing, which would be preferable to a modification proceeding. Why? The reason is simple. The burden of proof is on the registrant for a modification and the standard is clear and convincing evidence. For a redetermination hearing, the burden of proof on the prosecution to establish a risk level other than level 1 is by clear and convincing evidence, whereas the burden of proof on the registrant to obtain a downward departure is a mere preponderance of the evidence.

Members of the *Doe v. Pataki* class action are people who were (a) on parole or probation on January 21, 1996, were required to register under Correction Law § 168-g and whose risk levels were determined as level 2 or level 3 by either Parole or Probation; (b) incarcerated on January 21, 1996, were required to register under Correction Law § 168-e upon their release from a correctional facility, and whose risk levels were determined to be level 2 or level 3 by the original sentencing court prior to January 1, 2000; or (c) convicted in any other jurisdiction and whose risk levels were determined to be

level 2 or level 3 by the Board of Examiners of Sex Offenders prior to January 1, 2000. Members of this class must have their risk levels redetermined by the original sentencing court or a court designated by the New York State Office of Court Administration (OCA). In the case of a member of the plaintiff class who was convicted in any other jurisdiction, the risk level must be redetermined by the supreme or county court in the county of residence.

§ 8:10 CHILD PORNOGRAPHY

More than a decade ago New York courts began to question whether the RAI was appropriate for use in the unique circumstances of a non-contact offense such as child pornography. There are several reasons underlying this concern. First, the RAI was developed with contact, not non-contact, offenses in mind. Second, the recidivism rates for people who offend using child pornography, when compared to people who offend by sexual contact, are significantly lower. Third, the scoring of certain risk factors, particularly risk factors 3 and 7, tend to overestimate the risk of reoffense for people who offend using child pornography.

Courts have articulated the concern that in the case of a child pornography offense, by scoring the RAI with points for risk factors 3 (number of victims) and risk factor 7 (stranger), the scoring would create an anomaly such that low risk child pornography offenders would incorrectly be categorized as level 2 risk.

This anomaly was first identified by the Court of Appeals in *People v. Johnson,* 11 N.Y.3d 416 (2008), a case in which the court raised the concern that "[i]t does not seem that factor 7 was written with possessors of child pornography in mind." *Id.*at 420. The court recognized that, although the RAI might generally be valid for contact offenses, it could create an overly high-risk classification in cases of child pornography. In child pornography cases, the RAI "produces a seemingly anomalous result, one the authors of the Guidelines may not have intended or foreseen." *Id.* at 421. Again, in *People v Gillotti,* 23 N.Y.3d 841 (2014), the court expressed its unease that scoring points under risk factors 3 and 7 may result in an excessive risk calculation in a manner not contemplated by the Guidelines or statute:

> *[W]e recognized, as the partial dissent does, that scoring points under factors 3 and 7 may overestimate the risk of reoffense and danger to the public posed by quite a few child pornography offenders.*

People v. Gillotti, 23 N.Y.3d at 860.

In *People v. Marrero,* 37 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2012), Judge Conviser astutely pointed out that the RAI was obviously not written with "possessors of child pornography in mind," as the Court of Appeals surmised. He explained that the RAI was written in January of 1996, and that New York's child pornography statutes were not enacted until almost a year later, on November 1, 1996. (Penal Law § 263.16 and § 263.11). The simple possession of child pornography was not a crime under New York law when the RAI was written. *Marrero,* 37 Misc. 3d at 423-433.

Risk factors 3 and 7 add points "in a way that was intended by the authors of the guidelines to apply to physical contact, and not to defendants who possessed and shared

child pornography." *People v. Yen,* 33 Misc. 3d 1234(A) (Sup. Ct. Kings Co. 2011). The court in *Yen* went on to note:

> *Since this court does not think that result* (scoring as a level 2) *would be consistent with the intent of the authors of the SORA guidelines it anticipates that many SORA applications made as to such defendants should result in downward departures to level one.*

People v. Yen, 33 Misc. 3d 1234(A).

In response to *People v. Johnson,* 11 N.Y.3d 416 (2008), the Board issued a Position Statement, *Scoring of Child Pornography Cases Position Statement* 6/1/12. In the Position Statement, the Board acknowledges the inapplicability of their RAI to child pornography cases and concedes that scoring all child pornography cases for risk factors 3 and 7 "produces an unintended, anomalous result…." (Board Position Statement 6/1/12). (Included in Appendix).

The Position Statement implies, without clearly stating, that to address the anomaly created by the RAI in child pornography cases, the Board will only score points under risk factor 5 and will score no points for risk factors 3 and 7. As noted in *People v. Marrero,* 37 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2012), the implication seems to be that child pornography offenses should no longer be scored for risk factors 3 and 7, "[b]ut that basic point is cryptically omitted." *Marrero,* 37 Misc. 3d at 435. The Court of Appeals recognized this problem, observing that "[i]t is true that reading between the lines of the statement (Board Position Statement), one can sense that the Board is skeptical of scoring points under factors 3 and 7." *Gillotti,* 23 N.Y.3d at 860. Indeed, that is how the Board scored the RAI in *Marrero* and in virtually all other child pornography cases since issuance of their Position Statement – that is, scoring no points for risk factors 3 and 7, and then departing upward "when appropriate," which appears to be the Board's suggestion in almost every child pornography case.

However, it is not the scoring or non-scoring of risk factors 3 and 7 that is the real misapplication of the SORA statute advanced by the Board. There is an additional reason that explains the distinctly different methodology used by the Board and that sanctioned by the Court of Appeals in *Gillotti.* The second part of the Board's Position Statement goes on to create a preference or default towards an upward departure. In fact, the Board had the audacity in its Position Statement to advance the approach that apparently only an upward departure should be considered, not even hinting at a circumstance in which there might be a downward departure. This disingenuous approach is apparent when one considers that the Position Statement's second bullet point provides for an automatic override upward for clinical documentation, but utters not a word about a downward departure, or even a refraining from an upward departure, based upon clinical documentation that the individual is low risk to reoffend. This imbalanced approach was noted in *People v. Oliver,* 37 Misc. 3d 1201(A) n. 1 (Sup. Ct. Cayuga Co. 2009).

Fortunately, the Court of Appeals was having none of it. In *People v. Gillotti,* 23 N.Y.3d 841 (2014), the Court of Appeals thoroughly repudiated the Board's Position

Statement. "[T]he court has no statutory obligation to follow or consider a position statement." *People v. Gillotti,* 23 N.Y.3d at 859.

First, the court made clear that SORA courts must consider scoring risk factors 3 and 7. They cannot just be ignored as the Board's Position Statement suggests. However, they are not automatically scored. They are scored if, and only if, the facts of a specific case so warrant, and where clear and convincing evidence supports the scoring of risk factor 3 or 7. Thus, the Court of Appeals refuted the first step in the Board's methodology for child pornography cases.

Second, and far more importantly, the Court of Appeals took a diametrically opposed view on departure. While the Board's position appears to be that it should default to an upward departure in most child pornography cases, the Court of Appeals has directed that the emphasis should be on a downward departure.

> *[I]n deciding a child pornography offender's application for a downward departure, a SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score, and without departing downward might lead to an excessive level of registration.*

People v. Gillotti, 23 N.Y.3d at 860. (Emphasis added).

In other words, in most SORA child pornography cases, the defendants will properly be classified as a low risk. This is because their offense did not involve a contact offense, and their physical danger to public safety is low. Additionally, the recidivism rates for people convicted of child pornography offenses when compared to other people convicted of contact offenses is low. In his report submitted in *People v. Gillotti,* Dr. Heffler noted that "a recent study had indicated that child pornography users who do not commit 'hands-on' offenses have only a 4% rate of committing such hands-on offenses in the future." *People v. Gillotti,* 23 N.Y.3d at 849. *See also People v. Marrero,* 37 Misc. 3d 429, 440-442 (Sup. Ct. N.Y. Co. 2012). As noted by Judge Smith in his partial dissent in *Gillotti:*

> *[B]oth common sense and our decision in Johnson should make downward departure the norm in most child pornography cases.*

People v. Gillotti, 23 N.Y.3d at 869.

As a result of the Court of Appeals rejection of the Board's Position Statement, although the general rule is that the Board's recommendations are merely advisory, in the case of a child pornography case, the Board's recommendation, which is predicated on faulty and discredited reasoning, is of no advisory value to courts and should simply be ignored.

In *People v. Gillotti,* 23 N.Y.3d 841, 864 (2014), the Court of Appeals held that the statistically low likelihood that a person with a child pornography conviction will commit hands-on sex offenses in the future was a mitigating factor as a matter of law, of a kind or to a degree not adequately considered by the guidelines. That met the first step of the

three-step analysis. The Court remanded for consideration of step two of its analysis because the Appellate Division had incorrectly applied the clear and convincing standard of proof for a downward departure instead of a mere preponderance of the evidence.

One lesson from *People v. Gillotti* is that it is an absolute requirement for defense counsel to request a downward departure in a child pornography case. Since the defendant has a right to the effective assistance of counsel in a SORA proceeding (*People v. Bertrand,* 194 A.D.3d 1081 (2d Dept. 2021), in the context of a child pornography case, defense counsel's failure to apply for a downward departure on the basis of an overassessment of risk level due to application of points under risk factors 3 and 7 "demonstrated a misunderstanding of the relevant law and amounted to ineffective assistance of counsel." *People v. Bertrand,* 194 A.D.3d at 1082. In *People v. Gonzalez,* 189 A.D.3d 509 (1st Dept. 2020) defense counsel made an outstanding record on the issue of downward departure in a child pornography case, and despite the SORA court's denial of the downward departure, the Appellate Division found this to be the kind of case envisioned by *Gillotti, warranting a downward departure.*

In *People v. Marrero,* 37 Misc. 3d 429, 442 (Sup. Ct. N.Y. Co. 2012), the court reviewed some of the literature and studies regarding child pornography and non-contact offenses and it referenced one of the more recently written by highly regarded sexual behavior experts. In quoting from Seto, M.C., Hanson, R.K. & Babchishin, K.M., *Contact Sexual Offending by Men Arrested for Child Pornography Offenses,* 23 Sexual Abuse: A Journal of Research and Treatment 124-145 (2011), the court highlighted the authors' conclusion that "online offenders rarely go on to commit detected contact sexual offenses and that the recidivism rates for this group were significantly lower than for contact sexual offenses." *People v. Marrero,* 37 Misc. 3d at 442.

Below is a selection of articles and studies that support the proposition that people convicted of non-contact offenses are a low risk to reoffend.

LITERATURE

Thomas H. Cohen & Michelle C. Spidell, *How Dangerous Are They? An Analysis of Sex Offenders Under Federal Post-Conviction Supervision*, 80(2) Federal Probation 21-32 (2016).

> Most of the findings in this paper align with prior research on federal sex offenders and are consistent with the general empirical work focusing on recidivism prediction for the sex offender population. Specifically, prior research has shown that child pornography is the most common type of sex offense within the federal system and that offenders convicted of child pornography have fewer risk characteristics and recidivate less frequently compared to contact sex offenders.

Erik Faust, William Bickart, Cheryl Renaud, & Scott Camp, *Child Pornography Possessors and Child Contact Sex Offenders*, 27(5) Sexual Abuse: A Journal of Research and Treatment 460-478 (2015).

> Rates of recidivism were significantly different between the two groups, with child pornography offenders showing lower rates of re-offense for most measures of recidivism. When controlling for background characteristics and the timing of the

event, child contact sex offenders were at much greater risk for having an arrest for a new crime or a non-sexual violent crime than child pornography offenders.

U.S. Department of Justice, *Sex Offender Management Assessment and Planning Initiative* (2013) p. 85.

More research is needed, but an analysis of nine available follow-up studies suggests that Internet offenders, as a group, have a relatively low risk of reoffending compared to conventional contact sex offenders (based on official records, which are conservative estimates of recidivism because of reporting biases and other factors). This has implications for how we respond to Internet offending, given that the risk principle of effective corrections would suggest that legal, policy, and clinical responses to Internet offenders should be proportional to risk. The minority of offenders who have a higher risk of reoffending—based on age, criminal history, and other factors that are being identified in ongoing research—require different responses than offenders with no prior criminal history and clear evidence of stability and prosocial conduct in all other domains of their lives. Research distinguishing between different types of Internet offenders will likely be helpful in this regard.

U.S. Department of Justice, *Sex Offender Management Assessment and Planning Initiative* (2017) p. 96

Online-only internet offenders have a relatively low risk for sexual recidivism compared to offline contact sexual offenders. This document contains a chapter entitled "Adult Sex Offender Recidivism."

Michael C. Seto, INTERNET SEX OFFENDERS, 195 (2013).

Nevertheless, these rates are substantially lower than typically found for contact sexual offenders, suggesting that online offenders, particularly online-only offenders, are a relatively low-risk group.

Michael C. Seto, *Child Pornography Offender Characteristics and Risk to Reoffend*, Prepared for the United States Sentencing Commission, Draft dated February 6, 2012.

The recidivism rates (for online offenders) were relatively low compared to the average recidivism rates found for contact sexual offenders.

[O]nline offenders appear to pose a lower risk of contact sexual offending because they score lower on antisocial tendencies.

Follow-up research suggests there are meaningful distinctions to make among child pornography offenders. In particular, first-time child pornography possession only offenders appear to be very low risk of sexual recidivism, in contrast to those with any prior or concurrent criminal convictions or those who engage in other sexual offending.

Michael Seto, R. Karl Hanson & Kelly M. Babchishin, *Contact Sexual Offending by Men with Online Sexual Offenses,* 23(1) Sexual Abuse: A Journal of Research and Treatment 124-125 (2011).

> The results of these two quantitative reviews suggest that there may be a distinct subgroup of online-only offenders who pose relatively low risk of committing contact sexual offenses in the future.
>
> We found nine studies that reported the recidivism of online offenders. Many of these studies are as yet unpublished, reflecting the newness of this line of research. Nonetheless, given the caveats that the follow-up times are short and such studies have relied on official criminal records that underestimate reoffending, the recidivism rates appear to be quite low.
>
> Our second meta-analysis found that online offenders rarely go on to commit detected contact sexual offenses. During the follow-up period (up to 6 years), less than 5% of the online offenders were caught for a new sexual or violent offense. Two studies found no sexual recidivists.
>
> In contrast, the online offenders who had no history of contact offenses almost never committed contact sexual offenses, despite a comparably high likelihood that they were sexually interested in children.

Richard Wollert, Jacqueline Waggoner & Jason Smith, F*ederal Internet Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate,* Chapter X in "The Sex Offender: Current Trends in Policy and Treatment Practice, Vol. II Ed. Barbara Schwartz (2012).

> The results of this study are also consistent with the results of other follow-up studies that show that CPOs do not represent a high risk of recidivism and do not have florid or violent criminal histories. Furthermore, consistent with other findings, it has been our experience that the great majority of offenders in this group generally do quite well in treatment, supervision, and post-supervision, and are able to conform their behavior to society's expectations.

Kelly M. Babchishin, R. Karl Hanson & Chantal A. Hermann, *The Characteristics of Online Sex Offenders: A Meta-Analysis,* 23(1) Sexual Abuse: A Journal of Research and Treatment 92-123 (2011).

> Many of the observed differences can be explained by assuming that online offenders, compared with offline offenders, have greater self-control and more psychological barriers to acting on their deviant interests.
>
> Additionally, a recent meta-analysis by Seto et al. found that online offenders have a very low rate of sexual recidivism (4.6%, N=2,630). Although this finding was based on short follow-up periods (most less than 4 years), it suggests that the recidivism rates of online offenders may be lower than those of offline offenders (e.g., 13.7% after an average 5- to 6-year follow-up).

Jerome Endrass, Frank Urbaniok, Leal C. Hammermeister, Christian Benz, Thomas Elbert, Arja Laubacher & Astrid Rossegger, *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC Psychiatry 43 (2009).

> Consuming child pornography alone is not a risk factor for committing hands-on sex offenses – at least not for those subjects who had never committed a hands-on sex offense. The majority of the investigated consumers had no previous convictions for hands-on sex offenses. For those offenders, the prognosis for hands-on sex offenses, as well as for recidivism with child pornography, is favorable.
>
> Altogether, the empirical literature does not put forward any evidence that the consumers of child pornography pose a considerably increased risk for perpetrating hand-on sex offenses. Instead, the current research literature supports the assumption that the consumers of child pornography form a distinct group of sex offenders. Though some consumers do commit hands-on sex offenses as well – the majority of child pornography users do not. Previous hands-on sex offenses are a relevant risk factor for future hands-on sex offenses among child pornography users, just as they are among sex offenders in general. The consumption of child pornographic material alone does not seem to predict hands-on offenses.
>
> These recidivism rates after a follow-up time of six years indicate that the risk of re-offending for child pornography consumers is quite low.
>
> The consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample – at least not in those subjects without prior conviction for hands-on offenses.

Ian A. Elliott, Anthony R. Beech, Rebecca Mandeville-Norden, & Elizabeth Hayes, *Psychological Profiles of Internet Sex Offenders: Comparison with Contact Sex Offenders*, 21 Sex Abuse: A Journal of Research and Treatment 76-92 at 87-88 (2009).

> The finding that Internet offenders do not appear to have the same levels of cognitive distortions or victim empathy distortions is potentially a very positive one. The lower frequency of pro-offending attitudes and beliefs that serve to legitimize and maintain sexually abusive behaviors (Ward & Keenan, 1999) displayed by Internet offenders suggests that they may be unlikely to represent persistent offenders or potentially progress to commit future contact sexual offenses. This may be related to the findings that contact offenders are more than twice as likely as Internet offenders to have a known history of prior contact sexual offenses. Similarly, a greater ability to empathize with victims, coupled with an ability to relate to fictional characters, may also contribute positively to Internet offenders' achievements in therapeutic interventions. In most forms of cognitive-behavioral therapy there is a specific focus on creating an understanding of the harm caused to children by sexual contact with adults and developing appropriate perception of the sexual sophistication of children, relying on the ability of the offenders to consider abstract examples.

L. Webb, Jackie Craissati, & S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 Sex Abuse: A Journal of Research and Treatment 449-465 (2007).

The follow up research was carried out after a short period of time at risk – averaging 18 months – but suggested that internet sex offenders were significantly less likely to fail in the community than child molesters in terms of all types of recidivism.

The follow up research revealed that internet sex offenders are significantly less likely to fail in the community than child molesters.

Nevertheless, as yet, by far the largest subgroup of internet offenders would appear to pose a very low risk of sexual recidivism.

Anne Goller, Roland Jones, Volker Dittman, Pamela Taylor & Marc Graf, *Criminal Recidivism of Illegal Pornography Offenders in the Overall Population – A National Cohort Study of 4612 Offenders in Switzerland*, 6 Advances in Applied Sociology 48-56 (2016).

This study compared reconviction rates among illegal child pornography offenders with and without previous child contact offenses. Comparison of 3-year reconviction rates showed that only 0.2% of the non-contact offenders were convicted of contact child sex offenses, whereas 2.6% of the dual offenders were reconvicted. The illegal child pornography offenders were significantly less likely to be convicted of further pornography offenses, or indeed other sexual offense. The very low "progression rate" among offenders convicted of child pornography to contact child sexual offences, and their low rate of even repeat pornography offenses suggests that community sentences remain appropriate.

PRACTICE TIPS

In every child pornography case, defense counsel must request a downward departure. Included along with this request must be a submission of mitigating factors, including, of course, some literature and research showing the reduced risk of recidivism for people whose offenses are non-contact.

Because the Board and the Court of Appeals have taken opposite approaches to the scoring of the RAI and departures in child pornography cases, the Board's recommendation should carry no weight. In any child pornography case in which the Board has recommended an upward departure, consider arguing the following to the SORA court:

> *The proposals by the Board in the usual sexual contact case are merely recommendations. People v. Douglas, 18 A.D.3d 967, 968 (3d Dept. 2005). The court is not bound by the recommendations of the Board. N.Y.S. Bd. Of Examiners of Sex Offenders v. Ransom, 249 A.D.2d 891 (4th Dept. 1998). It is the sentencing court that is charged with making the actual determination. Douglas at 968, citing People v. Stevens, 91 N.Y.2d 270, 276 (1998). "The Board…serves only in an advisory capacity that is similar to the role served by*

a probation department in submitting a sentencing recommendation." People v. Johnson, 11 N.Y.3d 416, 421 (2008).

In a SORA case involving child pornography, the value of the Board recommendation is not even advisory, but is de minimis, because the Court of Appeals has rejected the Board's approach to scoring the RAI and departures as outlined in the Board issued document entitled "Scoring of Child Pornography Cases Position Statement 6/1/12." In light of the fact that the Court of Appeals in People v. Gillotti, 23 N.Y.3d 841 (2014) thoroughly repudiated the policy approach espoused by the Board, the Board's recommendations predicated on that policy are of no value to this Court.

§ 8:11 EXPERT TESTIMONY

Defense counsel often ask whether a clinical psychologist, well-versed in treatment and assessment of people who have sexually offended, can help in the defense of a SORA case. If the cost to retain such an expert is not prohibitive, defense counsel should at least consult with an expert to determine to what extent an assessment in a particular case might be helpful. Also, consider the use of the treatment provider, should there be one.

There are several ways defense counsel can gain an appreciation of the need for a treatment and/or risk assessment expert. Consult with one of the experts in the field. This consultation alone will likely prove invaluable. In addition, or as an alternative, any defense attorney defending even one SORA case must read *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010). The court's opinion is a tour de force of SORA, the flaws in the RAI, and the need to upgrade and professionalize our approach to risk assessment under SORA. It is a call to defense counsel, or anyone else who will listen, that instead of the RAI, we should be using both reliable and validated actuarial risk assessment instruments and psychiatric evaluations by trained professionals to make risk assessment determinations.

Two years after writing the opinion in *People v. McFarland,* Judge Conviser summarized his concern over the flawed SORA process:

> *Informed sex offender risk assessments, in this court's view, require psychiatric evaluations by trained professionals who have reviewed relevant data and a defendant's scores on a validated actuarial risk assessment instrument. Such evaluations are typically not available in SORA proceedings.*
>
> *Risk level determination under SORA are increasingly used not only for criminal justice and community notification decisions but to dispositively determine fundamental issues about people's lives, like where a sex offender is permitted to live and whom the offender can live with. Yet, in this state, our courts continue to tolerate a system which bases these increasingly important decisions on outdated and inaccurate scoring systems and court assessments which are made in most cases with clearly inadequate*

> *information. The court continues to believe that we can and must do better.*

People v. Marrero, 37 Misc. 3d 429, 443 (Sup. Ct. N.Y. Co. 2012).

In *People v. McFarland,* 29 Misc. 3d 1206(A), the court analyzed how professionals make "sex offender" risk assessments. The court explained that in making predictions about reoffending, psychologists and psychiatrists generally rely upon two methods: clinical judgment and "Actuarial Risk Assessments." The court concluded that, unfortunately, the RAI is neither. The court also had the benefit of testimony from Dr. Kostas Katsavdakis, a clinical psychologist and well-recognized expert in the field of risk assessment for people who have sexually offended. Dr. Katsavdakis testified as to how he conducts a risk assessment and what steps are necessary to accurately determine a person's risk to reoffend:

> *…[W]hat I do is I first request all the records from the District Attorney's Office, the defense or the Attorney General's Office, MHLS [Mental Hygiene Legal Services], I read them first.…Then I usually interview someone for approximately two days over about 10 hours…. I administer the Static 99R if appropriate, I administer structured professional judgment instruments as well, additional testing, IQ if needed, in addition to the interviews, and that makes up my assessment.*

People v. McFarland, 29 Misc. 3d 1206(A).

Judge Conviser observed of the usual SORA determinations:

> *Professionals in the field of sex offender risk assessment would never make risk level determination with the information most courts have in ruling on departures. Neither, in the Court's view, should the judiciary.*

People v. McFarland, 29 Misc. 3d 1206(A).

A clinical expert may be able to help with many different aspects of your case by contributing the following:

- Rule out pedophila and hebephilia
- Rule out anti-sociality and sexual deviance, two key predictors of reoffending
- Explain why one or more of the risk factors on the RAI overstate the risk of reoffending
- Identify and explain the mitigating factors in the particular case
- Explain why the prosecution's reliance on particular aggravating factors is flawed
- Provide an opinion that relies on both a professionally accepted actuarial risk assessment and professional clinical judgment

Surely, Judge Conviser is not the only judge who thinks we can and must do better. And doing better means that defense counsel must take a more professional approach to SORA with the use of experts.

§ 8:12 REGISTRABILITY

A challenge to registrability, that is, contesting whether a person is subject to the registration requirements of New York, can come up in two different contexts. A person who is convicted in New York can challenge their registrability, and a person convicted in another jurisdiction who moves to New York or returns to New York can also raise the issue of registrability. It is important to note that the challenge is raised in an entirely different procedural way depending on whether it is a New York conviction or a conviction from another jurisdiction.

For a New York conviction, the time to challenge registrability is at sentencing when the court certifies that the defendant is a sex offender. The certification is included in the order of commitment, if any, and judgment of conviction. This certification is appealable on the direct appeal of the conviction. *People v. Miguel,* 140 A.D.3d 497 (1st Dept. 2016). It cannot be challenged at the SORA hearing, nor can it be appealed along with the SORA appeal. *People v. Hernandez,* 93 N.Y.2d 261 (1999) and *People v. Lema,* 157 A.D.3d 406 (1st Dept. 2018). The sentencing court's discretionary determination as to registrability for a conviction of unlawful surveillance must be appealed on the direct appeal and cannot be raised at the SORA hearing. *People v. Lema,* 157 A.D.3d 406 (1st Dept. 2018).

For people with a conviction from another jurisdiction, the challenge to registrability is raised at the SORA hearing, which is held once they have established residence in New York. Unlike the situation when the conviction occurs in New York and the sentencing court makes the determination as to registrability via certification, in the case of a person convicted in another jurisdiction who moves to New York, Correction Law § 168-k (2) requires the Board to determine whether the person is required to register. The usual way to obtain judicial review of the action of an administrative agency, such as the Board, is by a CPLR article 78 proceeding. But in *People v. Liden,* 19 N.Y.3d 271 (2012), the Court addressed the question of whether an article 78 was the exclusive remedy or whether registrability can be challenged at a SORA proceeding. At the time the issue came to the Court of Appeals, there were several Appellate Division cases holding that the only way to challenge registrability regarding an out-of-state conviction was by an article 78. The Court of Appeals reversed the ruling of the Appellate Division and held that "[t]o allow the risk level court to decide the registrability issue is not just a more efficient way to proceed; it is good policy in other ways." *People v. Liden,* 19 N.Y.3d at 276.

Whether the conviction is from another state or from another country, the ruling in *People v. Liden* allowing the issue of registrability to be raised before the SORA court is controlling. *Matter of Board of Examiners of Sex Offenders of the State of N.Y. v. D'Agostino,* 130 A.D.3d 1449 (4th Dept. 2015).

As a result of the decision in *People v. Liden,* defense counsel should raise any challenge to registrability regarding a conviction from another jurisdiction at the SORA risk level determination proceeding.

In order to challenge the registrability of a conviction from another jurisdiction, defense counsel must determine if the conviction from the other jurisdiction is a sex offense as defined in Correction Law § 168-a (2)(d) or a sexually violent offense as defined in Correction Law § 168-a (3)(a). There are four ways that a conviction from another jurisdiction can be considered a sex offense or a violent sex offense for registration purposes.

Correctional Law § 168-a (2)(d):

(i) An offense in any other jurisdiction which includes all of the essential elements of any such crime provided in Correction Law § 168-a (2) (a, b or c); or

(ii) A felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred; or

(iii) Any of the provisions of 18 U.S.C. 2251, 18 U.S.C. 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, 18 U.S.C. 2260, 18 U.S.C. 2422(b), 18 U.S.C. 2423, or 18 U.S.C. 2425, provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect; or

Correction Law § 168-a (3):

(b) A conviction of an offense in any other jurisdiction which includes all of the essential elements of any sexually violent offense provided for in Correction Law § 168-a (3)(a).

If the conviction in another jurisdiction falls into any of the four categories listed above, registration will be required in New York. Conversely, if the foreign conviction falls into none of the above categories, registrability should be challenged.

Essential Elements Test

The "essential elements" test to be applied for SORA purposes is not the strict equivalency standard that the courts have applied when determining whether a conviction in a foreign jurisdiction qualifies as a predicate violent felony for purposes of sentencing as a second violent felony offender pursuant to the "essential elements" test of Penal Law § 70.04 (1)(b)(i). Despite the same terminology, the SORA "essential elements" is a more relaxed test. The distinction between the two tests was explained by the Court of Appeals in *Matter of North v. Board of Examiners of Sex Offenders of State of N.Y.,* 8 N.Y.3d 745 (2007). The court explained that unlike the "essential elements" test for the purposes of enhanced sentencing, where the court looks to determine if the elements of the offense in the foreign jurisdiction are virtually identical to the elements of the comparable New York State offense, for the purposes of SORA the "essential elements" only "requires registration whenever an individual is convicted of criminal conduct in a foreign jurisdiction that, if committed in New York, would have amounted to a registrable New York offense." *Matter of North v. Board of Examiners of Sex Offenders of State of N.Y.,* 8 N.Y.3d at 753. In other words, the "essential elements" test is satisfied when the "conduct underlying the foreign conviction…is, in fact, within the scope of the New York offense."

Matter of North v. Board of Examiners of Sex Offenders of the State of N.Y., 8 N.Y.3d at 753. *People v. Burden,* 176 A.D.3d 24 (1st Dept. 2019) is a good example of a court applying the essential elements test to find that the defendant was not required to register in New York, because his Connecticut conviction did not meet the essential elements test for the equivalent offense of sexual abuse in the first degree in New York.

For SORA purposes the "essential elements" test as outlined in *Matter of North* requires a two-step analysis:

> **Step 1:** Compare the statute in the foreign jurisdiction with the analogous New York statute. Compare the elements of each to identify points of overlap. If "the two offenses cover the same conduct, the analysis need proceed no further for it will be evident that the foreign jurisdiction is the equivalent of the registrable New York offense for SORA purposes." *Matter of North,* 8 N.Y.3d at 753.
>
> **Step 2:** In circumstances where the two statutes overlap but the foreign statute also criminalizes conduct not covered under the New York statute, the defendant's actual conduct underlying the foreign conviction must be reviewed "to determine if that conduct is, in fact, within the scope of the New York offense. If it is, the foreign jurisdiction is a registrable offense under SORA's essential elements test. *Matter of North,* 8 N.Y.3d at 753.
>
> For "Step 2," it is not sufficient for the prosecution to merely provide the court with a copy of the out-of-state statute that was the basis for the foreign conviction, and identify an analogous New York statute if the elements are not identical. The prosecution must provide proof of the underlying facts of that case. The SORA court cannot conduct the "essential elements" analysis without proof of the conduct underlying the out-of-state conviction. As a result, the prosecution invariably fails to prove by clear and convincing evidence that the defendant's out-of-state convictions was the equivalent of a New York offense. *People v. Crews,* 127 A.D.3d 491 (1st Dept. 2015). Where the prosecution lacks the facts underlying the conviction in the foreign jurisdiction, the foreign conviction cannot serve as a basis to require registration in New York for "Step 2." Of course, if the two statutes cover identical conduct, proof of the facts underlying the foreign conviction would not be necessary.

An example of an out-of-state conviction that did not meet this "essential elements" test is found in *People v. Burden,* 176 A.D.3d 524 (1st Dept. 2019).

Felony Conviction and Registration in Another State Test

An alternative means of determining whether a person with a conviction in another jurisdiction must register in New York is found in Correction Law § 168-a (2)(d)(ii). It requires that the conviction be "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." Although it seems quite straightforward, this three-step analysis has some nuance.

> **Step 1:** Is the conviction a felony in the other jurisdiction? It is not altogether clear whether all that is required is that the other jurisdiction call it a felony conviction, or whether it must meet New York's definition of a felony in Penal Law § 10.00 (5),

requiring that it is an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.

Step 2: Is registration required in the other jurisdiction for this conviction? If registration is not required the conviction does not require registration in New York unless it meets the alternative "essential "elements" test. Almost all jurisdictions have a registry. One exception was for military convictions. *See People v. Kennedy,* 7 N.Y.3d 87 (2006). As a result of *Kennedy,* the Department of Defense now requires registration with the military as well as with the jurisdiction in which the service member resides.

Step 3: Did the conviction occur prior to January 1, 2000, and was the defendant still serving that sentence as of that date. This subsection of the statute became effective January 1, 2000. The legislation specifically provides that it will apply to persons who were convicted of an offense committed prior to January 1, 2000, if on that date they had not completed their sentence. Of course, it also applies to anyone committing an offense for which they were convicted after the effective date.

Cases of Interest

- *People v. Diaz,* 32 N.Y.3d 538 (2018) – This case analyzed a Virginia conviction to determine registrability under Correction Law § 168-a (2)(d)(ii) which requires registration for "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." Diaz was convicted in Virginia for the murder of his 13-year-old half-sister. He served a sentence of over 26 years and upon release was required to register under Virginia's more expansive Sex Offender and Crimes Against Minors Registry Act. There was no sexual component to Diaz's crime. Diaz moved to New York. The Court of Appeals ruled that, even though the defendant was required to register for a felony committed in a foreign jurisdiction, he was not required to do so "as a sex offender," therefore SORA did not apply. The court in *People v. Covington,* 174 A.D.3d 548 (2d Dept. 2019) followed the holding in *People v. Diaz.*

- *People v. Hlatky*, 153 A.D.3d 1538 (3d Dept. 2017) – The defendant was convicted of rape in the third degree in the State of Washington. A Washington court relieved him of the obligation to register based upon the law in that state that premised relief on 10 consecutive years without committing any disqualifying offenses. Hlatky moved to New York and the Board required him to register. Defendant didn't dispute that his Washington offense met the essential elements test but argued that requiring him to register in New York, when Washington relieved him of the obligation to register in that state, violated the Full Faith and Credit Clause. The Third Department rejected defendant's argument challenging registrability and required him to register in New York.

- *People v. Kennedy,* 7 N.Y.3d 87 (2006) – Defendant was convicted by a general court-martial of a generic provision of the Uniform Code of Military Justice. The Board and the SORA court required Kennedy to register on the theory that his crime was one of indecent assault, a federal felony, and they somehow concluded that he was required to register as a sex offender with naval authorities, thus meeting the

requirements of Correction Law § 168-a (2)(d)(ii). The Court of Appeals assumed it was a felony conviction for the purpose of deciding the appeal but found that the prosecution had presented no evidence of any kind suggesting that naval sex offenders must register with the Navy. The Court of Appeals upheld the challenge to registrability and annulled the SORA hearing. The Department of Defense has since changed policy to require service members to register with both the DOD and the jurisdiction where the service member resides.

- *People v. Hahn,* 150 A.D.3d 1285 (2d Dept. 2017) – This case involved another military conviction. The military conviction apparently included all the essential elements of the analogous New York statute, and the defendant made no argument to the contrary. The defendant relied upon the court's decision in *People v. Kennedy,* arguing that he did not have to register with the Navy as a sex offender. Unfortunately, the Board and SORA court had predicated their determinations of his registration requirement on Correction Law § 168-a (2)(d)(i), "the same essential elements," and not on Correction Law § 168-a (2)(d)(ii), as the court had in *People v. Kennedy.* Consequently, the Second Department affirmed the finding that his registration was required in New York.

- *Matter of Smith v. Devane,* 73 A.D.3d 179 (3d Dept. 2010) – Smith pleaded guilty to a felony sex offense in Texas and was granted a deferred adjudication. Under Texas law a deferred adjudication is not a "conviction." Nevertheless, he was required to register in Texas. When Smith moved to New York he was required to register based upon the Texas deferred adjudication which required registration. The defendant challenged his registrability arguing that he should not be required to register because he did not have a felony conviction in Texas, as interpreted by the laws of Texas. The Third Department held that New York was entitled to treat Mr. Smith's plea of guilty as a conviction, regardless of how Texas treated it, and held that the defendant was required to register in New York.

- *People v. Ramos,* 178 A.D.3d 1408 (4th Dept. 2019) – Ramos moved to New York from Puerto Rico and the Board determined that he was required to register in New York based upon a conviction for a felony sex offense in Puerto Rico for which he was required to register there. The SORA court agreed. On appeal the determination that he was required to register in New York was reversed. All the documents purporting to prove the conviction and registration were written in Spanish and were not accompanied by an English translation. The court held that there was, therefore, no competent evidence to support the Board's determination that he was required to register in Puerto Rico, or that he was convicted of a felony offense in another jurisdiction.

- *People v. Liden,* 19 N.Y.3d 271 (2012) – Although *Liden* is best known for establishing that registrability can be challenged at the SORA hearing, and not just by an article 78 proceeding, there is another important lesson revealed in the Court's decision.

  Defense counsel must carefully look at the date of the conviction from the other state and the applicable registration laws in effect in New York at the time of the conviction. Mr. Liden was convicted of unlawful imprisonment in the State of

Washington in 1996. He moved to New York, and the Board determined that the Washington conviction required Mr. Liden's registration in New York in 2007. The SORA court upheld the registration requirement in the mistaken belief that it could not address the issue at a SORA hearing. The Court of Appeals concluded that Mr. Liden was not required to register in New York, and the specific registration law in effect in New York at the time of the conviction proved critical.

Unlawful imprisonment in the second degree – the New York crime corresponding with the Washington crime of which defendant was convicted – is a misdemeanor. Until 2002, a crime committed in another state was defined as a "sex offense" in New York only if it included "all of the essential elements" of a New York "felony" (*see* former Correction Law § 168-a (2)(b) (amended by L 2002, ch 11, § 1). The 2002 amendment, which replaced the word "felony" with the word "crime" (Correction Law § 168-a (2)(d)], applied only to offenses committed on or after its effective date (L 2002, ch 11, § 24). The timing made the Board's registration determination erroneous.

Sex Offense Only if "Previously Been Convicted" – Forcible Touching and Sexual Abuse in the Third Degree

In the event that the victim is not less than eighteen years of age, there are two offenses that can be considered a sex offense pursuant to Correction Law § 168-a (2)(c), and thus requiring registration, only when the defendant has "previously been convicted" of a sex offense, a sexually violent offense or a prior incident of forcible touching or sexual abuse in the third degree, or an attempt.

The simple phrase, "previously been convicted," requires some parsing. First, what does "convicted" mean in this context? Second, does the term "previously" require that the conviction have occurred prior to the commission of the current offense, or prior to the conviction or sentencing on the current offense, or prior to the conducting of the SORA hearing?

Both case law and the CPL help answer the first question. "Conviction" means "the entry of a plea of guilty to, or a verdict of guilty upon an accusatory instrument." CPL § 1.20 (13). Several SORA decisions make it clear that in the context of determining a prior conviction, the term does not require that sentencing have taken place – only that a plea of guilty or jury verdict of guilty have occurred. *People v. Wood,* 60 A.D.3d 1350 (4th Dept. 2009), *People v. Franco,* 106 A.D.3d 417 (1st Dept. 2013), and *People v. Hirji,* 170 A.D.3d 412 (1st Dept. 2019).

The prior offense for which the defendant must have "previously been convicted" in order for the current offense to qualify as a sex offense, must have occurred prior to the commission of the instant offense. There is strong logic and analogous case law to support this conclusion. If we look at the Penal Law recidivist statutes (Penal Law § 70.06 (1)(b)(ii) and § 70.04 (1)(b)(ii) we see that the sentence upon the prior conviction must have been imposed before the commission of the present felony." Even though the court in *People v. Franco,* 106 A.D.3d 417 (1st Dept. 2013) ruled that the term "conviction" in the SORA context did not refer to the sentence as in the recidivist sentencing statutes, it clearly required that the conviction occur prior to the commission of the current offense for the purposes of SORA risk factor 9 regarding prior convictions. The sequentiality

requirement, that the conviction for the prior offense must have occurred prior to the commission of the subsequent sex offense, can be seen in *People v. Hirji,* 170 A.D.3d 412 (1st Dept. 2019). The framework for much of the SORA risk assessment instrument is built around the commission of the current offense. Where prior events are required, they must have occurred prior to the commission of the current offense, as in the case of risk factors 9 and 10. *People v. Wood,* 60 A.D.3d 1350 (4th Dept. 2009). The prior conviction must have occurred prior to the commission of the instant offense, not only for purposes of risk factor 10 but also for purposes of override 1. *See People v. Neuer*, 86 A.D.3d 926 (4th Dept. 2011). In *People v. Wilkes,* 53 A.D.3d 1073 (4th Dept. 2008) the court rejected the notion that the prior conviction must simply have occurred prior to the SORA hearing to serve as an override. The Guidelines for risk factors 9 and 10 also make it clear that the prior offense and conviction must occur prior to the date the defendant "commits the instant offense." *See* Guidelines at pp. 13-14.

One might also argue the logic of the notice requirement that is implicit in a statute that requires a prior conviction of a similar nature. It is a prior conviction of a sex offense or a similar offense that puts the defendant on notice that the relatively minor crime of forcible touching or sexual abuse in the third degree is taken seriously for registration purposes. It is the prior conviction that serves notice to the defendant, and to serve that notice the conviction must occur prior to the current offense.

What does this all mean? It means that if a defendant is arrested for forcible touching for two separate incidents that occur a month apart, and no conviction occurs on the first incident prior to the commission of the second incident, then even though there are two convictions for forcible touching, neither can be considered a sex offense because the conviction on one did not occur before the commission of the second incident.

§ 8:13 COURT'S FAILURE TO PROVIDE PROPER NOTICE TO DEFENDANT

In *Doe v. Pataki,* 3 F. Supp 456, 471-473 (S.D.N.Y. 1998) the court established the seven due process rights required to be provided to a defendant for the purposes of a SORA hearing. These seven procedural requirements have been accepted by New York courts. *People v. Wells,* 138 A.D.3d 947 (2d Dept. 2016); *People v. Gutierrez-Lucero,* 103 A.D.3d 89 (2012); *People v. Black,* 33 A.D.3d 981 (2d Dept. 2006). The due process requirements include the right to notice of the risk level assessment proceeding sufficiently in advance of the hearing to prepare a challenge and notice of the proceeding that must include a statement of its purpose and the Board's recommendation. Notice for the purpose of a SORA proceeding is required in order to meet the minimum State and Federal constitutional requirements of due process. *People v. David W.,* 95 N.Y.2d 130, 140 (2000). "The bedrock of due process is notice and the opportunity to be heard." *People v. David W.,* 95 N.Y.2d at 138.

The seven due process rights "have been incorporated into Correction Law § 168-n." *People v. Black,* 33 A.D.3d at 982 and *People v. Gutierrez-Lucero,* 103 A.D.3d at 98. They are also incorporated into Correction Law § 168-d (2) and § 168-k (2) with the same notice requirements. All three statutes contain a very specific and extensive notice requirement which begins as follows: "This notice shall include the following statement or a substantially similar statement." Each statute then goes on to specify the contents and type of notice that the court must provide to the defendant.

In *People v. Brooksvasquez,* 24 A.D.3d 644 (2d Dept. 2005) the court held that due process rights are incorporated in Correction Law § 168-n (3) "which requires, inter alia, that a defendant be notified of the risk level hearing date, and be provided with a copy of the Board's recommendation and the statement of reasons for the recommendation at least 20 days before a SORA proceeding." Because the due process requirements were not satisfied, the court in *People v. Brooksvasquez* remitted the matter to County Court with the specific instructions to hold a new SORA hearing and make a new determination preceded by notice in accordance with Correction Law § 168-n (3). *See* also the dissent in *People v. Rodriguez,* 102 A.D.3d 457 (1st Dept. 2013).

Although the statutory notice is very specific, many courts no longer provide the full statutory notice and only provide the defendant with an abbreviated summary notice. This lax practice has caught the attention of the Appellate Division in the Fourth Department. In *People v. Huntley,* 191 A.D.3d 1261, 1262 (4th Dept. 2021) the court expressed concern that the form notice used by County Court to notify the defendant of the SORA proceeding "contained numerous deficiencies" and the court went on to instruct that in the future "[i]n providing the requisite notice to defendants pursuant to section 168-n (3), courts should be tracking the language used in that statute instead of giving a shortened summary." *People v. Huntley,* 191 A.D.3d at 1262.

PRACTICE TIPS

Considering People v. Huntley, defense counsel should carefully read the required statutory notice found in Correction Law § 168-n (3), § 168- d (2) and § 168-k (2) and compare it to the notice being used in your case. If the court's notice does not track the language of the statute or is not substantially similar you may want to strategically make use of this.

In a case where you need additional time to prepare for the hearing or obtain supporting documents and the judge is pressing you to proceed without further delay, you should consider raising the denial of due process/lack of proper notice as a basis for an adjournment. Placing this argument on the record may cause the judge to think twice about denying your request for an adjournment. This is particularly true when the court has not provided the full timely notice of 20 days

[§ 168-n (3)], 30 days [§ 168-k (2)] or 45 days {§ 168-d (2)], depending on which statute the SORA hearing is being held under. It will also preserve this due process issue for appeal.

If the notice does not provide the substantive notice required by the statute, defense counsel should consider objecting to the notice in order to preserve this issue for appeal should you not get the desired risk level determination.

§ 8:14 KIDNAPPING AND FALSE IMPRISONMENT

Kidnapping in the first and second degree and Unlawful Imprisonment in the first and second degree are considered sex offenses as defined in Correction Law § 168-a (2)(i) when the victim is less than seventeen and the person who commits the offense is not the parent of the victim, even though these offenses contain no element of sexual misconduct.

This is so even when the actual conduct is wholly devoid of sexual conduct or motivation. There are several cases that have challenged the registrability of persons convicted of such offenses.

- *People v. Knox,* 12 N.Y.3d 60 (2009) – The defendants in these cases which were heard together for the purpose of appeal, raised due process and equal protection challenges to the registration requirement because the crimes underlying their registration involved no actual, intended or threatened sexual misconduct. The Court of Appeals rejected their claims holding that because no fundamental right is infringed the legislation is valid since it is rationally related to legitimate government interests. The court concluded that the Legislature had a rational basis for concluding that, in the large majority of cases where people kidnap or unlawfully imprison other people's children, the children either are sexually assaulted or are in danger of sexual assault. A 2002 U.S. Department of Justice study cited by the court showed that this was the case less than 50% of the time. Yet the court went on to find that the Legislature could constitutionally provide that people convicted of kidnapping or unlawful imprisonment of children could "be conclusively deemed sex offenders." *People v. Knox,* 12 N.Y.3d at 69. The court cited to three contrary decisions from Florida, New Mexico and Ohio with which they disagreed.
- *Yunus v. Lewis-Robinson,* 2019 U.S. Dist. LEXIS 5654 (SDNY 2019) – *Yunus* provides a contrary view to that of *People v. Knox.* Yunus was convicted of a kidnapping that had no sexual component. Nevertheless, he was required to register. Yunus brought his challenge in federal court seeking a preliminary injunction of SORA's application to him. The preliminary injunction was granted on January 11, 2019, based on the defendant's substantive due process claim.
- *People v. Weir,* 174 A.D.3d 1465 (4th Dept. 2019) – The defendant, the biological mother of the victims of the kidnapping, had surrendered her parental rights to an adoptive family. She then planned with one of her children to travel to New York and take her two children back to Georgia. She was arrested, charged, and convicted of kidnapping, and was ordered to register under SORA. The defendant challenged the registration, arguing that as the biological mother she should not be subject to registration. The court ruled that because she had surrendered her parental rights and agreed to the adoption of her children, she was not a parent of the victim for the purposes of SORA, and thus not exempt from SORA.

Chapter 9

ENMESHED CONSEQUENCES OF A SEX OFFENSE CONVICTION

CHAPTER 9 SECTIONS

§ 9:1 Sex Offender Registration Act (SORA)

§ 9:1a To Whom Does SORA Apply?

§ 9:1b Consequences

§ 9:2 Sexual Assault Reform Act (SARA)

§ 9:2a To Whom Does SARA Apply?

§ 9:2b Consequences

§ 9:3 Sex Offender Management and Treatment Act (SOMTA)

§ 9:3a To Whom Does SOMTA Apply?

§ 9:3b Consequences

§ 9:4 Supervision by DOCCS

§ 9:4a Consequences

§ 9:5 Supervision by Probation

§ 9:6 Electronic Security and Targeting of Online Predators Act

Chapter 9
ENMESHED CONSEQUENCES OF A SEX OFFENSE CONVICTION

§ 9:1 SEX OFFENDER REGISTRATION ACT (SORA)

For any person subject to SORA, the enmeshed consequences are punitive, and not mere "collateral consequences." Among the many consequences of SORA are the obligations to register and verify, community notification by law enforcement, internet posting, special phone number for public inquiries, and e-mail notifications. In addition, a person subject to SORA is exposed to additional criminal prosecution for failure to register and verify, the stigma of registration and public notification, and the many enmeshed consequences that make it difficult to obtain housing, employment, or education, and participate in many aspects of family and civic life.

§ 9:1a To Whom Does SORA Apply?

The duty to register and verify under SORA is imposed by Correction Law § 168-f on every person who is a "sex offender," as that term is defined in Correction Law § 168-a (1). That definition includes any person convicted of either a "sex offense" or a "sexually violent offense." Correction Law § 168-a (2) and (3). The specific offenses for which a conviction subjects a person to SORA are listed in those two subdivisions.

§ 9:1b Consequences of Registration and Verification

Duration of Registration and Verification

Level 1 - 20 years [Correction Law § 168-h (1)]

Level 2 - Life with the possibility of discharge after 30 years. [Correction Law § 168-h (2) and § 168-o (1)].

- Modification is possible. [Correction Law § 168-o (2)].

Level 3 - Life

- Modification possible. [Correction Law § 168-o (2)]

Regardless of risk level, if designated as "sexual predator," "sexually violent offender," or "predicate sex offender" the duration of registration and verification is life. This cannot be changed by modification.

Initial Registration

- Must register at least 10 days prior to discharge, parole, release to post-release supervision or release from any state or local correctional facility, hospital or institution. [Correction Law § 168-f (1)(a)]
- Must register at the time sentence is imposed for any person convicted of a sex offense who is released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge. [Correction Law § 168-f (1)(b)]

- When moving from another state, must advise DCJS within 10 days of establishing residence in New York. DCJS notifies the Board, and the Board notifies the person if they have to register. Correction Law § 168-k. No specific period is set for registration. Presumably it is the same 10 days from the receipt of notice from the Board as would be required for annual verification. [Correction Law § 168-f (2)].

Periodic Registration and Verification

Level 1

- Annual verification of address and internet identifiers by mail within 10 days of receipt of form from DCJS. [Correction Law § 168-f (2)].
- Photograph updated in person with law enforcement every 3 years. [Correction Law § 168-f (2)(b-3)].
- Notify DCJS within 10 days of any change of address, internet account, internet identifiers, or enrollment, attendance, employment, or residence at any institution of higher education. [Correction Law § 168-f (4)].

Level 2

- Same as level 1 but must also verify employment address.

Level 3

- Same as level 2, but must also do the following:
- Photo updated annually in person with law enforcement. [Correction Law § 168-f (2)(b-2)].
- Must verify address in person with law enforcement every 90 days. If any change in appearance, new photograph can be taken at these 90-day verification reports. [Correction Law § 168-h (3) and § 168-f (3)].

Regardless of risk level, if designated as a "sexual predator," in person verification with law enforcement of address and photograph, if change in appearance, is required every 90 days. [Correction Law § 168-h (3) and § 168-f (3)].

Community Notification

Level 1

Special toll-free telephone number. (Correction Law § 168-p). Upon telephone request DCJS will disclose to caller whether the person about whom they are inquiring is required to register and shall also provide other relevant information provided for in Correction Law § 168-l (6)(a), including:

- Photograph
- Name
- Approximate address by zip code
- Crime of conviction
- Modus of operation
- Type of victim targeted

    - Name and address of any institution of higher education at which the person is enrolled, attends, is employed or resides
    - Special conditions of supervision imposed

- Active notification by law enforcement. [Correction Law § 168-l (6)(a)]. Law enforcement may disseminate relevant information as listed above to any "entity with vulnerable populations" related to the nature of the offense committed by such person. Correction Law § 168-l (6). Such entities with vulnerable populations may disclose or further disseminate this information. Such entities include:

    - superintendents of school
    - chief school administrators
    - superintendents of parks
    - public and private libraries
    - public and private school bus companies
    - day care centers
    - nursery schools
    - preschools
    - neighborhood watch groups
    - community centers
    - civic associations
    - nursing homes
    - victim's advocacy groups
    - places of worship

Level 2

- Internet posting on DCJS website. (Correction Law § 168-q). The posting includes the same information as above but includes the exact street address of residence and address of place of employment.

- Special toll-free telephone number. The same information is disclosed as in level 1 above, however, it includes the person's specific street address.

- E-mail notification. (Correction Law § 168-q).

- Active notification by law enforcement to entities with vulnerable populations is the same as above for level 1, except that disclosure includes the exact address of residence.

Level 3

- Internet posting on DCJS website. Same as level 2.

- Special toll-free telephone number. Same as level 2, but it also includes the address of employment.

- E-mail notification. Same as level 2.

- Active notification by law enforcement to entities with vulnerable populations is the same as above in level 2, except that disclosure includes the address of employment.

Criminal Penalties for Failure to Register or Verify

- Failure to register or verify subjects a person to criminal prosecution pursuant to Correction Law § 168-t. It is a class E felony for a first offense and a class D felony for a second offense.
- Failure to register or verify in New York can subject a person to federal prosecution under 18 U.S.C. § 2250 (a), which carries a term of imprisonment of up to 10 years. To be subject to this criminal liability, a person has to:
    - Be required to register under SORNA, and
    - Knowingly fail to register or update a registration as required by SORNA, and
    - Be a sex offender as defined for the purposes of SORNA by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States, or
    - Travel in interstate or foreign commerce, or enter, leave, or reside in Indian country.

Enmeshed Consequences

- As a result of the stigma that occurs from the publicly accessible and disseminated information about a person's status, and the banishment from large swaths of urban areas, individuals placed on the registry face grave difficulties in obtaining employment, housing, and accessing education.
- Occasionally, courts have recognized the harm caused by SORA.

> *Being labeled as a sex offender does far more than impose a stigma to one's reputation. It often results in the offender being subject to social ostracism and abuse, and impedes the person's ability to access schooling, employment, housing and many other areas.*

People v. Diaz, 150 A.D.3d 60, 66 (1st Dept. 2017) *aff'd* 32 N.Y.3d 538 (2018).

- Housing – Even when a person subject to the SARA 1,000-foot buffer zone does find housing that is compliant, many landlords do background checks or access the public registry and refuse to rent to anyone on the registry. In addition to this discrimination, lifetime registrants are banned from federal housing subsidies and living in federally funded housing. 42 U.S.C. § 13663.
- SORA makes travel and relocation extremely difficult.
- Many colleges and universities will not admit people who are on the SORA registry or will expel them when the college learns of their status.

- Public access to the registry predictably leads to discrimination in housing, employment, and education in addition to social ostracization, harassment and even vigilante assaults.[45]
- Even the New York State Unified Court System has noted the detrimental effects of registration. "[R]egistration can lead to social disgrace and humiliation, loss of relationships, jobs, and housing and both verbal and physical assaults."[46]
- A number of courts, albeit a minority, have echoed the sentiment that registries are akin to shaming. The Sixth Circuit recognized that Michigan's SORA "resemble[s] traditional shaming punishment," … "brand[ing] registrants as moral lepers solely on the basis of a prior conviction." *Doe v. Snyder,* 834 F.3d 696 (6th Cir. 2016). The New Hampshire Supreme Court has similarly acknowledged that "[i]n many ways the internet is our town square" … "[p]lacing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame and shun." *Doe v. State,* 111 A.3d 1077, 1097 (N.H. 2015). "Yesterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent." *Commonwealth v. Perez,* 97 A.3d 747, 765-766 (Pa. 2014) (Donohue, J. concurring).
- The public shaming that occurs as a result of the public dissemination of information as to one's status is not limited to the impact it has on registrants themselves. Sadly, the families and friends of registrants also "face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public – regardless of whether the registrant or his or her family is a threat to public safety." *Millard v. Rankin,* 265 F. Supp. 3d 1211, 1222-1223 (D. Colo. 2017).
- Contracted vigilantism – In *Jones v. County of Suffolk and Parents for Megan's Law,* 936 F.3d 108 (2d Cir. 2019) the Court of Appeals for the Second Circuit affirmed a decision of the District Court denying Jones' challenge to a contract system between Suffolk County and Parents for Megan's Law (PFML) under the "Community Protection Act" adopted by the County Legislature which authorized the Suffolk County Police Department to contract with PFML to "verify the home addresses of sex offenders registered under SORA in Suffolk County, monitor registrants' use of social media, develop a system for reporting SORA violations, and provide community education concerning SORA." The contract required PFML to use retired law enforcement officers to conduct the verification/vigilante visits. These retired cops (vigilantes), euphemistically called "Registry Verification Field Representatives" periodically visited the homes of people on the registry and

[45] Michael P. Lasher and Robert J. McGrath, *The Impact of Community Notification on Sex Offender Registration: A Quantitative Review of the Research Literature,* 56 Int. J. Offender Ther. & Comp. Criminol. 1 (2012:6)), 19. Jill Levenson and Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders,* 34 Am. J. Crim. Just. (2009: 54) 55.

[46] New York State Unified Court System, *Sex Offender Registration Consequences,* available at http://www.nycourts.gov/courthelp/Criminal/sexOffenderConsequences.shtml

demanded identification. The court rejected the Fourth Amendment challenge to these seizures as reasonable under the special needs doctrine.

§ 9:2 SEXUAL ASSAULT REFORM ACT (SARA)

Although entitled a "reform," it is more a reaction than a reform. It is an extremely harsh add-on to the already harsh consequences of SORA, prompting some courts to refer to it as being "akin to banishment," [*Matter of Williams v. DOCCS* 136 A.D.3d 147, 158 (1st Dept. 2016)], and others to observe that requiring compliance with SARA's 1000-foot buffer zone as a condition of release from prison "effectively converts … [a] fully-served prison term into a life sentence." [*Matter of Arroyo v. Annucci,* 61 Misc. 3d 930, 940 (Sup. Ct. Albany Co. 2018)].

SARA was first enacted in 2000 and became effective on February 1, 2001. It was subsequently amended in 2005 to expand its scope in two significant respects.

As originally enacted, SARA barred people convicted of certain enumerated sex offenses, whose victims were under the age of 18, from knowingly entering school grounds, or a facility or institution that primarily cares for minors. The term "school grounds" was limited to the narrower part of the definition provided for in Penal Law § 220.00 (14)(a), meaning "in or on or within any building, structure, athletic playing field, playground or land contained with the real property boundary."

Effective September 1, 2006, the Legislature amended SARA to make it apply not just to people convicted of the enumerated sex offenses whose victims were under the age of eighteen at the time of such offense, but also to apply to any such person convicted of the enumerated sex offenses who has been designated pursuant to SORA as a risk level 3. In addition, the definition of "school grounds" was broadened to incorporate the additional definition in Penal Law § 220.00 (14)(b), so as to include publicly accessible areas <u>within 1,000 feet</u> of the real property boundary line of any school. The most invidious of SARA's consequences are caused by the expanded definition of "school grounds." By incorporating that definition, a person subject to SARA is restricted from entering into or upon any area accessible to the public located within 1,000 feet of the real property boundary line comprising any such school.

"Although the statute itself does not restrict the location of a residence per se, the expanded definition of 'school grounds' necessarily operates to restrict places where a parolee (or probationer) may live or travel (*People v. Diack,* 24 N.Y.3d 674, 681-682 [2015])." *Matter of Williams v. DOCCS.* 136 A.D.3d at 151. Being that many urban areas of New York are densely populated with school buildings every several blocks, this thousand-foot buffer zone often makes it impossible to find a place to live or work.

SARA's restrictions are enforced by making them mandatory conditions of parole, conditional release (Executive Law § 259-c [14]), probation and a conditional discharge (Penal Law § 65.10 (4-a).

§ 9:2a TO WHOM DOES SARA APPLY?

1) The SARA conditions apply to people convicted and serving a sentence for an offense enumerated in Executive Law § 259-c (14) or Penal Law § 65.10 (4-a), including the following:

- an offense defined in article 130 of the Penal Law (Sex Offenses)
- an offense defined in article 135 of the Penal Law (Kidnapping, Coercion and Related Offenses)
- an offense defined in article 263 of the Penal Law (Sexual Performance by a Child)
- Penal Law § 255.25 (Incest in the Third Degree)
- Penal Law § 255.26 (Incest in the Second Degree)
- Penal Law § 255.27 (Incest in the First Degree); and

2) People serving a sentence and who are subject to conditions for one of the following:

- Parole or conditional release (curiously, post-release supervision is not referenced in the statute). Whether the failure of the Legislature to include the term post-release supervision in the statute negates the applicability of the SARA residence restriction may be resolved by the Court of Appeals in *Matter of Alvarez v. Annucci,* a case in which this issue was raised by appellate counsel. Leave was granted on May 4, 2021.
- Probation
- Conditional discharge; and

3) People who fall within one of the following categories:

- The victim of the offense for which they were convicted was under 18 years old at the time of the offense, or
- Has been designated as a level 3 risk pursuant to SORA

§ 9:2b <u>CONSEQUENCES</u>

- **Violation of SARA Condition** - A violation of SARA is treated as violation of parole, conditional release, probation, or a conditional discharge. It can subject the defendant to the return to prison for a violation of parole or conditional discharge and it can result in resentencing for a violation of probation or a conditional discharge. It does not subject the defendant to a new criminal charge.

- **Awaiting release from prison** – People in prison who have earned their good behavior allowance expect to be released at their conditional release date. (Penal Law § 70.30 (4) and Correction Law § 803). However, for those subject to SARA, DOCCS takes the position that it is their responsibility to develop a SARA-compliant residence. Failure to do so will result in a denial of conditional release and continued incarceration until the maximum term of the sentence. After serving the maximum term of the sentence, the person in prison might again expect to be released. Once again, DOCCS requires the individual to identify a SARA-compliant residence. If none of the proposed residences are approved by DOCCS, incarceration will continue even though the prison sentence has expired. DOCCS relies upon two statutory provisions to continue the incarceration. First, it relies upon Penal Law § 70.45 (3) to place the individual in a residential treatment facility (RTF), which looks strikingly like a prison, for up to six months. If no SARA-compliant residence has been identified at that point, DOCCS relies upon Correction Law § 73 (10) to continue the incarceration for the entirety of the post-

release supervision, albeit by "release" to a RTF. "The Kafkaesque irony of this situation is manifest. The only things changed are the labels: that which had been the prison is now called the residential treatment facility. Likewise, calling a prison a residential treatment facility does not dull the razor wire, and saying that petitioner has been released does not make him a free man." *Matter of Arroyo v. Annucci,* 61 Misc. 3d at 935, 936.

- **Released into the community** – If a person is fortunate enough to get released from prison to a SARA-compliant residence, the consequences of SARA still erect barriers. SARA's 1,000-foot buffer zone makes travel from home to employment, healthcare, school, and counseling difficult and in some instances impossible. It also makes it daunting to move to a new residence.

- **Returned to prison after completing a SARA compliance-required sentence and community supervision** – Occasionally, a person who was subject to SARA completes his sentence and also completes community supervision. Subsequently, that person is convicted and reincarcerated for a crime that is not enumerated in Executive Law § 259-c (14) and does not require SARA compliance. The question arises whether, upon completion of that new sentence, this person will be required to find SARA-compliant housing as a condition of release. At this point, there is a split on this issue in the Third and Fourth Departments. In *People ex rel. Negron v. Superintendent,* 170 A.D.3d 12 (3d Dept. 2019), the court ruled that SARA did not apply. The court ruled to the contrary in *People ex rel. Garcia v. Annucci,* 167 A.D.3d 199 (4th Dept. 2018).

Considering how extremely difficulty it is to find SARA-compliant housing, the question has arisen whether, pursuant to Correction Law § 201 (5), DOCCS has an obligation to provide substantial assistance to people in need of SARA-compliant housing who have completed their sentence and are awaiting release from an RTF. "No" says the Court of Appeals in *Matter of Gonzalez v. Annucci,* 32 N.Y.3d 461 (2018), over a caustic dissent by Judge Wilson.

This bizarre cycle of incarceration that persists while the near impossible search for a SARA-compliant residence continues is a consequence that defense counsel needs to bring to the attention of the defendant while discussing the plea options. These harsh SARA conditions have been the subject of considerable litigation. Below are a few cases and articles of interest:

- *People ex rel. McCurdy v. Warden,* 35 N.Y.3d 1056 (2020)
- *Matter of Gonzalez v. Annucci,* 32 N.Y.3d 461 (2018)
- *People ex rel. E.S. v. Superintendent,* 193 A.D.3d 57 (4th Dept. 2021)
- *People ex rel. Negron v. Superintendent,* 36 N.Y.3d 32 (2020)
- *People ex rel. Johnson v. Superintendent, Adirondack Correction Facility* and *People ex rel. Ortiz v. Breslin,* 36 N.Y.3d 187 (2020)

Literature

Association for the Treatment of Sexual Abusers, *Sex Offender Residence Restrictions,* August 2, 2014, available at www.atsa.com/pdfs/Policy/2014SOResidenceRestrictions.pdf

New York City Bar Association, *The Impact and Legality of Sex Offender Residency Restrictions Created by New York's Sexual Assault Reform Act,* Oct. 25, 2016, available at https://s3.amazonaws.com/documents.nycbar.org/files/20073107-SARAResidencyRestrictions_CrimCourt.CrimLaw.CJO.Corrections_Report_FINAL_10.24.16.pdf

Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd,* 49 Int. J. Offender Ther. & Comp. Criminology 168 (2005)

§ 9:3 SEX OFFENDER MANAGEMENT AND TREATMENT ACT (SOMTA)

In 2007, the New York Legislature enacted the Sex Offender Management and Treatment Act (SOMTA) providing for the civil management of individuals presumed to be likely to recidivate following the completion of their prison terms. SOMTA became effective on April 4, 2007, and was enacted based upon the legislative findings which are set forth in MHL § 10.01:

(a) That recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management.

(b) That some sex offenders have mental abnormalities that predispose them to special treatment modalities to address their risk to reoffend…and confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.

(c) That for other sex offenders, it can be effective and appropriate to provide treatment in a regimen of strict and intensive outpatient supervision.

To address these findings, the Legislature enacted MHL Article 10 and established a civil management process for New York. For people determined to need such civil management, there are two distinct dispositional outcomes: civil confinement to a secure facility or management in the community under strict and intensive supervision and treatment (SIST).

Civil commitment is a harsh consequence. As noted by Judge Ciparick in her dissent in *People v. Hartnett,* 16 N.Y.3d 200 (2011), it is a grave deprivation of liberty which may result in a period of confinement lengthier than a defendant's prison sentence, perhaps lasting indefinitely.

§ 9:3a TO WHOM DOES SOMTA APPLY?

In order to be subject to civil management a person must meet the following criteria:

- Be a "detained sex offender" within the meaning of MHL § 10.03 (g);
- Nearing anticipated release from confinement [MHL § 10.05 (f)];
- Suffering from a "mental abnormality" as defined in MHL § 1.03 (i);
- Be a "sex offender requiring civil management" as defined in MHL § 1.05 (q);
- Be a "dangerous sex offender requiring confinement" – a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control

behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility [MHL § 10.03 (e)]; **or**

- Be a "sex offender requiring strict and intensive supervision" – a detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement. [MHL § 10.03 (r)].

§ 9:3b CONSEQUENCES

- **Civil commitment** – If determined to be a "dangerous sex offender requiring confinement," the person is committed to a secure facility for care, treatment and control, "until such time as he or she no longer requires confinement." [MHL § 10.07 (f)]. Such confinement is usually at either Central New York Psychiatric Center in Marcy, N.Y., or St. Lawrence Psychiatric Center in Ogdensburg, N.Y. This confinement can last indefinitely, however, the person is entitled to an annual review. (MHL § 10.09).

- **SIST** – If determined to be a "sex offender requiring strict and intensive supervision," the person is placed in the community under a regimen of SIST and is supervised by a parole officer from DOCCS and is subject to the conditions set by the court. SIST could last indefinitely, however, the person is subject to review every two years. [MHL § 10.11 (f)].

§ 9:4 SUPERVISION BY DOCCS

Every state prison sentence for which a person is subject to SORA will result in community supervision by DOCCS either as parole, post-release supervision, or conditional release. Invariably, the defendant is placed under the supervision of a parole officer who has a specialized caseload consisting of people who have been convicted of a sex offense. This community supervision carries with it many harsh conditions.

§ 9:4a CONSEQUENCES

Statutory conditions

In addition to the parole conditions imposed by SARA, there are also mandatory conditions imposed by Executive Law §259-c (15) on any person released to community supervision for whom SORA registration is required and where the victim of the offense was under the age of eighteen at the time of the offense, or such person has been designated a level 3 risk level, or the internet was used to facilitate the commission of the crime. These conditions prohibit the use of the internet for the following:

- Accessing pornographic materials
- Accessing commercial social networking websites
- Communicating with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen
- Communicating with a person under the age of eighteen when the person on parole is over the age of eighteen, with the exception of special permission for communicating with one's own child

Standard parole conditions

Every person on community supervision is subject to a set of standard conditions,[47] including anyone subject to SORA. Included in these standard conditions are the following:

- I will make office and/or written reports as directed.
- I will not leave the State of New York or any other state to which I am released or transferred, or any areas defined in writing by my Parole Officer without permission.
- I will permit my Parole Officer to visit me at my residence and/or place of employment and will permit the search and inspection of my person residence and property.
- I will discuss any proposed changes in my residence, employment, or program status with my Parole Officer.
- I will notify my Parole Officer immediately any time I am in contact with or arrested by any law enforcement agency.
- I will not be in the company of or fraternize with any person I know to have a criminal record or whom I know to have been adjudicated a Youthful Offender.

Special conditions of parole

Any person released to community supervision and subject to SORA will receive a set of at least fifty special conditions, including some of the following:

- I shall not be in contact with children under the age of 18 years old without written permission of my assigned parole officer.
- I shall not enter or be within 1,000 feet of places where children congregate (parks, schools, daycares, swimming pools, beaches playgrounds, video galleries, bowling alleys, library, etc.) without written permission of my assigned parole officer.
- I will not own, be in possession of or be in close proximity of any items that could be considered as children's paraphernalia.
- I will notify my parole officer when I establish a relationship that can be described as, but not limited to, the following: intimate, romantic, sexual, ongoing, social and/or indiscriminate sexual encounter with another person.
- I will not enter into relationship(s) with people who have children living with them or have children visiting them frequently or infrequently.
- I will not use any computer without written permission of my assigned parole officer.
- I will inform my assigned parole officer of any and all computers I have access to.
- I will notify my assigned parole officer when I establish a significant relationship and shall inform the other party of my prior criminal history concerning sexual abuse and/or any domestic violence abuse.
- I will enter and complete a Sex Offender Therapy Treatment Program.
- I will not accept any type of employment, whether volunteer or paid, without prior approval of my assigned parole officer.

[47] The standard conditions and special conditions listed here are taken from the parole conditions set for a person released from a New York state prison to post-release supervision on April 2, 2018.

- I will not open door to trick or treaters or participate in Halloween festivals.
- I will not own/possess/buy any cell phone with camera or internet service.

Other conditions

In addition to regular and special conditions of community supervision, people who are subject to SORA may be subject to some of the following:

- GPS monitoring
- Polygraph
- Need permission to get a drivers' license
- Sitting for hours at the parole office waiting to see assigned parole officer for periodic reporting, thus interfering with any ability to work a steady job

§ 9:5 SUPERVISION BY PROBATION

In any case where a person who is subject to SORA is sentenced to probation or a conditional discharge, the court must impose the same mandatory internet conditions required for parolees, as listed above. Penal Law § 65.10 (4-a)(b). In addition, for a person sentenced to probation, the court may require:

> *…that the defendant comply with a reasonable limitation on his or her use of the internet that the court determines to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to protect public safety, provided that the court shall not prohibit such sentenced offender from using the internet in connection with education, lawful employment or search for lawful employment.*

Penal Law § 65.10 (5-a).

§ 9:6 ELECTRONIC SECURITY AND TARGETING OF ONLINE PREDATORS ACT

Also known as "e-Stop," this bill became effective April 28, 2008. Included in this bill were changes to the law imposing the conditions listed above on anyone convicted of a sex offense while on parole, probation, or conditional discharge, making changes to Executive Law § 259-c (15) and Penal Law § 65.10 (4-a)(b) and § 65.10 (5-a). "E-Stop" also provided for restrictions and controls on internet use. By amending Correction Law § 168-b (1)(a), the Act required any person convicted of a sex offense to register with DCJS any internet account with internet access providers belonging to such person and internet identifiers used by such person.

By amending Correction Law § 168-b (10), the Act authorized DCJS, upon the request of any authorized internet entity, to release to any authorized internet entity internet identifiers maintained in the sex offender registry that would enable such entity to prescreen or remove sex offenders from its service. The amendment to § 168-f (4) of the Correction Law required any person convicted of a sex offense to register with DCJS, within 10 days, any change of internet accounts with internet access providers belonging to such person and internet identifiers that such person uses.

In 2015, Arthur Ellis was convicted of failing to register his Facebook account as an "Internet Identifier" in violation of Correction Law § 168-f (4). On appeal, the Appellate

Division reversed the conviction and dismissed the indictment, holding that defendant's failure to disclose to DCJS his use of Facebook is not violative of Correction Law § 168-f (4) and is therefore not a crime. *People v. Ellis,* 162 A.D.3d 161 (3d Dept. 2018). The Court of Appeals affirmed in a full opinion. *People v. Ellis,* 33 N.Y.3d 582 (2019).

People v. Ellis is not the final word regarding Facebook. People on the registry who have a Facebook account may still find themselves charged with failure to register. In *People v. Weeks,* 188 A.D.3d 1420, 1423 (3d Dept. 2020), the court upheld a conviction for failure to register related to a Facebook account, holding that "[a]lthough a Facebook account itself is not an Internet identifier, defendant's alias or "designation" used to create and access his Facebook account, and to identify himself to and interact with other users on this "social networking" site, is an Internet identifier…"

The District Court in *Jones v. Stanford*, 489 F. Supp.3d 140 (E.D.N.Y. 2020), relying substantially on *Packingham v. North Carolina,* 137 S. Ct. 1730 (2017), issued a preliminary injunction enjoining the enforcement of the prohibitions on social media access by e-Stop and DOCCS Directive 9201 to people required to register who did not use the internet to facilitate the commission of their underlying sex offense. Settlement was still pending as of November 1, 2021.

PRACTICE TIPS

As explained above, there are considerable consequences of a conviction for a sex offense which may have far greater effect and last much longer than the prison sentence. A defense attorney needs to be aware of these consequences and carefully explain them to a client so that they can be considered when contemplating a plea bargain or going to trial.

There will also be occasions when defense counsel will want to remind a trial court judge of the harsh consequences that "punish" a defendant as the result of a conviction for a sex offense and impede successful reentry. That same reminder may be strategically made to a SORA judge, when arguing over the defendant's risk level or when the judge is considering a downward departure.

Chapter 10

ANTICIPATING SORA WHILE DEFENDING THE CRIMINAL SEX OFFENSE CASE

CHAPTER 10 SECTIONS

§ 10:1 Plea Bargaining

§ 10:2 Counsel the Defendant About the Advisability of a Plea

§ 10:3 Advocacy: Motions, Trial, Plea and Sentencing

§ 10:4 Advising and Preparing the Defendant in Anticipation of the SORA Proceeding

§ 10:5 Review, and Where Appropriate, Challenge the PSR

§ 10:6 Challenge the Certification at Time of Sentencing

Chapter 10

ANTICIPATING SORA WHILE DEFENDING THE CRIMINAL SEX OFFENSE CASE

DEFENSE OF A SORA PROCEEDING BEGINS AT ARREST

A defense attorney who represents a person charged with a registrable offense (either a "sex offense" or a "sexually violent offense") must begin thinking about the SORA proceeding from the first day he or she enters the case.

The Risk Assessment Guidelines and Commentary establish an important and basic protocol: "No one should attempt to assess a sex offender's level of risk without first studying this commentary." Guidelines p. 1. The corollary precept for defense counsel, whether appearing on the criminal case or on the SORA proceeding, is that no one should attempt to represent a person charged with a registrable offense without first carefully studying the Guidelines. An all-too-common refrain heard from defense counsel at SORA proceedings is, "I wish this issue had been anticipated and addressed at the time the criminal case was still pending. Now it is too late."

A defense attorney, well-versed in SORA, can make critical decisions, properly advise the defendant, and take action that will be invaluable at a subsequent SORA proceeding, including:

1) Plea bargaining
2) Counsel client about the advisability of a plea
3) Advocacy: motions, trial, plea, and sentencing
4) Advise and prepare client in anticipation of the SORA proceeding
5) Review and challenge the PSR

§ 10:1 PLEA BARGAINING

Before starting negotiations, defense counsel needs to determine what possible pleas will avoid SORA consequences. If a plea to a non-registrable offense cannot be negotiated, defense counsel should determine if the defendant is Youthful Offender eligible. Finally, if a plea to a registrable offense is unavoidable, defense counsel will want to determine whether a plea bargain can avoid designation of the client as a "sexually violent offender" or avoid SARA residency restrictions.

- **Youthful Offender**

  It is a home run whenever you can negotiate a Youthful Offender adjudication, but it is a grand slam when you can do so when the client is charged with a "sex offense" or a "sexually violent offense." A person who is adjudicated a Youthful Offender is not subject to SORA. This is so for two reasons. First, to be subject to SORA there must be a conviction. Second, in the definitional section of

SORA, it explicitly provides that '[a]ny conviction set aside pursuant to law is not a conviction for purposes of the article." Correction Law § 168-a (1).

Registration is required under SORA for any "sex offender." A "sex offender" is defined as "any person who is 'convicted' of any of the offenses set forth in subdivision two or three of this section." Correction Law § 168-a (1). CPL Article 720 makes it clear that a Youthful Offender adjudication is not a "conviction." When a court determines that an eligible youth is a youthful offender, "the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding." CPL § 720.20 (3). The effect of a Youthful Offender adjudication is made clear in CPL § 720.35 (1). "A youthful offender adjudication is not a judgment of conviction for a crime or any other offense."

A Defendant's Pre-plea/ Pre-sentence Memorandum may help persuade the prosecutor to agree to a Youthful Offender adjudication. This, in turn, may help get a commitment from the judge. If you are not successful in negotiating for a Youthful Offender adjudication, it is essential to submit a Pre-sentence Memorandum when a client is Youthful Offender eligible. The use of the Pre-sentence Memorandum in Youthful Offender eligible cases is discussed below.

- **Plea to a non-registrable offense**

  There are times when defense counsel can negotiate a plea to a non-registrable offense. Perhaps it is because the prosecution's case is weak, the defendant is sympathetic, or the victim's participation was consensual, or a combination of factors. But defense counsel will not be able to take advantage of a strong bargaining position if potential non-registrable offenses have not been identified and pursued in negotiations. Below are a few examples of offenses commonly negotiated in order to avoid SORA:

  - Endangering the Welfare of a Child – Penal Law § 260.10.

  - Obscenity First, Second or Third Degree – Penal Law §§ 235.05, 235.06, and 235.07. Although these offenses are not considered "sex offenses" for registration purposes, oddly enough, they are listed as offenses that are subject to SARA restrictions for a person who is sentenced to probation, conditional discharge [Penal Law § 65.10 (4-a)], or parole [Executive Law § 259-c (14)]. Note that SARA only applies if the victim was under the age of 18 at the time of the offense, or the defendant has been designated a level 3 risk to reoffend. If you can avoid the SARA restrictions, a plea to these offenses can be advantageous.

  - Assault in the Third Degree – Penal Law § 120.00.

  - Assault in the Second Degree – Penal Law § 120.05. Although this is a violent felony, the defendant may still be better off than being subject to SORA.

  - Attempted Assault in the Second Degree – Even better than a plea to Assault in the Second Degree since it is not a violent felony.

  - Unlawful Surveillance in the Second Degree (sub. 2, 3, or 4) – Penal Law § 250.45. These offenses are considered "sex offenses" for registration purposes "unless upon motion by the defendant, the trial court, having regard to the

nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that registration would be unduly harsh and inappropriate." Correction Law § 168-a (2)(e). Do not enter a plea first and wait to find out how the trial court feels about this. Make this part of your plea negotiation by getting a prior commitment from the court.

❍ Sexually motivated felony [caveat: a felony not listed in Correction Law § 168-a (2)(a)]. – Penal Law § 130.91. Whether due to the intention of the drafters, or a drafting error, a conviction for a sexually motivated felony is considered a "sex offense" for registration purposes only if the underlying felony is listed in Correction Law § 168-a (2)(a) and does not include the other specified offenses listed in Penal Law § 130.91 (2). For example, a conviction for Attempted Robbery in the Second Degree as a sexually motivated felony, was held not to be a registrable offense under the plain meaning of the statute. *People v. Lawrence,* 56 Misc.3d 752 (Sup. Ct. N.Y. Co. 2017). Note that *People v. Hernandez,* 61 Misc.3d 534 (Sup. Ct. Kings Co. 2018) holds to the contrary. In footnote 3 of *Hernandez,* three other unreported decisions deciding this issue consistent with *People v. Lawrence* are listed. This issue was temporarily put to rest in *People v. Buyund,* 179 A.D.3d 161 (2d Dept. 2019) when the Second Department favorably cited to *People v. Lawrence* and held that only those sexually motivated felonies specifically listed in Correction Law § 168-a (2)(a) are sex offenses subject to registration. The Court of Appeals reversed and remitted, dodging the substantive issue, concluding that the issue had not been preserved for appeal, because defendant had not objected to his certification as a sex offender during the plea or sentencing. *People v. Buyund,* 36 N.Y.3d 1037 (2021). Before defense counsel negotiates such a disposition, find out what the trial court's position is on this issue. Whether or not a sexually motivated felony subjects a defendant to SORA, it is clear that a conviction for a sexually motivated felony and a sentence of imprisonment does subject a defendant to the possibility of an article 10 proceeding for civil commitment, being a "detained sex offender" (MHL § 10.03 (g) and (p) and § 10.06).

❍ Plea to a non-registrable subdivision – Not every subdivision of what appears to be a registrable "sex offense" carries with it the requirement of registration. Care must be taken when given the option to plead to several different subdivisions of a Penal statute. For example, this comes up in Promoting Prostitution in the Second Degree, Penal Law § 230.30. From a cursory review, one might assume that a conviction under either subdivision of this statute requires registration. Not so. Registration is required under subdivision two, but it is not required under subdivision one. To an unsuspecting attorney, a plea to subdivision two sounds more innocuous (profiting from prostitution of a person less than eighteen years old), while a plea to subdivision one (advancing prostitution by compelling by force or intimidation) sounds more heinous. Not so when it comes to SORA registration. The plea to subdivision two can prove disastrous, requiring registration. Subdivision one does not subject the defendant to SORA.

- **Plead down to a "sex offense" and not a "sexually violent offense"**

  Once defense counsel has exhausted all attempts at a negotiated plea to a non-registrable offense, there are still important plea negotiations to be pursued to ameliorate the effects the plea will have on SORA. As discussed in Chapter 6 on Designations, a designation in any one of the three categories - "sexually violent offender," "predicate sex offender" or "sexual predator" - will have lifetime consequences. Any one of these three designations carry lifetime registration and verification. Correction Law § 168-h (2). A designation cannot be modified. Correction Law § 168-o.

  The easiest designation to control for during plea negotiations is that of the "sexually violent offender." A defendant will be designated as a "sexually violent offender" as a result of any plea to a "sexually violent offense" listed in Correction Law § 168-a (3). One can avoid this designation by pleading to an offense not on this list. This is easier than one might anticipate because at that stage of the negotiations the prosecution is not thinking about how the plea will affect the SORA classification. For example, a defendant who is charged with Rape in the First Degree is facing certain designation. Defense counsel might expect a plea offer down from this class B felony to the class C felony of Attempted Rape in the First Degree, which would still result in a designation as a "sexually violent offender." Alternatively, defense counsel could negotiate for a plea to Rape in the Second Degree, also a C felony, but not a sexually violent offense for SORA purposes. The defendant would serve the same sentence but avoid the inevitable lifetime registration that results from the sexually violent offender designation. A plea down to an offense of a lower degree accomplishes the same result for a number of different offenses.

- **Plea agreement as to the sentence**

  When negotiating for an agreed upon sentence, there are countervailing considerations: for example, the length of the term of incarceration and the length and type of supervision. It is imperative to have a discussion with your client to explain the consequences of each type of sentence and to determine the client's priorities. This will help inform and direct your plea negotiations.

  Consider, for example, a defendant charge with Sexual Abuse in the Second Degree, a misdemeanor. Your client may prefer to serve a definite sentence and avoid probation or may prefer probation and no incarceration. The choice of sentence will affect both the SORA risk factor score and possible SARA restrictions. It is important to think through the consequences of the plea deal. Although a defendant may want to avoid probation, being released without supervision will result in the assessment of 15 points under risk factor 14. A conditional discharge may also seem like a good deal, but again it will result in 15 points for release without supervision. On the other hand, the client may seek to avoid the SARA restrictions imposed under Penal Law § 65.10 (4-a) but will be subject to those restrictions if sentenced to probation or a conditional discharge. These restrictions will only apply if the defendant is designated as a risk level 3 or if the victim was

under age 18 at the time of such offense. To help the defendant prioritize, you should score the RAI, determine the likely points, overrides, designations, and consider the age of the victim. With this information in hand, you can advise your client of the consequences of the sentence agreement that is sought, including whether the additional 15 points for risk factor 14 pushes him into a higher level, or whether the SARA restrictions will likely be implicated.

- **Plea agreement including RAI**

  Although prosecutors are reluctant to include a discussion of the RAI in the plea negotiations, and judges generally resist doing so, under some circumstances defense counsel have been successful in limiting the potential damage from a higher risk level. A plea agreement that is resolved by a sentence of probation, conditional discharge, split sentence, discharge after payment of a fine, or unconditional discharge, and thus results in the court following the procedures in Correction Law § 168-d (2) and (3), is conducive to plea bargaining over the RAI. There is no Board recommendation, and the prosecutor will make the recommendation about how the RAI should be scored. In addition, the SORA hearing will be held close in time to the sentencing. In some jurisdictions, the judges hold the SORA hearing the same day as sentencing. Once defense counsel has scored the RAI, you will know what the concerns are, and for which issues it would be beneficial to work out a prior agreement with the prosecution. Consider seeking the prosecutor's consent to any of the following:

  - Total risk factor score
  - Risk level
  - No upward departure
  - No opposition to downward departure
  - Scoring of a particular risk factor
  - No designation
  - No override

§ 10:2 COUNSELING THE DEFENDANT ABOUT THE ADVISABILITY OF A PLEA

Defense counsel has the responsibility to inform the defendant in every case of all direct and collateral consequences of a plea or going to trial. *Padilla v. Kentucky,* 599 U.S.356 (2010). Whether the failure to inform the defendant of the consequences of a conviction violates due process or amounts to ineffective assistance of counsel based upon the outdated distinction between "direct" and "collateral consequences," as the court held in *People v. Gravino,* 14 N.Y.3d 546 (2010), is somewhat beside the point. Defense counsel owes a greater duty to the defendant than to simply avoid being ineffective, as made clear by professional standards that require defense counsel to fully inform the client about possible collateral consequences.[48]

[48] ABA, *Criminal Justice Standards for the Defense Function, 4th Ed.* Standard 4-5.4 (a). "Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions." The necessity to advise the client about collateral consequences is addressed in other professional standards as

When defending against a sex offense charge, the duty to advise the client is even more important, it is also more complex because there are additional consequences injected into the equation because of SORA[49] and SOMTA[50] (Mental Hygiene Law article 10 - civil management/ civil commitment). The lifetime consequences of both SORA and SOMTA must be explained to defendants so they can fully understand such consequences when deciding whether to plead guilty or go to trial.

Defense counsel should score the RAI and review the likely risk level with the defendant. Explain what SORA means, the different risk levels, whether the defendant will be designated, and the following consequences:

- Verification requirements
- Community notification
- Duration of registration
- Possibility of future modification
- SARA requirements
- Felony criminal liability for failure to register or verify in compliance with SORA (Correction Law § 168-t) or federal criminal liability for failure to register or update registration (18 U.S.C. § 2250)
- The difficulties travelling and relocating to another state

For a more complete discussion of the consequences of SORA, see Chapter 9, Enmeshed Consequences of a Sex Offense Conviction.

§ 10:3 ADVOCACY: MOTIONS, TRIAL, PLEA AND SENTENCING

Defense counsel must balance competing interests: defending the criminal case; punishment for a conviction; and the consequences of SORA and SOMTA. The goal is to minimize the impact of SORA consistent with the defense strategy, informed by the defendant's priorities.

- **Motions**
  - A motion to dismiss or reduce the indictment pursuant to CPL §§ 210.20 and 210.30 may allow dismissal of the count of the indictment that charges a "sexually violent offense." Even though it may still leave a higher class felony remaining in the indictment, and the dismissal of the one count will not reduce

well. NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York,* Standard VIII (A)(7). NYSBA, *2015 Revised Standards for Providing Mandated Representation,* Standard I-7(e). NLADA, *Performance Guidelines for Criminal Defense Representation,* Guidelines 6.2 (3).

[49] In *People v. Gravino,* 14 N.Y.3d 546, 550 (2010) the Court of Appeals held that because SORA is a collateral consequence, a trial court's neglect to mention SORA during the plea colloquy does not undermine the knowing, voluntary and intelligent nature of a defendant's guilty plea. *See also People v. Magliocco,* 101 A.D.3d 1724 (4th Dept. 2012).

[50] In *People v. Hartnett,* 16 N.Y.3d 200 (2011) the Court held that failure to warn a defendant who pleads guilty to a sex offense that he may be subject to SOMTA does not automatically invalidate the guilty plea. The court did leave the question open for a different result if the defendant had moved to vacate his plea as not being knowing and informed, had defendant not in fact been informed by the court or defense counsel of SOMTA, and if the evaluation of SOMTA would have been a significant factor in the evaluation of the plea bargain. In *People v. Balcerak,* 161 A.D.3d 764 (2d Dept. 2018) the court affirmed the trial court's vacating of the conviction, finding the plea was not knowing and voluntary where the defendant was not informed of SOMTA prior to entry of his plea, and defendant was actually the subject of a SOMTA proceeding.

the defendant's exposure to significant prison time, it will avoid designation as a "sexually violent offender."

❍ Where the defendant has either been convicted after trial of Unlawful Surveillance in the Second Degree, or pleaded guilty to that charge, under subdivisions two, three or four, defense counsel must make a motion pursuant to Penal Law § 168-a (2)(e), asking the trial court to find that registration would be unduly harsh and inappropriate in light of the nature and circumstances of the crime and the history and character of the defendant. Defense counsel should consider addressing these issues in a Defendant's Presentence Memorandum, with particular attention paid to the negative consequences the defendant will face as a result of SORA. If defense counsel is not fully familiar with such consequences, consider submitting an affidavit from an expert well-versed in reentry and collateral consequences. This motion must be made to the trial court and not to the SORA court. It must be made before the court makes the determination whether defendant is to be certified as a sex offender. The decision on this motion is appealed as part of the direct appeal, not as part of the SORA appeal. *People v. Lema,* 157 A.D.3d 406 (1st Dept. 2018).

- **Guilty Plea**

  Counsel should take care to craft the plea to limit SORA consequences.

  ❍ Limit the counts – Limit the counts to which the defendant will be required to plead guilty. In some instances, a "sexually violent offense" is a lower class offense than the initial counts of the indictment. Avoid a plea to a "sexually violent offense" count, if possible.

  ❍ Carefully craft the allocution. Avoid extraneous facts and try to keep the plea limited to the statutory elements.

  ❍ If the defendant will plead to an attempt, don't allow allocution to the complete crime.

- **Trial**

  ❍ Carefully review all the counts of the indictment. There may be good reason to go to trial, even if conviction on the top count is likely, if an acquittal on some lower, but more SORA-consequential count, can realistically be accomplished.

- **Sentencing**

  ❍ Youthful Offender – Unless the judge has committed to granting YO status, whenever defense counsel represents a client who is eligible for a YO adjudication, effective assistance of counsel requires the submission of a Defendant's Presentence Memorandum (CPL § 390.40). This is undoubtedly the best vehicle for putting before the trial judge the mitigating factors required by case law [*People v. Cruikshank,* 105 A.D.2d 325 (3d Dept. 1985) *affd sub nom. People v. Dawn Maria C.* (1986)] and statute [CPL § 720.20 (1) and § 720.10 (3)]. Of equal importance, without a Defendant's Presentence Memorandum, the appellate court will not be able to determine the YO issue and will likely remand back to an unsympathetic sentencing court. In both *People v. Amir W.,* 107 A.D.3d 1639 (4th Dept. 2013) and *People v.* Thomas *R.O.,* 136 A.D.3d 1400 (4th

Dept. 2016), the Appellate Division was able to rely upon the Defendant's Presentence Memorandum to modify in the interest of justice and adjudicate the defendant a Youthful Offender.

- Prepare the client for the PSI
- Attend the PSI with the client
- Order a copy of the plea and sentencing minutes
- Consider waiving the PSR – Since so much bad information and so many bad conclusions come from the PSR and are copied verbatim into the SORA case summary, consider waiving the PSR when you can. (CPL §390.20). Take note that this statute was amended effective August 21, 2017, expanding the circumstances for which a waiver of the PSR is permissible.
- Obtain a copy of the PSR (CPL § 390.50 (2)[a])
- Prepare the client to make a statement at sentencing
- Take care that your traditional mitigation does not become aggravating factors for sentencing, SORA, or SOMTA. Mental health issues and clinical assessments are often submitted as mitigation in non-sex offense cases. Such mitigating factors may be harmful in the sentencing context.

  - *Sentencing*

    Keep in mind that when SOMTA was enacted in 2007, the Penal Law was amended to add in § 70.80. Subdivision two of the new statute provides for new consideration for judges imposing sentences for felony sex offenses. Added to the standard considerations of Penal Law § 1.05 were the additional considerations:

    - defendant's criminal history
    - defendant's history of sex offenses
    - mental illness
    - mental abnormality
    - defendant's ability or inability to control his sexual behavior
    - if defendant has difficulty controlling such behavior, the extent to which that difficulty may pose a threat to public safety

    Some of these factors may negatively impact sentencing and defense counsel should be wary of submitting information to the court that may unwittingly increase the sentence.

  - *SORA*

    Override 4 may be triggered by a clinical assessment submitted by defense counsel, although intended to be mitigating, the assessment may form the basis for the SORA court to conclude that "there has been a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases ability to control impulsive sexual

behavior" thus overriding up to a risk level 3. Defense counsel should take care not to submit a clinical assessment with a harmful assessment.

- SOMTA

  Defense counsel should take care not to submit any clinical findings that might later be used to target the defendant for civil commitment. A defendant is a candidate for civil commitment if he meets the definition of "dangerous sex offender requiring confinement." This means "a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility." Mental Hygiene Law § 10.03 (e).

§ 10:4 ADVISING AND PREPARING THE DEFENDANT IN ANTICIPATION OF THE PROCEEDING

Defendants can impact their SORA risk level by what they say and do at many points along the criminal justice continuum, from arrest, through incarceration, and to reentry planning. You may not be able to impact statements made by the defendant at the time of arrest, but you can certainly mitigate some of what may have been said at the time of arrest by influencing what the defendant says starting at the time of the plea. Below is a checklist of issues to review with your client in order to avoid the unnecessary assessment of points for certain risk factors.

- Review the RAI with the defendant
  - Prepare the RAI and likely risk level and score.
  - Review all 15 of the risk factors so the defendant understands what is being assessed and what facts may be at issue.
- Review each risk factor and how it may be addressed at plea, PSI, and sentencing.
- Alert the defendant that any statements made at plea, trial, PSI, sentencing, and in prison will be used for SORA purposes and explain how.
- Discuss the advantages and disadvantages of speaking to the probation officer at the PSI and speaking at sentencing.
- Discuss the advantages and disadvantages of participating in the Sex Offender Counseling and Treatment Program (SOCTP) while in DOCCS. Defense counsel may find it helpful to review the New York State DOCCS program publication, *Sex Offender Counseling and Treatment Program (SOCTP) Guidelines* (April 2018).[51]
  - Consequences of refusal to participate the SOCTP
    - Loss of good behavior allowance – hold to maximum term
    - Risk factor 12 will be assessed 15 points
    - Could impact civil commitment
    - Could result in denial of parole and Limited Credit Time Allowance

[51] Online at https://doccs.ny.gov/system/files/documents/2019/05/SOCTP_Procedures_and_Guidelines.pdf.

- Consequences of Participation in the SOCTP
  - Statements not privileged
  - Pressured to admit to additional sex crimes
  - Statements could be used to support civil commitment
  - Program documents are provided to Board of Examiners of Sex Offenders and to OMH and Attorney General

- Discuss invoking the 5th Amendment privilege against self-incrimination during the PSI, sentencing, or when refusing to participate in the SOCTP. This is most effective in a situation where the defendant has been convicted after trial and intends to appeal or has an appeal pending. For a more complete discussion of invoking the 5th and its impact on risk factor 12 (acceptance of responsibility), see Chapter 3, Scoring the Risk Assessment Instrument, § 3:13. DOCCS does take the policy position that no written or oral statement made by the defendant in conjunction with the SOCTP may be used against the defendant in any subsequent criminal proceeding and so advises the defendant. SOCTP Guidelines p. 21.

- Prepare the defendant for the PSI, including what to say and what to avoid

  - How to discuss the offense
    - Don't deny that to which you allocuted
    - Limit talking about crime to facts in plea allocution
    - Don't add additional facts, victims, or offenses

  - Use the interview to work in defendant's acceptance of responsibility, remorse, and insight into the offending conduct

  - Review the risk factors and how the probation officer might bait the client to give a damaging answer

  - Review particularly relevant or troublesome risk factors
    - Risk factor 4 – To be assessed points for this risk factor, the prosecution must prove that two sexual acts occurred separated by more than 24 hours. The temporal relationship between the two offenses is required to assess points. Do not provide the times and places during the PSI if they do not already have them.

    - Risk factor 5 – If the charge is child pornography, do not acknowledge that any of the photographs were of individuals 10 or less.

    - Risk factor 7 – Defendant should not characterize the victim or victims as strangers if defendant had any acquaintance with them.

    - Risk factor 8 – If there is a sex offense for which the defendant was not convicted, defendant should not discuss it at the PSI.

    - Risk factor 11 – Defendants often assume that drug or alcohol use at the time of the offense is mitigating. Defense counsel should dispel that notion. The PSI is not a good time to talk about drug or alcohol use at the time of the offense. It is not a good time to talk about how much one drinks at one sitting or how much one has used drugs in

the past. This is a risk factor for which some of the most damning evidence comes directly from the defendant's own words. Forewarn and prepare your client in this regard.

- Risk factor 12 - Defendant should be advised of the many ways that failure to accept responsibility can be established and to avoid making such statements. Some common mistakes are to:
  - Deny guilt or minimize seriousness of offense
  - Deny memory of offense
  - Blame the victim
  - Move to withdraw plea
  - Explain that the reason you pleaded guilty was a reason other than acceptance of responsibility: avoid prison time, get it over with, get out of jail.
- Risk factor 13 – Telling the defendant to avoid engaging in misconduct or even minor disciplinary infractions while in jail or prison may seem like an exercise in futility, but it may help avoid points being assessed for this risk factor. Unsatisfactory behavior while in jail in pretrial detention, or in prison after sentencing can result in the assessment of either 10 or 20 points.
- Risk factor 15 – Points can be assessed for either inappropriate employment or living situation. Defendant should be warned that it is better to be unemployed than to be employed in a questionable circumstance. Uncertainty as to one's housing is often better than a living situation that may be problematic as explained in Chapter 3, on Scoring the Risk Assessment Instrument, § 3:16 on risk factor 15. It may be helpful to connect the defendant with a reentry program to provide support and to help avoid the assessment of points.

- Attend the PSI [52]
- Prepare the defendant for the plea (what to say and what to avoid)
- Prepare the defendant for what to say at sentencing. Assist the defendant in writing a prepared statement from which to read.
  - Acceptance of responsibility
  - Remorse
  - Apologize to the victim

[52] Although attendance at the Presentence Investigation interview is authorized and is standard practice in federal court, not so in New York State courts. Although it is considered "best practice," many defense attorneys pass up the opportunity to attend the probation officer's interview of their client. Although this practice has become more common, defense counsel should be aware that the current state of the law does not support defense counsel presence at the probation interview. Defense counsel's presence at the PSI interview should be arranged strategically and delicately. *See People v. Palazo,* 147 Misc. 2d 829 (Sup. Ct. Kings Co. 1990); *People v. Bogart,* 148 Misc. 2d 327 (Sup. Ct. Richmond Co. 1990); *People v. McNamara,* 103 A.D.3d 1273 (4th Dept. 2013); *People v. Brinkley,* 174 A.D.3d 1159 (3d Dept. 2019). Judicial and Probation Office attitudes about this issue vary from jurisdiction to jurisdiction.

§ 10:5 REVIEW, AND WHERE APPROPRIATE, CHALLENGE THE PSR

The PSR is undoubtedly the single most troublesome source of information and misinformation when it comes to sentencing, prison programming, parole release, civil commitment, community supervision and SORA. In addition to being the most important (and harmful) document created in the criminal justice system, it is, unfortunately, also the least challenged. Defense counsel must be vigilant to prevent misleading, unreliable, and conclusory statements to go unchallenged when they are identified in the PSR. This is particularly true when it comes to SORA. The PSR is the primary source of information referenced by the Board of Examiners when making recommendations as to the scoring of the RAI, overrides and departures. Sections of the PSR are often copied verbatim into the case summary, where they are treated as reliable hearsay, and "the gospel." Do not allow a probation officer's pseudo-clinical diagnosis to go unchallenged.

In *People v. Diaz,* 34 N.Y.3d 1179 (2020) the court made the importance of reviewing the PSR and challenging its accuracy very clear. "Defendants have a right to review the [probation] report prior to sentencing (see CPL 390.50[2][a]) and may challenge the accuracy of any facts contained therein at that time (see CPL 400.100. Indeed, defendants have a strong incentive to timely dispute and seek correction of inaccurate statements because they may impact the court's sentencing determination." *People v. Diaz,* 34 N.Y.3d at 1181. Not only may it impact sentencing, the PSR may also impact the SORA risk level, DOCCS's programming, and parole release. "Unless altered through this process [which can only be done at the time of sentencing], factual statements in PSI reports, can supply an evidentiary basis for the imposition of points, as is clear from our precedent." *People v. Diaz,* 34 N.Y.3d at 1181.

Below is a checklist of steps to take to challenge improper information in the PSR:

- ☐ **Obtain a copy of the PSR in advance of sentencing.**
  This is provided for in CPL § 390.50 (2)(a).

- ☐ **Carefully review the PSR for improper information.**
  You should enlist the defendant to assist you with this review. There are times when the defendant will pick up errors that defense counsel misses.

- ☐ **Request an adjournment in order to address problems identified in the PSR.**
  Several cases have found it reversible error for the trial court to refuse an adjournment for this purpose. *People v. Martinez,* 185 A.D.2d 191 (1st Dept. 1992) and *People v. Ranieri,* 43 A.D.2d 1012 (4th Dept. 1974).

- ☐ **File a motion to redact the erroneous information from the PSR and have it rewritten.**
  The procedural vehicles that can be used to challenge errors in a PSR are found in CPL § 380.30 (4) and CPL §400.10 (1) and (3), which provide for either a presentence conference and/or a hearing. The court in *People v. James,* 114 A.D.3d 1312 (4th Dept. 2014) recognized that the court could conduct a hearing to resolve discrepancies in the PSR. Such a summary hearing was held in *People v. Irwin,* 19 Misc. 3d 1118(A) (Co. Ct. Onondaga Co. 2008) which lasted almost a full day, with both the probation officer and a

clinical psychologist being called to testify at the hearing. *Irwin* was a case in which defense counsel successfully had the probation officer's pseudo-clinical opinion redacted in order to protect against harm to the defendant in future SORA and SOMTA proceedings.

- ☐ **The motion must be filed before sentencing.**
  Erroneous information in the PSR must be corrected prior to sentencing and cannot be corrected afterwards. *Hughes v. Probation,* 281 A.D.2d 229 (1st Dept. 2001). Objection to the PSR must be made prior to or at the time of sentencing or the objection is waived. *Wisniewski v. Michalski,* 114 A.D.3d 1188 (4th Dept. 2014).

- ☐ **Make sure the erroneous information is not just corrected but is also redacted.**
  In *People v. Freeman,* 67 A.D.3d 1202 (3d Dept. 2009), the trial court corrected the errors contained in the PSR on the record. The Appellate Division held that was not sufficient. "Failing to redact erroneous information from the PSI created an unjustifiable risk of future adverse effects to defendant in other contexts, including appearances before the Board of Parole or other agencies." *People v. Freeman,* 67 A.D.3d at 1203.

- ☐ **Object if the probation officer attaches a RAI to the PSR.**
  The role of the probation officer has been described as providing a "neutral rendition of facts" and "not an adversarial one." *People v. Cortijo,* 179 Misc. 2d 178 (Sup. Ct. N.Y. Co. 1998), *aff'd* 291 A.D.2d 352 (1st Dept. 2002). Perhaps that has not been your experience. Some unscrupulous probation officers take on a prosecutorial and adversarial bent. To this end, some have been known to attach an unfavorable RAI that they prepared to the PSR. This is a not-so-thinly veiled attempt to convince the judge to impose a harsher sentence because of the defendant's high risk to reoffend. As the court in *People v. Freeman,* 67 A.D.3d 1202 (3d Dept. 2009) noted, this is entirely improper, and the RAI should be redacted. Likewise, objection should be made if the PSR makes reference to any of the risk factors from the RAI.

<u>Cases of Interest – Correcting and Redacting the PSR</u>

Where the PSR contains statements that are erroneous, inappropriate, inaccurate, unreliable, unqualified conclusions, or unsubstantiated opinions, those statements should be redacted from the PSR.

- *People v. Cherry,* 166 A.D.3d 1220 (3d Dept. 2018)
- *People v. Washington,* 170 A.D.3d 1608 (4th Dept. 2019)
- *People v. James,* 114 A.D.3d 1312 (4th Dept. 2014)
- *People v. Freeman,* 67 A.D.3d 1202 (3d Dept. 2009)
- *People v. Irwin,* 19 Misc. 3d 1118(A) (Co. Ct. Onondaga Co. 2008)
- *People v. Boice,* 6 Misc. 3d 1014(A) (Co. Ct. Chemung Co. 2004)
- *People v. Rampersaud,* 144 Misc. 2d 126 (Sup. Ct. Bronx Co. 1989)

PRACTICE TIPS

Challenging the PSR is an important, yet often neglected, area of criminal defense practice for all categories of cases, not just sex offense cases. A full discussion requires far more space than this Guide permits. For a more detailed discussion of this issue, see Sentencing Tips for New York Lawyers: Obtain a Copy of the Pre-sentence Report and Request Corrections available at https://www.ocbaacp.org/wp-content/uploads/2021/11/Sentencing-Tips-Obtain-a-Copy-of-PSR-and-Correct.pdf

Also available are a sample motion challenging portions of a PSR and a supporting Memorandum of Law.
https://www.ocbaacp.org/wp-content/uploads/2021/11/Motion-to-Correct-PSR.pdf
https://www.ocbaacp.org/wp-content/uploads/2021/11/Memo-of-Law-Correct-PSR.pdf

Defense attorneys should carefully interview their clients in anticipation of possible SORA consequences. Ask about prior convictions and prior sex offense convictions, particularly prior convictions from other jurisdictions that may be overlooked but may affect a SORA risk factor score. Inquire about prior mental health treatment and counseling, hospitalization, and psychiatric care and commitments. Lurking in those records may be both helpful and harmful information when it comes to consideration of clinical assessments that the client has a psychological, physical, or organic abnormality that decreases ability to control impulsive sexual behavior. These may increase the SORA risk level for the client and is an important consideration that may have consequences when it comes to SOMTA.

§ 10:6 CHALLEGE THE CERTIFICATION AT TIME OF SENTENCING

Defense counsel should challenge the court's certification of the defendant as a sex offender at the time of the sentencing or it may be deemed waived. A challenge to the certification cannot be raised at the SORA hearing. Likewise, a motion pursuant to Correction Law § 168-a (2)(e) requesting the court find that registration would be unduly harsh and inappropriate for a conviction of unlawful surveillance in the second degree must be raised to the sentencing court and not to the SORA court. Certification is considered part of the judgment of conviction and can only be raised on direct appeal of the conviction. *People v. Lema,* 157 A.D.3d 406 (1st Dept. 2018), *People v. Hernandez,* 93 N.Y.2d 261 (1999), and *People v. Kearns,* 95 N.Y.2d 816 (2000).

Chapter 11

CHARTS AND CHECKLISTS

SORA: Duration of Registration

SORA: Reporting and Verification Requirements

SORA: Community Notification by Law Enforcement

Pathways to a SORA Hearing

SORA: Burden of Proof

SORA Hearing Timeline (Probation, Split Sentence, CD, UD, Fine)

SORA Hearing Timeline (Jail/Prison)

SORA Hearing Timeline (Conviction in another jurisdiction)

Registrable Offenses

Checklist: Initial SORA Hearing: Review and Preparation

The Twelve Cardinal Rules of SORA Defense

Checklist: Analyzing Each Risk Factor

Checklist: Arguments for a Downward Departure

Checklist: Arguments Against an Upward Departure

New York State SORA: Duration of Registration

Risk Level	Designated as Sexual Predator, Sexually Violent Offender of Predicate Sex Offender?	Duration of Registration	Modification of Risk Level Possible	Modification of Duration of Registration Possible
1	Not Designated	20 Years	NO	NO
	Yes, Designated	LIFE	NO	NO
2	Not Designated	LIFE (Can petition for relief after 30 years)	YES	YES
	Yes, Designated	LIFE	YES	NO
3	Not Designated	LIFE	YES	YES
	Yes, Designated	LIFE	YES	NO

The duration of registration, verification, and community notification is determined by a person's risk level and whether they are designated as a "sexual predator," "sexually violent offender," or a "predicate sex offender." A SORA court makes the decision as to risk level and designation.

Level 1 registrants are required to register for 20 years unless they are also designated. Level 2 and 3 registrants are required to register for life, however a level 2 registrant can petition for relief from registration after 30 years.

Designation as a "sexual predator," "sexually violent offender," or a "predicate sex offender" requires registration for life regardless of risk level.

Risk levels 2 and 3 can be modified down pursuant to Correction Law § 168-o. Designations and their lifetime registration requirement cannot be modified.

New York State SORA Reporting and Verification Requirements Correction Law § 168-f				
Risk Level	**Annual Residence Verification (via mail)** **Report within 10 days of receipt of form**	**Annual Employment Verification (via mail)** **Report within 10 days of receipt of form**	**Photograph Update (in person)** **Appear at law enforcement office within 20 days of anniversary of first registration**	**Personal Reporting to Law Enforcement Office**
1	YES	NO	YES – Every 3 Years	NO
2	YES	YES	YES – Every 3 Years	NO
3	YES	YES	YES – Every Year	YES – Every 90 Days
Designated a "Sexual Predator" Regardless of Risk Level	YES	YES	YES – Every Year	YES – Every 90 Days

Note: Any registrant shall register with DCJS no later than 10 calendar days after any change of address, internet accounts with internet access providers belonging to such registrant, internet identifiers that such registrant uses, or his or her status of enrollment, attendance, employment or residence at any institution of higher education. A fee of $10 is required every time a registrant registers any change of address or any change of his or her status of enrollment, attendance, employment or residence at any institution of higher education.

SORA Community Notification by Law Enforcement

Correction Law § 168-l (6)

Law enforcement agencies shall be notified and may disseminate certain information to any entity with vulnerable populations related to the nature of the offense committed by such registrant. Any entity receiving this information may disclose or further disseminate it. The registrant's risk level determines what information may be released as shown below.

Level 1	Level 2	Level 3
Name	Exact name & aliases	Exact name & aliases
Photograph & description	Photograph & description	Photograph & description
Approximate address based on registrant's zip code	Exact address	Exact address
Crime of conviction	Crime of conviction	Crime of Conviction
Modus of operation	Modus of Operation	Modus of Operation
Type of victim targeted	Type of victim targeted	Type of victim targeted
Name & address of any institution of higher education at which the registrant is enrolled, attends is employed or resides	Name & address of any institution of higher education at which the registrant is enrolled, attends is employed or resides	Name & address of any institution of higher education at which the registrant is enrolled, attends is employed or resides
Description of special conditions imposed	Description of special conditions imposed	Description of special conditions imposed
		Address of place of employment

Vulnerable organizational entities include: schools, parks, public and private libraries, public and private school bus companies, day care centers, nursery schools, pre-schools, neighborhood watch groups, community centers, civic associations, nursing homes, victim's advocacy groups and places of worship.

SORA provides four means of disseminating information to the public about people on the registry: Internet posting (Correction Law § 168-q); E-mail (Correction Law 168-q); Notification by law enforcement (Correction Law §168-l (6); and Special toll-free telephone (Correction Law § 168-p).

Internet posting – The disclosure is the same as the chart above with the following exceptions: 1) Level 1 registrants are not disclosed, 2) For level 2 and 3 registrants age, address of employment, distinctive markings and crimes of conviction requiring registration are disclosed. Aliases are not provided.

Special toll-free telephone number – Same as chart above for law enforcement notification.

Community notification by law enforcement – See chart above.

E-mail – Any person can apply to DCJS to receive e-mail notification when a new level 2 or 3 registrant is added in the geographic area specified.

PATHWAYS TO A SORA HEARING

Determine the Applicable Procedure

Pathway	Procedure
Sentenced to Prison or Jail in NY	Correction Law § 168-n
Sentenced to Probation[53] or CD	Correction Law § 168-d
Convicted in Another Jurisdiction (Another State, Federal, Military)	Correction Law § 168-k
Redetermination Hearing	*Doe v. Pataki* Stipulation of Settlement
Modification Proceeding	Correction Law § 168-o
Moved to NY from Another State	Correction Law § 168-k

[53] Includes straight probation and split sentence (shock probation). Correction Law § 168-a (12)

SORA
BURDEN OF PROOF

Issue to Prove	Burden of Proof on Prosecution	Burden of Proof on Defense	Authority
Each risk factor	Clear and convincing		Guidelines p. 5
Risk level	Clear and convincing		Correction Law §§168-n (3); 168-k (2); 168-d (3)
Override	Clear and convincing		Correction Law §§168-n (3); 168-l (2); 168-d (3) *People v. Locklear,* 154 A.D.3d 888,889 (2d Dept. 2017)
Upward departure	Clear and convincing		*People v. Gillotti,* 23 N.Y.3d 841, 862 (2014)
Downward departure		Preponderance	*People v. Gillotti* at 864
Designation	Clear and convincing		Correction Law §§168-n (3); 168-l (2); 168-d (3)
Modification/ up or down	Clear and convincing	Clear and convincing	Correction Law §168-o

SORA HEARING TIMELINE
(PROBATION, SPLIT SENTENCE, CD, UD, FINE)
CORRECTION LAW § 168-d

STATUTORY AUTHORITY FROM CORRECTION LAW	TIME WHEN EFFECTUATED	ACTION TAKEN
§ 168-d (1)	At sentencing	Court certifies defendant as a sex offender
§ 168-d (2)	At sentencing	Court registers the defendant and sends form to DCJS
§ 168-d (2)	At least **45 days** before hearing	Court sends notice of hearing to prosecution and defendant
§ 168-d (3)	At least **15 days** before hearing	Prosecution provides written statement of determinations sought to court and defendant
§ 168-d (3)	Hearing day	SORA Proceeding
§ 168-d (3)	Hearing day or thereafter	Court renders order

SORA HEARING TIMELINE
(JAIL/PRISON)
CORRECTION LAW §§ 168-n, 168-e, 168-l, 168-m

STATUTORY AUTHORITY FROM CORRECTION LAW	TIME WHEN EFFECTUATED	ACTION TAKEN
§ 168-m	No later than **120 days** prior to release	State or local correctional facility notifies Board of defendant's impending release and sends documents to Board
§ 168-n (3)	No later than **90 days** prior to release – No later than **30 days** prior to Board recommendation	Board notifies defendant that case is under review and that he is permitted to submit relevant information
§ 168-l (6)	Within **60 days** prior to release	Board makes recommendation to the court
§ 168-n (3)	At least **50 days** prior to release – At least **20 days** prior to hearing	Court notifies prosecution and defendant of the hearing date
§ 168-n (3)	At least **40 days** prior to release – At least **10 days** prior to hearing	Prosecution provides statement to court and defendant of determinations sought if they differ from the Board
§ 168-n (2)	At least **30 days** prior to release	SORA Proceeding
§ 168- n (2), but see § 168-l (8)	**30 days** prior to release/ except with adjournment and provisional order – can be after release	Court renders an order and sends it to DCJS
§ 168-e (1)	At least **15 days** prior to release	State or local correctional facility registers defendant
§ 168-e (1)	At lease **10 days** prior to release	State or local correctional facility sends registration form to DCJS

SORA HEARING TIMELINE
(CONVICTED OF A SEX OFFENSE IN ANOTHER JURISDICTION AND RETURNING OR MOVING TO N.Y.)
CORRECTION LAW § 168-k

STATUTORY AUTHORITY FROM CORRECTION LAW	TIME WHEN EFFECTUATED	ACTION TAKEN
§ 168-k (1)	Not later than **10 days** after establishing residence in N.Y.	Defendant notifies DCJS of new address
§ 168-k (2)		DCJS advises Board that defendant has new address in N.Y.
§ 168-k (2)		Board determines if defendant is required to register
§168-k (2)		Board notifies defendant registration required
§ 168-k (2)	Not later than **30 days** prior to Board recommendation	Board notifies defendant that case is under review and that he is permitted to submit relevant information
§ 168-k (2)	With **60 days** of reviewing information	Board must make a recommendation to the court
§ 168-k (2)	At least **30 days** prior to the hearing	Court must notify prosecution and defendant of the hearing date
§ 168-k (2)	At least **10 days** prior to the hearing	Prosecution provides statement to court and defendant of determinations sought if they differ from the Board
§ 168-k (2)		SORA Proceeding
§ 168-k (2)		Court renders an order and sends it to DCJS

New York State Sex Offender Registry
Registerable Offenses
June 5, 2018

Individuals convicted of one or more registerable offenses on or after January 21, 1996 must register as a sex offender with the Division of Criminal Justice Services. Additionally, any person convicted of a registerable offense who was incarcerated or under parole or probation supervision for the offense on January 21, 1996 is required to be registered. Below are three categories of offenses which require registration.

I. New York State Penal Law Sex Offenses

The following list contains the New York State Penal Law statutes for which registration as a sex offender is required. Individuals are required to register as a sex offender upon a **conviction** of a registerable offense or a **conviction for an attempt to commit** a registerable offense or a conviction of or a conviction for an attempt to commit a registerable offense as a hate crime or a crime of terrorism.

Penal Law Statute	Offense Class	Offense
120.70	E Felony[1]	luring a child
130.20	A Misdemeanor	sexual misconduct
130.25	E Felony	rape in the third degree
130.30	D Felony	rape in the second degree
130.35	B Felony	rape in the first degree
130.40	E Felony	criminal sexual act in the third degree
130.40	E Felony	sodomy in the third degree
130.45	D Felony	criminal sexual act in the second degree
130.45	D Felony	sodomy in the second degree
130.50	B Felony	criminal sexual act in the first degree
130.50	B Felony	sodomy in the first degree
130.52[2]	A Misdemeanor	forcible touching
130.53	E Felony	persistent sexual abuse
130.55[2]	B Misdemeanor	sexual abuse in the third degree
130.60	A Misdemeanor	sexual abuse in the second degree
130.65	D Felony	sexual abuse in the first degree
130.65-a	E Felony	aggravated sexual abuse in the fourth degree
130.66	D Felony	aggravated sexual abuse in the third degree
130.67	C Felony	aggravated sexual abuse in the second degree
130.70	B Felony	aggravated sexual abuse in the first degree
130.75	B Felony	course of sexual conduct against a child in the first degree
130.80	D Felony	course of sexual conduct against a child in the second degree
130.90	D Felony	facilitating a sex offense with a controlled substance
130.95	A-II Felony	predatory sexual assault
130.96	A-II Felony	predatory sexual assault against a child
135.05[3]	A Misdemeanor	unlawful imprisonment in the second degree
135.10[3]	E Felony	unlawful imprisonment in the first degree
135.20[3]	B Felony	kidnapping in the second degree

135.25[3]	A-I Felony	kidnapping in the first degree
230.04[4]	A Misdemeanor	patronizing a prostitute in the third degree
230.05	E Felony	patronizing a prostitute in the second degree
230.06	D Felony	patronizing a prostitute in the first degree
230.11[6]	E Felony	Aggravated patronizing a minor for prostitution in the third degree
230.12[6]	D Felony	Aggravated patronizing a minor for prostitution in the second degree
230.13[6]	B Felony	Aggravated patronizing a minor for prostitution in the first degree
230.25[6]	D Felony	Promoting prostitution in the third degree
230.30(2)	C Felony	promoting prostitution in the second degree
230.32	B Felony	promoting prostitution in the first degree
230.33	B Felony	compelling prostitution
230.34	B Felony	sex trafficking
235.22	D Felony	disseminating indecent material to minors in the first degree
250.45 (2), (3) and (4)[5]	E Felony	unlawful surveillance in the second degree
250.50	D Felony	unlawful surveillance in the first degree
255.25	E Felony	Incest (committed prior to 11/1/06)
255.25	E Felony	Incest in the third degree
255.26	D Felony	Incest in the second degree
255.27	B Felony	Incest in the first degree
263.05	C Felony	use of a child in a sexual performance
263.10	D Felony	promoting an obscene sexual performance by a child
263.11	E Felony	possessing an obscene sexual performance by a child
263.15	D Felony	promoting a sexual performance by a child
263.16	E Felony	possessing a sexual performance by a child
263.30	B Felony	facilitating a sexual performance by a child with a controlled substance or alcohol

- [1] If the underlying offense is a class A or a class B felony, then the offense of luring a child shall be considered respectively, a class C felony or class D felony.
- [2] A registerable offense only if the victim is less than eighteen years of age or where the defendant has a prior conviction for a sex offense, a sexually violent offense, forcible touching or sexual abuse in the third degree or an attempt thereof even if registration was not required for the prior conviction; regardless of when the prior conviction occurred.
- [3] A registerable offense only if the victim is less than seventeen years old and the offender is not the parent of the victim.
- [4] A registerable offense only if the person patronized is in fact less than seventeen years old.
- [5] A registerable offense unless the trial court finds that registration would be unduly harsh and inappropriate. The Attempt version of this offense is registerable for those offenders who committed the offense on or after Sept. 23, 2011, or who previously committed the offense but were still under sentence as of that date.
- [6] Where the person prostituted was less than 17 years old.
  Offender must have been convicted on or after Jan. 19, 2016

II. Convictions in Other Jurisdictions

Individuals convicted in another jurisdiction (federal, military, another state or country) who reside in New York State are required to register if:

(1) the individual is convicted of an offense equivalent to a New York State registerable sex offense; or
(2) the individual is convicted of a felony requiring registration in the conviction jurisdiction; or
(3) the individual is convicted of:

- *18 U.S.C.A. 2251 (*sexual exploitation of children)*;*
- *18 U.S.C.A. 2251A (*selling or buying of children)*;*
- *18 U.S.C.A. 2252* (certain activities relating to material involving the sexual exploitation of minors)*;*
- *18 U.S.C.A. 2252A (*certain activities relating to material constituting or containing child pornography)*;*
- *18 U.S.C.A. 2260* (production of sexually explicit depictions of a minor for importation into the United States)*;*
- *18 U.S.C.A. 2422(b) (coercion and enticement)*
- *18 U.S.C.A. 2423 (*transportation of minors)*; or*
- *18 U.S.C.A. 2425 (*use of interstate facilities to transmit information about a minor).

CHECKLIST

INITIAL SORA HEARING: REVIEW AND PREPARATION

If the defense attorney enters the case at or prior to the time the defendant receives notice from the Board of Examiners that it is about to undertake a SORA review in order to make a recommendation to the court and that the defendant has 30 days from the receipt of the notice to submit materials to the Board, or any time before the Board makes its recommendation to the SORA Court, defense counsel should consider the following:

- ☐ Interview client
  - ☐ Review the SORA process
  - ☐ Review SORA consequences
  - ☐ Review the RAI, how it is scored, risks level etc.
  - ☐ Review overrides, designations and departures
  - ☐ Obtain releases from client

- ☐ Obtain materials for submission to the Board
  - ☐ Documents supporting defense counsel's proposed scoring of specific risk factors
  - ☐ Documents establishing mitigating factors and downward departure

- ☐ Carefully consider whether a submission to the Board is strategically advisable and what issue should be submitted

- ☐ Submission to the Board
  - ☐ Submit a letter/ brief to the Board addressing the following where appropriate:
    - ☐ Registrability
    - ☐ Scoring of specific risk factors that may be in question
    - ☐ Reasons why no override or designation is warranted
    - ☐ Reasons why no upward departure is warranted
    - ☐ Mitigating factors supporting a downward departure
    - ☐ Risk level proposed
  - ☐ Submit supporting materials

If the defense attorney enters the case after assignment by the court, the Board will have already made its recommendation to the Board and so there will be no defense submission to the Board. Defense counsel should consider the following:

- ☐ Review all documents provided by the court
  - ☐ RAI proposed by the Board
  - ☐ Case summary
  - ☐ Determination of registrability by the Board (usually if moving from another state or convicted in another jurisdiction)
  - ☐ Plea transcript
  - ☐ Sentencing transcript
  - ☐ PSR
  - ☐ Defendant's presentence memorandum

- ☐ If any of the above documents are not available, obtain them from the court or elsewhere

- ☐ Review the RAI.
  - ☐ Review scoring of each risk factor
  - ☐ Review each risk factor scored against the Guideline principles
  - ☐ Review case law as to each risk factor to determine if there is a legal basis to challenge
  - ☐ Review whether there is a factual basis for each risk factor.
  - ☐ Review possible challenges to override
  - ☐ Review possible challenges to designation
  - ☐ Review basis for upward departure and prepare challenge
  - ☐ Review the math of total risk factor score

- ☐ Determine if it is it a registrable offense

- ☐ Review the case summary

- ☐ Initial conference with client
  - ☐ Explain why you want client to be present at the SORA hearing and why they should not waive their presence
  - ☐ Explain to client what you will do to avoid them being held past their release date in the even the SORA hearing has not been completed. Explain the use of a provisional order
  - ☐ Obtain releases from client
  - ☐ Review the SORA process
  - ☐ Review SORA consequences
  - ☐ Review the RAI, how it is scored, risks level etc.
  - ☐ Review overrides, designations and departures
  - ☐ Interview for facts that counter each risk factor
  - ☐ Interview for facts that counter designation, override or upward departure
  - ☐ Interview for mitigating factors

- ☐ Review and assess all possible mitigating factors for a downward departure or to be used to fend off an upward departure in a "totality of the circumstances" analysis

- ☐ Obtain documents

    - ☐ Discovery
    - ☐ Releases
    - ☐ Subpoena

- ☐ Speak with potential witnesses or supporters
- ☐ Serve Demand for statutory statement from prosecutor.
- ☐ Review prosecutor's notice for scoring, departure and reasons
- ☐ Determine if an expert witness is advisable and if so retain expert
- ☐ Preparation of court submissions.

    - ☐ Prepare the Defendant's Exhibits Cover Sheet
    - ☐ Prepare Defendant's Proposed Scoring of RAI
    - ☐ Prepare Defendant's Affidavit
    - ☐ Prepare Attorney's Affirmation
    - ☐ Prepare Memorandum of Law
    - ☐ Assemble all support letters
    - ☐ Assemble all exhibits

- ☐ Seek adjournment if needed to further prepare or obtain disclosure
- ☐ Address need for provisional order and prepare the proposed order
- ☐ Prepare for the SORA hearing
- ☐ Prepare motion to preclude if appropriate
- ☐ If defendant has moved from another state, prepare to ask for credit for time spent on registry to be credited in N.Y. (*Nunc Pro Tunc)*
- ☐ Identify and prepare to preserve potential appellate issues

THE TWELVE CARDINAL RULES OF SORA DEFENSE

1) **Carefully study the SORA Risk Assessment Guidelines and Commentary 2006 (Guidelines) and the Board of Examiners of Sex Offenders (BESO) Position Statement of 6/1/12 on Child Pornography Cases.** If you don't have the Guidelines or Position Statement, get them.

2) **Meet with client.** Explain both the importance of the SORA proceeding and the importance of client's attendance at the hearing. Caution against waiving appearance. Explain how this may impact SARA restrictions. Obtain releases from client so you can obtain their institutional records.

3) **When possible, and strategically appropriate, make a submission to the BESO prior to their recommendation to the Court.**[54]

4) **Carefully review the BESO recommendation to the Court:**

   a) For each risk factor for which BESO has recommended the assessment of points, review the Guidelines and case law to determine whether you should challenge the point assessment.

   b) If an override is recommended, review the Guidelines and case law to determine if the override should be challenged.

   c) If an upward departure is recommended, review the Guidelines and case law. Prepare to contest if appropriate.

   d) If a designation is recommended, review if it is factually and legally correct. Prepare to contest if appropriate.

5) **Determine if the conviction, whether from N.Y. or another jurisdiction, is one that requires registration. Challenge registrability if appropriate.**

6) **In the event that it is a case that doesn't require BESO preparation of the RAI and recommendation (when the sentence is probation, split sentence, fine, conditional or unconditional discharge and Correction Law § 168-d is applicable), repeat rule 4 above for prosecution's submission**. The prosecutor's submission should be submitted 15 days in advance of the determination proceeding. [Correction Law § 168-d (3)].

7) **Prepare your submission to the court to challenge the recommendations of BESO and/or the District Attorney, when appropriate.** The submission should include a challenge to any unwarranted scoring of a risk factor, designation, override or request for an upward departure. If not raised the issue will be deemed waived for appeal purposes.

---

[54] The reason that this is not always feasible is because in those cases where the attorney is assigned, the assignment usually does not occur until after the Court has received the recommendation from BESO. In cases where defense counsel is retained, hopefully defense counsel is retained in advance of BESO recommendation being sent to the Court. By statute, BESO must give a 30 day notice to the individual that their case is under review and that the person has a right to make a submission to BESO prior to BESO making its recommendation to the court.

8) **In every case your submission must set forth the mitigating factors specific to your client.**[55] You can undoubtedly find at least one. This serves two purposes. First, it establishes a basis for your request for a downward departure, which should be made in every case. Second, it serves as a basis to prevent an upward departure under the "totality of the circumstances" analysis. The only exception to this rule is if your client is presumptively a risk level 1 and there is no request for an override, or upward departure.

9) **Include in your submission to the court:**

   a) Defense proposed scoring of the RAI

   b) Attorney affirmation

   c) Defendant's affidavit

   d) Other exhibits

   e) Memorandum of Law

10) **Place your objection on the record,** if the prosecution has failed to comply with the 10 or 15 days notice required for their request to score a risk factor or upward departure not requested by BESO, and a statement of their reasons. Ask for preclusion or an adjournment to adequately prepare a response.

11) **Object and ask for an adjournment for additional time to adequately prepare a response,** if the court, *sua sponte,* assesses points for a risk factor or upwardly departs, when not previously requested by BESO or the prosecutor.

12) **Always check the judge's math. File Notice of Appeal when applicable.**

[55] Just as there is mitigation in the defense of every criminal case, there are mitigating factors in every SORA case, and defense counsel should request a downward departure, or make a conditional request for a downward departure, in the event that the presumptive risk factor score should total more than 70 points, or should the prosecution seek an upward departure.

CHECKLIST:

ANALYZING EACH RISK FACTOR

- ☐ Is the point score correct?
- ☐ Check the risk factor against the discussion in the Guidelines.
- ☐ Check the risk factor against case law.
- ☐ Check the risk factor against the facts.
- ☐ Have the facts used to establish this risk factor been used to establish another risk factor resulting in double counting?
- ☐ Has the prosecutor failed to give notice of her intention to propose assessing points for a risk factor that was not recommended for the assessment of points by the Board of Examiners of Sex Offenders?
- ☐ Is the judge considering assessing points for a risk factor that was not requested by either the Board or the prosecutor?
- ☐ Has the prosecutor failed to meet her burden of proof by failing to submit sufficient evidence to prove this risk factor by clear and convincing evidence?
- ☐ Are there any facts in this case that negate/mitigate against this risk factor?
- ☐ Under the circumstances of this case does the scoring of this risk factor overstate the risk of reoffending or the harm posed by this particular person should he reoffend?
- ☐ Does the scoring of this risk factor give rise to the need for a downward departure?

CHECKLIST:

ARGUMENTS FOR A DOWNWARD DEPARTURE (Annotated)

□ Exceptional response to treatment for sex offending.

- Guidelines p. 17
- Correction Law § 168-l (5) (f)
- *People v. Shiley,* 54 Misc. 3d 1220(A) (Monroe Co. Ct. 2016)
- *People v. Migliaccio,* 90 A.D.3d 879 (2d Dept. 2011)
- *People v. Lewis,* 140 A.D.3d 1697 (4th Dept. 2016)
- *People v. Bethel,* 165 A.D.3d 712 (2d Dept. 2018)
- *People v. Lagville,* 136 A.D.3d 1005 (2d Dept. 2016)
- *People v. Washington,* 84 A.D.3d 910 (2d Dept. 2011)
- *People v. Martinez,* 92 A.D.3d 930 (2d Dept. 2012)
- *People v. Rodriguez,* 33 Misc. 3d 1236(A) (Sup. Ct. Kings Co. 2011)

□ Willingness to seek treatment.

- *Vandover v. Czajaka,* 276 A.D.2d 945 (3d Dept. 2000)
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)

□ If assessed points for a prior EWOC conviction – where a review of the record indicates that there was no sexual conduct, a departure may be warranted.

- Guidelines p. 14

□ Advanced age.

- Correction Law § 168-l (5) (d)
- Guidelines p. 5
- *Vandover v. Czajaka,* 276 A.D.2d 945 (3d Dept. 2000)

- *People v. Santiago,* 137 A.D.3d 762 (2d Dept. 2016)
- *People v. Littles,* 155 A.D.3d 979 (2d Dept. 2017)
- *People v. Mota,* 165 A.D.3d 988 (2d Dept. 2018)

□ Debilitating or physical condition that minimizes the risk of roffending.

- Correction Law § 168-l (5) (d)
- Guidelines p. 5
- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. Mota,* 165 A.D.3d 988 (2d Dept. 2018)
- *People v. Stevens,* 55 A.D.3d 892 (2d Dept. 2008)
- *People v. Hosear,* 134 A.D.3d 633 (1st Dept. 2015)

□ Consensual participation by the victim. Departure may be justified when the victim's lack of consent is due only to the inability to consent by virtue of age and scoring 25 points for risk factor 2 results in an over-assessment.

- Guidelines p. 9
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. George,* 141 A.D.3d 1177 (4th Dept. 2016)
- *People v. Marsh,* 116 A.D.3d 680 (2d Dept. 2014)
- *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010)
- *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017)
- *People v. Santiago,* 20 A.D.3d 885 (4th Dept. 2005)
- *People v. Garcia,* 53 Misc. 3d 153(A) (App. Term 2d Dept. 2016)
- *People v. Carter,* 138 A.D.3d 706 (2d Dept. 2016)
- *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)
- *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)
- *People v. Secor,* 2019 NY Slip Op 02759 (3d Dept. 2019)

□ Accessorial conduct. Court may choose to depart downward where the defendant played a lesser role in the sexual conduct than a co-defendant.

- Guidelines p. 7

□ Child pornography – non-contact offense. Low risk to reoffend. See *People v. Gillotti,* 23 N.Y.3d 841 (2014).

- *People v. Johnson,* 11 N.Y.3d 416 (2009)
- *People v. Marrero,* 37 Misc. 3d 429, 442 (Sup. Ct. N.Y. Co. 2012)
- *People v. Cosby,* 154 A.D.3d 789 (2d Dept. 2017)
- *People v. Tutty,* 156 A.D.3d 1444 (4th Dept. 2017)
- *People v. Kemp,* 148 A.D.3d 1284 (3d Dept. 2017)

□ Significant time offense-free in the community.

- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Col. 2005)
- *People v. George,* 142 A.D.3d 1059 (2d Dept. 2016)
- *People v. Witchley,* 9 Misc. 3d 556 (County Ct. Madison Co. 2005)
- *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010)
- *People v. Santos,* 25 Misc. 3d 1212(A) (Sup. Ct. NY Co. 2009)
- *People v. Sotomayer,* 143 A.D.3d 686 (2d Dept. 2016)
- *People v. Gonzalez,* 138 A.D.3d 814 (2d Dept. 2016)

□ Evidence of rehabilitation and upstanding lifestyle.

- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. Abdullah,* 31 A.D.3d 515 (2d Dept. 2006)
- *People v. Madison,* 98 A.D.3d 573 (2d Dept. 2012)
- *People v. Santogual,* 157 A.D.3d 737 (2d Dept. 2018)

□ Engagement in treatment for sexually offending or successful completion while in the community.

- *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)

□ Lived with an intimate partner for a period of two or more years.

- *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010)
- *People v. Marrero,* 37 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2012)
- Static 99-R Coding Rules p. 49

□ Current age, such that the risk of recidivism is diminished.

- *People v. Littles,* 155 A.D.3d 979 (2d Dept. 2017)
- *People v. Santiago,* 137 A.D.3d 762 (2d Dept. 2016)

□ Significant stabilizing factors including family

- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012)
- *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)

□ Significant stabilizing factors including employment

- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012)

□ Significant stabilizing factors including pro-social activities.

□ Recent assessment by a clinical psychologist or LCSW exercising professional judgment that defendant is a low risk to reoffend.

- *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. King Co. 2012)
- *People v. Yen,* 33 Misc. 3d 1234(A) (Sup. Ct. Kings Co. 2011)
- *People v. Jusino,* 11 Misc. 2d 470 (Sup. Ct. N.Y. Co. 2005)
- *People v. Oliver,* 37 Misc. 3d 1201(A) (Sup. Ct. Cayuga Co. 2009)
- *People v. Darrah,* 153 A.D.3d 1528 (3d Dept. 2017)
- *People v. Seils*, 28 A.D.3d 1158 (4th Dept. 2006)
- *People v. Champagne,* 140 A.D.3d 719 (2d Dept. 2016)
- *People v. Kennedy,* 79 A.D.3d 1470 (3d Dept. 2010)
- *People v. Marrero,* 37 Misc. 3d 429, 443 (Sup. Ct. N.Y. Co. 2012)
- *People v. McFarland,* 29 Misc. 3d 1206(A) Sup. Ct. N.Y. Co. 2010)
- *People v. Shiley,* 54 Misc. 3d 1220(A) (Monroe Co. Ct. 2016)
- *People v. Williams,* 24 A.D.3d 894 (3d Dept. 2005)
- *People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009)

- Correction Law § 168-l (5) (e)

□ Educational accomplishments while incarcerated or post-conviction.

- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. 2005)
- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)

□ Participation in drug or alcohol counseling or other programming in prison or post-conviction.

- *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
- *People v. McCormick,* 21 A.D.3d 1221 (3d Dept. 2005)

□ Excellent prison record.

- *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)

□ Supportive housing.

- Correction Law §168-l (5)(c)

□ Has not previously been convicted of a sex offense.

- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010)
- *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)

□ No prior criminal convictions.

- *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)

□ There was no use of forcible compulsion.

- *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
- *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
- *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010)
- *People v. Brewer,* 63 A.D.3d 1604 (4th Dept. 2009)

□ Participation in volunteer activities that demonstrate empathy and good character.

- *People v. Gillotti,* 23 N.Y.3d 841 (2014)

- ☐ If a federal conviction, check the sentencing to determine if the Judge found sufficient mitigation to warrant a non-guideline sentence and acceptance of responsibility.

  - *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012)

- ☐ No history of drug or alcohol abuse.

  - Correction Law § 168-l (5)(a)(ii)
  - *People v. Shiley,* 54 Misc. 3d 1220(A) (Co. Ct. Monroe Co. 2016)

- ☐ Sought out treatment for mental health related issues and made efforts at rehabilitation and self-improvement.

  - *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)

- ☐ Clinical diagnosis that defendant is neither a pedophile nor a hebephile and has no chronic and persistent sexual arousal to pubescent or prepubescent children.

  - *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)
  - *People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009)
  - Correction Law § 168-l (5)(a)(i)

- ☐ Under the totality of the circumstance, or all relevant circumstances, a downward departure is warranted.

  - *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)
  - *People v. Shiley,* 54 Misc. 3d 1220(A) (Co. Ct. Monroe Co. 2016)

- ☐ Antisociality and sexual deviance have been ruled out by a clinician.

  - Michael C. Seto, INTERNET SEX OFFENDERS 196 (2013)

- ☐ Clinician's expert opinion that the defendant shows lack of social and sexual maturity and functions at the level of a young teenager.

  - *People v. Izzo,* 26 N.Y.3d 999 (2015)

- ☐ Acceptance of responsibility.

  - *People v. Smith,* 30 A.D.3d 1070 (4th Dept. 2006)
  - *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. King Co. 2012)

- ☐ Outstanding program participation.

  - *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017)

● *People v. Gillotti,* 23 N.Y.3d 841 (2014)

□ Recent good behavior.

● *People v. George,* 142 A.D.3d 1059 (2d Dept. 2016)

● Correction Law § 168-l (5)(g)

□ Risk factor 12 overstates risk – refusal to take SOTP for valid reason.

● *People v. Graves,*162 A.D.3d 1659 (4th Dept. 2018)

● *People v. Thousand,* 109 A.D.3d 1149 (4th Dept. 2013) *lv den* 22 N.Y.3d 857 (2013)

● *People v. Grigg,* 112 A.D.3d 857 (2d Dept. 2013) *lv den* 22 N.Y.3d 19 (2014)

● *People v. Kearns,* 68 A.D.3d 1713 (4th Dept. 2009)

□ Defendant had been a victim of sexual abuse as a child.

● *People v. Jusino,* 11 Misc.3d 470 (Sup. Ct. N.Y. Co. 2005)

□ Conditions of release that minimize risk of reoffense.

● Correction Law § 168-l (5)(c)

□ Total risk factor score is at low end of range and close to the level to which departure is sought.

● *People v. Carter,* 138 A.D.3d 706 (2d Dept. 2016)

● *People v. Filkins,* 107 A.D.3d 1069 (3d Dept. 2013)

□ Risk factor 9 overstates risk – remote convictions.

● *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010)

□ Risk factor 9 overstates risk – violent in name only.

□ Victim Chose to continue relationship with defendant into adulthood.

● *Timeo-Morales,* 101 A.D.3d 839 (2d Dept. 2012)

● *People v. Goosens*, 75 A.D.3d 1171 (4th Dept. 2012)

□ Conduct while incarcerated acceptable.

● *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017)

□ Completed at least one treatment program.

● *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017)

- ☐ Currently involved in an age-appropriate adult sexual relationship.
  - *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010)
  - *People v. Marrero,* 37 Misc. 3d 429, 441 (Sup. Ct. N.Y. Co. 2012)
- ☐ Exploited by the commercial sex industry.
  - *People v. Snyder,* 175 A.D.3d 1331 (2d Dept. 2019)
- ☐ Defendant suffers from an autism spectrum disorder.
  - *See* § 5:12 of the manual

CHECKLIST:

POSSIBLE ARGUMENTS AGAINST AN UPWARD DEPARTURE

□ The prosecutor has given no reason for an upward departure.

● Guidelines p. 4. There must be "special circumstances" and an articulated "aggravating factor."

● *People v. Kotler,* 123 A.D.3d 992 (2d Dept. 2014)

● *People v. Hayward,* 52 A.D.3d 1243 (4th Dept. 2008)

● *People v. October,* 101 A.D.3d 975 (2d Dept. 2012)

□ The prosecutor is seeking an upward departure that was not requested by BESO and has not given the statutory 10 days notice (Correction Law § 168-k or § 168-n) or 15 days notice (Correction Law § 168-d) or reasons for such departure, and should be precluded from making such a request or be deemed to have waived such request.

● *People v. Davilla,* 299 A.D.2d 573 (3d Dept. 2002)

● *People v. MacNeil,* 283 A.D.2d 835 (3d Dept. 2001)

● *People v. Neish,* 281 A.D.2d 817 (3d Dept. 2001)

● *People v. George,* 142 A.D.3d 1059 (2d Dept. 2016)

● *People v. Medina,* 84 N.Y.S.3d 376 (2d Dept. 2018)

● *People v. S.G.,* 4 Misc. 3d 563 (Sup. Ct. N.Y. Co. 2004)

● *People v. Current,* 147 A.D.3d 1235 (3d Dept. 2017)

□ If preclusion is not granted for failure of prosecution to give notice, you should at the very least be granted an adjournment in order to prepare a response.

● *People v. Owens,* 126 A.D.3d 1512 (4th Dept. 2015)

● *People v. Gardner,* 59 A.D.3d 604 (2d Dept. 2009)

● *People v. Ferguson,* 53 A.D.3d 571 (2d Dept. 2008)

● *People v. Cruz,* 132 A.D.3d 554 (1st Dept. 2015)

□ The court cannot depart upward *sua sponte* without giving defense counsel an adjournment upon request and the opportunity to prepare a response to the contemplated upward departure.

● *People v. Segura,* 136 A.D.3d 496 (1st Dept. 2016)

● *People v. Maus,* 162 A.D.3d 1415 (3d Dept. 2018)

● *People v. Hackett,* 89 A.D.3d 1479 (4th Dept. 2011)

● *People v. Howell,* 82 A.D.3d 857 (2d Dept. 2011)

□ Although the prosecutor has articulated an aggravating factor, under the facts and circumstances of this case it does not apply.

● *People v. Robinson,* 160 A.D.3d 1441 (4th Dept. 2018)

□ The aggravating factors alleged by the prosecutor are, as a matter of law, not of a kind or to a degree not adequately taken into account by the Guidelines. (*Gillotti* step one).

● *People v. Gillotti,* 23 N.Y.3d 841 (2014)

● *People v. Cardinale,* 160 A.D.3d 1490 (4th Dept. 2018)

● *People v. October,* 101 A.D.3d 975 (2d Dept. 2012)

● *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)

● *People v. Mota,* 165 A.D.3d (2d Dept. 2018)

□ The aggravating factors alleged by the prosecutor are, as a matter of law, not factors which tend to establish a higher likelihood of reoffense or danger to the community.

● *People v. Brown,* 161 A.D.3d 1201 (2d Dept. 2018)

● *People v. Wyatt,* 89 A.D.3d 112, 121 (2d Dept. 2011)

□ The prosecutor has not adduced sufficient evidence to meet her burden of proof to establish by clear and convincing evidence that the alleged aggravating circumstances actually exist in the case at hand. (*Gillotti* step two).

● *People v. Gillotti,* 23 N.Y.3d 841 (2014)

● *People v. Cardinale,* 160 A.D.3d 1490 (4th Dept. 2018)

□ If the prosecution fails to satisfy steps one and two of the *Gillotti* analysis, the court does not have the discretion to depart from the presumptive risk level.

● *People v. Mota,* 165 A.D.3d 988 (2d Dept. 2018)

□ Even if the prosecution has satisfied steps one and two of the *Gillotti* analysis, the prosecutor has failed to present sufficient aggravating factors that outweigh the mitigating factors presented by the defense, so that they have not established under a totality of the circumstances test sufficient evidence to warrant a departure to avoid an under-assessment of the defendant's dangerousness and risk of recidivism.

● *People v. Gillotti,* 23 N.Y.3d 841 (2014)

● *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)

□ The aggravating factor or factors relied upon by the prosecution are not factors that are supported in either research or in the literature that indicate an increased risk to reoffend.

□ There is case law that rejects this aggravating factor as a basis for an upward departure.

□ The prosecutor has failed to comply with discovery request related to this aggravating factor and should be precluded from presenting evidence on this factor as a result of a due process violation. (Failure to provide prehearing discovery is a due process violation. See *Doe v. Pataki,* 3 F.Supp.2d 456 (1998); *People v. David W.,* 95 N.Y.2d 130 (2000). However, this author is unaware of any court decisions that have precluded on this basis.)

□ The prosecutor's argument for upward departure for mental illness is without basis where there is no causal relationship between mental illness and increased risk to sexually reoffend.

● *People v. Robinson,* 160 A.D.3d 1441 (4th Dept. 2018)

● *People v. Zehner,* 24 A.D.3d 826 (3d Dept. 2005)

● *People v. Grady,* 81 A.D.3d 1464 (4th Dept. 2011)

● *People v. McKelvin,* 127 A.D.3d 440 (1st Dept. 2015)

● *People v. Burgos,* 39 A.D.520 (2d Dept. 2007)

● *People v. Perkins,* 35 A.D.3d 1167 (4th Dept. 2006)

● *People v. Jamison,* 96 A.D.3d 1237 (3d Dept. 2012)

● *People v. Diaz,* 100 A.D.3d 1491 (4th Dept. 2012)

□ An assessment by your forensic psychologist, psychiatrist or treatment provider concludes that the person is a low risk to reoffend. This should be sufficient to prevent the prosecution from meeting the clear and convincing evidence standard for an upward departure.

● *Vandover v. Czajka,* 276 A.D.2d 945 (3d Dept. 2000)

□ An assessment by your forensic psychologist or psychiatrist rules out antisociality or sexual deviance, two of the most significant indicators of risk of recidivism, thus combating proof by clear and convincing evidence.

● Micahel C. Seto, INTERNET SEX OFFENDERS 196 (2013)

□ An assessment by your forensic psychologist or treatment provider concludes that defendant did not exhibit a predatory pattern.

● *Vandover v. Czajka,* 276 A.D.2d 945 (3d Dept. 2000)

□ The aggravating factors used to justify the upward departure were ones for which the person was already assessed points. They are aggravating factors already taken into account by the Guidelines.

● *People v. Cohen,* 73 A.D.3d 1003 (2d Dept. 2010)

● *People v. Lyons,* 72 A.D.3d 776 (2d Dept. 2010)

● *People v. Wyatt,* 89 A.D.3d 112 (2d Dept. 2011)

● *People v. Mount,* 17 A.D.3d 714 (3d Dept. 2005)

● *People v. Cardinale,* 160 A.D.3d 1490 (4th Dept. 2018)

● *People v. Foley,* 35 A.D.3d 1240 (4th Dept. 2006)

● *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)

□ The aggravating factors relied upon by the prosecution are not "probative on the issue of the defendant's risk of reoffense."

● *People v. Cohen,* 73 A.D.3d 1003 (2d Dept. 2010)

● *People v. Lyons,* 72 A.D.3d 776 (2d Dept. 2010)

● *People v. Wyant,* 86 A.D.3d 754 (3d Dept. 2011)

- ☐ The aggravating factor relied upon by the prosecution is not sufficiently weighty to warrant an upward departure and a departure would overvalue the gravity of the facts on which it is based. The aggravating factor does not indicate that the presumptive risk level would result in an underassessment of the risk of sexual reoffense.

  ● *People v. Barody,* 54 A.D.3d 1109 (3d Dept. 2008)

  ● *People v. Garcia,* 153 A.D.3d 735 (2d Dept. 2017)

- ☐ Defendant's total risk factor score placed him at the extreme low end of level 2 and so an upward departure would be an improvident exercise of discretion.

  ● *People v. October,* 101 A.D.3d 975 (2d Dept. 2012)

  ● *People v. Aguilar,* 92 A.D.3d 401 (1st Dept. 2012)

- ☐ Prosecution cannot rely upon a charge that was ultimately dismissed for an upward departure (unless they can independently prove by clear and convincing evidence). Reliance on *People v. Coffey* seems to be undermined by the Court of Appeals cryptic decision in *People v. Britton,* 31 N.Y.3d 1019, a case in which the court held that even though the jury acquitted the defendant of certain felony sexual conduct, that same conduct could be used by the SORA court to find that conduct occurred for the purposes of risk factor 2 by clear and convincing evidence.

  ● *People v. Coffey,* 45 A.D.3d 658 (2d Dept. 2007)

- ☐ In a child pornography case in which the prosecution argues that the court should follow the Board's recommendation for an upward departure this should be refuted by using the *Gillotti* analysis and rejection of the Board's 6/1/12 Position Statement. See the Chapter on Child Pornography and SORA.

- ☐ Prosecution's argument that the defendant is a "danger to the community" is not an aggravating factor and not a basis for upward departure.

  ● *People v. Grady,* 81 A.D.3d 1464 (4th Dept. 2011)

Chapter 12

SAMPLE DOCUMENTS

Defendant's Exhibits Cover Sheet

Defendant's Proposed Scoring of RAI

Attorney's Affirmation

Defendant's Affidavit

Memorandum of Law

Judicial Subpoena Duces Tecum

Provisional SORA Order

Demand for Disclosure

Demand for Statutory Statement

Submission to Board

Notice of Entry

Notice of Appeal

Letter Requesting Dismissal of Second SORA Hearing

Memorandum of Law – Credit for Time on Another State's Registry

DEFENDANT'S EXHIBITS
PEOPLE V. JOHN DOE
SORA HEARING

Exhibit	Description
A	Defendant's Proposed RAI Scoring
B	Affirmation of Defense Counsel
C	Affidavit of Defendant
D	Report of Kostas Katsavdakis, Ph.D., ABPP
E	Reports of Noman Lesswing, Ph.D.
F	Sentencing Transcript
G	Employment Letter
H	Support Letters
I	Federal BOP Positive Decision Reports
J	California Coast University Documents
K	Recidivism Studies and Literature on Non-Contact Sex Offenders
L	Presentence Investigation Report
M	Board Position Statement 6/1/12

DEFENDANT'S PROPOSED SCORING

SEX OFFENDER REGISTRATION ACT RISK ASSESSMENT INSTRUMENT			
RISK FACTOR	VALUE		SCORE
I. CURRENT OFFENSE(S)			
1. Use of violence			
Used forcible compulsion	+10		
Inflicted physical injury	+15		
Armed with a dangerous instrument	+30		
2. Sexual contact with victim			
Contact over clothing	+5		
Contact under clothing	+10		
Sexual intercourse, deviate intercourse, or aggravated sexual abuse	+25		
3. Number of Victims			
Two	+20		
Three	+30		
4. Duration of offense conduct with victim			
Continuing course of sexual misconduct	+20		
5. Age of Victim			
11 though 16	+20		
10 or less, 63 or more	+30		
6. Other victim characteristics			
Victim suffered from mental abnormality or incapacity or physical helplessness	+20		
7. Relationship with victim			
Stranger or established for purpose of victimizing or professional relationship	+20		
II. Criminal History			
8. Age at first sex crime			
20 or less	+10		
9. Number and nature of prior crimes			
Prior history/no sex crimes or felonies	+5		
Prior non-violent felony	+15		
Prior violent felony, misdemeanor sex crime or endangering welfare of a child	+30		
10. Recency of prior felony or sex crime			
Less than 3 years	+10		
11. Drug or alcohol abuse			
History of abuse	+15		
COLUMNS 1-11 SUBTOTAL			

SEX OFFENDER REGISTRATION ACT RISK ASSESSMENT INSTRUMENT			
RISK FACTOR	VALUE		SCORE
III. POST-OFFENSE BEHAVIOR			
12. Acceptance of Responsibility			
Not accepted responsibility	+10		
Not accepted responsibility/ refused or expelled from treatment	+15		
13. Conduct while confined/ supervised			
Unsatisfactory	+10		
Unsatisfactory with sexual misconduct	+20		
IV. RELEASE ENVIRONMENT			
14. Supervision			
Release with specialized supervision	0		
Release with supervision	+5		
Release without supervision	+15		
15. Living/ employment situation			
Living or employment inappropriate	+10		
COLUMNS 12-15 SUBTOTAL			
COLUMNS 1-11 SUBTOTAL			
TOTAL RISK FACTOR SCORE (add 2 subtotals)			
1 ☐	2 ☐	3 ☐	

Level 1 (low)	=	0 to +70
Level 2 (moderate)	=	+75 to +105
Level 3 (high)	=	+110 to +300

Note: The Sex Offender Registration Act requires the court or Board of Examiners of Sex Offenders to consider any victim impact statement in determining a sex offender's level of risk.

Offender Name: _____

NYSID #: _____

Indictment #: _____

DIN: _____

RISK LEVEL: _____

Assessor's Signature _____

Date: _____

A. Overrides (If any override is circled, offender is presumptively a Level 3)

1. Offender has a prior felony conviction for a sex crime
2. Offender has inflicted serious physical injury or caused death
3. The offender has made a recent threat that he will reoffend by committing a sexual or violent crime
4. There has been a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases ability to control impulsive sexual behavior

B. Departure

1. A departure from the risk level is warranted
   Yes ☐ No ☐
2. If yes, check the appropriate risk level
   1 ☐ 2 ☐ 3 ☐
3. If yes, explain the basis for departure (see summary)

COUNTY COURT CAYUGA COUNTY

STATE OF NEW YORK

People of the State of New York,	AFFIRMATION
	SORA Proceeding
vs.	NYSID # 084630000Z
	Indictment # 2017-100
John Doe,	
Defendant.	

Alan Rosenthal, an attorney duly admitted to practice in the Courts of the State of New York, and not a party to this action, pursuant to CPLR §2106 subscribes and affirms the following to be true under the penalties of perjury:

1) I represent the Defendant, John Doe, and as such I make this Affirmation in support of the Defendant's requests to this Court regarding the SORA hearing pending before Cayuga County Court Judge Mark H. Fandrich.
2) I have read all of the documents that have been provided to the Court by the prosecutor including the Prosecutor's Statement dated September 18, 2018 and the prosecutor's proposed scoring of the SORA RAI. I have extensively reviewed this matter with Mr. Doe.
3) On May 8, 2018 Mr. Doe was convicted by a plea of guilty to the felony offenses of, Attempted Rape in the Second Degree, in violation of Penal Law § 110.00 and § 130.30 (1) and Possession of a Sexual Performance by a Child in violation of Penal Law § 263.16. On June 5, 2018, he was sentenced by Cayuga County Court Judge Mark H. Fandrich to a split sentence of ten years probation with the first six months to be served by imprisonment to run concurrently with the sentence of probation on both counts (count 1 and count 17) to run concurrently.

4) The prosecutor recommends scoring Mr. Doe a total risk factor score of 110 points and a presumptive level of 3 (high risk) to reoffend. This score was based upon the prosecutor's recommendation of a score of 20 for risk factor #3 (Number of Victims), 30 for risk factor #5 (Age of Victim), 20 for risk factor #7 (Relationship with Victim), 15 points for risk factor #9 (Prior Non-Violent Felony), 15 for risk factor # 11 (Drug or Alcohol Abuse) and 10 for risk factor #12 (Acceptance of Responsibility).
5) The prosecutor recommended that there is no basis for an upward departure.
6) The prosecutor also recommended that no override was applicable and that no designation was warranted.
7) Mr. Doe does not contest the scoring of 20 points for risk factor #3 or 30 points for risk factor #5, or 20 points for risk factor #7, or 15 points for risk factor #9.
8) The Defense agrees with the prosecutor that no override is applicable.
9) The Defense agrees with the prosecutor that no designation is warranted.
10) The Defense agrees with the prosecutor that no upward departure is warranted.
11) The Defense disputes that the prosecutor has correctly scored risk factor #11 and takes the position that this risk factor should be scored 0. Simply stated, the prosecutor has not established by clear and convincing evidence, that Mr. Doe should be assessed point under this risk factor. Mr. Doe has abstained from the use of all controlled substances and marihuana for the past 18 years. He is an occasional social drinker and has been so for more than the past seven years.
12) The Defense also disputes that the prosecutor has correctly scored risk factor #12 and takes the position that this risk factor should be scored 0. The record does not support, nor can the prosecutor prove by clear and convincing evidence, that Mr. Doe has not accepted responsibility for his actions. He has, as shown by his guilty pleas, his statements to probation that the accusations against him were "accurate" and that he "doesn't deny the charges," his seeking out

treatment, his positive responsiveness to treatment, and his expression of acceptance of responsibility in Exhibit C, pp. 2-5, that he does accept responsibility for his actions.

13) As to all of the other risk factors not referenced above, the Defense concurs with the prosecutor that they should be assessed a score of 0.

14) Mr. Doe should be scored a total risk factor score of 85 or less and as a presumptive risk level 2 (moderate risk) or if 70 points or less, as a presumptive risk level 1 (low risk).. For the convenience of the Court the Defendant's Proposed Scoring of the SORA RAI is attached. (Exhibit A).

15) Mr. Doe requests that this Court depart downward in the event that the total risk factor score exceeds 70 points, and that such downward departure be to a risk level 1.

16) Set forth below are the mitigating factors that Mr. Doe asks this court to consider. These mitigating factors establish, by a preponderance of the evidence, a strong basis for this Court to conclude that a downward departure is warranted in the event that the total risk factor score is determined to exceed 70 points.

17) Mr. Doe has no prior sex offense convictions. nor does he have any prior convictions of any type.

18) Mr. Doe did not use forcible compulsion against the victims.

19) The participation of the victim "Gracey" was consensual.

20) Mr. Doe has demonstrated a willingness to seek treatment and has indeed done so.

21) Mr. Doe's response to treatment has been exceptional. (See report of Catherine Diana, Exhibit D).

22) Mr. Doe has been in a long-term adult relationship, living with an intimate partner for a period in excess of two years

23) Mr. Doe has been found to be a low risk to reoffend by a licensed clinical social worker, Catherine Diana, who has been Mr. Doe's sex offender treatment provider since July 27, 2017. (Exhibit D).

24) Mr. Doe is employed which adds stability to his life and circumstances.

25) Mr. Doe lives with his parents at their family home in Syracuse, New York. They provide him with a stable and supportive family.

26) The fact that there was only a single image of child pornography found on Mr. Doe's computer is highly indicative that he has no obsessive or compulsive conduct or deviant interest in children.

27) Mr. Doe did not create, share, distribute or reproduce the child's image referenced in count 17 of the indictment.

28) Since his arrest, and except for the four months that he was incarcerated and serving his sentence, Mr. Doe has lived in the community. He has remained offense free for the time in the community, that is, a period of nineteen months. This is an indicator that he is not subject to repetitive uncontrollable compulsive behavior.

29) Mr. Doe is neither a pedophile nor a hebephile and has no chronic and persistent sexual arousal to pubescent or prepubescent age children.

30) The Guidelines and the SORA RAI do not accurately take into account the risk assessment of a person whose conduct involves child pornography. The scoring of the RAI for risk factors #3 and #7 overestimate the risk of reoffense and danger to the public.

31) Combining the risk factor scores from these two separate offenses overstates the risk of reoffense, particularly when the scoring of either one separately would score below 70 points.

32) Mr. Doe has engaged in substantial volunteer activities and life experiences demonstrating both empathy and good character.

33) Under a totality of the circumstances, or all relevant circumstances, a downward departure is warranted.

34) In the event that the Court determines that the presumptive risk factor score exceeds 70 points, Mr. Doe moves for a downward departure to a risk level 1, based upon the several factors listed above in paragraphs "17" through "33."

WHEREFORE, I respectfully ask this Court to determine Mr. Doe's risk factor score to be 85 or lower, and that he be determined to be a risk level 1, or in the alternative, I conditionally request a downward departure to a risk level 1 in the event that the Court determines the total risk factor score to be in excess of 70 points.

Dated: November 13, 2018
Syracuse, New York

_____

Alan Rosenthal
Attorney for Defendant
White Memorial Building, Suite 204
100 E. Washington Street
Syracuse, New York 13202
(315) 559-2240

COUNTY COURT CAYUGA COUNTY
STATE OF NEW YORK

People of the State of New York,	AFFIDAVIT OF DEFENDANT
	SORA Proceeding
vs.	NYSID # 084630000Z
	Indictment # 2017-100
John Doe,	
Defendant.	

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:

John Doe, being duly sworn, deposes and states that:

1) I am the defendant in the above captioned matter.

2) I am over 21 years of age. I was born on January 1, 1980.

3) I currently reside at 100 Bridge Road, Syracuse, New York.

4) On May 8, 2018 I was convicted by a plea of guilty to the felony offenses of, Attempted Rape in the Second Degree, in violation of Penal Law § 110.00 and § 130.30 (1) and Possesion of a Sexual Performance by a Child in violation of Penal Law § 263.16. On June 5, 2018 I was sentenced by Cayuga County Court Judge Mark H. Fandrich to a split sentence of ten years probation with the first six months to be served by imprisonment to run concurrently with the sentence of probation on both counts (count 1 and count 17) to run concurrently.

5) On October 5, 2018 I completed the imprisonment portion of my sentence and I was released from the Cayuga County Jail on that date. I am currently under probation supervision by the Onondaga County Department of Probation.

6) Other than the 2018 convictions referenced above, I have no prior sex offense convictions.

7) Since my arrest on December 14, 2016 I have engaged in no unlawful conduct and I have not been arrested or convicted of any offense.

8) I used no forcible compulsion against either of the two victims.

9) The participation by the victim "Gracey," in the communications leading up to and arrangements to meet with me for the purpose of engaging in sexual intercourse was consensual.

10) I did not create, share or distribute the one image referenced in count 17 of the indictment and I have not distributed that image onto the internet.

11) I have not possessed any other image of child pornography.

12) I fully and totally accept responsibility for my conduct with regard to my actions in both counts 1 and count 17 of the indictment against me for which I acknowledge my guilt. I am remorseful for the harm that was done to the child whose image was on my computer. I understand that she was victimized by the person who took her picture, and by the people who put it on the internet, passed it along, and downloaded it, and possessed it. I am embarrassed for having been in possession of her image and for my role in this chain of child pornography. To her I give a most sincere apology. I accept complete responsibility for my actions in seeking a relationship through Craig's list and in pursuing sexual contact with "Gracey" after being advised that she was not an adult. My participation in counseling at NuStep with Catherine Diana has helped me gain insight into my conduct and helped understand the importance of changing my behavior.

13) I have had time to think about my conduct. Quite frankly I have gone through different stages. After my arrest and up until the time that I entered a plea of guilty I had many questions about my legal culpability for my conduct as it related to "Gracey." I questioned if what I had done was legally an attempted rape, and I questioned whether I could be held responsible for an act directed at a fictional victim. I thought about this on a daily basis and about whether to take this

case to trial. I had endless conversations with my attorney about these issues. He spent a great deal of time, and frankly showed a great deal of patience in explaining the legal perspective to me. Slowly but surely I came to understand and appreciate that what I had done was conduct for which I was indeed legally culpable. This is what caused me to agree to enter a plea of guilty. Once I reached that conclusion and could put together the legal and lay perspectives, I realized that what I had done I was responsible for and that if a jury were to consider this case they would undoubtedly consider me to be guilty for both offenses. Once I reached that point I fully accepted the responsibility for my actions. From the time of the plea to the time of my sentencing I again had time to reflect and accepted that my sentence was appropriate for the wrong I had done. While imprisoned for four months I spent endless hours thinking about my conduct and how wrong my conduct had been. I was truly embarrassed. Thinking about my action made me cringe. My counseling sessions have been times of inner reflection. All of this has brought me to the sincere and undeniable conclusion that I alone am responsible for my actions. I believe this to my core.

14) I did tell the probation officer at my interview that I did think six months in county jail was better than prison. I still believe that. However, by making that statement I did not mean to convey that I did not accept responsibility for my actions. I was and am appreciative of the plea bargain that was offered so that I would not have to go to state prison.

15) One incident that occurred while I was incarcerated helped me appreciate my own understanding of what I had done and the change that I had gone through. One day, while in jail serving my sentence, I happened to have a conversation with another person who was serving a sentence for child pornography. He expressed his thoughts to me that he could not see what was wrong with all of the child pornography that was found on his computer – after all – "it was a victimless crime." Jailhouse conversations are difficult, and one often is reluctant to be

straightforward for fear of the reprisal for what is said. I now look back with both pride and dignity as to what happened next. I responded to him directly. For the first time in my life I was able to tell another person exactly what was wrong with this kind of conduct. I told him that from my perspective this was not a victimless crime. I explained to him that someone victimized each of the children by taking their photographs. That someone victimized these children by passing along their photographs. When he sought out these pictures, he was contributing to the harm done. We never talked about this subject again. I don't know if it made a difference to him. I know it made a difference for me.

16) Since July 27, 2017, I have been enrolled in sex offender counseling at NUSTEP Professional Counseling Services. I meet periodically with my counselor, Catherine Diana. She even came to the Cayuga County Jail on one occasion to provide a counseling session while I was there serving my sentence. My participation in this counseling was voluntary and when I was released from the Cayuga County Jail, I resumed the counseling sessions. I do understand from my probation officer that probation does require that I continue this counseling. I have participated to the best of my abilities, and I have been compliant, engaged, honest and open. This counseling has helped me gain insight into my behavior, has educated me about the impact and harm to teenaged victims that my conduct could cause as well as to victims of child pornography.

17) I have had several adult relationships and have no interest or sexual attraction particular to children or minors. I have never had sexual contact with an underage person. I have had several committed and meaningful relationship with age-appropriate women, and during several of these relationships we lived together. Between 1996 and 2000 I lived with Jessica Smith who was my girlfriend at the time. We met while both attending Mohawk Valley Community College. Between 20010 and 2018 I lived with my girlfriend Mary Jones. In 2014 we purchased a house

together at 5000 Makyes Road, Syracuse New York. We lived together at that house until February 2017.

18) I currently live at my parents' home Syracuse, New York. Throughout the entire course of my arrest through conviction and during my incarceration, my parents, although disappointed by my conduct, have been supportive. They have helped me grow, mature, and gain insight into my misconduct and inappropriate choices. My brother and sister have also both helped provide stability in my life since my arrest.

19) I am the owner and founder of John's Construction, located at 100 W. Fayette St., Syracuse, New York. I started that business about twelve years ago. Prior to my arrest I had six full time employees. As a result of my arrest business has fallen off and I presently only have four full or part time employees. My work is the driving force in my life. This work has been very fulfilling and has lent a great deal of stability as I try to rebuild my life

20) I did not drink alcohol or use any drugs on the day of the offense alleged in count 1 of the indictment. I have abstained from the use of any and all controlled substances or marihuana for approximately the past eighteen years. Over the course of the past seven years I have limited my consumption of alcohol to special occasions. By that I mean that between two and four times a year, at my parents' house, when we meet for family gatherings for Thanksgiving, Christmas or my brother's or sister's birthday. On these occasions I might have one drink of alcohol, or up to three or four bottles of beer or glasses of scotch.

21) Although I am humiliated and embarrassed by my conduct that resulted in my arrest, there are several things that I have done and continue to do with my life that do give me a sense of pride and accomplishment in helping others. I have used my business to help charitable activities. I have been supportive of the Aids Community Resources (ACR) in Syracuse and in particular the Sled for Red campaign. Through John's Construction we build carboard sleds for this campaign

to help fundraising. I have also been a volunteer to support fundraising through the breast cancer awareness marathon. John's Construction has also built sets for the New York State anti-smoking campaign, providing those services at cost.

22) As a young child I attended Ed Smith Elementary School. It was one of the first schools to mainstream children with physical and mental disabilities in Syracuse. I benefitted from that mainstream program, not because I had a disability, but because it exposed me to other children with disabilities and I came to see them as people and to look past their disabilities. I made several lifelong friends at Ed Smith School. Over the years we have remained friends and I have taken the time and made the effort to be there for them in the many simple every day ways that helps to provide support. I never looked at this as volunteer work or as charity, but as a simple act of friendship.

23) Since my arrest on December 14, 2016 and my release on bail on that date, and up to the present time, and excluding the period of incarceration, I have lived in the community crime free and without any offense of any type, including sexual offending – that is a period of over 19 months.

_____

John Doe

Sworn to before me this 13th
day of November, 2018.

_____

Notary Public

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

SORA HEARING

vs. MEMORANDUM OF LAW

NYSID # 000030000Z

John Doe, Indictment # 2017-100

Defendant.

This Memorandum of Law will first set forth a Preliminary Statement as to the SORA Risk Assessment Instrument proposed by the District Attorney. It will then review the applicable legal principles. Finally, with regard to the substantive issues, Point II of this Memorandum of Law will address the scoring of risk factors # 11 and explain why it should be 0. Point III will address the scoring of risk factor #12 and explain why it should be 0. Point IV will address the mitigating factors that weigh in favor of a downward departure in the event the total risk factor score exceeds 70 points.

PRELIMINARY STATEMENT AS TO THE SORA RISK ASSESSMENT INSTRUMENT

The prosecutor made her recommendations and submitted her proposed scoring of the Risk Assessment Instrument (RAI) to the Court, by Prosecutor's Statement dated September 18, 2018.

In addition to the scoring of the RAI and risk level determination, the prosecutor determined that no overrides were applicable. The prosecutor determined that Mr. Doe should not be designated as any of the three designation categories. Mr. Doe is in agreement with the inapplicability of any overrides or designation. The prosecutor also indicated that no departure is warranted and she does not seek a departure.

The prosecutor scored Mr. Doe a total risk factor score of 110 points and a presumptive level of 3 (high risk) to reoffend. This score was based upon the prosecutor's recommendation of a score of 20

for risk factor #3 (Number of Victims), 30 for risk factor #5 (Age of Victim), 20 for risk factor #7 (Relationship with Victim), 15 points for risk factor #9 (Prior Non-Violent Felony), 15 for risk factor # 11 (Drug or Alcohol Abuse) and 10 for risk factor #12 (Acceptance of Responsibility).

Mr. Doe does not contest the scoring of any of the risk factors by the prosecutor except risk factors #11 and #12. As to risk factors #11 and #12 Mr. Doe's position is that both should be scored as 0. He posits that his total risk score should be 85 and that this Court should depart downward based upon the mitigating factors discussed at Point IV of this memorandum of law to a risk level 1. See Defendant's Proposed RAI Score, Exhibit A.

POINT I

APPLICABLE PRINCIPLES OF LAW

Burden of Proof

For a person convicted of a New York sex offense, as was Mr. Doe, and who is sentenced to a split sentence, the relevant court procedures are set forth in Correction Law §168-d (3). Subdivision 3 specifically imposes upon the prosecution the "burden of proving the facts supporting the determinations sought by clear and convincing evidence." As explained in *People v. Gillotti,* 23 N.Y.3d 841, 862 (2014), this high burden of proof is placed on the District Attorney "largely to create an extra procedural protection against an excessive risk level classification and the resulting deprivation of the defendant's liberty."

This means that the prosecutor bears the burden of proving the facts supporting each of the 15 risk factors in the RAI by clear and convincing evidence. *People v. Pettigrew,* 14 N.Y.3d 406, 408 (2010); *People v. Wells,* 138 A.D.3d 947, 951 (2d Dept. 2016); *Doe v. Pataki,* 3 F.Supp.2d 456, 472 (S.D.N.Y. 1998). The *Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* (Guidelines) are in accord with this requirement. "Points should not be assessed for a factor – e.g. the

use of a dangerous instrument – unless there is clear and convincing evidence of the existence of that factor." (Guidelines p. 5).

It also means that the prosecutor bears the burden of proving that an upward departure is warranted by clear and convincing evidence. *People v. Gillotti,* 23 N.Y.3d 841, 862 (2014).

In contrast, the Defendant's burden of proof in order to prove the existence of the mitigating circumstances upon which he or she relies in advocating for a downward departure is "by a mere preponderance of the evidence." *People v. Gillotti,* 23 N.Y.3d 841, 864 (2014). That is because the Defendant has a "statutorily protected interest in being free from excessive government monitoring and stigmatization." *Gillotti* at 863.

What does this "clear and convincing" standard mean in practice?

"Clear and convincing" is a heightened and exacting standard. It is "significant since it is a higher more demanding standard than the preponderance standard." *Solomon v. New York,* 146 A.D.2d 439, 440 (1st Dept. 1989); *In re Gail R.,* 67 A.D.3d 808, 811-812 (2d Dept. 2009). The evidence must rise to such a level as to create a "high degree of probability" that the proposition alleged is in fact true. *See* NY PJI – Civil 1:64; *Krol v. Eckman,* 256 A.D.2d 945, 947 (3d Dept. 1998). The Appellate Division, Fourth Department, has applied this "highly probable" standard in the SORA context when it determined that the prosecution had not met its burden of proof. *People v. Warrior,* 57 A.D.3d 1471, 1472 (4th Dept. 2008). Clear and convincing evidence "means evidence that is neither equivocal nor open to opposing presumptions." *Solomon v. New York,* 146 A.D.2d at 440. Stated in yet another way, "the evidentiary requirement [operates] as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." *George Backer Mgt. Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 220 (1978). It is the "most rigorous standard of burden of proof in civil cases," and is applied to cases including decisions literally affecting a party's life or death. *Matter of Westchester Cty. Med. Ctr. On Behalf of O'Connor,* 72 N.Y.2d 517, 531 (1988). The United States

Supreme Court has cited with approval a description of the "clear and convincing" standard as one that requires evidence that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cruzan by Cruzan v. Dir., Missouri Dept. of Health,* 497 U.S. 261, 285 n. 11 (1990).

Placing the higher "clear and convincing" standard of proof on the District Attorney is "more than an empty semantic exercise." *Addington v. Texas,* 441 U.S. 418, 425 (1979). As the Supreme Court instructed, we must be mindful that the function of imposing on the legal process the "clear and convincing" standard "is to minimize the risk of erroneous decisions." *Id.* at 425. When a statute requires proof by "clear and convincing" evidence, such as in a SORA proceeding, civil commitments, deportation, denaturalization and life support terminations proceedings, it represents a legislative determination that "the individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than harm to the state." *Id.* at 427.

In the context of this case, in order for the prosecutor to meet her burden of proof by clear and convincing evidence she must prove that it is highly probable that Mr. Doe does not accept responsibility for his conduct and that it is highly probable that he either used drugs or alcohol on the day of the offense described in count 1 of the indictment or that it is highly probable that Mr. Doe has not abstained from the use of drugs for an extended period of time, or that it is highly probable that he is more than an occasional social drinker over the past seven years.

It is well-settled that the court "may consider reliable hearsay evidence submitted by either party." Correction Law § 168-d(3). Documents such as the presentence report, risk assessment instrument and case summary, grand jury testimony and the victim's sworn statement to the police have been found by courts to constitute admissible hearsay. *People v. Stewart,* 61 A.D.3d 1059, 1060 (3d Dept. 2009).

However, merely because reliable hearsay has been received into evidence does not mean that it rises to the level of clear and convincing evidence. A court must still examine whether the fact alleged has been proven by the reliable hearsay evidence to a high degree of probability. As the Court of Appeals noted in *People v. Mingo,* 12 N.Y.3d 563, 573 (2009) even when reliable hearsay such as a case summary or a presentence report has been admitted into evidence at a SORA hearing it does not necessarily meet the clear and convincing standard. "Of course, information found in a case summary or presentence report need not always be credited –

it may be rejected when it is unduly speculative or its accuracy is undermined by other more compelling evidence." *Mingo* at 573. If it does not meet the high "clear and convincing" as being "highly probable," the District Attorney cannot prevail as to that issue. If the hearsay proof is vague, equivocal or inconsistent and not substantiated by other proof, the clear and convincing standard is not met, and then this Court may not uphold the prosecutor's proposed point assessment under the Guidelines. *People v. Stewart,* 61 A.D.3d 1059, 1060 (3d Dept. 2009); *People v. Dominie,* 42 A.D.3d 589, 591 (3d Dept. 2007); *People v. Oliver,* 37 Misc.3d 1201(A) (Sup. Ct. Cayuga Co. 2009).

Even when the reliable hearsay is clear and unequivocal as to a particular risk factor, where the defendant denies or challenges the fact at issue, there must be other proof substantiating that fact, or the clear and convincing evidence standard will not be met. A good example of this principle is found in *People v. Warrior,* 57 A.D.3d 1471 (4th Dept. 2008). In that case at issue was the proper scoring of risk factor # 3, and the fact the District Attorney sought to prove was that there were two victims, and not one. The District Attorney offered his prior *Molineux* notice alleging the existence of a second victim. The Appellate Division held that "[i]n light of the defendant's denial of the allegations concerning the second victim and the absence of any proof substantiating *Molineux* notice or the Assistant District Attorney's oral assertions, we conclude that the hearsay evidence presented by the People does not rise to the level of clear and convincing evidence." *Warrior* at 1472. Moreover, a case summary, standing

alone, will not suffice to satisfy the District Attorney's burden of proving a risk level assessment by clear and convincing evidence where a defendant has contested the factual assertions contained therein. *People v. Paladin,* 57 Misc. 3d 130(A) (Sup. Ct. App. Term, 2d Dept. 2017).

In *People v. Judson,* 50 A.D.3d 1242 (3d Dept. 2008) the District Attorney sought to assess points under risk factor #3 for a "continuing course of sexual misconduct." The defendant challenged the assessment of points for that risk factor. The District Attorney relied upon the case summary. The Appellate Division ruled that points should not be assigned to risk factor #3, holding that "the case summary alone is not sufficient to satisfy the People's burden of proving the risk level assessment by clear and convincing evidence where, as here defendant contested the factual allegations related to this risk factor." *Judson* at 243. *People v. Coger,* 108 A.D.3d 1234 (4th Dept. 2013), another SORA case, is in accord. In *Coger* the court held that in addition to reliable hearsay, there must be other proof substantiating the facts alleged in order to assess points for a risk factor when challenged by the defendant. The court refused to allow the facts alleged in the PSR and case summary standing alone to be sufficient to meet the prosecution's burden of establishing that risk factor by clear and convincing evidence. *People v. Coger,* 108 A.D.3d 1234 (4th Dept. 2013).

With regard to hearsay, even reliable hearsay, there is a very basic and long-standing rule that applies whether the burden of proof is merely a preponderance of the evidence or the more exacting standard of clear and convincing evidence. This rule has been applied in numerous and varied civil and criminal law contexts. Stated very simply this basic principle requires that no decision by a court or administrative tribunal may be based solely on hearsay, even though admitted into evidence as reliable hearsay. The determination may not be based on hearsay alone but must also be based upon evidence setting forth facts of a probative character, outside of hearsay statements. In other words, the People's contention cannot rest entirely on hearsay. *People v. Pettway,* 286 A.D.2d 865 (4th Dept. 2001); *People v. Ramos,* 232 A.D.2d 433 (2d Dept. 1996). This rule was acknowledged as long ago as *Altschuler v.*

Bressler, 289 N.Y. 463 (1943) and as recently as *People v. Hubel,* 2018 NY Slip Op 01154 (1st Dept. 2018).

Child Pornography Cases

From the initial use of the SORA RAI and the enactment of SORA, New York courts have questioned whether the RAI was appropriate for use in the unique circumstances of a non-contact offense such as child pornography.

The primary concern was that in the case of a child pornography offense, by scoring the RAI with points for risk factors #3 (number of victims) and risk factor #7 (stranger) that the scoring would create an anomaly such that low risk child pornography offenders would incorrectly be categorized as level 2 risk.

This anomaly was first identified by the Court of Appeals in *People v. Johnson,* 11 N.Y.3d 416 (2009), a case in which the court raised the concern that "[i]t does not seem that factor 7 was written with possessors of child pornography in mind." *Id.*at 420. The court recognized that although the RAI might generally be valid for contact offenses, it might create an overestimation of the risk classification in cases of child pornography. In child pornography cases the RAI "produces a seemingly anomalous result, one the authors of the Guidelines may not have intended or foreseen." *Id.* at 421. Again, in *People v Gillotti,* 23 N.Y.3d 841 (2014) the court expressed its unease that scoring points under risk factors #3 and #7 may result in an excessive risk calculation in a manner not contemplated by the Guidelines or statute:

> *[W]e recognized, as the partial dissent does, that scoring points under factor 3 and 7 may overestimate the risk of reoffense and danger to the public posed by quite a few child pornography offenders*

.
Gillotti, 23 N.Y.3d at 860.

In *People v. Marrero,* 37 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2012, Judge Conviser astutely pointed out that the RAI was obviously not written with "possessors of child pornography in mind" as the Court

of Appeals surmised. He explained that the RAI was written in January of 1996, and that New York's child pornography statutes were not enacted until almost a year later, on November 1, 1996. (Penal Law § 263.16 and § 263.11). The simple possession of child pornography was not a crime under New York law when the RAI was written. *Marrero,* 37 Misc. 3d at 423-433.

Risk factors #3 and #7 add points "in a way that was intended by the authors of the guidelines to apply to physical contact, and not to defendants who possessed and shared child pornography." *People v. Yen,* 33 Misc. 3d 1234(A) (Sup. Ct. Kings Co. 2011). The court in *Yen* went on to note:

> *Since this court does not think that result* (scoring as a level 2) *would be consistent with the intent of the authors of the SORA guidelines it anticipates that many SORA applications made as to such defendants should result in downward departures to level one.*

People v. Yen, 33 Misc. 3d 1234(A).

The Board of Examiners of Sex Offender came up with one way to deal with this anomaly. It issued a Position Statement on 6/1/12. The Court of Appeals did not agree. In *People v. Gillotti,* 23 N.Y.3d 841 (2014) the Court of Appeals thoroughly and totally repudiated the Board's Position Statement.

First, the Court of Appeals made clear that SORA courts must consider scoring risk factors #3 and #7. They cannot just be ignored as the Board's Position Statement suggests. However, they are not automatically scored. They are scored if, and only if, the facts of a specific case so warrant, and clear and convincing evidence supports the scoring of risk factor #3 or #7. Thus, the Court of Appeals rejected the first step in the Board's methodology for child pornography cases.

Second, and far more importantly, the Court of Appeals took a diametrically opposed view on departure. The Board's position appears to be that it should default to an upward departure in most child pornography cases. In sharp contrast, the Court of Appeals has directed the default to a downward departure.

> *[I]n deciding a child pornography offender's application for a downward departure, a SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score, and without departing downward might lead to an excessive level of registration.*

Gillotti, 23 N.Y.3d at 860. (Emphasis added).

In other words, in most SORA child pornography cases, the defendant will properly be classified as a low risk. The reason is simple. They are non-contact offenders. The physical danger to public safety is low. And the recidivism rates for child pornography offenders when compared to other sex offenders is low. *See People v. Marrero,* 37 Misc. 3d 429, 440-442 (Sup. Ct. N.Y. Co. 2012). As noted by Judge Smith in his partial dissent in *Gillotti:*

> *[B]oth common sense and our decision in Johnson should make downward departure the norm in most child pornography cases.*

Gillotti, 23 N.Y.3d at 869.

Purpose of SORA

One of the challenges that scoring the SORA risk assessment instrument presents is that it causes us to revisit what may be a very repugnant act. It is this revisiting of the offense that may rekindle a desire for punishment or vengeance. But therein lies the danger. For neither punishment nor vengeance are the purpose of SORA. "Risk determinations under SORA should not be based primarily on moral outrage, as satisfying as such emotions might be." *People v. McFarland,* 29 Misc.3d 1206(A) (Sup. Ct. N.Y. Co. 2010).

In order to implement SORA, the Board "opted to create an objective assessment instrument that would provide a risk level combining risk of reoffense and danger posed by a sex offender." *People v. Curry,* 158 A.D.3d 52, 57 (2d Dept. 2017). The goal is to protect the public from the danger of recidivism. *Curry* at 56. This is to be accomplished by assessing each individual person subject to

SORA in order to assess the risk that he or she "will reoffend and the offender's threat to public safety." *People v. Marsh,* 116 A.D.3d 680, 682 (2d Dept. 2014).

The danger is that the visceral inclination towards punishment may undermine the "defendant's statutorily protected interest in being free from excessive government monitoring and stigmatization" and the defendant's "recognized liberty interest in not being required to register under an incorrect label." *People v. Gillotti,* 23 N.Y.3d 841, 863 (2014). That inclination needs to be resisted, or any semblance of the SORA RAI's objectivity and consistency are undermined. SORA has been described as a civil statute[56], remedial[57], regulatory[58] and a collateral consequence.[59] However, courts have consistently explained at great length that it is not a penal statute[60] and that SORA's purpose "is not intended to serve as a form of punishment."[61]

The Court of Appeals has reiterated its reminder of the danger of treating SORA as punishment. The "SORA requirements, unlike postrelease supervision, are not part of the punishment imposed by the judge." *People v. Gravino,* 14 N.Y.3d 546, 556 (2010).

As one Supreme Court Judge in Monroe County poignantly articulated it, SORA does not embody punishment. Rather, it is constituted as "vigilance without vengeance." *People v. Afrika,* 168 Misc. 2d 618, 626 (Sup. Ct. Monroe Co. 1996).

Judge Smith, dissenting in part in the Court of Appeals decision in *People v. Gillotti*, 23 N.Y.3d 841, 865 (2014), explained the need for great care in scoring a SORA risk assessment instrument, whether simply scoring the risk factors or considering a departure. He emphasized the need to be mindful that "SORA's purpose is not to punish."

> *An offender's risk level designation under SORA* ***is not an expression of outrage at the heinousness of a crime,***

---

[56] *People v. Parilla,* 109 A.D.3d 20, 24 (1st Dept. 2013)
[57] *North v. Board of Examiners*, 8 N.Y.3d 745, 752 (2007)
[58] *Doe v. Pataki,* 120 F.3d 1263, 1277,1278 (2d Dir. 1997)
[59] *People v. Windham,* 10 N.Y.3d 801,802 (2008)
[60] *People v. Gravino,* 14 N.Y.3d 546, 556 (2010)
[61] *People v. Wells,* 138 A.D.3d 947, 951 (2d Dept. 2016)

> ***or an attempt to make the offender suffer for what he has done.***

Gillotti, 23 N.Y.3d at 865 (emphasis added).

Care must be taken to use the SORA RAI, Guidelines and risk level classification to measure the risk of reoffense as it was intended, and not misuse them to reflect a moral judgment about how blameworthy sexually offending behavior is.

In a SORA determination, even when it may be difficult to discern the line between probative value and prejudicial force, it is the judicial challenge and responsibility to uphold the integrity of the process by which a defendant is classified as a level 1, 2 or 3 risk, and by which the evidence is judged.

POINT II

MR. DOE SHOULD BE SCORED 0 POINTS FOR RISK FACTOR 11

Mr. Doe should not be assessed 15 points for risk factor number 11 (Drug or Alcohol Abuse), because, as set forth below, the prosecutor has not proven by clear and convincing evidence that this risk factor is applicable.

There is no evidence whatsoever that Mr. Doe was using or abusing either drugs or alcohol at the time of the offense. The District Attorney's silence on this subject is clearly a tacit admission. The very absence of any alcohol or drugs at the time of the offense serves as further evidence that in the case of Mr. Doe there is no nexus between drug or alcohol abuse and sexual offending, and should not be considered a risk factor.

The sole evidence submitted by the District Attorney related to risk factor number 11 is based upon the Pre-Plea Investigation Report (PPI). In fact, the Prosecutor's Statement (p. 2, para. 5 (e) submitted to this Court repeats the PPI (p. 7) almost verbatim. However, what is left out is pertinent.

Contained in the PPI is the relevant statement: "He characterized himself as an occasional drinker, consuming alcohol on special occasions."

Although reference was made to Mr. Doe smoking marihuana and using LSD in the distant past, Mr. Doe has not smoked marihuana or used LSD in the past 18 years. In fact, Mr. Doe has abstained from marihuana and any controlled substance for almost two decades. This is substantiated by both his statement in the PPI, and his affidavit submitted for this hearing.

The Prosecutor's Statement contains no reference to drug or alcohol abuse by Mr. Doe in the past 18 years. A more recent reference to alcohol use was made by Mr. Doe to the Probation Officer who prepared the PPI, characterizing himself "as an occasional drinker" and "consuming alcohol on special occasions." Mr. Doe acknowledged consuming up to three to four bottles of beer or three to four 1.5 ounce glasses of scotch on occasion. The PPI also states that Mr. Doe acknowledged using alcohol at the age of fifteen and that he last consumed alcohol in February of 2018.

In his affidavit submitted as Exhibit C, Mr Doe explains his occasional drinking over the past seven years. He drinks only on special occasions, being the holidays of Christmas or Thanksgiving or on the birthdays of his brother and sister, which celebrations occur at his parents' home, limited to two to four times a year.

Support for scoring risk factor number 11 as 0 points under the facts presented to this Court is found in the Guidelines. Mr. Doe's long period of abstaining from drugs and his occasional social drinking do not warrant points being assessed for this risk factor. "The category focuses on the offender's history of abuse and the circumstances at the time of the offense. It is not meant to include occasional social drinking. In instances where the offender abused drugs/or alcohol in the distant past, but his more recent history is one of prolonged abstinence, the Board or court may choose to score zero points in this category." (Guidelines p. 15).

Support for Mr. Doe's position regarding risk factor 11 is well grounded in case law.

An individual who has abused drugs in the distant past, but who has abstained from drug use over an extended period of time, in this case over 18 years, should not be assessed points under risk factor 11. New York courts have repeatedly held that drug abuse, diagnosis, and treatment in the distant past, when followed by a significant period of abstaining from drugs makes assessing points for risk factor 11 unjustifiable. *People v. Taylor,* 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010); *People v. Ferrer,* 69 A.D.3d 513 (1st Dept. 2010); *People v. Abdullah,* 31 A.D.3d 515 (2d Dept. 2006); *People v. Wilbert,* 35 A.D.3d 1220 (4th Dept. 2006); *People v. Irizarry,* 36 A.D.3d 473 (1st Dept. 2007); *People v. Martinez,* 143 A.D.3d 563 (1st Dept. 2016). Mr. Doe's drug and marihuana use from his distant past, when followed by a significant period of abstaining, should not be considered as a basis to assess points under this risk factor.

In *People v. Martinez,* 143 A.D.3d at 563 the lower court was found to have improperly assessed points where the defendant had abstained from drugs for 20 years. In *People v. Wilbert,* 35 A.D.3d at 1221, eight years of abstaining was found to obviate the need to assess points under risk factor 11. The court in *People v. Abdullah,* 31 A.D.3d a6 516 held that assessing 15 points under risk factor 11 was unjustified in view of the fact that defendant had abstained for over 15 years. In *People v. Ferrer,* 69 A.D.3d at 515 the Appellate Division held that the SORA court should not have assessed 15 points for drug abuse since the defendant had been abstinent for 18 years and was not abusing any substance at the time of the offense. Finally, in *People v. Taylor,* 27 Misc. 3d 1201(A) the SORA court held that although the defendant had an admitted drug history and had been in several drug treatment programs, his recent history of 15 years of abstaining from drugs justified scoring zero points in this category.

Mr. Doe acknowledged to the probation officer conducting the PPI that he was an occasional social drinker. Occasional, moderate social drinkers are not to be subjected to stricter scrutiny and assessed points for risk factor 11. *People v. Palmer,* 20 N.Y.3d 373, 379 (2013). The Court of Appeals addressed risk factor 11 at great length and concluded:

> *Since the Board commented that "occasional drinking" is not counted as alcohol abuse, periodic, moderate drinking of alcoholic beverages does not qualify as abuse under the SORA risk factors and does not warrant the assessment of points.*

People v. Palmer, 20 N.Y.3d at 378.

Without evidence of a causal link between alcohol use and persistent social or relationship problems the prosecution cannot establish alcohol abuse. *People v. Palmer,* 20 N.Y.3d at 380. In the case before this court the prosecution has failed to produce evidence that is clear and convincing so as to meet the burden of proof. It should be noted that in *People v. Long,* the companion case to *People v. Palmer,* and similarly decided, the defendant Long admitted to probation that on the night in question he had "a few beers" over a ninety-minute period, and that he "occasionally drank alcohol and usually consumed two or three beers once a month." The court considered these facts, finding that this constituted "periodic, moderate drinking," that it was "occasional social drinking" and should not be counted as alcohol abuse within the meaning of risk factor 11.

In the recent case of *People v. Saunders,* 156 A.D.3d 1138, 1129, 1140 (3d Dept. 2017) the court followed *People v. Palmer*, holding that evidence of social or occasional use of drugs or alcohol does not establish a history of drug or alcohol abuse by clear and convincing evidence as contemplated by the SORA risk assessment guidelines. In *People v. Saunders* the court had before it a presentence investigation report that revealed that the defendant first used alcohol and marihuana at a young age, 17 years old, and had previously tested positive for marihuana while on probation for another crime. Despite such facts, the court found that "the record does not demonstrate any pattern of drug or alcohol abuse such as on a daily basis." Evidence of social or occasional drinking is not enough to score 15 points for risk factor 11. *People v. Saunders,* 156 A.D.3d at 1139 and 1140.

Many other cases have similarly concluded that social drinking does not warrant assessing points for alcohol abuse under risk factor 11. *See* for example, *People v. Titmas,* 46 A.D.3d 1308 (3d Dept. 2007); *People v. Rodriguez,* 130 A.D.3d 897 (2d Dept. 2015; *People v. Rohoman,* 121 A.D.3d 876 (2d

Dept. 2014). In *People v. Titmas,* the record reflected that the defendant was an occasional user of marihuana, last having smoked that substance seven years prior to the SORA hearing, had tried LSD and was an occasional user of alcohol. The court held that such evidence does not establish a history of drug or alcohol abuse by clear and convincing evidence. *People v. Titmas,* 46 A.D.3d at 1308.

Mr. Doe's statement to the probation officer about his occasional social drinking is not sufficient basis for an assessment of points under this risk factor.

Mr. Doe does have a prior DWAI conviction dating back to 2011. However, merely because a defendant has prior convictions related to drugs or alcohol is not sufficient to establish drug or alcohol abuse so as to assess points for risk factor 11. In *People v. Irizarry,* 36 A.D.3d 473 (1st Dept. 2007) the court held that an eight year old misdemeanor drug conviction and an even older disorderly conduct conviction arising out of a misdemeanor drug arrest were not sufficient basis to demonstrate that the defendant had a substance abuse problem within the meaning of risk factor 11. Similarly, the court in *People v. Guaman,* (12 Misc. 3d 707 (Sup. Ct. Kings Co. 2006) held that a two year old misdemeanor conviction for driving while intoxicated was not sufficient to establish clear and convincing evidence of alcohol abuse, thus concluding that assessment of 15 points under risk factor 11 is not permitted. In *People v. Coger,* 108 A.D.3d 1234 (4th Dept. 2013) prior convictions for criminal possession and sale of marihuana and criminal possession of a controlled substance in the seventh degree were held not to constitute clear and convincing evidence that the defendant had a history of abusing drugs, and did not warrant a point assessment under risk factor 11. In *People v. Coger* the court even considered the fact that the defendant had admitted that he was intoxicated during a previous sex offense incident. Despite that admission, the court found the evidence:

> *...insufficient to establish that his sexual misconduct can "be characterized by repetitive and compulsive behavior[ ] associated with drugs or alcohol' (Correction Law § 168-l [5] [a] [ii], especially because defendant does not have any other history of intoxication with respect to his sexual offenses, including the instant offenses.*

People v. Coger, 108 A.D.3d at 1235, 1236.

Other court rulings that prior convictions for drugs or alcohol are not sufficient to prove drug or alcohol abuse under risk factor 11 can be found in *People v. Madera,* 100 A.D.3d 1111 (3d Dept. 2012) and *People v. Velazquez,* 130 A.D.3d 997 (2d Dept. 2015).

Mr. Doe has abstained from the use of marihuana or any controlled substance for over 18 years. He is an occasional social drinker, and has been such over the past 7 years to the extent he explained that in the PPI and his supporting affidavit. (Exhibit C). Based upon the foregoing analysis, Mr. Doe should not be assessed points for risk factor 11 as the prosecution has not put forward clear and convincing evidence to support such a score.

POINT III

MR. DOE SHOULD BE SCORED 0 POINTS FOR RISK FACTOR 12

Mr. Doe should not be assessed 10 points for risk factor 12 (Acceptance of Responsibility). The District Attorney has failed to present this Court with sufficient evidence to establish by clear and convincing evidence that Mr. Doe has not accepted responsibility for the conduct for which he has been convicted.

In an effort to establish this risk factor, the prosecutor relies entirely on the PSI. As set forth in the "Prosecutor's Statement," (5)(f)(1), it is argued that there are two indicators of the Defendant's failure to accept responsibility. First, the prosecutor points out that the probation officer reported that he asked Mr. Doe if he ever thought about taking the case to trial, and Mr. Doe responded, "every day, but that he didn't want to go to prison and six months in the county jail was better than prison."[62] Second,

[62] Undoubtedly this is a response one might expect from anyone who has plea bargained for a lesser sentence. It demonstrates neither a denial of guilt nor a lack of acceptance of responsibility, despite the bald assertion by the authors of the Guidelines. One might provide such a response and maintain one's innocence, or fully accept responsibility, yet make a practical decision to plea bargain. It is an equivocal statement, being indicative of neither an acceptance or rejection of

the prosecutor points to the probation officers impression that Mr. Doe "showed little culpability and may be minimizing his intentions."

Although these two events may be considered indicators of lack of acceptance of responsibility, they are not the only indicators, and they are not dispositive of the issue. Acceptance of responsibility can only be ascertained by weighing all the indicators in the record.

There are equally weighty indictors to the contrary, that support the conclusion that Mr. Doe does accept responsibility for the acts alleged in counts 1 and 17 of the indictment. First, on May 8, 2018, Mr. Doe pleaded guilty to two counts of Indictment 2017-100, admitting that he was guilty of the offenses of Attempted Rape in the Second Degree and Possession of a Sexual Performance by a Child. The Court and prosecutor accepted Mr. Doe's admission at the time of the pleas as being truthful and satisfying the elements of the crimes. Second, during the same PSI interview referred to by the prosecutor, memorialized in the reports, Mr. Doe was read count 1 of the indictment and "the defendant admitted it was accurate." (PSI p. 7). Third, the PSI confirms that count 17 of the indictment was read to Mr. Doe and "the defendant admitted it was accurate. " (PSI p. 7). Fourth, it is established by the PSI that "the defendant doesn't deny the charges." Fifth, Mr. Doe has voluntarily participated in sex offender treatment and counseling at NuStep with Catherine Diana. Sixth, the conclusion of Catherine Diana, based upon eleven hours of interviews with Mr. Doe, far more than the single one-hour interview conducted by the probation department, is that Mr. Doe has accepted responsibility for his conduct. (Exhibit D, Report of Catherine Diana). Seventh, Mr. Doe's response to treatment has been exceptional, evidencing his acceptance of responsibility, and countering the prosecutor's speculation that Mr. Doe is a poor prospect for rehabilitation. Eighth, Mr. Doe's most recent actions and statements

---

responsibility. It is just one indicator suggested by the Guidelines, and carries no more weight than other indicators of acceptance of responsibility.

reflect his genuine acceptance of responsibility. (Guidelines p. 15 suggest looking to the most recent credible statements).

Mr. Doe's response to the probation officer's question about whether "he ever thought about taking the case to trial" should be considered in its context. On the one hand, the question itself, unnecessary for a PSI, might well be seen as a purposeful and baited inquiry by an experienced and wily probation officer, fully aware of the SORA Guidelines, the RAI, and risk factor 12. On the other hand, the context of the response is quite specific to this case and not conducive of broad generalizations concluding that an affirmative response and an acknowledgement of practical plea bargain considerations, automatically and in all cases is indicative of a lack of acceptance of responsibility. All that can and should be said about such a response is that it may suggest that the guilty plea in and of itself may not be an indicator of acceptance of responsibility. Further inquiry as to other indicators should be reviewed.

Mr. Doe's case involved some very specific and unusual circumstances and legal issues. Unlike other defendants to whom the prosecutor's conclusion might apply, Mr. Doe did not deny that he committed the specific acts. He did not claim that they did not happen. His acceptance of a plea bargain did not fly in the face of acceptance of responsibility for his conduct. Mr. Doe and his attorney spent months discussing, analyzing, and researching at least two specific thorny legal issues pertaining to "attempt" and a fictional victim. Mr. Doe worked with his attorney to make a decision as to whether to bring these issues on to a Judge or jury. Perhaps they are easy issues for a person skilled in the law, but it is no wonder that a lay person would find them troubling and have to think long and hard about going to trial or accepting a plea bargain. That has little to do with acceptance of responsibility. In the end, and after many discussions with his attorney, Mr. Doe was satisfied that he was indeed legally culpable for the crimes for which he pleaded guilty. He was simply expressing his prior legal doubts about the

case to the probation officer. He was not denying his guilt, nor was he refusing to accept responsibility for his conduct.

Mr. Doe has had plenty of time to reflect on his actions and on his acceptance of responsibility since his interview by probation on May 15, 2018. He has been through sentencing. He has served his sentence in the Cayuga County Jail and had time to contemplate his actions. He has undergone extensive counseling with Catherine Diana. Mr. Doe has gained additional insight and understanding of his own conduct. He is extremely remorseful for the harm done to the young child portrayed in the image that he possessed on his computer. He understands that she was victimized in order to create that image. He acknowledges the terrible harm caused by child pornography and the consumption of child pornography. He is deeply embarrassed and remorseful for his action that gave rise to counts 1 and 17 of the indictment. He is forthright and sincere in his acceptance of responsibility for his conduct.

Unlike most of the other 14 risk factors on the RAI, which are objective, risk factor 12 is subjective. Acceptance of responsibility is – in other words – in the eyes of the beholder. As one renowned clinical psychologist, specializing in sex offense assessments, observed, the Guidelines fail to provide any operational definition on what constitutes "genuine acceptance of responsibility."

Despite the shortcoming of the subjectiveness of this risk factor, the burden of proof standard to which the prosecutor is held in proving a failure to accept responsibility is very high and demanding. As discussed earlier in this memorandum of law at Point I, the clear and convincing evidence standard to which the prosecutor must be held in order to sustain a point assessment for this risk factor is such that the factor alleged must be proven to be highly probable. Inconsistent and contradictory indicators do not reach that standard.

The prosecutor's evidence as to this risk factor does not reach the clear and convincing standard. Their evidence must rise to such a level as to create a "high degree of probability" that the proposition

alleged is in fact true. *See* NY PJI – Civil 1:64; *Krol v. Eckman,* 256 A.D.2d 945, 947 (3d Dept. 1998). The Appellate Division, Fourth Department has applied this "high probability" standard in the SORA context when it determined that the prosecution had not met its burden of proof. *People v. Warrior,* 57 A.D.3d 1471, 1472 (4th Dept. 2008). As the court concluded in *Solomon v. New York,* 146 A.D.2d 439, 440 (1st Dept. 1989) clear and convincing evidence "means evidence that is neither equivocal nor open to opposing presumptions." It cannot be "loose, equivocal or contradictory." *George Backer Mgt. Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 220 (1978). In the case of Mr. Doe the prosecution has presented two indicators of failure to accept responsibility. Stacked against this are eight, at least as persuasive, indicators of acceptance of responsibility. Even the PSI is inconsistent, containing indicators, contrary to the prosecution position, that demonstrate acceptance of responsibility – "the defendant doesn't deny the charges" and "defendant admitted (the 1st and 17th counts of the indictment) it was accurate." The record before this court contains indicators on both sides of the argument, being inconsistent, equivocal or contradictory. The indicators presented clearly leave the proposition of "acceptance of responsibility" open to opposing presumptions.

One might even reasonably conclude that the far stronger presumption is that these indicators, in their totality, weigh in favor of the conclusion that Mr. Doe has genuinely accepted responsibility. However, this Court need not go that far. All that is required is for this Court to conclude, as the evidence warrants, that the prosecutor has failed to prove by clear and convincing evidence that it is "highly probably" that Mr. Doe does not accept responsibility for his actions.

The prosecution, having failed to prove this risk factor by clear and convincing evidence, cannot sustain its recommendation that risk factor 12 be scored 10 points. As a result, this Court should assess 0 points for risk factor 12.

POINT IV

A DOWNWARD DEPARTURE IS WARRANTED IN THE EVENT THAT THE PRESUMTIVE RISK FACTOR SCORE IS DETERMINED TO

EXCEED 70 POINTS

In the event that the Court determines that the total risk factor score exceeds 70 points, Mr. Doe requests a downward departure to a risk level 1 so as to avoid an over-assessment of his dangerousness and risk of sexual recidivism.

Mr. Doe offers substantial mitigating circumstances for the Court's consideration, as set forth in defense counsel's affirmation, that are, as a matter of law, of a kind or to a degree not adequately taken into account by the Guidelines. Each of these factors is set forth in summary fashion for reference purposes in this Memorandum of Law. They are set forth in more detailed fashion in the Affirmation of Attorney Alan Rosenthal and the Affidavit of John Doe. To prevail on a downward departure, at least one mitigating factor must be proven by a preponderance of the evidence. *People v. Gillotti,* 23 N.Y.3d 841 (2014).

1) Mr. Doe's willingness to seek treatment. *Vandover v. Czajaka,* 276 A.D.2d 945 (3d Dept. 2000); *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007)
2) Mr. Doe's response to treatment has been exceptional. Guidelines, p. 7; *People v. Shiley,* 54 Misc. 3d 1220(A) (Monroe Co. Ct. 2016); *People v. Lewis,* 140 A.D.3d 1697 (4th Dept. 2016); *People v. Migliaccio,* 90 A.D.3d 879 (2d Dept. 2011).
3) The victim's participation in the conduct alleged in count 1 of the indictment was consensual, albeit the consent of a fictional teenager. But for "Gracey's" age, her conduct was consensual. Guidelines, p. 9; *People v. Walker,* 146 A.D.3d 824 (2d Dept. 2017).
4) Mr. Doe has not previously been convicted of a sex offense. *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007); *People v. Goosen,* 75 A.D.3d 1171 (4th Dept. 2010).
5) There was no use of forcible compulsion. *People v. Smith,* 30 A.D.3d 1070

(4th Dept. 2006).

6) Mr. Doe has been in a long-term adult relationship, living with an intimate partner for a period of at least two years. *People v. McFarland,* 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010); *People v. Marrero,* 37 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2012).

7) An evaluation by a licensed clinical social worker, Catherine Diana, who is also the sex offender treatment provider, who found that Mr. Doe is a low risk to reoffend and did not present with a sexual attraction to children. This evaluation was the product of extensive in-persons interviews, rather than mere reliance on a risk assessment instrument or a one-off brief interview. *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012); *People v. Yen,* 33 Misc. 3d 1234(A)(Sup. Ct. Kings Co. 2011).

8) Mr. Doe is employed which adds stability to his life and circumstances. As noted, even in the PSI p. 9 "[t]he fact that defendant is employed and is presently engaged in counseling bodes well for him." *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012).

9) Mr. Doe currently lives at his parent' home in Syracuse, New York. They provide him with a stable and supportive family. *People v. Antoine,* 37 Misc. 3d 474 (Sup. Ct. Kings Co. 2012); *People v. Tineo-Morales,* 101 A.D.3d 839 (2d Dept. 2012).

10) The child pornography in this case consisting of a solitary image, is highly indicative that there is no obsessive or compulsive conduct or deviant interest in children. As noted in the Guidelines p. 10, "[t]he existence of multiple victims is indicative of compulsive behavior and is, therefore, a significant factor in assessing the offender's risk of reoffense and dangerousness." The possession of a single pornographic picture has none of the concerning indicators addressed in the Board of Examiners of Sex Offenders Statement of 6/1/12, regarding scoring of child pornography cases.

As the Board notes, the number of pictures is a factor ("the number of images possessed [10,000 is more concerning than <100"]). Mr. Doe is not a collector, has no paid subscription to access child pornography, did not categorize or organize his images, and the photo was not sadomasochistic.

11) Mr. Doe did not create, share or distribute the child's image onto the internet or reproduce it in any manner.

12) After his arrest Mr. Doe was released to live in the community on bail. He remained offense free during that time in the community, including no sexual offending. He has continued to remain offense free since his release from the definite sentence portion of his split sentence. *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005). Recent good behavior can be a factor for downward departure. *People v. George,* 142 A.D.3d 1059 (2d Dept. 2016).

13) Mr. Doe is neither a pedophile nor a hebephile and has no chronic and persistent sexual arousal to pubescent or prepubescent age children. *People v. Jusino,* 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005).

14) The courts have recognized that the Guidelines were written without taking into consideration child pornography. As a result, the scoring of the RAI in child pornography cases often produces a seemingly anomalous result, such that it may overestimate the risk of reoffense and danger to the public by quite a few child pornography offenders. *See People v. Gillotti,* 23 N.Y.3d 841 (2014) and *People v. Johnson,* 11 N.Y.3d 416 (2009). It is for that reason that the Court of Appeals has said that when a SORA court receives an application for a downward departure in child pornography case it should "give particular strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point

score, and without departing downward might lead to an excessive level of registration." *People v. Gillotti,* 23 N.Y.3d at 860. This is such a case.

15) Scoring for the age of the victim and number of victims in child pornography cases overstates the risk of reoffense. The coupling of the two offenses in counts 1 and 17 of the indictment for the purposes of scoring the RAI overstates the risk of reoffense. If either offense were scored individually, the total risk score would be less than 70 points. By combining the scoring of the two offenses overstates the total risk score.

16) Mr. Doe has engaged in substantial volunteer activities demonstrating empathy and good character. *People v. Gillotti,* 23 N.Y.3d 841 (2014).

17) Under the totality of the circumstances, or all relevant circumstances, a downward departure is warranted. *People v. Williams,* 148 A.D.3d 540 (1st Dept. 2017); *People v. Shiley,* 54 Misc. 3d 1220(A) (Monroe Co. Ct. 2016).

Some of the circumstances listed above have been recognized as mitigating factors as a matter of law by court decisions. As to those factors, a case citation of at least one case is given.

Several of the mitigating factors listed above are more fully developed below.

Lived with an Intimate Partner for at Least Two Years

Researchers have found that an individual's risk of sex reoffending is lessened by the fact that they have lived with an intimate partner for a period of more than two years. This is one of the 10 significant factors on the Static-99R risk assessment instrument. In the Static-99R Coding Rules, Revised-2016 we find a basic principle that addresses this factor. "Research suggests that having a prolonged intimate connection to someone may be a protective factor against sexual reoffending. On the whole, we know that the relative risk to sexually reoffend is lower in men who have been able to form and maintain intimate partnerships." Static 99-R uses the basic benchmark of "an intimate adult relationship of two years' duration." (Static-99R Coding Rules p. 49). As set forth in Mr. Doe's

affidavit, he has lived with several intimate adult partners for a period in excess of two years, thus decreasing his risk of reoffending.

Consensual Participation by Victim

The fictional victim, "Gracey," referenced in the first count of the indictment, willingly participated in the conduct that led to setting up their meeting which served as the factual basis for the Attempted Rape in the Second Degree offense. Although the consent was actually that of an adult posing as a teenager, for the purposes of this factor, let us assume that "Gracey" was under the age of fifteen.

The victim's consensual participation in the sexual conduct is a recognized basis for downward departure both in the Guidelines (p. 9) and in case law. That should be true whether it is consent of an actual participant in a sexual act, or a fictional victim. Consent is the operative concern.

Despite the fact that New York's Penal Law § 130.05 (3) deems a person incapable of consent when he or she is less than seventeen years old, it is well recognized that departure may be appropriate when the victim has indeed willingly participated in the sexual act and the victim's lack of consent is due only to the legal inability to consent by virtue of age proscribed by the statute.

The Guidelines support such a departure. "The Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety. (Guidelines p. 9). This mitigating factor is addressed in the Guidelines with regard to risk factor #2, pertaining to contact offenses. Of course, such consent would have equal implications in a non-contact offense such as an attempt.

There is a substantial line of cases that supports a downward departure when an underage victim is a willing participant in the sexual conduct. For more than a decade the Fourth Department has found support for a downward departure based upon a victim's willing participation in the sexual conduct even

though such victim was under the age of legal consent. This was deemed a special circumstance warranting a downward departure as early as *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007) and has been reaffirmed as recently as *People v. George,* 141 A.D.3d 1177 (4th Dept. 2016). Many cases are in accord with "willing participation" as a basis for downward departure. *See, People v. Marsh,* 116 A.D.3d 680 (2d Dept. 2014 and *People v. Goosens,* 75 A.D.3d 1171 (4th Dept. 2010).

This mitigating factor is enhanced, as in the instant case, when viewed in conjunction with other mitigating factors indicative of reduced risk to public safety such as no evidence of forcible compulsion, no prior sex offense conviction, and enrollment in a counseling program for people who have sexually offended. *People v. Weatherley,* 41 A.D.3d 1238 (4th Dept. 2007).

Exceptional Response to Treatment

The SORA Risk Assessment Guidelines and Commentary recognize that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure." (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at p. 17 [2006 ed.]. In *People v. Migliaccio,* 90 A.D.3d 879 (2d Dept. 2011) the court cited to the above provision and reversed the County Court because of its failure to consider this mitigating factor for a downward departure. The court in *People v. Shiley,* 54(A) Misc. 3d 1220(A) (Monroe Co. Ct. 2016) granted a downward departure to risk level 1 based upon the defendant's exceptional response to treatment, citing to the Appellate Division decision in *People v. Lewis,* 140 A.D.3d 1697 (4th Dept. 2016).

In the case of Mr. Doe, his response to treatment has been exception as verified by the report of Catherine Diana, attached as Exhibit D.

In light of any and all of these mitigating circumstances, and under a totality of the circumstances, in the event that the presumptive total risk score exceeds 70, a downward departure is warranted to a risk level 1.

CONCLUSION

Mr. Doe is a low risk to reoffend and a low threat to public safety. Both justice and our regulatory scheme simply cannot function if we treat everyone as a moderate or high risk. Pursuant to Correction Law §168-l (6)(a) "if the risk of repeat offense is low, a level one designation shall be given to such sex offender."

The restraints, reporting, monitoring and public notification to which a level 1 risk offender is subject are certainly more than adequate and appropriate under the circumstances to protect the public with regard to Mr. Doe. In light of the unusual circumstance of this case, the type of public notification required for a level 1 risk offender is well-suited to serve public safety. In addition, his supervision on probation for the next ten years will further protect the public. The more stringent reporting and notification requirements are more appropriate for those who are of higher risk and harm to the public.

Based on the foregoing, Mr. Doe asks this Court to assess him a total risk score of 85 points – 20 points for risk factor #3, and 30 points for risk factor #5, 20 points for risk factor 7, 15 for risk factor #9 and that 0 points be assessed for all other risk factors. Mr. Doe further asks this Court to depart downward to a risk level 1, find that there are no applicable overrides, find that no designation is applicable, and determine that he is a risk level 1.

Dated: November 13, 2018

_____

Alan Rosenthal, Esq.
Attorney for Defendant
White Memorial Building, Suite 204
100 E. Washington Street
Syracuse, New York 13202
(315) 559 – 2240

To: Judge Mark Myword
Onondaga County District Attorney

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

vs.

John Doe,
Defendant.

JUDICIAL SUBPOENA
DUCES TECUM
(Records Only)

Indictment #:_____

Index #: _____

NYSID #: _____

TO: NEW YORK STATE BOARD OF EXAMINERS OF SEX OFFENDERS

GREETINGS:

WE COMMAND YOU, *that all business and excuses being laid aside, you produce and deliver to Alan Rosenthal, attorney for the Defendant, at the Law Office of Alan Rosenthal, White Memorial Building, Suite 204, 100 E. Washington Street, Syracuse, New York on or before April 1, 2018 copies of the following records certified to be complete and accurate:* each and every document relied upon by the Board of Examiners of Sex Offenders to make the recommendation to this Court dated _____ with regard to the SORA risk level of the defendant named in the above caption matter.

The reason that this disclosure is necessary is that the above-named defendant has been scheduled for a SORA hearing by this Court for a risk level determination and is entitled to the due process disclosure of the evidence that the Board of Examiners of Sex Offenders relied upon for its recommendation.

To the extent that the documents to be disclosed are considered patient's records, written authorization executed by the patient is attached.

Your failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed one hundred fifty dollars and all damages sustained by reason of your failure to comply

All papers or other items delivered pursuant to this subpoena shall be accompanied by a copy of this subpoena.

WITNESS, Honorable _____ one of the Judges of the Onondaga County Court, the _____ day of _____, 2018.

ENTER:

_____
Onondaga County Court Judge

COUNTY COURT
COUNTY OF CAYUGA STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff

v.

Index #:
Indictment #:
NYSID #: _____

JOHN DOE
Defendant

PROVISIONAL ORDER PURSUANT TO CORRECTION LAW §168-n

This matter having come on before me at a term of this court at Auburn, New York on September 25, 2018 for a determination hearing pursuant to Correction Law §168-n (3), and this court having received from the Board of Examiners of Sex Offenders a recommendation as to a Level of Notification and documents upon which it was based including a proposed RAI and also received from the District Attorney a recommendation as to a Level of Notification and the Defendant through his counsel having been provided copies thereof , and the hearing was not able to be completed, and was adjourned to November 20, 2018, and in light of the fact that the defendant is scheduled to be released from the custody of the Department of Corrections and Community Supervision (DOCCS) on October 2, 2018 from a determinate sentence of 5 years and 10 years post-release supervision, this court will issue a provisional order so as to permit the defendant to be released on October 2, 2018 without further delay; it is hereby

ORDERED, that this matter will be adjourned to November 20, 2018 for a final determination, and it is further

ORDERED, that no designation is warranted; and it is further

ORDERED, that defendant is provisionally and temporarily determined to be a risk level 3, and shall remain a risk level 3 until such time as the court completes the hearing and makes a final determination of the risk level, and it is further

ORDERED, that DCJS shall be stayed from any community notification, including posting the defendant's risk level to the internet, until such time as a final order of defendant's risk level is determined by this court, and it is further

ORDERED, that the defendant shall be released from custody of DOCCS on reaching his scheduled release date.

Date: September _____, 2018

_____
COUNTY COURT JUDGE

COUNTY COURT WESTCHESTER COUNTY
STATE OF NEW YORK

People of the State of New York,

vs.

SORA HEARING
DEMAND FOR DISCLOSURE

John Doe,

Defendant.

NYSID #
INDICTMENT #
INDEX #

A SORA hearing is scheduled to be held on March 2, 2018 in the above captioned matter. As authorized by Correction Law § 168-n (3), and Due Process, demand is hereby made for disclosure of copies of all documents evidence, including but not limited to papers, documents, grand jury minutes, and other materials, you intend to submit for the court's consideration at the scheduled hearing, all documents and materials you and the Board relied upon to make your SORA RAI proposal and risk level proposals to the court, and all documents relating to the proposed risk level. Disclosure is requested to be made no later than 10 days prior to the hearing at the office of defense counsel set forth below. Failure to provide the requested statement and documents will subject you to preclusion.

In the event that you do not seek a determination that differs from the recommendation submitted by the Board please notify the undersigned so that an appropriate stipulation may be agreed upon for submission to the Court thus obviating the need for a hearing.

Dated: May 15, 2019

_____

Alan Rosenthal, Esq.
Attorney for Defendant
Law Office of Alan Rosenthal
White Memorial Building, Suite 204
Syracuse, New York 13224

COUNTY COURT WESTCHESTER COUNTY
STATE OF NEW YORK

People of the State of New York,

SORA HEARING

vs.

DEMAND FOR STATUTORY STATEMENT PURSUANT TO CORRECTION LAW §168-n (3)

John Doe,

NYSID #
INDICTMENT #
INDEX #

Defendant.

The Board of Examiners of Sex Offenders (Board) made a recommendation dated May 5, 2017 pertaining to a SORA determination to be made at a hearing now scheduled for March 13, 2018 that Mr. Doe receive a total risk score of 65 points and that he be determined to be a low risk (level 1), and that no override is applicable and that no departure from a level 1 is warranted.

As required by Correction Law § 168-n (3), in the event that you seek a determination that differs from the recommendation submitted by the Board, please provide to the Court and to the undersigned attorney a statement setting forth the determination that you seek together with the reasons for seeking such determination by March 2, 2018. As you are aware the statute requires that you provide this notice at least ten days prior to the determination proceeding. Failure to provide the requested notice of the statement and reasons will subject you to preclusion.

In the event that you do not seek a determination that differs from the recommendation submitted

by the Board please notify the undersigned so that an appropriate stipulation may be agreed upon for submission to the Court thus obviating the need for a hearing.

Dated: May 15, 2019

_____

Alan Rosenthal, Esq.
Attorney for Defendant
Law Office of Alan Rosenthal
White Memorial Building, Suite 204
Syracuse, New York 13224
(315) 559 - 2240

LAW OFFICE OF
ALAN ROSENTHAL
White Memorial Building, Suite 204
100 East Washington Street
Syracuse, New York 13202

March 16, 2018

NYS Board of Examiners of Sex Offenders
80 South Swan Street, Room 202
Albany, New York 12210-8001

Re: John Doe
NYSID#: 12345678M

Dear Board:

I am sending you this submission on behalf of my client, John Doe, who received your notification dated February 28, 2018, on March 2, 2018, indicating that the Board will prepare a risk level and designation recommendation for the court,

On behalf of Mr. Doe I take the following position:

1) Mr. Doe is not subject to any of the three designations defined in Correction Law §168-a (7)(a), (b) or (c).
2) None of the four overrides set forth in the Risk Assessment Guidelines and Commentary are applicable.
3) Mr. Doe's total risk factor score on the SORA RAI is less than 70. Under the Board's Position Statement of 6/1//12 for scoring child pornography the only risk factor to be scored is risk factor #5, resulting in a total risk factor score of 20. All other risk factors should be scored 0 in the case of Mr. Doe.
4) Mr. Doe scores as a presumptive level 1.
5) There is no basis for an upward departure as there does not exist an aggravating factor of a kind, or a degree, that is otherwise not adequately taken into account by the guidelines.
6) The factors set forth in Board's Position Statement of 6/1/12, when considered, do not warrant an upward departure in this case.
7) We respectfully urge the Board to recommend to the Court a risk level determination of level 1.

For the Board's review and consideration, the following documents are included with this submission:

1) Reports of Norman J. Lesswing, Ph.D., Clinical Psychologist, dated 10/16/17 and 5/21/13/
2) Report of Kostas Katsavdakis, Ph.D., ABPP, Clinical Psychologist, dated 2/28/18.
3) BOP Positive Decision Reports (2).
4) California Coast University (3).
5) Sentencing minutes from sentencing in Federal Court on 2/28/14.
6) Employment letter.

There are several factors and circumstances that I would like to highlight for the Board to consider when undertaking the case review for Mr. Doe.

I. Sentencing Transcript – U.S. District Court Judge David N. Hurd's statements:

a. "…acceptance of responsibility…" "Three levels off for acceptance." (p. 5).
b. "However, he does have many mitigating factors, none of which come close to excusing his conduct. But all do set him apart from most other defendants who receive child pornography." (p.29).
c. "First of all his age. At the time, he was conducting his activity, he was ages twenty-one to twenty-three, only a few years older than his victims." (p. 30).
d. "The ages of his victims were fourteen to seventeen. There is no evidence of prepubescent children under the age of ten years of age as there is in most all child pornography cases before me." (p. 30).
e. "There is no evidence of any actual sexual physical contact with any female under eighteen years of age." (p. 30).
f. "The age of the victim was not his particular interest." (p. 30).
g. Over the 1 ½ years under pretrial release "he has taken some very positive steps after making some terrible misjudgments in the years previous to that." (p. 31).
h. "He has sought and received extensive treatment for these problems and, as noted, seems to have shown remarkable improvement." (p. 31).
i. "He has been employed on a regular basis for the last year and a half at two jobs." (p. 31).
j. "Except for one small misstep, he has complied with all conditions of his supervised release." (p. 31).
k. "Finally, he has received unbelievable family support" while at the same time there was a recognition from his family that "[h]committed serious crimes."
l. "I will depart and impose a non-guideline sentence in this case." (p. 32).

II. Report from Kostas Katsavdakis Ph.D., ABBP, Clinical Psychologist

a. "…Mr. Doe currently presents a low risk for a contact and non-contact sexual offense within the community." (p. 12).
b. Mitigating factors:
   i. Absence of arrests for contact sexual offenses
   ii. No prior criminal history, whether violent or non-violent in nature
   iii. Absence of substance abuse/alcohol use
   iv. No antisocial character pathology
   v. No juvenile delinquent behavior
   vi. Acceptance of responsibility
   vii. No major violations of supervisory requirements, including infractions while incarcerated
   viii. Current social support network (p. 12).
c. "There was no evidence that he created his music YouTube site for identifying, seducing and/or behaviorally manipulating younger age females to engage in sexual interactions nor is there any evidence to indicate that his internet presence was established, promoted or designed for the primary purpose of victimization." (p. 21).

d. "The examinee maintained relationships with adult females during college and did not present with any emotional identification with children, pubescent or prepubescent in age." (p. 12).
e. Dr. Katsavdakis addressed many of the factors in the Board's Position Statement regarding child pornography. "Mr. Doe did not spend years collecting child pornography nor did he use paid subscriptions or utilize proxy servers or p2p networks such as Torrent. He did not categorize nor keep large volumes of pornography, some of which included adult females, not simply children. In terms of volume, law enforcement located 10 videos of child pornography and 63 images of child pornography. There were no allegations of having contact sexual offenses nor did the United States Attorney file charges for contact offenses. The offenses occurred with a relatively short period of time, primarily following his graduation from Berklee in approximately 2010 and 2011, with no indication, via the records or collateral interview, of similar behavior during his late high school or early college years.' (p. 12).
f. "Mr. Doe's mental health symptoms do not predispose him to engage in sexually deviant behavior nor serve as a catalyst to collect child pornography images or to interact with pubescent age girls." (p. 13).
g. "In all, Mr. Doe does not present with chronic and persistent sexual arousal to pubescent as well as prepubescent age children, such that it impairs his behavioral controls regarding his sexual conduct. Moreover, despite his history of mental health symptoms as well as potential autistic spectrum symptoms, they do not predispose him to engage in a sexual offense nor feed any specific type of sexual fantasy centered on prepubescent or pubescent age children." (p. 13).

III. Report from Norman Lesswing, Ph.D., Clinical Psychologist, dated 5/21/13

a. "It is my unequivocal opinion that John Doe is not a pedophile." (p. 3).
b. "He definitely does not have Antisocial Personality Disorder, rather his personality reflects a totally opposing pattern." (p. 3).
c. "In conclusion, John Doe is not a pedophile and has exceedingly low likelihood of perpetrating contact offenses." (p. 5).
d. "I do not believe that he presents a risk of recidivism." (p. 5).

IV. Report from Norman Lesswing, Ph.D., Clinical Psychologist, dated 10/16/17

a. "Therefore, 'cybersex' with underage adolescent females was not specific to that age group, and did not indicate hebephilia." (p. 2).
b. "…definitely not a pedophile." (p. 2).
c. "…John Doe did not act with predatory intent and motivation toward young females." (p. 2).
d. "He did not establish social media relationships with the adolescent females, who contacted him about his music, for the primary purpose of victimizing them. Rather, the crime for which he was convicted represented the end result of well-established typically long-term internet communication through which social relationships of a friendship quality had been formed." (p. 2).

V. Other Mitigating

a. Unlike the usual child pornography case, all of the "victims" in this case acted consensually when they sent their own images.
b. Mr. Doe has removed himself from involvement in the music industry and has made the purposeful decision to make a career change into electronics.
c. Almost immediately upon release Mr. Doe engaged in employment. (See employment letter from Electro Corporation).
d. Mr. Doe has a history of having adult relationships.
e. There is a statistically low likelihood that a child pornography offender will commit hands-on sex offenses in the future.
f. While incarcerated, Mr. Doe participated in a number of volunteer activities to help others, thus demonstrating care and empathy. Although his work assignment was to assist the prison Chaplain, John worked above and beyond his work assignment to help set up the chapel area for special events, including the setup of chairs, tables, sound and electrical systems. John also volunteered his time to help tutor those inmates who were working towards their GED. In particular, he tutored GED candidates in math and English. Finally, he volunteered in the music room, where he freely provided music lessons on musical instruments, taught inmates how to read music, and taught others how to set up and use the electronic equipment.
g. Mr. Doe has a very supportive family and will have a positive and supportive living environment.
h. Mr. Doe will be supervised in the community by the U.S. Probation Department on specialized supervision.
i. Mr. Doe's contact while under pretrial release and while incarcerated was satisfactory.
j. Mr. Doe has accepted responsibility.
k. Mr. Doe will participate in a sex offender treatment program and has already undergone evaluation by NuStep.

In light of the foregoing, it is urged that the Board recommend to the Onondaga County Court that Mr. Doe be determined to be a risk level 1.

Thank you for your careful consideration of this submission.

Very truly yours,

Alan Rosenthal

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

NOTICE OF ENTRY

vs.

Indictment #:_____

Index #: _____

_____,
Defendant.

NYSID:

PLEASE TAKE NOTICE that the within is a true copy of the Decision/Order in this proceeding duly entered in the Office of the Onondaga County Clerk on the 18th day of September, 2018.

Dated: October 19, 2018

_____

Alan Rosenthal
Attorney for Defendant
100 E. Washington Street, Suite 204
Syracuse, New York 13202
(315) 481-2884

To: District Attorney, Onondaga County

COUNTY COURT ONONDAGA COUNTY
STATE OF NEW YORK

People of the State of New York,

vs.

John Doe,
Defendant.

Notice of Appeal

Indictment #:_____

Index #: _____

NYSID #: _____

PLEASE TAKE NOTICE that the defendant hereby appeals to the Appellate Division, Fourth Department, from an order of the Onondaga County Court, (County Court Judge _____), dated June 29, 2018, entered in the above SORA proceeding in the office of the Clerk of Onondaga County on _____, __. 20__, and defendant appeals from each and every part of the aforesaid order, each and every intermediate order made as part of the proceeding, including but not limited to assessment of points on particular risk factors, denial of downward departure, granting of upward departure, granting of an override, determination of designation, determination of risk level, determination of registrability, and from the whole thereof, to the extent that he is aggrieved thereby.

Dated: Syracuse, New York
June __, 2018

_____

Alan Rosenthal
Attorney for Defendant
Law Office of Alan Rosenthal
White Memorial Building, Suite 204
100 E. Washington Street,
Syracuse, New York 13202
(315) 481-2884

To: The Clerk of Onondaga County (2 copies)

District Attorney, Onondaga County

Robert A. Defender
Attorney at Law
499 S. Warren Street – 4th Floor
Syracuse, New York 13202

June 17, 2021

Hon. Thomas J. Miller
Onondaga County Court
Courthouse – 3rd Floor
State Street

Criminal
505 South
Syracuse, New York 13202

Re: John Doe

Dear Judge Miller:

I write this letter to respectfully request a chambers conference with Your Honor and the Assistant District Attorney assigned to this case. I submit that the Court of Appeals ruling in *People v. Cook,* 29 NY3d 114 (2017*)* requires dismissal of the instant SORA proceeding. I would like to discuss this issue with the Court and the assigned ADA with the hope of eliminating the need for further prosecution, defense and judicial resources to be expended in this matter and prior to having to file a formal written motion to dismiss this proceeding. As explained below at page three, the two prosecutions for sex crimes in state and federal court were interconnected, coordinated and contemporaneous. Indeed, even the sentencings were a mere three days apart. Since both were what is considered current offenses for SORA purposes, only one SORA proceeding should be held for this defendant. Since this is the second such proceeding it should be dismissed and the risk level previously determined by the Cayuga County Court should control.

The defendant was convicted in United States District Court for the Northern District of New York of violations of *18 U.S.C. 2252A(a)(1)* [Transportation of Child Pornography] and *18 U.S.C. 2252(a)(5)(B)* [Possession of Child Pornography]. On March 5, 2010, he was sentenced to 180 months incarceration on the Transportation of Child Pornography offense and to 120 months incarceration on the Possession of Child Pornography offense to run concurrently with each other. Mr. Doe was also ordered to be on supervised release for life on each offense.

The defendant was convicted in Cayuga County Court of a violation of *Penal Law 130.50* [Criminal Sexual Act in the First Degree]. On March 8, 2010, he was sentenced to a 10-year determinate term of imprisonment with 10 years of post-release supervision. The defendant's sentence on the Cayuga County offense was ordered to run concurrently with his federal sentence. He was remanded into the custody of the New York State Department of Corrections and Community Supervision to serve his state sentence. On or about June 27, 2018, the New York State Board of Examiners submitted to Cayuga County Court a case summary and risk assessment instrument and sought to have that Court determine Mr. Doe's risk level. The Cayuga County Court designated the defendant a sexually violent offender and determined him to be a risk level one (low risk to reoffend). On or about September 27, 2018, the defendant was released from DOCCS custody and transferred to the Federal Bureau of Prisons to complete his federal sentence.

On April 15, 2021, the New York State Board of Examiners of Sex Offenders was notified that Mr. Doe was released from the Federal Bureau of Prisons and is currently living at a residential reentry facility in Onondaga County. The Board of Examiners has submitted to Onondaga County Court a case summary and risk assessment instrument and seeks to have this Court determine Mr. Doe's risk level. This Court has scheduled a SORA hearing for Thursday, July 22, 2021, at 11:15am.

Pursuant to *Correction Law 168-a(2)(d)*, a conviction for *18 U.S.C. 2252A* or *18 U.S.C. 2252* is defined as a "sex offense" and would normally subject a person to the requirements of the New York Sex Offender Registration Act (SORA). However, under the circumstances presented here, I believe that the instant proceeding should be dismissed in accordance with *People v. Cook* and *People v. Miller,* 179 A.D.3d 1517 (4th Dept. 2020).

In *Cook*, the defendant committed sex offenses in both Queens and Richmond Counties. Charges were brought in both jurisdictions and prosecution was coordinated between the two District Attorney's Offices. In Queens County, the defendant pleaded guilty to Rape 2nd, Attempted Sodomy 1st and two counts of Sexual Abuse 1st. In Richmond County, the defendant pleaded guilty to Sodomy 1st. The courts imposed all of the sentences to run concurrently, for an aggregate sentence of 15 years in prison, followed by 4 years of post-release supervision.

In August 2012, in anticipation of the defendant's scheduled November 2012 release, the Board of Examiners prepared a case summary and Risk Assessment Instrument that evaluated the defendant's risk of reoffending and the harm that would be inflicted if he did reoffend. The Board's risk assessment recommendation was based upon a review of the defendant's file, including presentence and probation reports from both the Queens and Richmond County offenses, and referenced the conduct committed in both jurisdictions.

In September 2012, the Richmond County sentencing court conducted a risk assessment hearing. Following the hearing, the Richmond County SORA court adjudicated the defendant a level three, sexually violent offender. In November 2012, the Queens County sentencing court notified counsel and the defendant that it would conduct an additional risk assessment hearing. The defendant moved to dismiss the proceeding, arguing that it was duplicative of the Richmond County risk level determination. In response, the People contended that SORA requires each sentencing court to render an independent adjudication. The Queens County sentencing court denied the defendant's motion to dismiss the Queens County SORA proceeding. The Queens County sentencing court conducted a SORA hearing and adjudicated the defendant a level three, sexually violent offender.

The Appellate Division, Second Department reversed the Queens County SORA court's order denying the defendant's motion to dismiss the SORA risk assessment hearing (*128 AD3d 928).* The Court ruled that the only reasonable interpretation of the Sex Offender Registration Act and the SORA Risk Assessment Guidelines, and the one that most effectuates SORA's purpose, is that only one SORA disposition may be made per "Current Offense" or group of "Current Offenses." The Court emphasized that the SORA Risk Assessment Guidelines and Commentary to the Sex Offender Registration Act to which the SORA court must adhere to in rendering its determination defined "Current Offenses" as follows:

"The Current Offense(s) section should be completed on the basis of all of the crimes that were part of the instant disposition … if the offender pleaded guilty to two indictments in two different counties, both indictments should be considered in scoring the section."

The Court of Appeals granted leave and, on the appeal, ruled that once the Division of Criminal Justice Services was notified of the Richmond County SORA court's determination, it had the

information it needed to create a file for the defendant and add him to the registry, thus serving SORA's goal of protecting the public from this particular sex offender. Any further proceedings became duplicative, and the appropriate remedy was to dismiss the second SORA proceeding. The Court reasoned that to permit multiple risk level determinations would result in redundant proceedings and constitute a waste of judicial resources. The Court went on to give fair warning to prosecutors that in the future they should coordinate their SORA efforts, instructing that:

> *In light of our holding, it is imperative that prosecuting offices coordinate their submissions to the sentencing court that is adjudicating an offender's risk level in order to ensure that all relevant information – from all relevant jurisdictions – is before that court (See Correction Law 168-n[3]).*

People v. Cook, 29 N.Y.3d at 120.

In this case, the investigation and prosecution of the state offenses and the federal offenses were inextricably interwoven, contemporaneous, and coordinated, and constitute a group of current offenses as defined in the SORA Risk Assessment Guidelines. The defendant was interviewed at the Cayuga County Sheriff's Office on January 9, 2009, relative to both the state offenses and the federal offenses. At that time, he admitted to sexually abusing minor children in Cayuga County in violation of state criminal law. Additionally, he admitted to possessing and trading child pornography in violation of federal criminal law. With his consent, the defendant's computer was brought to the Cayuga County Sheriff's Office, where he accessed his collection of child pornography and burned copies of files to disks for investigators. This evidence obtained by state law enforcement personnel was used as evidence against the defendant in his federal child pornography prosecution.

The defendant was arrested for the Cayuga County offenses on January 9, 2009, and was remanded into the custody of the Cayuga County Sheriff. The criminal action was commenced in United States District Court for the Northern District of New York on January 14, 2009, and the criminal complaint filed in federal court contained an affidavit from a Cayuga County Sheriff's Detective. The defendant was produced in Federal Court on January 15, 2009, for arraignment. The defendant pleaded guilty to his federal offenses and was sentenced on March 5, 2010. The defendant pleaded guilty to his Cayuga County offenses and was sentenced 3 days later on March 8, 2010. Pursuant to the negotiated plea agreement, the Cayuga County sentence was ordered to run concurrent with the defendant's federal sentence.

The defendant's commission of federal offenses was comprehensively referenced in the Case Summary submitted by the Board of Examiners to the Cayuga County Court. The Board of Examiners assessed the defendant as a Level 2 (moderate) risk to reoffend in the materials submitted to the Cayuga County Court. However, the Board of Examiners recommended an upward departure to a Level 3 (high) risk to reoffend because the risk assessment instrument did not capture the defendant's "accompanying" federal case that included additional victims, specifically the child pornography he traded and the undercover officer posing as a 13 year old boy to whom he distributed child pornography. The Board of Examiners concluded that these additional aggravating factors, particularly the crossover between child pornography trading and having sexual contact victims, were very concerning and increased his risk to public safety.

The defendant's commission of the state offenses was referenced frequently in his federal probation report. The defendant was assessed five (5) points in his federal offense level computation for commission of the state crime which he pleaded guilty and the offenses which were satisfied by his state court guilty plea. The defendant's commission of the state offenses was also frequently referenced in

the case summary recently provided to this Court by the Board of Examiners. In fact, the Board has recommended an upward departure on his federal child pornography convictions from a risk level 1 to a risk level 3 because of his commission of the sex offenses in Cayuga County.

As noted in *Cook,* the only reasonable interpretation of the Sex Offender Registration Act and the SORA Risk Assessment Guidelines and Commentary to the Sex Offender Registration Act, and the one that most effectuates SORA's purpose, is that only one SORA disposition be made per current offense or group of current offenses. The Guidelines provide that the current offense section should be completed on the basis of all the crimes that were part of the instant disposition … if the offender pleaded guilty to two indictments in two different jurisdictions, both indictments should be considered in scoring the section. The Court of Appeals has held that one – and only one – court should render a risk level determination based on all conduct where there is a group of current offenses.

Here, one court (Cayuga County Court) in this group of coordinated and concurrently prosecuted offenses has already rendered a risk level determination for the defendant based on all conduct. The defendant has already been designated a sexually violent offender and will be required to register for life. He has also been determined to be a risk level 1.

Once the Division of Criminal Justice Services was notified of the Cayuga County SORA court's determination, it had the information it needed to serve the Sex Offender Registration Act's goal of protecting the public from this particular sex offender. Any further proceedings in this matter are duplicative, unnecessary, constitute a waste of judicial resources and contravene the mandates of both the SORA Risk Assessment Guidelines and *People v. Cook.*

I look forward to hearing from you with regards to my request for the scheduling of a Chambers conference at your earliest convenience. I hope this will obviate the need for a formal motion. Thank you for your consideration.

Sincerely,

Robert A. Defender, Esq.

cc: ADA

MEMORANDUM OF LAW

CREDIT FOR TIME ON ANOTHER STATE'S REGISTRY

POINT I

THE COURT DETERMINING DEFENDANT'S SORA RISK LEVEL SHOULD AND CAN ORDER CREDIT FOR THE PERIOD OF TIME SERVED ON THE REGISTRY OF ANOTHER STATE

When a person who has been convicted of a sex offense in another state that requires registration in New York, they are required to notify DCJS of their new address within ten days of establishing residence in New York. This triggers a SORA hearing in New York pursuant to Correction Law § 168-k. A hearing is held in County Court or Supreme Court to determine the defendant's risk level.

It is not uncommon that the person who moves to New York and is required to register has already been on the registry of a sister state, sometimes for many years. There are two issues addressed in this memorandum of law. Under these circumstances, should the SORA risk level court give credit for the time spent on the registry in a sister state for the same offense, and does the SORA risk level court have authority or jurisdiction to do so?

As to the former question, the controlling statute is Correction Law § 168-h. That statute provides that the duration of registration shall be measured as follows:

…from the initial date of registration.

There is authority for the court to award credit for time already spent registering in the sister state.

New York's SORA, as well as the registration laws of all states, were enacted in response to federal legislation that required all states to establish a registry for people convicted of sex offenses. One such federal law was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. On January 5, 1999, the Office of the Attorney General, through the U.S. Department of Justice, published in the Federal Register, issued Guidelines for the implementation of the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act as amended by

Megan's Law, the Pam Lychner Sexual Offender tracking and Identification Act of 1996, and section 115 of the General Provisions of Title I of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998. Those Guidelines addressed the durational requirements of registration and the issue of a registrant moving from one state to another as follows:

> *If a portion of the applicable registration period has run while the registrant was residing in another state, a new state of residence* ***may give the registrant credit for that period.*** *For example, if a person required to register for 10 years under the Act's standards has lived for six years following release in the state of conviction, another state to which the registrant moves at that point does not have to require registration for more than the four remaining years.* (Emphasis added).

Megan's Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 Fed. Reg. 2 at 578 (January 5, 1999).

As can be seen from the Guidelines of the Attorney General, credit for time spent on another state's registry may be given.

Such crediting for time on the registry of another state has become common judicial practice throughout New York. See an array of such orders from around the state annexed as Exhibit A.

The genesis of this judicial practice was born out of necessity. It is a function of the impractical position taken by DCJS. On May 3, 2017, I inquired of DCJS what is the agency policy regarding crediting time spent on another state's registry for a person who moves to New York. I spoke with DCJS counsel Wendy Maher who has purview over sex offense management. Counsel Maher advised me that DCJS interprets the durational requirement of Correction Law §168-h to require that the measurement of time on the registry starts upon newly registering in New York. DCJS does not automatically give credit for time spent on the registry of a sister state. She conceded that there were two different interpretations of the phrase "from the initial date of registration." Finally, Counsel Maher

explained that if a SORA risk level court gave credit for time spent on the registry in another state, DCJS would honor that order and give time credit.

Because it has become common judicial practice to give this time credit, at least when defense counsel is astute enough to ask for it, there have only been a few courts that have had to address this issue in written decisions.

The Supreme Court in Rensselaer County addressed this issue, holding that the registrant was entitled to credit towards the twenty years he must register in New York, for the time that he was on the registry in Florida. The court held that Mr. Hubert's "initial date of registration" started while in Florida. *Matter of James Hubert v. Michael C. Green, as the Executive Deputy Commissioner of the NYS DCJS,* Index No. 258275 (Sup. Ct. Rensselaer Co. Sept 7, 2018). A copy of the court's decision is attached as Exhibit B.

The reasoning of the Court in *Matter of Hubert is* as follows:

> *The Court has reviewed the statute and finds that "initial date of registration" is not defined (Article 6-C Sex Offender Registration Act §§ 168-168 w). That being said, the language at issue is unambiguous. The word "initial" is commonly understood to mean and is defined as "placed at the beginning: first" (see Merriam-Webster Online Dictionary, [https://www.meriam-webster.com/dictionary/initial]). Thus, "initial date of registration" must mean the first time a convicted sex offender registers as a sex offender with the required state and local authorities. The Court rejects respondent's interpretation that in this case "initial date of registration" means the first time petitioner registered as a sex offender with the required New York authorities.*

There is nothing in SORA that restricts the "initial date of registration" to registration in New York, nor is there any indication that the Legislature intended such a limitation. In light of the Attorney General Guidelines cited above, the interpretation of Supreme Court in *Matter of Hubert* is persuasive.

In another decision directly on point, the SORA risk level court in Ulster County, ordered that the time that Mr. Koeppen had been on the registry in the state of California, a period of over twenty

years, be credited against the time he was required to be on the registry in the State of New York. *People v. Koeppen,* C18-301 (Ulster Co. Ct. June 16. 2020). A copy of the court decision is attached as Exhibit C. DCJS did not question the authority of the Ulster County Court, that is, the SORA risk level court, to award the credit, and proceeded to credit the time and terminated Mr. Koeppen's registration requirement, having completed his twenty years of required registration in New York when the time from California was applied. The court in Koeppen cited as authority for its actions *Hubert v. Green* and *People v. McGarghan,* 83 A.D.3d 422 (1st Dept. 2011).

The Appellate Division, First Department has noted with approval the practice of the SORA court granting the defendant full credit for the time spent on the registry in a sister state. *People v. McGarghan,* 83 A.D.3d 422,423 (1st Dept. 2011). In *McGarghan,* the Appellate Division acknowledged that "the court gave defendant full credit toward the 20-year period for all the time that he had been registered in Vermont…" There was no question raised by the court or respondent challenging the SORA court's authority to issue such time credit or that such an issue must be raised by an article 78. This point is emphatic, particularly when one considers that respondent and the court had to consider another issue in the case that they determined did require an article 78 proceeding. A copy of *People v. McGarghan* is attached as Exhibit D.

Based upon a fair legal interpretation, a person who moves to New York from another state should be credited with time on the sister states's registry. That leaves open the question of whether the New York SORA risk level court can issue such on order? Or, as at least one court has suggested, the remedy is limited to an article 78.

The remedy to credit time served on another state's registry should be addressed by the SORA risk level court. There are several reasons that there is a sound basis for the SORA court to address this issue.

First, certainly *People v. McGarghan* stands for the proposition that the SORA court can address this issue and the remedy is not limited to an article 78.

A second reason is the very simple and straightforward reason of practicality and efficiency of cost. For each case that comes before a SORA court regarding a person who has moved from another state the issue is not addressed, there is the resultant cost of additional litigation by way of an article 78. That means that for each such case there is an additional approximate cost of somewhere in the neighborhood of $2,500.00 to $7,500.00. The cost becomes all the more burdensome when one considers that the venue for such an article 78 is likely Albany County, where DCJS sits.

Third, forcing a person to pursue an article 78 to receive credit for time served on another state's registry may leave many indigent defendants without a remedy. It is not altogether clear that such an individual would even have the right to the assignment of counsel for an article 78, it being a civil proceeding. In such case, only the wealthy would have access to the remedy of time credit through an article 78.

Fourth, an article 78 is not ripe to be pursued, because at this juncture the administrative agency, DCJS, has not yet denied the time credit. In fact, the Legislature has failed to even indicate in the statute how a registrant is to obtain a determination of his or her time credit. Without a determination by the SORA court on the issue of time credit, the registrant may be left with no remedy. Since the agency, DCJS, has not made a determination, there is no basis for an article 78. Only the SORA court can provide the remedy.

Fifth, there is an efficiency in judicial time as well as time for counsel for the registrant. It makes little sense in terms of efficiency for the judge on the SORA case, who has become familiar with the facts, to take a pass, requiring another judge to spend time familiarizing himself with the case all over again. The same is true for the efficiency of time for defense counsel, prosecutor, and the Assistant Attorney General who would have to appear on the unnecessary article 78.

Sixth, the Court of Appeals in *People v. Liden,* 19 N.Y.3d 271, 273 (2012) held that "the unusual features of New York's sex offender registration system" justify an exception to the usual requirement of proceeding by way of an article 78. The court in *Liden* wisely relied upon concerns for "orderliness and efficiency" and "good policy." *Id.* at 276, 277. "[P]lainly, the most efficient course is for the risk level court to resolved the dispute; to have two separate courts examine essentially the same facts – one to decide registrability in an article 78 proceeding, and the other to decide risk level – serves no purpose." *Id.* at 276. To have the SORA court decide both issues is not just a more efficient way to proceed; it is good policy.

CONCLUSION

For all of the reasons explained above, the SORA court would be legally correct in ordering credit for time served on the registry of another state for the same offense, and has the jurisdiction to do so, without relegating the registrant to an article 78.

Appendix

Sex Offender Registration Act: Risk Assessment Guidelines and Commentary 2006

SORA Risk Assessment Instrument and Sex Offender Designation Form

Scoring of Child Pornography Cases Position Statement 6/1/12

Sex Offender Registration Act – Correction Law Article 6-C

Sex Offender Registration Form

Affidavit of Kostas Katsavdakis, Ph.D., P.C.

Responding to Sexual Offenses: Research, Reason and Public Safety

Myth v. Reality: Towards a More Informed Understanding of Issues Facing People Convicted of Sex Offenses and the Communities to Which They Return

SEX OFFENDER REGISTRATION ACT

Risk Assessment Guidelines
and Commentary

2006

SEX OFFENDER GUIDELINES

I. CURRENT OFFENSE(S)

Factor 1: Use of Violence (Choose only one)

1: The offender used forcible compulsion (10 pts)

2: The offender inflicted physical injury (15 pts)

3: The offender was armed with a dangerous instrument (30 pts)

Factor 2: Sexual Contact with Victim

1: The Offender/Victim contact was over clothing (5 pts)

2: The Offender/Victim contact was under clothing (10 pts)

3: The offender engaged in sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual abuse with the victim (25 pts)

Factor 3: Number of Victims

1: There were two victims (20 pts)

2: There were three or more victims (30 pts)

Factor 4: Duration of Offense Conduct with Victim

The offender engaged in a continuing course of sexual misconduct with at least one victim (20 pts)

Factor 5: Age of Victim

1: The victim was 11 through 16 years of age (20 pts)

2: The victim was 10 years old or less, or 63 years of age or more (30 pts)

Factor 6: Other Victim Characteristics

The victim suffered from a mental disability, mental incapacity, or physical helplessness (20 pts)

Factor 7: Relationship Between Offender and Victim

The offender's crime (i) was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization or (ii) arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of that relationship (20 pts)

II. CRIMINAL HISTORY

Factor 8: Age at First Sex Crime

The offender committed a sex offense, that subsequently resulted in an adjudication or conviction for a sex crime, at age 20 or less (10 pts)

Factor 9: Number and Nature of Prior Crimes

1: The offender has a prior criminal history but no convictions or adjudications for a sex crime or felony (5 pts)

2: The offender has a prior criminal history that includes a felony conviction or adjudication but not for a violent felony or sex crime (15 pts)

3: The offender has a prior criminal history that includes a conviction or adjudication for the class A felonies of Murder, Kidnaping or Arson, a violent felony, a misdemeanor sex crime, or endangering the welfare of a child, or any adjudication for a sex offense (30 pts). Please note that when an offender has a prior felony sex crime conviction, it is an automatic override to a level 3 risk. In the past, when a case was an override, the instrument was not scored. However, pursuant to People v. Sanchez (20 A.D.3r 693 [2005]), a companion score is now provided. Because there is no mechanism in the instrument to score adequately a prior felony sex offense conviction and it is considered to be an automatic level 3 risk, a prior felony sex offense conviction is scored conservatively at only 30 points. However, in all cases where there is a prior felony sex offense conviction, the companion score is overriden by the Board and the Board recommendation is an automatic override to risk level 3, unless there is some cause for departure from that level.

Factor 10: Recency of Prior Felony or Sex Crime

The offender has a prior conviction or adjudication for a felony or sex crime that occurred less than three years before the instant offense (10 pts)

Factor 11: Drug or Alcohol Abuse

The offender has a history of drug or alcohol abuse (15 pts)

III. POST-OFFENSE BEHAVIOR

Factor 12: Acceptance of Responsibility

1: The offender has not accepted responsibility for his sexual misconduct (10 pts)

2: The offender has refused or been expelled from treatment subsequent to sentencing (15 pts)

Factor 13: Conduct While Confined or Under Supervision

1: The offender's adjustment to confinement or supervision has been unsatisfactory (10 pts)

2: The offender's adjustment to confinement or supervision has been unsatisfactory and has included inappropriate sexual conduct (20 pts)

IV. RELEASE ENVIRONMENT

Factor 14: Supervision

1: The offender will be released under the supervision of a probation, parole or mental health professional who specializes in the management of sexual offenders or oversees a sex offender caseload (0 pts)

2: The offender will be released under the supervision of a probation, parole or mental health professional, but not one who specializes in the management of sexual offenders or oversees a sex offender caseload (5 pts)

3: The offender will be released with no official supervision (15 pts)

Factor 15: Living or Employment Situation

The offender's living or employment situation is inappropriate (10 pts)

V. OVERRIDES

1: **Prior sex felony conviction**

The offender has a prior felony conviction for a sex crime

2: **Serious Physical Injury or Death**

The offender inflicted serious physical injury or caused death to the victim

SEX OFFENDER GUIDELINES: COMMENTARY

The Sex Offender Registration Act ("Act"), set forth in Correction Law Article 6-C, requires the Board of Examiners of Sex Offenders ("Board") to "develop guidelines and procedures to assess the risk of a repeat offense by [a] sex offender and the threat posed to public safety." Correction Law §168-l(5). There are three levels of risk depending upon the offender's danger to the community: level 1 (low risk), level 2 (moderate risk), and level 3 (high risk). The offender's risk level determines the amount of information that can be disseminated about him to the public under the Act's notification procedures.[1] In addition, an offender receives a designation as a Sexually Violent Offender, Predicate Sex Offender, Sexual Predator or no such designation. A designation, in combination with the risk level, determines the length of an offender's registration.

This commentary discusses the general principles that underlie the guidelines and explains the specific factors included in them. As set forth in the appendix, the guidelines were developed with the assistance of a group of experts with diverse experience in dealing with sex offenders. With their aid, the Board sought to establish guidelines that would bring academic knowledge and practical acumen to the difficult task of predicting whether a person convicted of a sex crime is likely to reoffend. No one should attempt to assess a sex offender's level of risk without first carefully studying this commentary.

The 2006 revisions do not change the scoring of the instrument but, rather, simply include updated statutory language and clarification. Further information regarding the Act can be found at www.criminaljustice.state.ny.us.

---

[1] The guidelines and commentary use the masculine pronoun (he or him) to refer to a sex offender. Most sex offenders are males, and the masculine is therefore used for convenience, as it is in the Act.

A. General Principles

In developing the guidelines, the Board adhered to the following general principles:

1. As the Act makes clear, the threat posed by a sex offender depends upon two factors: (i) the offender's likelihood of reoffense and (ii) the harm that would be inflicted if he did reoffend. Some offenders repeatedly reoffend, but the harm they inflict, while not insubstantial, is less grave. Others may pose a lesser likelihood of recidivism, especially if properly supervised, but the harm would be great were they to reoffend. The sex offender whose modus operandi is to rub himself against women in a crowded subway car generally falls into the former category[2]; the child molester into the latter. The guidelines seek to capture both these elements -- the probability of reoffense and the harm therefrom -- in determining an offender's risk level. It is important to note that the risk level seeks to capture not only an offender's risk of reoffense but also the harm posed by a particular offender should he reoffend.

2. What is somewhat less clear is whether offenders who are convicted of certain violent sex crimes (e.g., first-degree rape) should automatically be designated level 3, regardless of the facts of the particular case or the offender's prior history. A careful reading of the statute supports the conclusion that the guidelines should eschew per se rules and that risk should be assessed on the basis of a review of all pertinent factors (see Correction Law §168-l[5]&[6]). Such an individualized approach is also mandated by the federal Violent Crime

[2] This is not to suggest that offenders who commit "lesser" sex crimes do not also commit offenses that cause greater harm. An offender who engages in public lewdness by exposing himself also may commit crimes that involve direct "hands on" contact with a victim (McGrath 1991; Abel et al. 1988; Romero & Williams 1985).

Control and Law Enforcement Act of 1994 (see, 42 U.S.C. §14071), with which the Legislature intended the Board comply.[3]

3. After much discussion, the Board opted to create an objective assessment instrument that would provide a risk level combining risk of reoffense and danger posed by a sex offender.[4] As required by the Act, the instrument includes factors related to the offender's current offense, his criminal history, his post-offense behavior (e.g., his conduct while confined for the offense), and his planned release environment (Correction Law §168-l[5]). It assigns numerical values to each risk factor -- e.g., 20 points if there were two victims; 30 points if there were three or more victims. The presumptive risk level is then calculated by adding the points that the offender scores in each category.[5] If the total score is 70 points or less, the offender is presumptively level 1; if more than 70 but less than 110, he is presumptively level 2; if 110 or more, he is presumptively level 3.

4. The guidelines contain four "overrides" that automatically result in a presumptive risk assessment of level 3: (i) a prior felony conviction for a sex crime; (ii) the infliction of serious physical injury or the causing of death; (iii) a recent threat to reoffend by committing a

---

[3] The legislative purpose section of the Act states that its enactment will bring "the state into compliance with the federal crime control act." Federal law eschews per se rules and requires a court to make an individualized determination that a person is a high risk offender (see, 42 U.S.C. §14071[a][2]).

[4] New Jersey has also adopted an objective risk assessment scale to implement its "Megan's Law" (see, New Jersey Sex Offender Risk Assessment Scale Manual, [dated 9/14/95]). That scale was designed "to provide an objective standard on which to base the community notification decision *** and to insure that the notification law is applied in a uniform manner throughout the state." (id). As discussed in the appendix, the New Jersey scale was the starting point for the development of New York's assessment instrument.

[5] Where the category does not apply to the offender, he should be scored 0 points. For example, if his crime involved one victim, that factor should be scored 0; if there was not a continuing course of sexual misconduct with the victim, that factor also should be scored 0.

sexual or violent crime; or (iv) a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior. If any of these factors exist, the offender is presumptively level 3. The Board decided to treat these factors as overrides (rather than scoring them heavily) because each provides compelling evidence that an offender poses a serious risk to public safety (Quinsey, et al. 1995; Rice & Harris 1995; Schram & Milroy 1995; Serin 1994; Quinsey 1992; Rice, Harris & Cormier 1992; Romero & Williams 1985). As noted previously in Part II of the Guidelines (Criminal History) Factor 9, the fact that the offender has a prior felony sex crime conviction automatically results in a presumptive risk assessment of level 3.

5. The risk level calculated from aggregating the risk factors and from applying the overrides is "presumptive" because the Board or court may depart from it if special circumstances warrant. The ability to depart is premised on a recognition that an objective instrument, no matter how well designed, will not fully capture the nuances of every case. Not to allow for departures would, therefore, deprive the Board or a court of the ability to exercise sound judgment and to apply its expertise to the offender. Of course, if there was to be a departure in every case, the objective instrument would be of minimal value. The expectation is that the instrument will result in the proper classification in most cases so that departures will be the exception -- not the rule.

6. Generally, the Board or a court may not depart from the presumptive risk level unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines (cf., 18 U.S.C. §3553 [federal sentencing guidelines departure provision]). Circumstances that may warrant a departure cannot, by their very nature, be comprehensively listed in advance. Departures may be upward

(e.g., from level 1 to 2) or downward (e.g., from level 3 to 2). For example, if an offender's presumptive risk level is 3 but he suffers from a physical condition that minimizes his risk of reoffense, such as advanced age or debilitating illness, a downward departure may be warranted.

7. Completing the risk assessment instrument will often require the Board or a court to review the case file to determine what occurred. Points should not be assessed for a factor -- e.g., the use of a dangerous instrument -- unless there is clear and convincing evidence of the existence of that factor. This evidence can be derived from the sex offender's admissions; the victim's statements; the evaluative reports of the supervising probation officer, parole officer or corrections counselor; or from any other reliable source. Notably, the Board is not limited to the crime of conviction but may consider the above in determining an offender's risk level. Similarly, the 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. For example, where a defendant is indicted for rape in the first degree on the theory that his victim was less than 11 (Penal Law §130.35[3]), but not on the theory that he used forcible compulsion (Penal Law §130.35[1]), the Board or court should be reluctant to conclude that the offender's conduct involved forcible compulsion.

8. The risk assessment instrument is divided into four parts: Current Offense[s]; Criminal History; Post-Offense Behavior; and Release Environment. The Current Offense[s] section should be completed on the basis of all of the crimes that were part of the instant disposition. For example, if the offender pleaded guilty to two indictments in two different counties, both indictments should be considered in scoring the section. If one indictment involved one victim and the other involved two victims and if there is clear and convincing

evidence that all three were abused, the offender should receive 30 points (three or more victims) in category 3.

For an offender who has been sentenced to an incarcerative sentence, the Post-Offense Behavior section will usually involve an assessment of his conduct while in custody. The Release Environment section will involve an assessment of the offender's planned work and living arrangements upon his release from custody. Because those arrangements are prospective and can readily change, the Board chose not to weigh this section as heavily as others in the assessment instrument.

9. In scoring the categories in the Current Offense[s] section of the instrument, the Board or court should look to the most serious wrongdoing in each category. For example, if the offender committed two crimes, a knifepoint rape of a 21-year-old woman and a rape of a 10-year-old girl in which no weapon was used, he should be assessed 30 points for using a dangerous instrument (from crime #1) and 30 points for victimizing a person under the age of 11 (from crime #2). The offender's willingness to use a weapon and to attack a young child are each factors that add to the risk level, even if they did not occur together in any one criminal incident.

10. The Criminal History section of the instrument asks for information about the offender's prior crimes. As used therein, the term "crime" includes criminal convictions, youthful offender adjudications and juvenile delinquency findings. The Board concluded that these determinations are reliable indicators of wrongdoing and, therefore, should be considered in assessing an offender's likelihood of reoffense and danger to public safety.[6] Convictions for

---

[6]Although an adjudication as a youthful offender is not a conviction, it constitutes a reliable determination that an offender committed the underlying criminal conduct (People v. Compton, 38 A.D. 2d 788 [4th Dept., 1972]); cf. People v. Cook, 37 N.Y. 2d 591 [1975][a person can be questioned as to conduct underlying a youthful offender adjudication for purposes of impeaching credibility]).

Penal Law offenses and unclassified misdemeanors should be considered. Where an offender has admitted committing an act of sexual misconduct for which there has been no such judicial determination, it should not be used in scoring his criminal history. It may, however, form the basis for an upward departure if there is clear and convincing evidence that the conduct occurred.

11. The guidelines assume that the Board or a court will generally apply traditional principles of accessorial liability in calculating an offender's presumptive risk level (see Penal Law §20). That means that if an offender held the victim down while his co-defendant had sexual intercourse with her, the offender should receive 25 points in the category for sexual contact with the victim. The Board or court, however, may choose to depart from the risk level so calculated if it determines that this point score results in an over-assessment of the offender's risk to public safety.

B. Specific Guidelines

Factor 1: Use of Violence

Research on sex offenders shows that an offender's use of violence is positively correlated with his likelihood of reoffending (Quinsey et al. 1995; Limandri & Sheridan 1995; Rice et al. 1991). It is, of course, also a factor strongly associated with how dangerous an offender is to the community. A sex offender who rapes at knifepoint or inflicts physical injury to the victim poses a far greater threat to public safety than one who rubs himself against another on a crowded subway (see, p.2, n.2, supra). The guidelines reflect this fact by assessing an offender 30 points if he was armed with a dangerous instrument; 15 points if he inflicted physical injury; and 10 points if he used forcible compulsion. There is an override if the offender caused serious physical injury or death, so that he is presumptively level 3. See infra p. 17.

To avoid ambiguity, the guidelines use terms that are defined in the Penal Law. Forcible compulsion means to compel by either " (a) use of physical force or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped***" (Penal Law §130.00[8)]. As the New York State Court of Appeals has observed, "the point *** is not what the defendants would have done, but rather what the victim observing their conduct, feared they *** might do if she did not comply with their demands." (People v. Coleman, 42 N.Y.2d 500, 505 [1977]). Discrepancies in age, size, or strength are relevant factors in determining whether there was such compulsion (e.g., People v. Yeaden, 156 A.D.2d 208 [1st Dept., 1989] [forcible compulsion shown "by evidence of defendant's dominating his smaller and weaker daughter and preventing her from leaving him"]). The victim's age, by itself, however, is not a sufficient basis for a finding of forcible compulsion.

Dangerous instrument means "any instrument, article or substance, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law §10.00[13]). Physical injury means "impairment of physical condition or substantial pain."(Penal Law §10.00[9]). It does not include petty slaps, shoves, kicks and the like. (see, e.g., Matter of Philip A., 49 N.Y.2d 198 [1980] [two punches to the face causing red marks, crying, and unspecified degree of pain was insufficient to prove physical injury]; People v. Tabachnik, 131 A.D.2d 611 [2d Dept., 1987] [testimony about "very sore" upper thigh did not establish physical injury].

Factor 2: Sexual Contact with Victim

This factor is also associated with the offender's danger to the community. The guidelines distinguish among offenders whose contact with their victims was touching over the clothing (5 points), touching under the clothing (10 points), or sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual abuse (25 points) as defined in Penal Law Article 130.

The Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category results in an over-assessment of the offender's risk to public safety.

Consideration was given to modifying this category so that an offender who intended to have sexual intercourse with his victim but whose attempt was prevented by some factor other than his own change of mind (e.g., police intervention) would still receive a significant number of points. Such a mens rea-based approach, however, was rejected in favor of a more workable guideline that focuses upon the offender's conduct.

Thus, if there was no sexual contact, the offender should receive 0 points in this category even if his intent was to have forced sexual intercourse with his victim. In such instances, where it is evident that an offender intended to rape his victim, the Board or a court may choose an upward departure if it concludes that the lack of points in this category results in an under-assessment of the offender's actual risk to public safety.

Factor 3: Number of Victims

This category focuses upon the number of people whom the offender victimized in the case (or cases) that ultimately resulted in the instant conviction. Clear and convincing evidence of sexual conduct by the actor against victims may be taken into consideration. The existence of multiple victims is indicative of compulsive behavior and is, therefore, a significant factor in assessing the offender's risk of reoffense and dangerousness (Rice & Harris 1995; Abel et al. 1993; Toch & Adams 1989; Abel et al. 1987). The guidelines assess 20 points if there were two victims, and 30 points if there were three or more victims.

Factor 4: Duration of Offense Conduct with Victim

This category is designed to reflect the fact that some offenders, particularly those who prey on young children, manifest their compulsive behavior by engaging in a continuing course of sexual contact with the same victim. The offender who sexually abuses his girlfriend's young daughter over a period of several weeks falls into this 20-point category.

The Board opted for a definition of continuing course of sexual contact that includes both the nature and length of the offender's conduct. For purposes of these guidelines an offender has engaged in a continuing course of sexual contact when he engages in 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.[7]

---

[7]Since the issuance of the original guidelines in January 1996, the Legislature has enacted a continuing course of sexual misconduct crime, which addresses conduct occurring over a period of more than three months. See Penal Law §§130.75, 130.80. The Legislative history of this law makes clear that the three-month period was selected for reasons related to the law of pleadings and particulars -- i.e., because court decisions had made it difficult to prosecute sex crimes

Factor 5: Age of Victim

Offenders who target young children as their victims are more likely to reoffend (Abel et al. 1993; Weinrott & Saylor 1991). Moreover, such offenders pose a heightened risk to public safety since young children lack the physical strength to resist and can be more easily lured into dangerous situations than adults. The guidelines therefore assess 20 points if the victim was 11 through 16 years old and 30 points if the victim was 10 years old or younger. These ages are adopted from the Penal Law (see, e.g., Penal Law §§130.05[3][a]; 130.35[3]; 130.50[3]). An offender who preys on an elderly person, defined as a person 63 years old or more, is treated the same as one who chooses a young child as his victim.

Factor 6: Other Victim Characteristics

For much the same reason as in Factor 5, the guidelines assess 20 points if the victim suffered from a mental disability, mental incapacity or physical helplessness. The terms mental disability, mental incapacity and physical helplessness have their same meaning as in the Penal Law (see Penal Law §130.00 [5],[6],[7] and Penal Law §130.05[3][b], [c], [d]). Offenders who prey upon such victims consciously choose people who cannot protect themselves or effectively report their abuse (McGrath 1991). Such offenders pose a greater risk to public safety since their crimes are more difficult to detect and prosecute. Absent extraordinary circumstances, an offender who has been assessed points for the age of his victim (factor 5) should not be assessed points in this category in order to avoid double-counting.

---

occurring over a period in excess of three months when the child victim could not specify the precise dates on which the crimes occurred. The history does not suggest that the legislature believed that repeated crimes occurring over a shorter period -- e.g., two weeks -- were not a sound basis for finding an offender to be compulsive in his misconduct. Hence, the Board has determined not to modify this guideline.

Factor 7: Relationship between Offender and Victim

The guidelines assess 20 points if the offender's crime (i) was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization or (ii) arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of such relationship. Each of these situations is one in which there is a heightened concern for public safety and need for community notification. (Schwartz 1995; McGrath 1991).[8]

As used herein, the term "stranger" includes anyone who is not an actual acquaintance of the victim. It can include a person living in the same apartment building if the relationship between the offender and victim is limited to their passing in the hallway or sharing an elevator. The phrase "established or promoted for the primary purpose of victimization" is adopted from the Act itself (Correction Law §168-a[9]). An uncle who offends against his niece generally would not fall into this category. A scout leader who chooses his profession or vocation to gain access to victims and "grooms" his victims before sexually abusing them would qualify. The final category -- the abuse of a professional relationship -- reaches health care providers and others who exploit a professional relationship in order to victimize those who repose trust in them. A dentist who sexually abuses his patient while the patient is anesthetized would fall squarely within this category.

---

[8] This, of course, is not meant to minimize the seriousness of cases where the relationship is other than that of stranger or professional -- e.g., familial. The need for community notification, however, is generally greater when the offender strikes at persons who do not know him well or who have sought out his professional care.

Factor 8: Age at First Sex Crime

The offender's age at the commission of his first sex crime, which includes his age at the time of the commission of the instant offense, is a factor associated with recidivism: those who offend at a young age are more prone to reoffend (Schwartz 1995; Barbaree, et al. 1993; McConaghy, et al. 1989; Groth & Lorendo 1987). For this reason, the guidelines assess 10 points if an offender's first sex crime, whether a felony or misdemeanor, was at age 20 or less. As discussed above, criminal convictions, youthful offender adjudications and juvenile delinquency findings are to be considered in scoring this category, as well as categories 9 and 10 (see, p. 6, supra).

Factor 9: Number and Nature of Prior Crimes

An offender's prior criminal history is significantly related to his likelihood of sexual recidivism, particularly when his past includes violent crimes or sex offenses (Quinsey et al. 1995; McGrath 1991; Quinsey 1990; Romero & Williams 1985; Longo & Groth 1983; Groth, Longo & McFadin 1982). This category incorporates this research by assessing an offender 30 points if he has a prior conviction or adjudication for a Class A felony of Murder, Kidnaping, or Arson, a violent felony, a misdemeanor sex crime, or endangering the welfare of a child, or any adjudication for a sex offense; 15 points if he has a prior felony conviction or adjudication for a crime other than a Class A felony of Murder, Kidnaping, or Arson, a violent felony, or a sex offense (e.g., drug dealing); and 5 points if he has any criminal history other than a felony or sex crime. As noted previously in Factor 9, under Part II of the Guidelines (Criminal History), the fact that the offender has a prior felony sex crime conviction automatically results in a presumptive risk assessment of level 3. If an offender has a conviction for a felony sex crime,

there is an override, and he is presumptively level 3 (see p. 17, infra). The term violent felony, as used in the guideline, has the same meaning as in the Penal Law (see Penal Law §70.02[1]). The Board decided to treat endangering the welfare of a child as if it were a sex crime because it generally involves sexual misconduct, especially when it is part of a plea bargained disposition. Where a review of the record indicates that there was no such misconduct, a departure may be warranted.

Notably, this category looks to an offender's prior criminal history. However, some sex offenders have concurrent or subsequent offenses not scored in this category. Although such concurrent or subsequent criminal history is not covered by this particular category, it may be the basis for an upward departure if it is indicative that the offender poses an increased risk to public safety.

Factor 10: Recency of Prior Felony or Sex Crime

In weighing an offender's criminal history, the nature of his prior crime is not the only important factor; the recency of those crimes matters as well. To capture this factor, the guidelines assess 10 points if an offender has a prior felony or sex crime within three years of the instant offense. This three-year period should be measured without regard to the time during which the offender was incarcerated or civilly committed. It is an offender's behavior during his time at liberty that is relevant in assessing his likelihood to reoffend. In other words, this category measures the time from when the offender is released into the community until the date he commits the instant offense.

Factor 11: Drug or Alcohol Abuse

Alcohol and drug abuse are highly associated with sex offending (Lightfoot and Barbaree 1993; Langevin & Lang 1990; Crowe & George 1989; Rada 1976). The literature indicates that use of these substances does not cause deviate behavior; rather, it serves as a disinhibitor and therefore is a precursor to offending (Green 1995). The guidelines reflect this fact by adding 15 points if an offender has a substance abuse history or was abusing drugs and or alcohol at the time of the offense. The category focuses on the offender's history of abuse and the circumstances at the time of the offense. It is not meant to include occasional social drinking. In instances where the offender abused drugs and/or alcohol in the distant past, but his more recent history is one of prolonged abstinence, the Board or court may choose to score zero points in this category. An offender need not be abusing alcohol or drugs at the time of the instant offense to receive points in this category.

Factor 12: Acceptance of Responsibility

An offender who does not accept responsibility for his conduct or minimizes what occurred is a poor prospect for rehabilitation (Strate et al. 1995; Byrum & Rogers 1993; Simkins et al. 1989). Such acknowledgement is critical, since an offender's ability to identify and modify the thoughts and behaviors that are proximal to his sexual misconduct is often a prerequisite to stopping that misconduct (McGrath 1991). The guidelines assess 10 points to an offender who has not accepted responsibility for his conduct and 15 points are assessed to an offender who has refused or been expelled from a sex offender program. In scoring this category, the Board or court should examine the offender's most recent credible statements and should seek evidence of genuine acceptance of responsibility. An offender who pleads guilty but tells his pre-sentence

investigator that he did so only to escape a State prison sentence has not accepted responsibility. The guidelines add five points if the offender has refused or been expelled from treatment since such conduct is powerful evidence of the offender's continued denial and his unwillingness to alter his behavior. If an offender who has historically not accepted responsibility and historically has refused sex offender treatment but, subsequently participates in such programming, the Board or court should seek to examine whether there is evidence of a genuine acceptance of responsibility.

Factor 13: Conduct While Confined or Under Supervision

This factor looks to the offender's conduct while in custody or under supervision as a predictor of future behavior. For example, an offender who has numerous citations for disciplinary violations or who accrues disciplinary dispositions of a serious nature or who receives dispositions for behavior such as attempting to contact the victim may be assessed points in this category. An offender who has incurred serious disciplinary violations in prison poses a heightened risk of recidivism: his misconduct bodes ill for his return to the streets. An offender's adjustment to confinement in prison also is unsatisfactory if he has a recent Tier Three disciplinary violation.[9] His adjustment on probation or parole is unsatisfactory if he has violated a condition of his release. The guidelines assess the offender 10 points for unsatisfactory adjustment.

Even more troubling are instances where the offender, while in custody or under supervision, has been involved in inappropriate sexual behavior or receives dispositions for

---

[9] Tier 3 disciplinary violations are the most serious infractions under DOCS' Three-Tier disciplinary system. Such violations can result in the loss of good time credits for an inmate.

behavior such as possessing pornography or any factor related to his sexual acting out. In such instances, the guidelines assess the offender 20 points.

Factor 14: Supervision

Strict supervision is essential when a sex offender is released into the community. (English et al. 1995). This category is premised on the theory that a sex offender should be supervised by a probation or parole officer who oversees a sex offender caseload or who otherwise specializes in the management of such offenders. Sex offender caseloads generally permit more intensive supervision and provide for the offender's enrollment in a treatment program. An offender who is released without such intensive supervision is assessed points in this category. The Board initially considered having a separate category for whether the offender was in a treatment program. Because the efficacy of sex offender treatment is open to question, this approach was rejected (Kaul 1993; Marshall, Laws & Barbaree 1990). An offender's response to treatment, if exceptional, can be the basis for a downward departure.

There are cases received by the Board in which the offender was convicted in a jurisdiction other than New York and subsequently relocates to New York. If such an offender satisfactorily completed the terms of that jurisdiction's community supervision, he will be scored 0 points in this category.

Factor 15: Living or Employment Situation

Many sex offenders are opportunistic criminals whose likelihood of reoffending increases when their release environment gives them access to victims or a reduced probability of detection (Pettett and Weirman 1995). An example of an offender in an inappropriate work situation is a

child molester employed in an arcade or as a school bus driver. If the same offender were to live near an elementary school playground, his living environment would be inappropriate. An offender is assessed 10 points in this category if either his work or living environment is inappropriate.

A Note on Overrides

As indicated above, the guidelines contain four overrides that automatically result in a presumptive risk assessment of level 3: (i) a prior felony conviction for a sex crime; (ii) the infliction of serious physical injury or the causing of death; (iii) a recent threat to reoffend by committing a sexual or violent crime; or (iv) a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior. Three matters require some explanation. First, the term serious physical injury has its Penal Law meaning: "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ" (Penal Law §10.00[10]). Second, the Board initially considered a requirement that the threat to reoffend must have occurred within the previous year. It decided, however, not to impose such a rigid time limit; if the threat is recent enough that there is cause to believe that the offender may act upon it, an override is warranted. Finally, the Board chose to require a clinical assessment of an abnormality so that loose language in a pre-sentence report would not become the basis for an override. Examples of a clinical assessment that would support an override are pedophilia and sexual sadism (Schwartz 1995; Rice & Harris 1995; Andrews & Bonta 1994; Serin 1994).

SEX OFFENDER GUIDELINES BIBLIOGRAPHY

Abel, G., Osborne, C. & Twiggs, D., "Sexual assault through the lifespan: Adult offenders with juvenile histories." In H.E. Barbaree, W.L. Marshall, S.M. Hudson (eds.), *The Juvenile Sex Offender,* (New York: The Guilford Press, 1993).

Abel, G., et al., "Multiple paraphillic diagnoses among sex offenders," *Bulletin of the American Academy of Psychiatry and the Law*, 16, 153-168 (1988).

Abel, G., Becker, J., Mittleman, M., Cunningham-Rathner, J., Rouleau, J. Murphy, W., "Self-reported sex crimes of nonincarcerated paraphilacs," *Journal of Interpersonal Violence*, 2, 3-25 (1987).

Andrews, D.A. & Bonta, J., "Exceptional offenders," in *The Psychology of Criminal Conduct* (Cincinnati, Ohio: Anderson Publishing Co., 1994).

Barbaree, H.E., Hudson, S.M., and Seto, M.C., "Sexual assault in society: the role of the juvenile offender." In H.E. Barbaree, W.L. Marshall, S.M. Hudson (eds.), *The Juvenile Sex Offender,* (New York: The Guilford Press, 1993).

Byrum, L., & S. Rogers, "Offender denial," (Distributed by the National Institute of Corrections: National Institute of Corrections Academy at the seminar, "Sex Offender Treatment Skills for Professionals," Longmont, Colorado, September 1. 1993).

Crowe, L. & George W., "Alcohol and human sexuality: review and integration," *Psychological Bulletin,* 105, 374-386 (1989).

English, K., Pullen, S., Jones, L., and Krauth, B., (In press), "The model process: A containment approach." In K. English, S. Pullen, & L. Jones (eds.), *Managing Adult Sex Offenders: A Containment Approach,* (Alexandria, VA: American Probation and Parole Association, 1995) (DRAFT Version provided by the Colorado Division of Criminal Justice).

Green, Randy, "Comprehensive treatment planning for sex offenders." In B.K. Schwartz and H. R. Celleni (eds.), *The Sex Offender: Corrections, Treatment and Legal Practice,*(New Jersey: Civic Research Institute, 1995).

Groth, N. & Lorendo, C.M., "Juvenile sexual offenders: guidelines for assessment," *Psychological Bulletin,* 25, (1), 31-32 (1987).

Groth, N., Longo, R., & McFadin, J., "Undetected recidivism among rapists and child molesters, *Crime and Delinquency*, 450-458 (1982).

Kaul, A., "Sex offenders - cure or management?," *Medical Science Law*, Vol. 33, No. 3, 207-212 (1993).

Langevin, R. & Lang, R., "Substance abuse among sex offenders," *Annals of Sex Research*, 3, 397-424 (1990).

Lightfoot, L.O, & Barbaree, H.E. "The relationship between substance use and abuse and sexual offending in adolescents." In Barbaree, H.E., Marshall, W.L. and Hudson, S.M. (eds.), *The Juvenile Sex Offender* (New York: The Guilford Press, 1993).

Limandri, B. J., & Sheridan, D. J., "Prediction of intentional interpersonal violence: An introduction." In J.C. Campbell (ed.), *Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers* (Thousand Oaks, CA: Sage, 1995).

Longo, R. & Groth, N., "Juvenile sexual offenses in the histories of adult rapists and child molesters," *International Journal of Offender Therapy and Comparative Criminology*, 27 (2), 150-155 (1983).

Marshall, W.L. Laws, D.R. & Barbaree, H.E., "Present status and future directions." In W.L. Marshall, H.R. Laws, and H.E. Barbaree (eds.), *Handbook of Sexual Assault* (New York: Plenum Press, 1990).

McConaghy, N., Blaszczynksi, A., Armstrong, M., and Kidson, W., "Resistance to treatment of adolescent sex offenders," *Archives of Sexual Behavior*, 18, 97-107 (1989).

McGrath, R., "Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings," *International Journal of Offender Therapy and Comparative Criminology*, 35 (4), 335-336 (1991).

"New Jersey Sex Offender Risk Assessment Scale Manual." Released by the New Jersey Office of the Attorney General, (September, 1995).

Pettett, J. and Weirman, D., (In press), "Monitoring with surveillance officers." In K. English, S. Pullen, & L. Jones (eds.), *Managing Adult Sex Offenders: A Containment Approach*, (Alexandria, VA: American Probation and Parole Association, 1995), (DRAFT Version provided by the Colorado Division of Criminal Justice).

Quinsey, V., Lalumiere, M., Rice, M., & Harris, G., "Predicting sexual offenses." In J.C. Campbell (ed.), *Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers* (California: Sage Publications, 1995).

Quinsey, V., "Review of sexual predator program: community protection research project" 8, Appendix 1 (Predicting sexual recidivism), (Olympia, WA: Washington State Institute for Public Policy, 1992).

Quinsey, V., "A follow-up of rapists assessed in a maximum security psychiatric facility," *Journal of Interpersonal Violence, 5, 435-448* (1990).

Rada, R., "Alcoholism and the child molester," *Annals of New York Academy of Sciences,* 273, 492-496 (1976).

Rice, M., & Harris, G., "Cross-validation and extension of an actuarial instrument for the prediction of recidivism among sex offenders," *Penetanguishene Mental Health Centre Research Report,* XII (2) (1995).

Rice, M., Quinsey, V.,& Harris, G., "Sexual recidivism among child molesters released from a maximum security psychiatric institution," *Journal of Consulting and Clinical Psychology*, 59, 381-386 (1991).

Rice, M., Harris, G., & Cormier, C., "An evaluation of a maximum security therapeutic community for psycopaths and other mentally disordered individuals," *Law and Human Behavior,* 16 (4) 399-412 (1992).

Romero, J. & Williams, L., "Recidivism among convicted sex offenders: A 10-year follow-up study," *Federal Probation,* 49, 58-64 (1985).

Schram, D., & Millroy, C., "Community notification: A study of offender characteristic and recidivism," ii, 13, and Appendix C-3 (Offender Characteristics and Recidivism) (Olympia: WA: The Urban Policy Institute, for, the Washington State Institute for Public Policy, 1995).

Schwartz, B., "Characteristics and typologies of sex offenders." In B.K. Schwartz and H. R. Cellcni (eds.), *The Sex Offender: Corrections, Treatment and Legal Practice.*(New Jersey: Civic Research Institute, 1995).

Serin, R., Malcolm, P., Khanna, A., and Barabaree, H., "Psychopathy and deviant sexual arousal in incarcerated sexual offenders," *Journal of Interpersonal Violence,* 9 (1), 3-11 (March, 1994).

Simkins **et al.**, "The multiphasic sex inventory: diagnosis and prediction of treatment response in child sex abusers," *Annals of Sex Research,* 2, 205-226 (1989).

Strate, D., Jones, L., Pullen, J., English, K., Crouch, J., Colling-Chadwick, S., & Patzman, J., (In press), "Criminal justice policies and sex offender denial." In K. English, S. Pullen, & L. Jones (eds.), *Managing Adult Sex Offenders: A Containment Approach* (Alexandria, VA: American Probation and Parole Association, 1995), (DRAFT Version provided by the Colorado Division of Criminal Justice).

Toch, H. & Adams, K., *The Disturbed Violent Offender,* (New Haven: Yale University Press, 1989).

Weinrott, M., & Saylor, M., "Self-report of crimes committed by sex offenders," *Journal of Interpersonal Violence,* 6(3) 287, 291-292, (1991).

APPENDIX: Development of the Guidelines

The Sex Offender Guidelines were developed with the assistance of Kim English, the Director of the Office of Research and Statistics for the Colorado Division of Criminal Justice. Ms. English is the author of Adult Sex Offenders on Probation and Parole: A National Survey (December 1995), prepared for the United States Department of Justice. Drawing on guidelines in use in New Jersey and applying the factors enumerated in New York's Act, Ms. English prepared a working draft for New York's guidelines. The draft incorporated risk assessment criteria that find support in the academic literature and are commonly used by sex offender experts.

Thereafter, with Ms. English's continued assistance, the Board modified the draft assessment instrument in an effort to make it as objective as possible. The Board recognized that the instrument would be used by courts throughout the State and that unnecessary complexity would frustrate uniform results. The review process lasted two months; it included testing the guidelines against a large sample of cases to insure that accurate results were produced.

After the Board was satisfied that the guidelines were workable, it invited a panel of experts to review them and propose improvements. The panel was comprised of eight professionals with diverse experience related to the behavior and treatment of sex offenders: Linda Fairstein, Chief, Sex Crimes Prosecution Unit, New York County District Attorney's Office; Marjorie Fischer, Bureau Chief, Special Victims Bureau, Queens County District Attorney's Office; Kenneth Cullen, Clinical Director of C.A.P. Behavior Associates and former coordinator of the Sex Offender Treatment program at Bronx-Lebanon Hospital (1983-1993); Captain Timothy McAuliffe, New York State Police; Dr. David Barry, University of Rochester School of Medicine; Judith Cox, Acting Director, Bureau of Forensic Services, New York State

Office of Mental Health; Ed Varela, Probation Officer, Westchester County; and Michael Rossetti, Deputy Attorney General for Legal Policy.

The panelists met for two days, carefully reviewed the guidelines, and applied them to 20 cases. Based upon the concerns expressed during those sessions, the Board modified the guidelines in several ways. For example, the panelists noted that the guidelines, as then proposed, failed to assess points if an offender had exploited a professional relationship to abuse his victim. The panelists emphasized that where such exploitation had occurred, there was a heightened need for community notification. Factor 7 was modified to incorporate this concern. The panelists also suggested that an offender's history of violence or sex offending should be weighted more heavily. This was accomplished by modifying the scoring system for Factor 9 and by creating an override for a prior sex felony. Finally, the panelists encouraged skepticism toward treatment, recommending that an offender's participation in a treatment program, by itself, should not reduce his risk level. The Board accepted this recommendation as well.

SEX OFFENDER REGISTRATION ACT
RISK ASSESSMENT INSTRUMENT

RISK FACTOR	VALUE		SCORE
I. CURRENT OFFENSE(S)			
1. Use of Violence			
Used forcible compulsion	+10		
Inflicted physical injury	+15		
Armed with a dangerous instrument	+30		
2. Sexual Contact with Victim			
Contact over clothing	+5		
Contact under clothing	+10		
Sexual intercourse, deviate sexual intercourse or aggravated sexual abuse	+25		
3. Number of Victims			
Two	+20		
Three or more	+30		
4. Duration of offense conduct with victim			
Continuing course of sexual misconduct	+20		
5. Age of victim			
11 through 16	+20		
10 or less, 63 or more	+30		
6. Other victim characteristics			
Victim suffered from mental disability or incapacity or from physical helplessness	+20		
7. Relationship with victim			
Stranger or established for purpose of victimizing or professional relationship	+20		
II. CRIMINAL HISTORY			
8. Age at first act of sexual misconduct			
20 or less	+10		
9. Number and nature of prior crimes			
Prior history/no sex crimes or felonies	+5		
Prior history/non-violent felony	+15		
Prior violent felony, or misdemeanor sex crime or endangering welfare of a child	+30		
10. Recency of prior felony or sex crime			
Less than 3 years	+10		
11. Drug or Alcohol abuse			
History of abuse	+15		
COLUMNS 1- 11 SUBTOTAL			

SEX OFFENDER REGISTRATION ACT
RISK ASSESSMENT INSTRUMENT

RISK FACTOR	VALUE		SCORE
III. POST-OFFENSE BEHAVIOR			
12. Acceptance of Responsibility			
Not accepted responsibility	+10		
Not accepted responsibility and refused or expelled from treatment	+15		
13. Conduct while confined / supervised			
Unsatisfactory	+10		
Unsatisfactory with sexual misconduct	+20		
IV. RELEASE ENVIRONMENT			
14. Supervision			
Release with specialized supervision	0		
Release with supervision	+5		
Release without supervision	+15		
15. Living / employment situation			
Living or employment inappropriate	+10		
COLUMNS 12-15 SUBTOTAL			
COLUMNS 1-11 SUBTOTAL			
TOTAL RISK FACTOR SCORE (add 2 subtotals)			
1 2 3			

Level 1 (low)	=	0 to +70
Level 2 (moderate)	=	+75 to +105
Level 3 (high)	=	+110 to +300

Note: The Sex Offender Registration Act requires the court or Board of Examiners of Sex Offenders to consider any victim impact statement in determining a sex offender's level of risk.

Offender Name: _____

NYSID #: _____

Docket #: _____

Risk Level: _____

Assessor's Signature _____

Date: _____

A. Overrides (If any override is circled, offender is presumptively a Level 3)

1. Offender has a prior felony conviction for a sex crime
2. Offender inflicted serious physical injury or caused death
3. The offender has made a recent threat that he will reoffend by committing a sexual or violent crime
4. There has been a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases ability to control impulsive sexual behavior

B. Departure

1. A departure from the risk level is warranted

   ☐ Yes ☐ No

2. If yes, circle the appropriate risk level 1 2 3
3. If yes, explain the basis for departure (See Summary)

SEX OFFENDER DESIGNATION FORM

Offender Name: _____

NYSID #: _____ **1ST Reviewer Initials:**_____

The following is the Board of Examiners of Sex Offenders' recommendation pursuant to Section 168-l of Article 6-C of the NYS Correction Law as to whether the offender shall be designated a Sexually Violent Offender, Predicate Sex Offender, or Sexual Predator as defined in subdivision seven of Section 168-a or whether the offender does not fit any of those categories due to his conviction. The District Attorneys may also use this form for recommendations to the Court pursuant to their authority under Correction Law 168-d(3).

Please check all that apply:

☐ **Sexually Violent Offender – a sex offender who has been convicted of a sexually violent offense defined in Correction Law section 168-a(3).**

Please check which conviction(s) apply, also please indicate whether the conviction was for an attempt at an offense:

Current	Attempt	
_____	_____	130.35 – Rape 1°
_____	_____	130.50 – Sodomy 1°/Criminal Sexual Act 1°
_____	_____	130.53 – Persistent sexual abuse
_____	_____	130.65 – Sexual Abuse 1°
_____	_____	130.65-a – Aggravated sexual abuse 4°
_____	_____	130.66 – Aggravated sexual abuse 3°
_____	_____	130.67 – Aggravated sexual abuse 2°
_____	_____	130.70 – Aggravated sexual abuse 1°
_____	_____	130.75 – Course of sexual conduct against a child 1°
_____	_____	130.80 – Course of sexual conduct against a child 2°
_____	_____	130.90 – Facilitating a sex offense with a controlled substance
_____	_____	130.95 – Predatory sexual assault
_____	_____	130.96 – Predatory sexual assault against a child
_____	_____	A conviction of an offense in any other jurisdiction which includes all of the essential elements of any listed felony provided for above, or conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in that jurisdiction in which the conviction occurred.
_____	_____	A conviction of, or a conviction for an attempt to commit, any provision of a sexually violent offense as set forth in Corr. Law § 168-a(3)(a) committed or attempted as a hate crime as defined in P.L.§ 485.05 (specify offense)_____.
_____	_____	A conviction of, or a conviction for an attempt to commit, any provision of a sexually violent offense as set forth in Corr. Law § 168-a(3)(a) committed or attempted as a crime of terrorism pursuant to Penal Law Section 490.25 (specify offense) _____.

(Continued on the next page)

Rev. 10/10/2008

☐ **Predicate Sex Offender – a sex offender who has been convicted of an offense set forth in subdivision 2 or 3 of Correction Law Section 168-a when the offender has been previously convicted of an offense set forth in subdivision 2 or 3 of Section 168-a, regardless of the date of the prior conviction and regardless of whether the offender was required to register for the previous conviction.**

Please identify below the offender's previous qualifying conviction(s) as well as the offender's current qualifying conviction, also please indicate whether the conviction was for an attempt of an offense:

Current	Previous	Attempt	
____	_____	____	120.70 - Luring a Child
____	_____	____	130.20 - Sexual Misconduct
____	_____	____	130.25 - Rape 3°
____	_____	____	130.30 - Rape 2°
____	_____	____	130.35 - Rape 1°
____	_____	____	130.40 - Criminal Sexual Act 3°/ Sodomy 3°
____	_____	____	130.45 - Criminal Sexual Act 2°/ Sodomy 2°
____	_____	____	130.50 - Sodomy 1° / Criminal Sexual Act 1 °
____	_____	____	130.52 - Forcible touching (victim < 18 years old)
____	_____	____	130.53 - Persistent sexual abuse
____	_____	____	130.55 - Sexual abuse 3 ° (victim < 18 years old)
____	_____	____	130.60 - Sexual Abuse 2°
____	_____	____	130.65 - Sexual Abuse 1°
____	_____	____	130.65-a - Aggravated sexual abuse 4°
____	_____	____	130.66 - Aggravated sexual abuse 3°
____	_____	____	130.67 - Aggravated sexual abuse 2°
____	_____	____	130.70 - Aggravated sexual abuse 1°
____	_____	____	130.75 - Course of sexual conduct against a child 1°
____	_____	____	130.80 - Course of sexual conduct against a child 2°
____	_____	____	130.90 - Facilitating a sex offense with a controlled substance
____	_____	____	130.95 - Predatory sexual assault
____	_____	____	130.96 - Predatory sexual assault against a child
____	_____	____	135.05 - Unlawful Imprisonment 2° (1)
____	_____	____	135.10 - Unlawful Imprisonment 1° (1)
____	_____	____	135.20 - Kidnapping 2° (1)
____	_____	____	135.25 - Kidnapping 1° (1)
____	_____	____	230.04 - Patronizing a prostitute 3° (victim <17 years old)
____	_____	____	230.05 - Patronizing a prostitute 2°
____	_____	____	230.06 - Patronizing a prostitute 1°
____	_____	____	230.30(2) - Promoting prostitution 2°
____	_____	____	230.32 - Promoting prostitution 1°
____	_____	____	230.33 - Compelling prostitution
____	_____	____	230.34 - Sex trafficking
____	_____	____	235.22 - Disseminating indecent material to minors 1°
____	_____	_NA_	250.45(2), (3), (4) - Unlawful surveillance 2° (2)
____	_____	____	250.50 - Unlawful surveillance 1°
____	_____	____	255.25 - Incest 3°
____	_____	____	255.26 - Incest 2°
____	_____	____	255.27 - Incest 1°
____	_____	____	Article 263 Offense-Sexual performance by a Child
____	_____	____	Conviction/Attempt to commit any provision of 130.52 or 130.55 of the Penal Law regardless of age of victim and the offender has previously been convicted of: (i) a sex offense listed in Correction Law §168-a(2), (ii) a sexually violent offense listed in Correction Law §168-a(3), or (iii) any of the provisions of §130.52 or § 130.55 of the Penal Law or an attempt thereof.

(Continued on the next page)

___ ____ ___ A conviction of any of the provisions of 18 U.S.C. 2251, 18 U.S.C. 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, 18 U.S.C. 2260, 18 U.S.C. 2422(b), 18 U.S.C. 2423. or 18 U.S.C. 2425, provided the elements of such crime of conviction are substantially the same as those which are part of such offense as of March 11, 2002.

___ ____ ___ A conviction of an offense in any other jurisdiction which includes all of the essential elements of any such crime as provided for in Corr. Law § 168-a(2)(a), (b), or (c) or any such felony as provided for in Corr. Law § 168-a(3)(a), or a conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in that jurisdiction in which the conviction occurred.

___ ____ ___ A conviction of, or a conviction for an attempt to commit, any provision of an offense as set forth in Corr. Law § 168-a(2)(a) or (3)(a) committed or attempted as a hate crime as defined in P.L.§ 485.05 (specify offense) _____.

___ ____ ___ A conviction of, or a conviction for an attempt to commit, any provision of an offense as set forth in Corr. Law § 168-a(2)(a) or (3)(a) committed or attempted as a of crime terrorism pursuant to Penal Law Section 490.25 (specify offense) _____.

___ ____ ___ A conviction of, or a conviction for an attempt to commit, any provision of an offense as set forth in Corr. Law § 168-a(2)(a) committed or attempted as a sexually motivated felony pursuant to Penal Law Section 130.91 (specify offense) _____.

(1) 135.05, 135.10, 135.20, 135.25 – the victim must be less than 17 years old and the offender must not be the parent of the victim.

(2) 250.45 (2), (3), (4) - A registerable offense unless the trial court finds that registration would be unduly harsh and inappropriate. Please note that an attempt to commit this offense does not require registration.

☐ **Sexual Predator – a sex offender who has been convicted of a sexually violent offense defined in Correction Law Section 168-a (3) and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses.**

☐ **None of the above.**

CHAIRPERSON
STEVE WHITBECK

SR. INVESTIGATOR
MICHELLE BASCOM

STATE OF NEW YORK
BOARD OF EXAMINERS OF SEX OFFENDERS
4 TOWER PLACE
ALBANY, NEW YORK 12203

BOARD MEMBERS
DAWNE E. AMSLER
EDWIN H. ELFELDT
MARK J. OSBORNE
STEPHEN D. WEBER

Scoring of Child Pornography Cases Position Statement 6/1/12

Case law (People v. Johnson, 11 N.Y. 3d 416, 420-421 (2008) & People v. Poole, 90 A.D.3d 1550 (2011)) has held that child pornography offenders properly have points assessed on Factors 3 (Number of Victims) and 7 (Stranger Relationship). However, as the Court in Johnson notes, scoring all child pornography cases for stranger relationship (and similarly in Poole scoring for three or more victims) produces an unintended, anomalous result as the majority of offenders convicted of child pornography offenses will be scored the same when there are clearly vast differences amongst these types of offenders. To address the Court's concern and to more accurately reflect the risk of a repeat offense and threat posed to public safety, the Board:

- Will continue to score either 20 or 30 points for the youngest age depicted in the images under the "Current Offense" category, and will depart from the presumptive level when appropriate based upon factors including but not limited to:
  - the number of images possessed (10,000 is more concerning than <100)
  - the length of time the offender has been collecting/viewing child porn (i.e. > 6 months)
  - paid subscriptions to access child pornography
  - categorized/organized material in their child pornography collection
  - absence of adult sexual relationships
  - emotional identification with children
  - allegations regarding sexual contact with children
  - nature of images (i.e. sadomasochistic)
  - reinforcement of deviant sexual arousal to children by masturbating to these images

  These factors are clearly articulated in the departure within the case summary and are empirically driven[1].

- Will recommend an automatic override to Level 3 in cases where clinical documentation exists detailing a mental abnormality that decreases the ability to control impulsive sexual behavior, such as Pedophilia or Hebephilia, as provided for on page 22 of the Guidelines.

The Board remains concerned about child pornography offenders, and in the majority of cases, believes that they have a sexually deviant interest in children which poses a significant risk to public safety; however, recognizes that each person convicted of a child pornography offense poses risks that are unique to that individual. These images are in essence crime scene photos of children being sexually abused, and the increased demand for these images results in further sexual victimization of children.

---

[1] See for example. Tanner, J. (2010). Digital Technology Use Factors Which Indicate Increased Sex Offender Investment in Digital Sexual Content. Retrieved on June 1, 2012 from Internet site http://www.kbsolutions.com/KBS14Factors.pdf; Hanson, and Morton-Bourgon (2004). Predictors of Sexual Recidivism: An Updated Meta-Analysis 2004-02. Retrieved from Canadian government Internet site http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-02-pred-se-eng.pdf; Seto, M. C., Hanson, R. K., & Babchishin, K. M. (2011). Contact sexual offending by men arrested for child pornography offenses. *Sexual Abuse: A Journal of Research and Treatment, 23*, 124-145.

Correction Law
Article 6-C
SEX OFFENDER REGISTRATION ACT

§ 168. Short title

This article shall be known and may be cited as the "Sex Offender Registration Act".

§ 168-a. Definitions [Effective November 13, 2018]

As used in this article, the following definitions apply:
1. "Sex offender" includes any person who is convicted of any of the offenses set forth in subdivision two or three of this section. Convictions that result from or are connected with the same act, or result from offenses committed at the same time, shall be counted for the purpose of this article as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this article.
2. "Sex offense" means:
(a) (i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 120.70, 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 230.34, 230.34-a, 250.50, 255.25, 255.26 and 255.27 or article two hundred sixty-three of the penal law, or section 135.05, 135.10, 135.20 or 135.25 of such law relating to kidnapping offenses, provided the victim of such kidnapping or related offense is less than seventeen years old and the offender is not the parent of the victim, or section 230.04, where the person patronized is in fact less than seventeen years of age, 230.05, 230.06, 230.11, 230.12, 230.13, subdivision two of section 230.30, section 230.32, 230.33, or 230.34 of the penal law, or section 230.25 of the penal law where the person prostituted is in fact less than seventeen years old, or (ii) a conviction of or a conviction for an attempt to commit any of the provisions of section 235.22 of the penal law, or (iii) a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted as a hate crime defined in section 485.05 of the penal law or as a crime of terrorism defined in section 490.25 of such law or as a sexually motivated felony defined in section 130.91 of such law; or
(b) a conviction of or a conviction for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, provided the victim of such offense is less than eighteen years of age; or
(c) a conviction of or a conviction for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law regardless of the age

of the victim and the offender has previously been convicted of: (i) a sex offense defined in this article, (ii) a sexually violent offense defined in this article, or (iii) any of the provisions of section 130.52 or 130.55 of the penal law, or an attempt thereof; or

(d) a conviction of (i) an offense in any other jurisdiction which includes all of the essential elements of any such crime provided for in paragraph (a), (b) or (c) of this subdivision or (ii) a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred or, (iii) any of the provisions of 18 U.S.C. 2251, 18 U.S.C. 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, 18 U.S.C. 2260, 18 U.S.C. 2422(b), 18 U.S.C. 2423, or 18 U.S.C. 2425, provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect.

(e) a conviction of or a conviction for an attempt to commit any of the provisions of subdivision two, three or four of section 250.45 of the penal law, unless upon motion by the defendant, the trial court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that registration would be unduly harsh and inappropriate.

3. "Sexually violent offense" means:

(a) (i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 130.35, 130.50, 130.65, 130.66, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96 of the penal law, or (ii) a conviction of or a conviction for an attempt to commit any of the provisions of sections 130.53, 130.65-a and 130.90 of the penal law, or (iii) a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted as a hate crime defined in section 485.05 of the penal law or as a crime of terrorism defined in section 490.25 of such law; or

(b) a conviction of an offense in any other jurisdiction which includes all of the essential elements of any such felony provided for in paragraph (a) of this subdivision or conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred.

4. "Law enforcement agency having jurisdiction" means: (a) (i) the chief law enforcement officer in the village, town or city in which the offender expects to reside upon his or her discharge, probation, parole, release to post-release supervision or upon any form of state or local conditional release; or (ii) if there be no chief law enforcement officer in such village, town or city, the chief law enforcement officer of the county in which the offender expects to reside; or (iii) if there be no chief enforcement officer in such village, town, city or county, the division of state police and (b) in the case of a sex

offender who is or expects to be employed by, enrolled in, attending or employed, whether for compensation or not, at an institution of higher education, (i) the chief law enforcement officer in the village, town or city in which such institution is located; or (ii) if there be no chief law enforcement officer in such village, town or city, the chief law enforcement officer of the county in which such institution is located; or (iii) if there be no chief law enforcement officer in such village, town, city or county, the division of state police; and (iv) if such institution operates or employs a campus law enforcement or security agency, the chief of such agency and (c) in the case of a sex offender who expects to reside within a state park or on other land under the jurisdiction of the office of parks, recreation and historic preservation, the state regional park police.

5. "Division" means the division of criminal justice services as defined by section eight hundred thirty-seven of the executive law.

6. "Hospital" means: (a) a hospital as defined in subdivision two of section four hundred of this chapter and applies to persons committed to such hospital by order of commitment made pursuant to article sixteen of this chapter; or (b) a secure treatment facility as defined in section 10.03 of the mental hygiene law and applies to persons committed to such facility by an order made pursuant to article ten of the mental hygiene law.

7.

(a) "Sexual predator" means a sex offender who has been convicted of a sexually violent offense defined in subdivision three of this section and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses.

(b) "Sexually violent offender" means a sex offender who has been convicted of a sexually violent offense defined in subdivision three of this section.

(c) "Predicate sex offender" means a sex offender who has been convicted of an offense set forth in subdivision two or three of this section when the offender has been previously convicted of an offense set forth in subdivision two or three of this section.

8. "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

9. "Predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

10. "Board" means the "board of examiners of sex offenders" established pursuant to section one hundred sixty-eight-l of this article.

11. "Local correctional facility" means a local correctional facility as that term is defined in subdivision sixteen of section two of this chapter.
12. Probation means a sentence of probation imposed pursuant to article sixty-five of the penal law and shall include a sentence of imprisonment imposed in conjunction with a sentence of probation.
13. "Institution of higher education" means an institution in the state providing higher education as such term is defined in subdivision eight of section two of the education law.
14. "Nonresident worker" means any person required to register as a sex offender in another jurisdiction who is employed or carries on a vocation in this state, on either a full-time or a part-time basis, with or without compensation, for more than fourteen consecutive days, or for an aggregate period exceeding thirty days in a calendar year.
15. "Nonresident student" means a person required to register as a sex offender in another jurisdiction who is enrolled on a full-time or part- time basis in any public or private educational institution in this state including any secondary school, trade or professional institution or institution of higher education.
16. "Authorized internet entity" means any business, organization or other entity providing or offering a service over the internet which permits persons under eighteen years of age to access, meet, congregate or communicate with other users for the purpose of social networking. This definition shall not include general e-mail services.
17. "Internet access provider" means any business, organization or other entity engaged in the business of providing a computer and communications facility through which a customer may obtain access to the internet, but does not include a business, organization or other entity to the extent that it provides only telecommunications services.
18. "Internet identifiers" means electronic mail addresses and designations used for the purposes of chat, instant messaging, social networking or other similar internet communication.

§ 168-b. Duties of the division; registration information

1. The division shall establish and maintain a file of individuals required to register pursuant to the provisions of this article which shall include the following information of each registrant:
(a) The sex offender's name, all aliases used, date of birth, sex, race, height, weight, eye color, driver's license number, home address and/or expected place of domicile, any internet accounts with internet access providers belonging to such offender and internet identifiers that such offender uses.

(b) A photograph and set of fingerprints. For a sex offender given a level three designation, the division shall, during the period of registration, update such photograph once each year. For a sex offender given a level one or level two designation, the division shall, during the period of registration, update such photograph once every three years. The division shall notify the sex offender by mail of the duty to appear and be photographed at the specified law enforcement agency having jurisdiction. Such notification shall be mailed at least thirty days and not more than sixty days before the photograph is required to be taken pursuant to subdivision two of section one hundred sixty-eight-f of this article.
(c) A description of the offense for which the sex offender was convicted, the date of conviction and the sentence imposed including the type of assigned supervision and the length of time of such supervision.
(d) The name and address of any institution of higher education at which the sex offender is or expects to be enrolled, attending or employed, whether for compensation or not, and whether such offender resides in or will reside in a facility owned or operated by such institution.
(e) If the sex offender has been given a level two or three designation, such offender's employment address and/or expected place of employment.
(f) Any other information deemed pertinent by the division.
2.
a. The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information. The division shall accept files from any regional or national registry of sex offenders and shall make such files available when requested pursuant to the provisions of this article.
b. The division shall also make registry information available to: (i) the department of health, to enable such department to identify persons ineligible to receive reimbursement or coverage for drugs, procedures or supplies pursuant to subdivision seven of section twenty-five hundred ten of the public health law, paragraph (e) of subdivision four of section three hundred sixty-five-a of the social services law, paragraph (e-1) of subdivision one of section three hundred sixty-nine-ee of the social services law, and subdivision one of section two hundred forty-one of the elder law; (ii) the department of financial services to enable such department to identify persons ineligible to receive reimbursement or coverage for drugs, procedures or supplies pursuant to subsection (b-1) of section four thousand three hundred twenty-two and subsection (d-1) of section four thousand three hundred twenty-six of the insurance law; and (iii) a court, to enable the court to promptly comply with the provisions of paragraph (a-1) of subdivision one of section two hundred forty of the domestic relations law, subdivision (e) of section six hundred fifty-one of the family court act, and subdivision (g) of section 81.19 of the mental hygiene law.
c. The department of health and the department of financial services may disclose to plans providing coverage for drugs, procedures or supplies for the treatment of erectile dysfunction pursuant to section three hundred sixty-nine-ee of the social services law or sections four thousand three hundred twenty-one, four thousand three hundred twenty-two or four thousand three hundred twenty-six of the insurance law registry information that is limited to the names, dates of birth, and social security numbers of persons who are ineligible by law to receive payment or reimbursement for specified drugs,

procedures and supplies pursuant to such provisions of law. Every such plan shall identify to the department of health or the department of financial services, in advance of disclosure, each person in its employ who is authorized to receive such information provided, however, that such information may be disclosed by such authorized employee or employees to other personnel who are directly involved in approving or disapproving reimbursement or coverage for such drugs, procedures and supplies for such plan members, and provided further that no person receiving registry information shall redisclose such information except to other personnel who are directly involved in approving or disapproving reimbursement or coverage for such drugs, procedures and supplies.

d. No official, agency, authorized person or entity, whether public or private, shall be subject to any civil or criminal liability for damages for any decision or action made in the ordinary course of business of that official, agency, authorized person or entity pursuant to paragraphs b and c of this subdivision, provided that such official, agency, authorized person or entity acted reasonably and in good faith with respect to such registry information.

e. The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article.

3. The division shall develop a standardized registration form to be made available to the appropriate authorities and promulgate rules and regulations to implement the provisions of this section. Such form shall be written in clear and concise language and shall advise the sex offender of his or her duties and obligations under this article.

4. The division shall mail a nonforwardable verification form to the last reported address of the person for annual verification requirements.

5. The division shall also establish and operate a telephone number as provided for in section one hundred sixty-eight-p of this article.

6. The division shall also establish a subdirectory pursuant to section one hundred sixty-eight-q of this article.

7. The division shall also establish a public awareness campaign to advise the public of the provisions of this article.

8. The division shall charge a fee of ten dollars each time a sex offender registers any change of address or any change of his or her status of enrollment, attendance, employment or residence at any institution of higher education as required by subdivision four of section one hundred sixty-eight-f of this article. The fee shall be paid to the division by the sex offender. The state comptroller is hereby authorized to deposit such fees into the general fund.

9. The division shall, upon the request of any children's camp operator, release to such person any information in the registry relating to a prospective employee of any such person or entity in accordance with the provisions of this article. The division shall promulgate rules and regulations relating to procedures for the release of information in the registry to such persons.

10. The division shall, upon the request of any authorized internet entity, release to such entity internet identifiers that would enable such entity to prescreen or remove sex offenders from its services or, in conformity with state and federal law, advise law enforcement and/or other governmental entities of potential violations of law and/or threats to public safety. Before releasing any information the division shall require an

authorized internet entity that requests information from the registry to submit to the division the name, address and telephone number of such entity and the specific legal nature and corporate status of such entity. Except for the purposes specified in this subdivision, an authorized internet entity shall not publish or in any way disclose or redisclose any information provided to it by the division pursuant to this subdivision. The division may charge an authorized internet entity a fee for access to registered internet identifiers requested by such entity pursuant to this subdivision. The division shall promulgate rules and regulations relating to procedures for the release of information in the registry, including but not limited to, the disclosure and redisclosure of such information, and the imposition of any fees.

11. The division shall promptly notify each sex offender whose term of registration and verification would otherwise have expired prior to March thirty-first, two thousand seven of the continuing duty to register and verify under this article.

12. The division shall make registry information regarding level two and three sex offenders available to municipal housing authorities, as established pursuant to article three of the public housing law, to enable such authorities to identify persons ineligible to reside in public housing. The division shall, at least monthly, release to each municipal housing authority information about level two and three sex offenders with a home address and/or expected place of domicile within the corresponding municipality. The division may promulgate rules and regulations relating to procedures for the release of information in the registry to such authorities.

§ 168-c. Sex offender; relocation; notification

1. In the case of any sex offender, it shall be the duty of the department, hospital or local correctional facility at least ten calendar days prior to the release or discharge of any sex offender from a correctional facility, hospital or local correctional facility to notify the division of the contemplated release or discharge of such sex offender, informing the division in writing on a form provided by the division indicating the address at which he or she proposes to reside and the name and address of any institution of higher education at which he or she expects to be enrolled, attending or employed, whether for compensation or not, and whether he or she resides in or will reside in a facility owned or operated by such institution. If such sex offender changes his or her place of residence while on parole, such notification of the change of residence shall be sent by the sex offender's parole officer within forty-eight hours to the division on a form provided by the division. If such sex offender changes the status of his or her enrollment, attendance, employment or residence at any institution of higher education while on parole, such notification of the change of status shall be sent by the sex offender's parole officer within forty-eight hours to the division on a form provided by the division.

2. In the case of any sex offender on probation, it shall be the duty of the sex offender's probation officer to notify the division within forty-eight hours of the new place of residence on a form provided by the division. If such sex offender changes the status of his or her enrollment, attendance, employment or residence at any institution of higher education while on probation, such notification of the change of status shall be sent by the sex offender's probation officer within forty-eight hours to the division on a form provided by the division.

3. In the case in which any sex offender escapes from a state or local correctional facility or hospital, the designated official of the facility or hospital where the person was confined shall notify within twenty-four hours the law enforcement agency having had jurisdiction at the time of his or her conviction, informing such law enforcement agency of the name and aliases of the person, and the address at which he or she resided at the time of his or her conviction, the amount of time remaining to be served, if any, on the full term for which he or she was sentenced, and the nature of the crime for which he or she was sentenced, transmitting at the same time a copy of such sex offender's fingerprints and photograph and a summary of his or her criminal record.

4. The division shall provide general information, in registration materials and annual correspondence, to registrants concerning notification and registration procedures that may apply if the registrant is authorized to relocate and relocates to another state or United States possession, or commences employment or attendance at an education institution in another state or United States possession. Such information shall include addresses and telephone numbers for relevant agencies from which additional information may be obtained.

§ 168-d. Duties of the court

1.
(a) Except as provided in paragraphs (b) and (c) of this subdivision, upon conviction of any of the offenses set forth in subdivision two or three of section one hundred sixty-eight-a of this article the court shall certify that the person is a sex offender and shall include the certification in the order of commitment, if any, and judgment of conviction, except as provided in paragraph (e) of subdivision two of section one hundred sixty-eight-a of this article. The court shall also advise the sex offender of his or her duties under this article. Failure to include the certification in the order of commitment or

the judgment of conviction shall not relieve a sex offender of the obligations imposed by this article.

(b) Where a defendant stands convicted of an offense defined in paragraph (b) of subdivision two of section one hundred sixty-eight-a of this article or where the defendant was convicted of patronizing a person for prostitution in the third degree under section 230.04 of the penal law and the defendant controverts an allegation that the victim of such offense was less than eighteen years of age or, in the case of a conviction under section 230.04 of the penal law, less than seventeen years of age, the court, without a jury, shall, prior to sentencing, conduct a hearing, and the people may prove by clear and convincing evidence that the victim was less than eighteen years old or less than seventeen years old, as applicable, by any evidence admissible under the rules applicable to a trial of the issue of guilt. The court in addition to such admissible evidence may also consider reliable hearsay evidence submitted by either party provided that it is relevant to the determination of the age of the victim. Facts concerning the age of the victim proven at trial or ascertained at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated. At the conclusion of the hearing, or if the defendant does not controvert an allegation that the victim of the offense was less than eighteen years old or less than seventeen years old, as applicable, the court must make a finding and enter an order setting forth the age of the victim. If the court finds that the victim of such offense was under eighteen years old or under seventeen years old, as applicable, the court shall certify the defendant as a sex offender, the provisions of paragraph (a) of this subdivision shall apply and the defendant shall register with the division in accordance with the provisions of this article.

(c) Where a defendant stands convicted of an offense defined in paragraph (c) of subdivision two of section one hundred sixty-eight-a of this article and the defendant controverts an allegation that the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, the court, without a jury, shall, prior to sentencing, conduct a hearing, and the people may prove by clear and convincing evidence that the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, by any evidence admissible under the rules applicable to a trial of the issue of guilt. The court in addition to such admissible evidence may also consider reliable hearsay evidence submitted by either party provided that it is relevant to the determination of whether the defendant was previously

convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law. At the conclusion of the hearing, or if the defendant does not controvert an allegation that the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, the court must make a finding and enter an order determining whether the defendant was previously convicted of a sex offense or a sexually violent offense defined in this article or has previously been convicted of or convicted for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law. If the court finds that the defendant has such a previous conviction, the court shall certify the defendant as a sex offender, the provisions of paragraph (a) of this subdivision shall apply and the defendant shall register with the division in accordance with the provisions of this article.

2. Any sex offender, who is released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge shall, prior to such release or discharge, be informed of his or her duty to register under this article by the court in which he or she was convicted. At the time sentence is imposed, such sex offender shall register with the division on a form prepared by the division. The court shall require the sex offender to read and sign such form and to complete the registration portion of such form. The court shall on such form obtain the address where the sex offender expects to reside upon his or her release, and the name and address of any institution of higher education he or she expects to be employed by, enrolled in, attending or employed, whether for compensation or not, and whether he or she expects to reside in a facility owned or operated by such an institution, and shall report such information to the division. The court shall give one copy of the form to the sex offender and shall send two copies to the division which shall forward the information to the law enforcement agencies having jurisdiction. The court shall also notify the district attorney and the sex offender of the date of the determination proceeding to be held pursuant to subdivision three of this section, which shall be held at least forty-five days after such notice is given. This notice shall include the following statement or a substantially similar statement: "This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long

you must register as a sex offender and how much information can be provided to the public concerning your registration. If you fail to appear at this proceeding, without sufficient excuse, it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney." The court shall also advise the sex offender that he or she has a right to a hearing prior to the court's determination, that he or she has the right to be represented by counsel at the hearing and that counsel will be appointed if he or she is financially unable to retain counsel. If the sex offender applies for assignment of counsel to represent him or her at the hearing and counsel was not previously assigned to represent the sex offender in the underlying criminal action, the court shall determine whether the offender is financially unable to retain counsel. If such a finding is made, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. Where the court orders a sex offender released on probation, such order must include a provision requiring that he or she comply with the requirements of this article. Where such sex offender violates such provision, probation may be immediately revoked in the manner provided by article four hundred ten of the criminal procedure law.

3. For sex offenders released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge, it shall be the duty of the court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. At least fifteen days prior to the determination proceeding, the district attorney shall provide to the court and the sex offender a written statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations. The court shall allow the sex offender to appear and be heard. The state shall appear by the district attorney, or his or her designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence. Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from any state or local facility, hospital, institution, office, agency, department or division. Such materials may be obtained by subpoena if not voluntarily provided to the requesting party. In making the determinations, the court shall review

any victim's statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the court may consider reliable hearsay evidence submitted by either party provided that it is relevant to the determinations. Facts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated. 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. A copy of the order shall be submitted by the court to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute. Either party may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

4. If a sex offender, having been given notice, including the time and place of the determination proceeding in accordance with this section, fails to appear at this proceeding, without sufficient excuse, the court shall conduct the hearing and make the determinations in the manner set forth in subdivision three of this section.

§ 168-e. Discharge of sex offender from correctional facility; duties of official in charge

1. Any sex offender, to be discharged, paroled, released to post-release supervision or released from any state or local correctional facility, hospital or institution where he or she was confined or committed, shall at least fifteen calendar days prior to discharge, parole or release, be informed of his or her duty to register under this article, by the facility in which he or she was confined or committed. The facility shall require the sex offender to read and sign such form as may be required by the division stating the duty to register and the procedure for registration has been explained to him or her and to complete the registration portion of such form. The facility shall obtain on such form the address where the sex offender expects to reside upon his or her discharge, parole or release and the name and address of any institution of higher education he or she expects to be employed by, enrolled in, attending or employed, whether for compensation or not, and whether he or she expects to reside in a facility owned or operated by such

an institution, and shall report such information to the division. The facility shall give one copy of the form to the sex offender, retain one copy and shall send one copy to the division which shall provide the information to the law enforcement agencies having jurisdiction. The facility shall give the sex offender a form prepared by the division, to register with the division at least fifteen calendar days prior to release and such form shall be completed, signed by the sex offender and sent to the division by the facility at least ten days prior to the sex offender's release or discharge.

2. The division shall also immediately transmit the conviction data and fingerprints to the Federal Bureau of Investigation if not already obtained.

§ 168-f. Duty to register and to verify

1. Any sex offender shall, (a) at least ten calendar days prior to discharge, parole, release to post-release supervision or release from any state or local correctional facility, hospital or institution where he or she was confined or committed, or, (b) at the time sentence is imposed for any sex offender released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge, register with the division on a form prepared by the division.

2. For a sex offender required to register under this article on each anniversary of the sex offender's initial registration date during the period in which he is required to register under this section the following applies:
(a) The sex offender shall mail the verification form to the division within ten calendar days after receipt of the form.
(b) The verification form shall be signed by the sex offender, and state that he still resides at the address last reported to the division.
(b-1) If the sex offender has been given a level two or three designation, such offender shall sign the verification form, and state that he or she still is employed at the address last reported to the division.
(b-2) If the sex offender has been given a level three designation, he or she shall personally appear at the law enforcement agency having jurisdiction within twenty days of the first anniversary of the sex offender's initial registration and every year thereafter during the period of registration for the purpose of providing a current photograph of such offender. The law enforcement agency having jurisdiction shall photograph the sex offender and shall promptly forward a copy of such photograph to the division. For purposes of this paragraph, if such sex offender is confined in a state or local correctional facility, the local law enforcement agency having jurisdiction

shall be the warden, superintendent, sheriff or other person in charge of the state or local correctional facility.
(b-3) If the sex offender has been given a level one or level two designation, he or she shall personally appear at the law enforcement agency having jurisdiction within twenty days of the third anniversary of the sex offender's initial registration and every three years thereafter during the period of registration for the purpose of providing a current photograph of such offender. The law enforcement agency having jurisdiction shall photograph the sex offender and shall promptly forward a copy of such photograph to the division. For purposes of this paragraph, if such sex offender is confined in a state or local correctional facility, the local law enforcement agency having jurisdiction shall be the warden, superintendent, sheriff or other person in charge of the state or local correctional facility.
(c) If the sex offender fails to mail the signed verification form to the division within ten calendar days after receipt of the form, he or she shall be in violation of this section unless he proves that he or she has not changed his or her residence address.
(c-1) If the sex offender, to whom a notice has been mailed at the last reported address pursuant to paragraph b of subdivision one of section one hundred sixty-eight-b of this article, fails to personally appear at the law enforcement agency having jurisdiction, as provided in paragraph (b-2) or (b-3) of this subdivision, within twenty days of the anniversary of the sex offender's initial registration, or an alternate later date scheduled by the law enforcement agency having jurisdiction, he or she shall be in violation of this section. The duty to personally appear for such updated photograph shall be temporarily suspended during any period in which the sex offender is confined in any hospital or institution, and such sex offender shall personally appear for such updated photograph no later than ninety days after release from such hospital or institution, or an alternate later date scheduled by the law enforcement agency having jurisdiction.

3. The provisions of subdivision two of this section shall be applied to a sex offender required to register under this article except that such sex offender designated as a sexual predator or having been given a level three designation must personally verify his or her address with the local law enforcement agency every ninety calendar days after the date of release or commencement of parole or post-release supervision, or probation, or release on payment of a fine, conditional discharge or unconditional discharge. At such time the law enforcement agency having jurisdiction may take a new photograph of such sex offender if it appears that the offender has had a change in appearance since the most recent photograph taken pursuant to paragraph (b-2) of subdivision two of this section. If such

photograph is taken, the law enforcement agency shall promptly forward a copy of such photograph to the division. The duty to personally verify shall be temporarily suspended during any period in which the sex offender is confined to any state or local correctional facility, hospital or institution and shall immediately recommence on the date of the sex offender's release.

4. Any sex offender shall register with the division no later than ten calendar days after any change of address, internet accounts with internet access providers belonging to such offender, internet identifiers that such offender uses, or his or her status of enrollment, attendance, employment or residence at any institution of higher education. A fee of ten dollars, as authorized by subdivision eight of section one hundred sixty-eight-b of this article, shall be submitted by the sex offender each time such offender registers any change of address or any change of his or her status of enrollment, attendance, employment or residence at any institution of higher education. Any failure or omission to submit the required fee shall not affect the acceptance by the division of the change of address or change of status.

5. The duty to register under the provisions of this article shall not be applicable to any sex offender whose conviction was reversed upon appeal or who was pardoned by the governor.

6. Any nonresident worker or nonresident student, as defined in subdivisions fourteen and fifteen of section one hundred sixty-eight-a of this article, shall register his or her current address and the address of his or her place of employment or educational institution attended with the division within ten calendar days after such nonresident worker or nonresident student commences employment or attendance at an educational institution in the state. Any nonresident worker or nonresident student shall notify the division of any change of residence, employment or educational institution address no later than ten days after such change. The division shall notify the law enforcement agency where the nonresident worker is employed or the educational institution is located that a nonresident worker or nonresident student is present in that agency's jurisdiction.

§ 168-g. Prior convictions; duty to inform and register

1. The department or office of probation and correctional alternatives in accordance with risk factors pursuant to section one hundred sixty-eight-l of this article shall determine the duration of registration and notification for every sex offender who on the effective date of this article is then on community supervision or probation for an offense provided for in subdivision two or three of section one hundred sixty-eight-a of this article.

2. Every sex offender who on the effective date of this article is then on community supervision or probation for an offense provided for in subdivision two or three of section one hundred sixty-eight-a of this article shall within ten calendar days of such determination register with his parole or probation officer. On each anniversary of the sex offender's initial registration date thereafter, the provisions of section one hundred sixty-eight-f of this article shall apply. Any sex offender who fails or refuses to so comply shall be subject to the same penalties as otherwise provided for in this article which would be imposed upon a sex offender who fails or refuses to so comply with the provisions of this article on or after such effective date.

3. It shall be the duty of the parole or probation officer to inform and register such sex offender according to the requirements imposed by this article. A parole or probation officer shall give one copy of the form to the sex offender and shall, within three calendar days, send two copies electronically or otherwise to the department which shall forward one copy electronically or otherwise to the law enforcement agency having jurisdiction where the sex offender resides upon his or her community supervision, probation, or local conditional release.

4. A petition for relief from this section is permitted to any sex offender required to register while released to community supervision or probation pursuant to section one hundred sixty-eight-o of this article.

§ 168-h. Duration of registration and verification

1. The duration of registration and verification for a sex offender who has not been designated a sexual predator, or a sexually violent offender, or a predicate sex offender, and who is classified as a level one risk, or who has not yet received a risk level classification, shall be annually for a period of twenty years from the initial date of registration.

2. The duration of registration and verification for a sex offender who, on or after March eleventh, two thousand two, is designated a sexual predator, or a sexually violent offender, or a predicate sex offender, or who is classified as a level two or level three risk, shall be annually for life. Notwithstanding the foregoing, a sex offender who is classified as a level two risk and who is not designated a sexual predator, a sexually violent offender or a predicate sex offender, may be relieved of the duty to register and verify as provided by subdivision one of section one hundred sixty-eight-o of this article.

3. Any sex offender having been designated a level three risk or a sexual predator shall also personally verify his or her address every ninety calendar days with the local law enforcement agency having jurisdiction where the offender resides.

§ 168-i. Registration and verification requirements

Registration and verification as required by this article shall consist of a statement in writing signed by the sex offender giving the information that is required by the division and the division shall enter the information into an appropriate electronic data base or file.

§ 168-j. Notification of local law enforcement agencies of change of address

1. Upon receipt of a change of address by a sex offender required to register under this article, but in any event no more than two business days after such receipt, the division shall notify the local law enforcement agency having jurisdiction of the new place of residence and the local law enforcement agency where the sex offender last resided of the new place of residence.

2. Upon receipt of change of address information, the local law enforcement agency having jurisdiction of the new place of residence shall adhere to the notification provisions set forth in subdivision six of section one hundred sixty-eight-l of this article.

3. The division shall, if the sex offender changes residence to another state, notify the appropriate agency within that state of the new place of residence.

4. Upon receipt of a change in the status of the enrollment, attendance, employment or residence at an institution of higher education by a sex offender required to register under this article, but in any event no more than two business days after such receipt, the division shall notify each law enforcement agency having jurisdiction which is affected by such change.

5. Upon receipt of change in the status of the enrollment, attendance, employment or residence at an institution of higher education by a sex offender required to register under this article, each law enforcement agency having jurisdiction shall adhere to the notification provisions set forth in subdivision six of section one hundred sixty-eight-l of this article.

§ 168-k. Registration for change of address from another state

1. A sex offender who has been convicted of an offense which requires registration under paragraph (d) of subdivision two or paragraph (b) of subdivision three of section one hundred sixty-eight-a of this article shall notify the division of the new address no later than ten calendar days after such sex offender establishes residence in this state.

2. The division shall advise the board that the sex offender has established residence in this state. The board shall determine whether the sex offender is required to register with the division. If it is determined that the sex offender is required to register, the division shall notify the sex offender of his or her duty to register under this article and shall require the sex offender to sign a form as may be required by the division acknowledging that the duty to register and the procedure for registration has been explained to the sex offender. The division shall obtain on such form the address where the sex offender expects to reside within the state and the sex offender shall retain one copy of the form and send two copies to the division which shall provide the information to the law enforcement agency having jurisdiction where the sex offender expects to reside within this state. No later than thirty days prior to the board making a recommendation, the sex offender shall be notified that his or her case is under review and that he or she is permitted to submit to the board any information relevant to the review. After reviewing any information obtained, and applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article, the board shall within sixty calendar days make a recommendation regarding the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. This recommendation shall be confidential and shall not be available for public inspection. It shall be submitted by the board to the county court or supreme court and to the district attorney in the county of residence of the sex offender and to the sex offender. It shall be the duty of the county court or supreme court in the county of residence of the sex offender, applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article, to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. At least thirty days prior to the determination proceeding, such court shall notify the district attorney and the sex offender, in writing,

of the date of the determination proceeding and the court shall also provide the district attorney and sex offender with a copy of the recommendation received from the board and any statement of the reasons for the recommendation received from the board. This notice shall include the following statement or a substantially similar statement: "This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. If you fail to appear at this proceeding, without sufficient excuse, it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney." The court shall also advise the sex offender that he or she has a right to a hearing prior to the court's determination, that he or she has the right to be represented by counsel at the hearing and that counsel will be appointed if he or she is financially unable to retain counsel. A returnable form shall be enclosed in the court's notice to the sex offender on which the sex offender may apply for assignment of counsel. If the sex offender applies for assignment of counsel and the court finds that the offender is financially unable to retain counsel, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. 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. The court shall allow the sex offender to appear and be heard. The state shall appear by the district attorney, or his or her designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence. It shall be the duty of the court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from

the state board of examiners of sex offenders or any state or local facility, hospital, institution, office, agency, department or division. Such materials may be obtained by subpoena if not voluntarily provided to the requesting party. In making the determinations the court shall review any victim's statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the recommendation and any material submitted by the board, and may consider reliable hearsay evidence submitted by either party, provided that it is relevant to the determinations. If available, facts proven at trial or elicited at the time of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated. 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. A copy of the order shall be submitted by the court to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute. Either party may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

3. The division shall undertake an information campaign designed to provide information to officials and appropriate individuals in other states and United States possessions concerning the notification procedures required by this article. Such information campaign shall be ongoing, and shall include, but not be limited to, letters, notice forms and similar materials providing relevant information about this article and the specific procedures required to effect notification. Such materials shall include an address and telephone number which such officials and individuals in other states and United States possessions may use to obtain additional information.

4. If a sex offender, having been given notice, including the time and place of the determination proceeding in accordance with this section, fails to appear at this proceeding, without sufficient excuse, the court shall conduct the hearing and make the determinations in the manner set forth in subdivision two of this section.

§ 168-l. Board of examiners of sex offenders

1. There shall be a board of examiners of sex offenders which shall possess the powers and duties hereinafter specified. Such board shall consist of five members appointed by the governor. All members shall be employees of the department and shall be experts in the field of the behavior and treatment of sex offenders. The term of office of each member of such board shall be for six years; provided, however, that any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the remainder of the unexpired term of the member whom he or she is to succeed. In the event of the inability to act of any member, the governor may appoint some competent informed person to act in his or her stead during the continuance of such disability.
2. The governor shall designate one of the members of the board as chairman to serve in such capacity at the pleasure of the governor or until the member's term of office expires and a successor is designated in accordance with law, whichever first occurs.
3. Any member of the board may be removed by the governor for cause after an opportunity to be heard.
4. Except as otherwise provided by law, a majority of the board shall constitute a quorum for the transaction of all business of the board.
5. The board shall develop guidelines and procedures to assess the risk of a repeat offense by such sex offender and the threat posed to the public safety. Such guidelines shall be based upon, but not limited to, the following:
(a) criminal history factors indicative of high risk of repeat offense, including:
(i) whether the sex offender has a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses;
(ii) whether the sex offender's conduct was found to be characterized by repetitive and compulsive behavior, associated with drugs or alcohol;
(iii) whether the sex offender served the maximum term;
(iv) whether the sex offender committed the felony sex offense against a child;
(v) the age of the sex offender at the time of the commission of the first sex offense;
(b) other criminal history factors to be considered in determining risk, including:
(i) the relationship between such sex offender and the victim;
(ii) whether the offense involved the use of a weapon, violence or infliction of serious bodily injury;
(iii) the number, date and nature of prior offenses;
(c) conditions of release that minimize risk or [of]* re-offense, including but not limited to whether the sex offender is under supervision; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision;
(d) physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness;
(e) whether psychological or psychiatric profiles indicate a risk of recidivism;
(f) the sex offender's response to treatment;
(g) recent behavior, including behavior while confined;
(h) recent threats or gestures against persons or expressions of intent to commit additional offenses; and
(i) review of any victim impact statement.

6. Applying these guidelines, the board shall within sixty calendar days prior to the discharge, parole, release to post-release supervision or release of a sex offender make a recommendation which shall be confidential and shall not be available for public inspection, to the sentencing court as to whether such sex offender warrants the designation of sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. In addition, the guidelines shall be applied by the board to make a recommendation to the sentencing court which shall be confidential and shall not be available for public inspection, providing for one of the following three levels of notification depending upon the degree of the risk of re-offense by the sex offender.

(a) If the risk of repeat offense is low, a level one designation shall be given to such sex offender. In such case the law enforcement agency or agencies having jurisdiction and the law enforcement agency or agencies having had jurisdiction at the time of his or her conviction shall be notified and may disseminate relevant information which may include a photograph and description of the offender and which may include the name of the sex offender, approximate address based on sex offender's zip code, background information including the offender's crime of conviction, modus of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled, attends, is employed or resides and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at its discretion.

(b) If the risk of repeat offense is moderate, a level two designation shall be given to such sex offender. In such case the law enforcement agency or agencies having jurisdiction and the law enforcement agency or agencies having had jurisdiction at the time of his or her conviction shall be notified and may disseminate relevant information which shall include a photograph and description of the offender and which may include the exact name and any aliases used by the sex offender, exact address, background information including the offender's crime of conviction, mode of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled, attends, is employed or resides and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at its discretion. In addition, in such case, the information described herein shall also be provided in the subdirectory established in this article and notwithstanding any other provision of law, such information shall, upon request, be made available to the public. Such law enforcement agencies shall compile, maintain and update a listing of vulnerable organizational entities within its jurisdiction. Such listing shall be utilized for notification of such organizations in disseminating such information on level two sex offenders pursuant to this paragraph. Such listing shall include and not be limited to: superintendents of schools or chief school administrators, superintendents of parks, public and private libraries, public and private school bus transportation companies, day care centers, nursery schools, preschools, neighborhood watch groups, community

centers, civic associations, nursing homes, victim's advocacy groups and places of worship.

(c) If the risk of repeat offense is high and there exists a threat to the public safety a level three designation shall be given to such sex offender. In such case, the law enforcement agency or agencies having jurisdiction and the law enforcement agency or agencies having had jurisdiction at the time of his or her conviction shall be notified and may disseminate relevant information which shall include a photograph and description of the offender and which may include the sex offender's exact name and any aliases used by the offender, exact address, address of the offender's place of employment, background information including the offender's crime of conviction, mode of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled, attends, is employed or resides and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at its discretion. In addition, in such case, the information described herein shall also be provided in the subdirectory established in this article and notwithstanding any other provision of law, such information shall, upon request, be made available to the public. Such law enforcement agencies shall compile, maintain and update a listing of vulnerable organizational entities within its jurisdiction. Such listing shall be utilized for notification of such organizations in disseminating such information on level three sex offenders pursuant to this paragraph. Such listing shall include and not be limited to: superintendents of schools or chief school administrators, superintendents of parks, public and private libraries, public and private school bus transportation companies, day care centers, nursery schools, preschools, neighborhood watch groups, community centers, civic associations, nursing homes, victim's advocacy groups and places of worship.

7. Upon request by the court, pursuant to section one hundred sixty-eight-o of this article, the board shall provide an updated report pertaining to the sex offender petitioning for relief of the duty to register or for a modification of his or her level of notification.

8. A failure by a state or local agency or the board to act or by a court to render a determination within the time period specified in this article shall not affect the obligation of the sex offender to register or verify under this article nor shall such failure prevent a court from making a determination regarding the sex offender's level of notification and whether such offender is required by law to be registered for a period of twenty years or for life. Where a court is unable to make a determination prior to the date scheduled for a sex offender's discharge, parole, release to post-release supervision or release, it shall adjourn the hearing until after the offender is discharged, paroled, released to post-release supervision or released, and shall then expeditiously complete the hearing and issue its determination.

§ 168-m. Review

Notwithstanding any other provision of law to the contrary, any state or local correctional facility, hospital or institution, district attorney, law enforcement

agency, probation department, state board of parole, court or child protective agency shall forward relevant information pertaining to a sex offender to be discharged, paroled, released to post-release supervision or released to the board for review no later than one hundred twenty days prior to the release or discharge and the board shall make recommendations as provided in subdivision six of section one hundred sixty-eight-l of this article within sixty days of receipt of the information. Information may include, but may not be limited to all or a portion of the arrest file, prosecutor's file, probation or parole file, child protective file, court file, commitment file, medical file and treatment file pertaining to such person. Such person shall be permitted to submit to the board any information relevant to the review. Upon application of the sex offender or the district attorney, the court shall seal any portion of the board's file pertaining to the sex offender that contains material that is confidential under any state or federal law; provided, however, that in any subsequent proceedings in which the sex offender who is the subject of the sealed record is a party and which requires the board to provide a recommendation to the court pursuant to this article, such sealed record shall be available to the sex offender, the district attorney, the court and the attorney general where the attorney general is a party, or represents a party, in the proceeding.

§ 168-n. Judicial determination

1. A determination that an offender is a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article shall be made prior to the discharge, parole, release to post-release supervision or release of such offender by the sentencing court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article after receiving a recommendation from the board pursuant to section one hundred sixty-eight-l of this article.
2. In addition, applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article, the sentencing court shall also make a determination with respect to the level of notification, after receiving a recommendation from the board pursuant to section one hundred sixty-eight-l of this article. Both determinations of the sentencing court shall be made thirty calendar days prior to discharge, parole or release.
3. No later than thirty days prior to the board's recommendation, the sex offender shall be notified that his or her case is under review and that he or she is permitted to submit to the board any information relevant to the review. Upon receipt of the board's recommendation, the sentencing court shall determine whether the sex offender was previously found to be eligible for assigned counsel in the underlying case. Where such a finding was previously made, the court shall assign counsel to represent the offender,

pursuant to article eighteen-B of the county law. At least twenty days prior to the determination proceeding, the sentencing court shall notify the district attorney, the sex offender and the sex offender's counsel, in writing, of the date of the determination proceeding and shall also provide the district attorney, the sex offender and the sex offender's counsel with a copy of the recommendation received from the board and any statement of the reasons for the recommendation received from the board. This notice shall include the following statement or a substantially similar statement: "This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. If you fail to appear at this proceeding, without sufficient excuse, it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney." The written notice to the sex offender shall also advise the offender that he or she has a right to a hearing prior to the court's determination, and that he or she has the right to be represented by counsel at the hearing. If counsel has been assigned to represent the offender at the determination proceeding, the notice shall also provide the name, address and telephone number of the assigned counsel. Where counsel has not been assigned, the notice shall advise the sex offender that counsel will be appointed if he or she is financially unable to retain counsel, and a returnable form shall be enclosed in the court's notice to the sex offender on which the sex offender may apply for assignment of counsel. If the sex offender applies for assignment of counsel and the court finds that the offender is financially unable to retain counsel, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. 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. The court shall allow the sex offender to appear and be heard. The state shall appear by the district attorney, or his or her designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence. Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from the state board of examiners of sex offenders or any state or local facility, hospital, institution, office, agency, department or division. Such materials may be obtained by subpoena if not voluntarily provided to the requesting party. In making the determinations the court shall review any victim's statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the recommendation and any materials submitted by the board, and may consider reliable hearsay evidence submitted by either party, provided that it is relevant to the determinations. Facts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence

and shall not be relitigated. 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. A copy of the order shall be submitted by the court to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute. Either party may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

4. Upon determination that the risk of repeat offense and threat to public safety is high, the sentencing court shall also notify the division of such fact for the purposes of section one hundred sixty-eight-q of this article.

5. Upon the reversal of a conviction of a sexual offense defined in paragraphs (a) and (b) of subdivision two or three of section one hundred sixty-eight-a of this article, the appellate court shall remand the case to the lower court for entry of an order directing the expungement of any records required to be kept herein.

6. If a sex offender, having been given notice, including the time and place of the determination proceeding in accordance with this section, fails to appear at this proceeding, without sufficient excuse, the court shall conduct the hearing and make the determinations in the manner set forth in subdivision three of this section.

§ 168-o. Petition for relief or modification

1. Any sex offender who is classified as a level two risk, and who has not been designated a sexual predator, or a sexually violent offender, or a predicate sex offender, who is required to register or verify pursuant to this article and who has been registered for a minimum period of thirty years may be relieved of any further duty to register upon the granting of a petition for relief by the sentencing court or by the court which made the determination regarding duration of registration and level of notification. The sex offender shall bear the burden of proving by clear and convincing evidence that his or her risk of repeat offense and threat to public safety is such that registration or verification is no longer necessary. Such petition, if granted, shall not relieve the petitioner of the duty to register pursuant to this article upon conviction of any offense requiring registration in the future. Such a petition shall not be considered more than once every two years. In the event that the sex offender's petition for relief is granted, the district attorney may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and

the person may appeal as a poor person pursuant to article eighteen-B of the county law.

2. Any sex offender required to register or verify pursuant to this article may petition the sentencing court or the court which made the determination regarding the level of notification for an order modifying the level of notification. The petition shall set forth the level of notification sought, together with the reasons for seeking such determination. The sex offender shall bear the burden of proving the facts supporting the requested modification by clear and convincing evidence. Such a petition shall not be considered more than annually. In the event that the sex offender's petition to modify the level of notification is granted, the district attorney may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

3. The district attorney may file a petition to modify the level of notification for a sex offender with the sentencing court or with the court which made the determination regarding the level of notification, where the sex offender (a) has been convicted of a new crime, or there has been a determination after a proceeding pursuant to section 410.70 of the criminal procedure law or section two hundred fifty-nine-i of the executive law that the sex offender has violated one or more conditions imposed as part of a sentence of a conditional discharge, probation, parole or post-release supervision for a designated crime, and (b) the conduct underlying the new crime or the violation is of a nature that indicates an increased risk of a repeat sex offense. The petition shall set forth the level of notification sought, together with the reasons for seeking such determination. The district attorney shall bear the burden of proving the facts supporting the requested modification, by clear and convincing evidence. In the event that the district attorney's petition is granted, the sex offender may appeal as of right from the order, pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the offender upon the ground that he or she is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may proceed as a poor person, pursuant to article eighteen-B of the county law.

4. Upon receipt of a petition submitted pursuant to subdivision one, two or three of this section, the court shall forward a copy of the petition to the

board and request an updated recommendation pertaining to the sex offender and shall provide a copy of the petition to the other party. The court shall also advise the sex offender that he or she has the right to be represented by counsel at the hearing and counsel will be appointed if he or she is financially unable to retain counsel. A returnable form shall be enclosed in the court's notice to the sex offender on which the sex offender may apply for assignment of counsel. If the sex offender applies for assignment of counsel and the court finds that the offender is financially unable to retain counsel, the court shall assign counsel to represent the offender, pursuant to article eighteen-B of the county law. Where the petition was filed by a district attorney, at least thirty days prior to making an updated recommendation the board shall notify the sex offender and his or her counsel that the offender's case is under review and he or she is permitted to submit to the board any information relevant to the review. The board's updated recommendation on the sex offender shall be confidential and shall not be available for public inspection. After receiving an updated recommendation from the board concerning a sex offender, the court shall, at least thirty days prior to ruling upon the petition, provide a copy of the updated recommendation to the sex offender, the sex offender's counsel and the district attorney and notify them, in writing, of the date set by the court for a hearing on the petition. After reviewing the recommendation received from the board and any relevant materials and evidence submitted by the sex offender and the district attorney, the court may grant or deny the petition. The court may also consult with the victim prior to making a determination on the petition. The court shall render an order setting forth its determination, and the findings of fact and conclusions of law on which the determination is based. If the petition is granted, it shall be the obligation of the court to submit a copy of its order to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute.

§ 168-p. Special telephone number

1. Pursuant to section one hundred sixty-eight-b of this article, the division shall also operate a telephone number that members of the public may call free of charge and inquire whether a named individual required to register pursuant to this article is listed. The division shall ascertain whether a named person reasonably appears to be a person so listed and provide the caller with the relevant information according to risk as described in subdivision six of section one hundred sixty-eight-l of this article. The

division shall decide whether the named person reasonably appears to be a person listed, based upon information from the caller providing information that shall include (a) an exact street address, including apartment number, driver's license number or birth date, along with additional information that may include social security number, hair color, eye color, height, weight, distinctive markings, ethnicity; or (b) any combination of the above listed characteristics if an exact birth date or address is not available. If three of the characteristics provided include ethnicity, hair color, and eye color, other identifying characteristics shall be provided. Any information identifying the victim by name, birth date, address or relation to the person listed by the division shall be excluded by the division.

2. When the telephone number is called, a preamble shall be played which shall provide the following information:
(a) notice that the caller's telephone number will be recorded;
(b) that there is no charge for use of the telephone number;
(c) notice that the caller is required to identify himself or herself to the operator and provide current address and shall be maintained in a written record;
(d) notice that the caller is required to be eighteen years of age or older;
(e) a warning that it is illegal to use information obtained through the telephone number to commit a crime against any person listed or to engage in illegal discrimination or harassment against such person;
(f) notice that the caller is required to have the birth date, driver's license or identification number, or address or other identifying information regarding the person about whom information is sought in order to achieve a positive identification of that person;
(g) a statement that the number is not a crime hotline and that any suspected criminal activity should be reported to local authorities;
(h) a statement that an information package which will include a description of the law and sex abuse and abduction prevention materials is available upon request from the division. Such information package shall include questions and answers regarding the most commonly asked questions about the sex offender registration act, and current sex abuse and abduction prevention material.

2-a.
(a) The division shall establish a program allowing non-profit and not-for-profit youth services organizations to pre-register with the division for use of the telephone number. Pre-registration shall include the identification of up to two officials of the organization who may call the telephone number and obtain information on behalf of the organization. A pre-registered certificate issued under this subdivision shall be valid for two years, unless earlier

revoked by the division for good cause shown. No fee shall be charged to an applicant for the issuance of a pre-registered certificate pursuant to this subdivision.
(b) An organization granted a pre-registered certificate pursuant to this subdivision may, upon calling the telephone number, inquire whether multiple named individuals are listed on the sex offender registry. Notwithstanding any per call limitation the division may place on calls by private individuals, the division shall allow such pre-registered organizations to inquire about up to twenty prospective coaches, leaders or volunteers in each call to the telephone number.
(c) For purposes of this subdivision, "youth services organization" shall mean a formalized program operated by a corporation pursuant to subparagraph five of paragraph (a) of section one hundred two of the not-for-profit corporation law that functions primarily to: (a) provide children the opportunity to participate in adult-supervised sporting activities; or (b) match children or groups of children with adult volunteers for the purpose of providing children with positive role models to enhance their development.

2-b. The division shall maintain a program allowing a transportation network company (TNC), as defined in section one thousand six hundred ninety-one of the vehicle and traffic law, to electronically submit multiple names, and other necessary identifying information as required by the division and in accordance with subdivision one of this section, of applicants applying to be TNC drivers for the purpose of determining whether such applicants are listed on the sex offender registry pursuant to this article. The division shall respond to such inquiry electronically, within four business days, and notify such TNC of any such applicant who is listed on the registry pursuant to this article. A TNC shall pre-register with the division before the electronic submission of names and shall agree in writing that information obtained by a TNC pursuant to this subdivision be used only for the purposes of determining eligibility of an applicant for a TNC permit, pursuant to sections one thousand six hundred ninety-six and one thousand six hundred ninety-nine of the vehicle and traffic law, by designated employees of such TNC and that such information shall not be distributed or disclosed except as specifically authorized by law.

3. Whenever there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of misuse of the telephone number, the attorney general, any district attorney or any person aggrieved by the misuse of the number is authorized to bring a civil action in the appropriate court requesting preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or group of persons responsible for the pattern or practice of

misuse. The foregoing remedies shall be independent of any other remedies or procedures that may be available to an aggrieved party under other provisions of law. Such person or group of persons shall be subject to a fine of not less than five hundred dollars and not more than one thousand dollars.

4. The division shall submit to the legislature an annual report on the operation of the telephone number. The annual report shall include, but not be limited to, all of the following:
(a) number of calls received;
(b) a detailed outline of the amount of money expended and the manner in which it was expended for purposes of this section;
(c) number of calls that resulted in an affirmative response and the number of calls that resulted in a negative response with regard to whether a named individual was listed;
(d) number of persons listed; and
(e) a summary of the success of the telephone number program based upon selected factors.

§ 168-q. Subdirectory; internet posting

1. The division shall maintain a subdirectory of level two and three sex offenders. The subdirectory shall include the exact address, address of the offender's place of employment and photograph of the sex offender along with the following information, if available: name, physical description, age and distinctive markings. Background information including all of the sex offender's crimes of conviction that require him or her to register pursuant to this article, modus of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled, attends, is employed or resides and a description of special conditions imposed on the sex offender shall also be included. The subdirectory shall have sex offender listings categorized by county and zip code. Such subdirectory shall be made available at all times on the internet via the division homepage. Any person may apply to the division to receive automated e-mail notifications whenever a new or updated subdirectory registration occurs in a geographic area specified by such person. The division shall furnish such service at no charge to such person, who shall request e-mail notification by county and/or zip code on forms developed and provided by the division. E-mail notification is limited to three geographic areas per e-mail account.

2. Any person who uses information disclosed pursuant to this section in violation of the law shall in addition to any other penalty or fine imposed, be subject to a fine of not less than five hundred dollars and not more than one thousand dollars. Unauthorized removal or duplication of the subdirectory from the offices of local, village or city police department shall be punishable by a fine not to exceed one thousand dollars. In addition, the attorney general, any district attorney, or any person aggrieved is authorized to bring a civil action in the appropriate court requesting preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or group of persons responsible for such action. The foregoing remedies shall be independent of any other remedies or procedures that may be available to an aggrieved party under other provisions of law.

§ 168-r. Immunity from liability

1. No official, employee or agency, whether public or private, shall be subject to any civil or criminal liability for damages for any discretionary decision to release relevant and necessary information pursuant to this section, unless it is shown that such official, employee or agency acted with gross negligence or in bad faith. The immunity provided under this section applies to the release of relevant information to other employees or officials or to the general public.

2. Nothing in this section shall be deemed to impose any civil or criminal liability upon or to give rise to a cause of action against any official, employee or agency, whether public or private, for failing to release information as authorized in this section unless it is shown that such official, employee or agency acted with gross negligence or in bad faith.

§ 168-s. Annual report

The division shall on or before February first in each year file a report with the governor, and the legislature detailing the program, compliance with provisions of this article and effectiveness of the provisions of this article, together with any recommendations to further enhance the intent of this article.

§ 168-t. Penalty

Any sex offender required to register or to verify pursuant to the provisions of this article who fails to register or verify in the manner and within the time periods provided for in this article shall be guilty of a class E felony upon conviction for the first offense, and upon conviction for a second or subsequent offense shall be guilty of a class D felony. Any sex offender who violates the provisions of section one hundred sixty-eight-v of this article shall be guilty of a class A misdemeanor upon conviction for the first offense, and upon conviction for a second or subsequent offense shall be guilty of a class D felony. Any such failure to register or verify may also be the basis for revocation of parole pursuant to section two hundred fifty-nine-i of the executive law or the basis for revocation of probation pursuant to article four hundred ten of the criminal procedure law.

§ 168-u. Unauthorized release of information

The unauthorized release of any information required by this article shall be a class B misdemeanor.

§ 168-v. Prohibition of employment on motor vehicles engaged in retail sales of frozen desserts

No person required to maintain registration under this article (sex offender registration act) shall operate, be employed on or dispense goods for sale at retail on a motor vehicle engaged in retail sales of frozen desserts as defined in subdivision thirty-seven of section three hundred seventy-five of the vehicle and traffic law.

§ 168-w. Separability

If any section of this article, or part thereof shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder or any other section or part thereof.

New York State
SEX OFFENDER REGISTRATION FORM
Please Print or Type ALL Information, Instructions are on back of form

DCJS USE ONLY | LOCAL AGENCY USE ONLY (i.e., DIN)

OFFENDER INFORMATION

1. Name (Last, First, Middle)

2. Alias / Nickname / Maiden Name (Last, First, Middle) | 3. Date of Birth | 4. Sex ☐ M ☐ F ☐ U

5. Race ☐ White ☐ Black ☐ Asian ☐ Native American ☐ Unknown | 6. Ethnic Origin ☐ Non Hispanic ☐ Hispanic ☐ Unknown | 7. Height Feet Inches | 8. Weight | 9. Hair | 10. Eyes | 11. Glasses ☐ Yes ☐ No ☐ Contacts

12. Scars / Marks / Tattoos ☐ Yes ☐ No If yes, describe on Continuation/Supplemental Form | 13. Social Security # | 14. NYSID # | 15. FBI #

16. Driver's License # & State ( ) | 17. License Plate # | 18. Issuing State | 19. Vehicle Year | 20. Make | 21. Model | 22. Color

Answer the following three questions if sex offender subscribes to an internet account
23. Name(s) of Internet Service Provider(s) | 24. UserScreen Name(s) | 25. Email Address(es)

26. Institution of Higher Education (name) ☐ Attending ☐ Employed At ☐ Enrolled At | 27. Anticipated Dates of Attendance, Employment, or Enrollment From: Mo Day Yr To: Mo Day Yr

28. Institution of Higher Education Address (include City, State, Zip) | 29. County

ARREST INFORMATION

30. Arresting Agency | 31. County | 32. Date of Arrest Mo Day Yr | 33. Date of Crime Mo Day Yr

34. Sex Offender's Primary Address at Time of Arrest (Street #, Street Name, Bldg. #, Apt. #, City, State, Zip) | 35. County

36. Conviction(s) for Registration Purposes (include subsection, if applicable) | 37. Sentencing Court | 38. Docket #

39. Date of Conviction Mo Day Yr | 40. Sentence(s) Imposed of Conviction | 41. Victim(s) Age and Gender: Victim 1 Age: ____ Gender: ____ Victim 2 Age: ____ Gender: ____ Victim 3 Age: ____ Gender: ____ Victim 4 Age: ____ Gender: ____

42. Mode of Operation/Description of Offenses of Conviction (select all that apply):

a. Description of actual crime (check all that apply):	Actual	Attempted	More Than Once
Sexual intercourse	☐	☐	☐
Oral or anal sexual conduct	☐	☐	☐
Sexual contact	☐	☐	☐
Kidnapping/unlawful imprisonment	☐	☐	☐
Patronizing/promoting prostitution	☐	☐	☐
Disseminating indecent materials to a minor	☐	☐	☐
Promoting/possessing sexual performance by a child	☐	☐	☐

b. Relationship to victim(s) (select all that apply) ☐ Stranger ☐ Non-stranger ☐ Unknown ☐ Person in actual or apparent position of authority other than family member
Describe

c. Was force used or did physical assault occur? ☐ Yes ☐ No ☐ Unknown
If Yes, type: ☐ Threat ☐ Hit with hand/fist/club ☐ Coercion ☐ Immediately and physically overpowered ☐ Choked ☐ Vehicle ☐ Gagged ☐ Chemical agent ☐ Shot ☐ Other

d. Was a weapon used? ☐ Yes ☐ No ☐ Unknown If yes, type _____ | e. Was a computer/internet used? ☐ Yes ☐ No | f. Was pornography involved? ☐ Yes ☐ No

43. Supervising Agency (i.e., Probation [indicate specific county], Parole) | 44. Agency Phone # ( ) | 45. Supervising Officer (if known)

46. Max. Exp. Date of Parole/Probation | 47. Special Conditions of Release Apply ☐ Yes ☐ No (List on Continuation/Supplemental Form) | 48. Risk Level of Offender ☐ One ☐ Two ☐ Three ☐ Pending Designation: ☐ Sexual Predator ☐ Sexually Violent Offender ☐ Predicate Sex Offender ☐ Not Applicable Date Assigned: _____

49. Residence Address of Offender at Release (Street #, Street Name, Bldg. #, Apt. #, City, State, Zip) If multiple residences, describe on Continuation/Supplemental Form | 50. County | 51. Home Phone # ( )

52. Employer Address of Offender at Release (Street #, Street Name, Bldg. #, Apt. #, City, State, Zip) | 53. County

54. Notifying Agency (i.e., Name of Court, Jail, Prison) | 55. Notifying Agency Address | 56. Notifying Agency Phone # ( )

57. Signature of Notifying Officer | 58. Name and Title of Notifying Officer | 59. Earliest Possible Release Date to Community Mo Day Yr

The sex offender's signature and date of signature are required below.
I have read the back of this form. I understand I have a duty to register and my duties were explained to me.

Sex Offender's Signature | Sex Offender's Name (print) | Date

White - DCJS Yellow - Agency Pink - Offender Green - Supervising Agency

DCJS - 3230 (8/16)

PLEASE READ CAREFULLY THROUGH THE FOLLOWING SEX OFFENDER REGISTRATION ACT REQUIREMENTS. YOU ARE LEGALLY OBLIGATED TO COMPLY WITH EVERY PART OF THIS LAW; FAILURE TO DO SO IS A CRIME.

1. You must register with the Division of Criminal Justice Services (DCJS) prior to your release from prison or jail, or at the time that you receive a sentence in court of probation or a conditional or unconditional discharge, or a fine. You must register by fully completing, signing, dating and sending this form to DCJS.

2. You must notify DCJS in writing of any change of your address no later than 10 days after you move. You must register any and all addresses, wherever located, with DCJS. Change of Address forms are available at your local police agency, parole or probation office, or from DCJS.

3. You must verify your address in writing every year while you are registered as a sex offender. You must register any and all addresses, wherever located, with DCJS. DCJS will mail an Address Verification Form to your primary address. You must sign, date and return the form to DCJS within 10 days after receipt of the form.

4. If you are assigned a risk level 3 or are designated a sexual predator, you must also verify your address by appearing in person at your local police agency every 90 days. In addition, you must annually report your address to DCJS as noted in #3 above.

5. If you are assigned a risk level 2 or 3 you are required to provide DCJS with your employer's address. Any change to this information must be reported to DCJS in writing no later than 10 days after the change.

6. You are required to provide DCJS with any e-mail addresses and screen names that you use and your internet accounts including internet service provider(s) information. Any changes or additions to this information must be reported to DCJS in writing no later than 10 days after the change.

7. You must have your photograph taken at your local police agency as follows:
Risk Level 1 and Risk Level 2 – every 3 years; Risk Level 3 – every year
DCJS will send a letter to your primary address notifying you of this obligation prior to your photo being due.

8. You must notify DCJS in writing if you attend, enroll in, reside at or work at any institution of higher education. Any changes regarding an institution of higher education must be reported to DCJS in writing no later than 10 days after such change.

9. You may be required to provide fingerprints or any other information necessary for compliance with the law.

NOTE: If you move to, work in or attend school in another state or country, you may be required to register as a sex offender in that state or country. It is your responsibility to check state/country laws.

Your failure to comply with any of these legal obligations may result in your being convicted of a class E felony for the first failure. Conviction of a second offense will be a class D felony.

Failure to comply with these requirements may also result in revocation of probation or parole if you are under supervision.

SEND DCJS COPY TO: NYS Sex Offender Registry, Division of Criminal Justice Services, Alfred E. Smith Building
80 South Swan Street, Albany, NY 12210

POR FAVOR LEA DETENIDAMENTE HASTA EL FINAL LOS SIGUIENTES REQUISITOS DE LA LEY DE INSCRIPCIÓN DE DELINCUENTES SEXUALES. USTED TIENE LA OBLIGACIÓN LEGAL DE ACATAR CADA PARTE DE ESTA LEY; SI NO CUMPLE CON ELLO, COMETE UN CRIMEN.

1. Debe inscribirse ante la División de Servicios de Justicia Penal (DCJS, por sus siglas en inglés) antes de su excarcelación, o en el momento en que reciba una sentencia en el tribunal de libertad a prueba o libertad condicional o incondicional, o una multa. Debe inscribirse llenando completamente este formulario, firmándolo, fechándolo y enviándolo a DCJS.

2. Debe notificar por escrito a DCJS sobre cualquier cambio en su dirección, a más tardar diez (10) después de mudarse. Debe registrar cualquier y todas las direcciones de donde estén ubicados, con DCJS. Los formularios de cambio de dirección están a su disposición en su comisaría de policía local, en la oficina de libertad condicional o en la oficina de libertad a prueba, o en la DCJS.

3. Debe verificar por escrito su dirección todos los años mientras esté inscrito(a) como delincuente sexual. Debe registrar cualquier y todas las direcciones de donde estén ubicados, con DCJS. DCJS le enviará por correo un formulario de verificación de direcciones a su dirección principal. Debe firmar, fechar y devolver el formulario a DCJS dentro de un plazo de diez (10) días después de recibir el formulario.

4. Si le asignan un nivel de riesgo 3 o le(a) designan depredador(a) sexual, también debe verificar su dirección compareciendo en persona en su comisaría de policía local cada noventa (90) días. Además, debe informar anualmente su dirección a DCJS, de conformidad con lo estipulado en el # 3 anteriormente citado.

5. En caso de que se le asigne un nivel de riesgo de 2 ó 3, se le pedirá indicar a DCJS la dirección de su empleador. Cualquier cambio a esta información deberá ser reportado por escrito al DCJS dentro de los 10 días siguientes al cambio.

6. Tiene la obligación de suministrar a DCJS cualquier dirección electrónica y nombre de usuario(a) en Internet que utilice, así como sus cuentas de Internet, incluyendo información de proveedor(es) de servicio de Internet. Cualquier cambio o adiciones a esta información deben informarse por escrito a DCJS a más tardar diez (10) días después del cambio.

7. Debe hacer que le tomen una fotografía en su comisaría de policía local de la siguiente manera.
Nivel de riesgo 1 y Nivel de riesgo 2: cada tres (3) años; Nivel de riesgo 3: todos los años
DCJS le enviará una carta a su dirección principal inscrita notificándole este compromiso antes de que se venza el plazo de la foto.

8. Debe notificar por escrito a DCJS si asiste, se matricula, reside o trabaja en cualquier institución de educación superior. Cualquier cambio con respecto a una institución de educación superior debe informarse por escrito a DCJS a más tardar diez (10) días después de tal cambio.

9. Es posible que le exijan suministrar huellas digitales o cualquiera otra información necesaria para cumplir con la ley.
NOTA: Si se muda, trabaja o estudia en otro estado o país, es posible que le exijan inscribirse como delincuente sexual en ese estado o país. A usted le corresponde verificar las leyes del estado y (o) del país.

El incumplimiento con cualquiera de estas obligaciones legales podría traer como consecuencia que le hallen culpable de un delito grave de clase E por su primer incumplimiento. Una sentencia condenatoria por un segundo delito será un delito grave de clase D.

Si no cumple con estos requisitos podría traer también como consecuencia la revocación de su libertad a prueba o condicional si está bajo supervisión.

ENVÍE COPIA DCJS A: NYS Sex Offender Registry, Division of Criminal Justice Services, Alfred E. Smith Building
80 South Swan Street, Albany, NY 12210

KOSTAS A. KATSAVDAKIS, PH.D., P.C.
Clinical and Forensic Psychology
164 West 80th Street
New York, NY 10024
718-926-9489 Fax: 206-350-5778

Affidavit of Kostas A. Katsavdakis, Ph.D.

I, Kostas A. Katsavdakis, Ph.D., being of full age, do hereby declare:

1. I am a psychologist licensed to practice in New York State. I am a Clinical and Forensic Psychologist in private practice and am an Adjunct Professor at John Jay College of Criminal Justice. One of my areas of expertise involves the diagnosis, evaluation and treatment of sexual offenders. I have specialized in this area for approximately 7 years.

2. I was formerly the Assistant Director of Psychology at Kirby Forensic Psychiatric Center, a maximum security forensic hospital on Ward's Island, New York City. As part of my responsibilities, I coordinated the development of an integrated assessment and treatment program for sexual offenders. In addition, I supervised clinicians completing sexual offender risk assessments, provided on-going training on the administration, scoring and interpretation of risk assessment instruments, and supervised clinicians providing group treatment. Finally, I coordinated a research study for the sexual offender assessment and treatment program.

3. I served as a staff psychologist with the Heritage Mental Health Clinic, LLC in Topeka, Kansas and The Menninger Clinic in Topeka, Kansas. As part of my responsibilities, I assessed and treated individuals, including professionals such as physicians, clergy and other professionals accused of sexual offenses. In addition, I co-authored a publication on impaired health professionals, which summarized the reasons health professionals sought evaluation and treatment.

4. Over the course of the last two years, I have made 8 presentations on the evaluation and treatment of sexual offenders for various law organizations and medical organizations/hospitals. These presentations included a review of sex offender risk assessment instruments, sex offender recidivism rates, risk factors associated with increased risk for recidivism, management of risk factors, factors lowering the risk of sex offender recidivism and the treatment for sexual offenders.

5. My forensic experience as an expert in the field of sexual offender evaluation and risk assessment is extensive. I have been qualified as a forensic expert in New York State Supreme Court. I have testified in New York State Supreme Court. I have completed numerous sexual offender risk assessments for adult offenders, which include identifying risk factors that exacerbate risk for re-offense as well as factors decreasing the risk for re-offense.

6. As part of my role as a forensic expert, I have reviewed and become familiar with the New York State Sexual Offender Registration Act (SORA) and SORA Risk Assessment Instrument. I have reviewed the Sex Offender Risk Assessment Guidelines and Commentary, General Principles, Categories and Factors. I have been asked by the Legal Aid Society – Criminal Appeals Bureau to (a) review the Sexual Offender Risk Assessment Instrument, and (b) provide my opinion regarding the validity of the Sexual Offender Registration Act Risk Assessment Instrument for adult offenders. My CV is attached.

I. New York State Risk Assessment Instrument Review and Critique of Development

1. The Sexual Offender Registration Act (Correction Law 168 et seq.) established the Board of Examiners of Sex Offenders, which was charged with the responsibility to "develop guidelines and procedures to assess the risk of a repeat offense by [a] sex offender and the threat posed to public safety" (p. 1). Based upon this risk assessment, an offender is categorized as Level 1 (low risk), Level 2 (moderate risk) or Level 3 (high risk). The

Board of Examiners developed the New York State Risk Assessment Instrument (RAI), and promulgated the "Risk Assessment Guidelines and Commentary," a document that was intended to explain the principles underlying the Risk Assessment Instrument, test construction as well as a guide for the proper administration and scoring.

2. The Sex Offender Guidelines state that "No one should attempt to assess a sex offender's level of risk without carefully studying this commentary" (p. 1). The Guidelines contain the following segments: Eleven General Principles that "underlie the guidelines and explain the specific factors included in them," and Guidelines that provide scoring instructions for the RAI. The Risk Assessment Instrument has 15 Factors that are grouped in four Categories; Current Offense [s] (7 Factors), Criminal History (4 Factors), Post-Offense Behavior (2 Factors), and Release Environment (2 Factors). Finally, the Risk Assessment Instrument includes four Overrides "that automatically result in a presumptive risk assessment of level 3" (p. 3).

3. The Board, in creating the New York State Risk Assessment Instrument (1996) and the Guidelines (November, 1997) wanted to develop an "objective assessment instrument." The instrument purported to identify and measure a series of factors that were associated with an increased risk for sexual re-offense. The Board relied on a handful of studies ranging from 1976 – mid 1995, and stated in the Appendix, "The draft incorporated risk assessment criteria that find support in the academic literature and are commonly used by sex offender experts" (p. 21).

4. The Board has not made any modifications or revisions to the Factors or Guidelines since the inception of the Risk Assessment Instrument, a period of approximately 10 years. Since then, empirical research, including large meta-analytic studies (Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004), as well as theoretical-practice literature have yielded substantial new information about the nature of sexual offender risk assessment (Amenta, Guy, & Edens, 2003; Becker & Murphy, 1998; Beech, Fisher, & Thornton, 2003; Harris, Rice, & Quinsey, 1998; Harris, Rice, Quinsey, Lalumiére, Boer, & Lang,

2003), factors that increase risk for sexual re-offense in the community (Hanson & Bussiére, 1996; Hanson & Harris, 2000; Hanson & Morton-Bourgon, 2004; Hanson, Scott, & Steffy, 1995; Hanson, Steffy, & Gauthier, 1992), limitations of risk assessments (Campbell, 2003; Levenson, 2004; Sjostedt, 2002), sexual re-offense base rates for various types of sexual offenders (Hanson, 2001; Hanson & Bussiére, 1996; Harris & Hanson, 2004; Hanson & Morton-Bourgon, 2004; Lanagan, Schmitt, & Durose, 2003; Prentky, Lee, Kinght, & Cerce, 1997), dynamic risk factors (Hanson & Harris, 1998; Hanson & Thornton, 2000; Thornton, 2002), and risk communication (Heilbrun, Dvoskin, Hart, & McNeil, 1999; Heilbrun, Nezu, Keeney, Chung, & Wasserman, 1998). The Board has not incorporated this empirical and theoretical literature to revise the Risk Assessment Instrument. This is in contrast to widely utilized sexual offender risk assessment instruments such as the Sexual Violence Risk – 20 (SVR-20), and Static – 99 that are regularly peer-reviewed and incorporate the findings from the current empirical and theoretical literature on sexual offender risk assessment.

5. In the process of developing an "objective assessment instrument," the Board did not and has not assessed the reliability and validity of the Risk Assessment Instrument. The term reliability refers to consistency. There are different types of reliability, including internal consistency and inter-rater reliability. Internal consistency refers to the similarity of the test items within one instrument while inter-rater reliability refers to how consistently different assessors score the same person. The term validity refers to accuracy, and different forms include construct validity and predictive validity. Construct validity assesses whether the instrument measures what it purports to measure. An assessment or test is said to have predictive validity if it predicts some variable or has the ability to predict the outcome of interest. I could not locate any studies or publications that provided information on the reliability or consistency and validity or accuracy of the Risk Assessment Instrument. This is in contrast to currently utilized sexual offender risk assessment instruments such as the Sexual Violence Risk – 20 (SVR-20), and the Static-99.

II. New York State Risk Assessment Instrument
Individual Factors and Overrides

1. The first Category, Current Offense [s] includes 7 Factors. They are (1) use of violence, (2) sexual contact with victim, (3) number of victims, (4) duration of offense conduct with victim, (5) age of victim, (6) other victim characteristics, and (7) relationship with victim.

    a. Factor 1, Use of violence: This factor assesses use of violence by "assessing an offender 30 points if he was armed with a dangerous instrument; 15 points if he inflicted physical injury, and 10 points if he used forcible compulsion" (p. 7). There is some evidence linking psychological coercion and sexual recidivism (Scalora & Garbin, 2003), and the use of physical violence may be a marker of attitudes that condone or support sexual violence. A recent meta-analytic study found a statistically significant relationship between the degree of force used during the sexual offense and the probability of sexual recidivism (Hanson & Morton-Bourgon, 2004). However, the same meta-analytic study summarized that the effect size was tiny. Previous studies suggested no clear evidence that physical harm to a victim was associated with increased risk for sexual re-offense in the community (Hanson & Bussiére, 1996), however, this is not an easy factor to study because those offenders who commit serious physical violence may be institutionalized for lengthier periods of time, and thus physical harm to a victim, as a risk factor, may be difficult to study. Given the equivocal and inconsistent findings, the weighting of these items can not be justified as written. That is, the literature does not support scoring an offender three times higher for the use of a dangerous instrument (30 points).

    b. Factor 2, Sexual contact with victim: The Guidelines cite no study to support the inclusion of this Factor. This factor makes a distinction between touching over the clothing, touching under the clothing and sexual intercourse, deviant sexual intercourse or aggravated sexual abuse. The offender receives progressively

higher scores if he or she engaged in touching under the clothes or in sexual intercourse. I could not locate any empirical or theoretical studies that indicate that touching over the clothing, under the clothing or sexual intercourse was associated with increasing levels of risk for sexual re-offense.

c. Factor 3, Number of victims: The scoring guidelines summarize that a higher number of victims in "the case (or cases) that resulted in his instant conviction" (p. 10), increases the risk for sexual re-offense in the community (Abel, Osborne, & Twiggs, 1993; Rice & Harris, 1995). Research studies have focused on number of victims across arrests and/or convictions and suggested that number of past sexual offenses and sentencing dates are associated with increased risk for sexual re-offense in the community among correctional offenders and forensic patients (Hanson, 1997; Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004; Quinsey, Lalumiére, Rice & Harris, 1995). The current literature does not support the association between number of victims in the index or instant offense and increased risk for sexual re-offending in the community unless there are a very high number (e.g., greater than 10) of victims (R.K., Hanson, personal communication, March 9, 2005).

d. Factor 4, Duration of offense conduct with victim: The Board cites no studies to support the inclusion of this Factor. The fourth factor is defined as "continuing course of sexual contact that includes both the nature and length of the offender's conduct" (p. 10). The "continuing course of sexual contact" occurs "when he engages in either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, deviate sexual intercourse, or aggravated sexual abuse, 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 (p. 10)." This Factor is not assessing number of past sexual offenses, which has been associated with an increased risk for sexual re-offense in the community (Hanson & Bussiére, 1996), and is measured by a later risk Factor. Despite my experience in the field, I could

not locate any empirical or theoretical support for the inclusion of this item as a risk Factor.

e. Factor 5, Age of victim: The guidelines cite two studies to support scoring for this factor on the basis that "Offenders who target young children as their victims are more likely to re-offend" (p. 11). In addition, an offender targeting a person above age 63 "is treated the same as one who chooses a young child as his victim" (p. 11). While empirical studies suggest that deviant sexual interest in children, in particular boys, is associated with a risk for sexual re-offense in the community (Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004; Hanson, Steffy and Gauthier, 1992), there is no current empirical support to suggest that the age of the victim is significantly associated with an increased for sexual re-offense in the community (Hanson, Steffy and Gauthier, 1992; Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004). An evaluator conducting a risk assessment should not assume that an offender who sexually assaulted a 10 year old child has sexual deviant interests in children 10 years of age or younger. The evaluation of sexual deviant interests is a difficult and lengthy process that includes inquiring into the offender's sexual attitudes, beliefs and behavior with adults and/or children. For example, an evaluator should not assume that a married father of 20 years who sexually assaulted his 10-year old daughter, with no history of viewing child pornography or sexual contact with children, has sexual deviant interest based only on the instant offense or age of the victim. Moreover, well established sexual offender risk assessment instruments, such as the Static-99 and Sexual Violence Risk – 20, do not include "age of victim" as a risk factor. Finally, I could not locate empirical or theoretical support for an association between sexual re-offending in the community and the selection of a victim above age 63.

f. Factor 6, Other victim characteristics: This Factor focuses on whether the victim suffers from a mental defect, incapacity or helplessness. The guidelines state, "Offenders who prey upon such victims consciously choose people who cannot

protect themselves or effectively report their abuse… Such offenders pose a greater risk to public safety since their crimes are more difficult to detect and prosecute" (p. 11). Despite my expertise in sexual offender risk assessment, I could not locate any current empirical or theoretical studies that suggest that offenders whose victims demonstrate mental defects, incapacities and helplessness are more likely to sexually re-offend in the community than those offenders whose victims do not demonstrate mental defects, incapacities and helplessness.

g. Factor 7, Relationship with victim: The guidelines state that a score of "20" is assessed "if the offender's crime (i) was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization or (ii) arose in the context of a professional relationship between the offender and the victim and was an abuse of such relationship" (p. 12). The Board defines stranger as "anyone who is not an actual acquaintance of the victim" (p. 12). There is consistent empirical support that selection of a stranger victim and/or an extrafamilial victim is associated with an increased risk for sexual re-offense in the community (Hanson & Bussiére, 1996). However, the definition of stranger victim for the Static-99 is defined as "A victim is considered a stranger if the victim did not know the offender 24 hours before the offence" (Harris, Phenix, Hanson, & Thornton, 2003, p. 54). No similar time frame is included in the Board's definition of "stranger." Moreover, there is no empirical data to suggest that a person establishing a relationship "for the primary purpose of victimization" or "in the context of a professional relationship… and was an abuse of such relationship" is a greater risk for sexual re-offense in the community. Finally, there is strong empirical support to suggest that offenders, who offend against intrafamilial victims, in particular girls, have lower rates of sexual re-offending in the community (Hanson, 2001; Hanson & Bussiére, 1996; Harris & Hanson, 2004; Rice and Harris, 2002). The New York Risk Assessment does not take into account offenders in this category and their lower rates of sexual re-offending.

2. The second Category, Criminal History contains 4 Factors. They are (1) age at first act of sexual misconduct, (2) number and nature of prior crimes, (3) recency of prior felony or sex crimes, and (4) drug and alcohol use. The person completing this section does not score the offender for an admission for a sexual offense "for which there has been no judicial determination" (p. 6).

    a. Factor 8, Age at first act of sexual misconduct: The Board assesses points "if an offender's first sex crime, whether a felony or misdemeanor, was at age 20 or less" (p. 13). The early onset of sexual offending has been shown to be a reliable predictor of sexual offenses (Hanson & Bussiére, 1996; Scalora & Garbin, 2003).

    b. Factor 9, Number and Nature of prior crimes; There is empirical support that offenders with a history of non-sexual and sexual criminal conduct is associated with an increased risk for sexual re-offending in the community (Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004; Harris & Hanson, 2004; Quinsey, Lalumiére, Rice & Harris, 1995; Scalora & Garbin, 2003).

        i. The current research suggests that the assessment of risk for sexual re-offense should also take into account (1) sexual offense free behavior in the community, (2) sexual offense conviction history, and (3) age of the offender at time of release (Harris & Hanson, 2004). First, those sexual offenders who remain offense free in the community are less likely to sexually re-offend. For example, Harris and Hanson (2004) reported that "those who have remained offence free in the community were at reduced risk for subsequent sexual recidivism" (p. 7), and "the longer offenders remain offence-free in the community the less likely they are to sexually recidivate" (p. 7). In the revised coding rules for the Static-99, the authors wrote, "The expected sexual offence recidivism rate should be reduced by about half if the offender has five to ten years of offence-free

behavior in the community" (Harris, Phenix, Hanson, & Thornton, 2003, p. 59). Second, sexual offenders with no history of a conviction for a sexual offense had lower rates of sexual re-offending in the community (Harris & Hanson, 2004). Finally, offenders older than age 50 at time of release sexually re-offend at approximately one-half the rate of the younger offenders (Harris & Hanson, 2004). Similar findings were identified in a recent U.S. Department of Justice study when the cut-off age was 45 (Lanagan, Schmitt, & Durose, 2003). While prior sexual and non-sexual offenses are important factors to consider when assessing risk, it is also important to assess offense free behavior in the community, sexual offense conviction history, and age of offender at time of release. These considerations are not included in the current scoring guidelines.

c. Factor 10, Recency of prior offense; The board lists no citations to support the inclusion of this Factor. There is empirical support that a history of sexual offending or other criminal conduct is associated with an increased risk for sexual re-offending in the community among correctional offenders and forensic patients (Hanson & Bussiére, 1996; Prentky, Knight, & Lee, 1997). However, I could not locate any studies to suggest that an offender with a "prior felony or sex crime within three years of his instant offense" (p. 14), as defined by the Risk Assessment Instrument, is a higher risk to re-offend than an offender who has not committed a "prior felony or sex crime within three years of his instant offense."

d. Factor 11, Drug and Alcohol Abuse; This Factor focuses on whether "an offender has a substance abuse history or was abusing drugs and or alcohol at the time of the offense" (p. 14). While a history of drug and alcohol abuse has been associated with an increased risk for sexual re-offending among correctional offenders and forensic patients (Hanson & Morton-Bourgon, 2004), general violence (Swanson, 1994), and criminality in sexual offenders (Hanson & Bussiére, 1996), the connection between substance abuse and sexual violence is

not clear. Moreover, this Factor does not take into account abstinent time, focusing "on the offender's history of abuse and the circumstances at the time of the offense" (p. 14). The guidelines acknowledge that abstinent time is relevant, stating that if "the offender abused drugs in his distant past, but his more recent history is one of prolonged abstinence, the Board or court may choose to depart" (p. 14), but do not include an operational definition of "prolonged abstinence" or "distant past," and a weighted score for abstinent time. The absence of a definition of "prolonged abstinence" or "distant past," as well the lack of a method to weight abstinent time limits the generalizability and validity of this Factor.

3. The third Category, Post-Offense Behavior contains 2 Factors. They are (1) acceptance of responsibility, and (2) conduct while confined/supervised.

    a. Factor 12, Acceptance of responsibility; The specific guidelines state that "the Board or court should examine the offender's most recent credible statements and should seek evidence of genuine acceptance of responsibility" (p. 15), but do not provide any operational definitions on what constitutes "genuine acceptance and responsibility." Moreover, in a recent study, the denial of a sex crime, minimization and lack of victim empathy were not statistically significantly related to sexual re-offense in the community (Hanson & Morton-Bourgon, 2004). The offender's extreme minimization and denial may be important in clinical evaluations and be related to participation and completion in treatment, which in turn may be related to sexual re-offending in the community (Geer, 1991; Geer, Becker, Gray & Krause, 2001). However, it is difficult to define denial and failure to accept responsibility as well as complex to accurately assess denial using risk instruments in correctional or probation settings. The weighted scores for this item do not appear justified as written given the inconsistent findings, difficulties in defining denial and minimization, as well as pitfalls in assessing denial in a correctional setting.

b. Factor 13, Conduct while confined/supervised; This factor examines the offender's "conduct while in custody or under supervision" and "adjustment on probation or parole" (p. 15). There is empirical support that supervision problems and failures are risk factors for sexual re-offense in the community (Harris & Hanson, 2004; Rice & Harris, 1997; Quinsey, Lalumiére, Rice, & Harris, 1995).

4. The fourth Category, Release Environment, contains 2 Factors, (1) supervision, and (2) living/employment situation.

a. Factor 14, Supervision; While the guidelines state that "strict supervision is essential when a sex offender is released into the community" (p. 16), there are no guidelines on the nature and type of supervision available, including type and duration of supervision. The guidelines further state "An offender's response to treatment, if exceptional, can be the basis for a downward departure" (p. 16), but "exceptional" is not operationalized. While the nature of supervision may assist the offender to re-integrate into the community in order to have access to treatment programs, I could not locate any research finding linking the presence of supervision (post-release) and the likelihood of sexual re-offending in the community.

b. Factor 15, Living/employment situation; This item incorporates employment problems and living situation. The offender is evaluated to determine "if either his work or living environment is inappropriate" (p. 16). Sexual offenders residing in a certain type of community may have greater access to victims, however, this has not been identified as a risk Factor associated with an increased risk for sexual re-offending in the community. Conversely, research has identified an association between a stable interpersonal relationship and lower risk of sexual re-offense in the community (Hanson & Morton-Bourgon, 2004), but

this Factor does not define or have a means to assess a stable interpersonal relationship.

5. The Risk Assessment Instrument includes four Overrides "that automatically result in a presumptive risk assessment of level 3" (p. 3). According to General Principle 4, the Board included these Factors "because each provides compelling evidence that an offender poses a serious risk to public safety" (p. 3). The four Overrides are "(i) prior felony conviction for a sex crime; (2) the infliction of serious physical injury or the causing of the death; (3) a recent threat to reoffend by committing a sexual or violent crime; or (4) a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior." (p. 17). The Board does not impose a time frame for the third Override, stating that "if the threat is recent enough that there is cause to believe that the offender may act upon it, an override is warranted" (p. 17). Moreover, the Board writes, "Examples of a clinical assessment that would support an override are pedophilia and sexual sadism" (p. 17). There are no current empirical or theoretical findings to support the proposition that one risk factor, standing alone, is enough to supplant the results of an entire risk assessment.

6. In closing, a number of the risk Factors have weak associations with risk for sexual re-offense in the community, whereas other risk Factors have no empirically demonstrated associations with an increased risk for sexual re-offense in the community. Moreover, the Board provides no research or theoretical findings to support the inclusion of three of the fifteen Factors or approximately 20% of the Risk Assessment Instrument [(2) sexual contact with victim, (4) duration of offense conduct with victim, and (10) recency of offense]. Additional risk Factors do not account for circumstances that reduce the risk for sexual re-offense in the community such as intrafamilial offenders, offenders over the age 45-50, offenders with no previous sexual offense convictions, and those offenders who have been offense free in the community. For these reasons, the predictive validity of the Factors is limited and the Risk Assessment Instrument total score is likely to produce inaccurate classifications.

III. New York State Risk Assessment Instrument

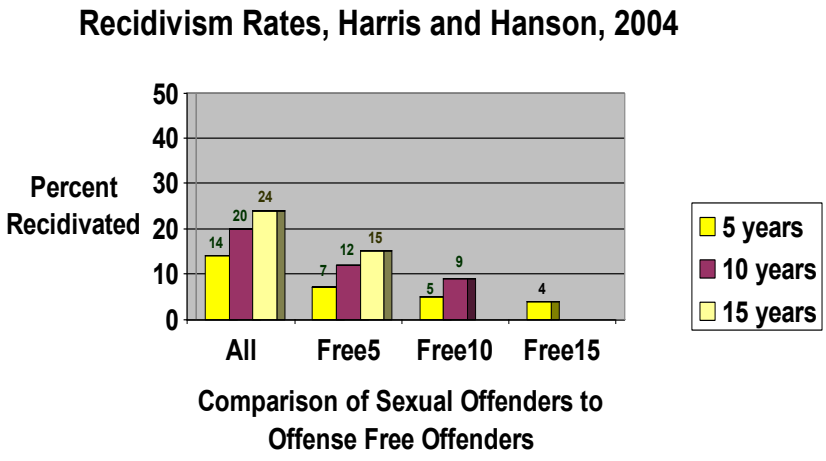
Recent Empirical Findings Regarding Sexual Offense Recidivism

1. The results from a recent meta-analytic study, utilizing data from 10 follow-up studies of adult male sexual offenders (sample size of 4,724), highlighted important factors to assess when estimating risk for sexual re-offense in the community. The results indicated that an assessment of risk should take into account (1) sexual offense free behavior in the community, (2) history of sexual offense convictions, (3) age of the offender at time of release, and (4) offenders with intrafamilial or girl victims (Harris & Hanson, 2004).

    a. Sexual offenders who had remained offense free in the community were less likely to sexually re-offend in the community. Harris and Hanson (2004) reported that "those who have remained offence free in the community were at reduced risk for subsequent sexual recidivism," and "the longer offenders remain offence-free in the community the less likely they are to sexually recidivate" (p. 7). Figure 1 below compares all offenders and offenders who remained offense free in the community. The term "offence-free" was defined as "no new sexual or violent non-sexual offence, and no non-violent offences serious enough that they are incarcerated at the end of the follow-up period" (p. 7). Looking first at all the sexual offenders, 14% sexually re-offended in the community within 5 years, 20% re-offended in the community within 10 years, and 24% re-offended in the community within 15 years. When offenders were offense free for a period of 5 years, 7% sexually re-offended in the community within 5 years, 12% sexually re-offended in the community within 10 years, and 15% sexually re-offended in the community within 15 years. When offenders were offense free for a period of 10 years, 5% sexually re-offended within 5 years, and 9% sexually re-offended within 10 years. In the revised coding rules for the Static-99, the authors write, "The expected sexual offence recidivism rate should be reduced by about half if the offender has five to ten years of offence-free behavior in the community"

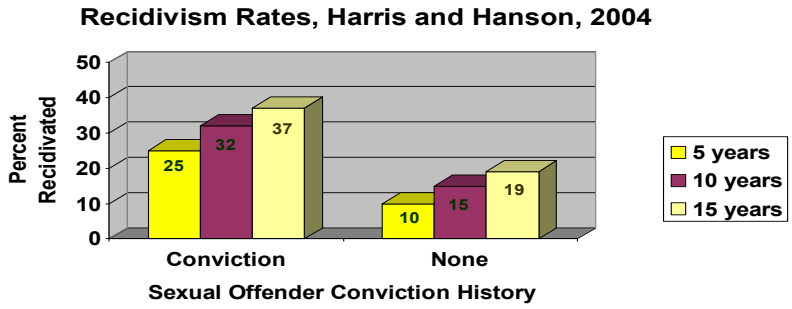
(Harris, Phenix, Hanson, & Thornton, 2003, p. 59). The Harris and Hanson (2004) findings emphasize that offense free behavior must be taken into account when assessing risk for sexual re-offense in the community.

FIGURE 1



b. The same meta-analytic study findings emphasized the importance of determining whether the offender had a history of a conviction for a sexual offense (see Figure 2). Offenders without a history of a sexual offense conviction sexually re-offended in the community at lower rates than offenders with a history of a conviction for a sexual offense (Harris & Hanson, 2004).

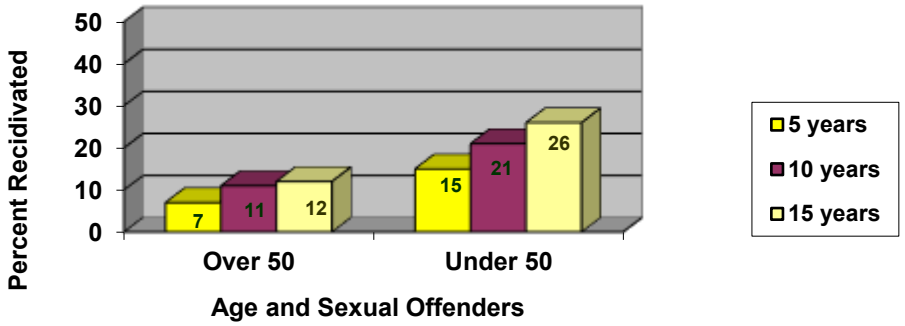
FIGURE 2



c. The meta-analytic study results indicated that offenders older than age 50 at time of release re-offended in the community at approximately one-half the rate of younger offenders (see Figure 3). Lower rates of sexual re-offending in the community were also noted in a recent U.S. Department of Justice study when the cut-off age was 45 (Lanagan, Schmitt, & Durose, 2003).

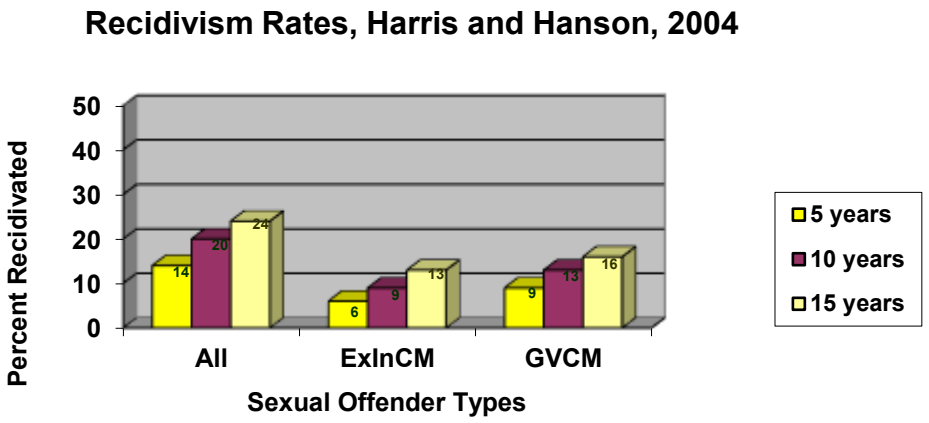
FIGURE 3

Recidivism Rates, Harris and Hanson, 2004



d. There is consistent empirical support to suggest that offenders with intrafamilial or female victims have lower rates of re-offending in the community (Hanson, 2001; Hanson & Bussiére, 1996; Harris & Hanson, 2004; Rice and Harris, 2002). In the most recent meta-analytic study, the findings (see Figure 4) summarized that extended incest child molesters (ExInCM), and child molesters whose victims were girls (GVCM) had lower rates of sexual re-offense in the community when compared to all types of sexual offenders. For example, 9% of child molesters whose victims were girls sexually re-offended in the community at 5 years, 13% in 10 years and 16% in 15 years. The New York Risk Assessment does not take into account offenders in this category and their lower rates of sexual re-offending in the community.

FIGURE 4



e. The current New York Risk Assessment Instrument does not take into account offense free behavior in the community, the absence of a conviction for a sexual offense, age of offender at time of release, and offenders with intrafamilial or girl victims. It is my expert opinion that these factors are important to assess in completing a risk assessment for sexual re-offense in the community.

IV. New York State Risk Assessment Instrument Lack of Validation for Weighted Factors and Risk Level Designations

1. As stated earlier, each offender is scored on the fifteen Factors, which are then summed in order to calculate the overall score which places the offender in the low, medium or high risk level classification. The fifteen Factors have scoring weights that range from 5 – 30. Some Factors have weighted scores of 20 and 30 (10 point weighted range) while others have weighted scores of 5 and 10 (5 point weighted range). The discrepancy in weighed scores between items and different weighted ranges implies that certain Factors are weighted more heavily, further implying a greater importance for that Factor. The Board does not provide any rational basis for the discrepancy in the weighted scoring system. In contrast, the New Jersey Risk Assessment instrument has equally weighted scoring ranges (scores 0, 1 or 3) between items.

2. The summed fifteen Factors yield an overall score, placing the offender in the low, moderate or high risk level classification. Individuals who score between 0 – 70 are classified as low risk for sexual re-offense, 75 – 105 as moderate risk for sexual re-offense and a score of 110 – 300 as high risk for re-offense. The three risk level ranges are not equivalent, that is the low classification consists of a 70 point range, moderate classification consists of a 30 point range, and high classification consists of a 190 point range. The low risk range makes up approximately 23% of the scale (70 out of 300), moderate risk range makes up approximately 10% of the scale (30 out of 300), while the high risk range makes up approximately 63% of the scale (190 out of 300). In contrast, the New Jersey risk assessment instrument has three classifications, low (0-36), moderate (37-73), and high (74-111) that have practically identical ranges.

3. The Sexual Offender Risk Assessment Instrument provides risk ranges for 3 categories, low risk (0-70), moderate risk (75-105) and high risk (110-300). The three-tier categorization system implies that offenders who fall in the high risk category are at a significantly higher risk to sexually re-offend in the community than those offenders who fall in the low or moderate risk category. There are no published studies or findings that have examined the validity of the categorization levels. It is my expert opinion that given the lack of empirical support for the three-tier system, the risk designations do not distinguish or accurately predict the relative degrees of risk for sexual re-offense in the community.

4. The absence of testing for the validity and risk classifications for the Risk Assessment Instrument indicate that there may be high rates of classification errors. The classification of an offender as a high risk to re-offend in the community, when in fact he or she does not re-offend in the community, is referred to a false positive error. The Board wrote in Guideline 5, "The expectation is that the instrument will result in the proper classification in most cases so that departures will be the exception not the rule" (p. 4). The Board does not indicate an acceptable false positive error rate, and to my

knowledge, research has not been conducted to measure the percentage of false positives. The U.S. Department of Justice – Bureau of Justice National Conference on Sex Offender Registries (1998) summarized that New York State had 1,540 registered sexual offenders between January 21st, 1997 and June 13th 1997 (p. 61). Among the 1,540 offenders, 52% were classified as Level 3 offenders or high risk, 39% were classified as Level 2 or moderate risk and 9% were classified as Level 1 or low risk. To my knowledge, the Board has not examined the false positive error rate or identified the percentage of offenders designated Level 3 who have not sexually re-offended in the community. Adams (2002), in a U.S. Department of Justice, reported that New York had approximately 11,575 registered sexual offenders in 2001, an increase of 61% from 1998 (7,200). However, no data was available regarding the percentage of offenders designated Level 3. To my knowledge, the Board has not conducted any research to determine what percentage of Level 3 offenders, among the 11,575, have not sexually re-offended in the community as well as compared whether Level 3 offenders sexually re-offended in the community at a significantly higher rate than those offenders designated Level 2 or Level 1.

IV. New York State Risk Assessment Instrument Closing Comments

1. In my expert opinion, the New York Risk Assessment Instrument does not accurately classify sexual offenders as low, medium or high risk. The reasons are based upon (a) lack of validation in the development of the Risk Assessment Instrument, (b) absence of incorporating research findings to revise the Guidelines and Factors, (c) absence of associations between Factors and probability to sexually re-offend in the community, and (d) lack of validation in the three-tier categorization to determine whether Level 3 offenders are at a significantly higher risk to re-offend in the community than Level 2 or Level 1 offenders.

I hereby declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated this 9th day of April, 2005 at Queens, New York.

Kostas A. Katsavdakis, Ph.D.

Clinical and Forensic Psychologist

References

Abel, G., Osborne, C., & Twiggs, D. (1993). Sexual assault through the lifespan: Adult offenders with juvenile histories. In H.E. Barbaree, W.L. Marshall, S.M. Hudson (Eds.), The Juvenile Sex Offender (pp 104-117). New York: Guilford Press.

Adams, D.B. (2002). Summary of state offender registries, 2001. Bureau of Justice Statistics, U.S. Department of Justice, NCJ-192265.

Amenta, A.E., Guy, L.S. & Edens, J.F. (2003). Sex offender risk assessment: A cautionary note regarding measures attempting to quantify violence risk. Journal of Forensic Psychology, 3(1), 39-50.

Becker, J.V., & Murphy, W.D. (1998). What we know and do not know about assessing and treating sex offenders. Psychology, Public Policy, and Law. 4 (1/2), 116-137.

Beech, A.R., Fisher, D.D. & Thornton, D. (2003). Risk assessment of sex offenders. Professional Psychology: Research and Practice, 4, 339-352.

Campbell, T.W. (2003). Sex offenders and actuarial risk assessments: Ethical considerations. Behavioral Sciences and the Law, 21, 269-279.

Geer, T.M. (1991). Aftercare: Community integration following institutional treatment. In G.D. Ryan & S.L. Lane (Eds.), Juvenile Sex Offending: Causes, Consequences, and Corrections (pp. 377-390). Toronto: Lexington.

Geer, T.M., Becker, J.V., Gray, S.R., & Krause, D. (2001). Prediction of treatment completion in a correctional sex offender treatment program. International Journal of Offender Therapy and Comparative Criminology, 45, 302-313.

Hanson, R.K. (1997). The development of a brief actuarial scale for sexual offense recidivism. Ottawa, Public Works and Government Services, Canada.

Hanson, R.K. (2001). Age and sexual recidivism: A comparison of rapists and child molesters. (User Report No. 2001-01). Ottawa, Department of the Solicitor General of Canada.

R.K. Hanson. (personal communication, March 9, 2005).

Hanson, R.K., & Bussiére, M.T. (1996). Predicting of sexual recidivism: A meta-analysis. (User Report No. 1996-04). Ottawa. Public Works and Government Services, Department of the Solicitor General of Canada.

Hanson, R.K. & Harris, A. (1998). Dynamic predictors of sexual recidivism. (User Report No. 1998-01). Ottawa. Public Works and Government Services, Department of the Solicitor General of Canada.

Hanson, R.K. & Harris, A. (2002). Where should we intervene? Dynamic predictors of sexual offense recidivism. Criminal Justice and Behavior, 27, (1), 6-35.

Hanson, R.K., & Morton-Bourgon, K. (2004). Predictors of sexual recidivism: An updated meta-analysis. (User Report No. 2004-02). Canada. Public Safety and Emergency Preparedness.

Hanson, R.K., Scott, H. & Steffy, R.A. (1995). A comparison of child molesters and nonsexual criminals: Risk predictors and long-term recidivism. Journal of Research in Crime and Delinquency, 32(3), 325-337.

Hanson, R.K., Steffy, R.A. & Gauthier, R. (1992). Long-term follow-up of child molesters: Risk Predictors and treatment outcome. (User Report No. 1992-02). Ottawa. Department of the Solicitor General of Canada.

Hanson, R.K., & Thornton, D. (2000). Improving risk assessments for sexual offenders: A comparison of three actuarial scales. Law and Human Behavior, 24, 119-136.

Harris, A.J.R., & Hanson, R.K. (2004). Sex offender recidivism: A simple question. (User Report No. 2004-03). Canada, Public Safety and Emergency Preparedness.

Harris, A., Phenix, A., Hanson, R.K., & Thornton, D. (2003). Static-99 coding rules: Revised – 2003. Ottawa. Department of the Solicitor General of Canada.

Harris, G.T., Rice, M.E., & Quinsey. V.L. (1998). Appraisal and management of risk in sexual aggressors. Psychology, Public Policy, and Law, 4 (1/2), 73-115.

Harris, G.T., Rice, M.E., Quinsey, V.L., Lalumiére, M.L., Boer, D., and Lang C. (2003). A multisite comparison of actuarial risk instruments for sex offenders. Psychological Assessment, 15(3), 413-425.

Heilbrun, K., Dvoskin, J., Hart, S., & McNeil, D. (1999). Violence risk communication: Implications for research, policy, and practice. Health, Risk, & Society, 1, 91-106.

Heilbrun, K., Nezu, C.M., Keeney, M., Chung, S., & Wasserman, A.L. (1998). Sexual offending: Linking assessment, intervention, and decision making. Psychology, Public Policy, and Law, 4, 138-174.

Lanagan, P.A., Schmitt, E.L., & Durose, M.R. (2003). Recidivism of sex offenders released from prison in 1994. U.S. Department of Justice, Bureau of Justice Statistics NCJ 198281.

Levenson, J.S. (2004). Reliability of sexually violent predator civil commitment criteria in Florida. Law and Human Behavior, 28(4), 357-368.

Quinsey, V.L., Lalumiére, M.E., Rice, M.E., & Harris, G.T. (1995). Predicting sexual offenses. In J.C. Campbell (Ed.), Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers (pp. 114-137). Thousand Oaks, CA: Sage.

Prentky, R. A., Lee, A.F.S., Kinght R.A., & Cerce, D. (1997). Recidivism rates among child molesters and rapists: A methodological analysis. Law and Human Behavior, 21, 635-658.

Rice, M.E., & Harris, G.T. (1995). Cross validation and extension of an actuarial instrument for the prediction of recidivism of sex offenders. Penetanguishene Mental Health Centre Research Report, XII (2).

Rice, M.E., & Harris, G.T. (1997). Cross-validation and extension of the Violence Risk Appraisal Guide for child molesters and rapists. Law and Human Behavior, 21, 231-241.

Rice, M.E., & Harris, G.T. (2002). Men who molest their sexually immature daughters: Is a special explanation required? Journal of Abnormal Psychology, 11(2), 329-339.

Scalora, M.J., & Garbin, C. (2003). A multivariate analysis of sex offender recidivism. International Journal of Offender Therapy and Comparative Criminology, 47, 309-323.

Sjostedt, G., & Grann, M. (2002). Risk assessment: What is being predicted by actuarial prediction instruments? International Journal of Forensic Mental Health, 1(2), 179-183.

Swanson, J.W. (1994). Mental disorder, substance abuse, and community violence: An epidemiological approach. In J. Monahan & H.J. Steadman (Eds.), Violence and Mental Disorder (pp. 101-136). Chicago: University of Chicago Press.

Thornton, D. (2002). Constructing and testing a framework for dynamic risk assessment. Sexual Abuse: A Journal of Research and Treatment, 14, 139-154.

U.S. Department of Justice (1998). National conference on sex offender registries. Bureau of Justice Statistics, U.S. Department of Justice, NCJ-168965.

CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

Responding to Sexual Offenses: Research, Reason and Public Safety

Kostas A. Katsavdakis, Marsha Weissman, and Alan Rosenthal*

A Call to Reason

There is likely no criminal behavior that breeds as much condemnation and fear as sex offending. There are tragic examples of young victims of sex offenders in New York State and across the country that have raised our concerns, and prompted calls for increased surveillance, control and incapacitation. It is responsible public policy to address these concerns in ways that will increase public protection that are based on research and evidence. An evidence-based approach ensures that we will sequester only those who are likely to reoffend by committing serious, violent sexual offenses and affording treatment and effective supervision for those who do not fall into this category.

To date, much of the debate about sex offenders has been driven by the most horrific and heinous crimes that contribute to the myth that nothing works. This ignores a growing body of research that documents what works, for whom and in what setting and context. This policy alert calls attention to some of the literature, and urges that new legislation on sex offenders, both criminal and civil penalties, be guided by this research and further expert consultation. We briefly address three key areas: assessment of people who commit sex offenses, the efficacy of treatment - what works for whom, and the use and misuse of civil commitment. Finally, we draw upon lessons learned from the past and New York's experience with legislation that was driven by fear and political rhetoric - the Rockefeller drug laws.

This call for a more thoughtful, research-based approach to the assessment, sentencing and post-release supervision of sex offenders does not emanate solely from criminal justice reform organizations and defender associations. There are law enforcement and mental health professionals who raise concerns about the overreaching of these laws.

In a statement issued in January 2006, the Iowa County Attorneys Association (an association of state prosecutors) opposes certain residency restrictions as unnecessary

---

* Kostas A. Katsavdakis , PhD, PC, is a Clinical and Forensic Psychologist in private practice and an Assistant Professor at John Jay College of Criminal Justice. Dr. Katsavdakis' area of expertise includes the diagnosis, evaluation and treatment of sexual offenders. He was previously the Assistant Director of Psychology at a maximum security forensic hospital on Ward's Island, New York City where he coordinated the development of an integrated assessment and treatment program for sexual offenders. Dr. Katsavdakis can be reached at 718-926-9489 or www.drforensic.com and info@drforensic.com. Marsha Weissman, MPA and Alan Rosenthal, Esq. are respectively CCA's Executive Director and Director of Justice Strategies, CCA's Research and Policy Division.

as defined, unenforceable, causing undue harm and hardship to offender families, and preventing effective prosecution of sex offenders. They call instead for more careful

and specific definitions of areas from which people who commit sex offenses are banned, such as schools and libraries, and targeting a more precise and limited offender group to be identified by competent and expert assessment. The statement concludes *"The observations of Iowa prosecutors are not motivated by sympathy for those committing sex offenses against children, but by our concern that legislative proposals designed to protect children must be both effective and enforceable. Anything else lets our children down. The Iowa County Attorneys Association strongly urges the General Assembly and the Governor to act promptly to address the problems created by the 2,000 foot residency restriction by replacing the restriction with measures that more effectively protect children, that reduce the unintended unfairness to innocent persons and that make more prudent use of law enforcement resources.*"
The Center for Sex Offender Management (CSOM), a project of the National Institute of Justice, U.S. Department of Justice (Bynum, 2001), also urges that decisions about and responses to sex offending be made based on assessment and with knowledge of treatment and custodial and non-custodial supervision options that make sense for different individuals: "... c*riminal justice practitioners must avoid reactionary responses that are based on public fear of this population. Instead, they must strive to make management decisions that are based on the careful assessment of the likelihood of recidivism. The identification of risk factors that may be associated with recidivism of sex offenders can aid practitioners in devising management strategies that best protect the community and reduce the likelihood of further victimization."*

People who commit sex offenses are now at the forefront of the interchange between mental health and the law. Sexual offense arrests and convictions are high profile events, attracting the public's attention, and demands for swift justice. While the question of punishment or application of justice should by no means be cast aside, legislators, mental health professionals and the community are responsible for developing evidence-based assessment practices that identify the risk an offender poses to the community, as well as what type of evidence-based treatment is available to reduce the likelihood of recidivism. The absence of an informed risk assessment leading to an accurate diagnosis and treatment leaves the community and offender at risk. Contrary to popular beliefs and common misperceptions, not all people who commit sexual offenses are the same, and there are valid and reliable risk assessment methods that can inform which treatments may be most effective in reducing risk. Assessment, classification and treatment are the keys to public safety.

ASSESSMENT: The first step…

A standardized, valid and reliable assessment method is the first step to accurately classify the risk a specific offender poses to the community. The overall goal of the risk assessment is to guide intervention/treatment, protect the safety of the public, protect the patient or inmate, and liability management. Since the inception of the New York State Risk Assessment Instrument, empirical research, including large meta-analytic studies (Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004), as well as theoretical-practice literature have yielded substantial new information about the nature of sexual offender risk assessment (Amenta, Guy, & Edens, 2003; Becker & Murphy,

1998; Beech, Fisher, & Thornton, 2003; Harris, Rice, & Quinsey, 1998; Harris, Rice, Quinsey, Lalumiére, Boer, & Lang, 2003). This literature identified factors that increase and reduce risk for sexual re-offense in the community (Hanson & Bussiére, 1996; Hanson & Harris, 2000; Hanson & Morton-Bourgon, 2004; Hanson, Scott, & Steffy, 1995; Hanson, Steffy, & Gauthier, 1992), limitations of risk assessments (Amenta, Guy, & Edens, 2003; Edens, 2006; Campbell, 2003; Levenson, 2004; Miller, Amenta, & Conroy; Salekin, 2001; Sjostedt, 2002), sexual re-offense base rates for various types of sexual offenders (Hanson, 2001; Hanson & Bussiére, 1996; Harris & Hanson, 2004; Hanson & Morton-Bourgon, 2004; Lanagan, Schmitt, & Durose, 2003; Prentky, Lee, Kinght, & Cerce, 1997), dynamic risk factors (Hanson & Harris, 1998; Hanson & Thornton, 2000; Thornton, 2002; Douglas, K.S. & Skeem, J.L., 2005), and methods to communicate risk (Heilbrun, Dvoskin, Hart, & McNeil, 1999; Heilbrun, Nezu, Keeney, Chung, & Wasserman, 1998).

The current New York State Risk Assessment Instrument has not incorporated this evidenced based research, which is in contrast to widely utilized sexual offender risk assessment instruments such as the Sexual Violence Risk – 20 (SVR-20), and Static – 99, as well as other state risk assessment instruments (e.g. New Jersey). Moreover, the current Risk Assessment Instrument has not been subjected to examination as to the validity and reliability of the 3 risk levels which may contribute to high rates of classification errors.

Sound, research-based assessment is essential in the treatment and management of people who commit sex offenses. With the stakes so high - public protection and deprivation of liberty - it is critical to use assessment tools that comport with research on risk of reoffending.

CLASSIFICATION: Not all people who commit sexual offenses …

The data are unequivocal that not all people who commit sex offenses are the same. Some behaviors are less likely to be repeated and some individuals are more amenable to treatment. Sexual recidivism rates in the community vary by key factors that must be carefully assessed in order to accurately identify the risk an offender poses to the community, and what steps must be taken to reduce or moderate risk for the community. These factors include perpetrator/victim relationship (Hanson, 2001; Hanson & Bussiére, 1996; Harris & Hanson, 2004; Rice and Harris, 2002), number of previous arrests and/or convictions (Hanson, 1997; Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004; Harris & Hanson, 2004; Quinsey, Lalumiére, Rice & Harris, 1995), age of first sexual misconduct (Hanson & Bussiére, 1996; Scalora & Garbin, 2003), number and nature of prior criminal activities (Hanson & Bussiére, 1996; Hanson & Morton-Bourgon, 2004; Harris & Hanson, 2004; Quinsey, Lalumiére, Rice & Harris, 1995; Scalora & Garbin, 2003), age of the offender at time of release (Harris & Hanson, 2004; Lanagan, Schmitt, & Durose, 2003), sexual offense-free behavior in the community (Harris and Hanson, 2004; Harris, Phenix, Hanson, & Thornton, 2003), drug and alcohol abuse (Hanson & Morton-Bourgon, 2004, Swanson, 1994, Hanson & Bussiére, 1996), and psychological/physical coercion (Scalora & Garbin, 2003; Hanson & Morton-Bourgon, 2004). Some of the evidence-based factors that show lower risk,

such as offense-free behavior in the community or age at the time of release are not included in New York State's Risk Assessment Instrument. Moreover, approximately 20% of the Risk Assessment Instrument items have no significant relationship with risk for sexual reoffending in the community. In order to accurately classify an offender, the evidence-based factors listed above, must be considered and irrelevant factors discarded.

TREATMENT: Tailoring interventions to the offender...

Because of headline cases, the public has received distorted information about the benefits of treatment for people convicted of sex offenses. In contrast to the "nothing works" response, there is evidence that some treatment approaches are effective for some people who commit sex offenses. Researchers are beginning to identify the relevant factors associated with the risk for sexual reoffending, and identify what approaches work for which type of offenders.

The assumption of a "one size fits all" treatment approach for sexual offenders is clearly contradicted by the assessment literature which emphasizes how different risk factors increase or decrease sexual offense recidivism. Certain studies support the conclusion that treatment reduces the likelihood of sexual reoffense in the community (Hanson, Gordon, Harris, Marques, Murphy, Quinsey & Seto, 2002), other studies demonstrate mixed effects (Marques, Wiederanders, Day, Nelson & van Ommeren, 2005), emphasizing that offenders who met program goals have lower re-offense rates, while other studies showed no significant treatment effects (Hanson, 2005). Hanson et al. (2005) found no significant differences between the treated versus non-treated sexual offenders over the course of 8 years. However, the study clustered together all different types of sexual offenders because the data regarding victim characteristics was not available (R.K., Hanson, personal communication, March 2, 2006). Overall, there remain significant unanswered questions regarding the effectiveness of treatment, and only with accurate assessment and classification will reliable data be collected to develop evidenced-based treatment modalities.

Framing Policy

While there is likely no criminal behavior that breeds as much condemnation and fear as sex offending, it is the responsibility of legislators, mental health professionals and the public to develop evidence based practices for the assessment, classification and

treatment of sexual offenders and use this evidence to create sound policies. In general, and contrary to public opinion, people convicted of sex offenses reoffend at lower rates than people convicted of other offenses. The U.S. Department of Justice, Bureau of Justice Statistics (Langan, Schmitt & Durose, 2003) report on recidivism of people convicted of sex offenses shows that only 5.3% of sex offenders were rearrested for any type of new sex crime within three years after release from prison. Sex

offenders had lower overall rearrest rates than people convicted of non-sexual crimes: 43% of people convicted of sex offenses were rearrested post release compared to a 68% rearrest rate for people convicted of crimes other than sex offenses.

These recent data and findings are excluded in favor of confinement and incarceration. In Vermont, there is a proposal that would extend civil commitment to people convicted of violent crimes, not just sexual crimes. Legislative discussions in New York State have already suggested that civil commitment be extended to people convicted of nonsexual crimes, such as robbery, who are "suspected" of having a "sexual motivation." While confinement may be the most appropriate response in some cases, it ignores the completion of a thorough risk assessment that protects the public, the individual, and identifies the treatment to lower sexual reoffending upon release.

The current concern about people who commit sex offenses and the prospect of a civil commitment law should be informed after consideration of the following questions:

1. How does New York State's classification system compare to current research on best practices?
2. What are current methods and procedures for revising New York State's sex offender risk assessment?
3. What is the current capacity for sexual offender treatment in New York State prisons?
4. How does current treatment in New York State prisons compare to best practice recommendations for sex offender treatment?
5. What data exist on recidivism rates for sex offenders in New York State now? Are we able to compare recidivism rates of sex offenders who received treatment, compared to those who have not? Will New York State make an investment in learning more about recidivism rates in order to be able to use data in constructing civil commitment laws?
6. Given the very high stakes involved in civil commitment, how will New York State ensure that all sex offenders have access to quality treatment?
7. What options to civil commitment will be available and for which type of offender? What supervision options would be available, what treatment options will be available?
8. What are the financial consequences for civil commitment? Will civil commitment be tied to equal spending on treatment options or will civil commitment further restrict funding for treatment?

Avoiding Mistakes of the Past

New York's Rockefeller drug laws are examples of how easy it is to enact draconian laws but how hard it is to repeal such legislation. First enacted in 1973 ostensibly to target drug dealing kingpins, these laws ensnared low level sellers/users and paved the way for a bevy of other mandatory sentences for other crimes. Despite evidence of the efficacy of drug treatment, and despite a shift in public opinion that supported treatment over incarceration, it was not until 2004, that even modest reform of these harsh and ineffective laws were enacted. The lessons of the Rockefeller drug laws - the relative ease of enacting these laws and the incredible challenge in undoing them - dictates that caution be used in the creation of civil commitment and other draconian and "one size fits all" approaches to people who commit sex offenses in New York State. If civil

commitment is to be used, it must be reserved for the most serious, chronic sexual offenders whose risk to others has not been reduced by prior treatment or other mitigating factors.

If New York State intends to go further down the path of civil commitment, registration and notification requirements, and residency and travel restrictions for people who who commit sex offenses, it must use an evidence-based approach to ensure that any new restrictions on our fellow citizens are not merely driven by fear and a penchant for punishment but rather by reason, research and science. To do less would merely repeat the mistakes of the past, and set us on a course that is not only inhumane but also counterproductive to public safety.

References

Adams, D.B. (2002). Summary of state offender registries, 2001. Bureau of Justice Statistics, U.S. Department of Justice, NCJ-192265.

Amenta, A.E., Guy, L.S. & Edens, J.F. (2003). Sex offender risk assessment: A cautionary note regarding measures attempting to quantify violence risk. Journal of Forensic Psychology, 3(1), 39-50.

Becker, J.V., & Murphy, W.D. (1998). What we know and do not know about assessing and treating sex offenders. Psychology, Public Policy, and Law. 4 (1/2), 116137.

Beech, A.R., Fisher, D.D. & Thornton, D. (2003). Risk assessment of sex offenders. Professional Psychology: Research and Practice, 4, 339-352.

Bynum, T. (2001). Recidivism of sex offenders. Center for Sex Offender Management. Silver Spring MD. http://www.csom.org/pubs/recidsexof.html May 2001

Campbell, T.W. (2003). Sex offenders and actuarial risk assessments: Ethical considerations. Behavioral Sciences and the Law, 21, 269-279.

Douglas, K.S., & Skeem, J.L. (2005). Violence risk assessment: Getting specific about being dynamic. Psychology, Public Policy, and Law, 11(3), 347-383.

Edens, J.F. (2006). Unresolved controversies concerning psychopathy: Implications for clinical and forensic decision making. Professional Psychology, Research and Practice, 37(1), 59- 65.

Geer, T.M. (1991). Aftercare: Community integration following institutional treatment. In G.D. Ryan & S.L. Lane (Eds.), Juvenile Sex Offending: Causes, Consequences, and Corrections (pp. 377-390). Toronto: Lexington.

Geer, T.M., Becker, J.V., Gray, S.R., & Krause, D. (2001). Prediction of treatment completion in a correctional sex offender treatment program. International Journal of Offender Therapy and Comparative Criminology, 45, 302-313.

Hanson, R.K. (1997). The development of a brief actuarial scale for sexual offense recidivism. Ottawa, Public Works and Government Services, Canada.

Hanson, R.K., Broom, I., & Stephenson, M. (2005). Evaluating community sex offender treatment programs: A 12-year follow-up of 724 offenders. Canadian Journal of of Behavioural Science, 36(2), 87-96

Hanson, R.K. (2001). Age and sexual recidivism: A comparison of rapists and child molesters. (User Report No. 2001-01). Ottawa, Department of the Solicitor General of Canada.

Hanson, R.K. (personal communication, March 9, 2005).

Hanson, R.K. (personal communication, March 2, 2006).

Hanson, R.K., & Bussiére, M.T. (1996). Predicting of sexual recidivism: A metaanalysis. (User Report No. 1996-04). Ottawa. Public Works and Government Services, Department of the Solicitor General of Canada.

Hanson, R.K., Gordon, A., Harris, A.J.R., Marques, J.K., Murphy, W., Quinsey, V.L., & Seto, M.C. (2002). First report of the Collaborative Outcome Data Project on the effectiveness of psychological treatment for sex offenders. Sexual Abuse: A Journal of Research and Treatment, Vol. 14 (2), 169 – 194.,

Hanson, R.K. & Harris, A. (1998). Dynamic predictors of sexual recidivism. (User Report No. 1998-01). Ottawa. Public Works and Government Services, Department of the Solicitor General of Canada.

Hanson, R.K. & Harris, A. (2002). Where should we intervene? Dynamic predictors of sexual offense recidivism. Criminal Justice and Behavior, 27, (1), 6-35.

Hanson, R.K., & Morton-Bourgon, K. (2004). Predictors of sexual recidivism: An updated meta-analysis. (User Report No. 2004-02). Canada. Public Safety and Emergency Preparedness.

Hanson, R.K., Scott, H. & Steffy, R.A. (1995). A comparison of child molesters and nonsexual criminals: Risk predictors and long-term recidivism. Journal of Research in Crime and Delinquency, 32(3), 325-337.

Hanson, R.K., Steffy, R.A. & Gauthier, R. (1992). Long-term follow-up of child molesters: Risk Predictors and treatment outcome. (User Report No. 1992-02). Ottawa. Department of the Solicitor General of Canada.

Hanson, R.K., & Thornton, D. (2000). Improving risk assessments for sexual offenders: A comparison of three actuarial scales. Law and Human Behavior, 24, 119136.

Harris, A.J.R., & Hanson, R.K. (2004). Sex offender recidivism: A simple question. (User Report No. 2004-03). Canada, Public Safety and Emergency Preparedness.

Harris, A., Phenix, A., Hanson, R.K., & Thornton, D. (2003). Static-99 coding rules: Revised – 2003. Ottawa. Department of the Solicitor General of Canada.

Harris, G.T., Rice, M.E., & Quinsey. V.L. (1998). Appraisal and management of risk in sexual aggressors. Psychology, Public Policy, and Law, 4 (1/2), 73-115.

Harris, G.T., Rice, M.E., Quinsey, V.L., Lalumiére, M.L., Boer, D., and Lang C. (2003). A multisite comparison of actuarial risk instruments for sex offenders. Psychological Assessment, 15(3), 413-425.

Heilbrun, K., Dvoskin, J., Hart, S., & McNeil, D. (1999). Violence risk communication: Implications for research, policy, and practice. Health, Risk, & Society, 1, 91-106.

Heilbrun, K., Nezu, C.M., Keeney, M., Chung, S., & Wasserman, A.L. (1998). Sexual offending: Linking assessment, intervention, and decision making. Psychology, Public Policy, and Law, 4, 138-174.

Iowa County Attorneys Association. (2006). Statement on sex offender residency restrictions in Iowa. http://spd.iowa.gov/filemgmt_data/files/SexOffender.pdf

Langan, P.A., Schmitt, E.L., & Durose, M.R. (2003). Recidivism of sex offenders released from prison in 1994. U.S. Department of Justice, Bureau of Justice Statistics NCJ 198281.

Levenson, J.S. (2004). Reliability of sexually violent predator civil commitment criteria in Florida. Law and Human Behavior, 28(4), 357-368.

Marques, J.K., Wiederanders, M., Day, D.M., Nelson, C., & van Ommeren, A. (2005). Effects of a relapse prevention program on sexual recidivism: Final results from California's Sex Offender Treatment and Evaluation Project (SOTEP). Sexual Abuse: A Journal of Research and Treatment, Vol. 17(1), 79- 95.

Miller, H.A., Amenta, A.E., Conroy, M.A. (2005). Sexually violent predator evaluations: Empirical evidence, strategies for professionals, and research directions. Law and Human Behavior, 29(1), 29 – 54.

Quinsey, V.L., Lalumiére, M.E., Rice, M.E., & Harris, G.T. (1995). Predicting sexual offenses. In J.C. Campbell (Ed.), Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers (pp. 114-137). Thousand Oaks, CA: Sage.

Prentky, R. A., Lee, A.F.S., Kinght R.A., & Cerce, D. (1997). Recidivism rates among child molesters and rapists: A methodological analysis. Law and Human Behavior, 21, 635-658.

Rice, M.E., & Harris, G.T. (1995). Cross validation and extension of an actuarial instrument for the prediction of recidivism of sex offenders. Penetanguishene Mental Health Centre Research Report, XII (2).

Rice, M.E., & Harris, G.T. (1997). Cross-validation and extension of the Violence Risk Appraisal Guide for child molesters and rapists. Law and Human Behavior, 21, 231-241.

Rice, M.E., & Harris, G.T. (2002). Men who molest their sexually immature daughters: Is a special explanation required? Journal of Abnormal Psychology, 11(2), 329-339.

Salekin, R.T. (2001). Psychopathy and therapeutic pessimism: Clinical lore or clinical reality. Clinical Psychology Review, 22, 79-112.

Scalora, M.J., & Garbin, C. (2003). A multivariate analysis of sex offender recidivism. International Journal of Offender Therapy and Comparative Criminology, 47, 309-323.

Sjostedt, G., & Grann, M. (2002). Risk assessment: What is being predicted by actuarial prediction instruments? International Journal of Forensic Mental Health, 1(2), 179-183.

Swanson, J.W. (1994). Mental disorder, substance abuse, and community violence: An epidemiological approach. In J. Monahan & H.J. Steadman (Eds.), Violence and Mental Disorder (pp. 101-136). Chicago: University of Chicago Press.

Thornton, D. (2002). Constructing and testing a framework for dynamic risk assessment. Sexual Abuse: A Journal of Research and Treatment, 14, 139-154.

U.S. Department of Justice (1998). National conference on sex offender registries. Bureau of Justice Statistics, U.S. Department of Justice, NCJ-168965.

Myth v. Reality:
Towards a More Informed Understanding of Issues Facing People Convicted of Sex Offenses and the Communities to Which They Return

Examining Our Assumptions: What is the reality?

Assumption One:
People convicted of a sex offense have a high likelihood of re-offending.

Reality:

- The majority of those convicted of a sex offense are not arrested for new crimes. According to a 2003 U.S. Department of Justice study which examined data from 15 states, over a 3 year period after being released from prison, 5.3% of people convicted of a sex offense were rearrested for a new crime. This compared with 73.8% and 66.7% re-arrest rates for people convicted of property crimes and drug crimes respectively.
- In 1998, two researchers conducted a meta-analysis of studies on sex offense recidivism, reviewing 87 research projects representing 28,972 people convicted of a sex offense. These researchers found that the average recidivism rate for people convicted of a sex offense was only 13.4%, while the average recidivism rate for any offense was 36.3%. These researchers noted that their findings "contradict the popular view that sexual offenders inevitably re-offend … even in studies with thorough searches and long follow-up periods of the recidivism rate never exceeded 40%."
- More recently, a judge on Missouri's highest court wrote the following: "[R]ather than assuming that the [recidivism rates of sex offenders] are high, one should look at the data. Of the five categories of felony offenders in Missouri's correctional population – drugs, nonviolent felonies, violent felonies, DWI (driving while intoxicated), felonies, and sex and child abuse – *sex offenders have the lowest rates of recidivism*. Their rate of recidivism after two years is 5.3 percent, while recidivism rates for other categories of offenders are 9.6 for violent offenders, 11.7 percent for drug offenders, and 11.4 percent for felony DWI offenders. The rate of recidivism includes the likelihood of a convicted sex offender to commit any future crime, not just a sex offense."

Sources of Information:

- U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Recidivism of Sex Offender Released from Prison in 1994 (2003)
- Hanson and Bussiere, "Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies," *Journal of Consulting and Clinical Psychology,* (1998)
- F.R. v. St. Charles County Sheriff's Department, 301 S.W.3d 56 (Missouri Sup. Ct. 2010)

Assumption Two:
Most people convicted of sex offenses are pedophiles or sexual predators.

Reality:
- Not all people convicted of a sex offense offend against children. Most do not. But even amongst the group of people who sexually offend against children, there is great diversity. As one expert stated: "The sex abuser population is much more diverse and less uniformly insidious and intractable then the stereotype might suggest… Most are not pedophiles…. Moreover, about a third of offenders against juveniles are themselves juveniles… In sum, the child sex offender population is diverse. It ranges from a small group with a serious pathology and high recidivism risk to a large group, including other youth, whose offending my be situational or transitory and who pose a lower risk." (David Finkelhor)
- It is also important to consider the types of convictions that can result in a person being labeled a "sex offender." For example, Wendy Whitaker is on the sex offender registry because when she was a 17 year old high school student, she engaged in oral sex with a 15 year old fellow student. Does she fit the profile of a pedophile or a sexual predator? Or is her conduct instead that of an impulsive teenager who did not use good judgment? (Patricia Salkin)

Sources of Information:
- David Finkelhor, "The Prevention of Childhood Sexual Abuse," The Future of Children (Fall 2009).
- Patricia Salkin, "Residency Restrictions for Convicted Sex Offenders: A Popular Approach on Questionable Footing," 9 NY Zoning Law and Practice Report (January/February 2008)
- Center for Community Alternatives, "Responding to Sexual Offenses: Research, Reason, and Public Safety," available at www.communityalternatives.org.

Assumption Three:
Treatment does not work.

Reality:
Earlier treatment modalities treated all people convicted of a sex offense the same. Not surprisingly, these programs were not very effective. But the rich research that has emerged over the years has led to the development of more effective treatment programs. "Researchers are beginning to identify the relevant factors associated with the risk of sexual offending, and identify what approaches work for which type of offenders." (CCA)

The following from the Division of Criminal Justice Services' website discusses some studies about the effectiveness of treatment:
- Research that looks at groups of treated and untreated sex offenders, and matches them on similar characteristics, has shown that treatment is moderately effective at reducing sexual reoffense (Thornton, 2008).
- Several studies have shown significantly lower rates of repeat sex offenses for those offenders who successfully completed treatment goals, compared to those who did not (Gallagher, Wilson, Hirschfield, Coggeshall, & MacKenzie, 1999; Hanson, Gordon, Harris,

Marques, Murphy, Quinsey, & Seto, 2002; Lösel & Schmucker, 2005; Nicholaichuk, Gordon, Gu, & Wong, 2000; Looman, Abracen, & Nicholaichuk, 2000; McGrath, Cumming, & Burchard 2003). Treatment can help many offenders to learn to control their behavior by recognizing and changing the thoughts that rationalize sexually abusive behavior in their own minds (ATSA, "Ten Things"; ATSA, "Facts," undated).

Sources of Information:
- Center for Community Alternatives, "Responding to Sexual Offenses: Research, Reason, and Public Safety," available at www.communityalternatives.org.
- Division of Criminal Justice Services, Facts and Myths, available at: http://criminaljustice.state.ny.us/nsor/som_mythsandfacts.htm.

Assumption Four:
People with a prior sex offense conviction pose the most danger to our children.

Reality:
The significant majority of sex offenses are not committed by people with a prior sex offense conviction, but instead by people who have never before been convicted of a crime. Researchers examined 21 years worth of arrest data in New York and discovered that nearly all – about 95% of arrests for sexual offenses – involved first time offenders. This finding caused these researchers to question the efficacy of our current policies, which devote considerable attention to people who have a past sex offense conviction.

Source of Information:
- Sandler, Freeman, and Socia, "Does A Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law," Psychology, Public Policy, and Law (2008).

Assumption Five:
People with a prior sex offense conviction chose to reside in close proximity to places where children congregate so they can target children who are strangers to them.

Reality:
- The research clearly tells us that economic factors rather than proximity to areas where children congregate are what drive where people convicted of sex offenses live.
- Research also reveals that for the small percentage of people who re-offend sexually, proximity to schools, parks, and playgrounds played no role in the re-offense. For example, in 2003 the Minnesota Department of Corrections examined all of the re-offenses of registered sex offenders who had been deemed a risk level 3 that occurred over a two year period. Researchers could not find any "examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses" researchers had evaluated.

- Notably, most crimes against children are committed by people known to the children and not strangers. According to a Department of Justice study, 93% of children who were sexually abused knew their abuser – who was a family member or family acquaintance.

Sources of Information:

- Duwe, G., Donnay, W., and Tewksbury, R., "Does Residential Proximity Matter: A Geographic Analysis of Sex Offenses," Criminal Justice and Behavior (2008)
- Minnesota Department of Corrections (2003). "Level 3 Sex Offenders Residential Placement Issues," St. Paul Minnesota, available at: http://www.leg.state.mn.us/docs/2003/mandated/030175.pdf
- U.S. Department of Justice, "Sexual Assault of Young Children as Reported to Law Enforcement: Victim Incident and offender Characteristics" (2000)

Assumption Six:

When using the Internet, children face significant danger of being preyed upon by sexual predators.

Reality:

- The issue of adolescent internet use and exposure to sex or sexual predators was explored at length in a 2008 Frontline documentary, "Growing up Online." In an interview, co-producer and co-director Rachel Dretzin, a mother of three children, stated as follows: "One of the biggest surprises in making this film was the discovery that the threat of online predators is misunderstood and overblown.… [A]ll the kids we met, without exception, told us the same thing: They would never dream of meeting someone in person they'd met online." (This interview is available at: http://www.pbs.org/wgbh/pages/frontline/kidsonline/etc/notebook.html)

- The "Growing Up Online" producers consulted with expert, David Finkelhor, Director of the Crimes Against Children Research Center at the University of New Hampshire, who believes that, with regard to the incidents of online sexual solicitation of minors, "considerable numbers of them are undoubtedly coming from other kids, or just people acting weird online." He further stated: "We have this idea that these Internet pedophiles are targeting young children through the online hookup, that they've moved into your living room, that they're misleading kids by pretending to be other kids and getting them to give out personal information. And then these kids go to meet someone who they think is a friend, and at that point they get abducted, assaulted or even murdered. That's really not what's going on in most of these crimes. ... [M]ost kids are really handling these solicitations quite responsibly and not responding, and that they're not all that affected by them, either; that they regard them as litter on their information superhighway and just kind of blow them off." (This interview, as well as excerpts from interviews with other experts, is at: http://www.pbs.org/wgbh/pages/frontline/kidsonline/safe/predator.htm

Table of Cases

Addington v. Texas, 441 U.S. 418 (1979)
Altschuler v. Bressler, 289 N.Y. 463 (1943)
Commonwealth v. Perez, 97 A.3d 747 (Pa. 2014)
Cruzan by Cruzan v. Dir., Missouri Dept. of Health, 497 U.S. 261 (1990)
Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014)
Doe v. Pataki, 481 F.3d 69 (2d Cir. 2007)
Doe v. Pataki, 427 F. Supp. 2d 398 (SDNY 2006)
Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998)
Doe v. Pataki, 940 F. Supp. 603 (SDNY 1996)
Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997)
Doe v. Pataki, 439 F. Supp. 2d 324 (SDNY 2006)
Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016)
Doe v. Snyder, 49 F. Supp.3d 719 (E.D. Michigan, 2020)
Doe v. State, 111 A.3d 1077, 1097 (N.H. 2015)
George Backer Mgt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 220 (1978)
Hughes v. Probation, 281 A.D.2d 229 (1st Dept. 2001)
In re Gail R., 67 A.D.3d 808 (2d Dept. 2009)
Jones v. Stanford, 489 F. Supp.3d 140 (E.D.N.Y. 2020)
Krol v. Eckman, 256 A.D.2d 945, 947 (3d Dept. 1998)
Marciano v. Goord, 2006 N.Y. LEXIS 2656, at 23-24 (Sup. Ct. N.Y. Co. 2006)
Matter of Arroyo v. Annucci, 61 Misc. 3d 930 (Sup. Ct. Albany Co. 2018)
Matter of Board of Examiners of Sex Offenders of the State of N.Y. v. D'Agostino, 130 A.D.3d 1449 (4th Dept. 2015).
Matter of Bush v. New York State Board of Examiners of Sex Offenders, 72 A.D.3d 1078 (2d Dept. 2010)
Matter of Gonzalez v. Annucci, 32 N.Y.3d 461 (2018)
Matter of Merrell v. Sliwa, 156 A.D.3d 1186 (3d Dept. 2017)
Matter of New York State Board of Examiners of Sex Offenders v. Ransom, 249 A.D.2d 891 (4th Dept. 1998)
Matter of North v. Board of Examiners of Sex Offenders of State of N.Y., 8 N.Y.3d 745, 752 (2007)
Matter of Philip A., 49 N.Y.2d 198 (1980)
Matter of Westchester Cty. Med. Ctr. On Behalf of O'Connor, 72 N.Y.2d 517, 531 (1988)
Matter of Williams v. DOCCS. 136 A.D.3d 147 (1st Dept. 2016)
Millard v. Rankin, 265 F. Supp. 3d 1211 (D. Colo. 2017)
Matter of Smith v. Devane, 73 A.D.3d 179 (3d Dept. 2010)
Packingham v. North Carolina, 137 S. Ct. 1730 (2017)
Padilla v. Kentucky, 599 U.S.356 (2010)
People v. Abdullah, 31 A.D.3d 515 (2d Dept. 2006)
People v. Acevedo, 195 A.D.3d 528 (1st Dept. 2021)
People v. Agarwal, 96 A.D.3d 1450 (4th Dept. 2012)
People v. Aleman, 187 A.D.3d 482 (1st Dept. 2020)
People v. Alemany, 13 N.Y.3d 424 (2009)
People v. Amir W., 107 A.D.3d 1639 (4th Dept. 2013)

People v. Anderson, 151 A.D.3d 767 (2d Dept. 2017)
People v. Anderson, 53 Misc. 3d 144(A) (App. Term, 1st Dept. 2016)
People v. Arotin, 19 A.D.3d 845 (3d Dept. 2005)
People v. Asfour, 148 A.D.3d 1669 (4th Dept. 2017)
People v. Ashley, 19 A.D.3d 882, 883 (3d Dept. 2005)
People v. Bajek, 191 A.D.3d 1431 (4th Dept. 2021)
People v. Bailey, 52 A.D.3d 336 (1st Dept. 2008)
People v. Baker, 57 A.D.3d 1472 (4th Dept. 2008)
People v. Balic, 12 N.Y.3d 563 (2009)
People v. Barnes, 6 Misc. 3d 469, 475 (Sup. Ct. Monroe Co. 2004)
People v. Barney, 168 A.D.3d 774 (2d Dept. 2019),
People v. Barney, 126 A.D.3d 1245 (3d Dept. 2015)
People v. Barrier, 58 A.D.3d 1086 (3d Dept. 2009)
People v. Bateman, 59 A.D.3d 788 (3d Dept. 2009)
People v. Baxin, 26 N.Y.3d 6 (2015)
People v. Beames, 71 A.D.3d 1300 (3d Dept. 2010)
People v. Bean, 190 A.D.3d 622 (1st Dept. 2021)
People v. Belanger, 60 A.D.3d 1398 (4th Dept. 2009)
People v. Bertrand, 194 A.D.3d 1081 (2d Dept. 2021)
People v. Bethel, 165 A.D.3d 712 (2d Dept. 2018)
People v. Betts, ___ N.W.2d ___, 2021 WL 3161828 (2021).
People v. Birch, 99 A.D.3d 422 (1st Dept. 2012)
People v. Birch, 114 A.D.3d 1117 (3d Dept. 2014)
People v. Black, 33 A.D.3d 981 (2d Dept. 2006)
People v. Blaylock, 125 A.D.3d 950 (2d Dept. 2015)
People v. Blue, 186 A.D.3d 1088 (4th Dept. 2020).
People v. Boan, 11 A.D.3d 956 (4th Dept. 2004)
People v. Bogart, 148 Misc. 2d 327 (Sup. Ct. Richmond Co. 1990)
People v. Boice, 6 Misc. 3d 1014(A) (Co. Ct. Chemung Co. 2004)
People v. Boncic, 15 Misc. 3d 1139(A) (Sup. Ct. N.Y. Co. 2007)
People v. Bove, 52 A.D.3d 1124 (3d Dept. 2008)
People v. Brewer, 63 A.D.3d 1604 (4th Dept. 2009)
People v. Briggs, 86 A.D.3d 903 (3d Dept. 2011)
People v. Briscoe, 172 A.D.3d 1788 (3d Dept. 2019)
People v. Britt, 66 A.D.3d 853 (2d Dept. 2009)
People v. Britton, 148 A.D.3d 1064 (2d Dept. 2017) *aff'd* 31 N.Y.3d 1019 (2018)
People v. Britton, 31 N.Y.3d 1019 (2018)
People v. Brooksvasquez, 24 A.D.3d 644 (2d Dept. 2005)
People v. Brown, 178 A.D.3d 1167 (3d Dept. 2019)
People v. Brown, 148 A.D.3d 1705 (4th Dept. 2017)
People v. Brown, 302 A.D.2d 919 (4th Dept. 2003)
People v. Bryant, 187 A.D.3d 1657 (4th Dept. 2020)
People v. Buggs, 25 Misc. 3d 130(A) (App. Term, 2d Dept. 2009)
People v. Bullock, 125 A.D.3d 1 (1st Dept. 2014)
People v. Bunger, 78 A.D.3d 1433, 1434 (3d Dept. 2010)
People v. Burden, 176 A.D.3d 524 (1st Dept. 2019)

People v. Burden, 6 Misc. 3d 1033(A) (Sup. Ct. Bronx Co. 2008)
People v. Burke, 68 A.D.3d 1175 (3d Dept. 2009)
People v. Bush, 105 A.D.3d 1179 (3d Dept. 2013)
People v. Buss, 11 N.Y.3d 553 (2008)
People v. Butler, 161 A.D.3d 1232 (3d Dept. 2018)
People v. Butler, 157 A.D.3d 727 (2d Dept. 2018)
People v. Buyund, 179 A.D.3d 161 (2d Dept. 2019)
People v. Buyund, 36 N.Y.3d 1037 (2021)
People v. Bynum, 140 A.D.3d 501 (1st Dept. 2016)
People v. Calix, 191 A.D.3d 442 (1st Dept. 2021)
People v. Cameron, 114 A.D.3d 522, 523 (1st Dept. 2014)
People v. Campbell, 98 A.D.3d 5, 12 (2d Dept. 2012)
People v. Canady, 195 A.D.3d 752 (2d Dept 2021)
People v. Cantrell, 37 A.D.3d 1183 (4th Dept. 2007)
People v. Carlton, 78 A.D.3d 1654 (4th Dept. 2010)
People v. Carlton, 307 A.D.2d 763 (4th Dept. 2003)
People v. Carman, 33 A.D.3d 1145 (3d Dept. 2006)
People v. Carmichael, 192 A.D.3d 924 (2d Dept. 2021)
People v. Carpenter, 60 A.D.3d 833 (2d Dept. 2009)
People v. Carter, 138 A.D.3d 706 (2d Dept. 2016)
People v. Catchings, 56 A.D.3d 1181 (4th Dept. 2008)
People v. Cephus, 128 A.D.3d 656 (2d Dept. 2015)
People v. Chabrier, 38 A.D.3d 355 (1st Dept. 2007)
People v. Chandler, 48 A.D.3d 770 (2d Dept. 2008)
People v. Charache, 9 N.Y.3d 829 (2007)
People v. Cherry, 166 A.D.3d 1220 (3d Dept. 2018)
People v. Chiddick, 8 N.Y.2d 445 (2007)
People v. Chilson, 286 A.D.2d 828 (3d Dept. 2001)
People v. Chiu, 123 A.D.3d 896 (2d Dept. 2014)
People v. Chrisley, 172 A.D.3d 1914 (4th Dept. 2019)
People v. Chrisley, 193 A.D.3d 1422 (4th Dept. 2021)
People v. Coger, 108 A.D.3d 1234 (4th Dept. 2013)
People v. Coleman, 42 N.Y.2d 500, 505 (1977)
People v. Collazo, 7 A.D.3d 595 (2d Dept. 2004)
People v. Collazo, 179 A.D.3d 1103 (2d Dept. 2020)
People v. Collins, 156 A.D.3d 830 (2d Dept. 2017)
People v. Collins, 188 A.D.3d 1107 (2d Dept. 2020)
People v. Compasso, 35 Misc. 3d 1201(A), (County Ct., Suffolk Co. 2012)
People v. Cook, 128 A.D.3d 928 (2d Dept. 2015) *rev'd* 29 N.Y.3d 114 (2017)
People v. Cook, 29 N.Y.3d 121 (2017)
People v. Cook, 29 N.Y.3d 114 (2017)
People v. Cooney, 137 A.D.3d 1665, 1668 (4th Dept. 2016)
People v. Cooper, 141 A.D.3d 710 (2d Dept. 2016)
People v. Corn, 128 A.D.3d 436 (1st Dept. 2015)
People v. Cortez-Moreno, 194 A.D.3d 953 (2021)
People v. Cortijo, 179 Misc. 2d 178 (Sup. Ct. N.Y. Co. 1998)

People v. Cortijo, 291 A.D.2d 352 (1st Dept. 2002)
People v. Cosby, 154 A.D.3d 789 (2d Dept. 2017)
People v. Costello, 35 A.D.3d 754 (2d Dept. 2006)
People v. Cratsley, 86 N.Y.2d 81 (1995)
People v. Crews, 127 A.D.3d 491 (1st Dept. 2015)
People v. Cruikshank, 105 A.D.2d 325 (3d Dept. 1985) *affd sub nom. People v. Dawn Maria C.,* 67 N.Y.2d 625 (1986)
People v. Cruz, 139 A.D.3d 601 (1st Dept. 2016)
People v. Cruz, 132 A.D.3d 554 (1st Dept. 2015)
People v. Cruz, 38 A.D.3d 740 (2d Dept. 2007)
People v. Cuesta, 65 A.D.3d 1113 (2d Dept. 2009)
People v. Current, 147 A.D.3d 1235, 1237 (3d Dept. 2017).
People v. Damato, 58 A.D.3d 819 (2d Dept. 2009)
People v. Daniel, 196 A.D.3d 652 (2d Dept. 2021)
People v. Darrah, 153 A.D.3d 1528 (3d Dept. 2017)
People v. Davenport, 38 A.D.3d 634 (2d Dept. 2007)
People v. David W., 95 N.Y.2d 130, 139 (2000)
People v. Davis, 145 A.D.3d 1625 (4th Dept. 2016)
People v. Davis, 130 A.D.3d 1131 (3d Dept. 2015)
People v. Dean, 169 A.D.3d 1414 (4th Dept. 2019)
People v. DeBiaso, 49 A.D.3d 1280 (4th Dept. 2008)
People v. DeDona, 102 A.D.3d 58 (2d Dept. 2012)
People v. Delles, 195 A.D.3d 1434 (4th Dept. 2021)
People v. Denny, 87 A.D.3d 1230 (3d Dept. 2011)
People v. DeWoody, 127 A.D.3d 831 (2d Dept. 2015)
People v. Diack, 24 N.Y.3d 674 (2015)
People v. Diaz, 169 A.D.3d 727 (2d Dept. 2019)
People v. Diaz, 61 A.D.3d 465 (1st Dept. 2009)
People v. Diaz, 150 A.D.3d 60, 66 (1st Dept. 2017) *aff'd* 32 N.Y.3d 538 (2018).
People v. Diaz, 32 N.Y.3d 538 (2018)
People v. Diaz, 34 A.D.3d 1179 (2020)
People v. DiJohn, 48 A.D.3d 1302 (4th Dept. 2008)
People v. Dilillo (Lisa), 162 A.D.3d 915 (2d Dept. 2018)
People v. Dilillo (Tommaso), 146 A.D.3d 960 (2d Dept. 2016)
People v. Dominie, 42 A.D.3d 589 (3d Dept. 2007)
People v. Donhauser, 37 A.D.3d 1053 (4th Dept. 2007)
People v. Donk, 39 A.D.3d 1268 (4th Dept. 2007)
People v. Dorsett, 35 A.D.3d 279 (1st Dept. 2006)
People v. Douglas, 18 A.D.3d 967 (3d Dept. 2005)
People v. Duart, 84 A.D.3d 908 (2d Dept. 2011)
People v. Ealy, 55 A.D.3d 1313 (4th Dept. 2008)
People v. Easley, 42 N.Y.2d 50 (1977)
People v. Edmonds, 133 A.D.3d 1332 (4th Dept. 2015)
People v. Edney, 111 A.D.3d 612 (2d Dept. 2013)
People v. Ellis, 33 N.Y.3d 582 (2019)
People v. Ellis, 162 A.D.3d 161 (3d Dept. 2018)

People v. English, 60 A.D.3d 923 (2d Dept. 2009)
People v. Erb, 59 A.D.3d 1020 (4th Dept. 2009)
People v. Fabian-Lopez, 160 A.D.3d 536 (1st Dept. 2018)
People v. Faison, 46 A.D.3d 316 (1st Dept. 2007)
People v. Farahat, 78 A.D.3d 805 (2d Dept. 2010)
People v. Farrell, 142 A.D.3d 1299, 1300 (4th Dept. 2016)
People v. Faulkner, 151 A.D.3d 601 (1st Dept. 2017)
People v. Ferguson, 39 A.D.3d 1258 (4th Dept. 2007)
People v. Ferguson, 53 A.D.3d 571 (2d Dept. 2008)
People v. Ferrer, 69 A.D.3d 513 (1st Dept. 2010)
People v. Filkins, 107 A.D.3d 1069 (3d Dept. 2013)
People v. Fiol, 49 A.D.3d 834 (2d Dept. 2008)
People v. Fisher, 22 A.D.3d 358 (1st Dept. 2005)
People v. Fisher, 177 A.D.3d 615 (2d Dept. 2019)
People v. Ford, 25 N.Y.3d 939 (2015)
People v. Fortin, 29 A.D.3d 765, 766 (2d Dept. 2006)
People v. Fowler, 145 A.D.3d 437 (1st Dept. 2016)
People v. Francis, 30 N.Y.3d 737 (2018)
People v. Franco, 106 A.D.3d 417 (1st Dept. 2013)
People v. Freeman, 85 A.D.3d 1335 (3d Dept. 2011)
People v. Freeman, 67 A.D.3d 1202 (3d Dept. 2009)
People v. Galindo, 107 A.D.3d 603 (1st Dept. 2013)
People v. Garcia, 53 Misc. 3d 153(A) (App. Term 2d Dept. 2016)
People v. Garcia, 47 A.D.3d 428, 430 (1st Dept. 2008)
People v. Garcia, 153 A.D.3d 735 (2d Dept. 2017)
People v. Gardner, 59 A.D.3d 605 (2d Dept. 2009)
People v. Garofolo, 195 A.D.3d 958 (2d Dept. 2021)
People v. Gattling, 188 A.D.3d 1765 (4th Dept. 2020)
People v. George, 141 A.D.3d 1177 (4th Dept. 2016)
People v. Gerald, 16 Misc.3d 106 (App. Term 2d Dept. 2007)
People v. Gerros, 175 A.D.3d 1111 (4th Dept. 2019)
People v. Gilbert, 78 A.D.3d 1584 (4th Dept. 2010)
People v. Gillotti, 23 N.Y.3d 841 (2014)
People v. Grady, 81 A.D.3d 1464 (4th Dept. 2011)
People v. Guaman, 12 Misc. 3d 707 (Sup. Ct. Kings Co. 2005)
People v. Gonzalez, 28 A.D.3d 1073 (4th Dept. 2006)
People v. Gonzalez, 189 A.D.3d 509 (1st Dept. 2020)
People v. Gonzalez, 32 N.Y.3d 461 (2018)
People v. Gonzalez, 157 A.D.3d 409 (1st Dept. 2018)
People v. Goosens, 75 A.D.3d 1171 (4th Dept. 2010)
People v. Gordon, 133 A.D.3d 835 (2d Dept. 2015)
People v. Graves, 162 A.D.3d 1659 (4th Dept. 2018)
People v. Gravino, 14 N.Y.3d 546 (2010)
People v. Green, 104 A.D.3d 1222 (4th Dept. 2013)
People v. Griest, 143 A.D.3d 1058 (3d Dept. 2016)
People v. Griffin, 148 A.D.3d 735 (2d Dept. 2017)

People v. Grigg, 112 A.D.3d 802 (2d Dept. 2013)
People v. Guallpa-Lema, 188 A.D.3d 1108 (2d Dept. 2020)
People v. Guitard, 57 A.D.3d 751 (2d Dept. 2008)
People v. Gutierrez-Lucero, 103 A.D.3d 89 (2012)
People v. Hackett, 89 A.D.3d 1479 (4th Dept. 2011)
People v. Hagen, 193 A.D.3d 991 (2d Dept. 2021)
People v. Hahn, 150 A.D.3d 1285 (2d Dept. 2017)
People v. Harris, 46 A.D.3d 1445 (4th Dept. 2007)
People v. Harris, 178 Misc. 2d 858 (Crim. Ct. N.Y.C, Queens Co. 1998)
People v. Hartnett, 16 N.Y.3d 200 (2011)
People v. Hatton, 72 Misc. 3d 141(A) (App. Term, 2d Dept. 2021)
People v. Havens, 144 A.D.3d 1632 (4th Dept. 2016)
People v. Hawkins, 66 Misc. 3d 145(A) (App. Term, 2d Dept. 2020)
People v. Hawthorne, 158 A.D.3d 651 (2d Dept. 2018)
People v. Hector. 45 A.D.3d 503 (1st Dept. 2007)
People v. Heichel, 20 A.D.3d 934, 935 (4th Dept. 2005)
People v. Helmer, 65 A.D.3d 68 (4th Dept. 2009)
People v. Hemmes, 110 A.D.3d 1387 (3d Dept. 2013)
People v. Hernandez, 93 N.Y.2d 261 (1999)
People v. Hernandez, 187 A.D.3d 1227 (2d Dept. 2020)
People v. Hernandez, 61 Misc.3d 534 (Sup. Ct. Kings Co. 2018)
People v. Hingel, 50 A.D.3d 501 (1st Dept. 2008)
People v. Hinson, 170 A.D.3d 1385 (3d Dept. 2019)
People v. Hiram, 142 A.D.3d 1304 (4th Dept. 2016)
People v. Hirji, 170 A.D.3d 412 (1st Dept. 2019).
People v. Hlatky, 153 A.D.3d 1538 (3d Dept. 2017)
People v. Hoffman, 160 A.D.3d 1485 (4th Dept. 2018)
People v. Hoffman, 62 A.D.3d 976 (2d Dept. 2009)
People v. Hoffman, 160 A.D.3d 1485, 1486 (4th Dept. 2018)
People v. Holland, 32 Misc. 3d 926 (Co. Ct. Rockland Co. 2011)
People v. Holmes, 166 A.D.3d 821 (2d Dept. 2018)
People v. Horne, 61 A.D.3d 945 (2d Dept. 2009)
People v. Houston, 39 Misc. 3d 1202(A) (Sup. Ct. Kings Co. 2013)
People v. Howard, 27 N.Y.3d 337 (2016)
People v. Hubel, 158 A.D.3d 539 (1st Dept. 2018)
People v. Hunt, 158 A.D.3d 730 (2d Dept. 2018)
People v. Huntley, 191 A.D.3d 1261 (4th Dept. 2021)
People v. Hurlburt-Anderson, 46 A.D.3d 1437 (4th Dept. 2007)
People v. Hurst, 19 A.D.3d 1165 (4th Dept. 2005)
People v. Huyler, 173 A.D.3d 1409 (3d Dept. 2019)
People v. Inghilleri, 21 A.D.3d 404 (2d Dept. 2005)
People v. Ireland, 50 A.D.3d 1592 (4th Dept. 2008)
People v. Irizzary, 36 A.D.3d 473 (1st Dept. 2007)
People v. Irwin, 19 Misc. 3d 1118(A) (Co. Ct. Onondaga Co. 2008)
People v. Iverson, 90 A.D.3d 1561 (4th Dept. 2011)
People v. Izzo, 26 N.Y.3d 999 (2015)

People v. James, 114 A.D.3d 1312 (4th Dept. 2014)
People v. Jones, 172 A.D.3d 1786 (3d Dept. 2019)
People v. Jarama, 178 A.D.3d 970 (2d Dept. 2019)
People v. Jenkins, 151 A.D.3d 891 (2d Dept. 2017)
People v. Jiminez, 55 N.Y.2d 895 (1982)
People v. Jiminez, 178 Misc. 2d 319, 331 (Sup. Ct. Kings Co. 1998)
People v. Johnson, 11 N.Y.3d 416 (2008)
People v. Johnson, 46 A.D.3d 1032, 1033 (3d Dept. 2007)
People v. Johnson, 93 A.D.3d 1323 (4th Dept. 2012)
People v. Johnson, 104 A.D.3 1321 (4th Dept. 2013)
People v. Johnson, 151 A.D.3d 1950 (4th Dept. 2017)
People v. Johnston, 31 Misc. 3d 1221(A) (Co. Ct. Madison Co. 2011)
People v. Johnson, 77 A.D.3d 548, 549 (1st Dept. 2010)
People v. Johnson, 179 A.D.3d 1159 (3d Dept. 2020)
People v. Johnson, 135 A.D.3d 720 (2d Dept. 2016)
People v. Johnson, 32 Misc. 3d 138(A) (App. Term 2d Dept. 2011)
People v. Johnson, 44 A.D.3d 571, (1st Dept. 2007)
People v. Johnson, 130 A.D.3d 454 (1st Dept. 2015)
People v. Jones, 172 A.D.3d 1786 (3d Dept. 2019)
People v. Jones, 24 Misc. 3d 1224(A) (Co. Ct. Suffolk Co., 2009)
People v. Jordan, 62 A.D.3d 1176 (3d Dept. 2009)
People v. Joslyn, 27 A.D.3d 1033 (3d Dept. 2006)
People v. Judd, 29 A.D.3d 431 (1st Dept. 2006)
People v. Judson, 50 A.D.3d 1242, 1243 (3d Dept. 2008)
People v. June, 150 A.D.3d 1701 (4th Dept. 2017)
People v. Jusino, 11 Misc. 3d 470 (Sup. Ct. N.Y. Co. 2005)
People v. Kaff, 149 A.D.3d 783 (2d Dept. 2017)
People v. Katz, 150 A.D.3d 1160 (2d Dept. 2017)
People v. Kearns, 95 N.Y.2d 816 (2000).
People v. Kearns, 68 A.D.3d 1713 (4th Dept. 2009)
People v. Kelemen, 44 A.D.3d 687 (2d Dept. 2007)
People v. Kelley, 64 A.D.3d 1192 (4th Dept. 2009)
People v. Kelly, 69 A.D.3d 498 (1st Dept. 2010)
People v. Kemp, 148 A.D.3d 1284 (3d Dept. 2017)
People v. Kennedy, 160 A.D.3d 671 (2d Dept. 2018)
People v. Kennedy, 7 N.Y.3d 87 (2006)
People v. Knox, 12 N.Y.3d 60 (2009)
People v. Kowal, 175 A.D.3d 1057 (4th Dept. 2019)
People v. Kraeger, 27 A.D.3d 1160 (4th Dept. 2006)
People v. Kraus, 45 A.D.3d 826 (2d Dept. 2007)
People v. Kruger, 88 A.D.3d 1169, 1170-1171 (3d Dept. 2011)
People v. Kwiatkowski, 150 N.Y.S.3d 903 (3d Dept. 2021)
People v. Kyle, 64 A.D.3d 1117 (4th Dept. 2009)
People v. Lancaster, 128 A.D.3d 786 (2d Dept. 2015)
People v. Landa, 179 A.D.3d 432 (1st Dept. 2020)
People v. Lashway, 25 N.Y.3d 478, 483 (2015)

People v. Lavelle, 169 A.D.3d 1127 (3d Dept. 2019)
People v. Lawrence, 56 Misc. 3d 752 (Sup. Ct. N.Y. Co. 2017)
People v. Lawson, 90 A.D.3d 1006, 1007 (2d Dept. 2011)
People v. Leach, 158 A.D.3d 1240, 1241 (4th Dept. 2018)
People v. Leach, 106 A.D.3d 1387 (3d Dept. 2013)
People v. Leeks, 43 A.D.3d 1251 (3d Dept. 2007)
People v. Lema, 157 A.D.3d 406 (1st Dept. 2018)
People v. Leon, 177 A.D.3d 773 (2d Dept. 2019)
People v. Leon, 172 A.D.3d 765 (2d Dept. 2019)
People v. Leopold, 13 N.Y.3d 923 (2010)
People v. Lerch, 66 A.D.3d 1088 (3d Dept. 2009)
People v. Lewis, 178 A.D.3d 971 (2d Dept. 2019)
People v. Lewis, 173 A.D.3d 913 (2d Dept. 2019)
People v. Lewis, 45 A.D.3d 1381 (4th Dept. 2007)
People v. Lewis, 37 A.D.3d 689, 690 (2d Dept. 2007)
People v. Liden, 19 N.Y.3d 271 (2012)
People v. Liguori, 48 A.D.3d 773 (2d Dept. 2008)
People v. Lin, 188 A.D.3d 1109 (2d Dept. 2020)
People v. Linton, 94 A.D.3d 962 (2d Dept. 2012)
People v. Littles, 155 A.D.3d 979, 980 (2d Dept. 2017)
People v. Lobello, 123 A.D.3d 993, 994 (2d Dept. 2014)
People v. Lockett, 67 A.D.3d 1266 (3d Dept. 2009)
People v. Locklear, 154 A.D.3d 888, 889 (2d Dept. 2017)
People v. Lockrow, 161 A.D.3d 1492 (3d Dept. 2018)
People v. Lockwood, 308 A.D.2d 640 (3d Dept. 2003)
People v. Logsdon, 169 A.D.3d 1466 (4th Dept. 2019)
People v. Lombardo, 167 Misc. 2d 942 (County Ct. Nassau Co. 1996)
People v. Long, 20 N.Y.3d 373 (2013)
People v. Long, 129 A.D.3d 687 (2d Dept. 2015)
People v. Lopez, 192 A.D.3d 1050 (2d Dept. 2021)
People v. Lopez, 62 Misc. 3d 146(A) (App. Term, 1st Dept. 2019)
People v. Loughlin, 145 A.D.3d 1426 (4th Dept. 2016)
People v. Lovelace, 39 A.D.3d 728 (2d Dept. 2007)
People v. Lowery, 93 A.D.3d 1269 (4th Dept. 2012)
People v. Lucero, 188 A.D.3d 1111 (2d Dept. 2020)
People v. Mabb, 32 A.D.3d 1135 (3d Dept. 2006)
People v. Mabee, 69 A.D.3d 820 (2d Dept. 2010)
People v. Macchia, 126 A.D.3d 458 (1st Dept. 2015)
People v. MacNeil, 283 A.D.2d 835 (3d Dept. 2001)
People v. Madera, 100 A.D.3d 1111 (3d Dept. 2012)
People v. Madison, 153 A.D.3d 737 (2d Dept. 2017)
People v. Madlin, 302 A.D.2d 751 (3d Dept. 2003)
People v. Madonna, 167 A.D.3d 1488 (4th Dept. 2018)
People v. Maldonado-Escobar, 196 A.D.3d 655 (2d Dept. 2021)
People v. Mallory, 293 A.D.2d 881 (3d Dept. 2002)
People v. Marrero, 37 Misc. 3d 429 (Sup. Ct. N.Y. Co. 2012)

People v. Marrero, 52 A.D.3d 797 (2d Dept. 2008)
People v. Marsh, 116 A.D.3d 680 (2d Dept. 2014)
People v. Martinez, 143 A.D3d 563 (1st Dept. 2016)
People v. Martinez, 185 A.D.2d 191 (1st Dept. 1992)
People v. Martinez, 39 A.D.3d 835 (2d Dept. 2007)
People v. Mathie, 34 A.D.3d 987 (3d Dept. 2006)
People v. Maund, 181 A.D.3d 1331 (4th Dept. 2020)
People v. Maus, 162 A.D.3d 1415 (3d Dept. 2018)
People v. McCabe, 142 A.D.3d 1379 (4th Dept. 2016)
People v. McClelland, 38 A.D.3d 1274 (4th Dept. 2007)
People v. McCollum, 41 A.D.3d 1187 (4th Dept. 2007)
People v. McCurdy, 35 N.Y.3d 1056 (2020)
People v. McEvoy, 57 Misc. 3d 1201(A) (Sup. Ct. Kings Co. 2017)
People v. McFarland, 29 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2010)
People v. McGarghan, 83 A.D.3d 422 (1st Dept. 2011)
People v. McLean, 55 A.D.3d 973 (3d Dept. 2008)
People v. McNeil, 59 Misc. 3d 128(A) (App. Term, 1st Dept. 2018)
People v. Medina, 165 A.D.3d 1184 (2d Dept. 2018)
People v. Medina, 180 A.D.3d 818 (2d Dept. 2020)
People v. Menjivar, 121 A.D.3d 660, 661 (2d Dept. 2014)
People v. Middlemiss, 125 A.D.3d 1065 (3d Dept. 2015)
People v. Miguel, 140 A.D.3d 497 (1st Dept. 2016)
People v. Milks, 28 A.D.3d 1163 (4th Dept. 2006)
People v. Miller, 149 A.D.3d 1279 (3d Dept. 2017)
People v. Miller, 77 A.D.3d 1386 (4th Dept. 2010)
People v. Miller, 179 A.D.3d 1517 (4th Dept. 2020)
People v. Mingo, 12 N.Y.3d 563 (2009)
People v. Montufar-Tez, 195 A.D.3d 1052 (2d Dept. 2021)
People v. Moore, 32 A.D.3d 692 (1st Dept. 2006)
People v. Mota, 165 A.D.3d 988 (2d Dept. 2018)
People v. Mott, 195 A.D.3d 756 (2d Dept. 2021)
People v. Murphy, 68 A.D.3d 832 (2d Dept. 2009)
People v. Murray, 184 A.D.3d 882 (2d Dept. 2020)
People v. Myers, 87 A.D.3d 1286 (4th Dept.2011)
People v. Neish, 281 A.D.2d 817 (3d Dept. 2001)
People v. Neuer, 86 A.D.3d 926 (4th Dept. 2011)
People v. Nichols, 52 A.D.3d 799 (2d Dept. 2008)
People v. Nowicki, 133 A.D.3d 732 (2d Dept. 2015)
People v. Noyes, 108 A.D.3d 1202 (4th Dept. 2013)
People v. Oliver, 37 Misc. 3d 1201(A) (Sup. Ct. Cayuga Co. 2009)
People v. Oginski, 35 A.D.3d 952 (3d Dept. 2006)
People v. Orengo, 40 A.D.3d 609 (2d Dept. 2007)
People v. Owens, 126 A.D.3d 1512 (4th Dept. 2015)
People v. Paladin, 57 Misc. 3d 130(A) (Sup. Ct. App. Term 2d Dept. 2017)
People v. Palazo, 147 Misc. 2d 829 (Sup. Ct. Kings Co. 1990)
People v. Palladino, 46 A.D.3d 864 (2d Dept. 2007)

People v. Palmer, 20 N.Y.3d 373 (2013)
People v. Palmer, 68 A.D.3d 1364 (3d Dept. 2009)
People v. Parilla, 109 A.D.3d 20 (1st Dept. 2013)
People v. Parker, 62 A.D.3d 1195 (3d Dept. 2009)
People v. Parris, 153 A.D.3d 68 (2d Dept. 2017)
People v. Patel, 192 A.D.3d 1052 (2d Dept. 2021)
People v. Pendelton, 50 A.D.3d 659 (2d Dept. 2008)
People v. Pendergrast. 48 A.D.3d 356 (1st Dept. 2008)
People v. Perahia, 57 A.D.3d 865 (2d Dept. 2008)
People v. Perez, 35 N.Y.3d 85 (2020)
People v. Perez, 165 A.D.3d 1628 (4th Dept. 2018)
People v. Perez, 104 A.D.3d 403 (1st Dept. 2013).
People v. Perkins, 35 A.D.3d 1167 (4th Dept. 2006)
People v. Perkins, 128 A.D.3d 1036 (2d Dept. 2015)
People v. Persico, 68 Misc. 3d 919 (Dist. Ct. Suffolk County 2020)
People v. Peterson, 8 A.D.3d 1124 (4th Dept. 2004)
People v. Pettigrew, 14 N.Y.3d 406 (2010)
People v. Pettway, 286 A.D.2d 865 (4th Dept. 2001)
People v. Pietarniello, 53 A.D.3d 475, 476-477 (2d Dept. 2008)
People v. Pinckney, 129 A.D.3d 1048 (2d Dept. 2015)
People v. Pittman, 179 A.D.3d 955 (2d Dept. 2020)
People v. Piznarski, 46 Misc. 3d 1021 (County Ct. Madison Co. 2014)
People v. Plunkett, 19 N.Y.3d 400 (2012)
People v. Porrata, 62 Misc. 3d 138(A) (App. Term 1st Dept. 2019)
People v. Porter, 178 A.D.3d 1159 (3d Dept. 2019)
People v. Powell. 173 A.D.3d 1228 (2d Dept. 2019)
People v. Price, 31 A.D.3d 1114 (4th Dept. 2006)
People v. Ramos, 167 A.D.3d 787 (2d Dept. 2018)
People v. Ramos, 232 A.D.2d 433 (2d Dept. 1996)
People v. Rampersaud, 144 Misc. 2d 126 (Sup. Ct. Bronx Co. 1989)
People v. Ranieri, 43 A.D.2d 1012 (4th Dept. 1974)
People v. Redcross, 54 A.D.3d 1116 (3d Dept. 2008)
People v. Reede, 113 A.D.3d 663 (2d Dept. 2014)
People v. Regan, 46 A.D.3d 1434 (4th Dept. 2007)
People v. Reid, 141 A.D.3d 156 (1st Dept. 2016)
People v. Reyes, 48 A.D.3d 267 (1st Dept. 2008)
People v. Reynolds, 68 A.D.3d 955 (2d Dept. 2009)
People v. Rhodehouse, 88 A.D.3d 1030 (3d Dept. 2011)
People v. Riley, 85 A.D.3d 1141 (2d Dept. 2011)
People v. Rivera, 188 A.D.3d 609 (1st Dept. 2020)
People v. Riverso, 96 A.D.3d 1533 (4th Dept. 2012)
*People v. Roberts,*108 A.D.3d 947 (3d Dept. 2013)
People v. Robertson, 101 A.D.3d 1671 (4th Dept. 2012)
People v. Robinson, 55 A.D.3d 708 (2d Dept. 2008)
People v. Robinson, 98 N.Y.2d 755 (2002)
People v. Robinson, 150 A.D.3d 775 (2d Dept. 2017)

People v. Robinson, 186 A.D.3d 759 (2d Dept. 2020)
People v. Rodriguez, 179 A.D.3d 957 (2d Dept. 2020)
People v. Rodriguez, 130 A.D.3d 897 (2d Dept. 2015)
People v. Rodriguez, 196 A.D.3d 42 (2d Dept. 2021)
People v. Rodriguez, 194 A.D.3d 864 (2d Dept. 2021)
People v. Rodriguez, 102 A.D.3d 457 (1st Dept. 2013)
People v. Rohoman, 121 A.D.3d 876 (2d Dept. 2014)
People v. Roland, 292 A.D.2d 27 (1st Dept. 2002)
People v. Rollins, 33 A.D.3d 398 (1st Dept. 2006)
People v. Romulus, 189 A.D.3d 553 (1st Dept. 2020)
People v. Roney, 80 A.D.3d 909 (3d Dept. 2011)
People v. Rosario, 164 A.D.3d 625 (2d Dept. 2018)
People v. Rosario, 36 N.Y.3d 964 (2020)
People v. Ross, 37 A.D.3d 1117 (4th Dept. 2007)
People v. Ross, 116 A.D.3d 1171 (3d Dept. 2014)
People v. Ruddy, 31 A.D.3d 517 (2d Dept. 2006)
People v. Ryan, 96 A.D.3d 1692 (4th Dept. 2012)
People v. S.G., 4 Misc. 3d 563 (Sup. Ct. N.Y. Co. 2004)
People v. Salley, 67 A.D.3d 52591st Dept. 2009)
People v. Sanchez, 20 A.D.3d 693 (3d Dept. 2005)
People v. Sanchez, 192 A.D.3d 409 (1st Dept. 2021)
People v. Santiago, 20 A.D.3d 885 (4th Dept. 2005)
People v. Santogual, 157 A.D.3d 737 (2d Dept. 2018)
People v. Santos, 25 Misc. 3d 1212(A) (Sup. Ct. N.Y. Co. 2009)
People v. Sass, 27 A.D.3d 968 (3d Dept. 2006)
People v. Saunders, 156 A.D.3d 1138 (2d Dept. 2017)
People v. Schlau, 60 A.D.3d 529 (1st Dept. 2009)
People v. Schwartz, 145 A.D.3d 1548 (4th Dept. 2016)
People v. Scone, 145 A.D.3d 1327 (3d Dept. 2016)
People v. Scott, 157 A.D.3d 1070 (3d Dept. 2018)
People v. Scott, 85 A.D.3d 890 (2d Dept. 2011)
People v. Scott, 111 A.D.3d 1274 (4th Dept. 2013)
People v. Scott, 288 A.D.2d 763 (3d Dept. 2001)
People v. Scott, 113 A.D.3d 491 (1st Dept. 2014)
People v. Secor, 171 A.D.3d 1314 (3d Dept. 2019)
People v. Seabolt, 148 A.D.3d 1650 (4th Dept. 2017)
People v. Segura, 136 A.D.3d 496, 497 (1st Dept. 2016)
People v. Shaffer, 129 A.D.3d 54 (3d Dept. 2015)
People v. Shaynak, 178 A.D.3d 1105 (2d Dept. 2019)
People v. Shea, 61 A.D.3d 947 (2d Dept. 2009)
People v. Shen Chao Chen, 144 A.D.3d 1119 (2d Dept. 2016)
People v. Shim, 139 A.D.3d 68 (2d Dept. 2016)
People v. Simons, 157 A.D.3d 1063 (3d Dept. 2018)
People v. Sincerbeaux, 27 N.Y.3d 686 (2016)
People v. Slotman, 112 A.D.3d 1332 (4th Dept. 2013)
People v. Smith, 158 A.D.3d 654 (2d Dept. 2018)

People v. Smith, 175 A.D.3d 572 (2d Dept. 2019)
People v. Smith, 144 A.D.3d 652 (2d Dept. 2016)
People v. Snyder, 175 A.D.3d 1331 (2d Dept. 2019)
People v. Souverain, 137 A.D.3d 765 (2d Dept. 2016)
People v. Spratley, 175 A.D.3d 962 (4th Dept. 2019)
People v. Stacconi, 81 A.D.3d 1046 (3d Dept. 2011)
People v. Stein, 194 A.D.3d 1201 (3d Dept. 2021)
People v. Stein, 63 A.D.3d 99 (4th Dept. 2009)
People v. Steinke, 26 Misc. 3d 134(A) (Sup. Ct., App. Term, 2d Dept. 2010)
People v. Stevens, 91 N.Y.2d 270 (1998)
People v. Stewart, 63 A.D.3d 1588 (4th Dept. 2009)
People v. Stewart, 61 A.D.3d 1059 (3d Dept. 2009),
People v. Struble, 49 A.D.3d 1348 (4th Dept. 2008)
People v. Sumpter, 177 Misc. 2d 492 (Crim. Ct. City of N.Y., Queens Co. 1998)
People v. Swain, 46 A.D.3d 1157 (3d Dept. 2007)
People v. Syed, 60 Misc. 3d 129(A) (App. Term 1st Dept. 2018)
People v. Szwalla, 61 A.D.3d 1289 (3d Dept. 2009)
People v. Tabachnik, 131 A.D.2d 611 (2d Dept. 1987)
People v. Talluto, 2022 NY Slip Op 00575 (4th Dept. 2022)
People v. Taylor, 27 Misc. 3d 1201(A) (Sup. Ct. Westchester Co. 2010)
People v. Taylor, 103 A.D.3d 867 (2d Dept. 2013)
People v. Tejada, 51 A.D.3d 472 (1st Dept. 2008)
People v. Terdeman, 175 Misc. 2d 379 (Crim. Ct. Queens Co. 1997)
People v. Thomas *R.O.,* 136 A.D.3d 1400 (4th Dept. 2016)
People v. Thomas, 179 A.D.3d 444 (1st Dept. 2020)
People v. Thompson, 34 A.D.3d 661 (2d Dept. 2006)
People v. Thornton, 16 A.D.3d 1169 (4th Dept. 2005)
People v. Thorpe, 186 A.D.3d 629 (2d Dept. 2020)
People v. Thousand, 109 A.D.3d 1149 (4th Dept. 2013)
People v. Tineo-Morales, 101 A.D.3d 839 (2d Dept. 2012)
People v. Titmas, 46 A.D.3d 1308, 1309 (3d Dept. 2007)
People v. Torchia, 39 A.D.3d 1137 (3d Dept. 2007)
People v. Torres, 176 A.D.3d 1125 (2d Dept. 2019)
People v. Trotter, 163 A.D.3d 729 (2d Dept. 2018)
People v. Tubbs, 124 A.D.3d 1094 (3d Dept. 2015)
People v. Urbanski, 74 A.D.3d 1882 (4th Dept. 2010)
People v. Uver A., 195 A.D.3d 61 (2d Dept. 2021)
People v. Vacanti, 26 A.D.3d 732 (4th Dept. (2006)
People v. Valdivia, 51 Misc. 3d 134(a) (App. Term 2016)
People v. Vasquez, 149 A.D.3d 1584 (4th Dept. 2017)
People v. Vaughn, 26 A.D.3d 776 (4th Dept. 2006)
People v. Velazquez, 130 A.D.3d 997 (2d Dept. 2015)
People v. Velasquez, 166 A.D.3d 536 (1st Dept. 2018)
People v. Velez, 100 A.D.3d 847 (2d Dept. 2012)
People v. Verdelli, 44 Misc. 3d 144(U) (App. Term, 1st Dept. 2014)
People v. Villane, 17 A.D.3d 336 (2d Dept. 2005)

People v. Villanueva, 143 A.D.3d 794 (2d Dept. 2016)
People v. Walker, 15 A.D.3d 692 (3d Dept. 2005)
People v. Walker, 146 A.D.3d 824 (2d Dept. 2017)
People v. Warren, 42 A.D.3d 593 (3d Dept. 2007)
People v. Warrior, 57 A.D.3d 1471, 1472 (4th Dept. 2008)
People v. Washington, 170 A.D.3d 1608 (4th Dept. 2019)
People v. Wassilie, 193 A.D.3d 1193 (3d Dept. 2021)
People v. Weatherley, 41 A.D.3d 1238 (4th Dept. 2007)
People v. Weathersby, 61 A.D.3d 1382 (4th Dept. 2009)
People v. Weber, 158 A.D.3d 498 (1st Dept. 2018)
People v. Weber, 176 A.D.3d 1631 (4th Dept. 2019)
People v. Wellman, 142 A.D.3d 879 (1st Dept. 2016)
People v. Wells, 138 A.D.3d 947 (2d Dept. 2016)
People v. Whalen, 22 A.D.3d 900 (3d Dept. 2005)
People v. Wheeler, 59 A.D.3d 1007 (4th Dept. 2009)
People v. Wilbert, 35 A.D.3d 1220 (4th Dept. 2006)
People v. Wilke, 181 A.D.3d 1324 (4th Dept. 2020)
People v. Wilkes, 53 A.D.3d 1073 (4th Dept. 2008)
People v. Williams, 100 A.D.3d 610 (2d Dept. 2012)
People v. Wilson, 103 A.D.3d 1178 (4th Dept. 2013)
People v. Wilson, 33 A.D.3d 488, 489 (1st Dept. 2006)
People v. Wilson, 117 A.D.3d 1557 (4th Dept. 2014)
People v. Wilson, 167 A.D.3d 1192 (3d Dept. 2018)
People v. Windham, 10 N.Y.3d 801 (2008)
People v. Wise, 127 A.D.3d 834 (2d Dept. 2015)
People v. Wood, 60 A.D.3d 1350 (4th Dept. 2009)
People v. Woods, 45 A.D.3d 408 (1st Dept. 2007)
People v. Wright, 53 A.D.3d 963, 964 (3d Dept. 2008)
People v. Wright, 37 A.D.3d 797 (2d Dept. 2007)
People v. Wroten, 286 A.D.2d 189 (4th Dept. 2001)
People v. Wyant, 86 A.D.3d 754 (3d Dept. 2011)
People v. Wyatt, 89 A.D.3d 112 (2d Dept. 2011)
People v. Yancey, 66 Misc. 3d 1231(A) (Watertown City Court 2020)
People v. Yeaden, 156 A.D.2d 208 (1st Dept. 1989)
People v. Yen, 33 Misc. 3d 1234(A) (Sup. Ct. Kings Co. 2011)
People v. Young, 108 A.D.3d 1232 (4th Dept. 2013)
People v. Zachary, 188 A.D.3d 935 (2d Dept. 2020)
People ex rel. Garcia v. Annucci, 167 A.D.3d 199 (4th Dept. 2018)
People ex rel. Green v. Superintendent of Sullivan C.F., 137 A.D.3d 56 (3d Dept. 2016)
People ex re. Johnson v. Superintendent, Adirondack Correctional Facility, 36 N.Y.3d 187 (2020)
People ex rel. Levy v. Walters, 87 A.D.2d 620 (2d Dept. 1982)
People ex rel. McCurdy v. Warden, 35 N.Y.3d 1056 (2020)
People ex rel. Negron v. Superintendent, 36 N.Y.3d 32 (2020)
People ex rel. Ortiz v. Breslin, 36 N.Y.3d 187 (2020)
People ex rel. E.S. v. Superintendent, Livingston Corr. Facility, 193 A.D.3d 57 (4th Dept. 2021)

Powell v. Keel and The State of South Carolina, 860 S.E.2d 344 (Sup. Ct. 2021)
Smith v. Doe, 538 U.S. 84 (2003)
Solomon v. New York, 146 A.D.2d 439 (1st Dept. 1989)
Wisniewski v. Michalski, 114 A.D.3d 1188 (4th Dept. 2014)
Woe v. Spitzer, 571 F. Supp. 2d 382 (EDNY 2008)
Vandover v. Czajka, 276 A.D.2d 945 (3d Dept. 2000)
Yunus v. Lewis-Robinson, 2019 U.S. Dist. LEXIS 5654 (SDNY 2019)

Index

A

accessorial liability.....*34, 44, 112, 116*
actuarial risk assessment.....*20, 21, 199, 200*
adjournment *12, 25, 28, 72, 86, 136, 139, 152, 156, 162, 163, 164, 167, 169, 170, 171, 172, 173, 208, 236*
advocacy *23, 26, 28, 39, 127, 132, 213, 224, 225, 230*
age
  advanced..... *27, 63, 101, 107, 112, 122, 123, 192*
  advancing.....*122, 227*
  disparity *120, 121*
  underage victim *8, 9, 47, 48, 50, 51, 52, 53, 55, 93, 120, 121, 217*
aggravating factors .....*See* risk factor
alcohol .....*See* substance use, *See* risk factor 11
appeal
  pending *18, 77, 78, 80, 234*
  preservation of issues *4, 47, 86, 136, 143, 149, 156, 168, 169, 173, 177, 178, 179, 208, 227*
autism spectrum disorder.....*119, 127, 128, 129, 130, 131, 132, 133, 134*

B

buffer zone.....*15, 214, 216, 218, 221*
burden of proof.... *7, 8, 9, 12, 27, 28, 29, 32, 34, 52, 75, 89, 93, 97, 98, 100, 107, 111, 113, 114, 140, 153, 154, 155, 181, 182, 183, 184, 185, 190*
  clear and convincing evidence ... *7, 8, 9, 12, 14, 15, 18, 25, 28, 32, 33, 36, 37, 40, 44, 45, 46, 48, 52, 53, 65, 66, 67, 68, 71, 81, 84, 85, 88, 89, 91, 92, 93, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 113, 114, 140, 141, 142, 151, 153, 155, 159, 160, 171, 172, 173, 181, 182, 183, 184, 185, 190, 193, 194, 203*
  preponderance of the evidence..... *7, 27, 28, 100, 107, 113, 114, 135, 137, 182, 185, 190, 194*

C

case summary... *9, 11, 13, 37, 47, 52, 60, 82, 85, 103, 107, 183, 184, 232, 236*
certification ..... *See* Sex Offender Registry
child pornography..... *20, 45, 48, 55, 112, 120, 125, 126, 127, 130, 131, 132, 134, 142, 143, 175, 191, 192, 193, 194, 195, 197, 198, 199, 234*
civil commitment *219, 220*
clinical assessment.....*6, 19, 20, 96, 106, 232, See* mental disability
  abnormality.... *6, 96, 106, 128, 147, 149, 154, 155, 157, 219, 220, 232, 233, 238*
  impulsive sexual behavior.....*6, 96, 106, 232, 238*
conclusions of law... *8, 10, 12, 25, 26, 30, 143, 144, 145, 176*
conditional discharge...*4, 5, 7, 15, 90, 147, 211, 216, 217, 222, 226, 228, 229*
consensual conduct... *42, 48, 49, 50, 73, 83, 84, 113, 115, 119, 120, 121, 129, 186, 226, 229*
crime of conviction.....*5, 33, 40, 44, 202*
criminal history .. *20, 37, 55, 56, 57, 58, 59, 60, 63, 65, 101, 102, 143, 195, 221, 232*
current offense *35, 36, 37, 44, 48, 55, 58, 61, 91, 101, 103, 105, 189, 206, 207*

D

Department of Corrections and Community Supervisions (DOCCS) ...*5, 27, 68, 79, 80, 106, 124, 161, 162, 163, 164, 187, 210, 216, 217, 218, 220, 223, 233, 234, 236*
departure
  downward....*6, 7, 13, 14, 26, 27, 28, 30, 34, 42, 44, 46, 55, 59, 62, 72, 76, 77, 91, 94, 96, 97, 98, 99, 100, 104, 105, 107, 109, 110, 111, 112, 113, 114, 116, 118, 119, 120, 121, 122, 123, 125, 126, 127, 128, 131, 134, 135, 136, 137, 138, 144, 145, 156, 157, 159, 163, 168, 175, 182, 189, 190, 192, 193, 194, 198, 223, 229*
  preclusion .. *86, 139, 140, 143, 152, 156, 167, 168, 169, 170, 171, 172, 173*
  three-step analysis..... *45, 46, 48, 55, 71, 100, 107, 111, 112, 113, 114, 116, 118, 122, 125, 126, 131, 135, 136, 139, 140, 142, 144, 175, 182, 191, 192, 193, 194, 199, 203*
  upward....*6, 7, 13, 27, 29, 30, 35, 43, 44, 45, 56, 57, 62, 71, 78, 79, 100, 107, 109, 110, 111, 112, 113, 114, 122, 134, 136, 137, 138, 139,*

140, 141, 142, 143, 144, 145, 156, 159, 167, 168, 169, 170, 172, 173, 175, 178, 179, 181, 182, 189, 190, 192, 193, 198, 229
waived.... 29, 30, 86, 139, 143, 167, 168, 169, 170, 171, 173, 177, 237, 238
designation... 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 27, 30, 98, 103, 143, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159, 166, 167, 172, 175, 179, 181, 223, 225, 228, 229, 231, *See* risk classification
discovery..... 14, 15, 18, 140, 159, 160, 161
Division of Criminal Justice Services .. 3, 4, 8, 9, 10, 11, 15, 164, 165, 166, 212, 213, 222, 223
Doe v. Pataki....2, 5, 13, 15, 16, 17, 18, 19, 22, 32, 90, 140, 148, 159, 160, 161, 180, 182, 186, 190, 207
double counting... 34, 35, 48, 49, 50, 56, 58, 79, 85, 90, 104
double jeopardy.....2, 15, 16, 77
drugs.....*See* risk factor 11, *See* substance use
due process.....4, 10, 11, 13, 14, 15, 16, 17, 18, 34, 38, 140, 159, 160, 162, 163, 168, 169, 171, 172, 185, 186, 190, 207, 208, 209, 229

E

Electronic Security and Targeting of Online Predators Act (E-STOP).....15, 210, 222
employment ...ii, 15, 91, 94, 117, 135, 211, 212, 213, 214, 215, 218, 221, 222, 235
endangering the welfare of a child 56, 57, 61, 62, 103, 113, 226
essential elements.... 4, 59, 64, 102, 103, 150, 151, 152, 153, 154, 155, 157, 202, 203, 204, 205, 206
Ex Post Facto.....2, 15, 16, 17

F

fictitious victim 43, 45, 47, 48, 55, 180, 187, 197
Fifth Amendment .....*See* responsibility
findings of fact.... 8, 10, 12, 25, 26, 30, 143, 144, 145, 176
forcible compulsion.....39, 40, 118, 120
foreign conviction 3, 4, 5, 7, 12, 38, 56, 59, 60, 61, 64, 86, 87, 102, 103, 149, 150, 151, 152, 153, 154, 156, 157, 164, 174, 188, 201, 202, 203, 204, 205, 238

G

Gillotti.....*See* departure: three-step analysis

H

hearsay 25, 27, 33, 38, 40, 42, 60, 71, 75, 85, 104, 183, 184, 185, 236
hebephilia.....200
housing ..... ii, 15, 117, 135, 211, 214, 215, 218, 235

I

incarceration.... 5, 17, 65, 66, 70, 72, 75, 79, 80, 81, 82, 83, 84, 85, 86, 90, 92, 93, 116, 117, 123, 124, 133, 136, 137, 148, 160, 162, 167, 171, 174, 187, 188, 216, 217, 218, 219, 220, 221, 223, 228, 231, 233, 235, 236
release date .. 10, 13, 163, 164, 171, 174, 187, 217
injury..... 6, 39, 40, 41, 96, 105, 183
internet ....ii, 3, 4, 9, 10, 14, 15, 36, 47, 51, 129, 130, 164, 187, 195, 198, 211, 212, 215, 220, 222, 223
Facebook.....222, 223

J

jail .....*See* incarceration
juvenile delinquency.....36, 37, 56, 57, 58

K

kidnapping..... 8, 9, 57, 60, 150, 180, 208, 209, 217

L

Legislature..... 14, 15, 18, 19, 21, 38, 114, 151, 209, 215, 216, 217, 219

M

medical records 49, 161, 184
Megan's Law.....3, 166, 215
Memorandum of Law.....26, 238
mental disability..... 35, 48, 49, *See* clinical assessment, *See* mental illness
mental disease 49, 50, 155
mental retardation.....50, 106
mental illness ....49, 185, 232, *See* mental disability
military 4, 64, 153, 164, 204, 205, 214
mitigating factors .....*See* risk factor
modification .....*See* risk level

N

non-contact offense..... 20, 116, 120, 126, 135, 191, 194, 198
non-registrable offense....36, 56, 225, 226, 227, 228
notice (prosecutorial)... 8, 9, 10, 11, 12, 13, 14, 15, 18, 24, 29, 30, 34, 86, 129, 136, 139, 143, 152,

156, 162, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 177, 178, 184, 185, 186, 190, 207, 208, 212
inadequate 166, 167, 168, 173
purpose of the SORA proceeding 14, 15, 18, 24, 159, 171, 207
nunc pro tunc ..... 28, 30, 164, 165, 166, *See* Sex Offender Registry: duration of registration: credited time

O

out-of-state conviction ..... *See* foreign conviction
override 3, 6, 7, 13, 19, 27, 28, 29, 37, 59, 61, 62, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109, 136, 143, 144, 151, 155, 159, 166, 167, 175, 178, 181, 192, 207, 229, 236
automatic 96, 97, 98, 99, 106, 192

P

parole ... 4, 14, 15, 17, 18, 33, 74, 75, 79, 80, 82, 86, 88, 90, 106, 163, 167, 178, 183, 187, 190, 211, 216, 217, 220, 221, 222, 226, 233, 236
Pataki ..... *See* Doe v. Pataki
pedophilia 106, 132, 134, 200
plea 25, 33, 34, 37, 41, 58, 61, 65, 74, 75, 76, 78, 79, 80, 81, 82, 90, 102, 105, 183, 205, 206, 218, 223, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235
Alford plea 34, 41, 74, 76
preclusion ..... *See* departure
predicate sex offender 3, 5, 7, 14, 24, 103, 147, 148, 153, 154, 155, 156, 181, 189, 190, 211, 228
presentence investigation (PSI) 50, 52, 53, 67, 73, 74, 75, 79, 232, 233, 234, 235, 236, 237
presentence report (PSR) 12, 56, 58, 68, 69, 73, 74, 75, 80, 93, 183, 224, 225, 232, 236, 237, 238
presumptive risk level ..... *See* risk classification
prior conviction ... 6, 7, 9, 37, 58, 59, 60, 61, 63, 64, 65, 66, 68, 84, 102, 103, 104, 107, 113, 115, 153, 154, 197, 206, 207, 215
proof of 37, 103
remoteness 59, 82, 83, 85, 104, 107, 119
prison ..... *See* incarceration
probation ... 4, 5, 7, 14, 15, 17, 18, 33, 38, 39, 66, 70, 75, 80, 82, 84, 86, 87, 88, 89, 90, 91, 106, 137, 147, 160, 166, 183, 189, 190, 199, 211, 216, 217, 222, 226, 228, 229, 233, 234, 235, 236, 237
report 75, 76
prostitution 43, 227
provisional order 10, 13, 164, 171, 187
psychologist 27, 75, 117, 134, 141, 157, 174, 199, 200, 237
public safety 3, 5, 21, 34, 35, 42, 43, 44, 49, 57, 96, 105, 111, 113, 120, 121, 127, 149, 193, 215, 222, 232

R

rape 40, 43, 64, 113, 149, 204, 228
recidivism ... 16, 20, 21, 32, 58, 61, 83, 84, 100, 111, 116, 122, 123, 124, 127, 140, 141, 144, 191, 193, 194, 195, 196, 197, 198, 206, 219, *See* reoffense
reconsideration motion 179
redetermination hearing 14, 18, 90, 148, 190
registrability 12, 29, 175, 178, 201, 202, 204, 205, 209
registry ..... *See* Sex Offender Registry
reoffense .... 3, 6, 19, 20, 32, 35, 40, 49, 55, 57, 58, 59, 64, 65, 96, 104, 105, 107, 109, 110, 111, 112, 114, 116, 117, 119, 121, 122, 123, 124, 125, 126, 127, 130, 131, 132, 134, 135, 136, 137, 138, 140, 141, 142, 175, 191, 192, 194, 195, 196, 200, 219, 226, 237, *See* recidivism
time spent offense-free 20, 116
responsibility
acceptance of ... 27, 72, 73, 74, 75, 76, 79, 80, 118, 133, 234, 235
Fifth Amendment right 16, 76, 77, 78, 80
remorse 27, 73, 74, 75, 80, 234, 235
risk classification
level 1 ..... 3, 6, 14, 18, 19, 96, 109, 120, 131, 134, 136, 148, 164, 165, 168, 169, 171, 179, 189, 190, 211, 212, 213
level 2 ..... 3, 4, 6, 9, 10, 14, 18, 96, 100, 107, 109, 125, 142, 156, 168, 169, 189, 190, 191, 192, 211, 212, 213
level 3 ..... 3, 4, 6, 9, 10, 14, 15, 18, 95, 96, 97, 98, 99, 100, 101, 104, 106, 107, 109, 148, 169, 189, 190, 191, 211, 212, 213, 216, 217, 220, 226, 228, 233
over-assessment 20, 34, 42, 44, 111, 113, 115, 120, 125, 135, 136, 144, 182, 191, 194, 200
risk factor
1) use of violence 39, 40, 105, 124, 168
2) sexual contact with victim ... 34, 42, 43, 44, 111, 112, 113, 115, 120, 142, 179, 183
3) number of victims 36, 44, 45, 48, 55, 125, 184, 187, 191, 192, 193, 194

4) duration of offense conduct with victim ...*43, 46, 47, 171, 184, 234*
5) age of victim .. *34, 35, 36, 45, 47, 48, 49, 50, 55, 187, 192, 234*
6) other victim characteristics *34, 35, 48, 49, 51*
7) relationship between offender and victim *36, 45, 48, 51, 52, 53, 54, 55, 125, 187, 191, 192, 193, 194, 234*
8) age at first sex crime....*20, 35, 36, 55, 56, 58, 169, 234*
9) number and nature of prior crimes ...*35, 36, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 96, 101, 102, 104, 113, 115, 119, 206, 207*
10) recency of prior felony or sex crime *36, 56, 58, 64, 65, 66, 207*
11) drug or alcohol abuse *36, 66, 67, 68, 69, 70, 71, 72, 234*
12) acceptance of responsibility *35, 72, 73, 74, 77, 78, 79, 119, 168, 172, 233, 234, 235*
13) conduct while confined or under supervision ... *35, 79, 80, 82, 83, 84, 85, 86, 90, 161, 170, 235*
14) supervision.....*35, 85, 86, 87, 88, 90, 91, 228, 229*
15) living or employment situation.....*91, 93, 94, 235*
aggravating .. *7, 27, 29, 62, 71, 100, 110, 111, 112, 113, 121, 122, 135, 138, 139, 140, 141, 142, 169, 190, 200, 232*
general principles.....*6, 32, 188*
mitigating ... *7, 13, 27, 28, 30, 42, 59, 62, 72, 75, 91, 94, 98, 99, 100, 104, 107, 109, 110, 111, 112, 113, 114, 120, 121, 122, 123, 125, 126, 127, 131, 134, 135, 136, 137, 138, 140, 143, 144, 159, 175, 182, 190, 193, 198, 200, 231, 232, 234*
risk level .....*See* risk classification
modification .. *14, 18, 148, 156, 189, 190, 211, 230*
risk score *6, 79, 99, 109, 122, 136, 137*

S

sadism *106*
school grounds.....*4, 14, 15, 216*
sentencing ...*5, 7, 8, 9, 14, 25, 33, 37, 58, 60, 61, 65, 77, 79, 81, 89, 102, 103, 110, 118, 147, 150, 174, 177, 183, 188, 190, 198, 201, 202, 206, 225, 227, 229, 231, 232, 233, 234, 235, 236, 237, 238*
sex crime....*6, 37, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 96, 101, 102, 103, 104, 106, 107, 113*
sex offender.....*See* predicate sex offender
Sex Offender Counseling and Treatment Program ... *69, 73, 76, 77, 78, 79, 80, 91, 113, 119, 132, 135, 137, 161, 162, 175, 183, 233, 234*
Sex Offender Management and Treatment Act (SOMTA)..... *210, 219, 230, 232, 233, 237, 238*
Sex Offender Registration Act (SORA)
effective date *4, 13, 14, 18, 148, 204, 206*
history of.....*13, 14, 15*
Doe v. Pataki litigation .... *17, 18, 19, See* Doe v. Pataki
purpose *5, 32, 60*
Sex Offender Registry ...*ii, 3, 8, 9, 10, 14, 16, 17, 21, 28, 30, 164, 165, 166, 204, 214, 215, 222, 223*
certification..... *7, 8, 9, 177, 201, 227, 231, 238*
community notification ...*4, 15, 16, 17, 18, 21, 190, 199, 211, 212, 215*
level of notification *24, 156, 181, 189*
duration of registration *3, 4, 19, 148, 211*
credited time.....*30, 164, 165, 166*
for life.....*3, 4, 14, 148, 156, 190*
relief from *14, 156, 169, 170, 182, 189, 204*
verification *4, 148, 156, 211, 212, 215, 228*
sex offense .. *ii, 3, 4, 7, 9, 21, 38, 56, 57, 60, 61, 62, 63, 64, 66, 81, 88, 89, 90, 101, 102, 103, 104, 116, 117, 120, 123, 127, 133, 134, 149, 150, 151, 153, 154, 156, 157, 187, 189, 194, 197, 202, 205, 206, 207, 211, 220, 222, 223, 225, 227, 228, 230, 232, 234, 238*
Sexual Assault Reform Act (SARA)....*14, 15, 21, 210, 214, 216, 217, 218, 219, 220, 225, 226, 228, 229, 230*
sexual contact... *34, 36, 42, 43, 44, 46, 47, 49, 50, 52, 53, 73, 83, 113, 137, 154, 191, 197, 198*
sexual misconduct *36, 45, 47, 58, 61, 82, 83, 84, 113, 184, 208, 209*
sexual predator .....*ii, 3, 5, 7, 14, 24, 147, 148, 152, 154, 155, 156, 157, 172, 181, 189, 190, 211, 212, 228*
sexually violent predator *14, 148*
sexually violent offender.... *3, 5, 7, 14, 24, 147, 148, 149, 152, 153, 156, 157, 181, 189, 190, 211, 225, 228, 231*
sexually violent offense ... *4, 5, 7, 9, 60, 62, 63, 66, 101, 102, 103, 147, 149, 150, 151, 153, 154, 157, 202, 206, 211, 225, 228, 230, 231*
Static-99R..... *20, 121, 122, 123, 124, 137, 138*
statutory principles and procedures....*24, 25, 26*
stigma .....*ii, 211, 214*

strangers *51, 52, 55, 125, 154, 191, 234*
sua sponte... *34, 86, 136, 138, 139, 152, 171, 172, 173*
submission of documents..... *9, 11, 25, 26, 27, 29, 125, 126, 135, 173, 174, 175, 198, 231, 232*
subpoena....*8, 10, 11, 12, 13, 25, 28, 29, 159, 160, 162*
substance use *66, 68, 69, 70, 72*
abstinence..... *66, 69, 70, 71, 72*
alcohol *66, 67, 68, 69, 70, 71, 72, 74, 117, 118, 234*
drug... *35, 49, 66, 67, 68, 69, 71, 72, 117, 118, 234*
supervision..... *See* risk factor 13, 14
specialized..... *86, 88, 89, 91, 220, 229*

T

testimony.... *27, 29, 33, 77, 82, 91, 138, 183, 199, 200, 237*
expert..... *138, 199, 200, 201*
threat *3, 5, 6, 39, 40, 96, 105, 106, 107, 149, 163, 215, 232*

V

victimization
for the purpose of..... *51, 52, 53, 54, 155, 220*
violence *40, 61, 105, 215, 221*

W

waiver..... *See* departure

Y

youthful offender .. *36, 37, 56, 57, 58, 59, 101, 102, 221, 225, 226, 231, 232*