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A FEW WORDS ON THE SEX OFFENDER REGISTRATION ACT (S.O.R.A)

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INTRODUCTION

Defendants who are convicted of sex offenses must contend not only with the prospect of significant sentencing for crimes that society considers to be the worst kind (especially if the victim is a child), but also with the secondary consequence of having to register with the state as a SEX OFFENDER under the SEX OFFENDER REGISTRATION ACT (SORA) set forth in Article 168 of the Corrections Law. (People v Francis, 30 NY3d 737 [2018]).

Though considered to be a collateral consequence of a judgment of conviction for appeal purposes (i.e., the court's failure to advise the defendant of his/her obligation to register will not render the plea involuntary), a SORA risk level designation will require the defendant to register with the State DCJS as a sex offender and keep local law enforcement agencies apprised of his/her whereabouts (and changes of address) for 20 years (level 1) or for life (level 2 and 3).

The failure to register can lead to a Class E felony level prosecution under Corrections Law (CL) 168-t for a first such offense and a Class D felony for a subsequent offense.

Convicted sex offenders (designated level 2 or 3) will also have their identities, physical description, crime of conviction (and pertinent details) made known on the DCJS subdirectory which is accessible online. Information about where they live and work (if employed) will also be included. (This may well be a deterrent to employers who might otherwise be inclined to take a chance because the public will know that they have hired a convicted sex offender).

Level 1 offenders are not included in the on-line subdirectory but interested persons can find out about them by calling a DCJS toll-free number. (SORA@800#infoline).

SOME BACKGROUND INFORMATION

The SORA statute was enacted in January of 1996 to help law enforcement protect communities from sex offenders by requiring then to register with the state and keep the authorities informed of where they are living at any given time. The statute also requires individuals convicted in another jurisdiction of a sex crime that is the equivalent of a SORA offense to register as well.

The purpose of SORA, as stated by the Court of Appeals in People v Gillotti, 23 NY3d 841 (2014), is to "protect the community. To that end, information is made available to police authorities and to the

public, telling them where convicted sex offenders can be found. The higher the risk level, the more information is made available, the more widely disseminated and the longer the registration will last." (Citing People v Windham, 10 NY3d 801 [2008]).

According to a 2/22/22 Committee Report entitled "Recommendations for Change" of the NYC Bar Organization, which led to proposed legislation (S3096) to Amend the Corrections Law Regarding Risk Assessment Instruments for Sex Offenders, (nycbar.org), there are 52,945 registered sex offenders in New York State, 16,131 of whom are level 2 and 10,756 of whom are level 3. The remaining 26,058 are level 1 offenders.

BOARD OF EXAMINERS OF SEX OFFENDERS

Under SORA, the Board of Examiners of Sex Offenders (the Board) has developed GUIDELINES and PROCEDURES to ASSESS THE RISK OF A REPEAT OFFENSE BY A SEX OFFENDER and the THREAT POSED TO PUBLIC SAFETY. (CL 168-l [5]). The guidelines (which have been criticized as outdated and poor predictors of recidivism [see above-referenced committee report]), are based on several different categories (including the crime of conviction, defendant's criminal history, relationship to and age/ number of victims, drug/alcohol abuse, acceptance of responsibility, post crime behavior and living/supervision situation).

RISK ASSESSMENT INSTRUMENT

Shortly before the defendant is set to be released from prison, the Board will review his/her case materials (e.g., accusatory instruments, supporting statements, pre-sentence report), interview him/her and prepare a CASE SUMMARY. It will then provide a recommended numerical score in each category on a RISK ASSESSMENT INSTRUMENT (RAI). The total score will result in a recommended designation of either risk-level 1 (i.e., low risk in the 0 to +70 range); 2 (+75 to +105 range for moderate risk); or 3 (+110 to +300 for high risk).

The form also contains four categories for OVERRIDES any one of which, if met, would qualify the defendant as a PRESUMPTIVE LEVEL 3 SEX OFFENDER, (i.e., high-risk offender requiring the most stringent registration and reporting requirements). They include: 1. A PRIOR FELONY CONVICTION FOR A SEX CRIME. 2.INFLICTION OF SERIOUS PHYSICAL INURY OR DEATH (during the instant crime), 3. a RECENT THREAT TO RE-OFFEND BY COMMITTING A SEXUAL OR VIOLENT CRIME or 4. There has been a CLINICAL ASSESSMENT that the offender has a PHYSICAL, PSYCHOLOGICAL or ORGANIC ABNORMALITY THAT DECREASES THE ABILITY TO CONTROL IMPULSIVE SEXUAL BEHAVIOR.

On the off chance that the defendant is NOT sentenced to a period of imprisonment, the DISTRICT ATTORNEY (rather than the Board) will prepare and submit an RAI and the COURT will designate the risk level at a SORA HEARING which will be conducted at or shortly after the sentencing. In the case of a defendant who has been sentenced to a term of imprisonment, the hearing will be held at or near the time of his/her release from prison.

The defendant has a due process right to (and should) be present for the hearing but he may waive it provided he is notified of the proceeding , of his right to be present and that it will go forward in his absence if he refuses to attend. (See People v Hunt, 2018 NY Slip Op 01087 [2d Dep't 2/14/18)

DEPARTURES FROM PRESUMPTIVE RISK LEVEL

A defendant who believes that his/her presumptive risk level is too high (i.e., anything above a level 1), may seek a DOWNWARD MODIFICATION. Although the People have the initial burden of establishing their recommended risk-level designation by CLEAR AND CONVINCING EVIDENCE (People v Diaz, 2020 NY Slip Op 0114 [4th Dep't 2/18/20}, Rivera J. dissenting), a defendant seeking a downward departure must show by a PREPONDERANCE OF THE EVIDENCE that there is some mitigating factor that is "of a kind or to a degree that is otherwise not adequately taken into account by the SORA guidelines." (People v Edwards, 2021 NY Slip Op 07359 [4th Dep't 12/23/21]. Citing People v Sanders, 196 AD3d 1066 [4th Dep't 2021]).

RISK ASSESSENT INSTRUMENT: POINT CATEGORIES

THE RAI CATEGORIES AND RISK FACTOR VALUES include:

1. CURRENT OFFENSE(S), use of VIOLENCE including either FORCIBLE COMPULSION (10 pts) or INFLICTION OF PHYSICAL INJURY (15 pts) or being ARMED with a DANGEROUS INSTRUMENT (30 pts).
2. SEXUAL CONTACT WITH VICTIM including either CONTACT OVER CLOTHING (5 pts), CONTACT UNDER CLOTHING (10 pts), SEXUAL INTERCOURSE, DEVIATE SEXUAL INTERCOURSE or AGGRAVATED SEXUAL ABJUSE (25 pts).
3. NUMBER OF VICTIMS, if two (20 pts) or if THREE OR MORE (30 pts). (This includes children depicted in child pornography. SeevPeople v Johnson, 11 NY3d 410 [2008] and People v Poole, 90 AD3d 1550 [4th Dep't 2011]).
4. DURATION OF OFFENSE/CONTACT WITH VICTIM defined as a CONTINUING COURSE OF SEXUAL MISCONDUCT (20 pts).
5. AGE OF VICTIM where V was age 11-16 (20 pts) or 10 or younger or 63 or older (30 pts).
6. OTHER VICTIM CHARACTERISTICS defined as a victim having suffered from a MENTAL DEFECT or INCAPACITY or from PHYSICAL HELPLESSNESS (20 pts).
7. RELATIONSHIP WITH VICTIM defined as STRANGER or ESTABLISHED FOR PURPOSES OF VICTIMIZING OR PROFESSIONAL RELATIONSHIP (20 pts).

II. CRIMINAL HISTORY

8. OFFENDER'S AGE AT FIRST SEX OFFENSE. If 20 or younger (10 points).
9. NUMBER and NATURE of Prior Crimes: Prior history/NO SEX CRIMES or FELONIES (5 pts), or PRIOR NON-VIOLENT FELONY (15 pts), or PRIOR VIOLENT FELONY, MISDEMEANOR SEX CRIME, OR ENDANGERING THE WELFARE OF A CHILD (30 pts).
10. RECENCY OF PRIOR FELONY OR SEX CRIME. If LESS THAN 3 YEARS (10 PTS).
11. DRUG/ALCOHOL ABUSE (15 pts).

III. POST OFFENSE BEHAVIOR

12. ACCEPTANCE OF RESPONSIBILITY. If NOT (10 pts) or if NOT and REFUSED or EXPELLED FROM TREATMENT (15 pts).
13. CONDUCT WHILE CONFINED/SUPERVISED. UNSATISFACTORY (10 pts) or UNSATISFACTORY WITH SEXUAL MISCONDUCT (20 pts).
14. RELEASE ENVIRONMENT/SUPERVISON. Release with SPECIALIZED SUPERVISION (O pts), RELEASED WITH SUPERVISION (5 pts) or RELEASED WITHOUT SUPERVISION (15 pts).
15. LIVING/EMPLOYMENT SITUATION. IF INAPPROPRIATE (15 PTS).

SOME IMPORTANT DEFINITIONS

Correction Law 168-a provides the following relevant definitions:

1. SEX OFFENDER includes any person who is CONVICTED of any of the offenses set forth in subdivisions 2 and 3 of this section unless the conviction was set aside. Convictions resulting from or which are connected with the same act (or which result from offenses committed at the same time) are counted as one conviction.

2. A SEX OFFENSE means (a)(i) a conviction of (or for an ATTEMPT to commit any of the provisions of PL 120.70, 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 230.34, 230.34-a, 250.50, 255.25, 225.26 and 255.27 or PL Art 263, or PL 135.05, 135.10, 135.20 or 135.25 (relating to kidnapping offenses, provided the victim of such kidnapping or related offense is less than 17-years-old and the offender is not the victim' parent), or PL 230.04 (where the person patronized is, in fact, less than 17-years-old), PL 230.05, 230.06, 230.11, 230.12, 230.13 230.30(2), 230.32, 230.33, 230.34, or 230.25 (where the person prostituted is, in fact, less than 17-years-old, or (ii) a conviction of (or for an ATTEMPT to commit any of the provisions of) PL 235.22. or (iii) a conviction of (or a conviction for an ATTEMPT to commit any of the provisions of the foregoing sections) committed or attempted as a HATE CRIME (PL 485.05) or as a CRIME OF TERRORISM (PL 490.25) or as a SEXUALLY MOTIVATED FELONY defined in PL 130.91). (See People v Bunyund 2021 NY Slip Op 06529 [11/23/21]).

SEX OFFENSES also include:

2(b). a conviction of (or for an ATTEMPT to commit any of the provisions of) PL 130.52 or 130.55 provided that the victim is less than 18-years-old, or

(c). a conviction of (or for an ATTEMPT to commit) any of the provisions of PL 130.52 or 130.55 regardless of the victim's age and the offender has PREVIOUSLY BEEN CONVICTED of: (i) a SEX OFFENSE, (ii) a SEXUALLY VIOLENT OFFENSE, or (iii) any of the provisions of PL 130.52 0r 130.55 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 paragraphs (a), (b) or (c) above 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 USC 2251, 2251A, 2252, 2252A, 2260,2422(b), 2243 or 2245, provided that the ELEMENTS OF SUCH CRIME OF CONVICTION ARE SUBSTANTIALLY THE SAME AS THOSE WHICH ARE A PART OF SUCH OFFENSE.

(e). a conviction of (or an ATTEMPT to commit any of the provision of PL 250.45 (2, 3 or 4), unless upon motion by the defendant, the trial court, considering the nature and circumstances of the crime and the history and character of the defendant, concludes that registration would be UNDULY HARSH AND INAPPROPRIATE.

3. A SEXUALLY VIOLENT OFFENSE (SVO) means (a)(i) a conviction of (or an ATTEMPT to commit any of the provisions of) PL 130.35, 130.50. 130.65., 130.66, 130.67, 130.70, 130.75, 130.80, 130.95 and 130.96, or (ii) a conviction of (or an ATTEMPT to commit any of the above sections) committed as a HATE CRIME or as a crime of TERRORISM, 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.

A FEW MORE DEFINITIONS

CL 168-a (7)(a) defines a SEXUAL PREDATOR as a sex offender who has been CONVICTED OF A SEXUALLY VIOLENT OFFENSE and who SUFFERS FROM A MENTAL ABNORMALITY OR PERSONALITY DISORDER THAT MAKES HIM/HER LIKELY TO ENGAGE IN PREDATORY SEXUALLY VIOLENT OFFENSES.

(b). A SEXUALLY VIOLENT OFFENDER is a sexual offender who has been convicted of a SEXUALLY VIOLENT OFFENSE.

(c). A PREDICATE SEX OFFENDER is a sex offender who has been convicted an offense set forth in subdivision 2 or 3 of this section when the offender has PREVIOUSLY BEEN CONVICTED OF AN OFFENSE SET FORTH IN SUBDIVSION 2 or 3 OF THIS SECTION.

8. A MENTAL ABNORMALITY means a CONGENITAL or ACQUIRED CONDITION of a person that affects his/her emotional or volitional capacity in a manner that PREDISPOSES him/her TO THE COMMISSION OF CRIMINAL SEXUAL ACTS to a degree that makes him/her a MENACE to the HEALTH AND SAFETY OF OTHER PERSONS.

AN OBSERVATION

Paragraph 8 seems to reflect society's overall perception of sex offenders (especially pedophiles) and perhaps explains why courts tend to err on the side of caution when assigning them a risk-level designation. That it is why It is so important for defense counsel to contest the RAI'S which may overstate a defendant's recidivism risk potential, argue for downward departures (based on factors not necessarily accounted for in the Guidelines) and to urge SORA courts to resist the temptation to paint all sex offenders with the same broad brush based on possible misperceptions about sex offenders and their likelihood to re-offend as if from an irresistible impulse.

According to a USDOJ study which pre-dated SORA, only 5.3% of convicted sex offenders were likely to be re-arrested for a sex crime during the first three years of release from prison. After six years of release, 13% of former offenders were arrested and convicted of a new sex offense. And according to a 2008 study, first-time sex offenders accounted for 95% of sex crimes in New York State. (See 2/22/22 Committee Report at nycbar.org referenced at the outset).

AN INTERESTING ISSUE AVOIDED BY THE COURT OF APPEALS:

In People v Buyund 2021 NY Slip Op 06529 (11/23/21), the Court of Appeals deemed the defendant's challenge to his certification as a sex offender for a crime NOT LISTED as a registerable offense under CL 168-a(2)(a) UNPRESERVED for failure to object at the time of SORA proceedings. The Court also rejected the defendant's argument that the illegal SORA certification, raised for the first time at the Appellate Division (AD), fell under the illegal sentence exception to the preservation rule (People v Fuller, 57 NY2d 152 [1982]), because the SORA certification (and eventual risk-level assessment and notification requirements), while part of the judgement of conviction, did NOT constitute a part of the sentence.

The defendant pled guilty to Burglary 1st degree as a SEXUALLY MOTIVATED FELONY (SMF) stemming from an incident in which he entered the sleeping victim's apartment, put his hand and arm over her mouth and chest and attempted to insert himself into her mouth and vagina.

At the time of the plea, the court informed the defendant (erroneously it seems) that he would have to register under SORA upon his release from prison following his sentence of 11 years in prison and 10 years of post-release supervision (PRS). In due course, he was certified as a sex offender without objection.

On appeal the defendant now argued that even though Burglary 1st degree may qualify as a SMF under PL 130.91, it is NOT "one of the foregoing sections" specifically enumerated as REGISTERABLE SEX OFFENSES under CL 168-a (2) (a)(i) and (ii). The Second Department (179 AD3d 161 [2d Dep't 2019]), agreed and struck the sex offender certification from the sentence.

With respect to the issue of preservation, the court held that certifying the defendant (in a case where there were other equivalent registerable offenses to which he could have pled guilty), thus requiring him to register as a sex offender deprived him of his essential right to be sentenced as provided by law. (Citing People v Fuller, supra). Therefore, the AD vacated that part of the sentence.

COURT OF APPEALSS REVERSES:

The Court first noted that its jurisdiction was limited to questions of law rather than matters relating to the interests of justice. In the Court's view, the "illegal sentence" exception did NOT apply here because a SORA certification, not unlike the issuance of an order of protection (People v Nieves, 2 NY3d 315 [2004]), or restrictions imposed on gun registration (People v Smith, 15 NY3d 669 [2010]) stemming from criminal convictions are part of the judgment of conviction but NOT of the sentence for purposes of appeal.

The majority opinion noted that SORA is a remedial civil statute, not a punitive one, and that SORA requirements are collateral rather than a direct consequence of the sentence (even though the SORA court certifies the defendant as a sex offender in the first place and retains the ultimate discretion to accept or reject the Board's recommended risk level).

In the majority's view, the court order with respect to a defendant who is sentenced to prison constitutes the beginning of a statutory process that involves other agencies (e.g., DCJS, the Board of Examiners) which eventually culminates in a SORA hearing and risk-level determination which is civil rather than criminal in nature. Consequently, since the defendant's SORA certification was NOT part of his sentence, his claim that he was illegally "sentenced" as a sex offender under CL168-a (2) was not reviewable by that court. (The AD on the other hand, was free to take whatever corrective action it deemed appropriate in the interest of justice).

The dissenting justice, (Hon. Rowan D. Wilson), concluded that the majority misinterpreted prior precedent (in particular, People v Hernandez 93 NY2d 261 [1999] and People v Smith supra) to conclude that a SORA certification (which is imposed by the court at sentencing) is NOT part of the sentence. In Hernandez, the Court recognized that a SORA certification was deemed to be "part of the plenary adjudication of the defendant's conviction and sentence." (93 NY2d at 268).

In the dissenter's view, the majority failed to distinguish the certification of the defendant as a sex offender BY THE SENTENCING COURT with the subsequent registration of the offender and risk level determination which are not part of the sentencing. (Citing People v Smith supra and People v Gravino, 14 NY3d 546 [2010]).

While the dissenter did not dispute that the defendant's conduct should have qualified him for a registerable offense, the fact remained that the crime that was agreed upon by the parties and approved by the court for plea purposes was not included in the list of designated offenses qualifying as such under the Corrections Law.

BURDEN OF PROOF AND ADMISSIBLE EVIDENCE AT SORA HEARINGS

SORA hearings, as noted above, are civil proceedings in which the People must establish the defendant's risk level by clear and convincing evidence (i.e., a high probability of truth) and a defendant who seeks a downward departure from an unsatisfactory presumptive risk level must do so by a preponderance or greater weight of the evidence. (See People v Mingo 12 NY2d 563 [2009]).

In Mingo, the Court also ruled that the types of evidence that may establish a proposed risk level can include so-called RELIABLE HEARSAY contained in such documents as CASE SUMMARIES prepared by the Board of Examiners of Sex Offenders, PRE-SENTENCE REPORTS prepared by the Probation Department, Grand Jury testimony of the victim (People v Imbert, 48 AD3d 297 [1st Dep't 2008]). and a sworn criminal complaint incorporating third-party hearsay from the victim which may be admitted WITHOUT FOUNDATION from an authenticating witness. (People v Moore, 16 AD3d 190 [1st Dep't 2005]).

As the Court observed in Mingo, "hearsay is reliable for SORA purposes and thus is admissible if, based on the circumstances surrounding the development of the proof, a reasonable person would deem it to be trustworthy." (Citing, inter alia, People v Feine, 56 AD3d 921 [3d Dep't 2003]).

The documentary evidence at issue in Mingo (who had pled guilty to Rape 1st degree) consisted of internal documents of the DA's office (a data analysis form, grand jury synopsis sheet and early case assessment data sheet) which contained unattributed entries that the defendant had "threatened the victim with a …piece of metal," and were submitted in support of the People's claim under risk factor (RF) #1 that the defendant should be assessed 30 points for USE OF VIOLENCE.

In the companion case of People v Balic, the defendant was designated a level 2 offender based on a sworn criminal complaint of a police officer (from a case underlying a prior assault conviction) who referenced statements of the victim about being pulled into a van and raped, thus permitting an upward departure.

MINGO

At the Mingo SORA hearing, the defendant objected to the admission of the DA's internal documents as constituting unreliable hearsay under CL 168-n (3). The court received them over objection along with the indictment which also charged the defendant with possession of a weapon, thus designating the defendant a level 2 offender. (Without these 30 points, he would have been a level 1).

The Second Department (49 AD3d 148 [2d Dep't 2008]) AFFIRMED, finding the DA's records to be reliable hearsay even though the absence of foundation (e.g., as to source of information and circumstance of their making) was problematic. The lone dissenter suggested that the SORA judgment be reversed, and the case remanded for further proceedings to determine the factual basis for the records.

The Court of Appeals agreed with the dissent and remitted the matter for further proceedings.

BALIC

The defendant in Balic had pled guilty to Sex Abuse 1st degree stemming from a 2004 incident in which he (a school custodian) forcibly fondled a student. At the SORA hearing, the People argued that the

defendant should be assessed 30 points for a 1985 misdemeanor assault conviction under RF # 9, and 10 points under RF #8 because he was under 20 at the time of his first sex crime. In support thereof, the People offered the assault complaint in which the officer incorporated statements attributed to the victim that the defendant has forcibly fondled her during the incident, tried to remove her clothes and threated to shoot her if she did not comply.

The defendant argued that assessment of points in these categories was error because they require a conviction for a SORA enumerated crime which Assault 3d degree is not. Moreover, the hearsay allegations in the complaint were insufficient proof of acts of a sexual nature. The lower court rejected both arguments, finding that even if Assault 3d degree is not a sex offense, an upward departure was still warranted considering the sexual nature of the attack as described in the complaint (which the court deemed to constitute sufficiently reliable evidence).

On appeal, the People conceded that RF#9 requires a conviction for either a prior violent felony, a misdemeanor SEX crime, or Endangering the Welfare of a Child (thereby giving him 5 points instead of 30 in this category), and that the 10 points under RF#8 also only applied to a sex crime. They argued, however, that he deserved and properly received a higher risk level as an upward departure given the sexual nature of the attack as set forth in the criminal complaint. The AD agreed and AFFIRMED. (52 AD3d 201 [1st Dep't 2008]).

The Court of Appeals also agreed and affirmed the defendant's level 2 designation.

RELIABLE HEARSAY RULE

The Court noted that in determining an appropriate risk level, a SORA court shall review any victim statements (not necessarily sworn), and any relevant materials and evidence submitted by the People, the Board, and the sex offender, and may consider RELIABLE HEARSAY EVIDENCE submitted by either party provided that it is relevant to the court's determinations. (CL 168-n [3], 168-d [3]).

Information to determine an offender's risk level can also include any statements/admissions of the defendant, evaluative reports of a supervising parole officer or corrections counselor and information from any reliable source. Noting that neither the Legislature nor the Board has precisely specified what evidence may be utilized, the Court was satisfied that they did not limit it to only that which would be admissible at a trial.

At a trial, for example, unless an opposing party stipulates or fails to object, uncertified documentary evidence generally will not be admitted without a proper foundation to ensure that it constitutes reliable hearsay (e.g., business records exception). Even then, where the document contains statements of a third party under no business duty to make a timely and accurate report of information, such statements must meet their own hearsay exception (e.g., statement of a party opponent, present sense impression), lest they be excluded. (See Johnson v Lutz, 253 NY 154 [1930], and NY Advisory Evidence Rule 8.08).

Not so at a SORA hearing. The Court in Mingo/Balic concluded that CASE SUMMARIES and PRESENTENCE REPORTS meet the test of reliable hearsay because they are prepared by trained professionals acting under a statutory mandate to provide accurate information to courts whom they know will be relying on

such information to make consequential decisions with respect to sentencing and risk-level assessments. So, unless, they are unduly speculative or are undermined by other, more compelling evidence, they can be received into evidence WITHOUT FOUNDATION.

The Court cautioned however, that since accuracy of information is the objective at SORA hearings, the People should proffer the BEST EVIDENCE AVAILABLE (which may vary depending on the age of the case and the accessibility of records and efforts made to locate them), to illuminate the facts that are relevant to the court's determination.

In MINGO, the court concluded that while the People's records may have been reliable to establish that the defendant had been armed with a dangerous instrument at the time of the crime, unlike case summaries and probation reports, the court did not know how or by whom they were prepared, or who supplied the relevant information. The documents also contained certain codes which were not explained. As such, they were deemed UNRELIABLE. Accordingly, since the lower court accepted them without any foundation, the matter was remitted to see whether the People could provide one.

In BALIC, the Court was satisfied that the sworn criminal complaint which was prepared by an officer acting under a duty to record information accurately met the standard of reliability. And even though the victim's information referenced therein was hearsay, the Court noted that the Corrections Law does not require that such statements be sworn to, and absent equivocation or inconsistency with other evidence, such evidence can be received for SORA purposes. The Court also noted that the defendant's guilty plea at least partially corroborated the victim's allegations. Hence, unlike Mingo, there was no need for remand in this case.

FACTS-vs-CONCLUSIONS

In People v Diaz, 2020 NY Slip Op 01114 (2/18/20), the Court of Appeals upheld the defendant's level 2 determination which turned on 10 points for use of VIOLENCE/FORCIBLE COMPULSION under RF#1. The basis was a statement contained in the PSR which said in conclusory fashion that the defendant (who HAD PLED GULITY TO Course of Sexual Conduct with a Child) used physical force "on one or more occasions… to coerce the victim into cooperation."

The Case Summary which was also admitted stated that the defendant had used force on "more than one occasion." No supporting statements or documents to describe what words or conduct constituted the use of force were provided.

Noting that PSRS and case summaries qualify as reliable hearsay (People v Mingo, supra), and apparently untroubled by the lack of factual detail, the majority noted that the defendant did not challenge the accusation during the hearing and found sufficient record evidence to support the assessment of points under RF#1.

The dissenting justice (Hon. Jenny Rivera) said that while reliable hearsay may be admitted at a SORA hearing it should not be allowed (much less credited) where as here, there was NOTHING in the way of factual information to support the bald (and contradictory) conclusions set forth in the PSR and case summary.

In the dissenter's view, it was error for the trial court to admit and credit these documents in the absence of any evidentiary support for the conclusions they asserted. And while Mingo may have eliminated the foundation requirement, it did not relieve SORA courts of the obligation to assess the persuasive weight (or lack thereof) of the items admitted.

In contrast, the dissenter pointed to People v Sincerbeaux, 27 NY3d 683 (2016) which referenced a detailed statement from the victim as to the defendant's use of force, and People v Pettigrew, 24 NY3d 406 (2010) which also contained a detailed description of a violent rape. Conversely, in People v Hubel, 70 AD3d 1492 (4th Dep't 2010), the Fourth Department rejected the defendant's challenge to the claim of oral sexual contact (not mentioned in the accusatory instrument) because other reliable evidence (the victim's statements) provided a sufficient basis for the court's risk level determination by clear and convincing evidence.

In short, the dissenter concluded that conclusions unsupported by any facts cannot provide clear and convincing evidence to a support a risk level determination, and notwithstanding the majority's contrary conclusion, the Board and Probation Departments should be required to IDENTIFY THE SOURCES OF THE FACTUAL STATEMENTS and ensure that their recommendations are SUPPORTED BY RELIABLE EVIDENCE, especially when it consists of hearsay.

PRACTICE POINTER

Defense counsel should always keep in mind that even if the judge admits records such as PSR'S and cases summaries into evidence, he/she has the DISCRETION to either credit, disregard or give minimal weight to any conclusions lacking in factual support. This is especially so where such conclusion can make the difference between a level 1 determination and a lifetime of registration requirements for levels 2 and 3. Also, where appropriate, counsel should offer any other records or documents (or offer witness testimony) which contradicts or mitigates the People's proof (or supports a downward departure from the presumptive risk level).

CHILDREN DEPICTED IN PORNOGRAPHY ARE "VICTIMS" FOR SORA PURPOSES.

When SORA went into effect in the mid-1990's, the Legislature appears to have focused on in-person offenders who sexually abuse children whom they know or come to know as a prelude to victimizing them. Two of the RF categories, #3 and #7 respectively, assign points based on the number of victims (two or more =20 pts and 3 or more =30 pts) and on the relationship with the victim (stranger or established for purposes of victimizing or a professional relationship =30 pts).

In most cases, consumers/viewers/sharers of child pornography do not know the children depicted in the images, and it is not uncommon for the offenders to possess/view hundreds if not thousands of such images over time.

Consequently, unlike an in-person offender who may sexually abuse one or more children, most child-pornography consumers who view such conduct remotely invariably will qualify for 50 or 60 points total in these two categories for viewing sexual depictions of 2-3 or more children whom they typically do not know and will never meet.

In People v Johnson, 11 NY3d 416 (2018), the Court of Appeals noted that while children (who are sexually exploited for profit which is fueled by demand from consumers), clearly qualify as victims for SORA purposes, reflexively (if not automatically) assigning points under RF#s 3 and 7 may result in an excessive risk calculation. It can be offset, however, by a discretionary downward departure by the court in appropriate cases.

After Johnson, the Board issued a POSITION STATEMENT recognizing that adding points in all child pornography cases for "stranger relationship," for example, can produce an unintended, anomalous result which does not account for differences in individual offenders. Consequently, the Board decided that it would continue to score 20 or 30 points based on the victims' ages but would depart from the presumptive risk level, when appropriate, based on various factors including the number and nature of the images possessed, whether the viewer was a subscriber, whether the material categorized and organized, whether the offender lacks adult sexual relationships and engaged in sexual self-gratification while viewing the images.

In People v Gillotti, 23 NY3d 841 (2014), the Court of Appeals addressed the questions whether: 1. points may be assessed under RF#3 based on the number of victims (Ans: yes), 2. whether the Board's position statement prohibits a SORA court from assigning points under RF#3 and #7 (Ans: no), and 3. by what standard of proof must a defendant seeking a downward departure establish entitlement to such relief? (Ans: preponderance of the evidence).

In Gillotti, the defendant, age 19 was found in possession of over 1000 images of child pornography on his laptop at a US Airforce base in England where he was stationed. He later pled guilty to Sexual Exploitation of Children (10 USC 934) and, after serving time in military custody, was returned to the US where he moved in with his mother in Middleport NY.

The Board of Examiners prepared a case summary and RAI, recommending a risk level of 55 (level 1). There was no assessment of points under RF's #3 or #7. The People, however, urged the court to apply 30 points for the number of victims and 20 points for stranger relationship under RF #7. They also sought 15 points under RF#15 for inappropriate living/work situation. (The defendant worked at a local amusement park). All told, the People sought 115 points (level 3).

At the SORA hearing, the People submitted the RAI, the case summary and the Air Force case file which revealed that the defendant possessed and catalogues numerous pornographic images of children (some of whom appeared to be "forced" to engage in sex).

The defendant stated that he hadn't downloaded such imagery in a long time and simply forgot to delete them from his laptop, but other evidence indicated otherwise, including that he had attempted to send a pornographic video of a 13-year-old girl who was forced into sex.

A psychologist (Dr Heffler) who examined the defendant testified that while porn-viewers do not have a high rate of engaging in abusive physical contact, the defendant (whom he diagnosed as hebephobic i.e., irrationally afraid of children of a certain age), did present a risk of recidivism based in part on his untruthfulness about his conduct. The defendant also offered several character witnesses.

The trial court found that any mitigating factors were outweighed by the aggravating factors including the defendant's possession of numerous unsavory images and lack of candor. Therefore, a downward departure was deemed to be unwarranted.

The Fourth Department (104 AD3d 155 [2013]) affirmed, holding that the lower court properly assessed points, and the defendant, for his part, failed to establish entitlement to a downward modification by clear and convincing evidence. The Court of Appeals held that the AD erred in holding the defendant to this level of burden and hence, remitted the case for the AD to evaluate the defendant's proof by the preponderance standard.

PEOPLE V FAZIO

In this companion case, decided with Gillotti, the defendant pled guilty to two counts of sexual abuse of children under the law of Pennsylvania where the defendant then resided. The defendant moved to NY State and the Board prepared a RAI which assessed 30 points based on the age of the victims and 15 points for release without supervision (level #1).

For their part, the People sought 50 more points under RF# 3 and #7 which would elevate him to a level 2 offender. The defendant objected but did not request a downward departure in the event that the court deemed the assignment of points in these categories to be otherwise proper.

The trial court assessed the defendant a level 2 and the Third Department affirmed. (106 AD3d 121 [3d Dep't 2013]).

The Court of Appeals noted that this defendant challenged the validity of imposing points in RF#3 and #7 on a child-pornography viewer (an issue left unpreserved by Gillotti) but rejected the defendant's argument, noting that images of child pornography essentially depict crimes in progress and the children exploited therein are victimized not only by their in-person abusers but by the lascivious consumers who perpetuate the demand for such material.

The Court held that the trial court properly adjudicated the defendant to be a level 2 offender based on the total points (including under category #3). The Court also held that the Board's position statement did not abrogate a SORA court's authority to follow the guidelines and assess points under RF#'s 3 and 7 (leaving open the possibility of a downward departure, if warranted).

DISSENTING OPINION

The dissenting justice (Hon. Robert S. Smith) acknowledged the seriousness and harmfulness of child pornography cases but stressed that the sex offender risk assessment process, as presently constituted, is ill-suited to consumers of child pornography because labelling them more severely (based on their observation of multiple images of unknown children) does not serve SORA'S principal objective of protecting the public from sex offenders because notifying the community that there is a pervert in their midst will not necessarily stop that individual from continuing to view child pornography in the privacy of his home.

The dissenter observed, "the language of the sex offender classification rules assigns points to possessors of child pornography for the number of victims and stranger classification in a way that was intended to apply to PHYSICAL CONTACT and NOT to defendants who possess and share child pornography, whether or not they are as dangerous as physical offenders." (Citing People v Yen, 33 Misc 3d 1234[A] {sup Ct NY County 2011]).

As a result, according to the dissenter, many child-pornography offenders who do not pose a serious (in-person) threat to society will be labelled at level 2. A better approach, in his view, would be to either

make downward departures the norm in such cases or to treat the Board's position statement as an amendment to the Guidlelines and not score the defendant under RF'S #3 and #7.

A FEW MORE CASES

In People v Jackson, 2022 NY Slip Op 01918 (4th Dep't 3/15/22), the Fourth Department held that the trial court properly assessed the defendant 15 points under RF#11 for ALCOHOL/SUBSTANCE ABUSE because the People established by clear and convincing evidence that the defendant was abusing alcohol at the time of the crime and failed to complete a treatment program after developing an admittedly serious drinking problem about one year before committing this crime. (Citing People v Palmer, 20 NY3d 373 [2013] and People v Kowal, 175 AD3d 373 [2013]).

The court also rejected the defendant's claim that 10 points were erroneously assessed under RF#12 for FAILURE TO ACCEPT RESPONSIBILITY. Although the defendant pled guilty and told the probation officer that he accepted responsibility, the court concluded that his statements were rehearsed and insincere. It also did not help that the defendant blamed the victim for his crime. Hence, his claimed acceptance of responsibility rang hollow. (Citing People v Vasquez, 149 AD3d 1584 [4th Dep't 2017]. People v Askins, 148 AD3d 1598 [4th Dep't 2017).

In People v Richardson, 2021 NY Slip Op 04807 (4th Dep't 8/26/21), the defendant argued that he was incorrectly labelled a level 3 offender based, in part, on points assessed in RF#11 (Drug/Alcohol Abuse) and #12 (Acceptance of Responsibility).

The court noted that while the defendant argued at the SORA hearing in favor of a downward departure, he did not address this issue on appeal. Hence, it was deemed abandoned. (People v Liddle, 159 AD3d 1286 [3d Dep't 2018]).

With respect RF#11, the court noted that while there was no evidence that the defendant used drugs during the offense, the People presented proof that he was convicted of CPCS (and of possessing marijuana) and he admitted consuming alcohol, smoking pot, taking acid, and using crack cocaine at different times. He also returned to drug use and alcohol consumption after a brief period of sobriety and admitted that he "self-medicated" during periods of depression. Hence, the court was satisfied that he demonstrated a PATTERN OF DRUG/ALCOHOL USE sufficient to warrant the assigned points. (Citing People v Kowal supra).

Points were also deemed to have been properly assessed under RF#12 based on the defendant's refusal of treatment which demonstrated his ongoing denial and unwillingness to change his ways. (Citing People v Ford, 25 NY3d 939 [2015]). The court also noted that the Guidelines do not make exceptions based on the defendant's claimed reasons for not following through with needed treatment. (Citing People v Graves, 162 AD3d 1659 [4th Dep't 2018]).

The court pointed out that the defendant offered no evidence that the facility where he was confined did not offer sex offender treatment and, in any event, he admitted that he would not be willing to accept a transfer to a facility where he could participate in such treatment. Hence, in the court's view, he rejected it, thus reflecting his unwillingness to accept responsibility for his crime.

In People v Turner, 2020 NY Slip Op 06906 (4th Dep't 11/20/20), the court held that the defendant was properly assessed points under RF#11 for drug/alcohol abuse even though he may not have been doing so AT THE TIME OF the instant offense. (Citing People v Kuniz, 150 AD3d 1096 [4h Dep't 2017]).

The evidence established that the defendant did engage in drug treatment while incarcerated, he admitted to a history of drug use and had been diagnosed as drug dependent. The court noted that while the defendant seemed to have abstained from drug and alcohol use while incarcerated, a recent history of abstinence in jail is not necessarily predictive of one's behavior when not under such constraint.

CONVICTIONS IN OTHER JURISDICTIONS/ ESSENTIAL ELEMENTS TEST

In People v Blue, 2020 NY Slip Op 04689 (4th Dep't 8/20/20), the AD modified the defendant's level 2 assessment to level one stemming from a federal court conviction for Conspiracy to Commit Sex Trafficking of a Minor (18 USC 1591).

The court initially rejected the defendant's claim that she did not have to register as a sex offender because, as the court observed, SORA registration also applies to persons convicted in ANY OTHER JURISDICTION OF AN OFFENSE THAT INCLUDES THE ESSENTIAL ELEMENTS OF A CRIME SPECIFIED IN CL 168-a (2) (a-c). (Citing People v Kennedy 7 NY3d 87 [2006], Matter of North v Board of Examiners of Sex Offenders, 8 NY3d 745 [2007]).

Making that determination requires the SORA court to COMPARE THE ELEMENTS of the foreign offense with the comparable NY offense. Where the offenses overlap but the foreign one also criminalizes conduct not covered by the NY offense, the court must then REVIEW THE CONDUCT UNDERLYING THE FOREIGN CONVICTION to see whether it FALLS WITHIN THE SCOPE OF THE NY OFFENSE.

In this case the court noted that even if the federal and NY crimes did not perfectly overlap, the defendant's UNDERLYING CONDUCT qualified as PROMOTING PROSTITUTION (PL 230.25) insofar as the defendant enticed a 14-year-old victim to engage in commercial sex acts, provided a place for her to perform those acts and took all the money that she made from them. As such, the defendant advanced and profited from prostitution of a person under 19 years of age and had to register as a sex offender under CL 168-a (2)(a)(i). (Citing Board of Examiners v North, supra at 753).

It was also proper in the court's estimation for the defendant to be assessed 15 points under RF#11 because information in the PSR and case summary (which included the defendant's admissions to daily marijuana use and undergoing drug treatment while incarcerated) supported it.

It was ERROR, however for the lower court to assess 25 points under RF#2 for sexual contact with the victim and 20 points under RF#4 for a continuing course of sexual misconduct because the People did NOT establish by clear and convincing evidence that the defendant actually had sexual contact with her (citing People v DiLillo, 162 AD3d 915 [2d Dep't 2018]), or that the defendant shared the intent of the

victim's customers who engaged her in sexual contact. (Citing People v SG, 4 Misc3d 563 [Sup Ct NY County 2004]).

RECOMMENDATIONS FOR CHANGE

The proposed legislation mentioned at the outset (S-3096) is based on the premise that the current RAI is an ineffective tool for predicting the risk of re-offending by convicted sex offenders because it lacks what its critics (including NYS Supreme Court Justice Daniel Conviser, JSC, NY County) describe as a coherent methodology and is based on outdated (if ever validated) research which fails to correlate the numerically scored risk factors with any realistic risk of recidivism.

According to Conviser, the RAI is a hodge-podge of different categories that mix and match purportedly objective factors related to the risk of re-offense with numerical values (and policy-based) judgments about the degree of harm that an offender's conduct creates. Also, the RAI scoring ranges appear arbitrary and lacking in rationality. For example, it's difficult to say how someone who makes sexual contact over the victim's clothing (5 pts under RF#2) is any less likely to re-offend than one who makes contact under the victim's clothing (10 pts under RF#2). (See 2/22/22 Committee Report supra at nycbar.org).

Also, as noted above, the RAI arguably tends to overestimate the risk of viewers of child pornography who reportedly represent about 10 percent of SORA offenders. While the Board, in light of its Position Paper after People v Johnson supra, may or may not score an offender in RF# 3 or 7 (opting instead for a recommended override), the concern expressed by the Committee Report is that judges will continue to score these offenders mechanically in these categories on the theory of "better safe than sorry" rather than take a closer look at their individual situations.

The Committee also questions the validity of assessments 10 points under RF#8 (defendant under 20 at first sex offense) when more recent research suggests that the sexual recidivism rate reported for juvenile sex offenders is generally lower than for sex offenders who commit such offenses as adults.

Also questioned is the validity of assigning twenty points under RF#3 for two victims but 30 points for three or more victims when more recent research, according to the Report, does not show a correlation between number of victims and risk of recidivism. It certainly begs the question whether a voyeur of numerous images of child pornography who has never acted out his fantasies poses a greater danger to the community that the neighborhood pedophile who has repeatedly sexually abused the same child victim over an extended period of time. (Under RF#3, the viewer of three or more child pornographic images would earn 30 points while the serial sex abuser of a single victim would receive only 20 points under RF#4).

The Report also criticizes the use of four overrides any one of which could catapult the defendant into level three territory thus requiring him to register for the rest of his life. On the other hand, the RAI fails to consider constructive factors such as time spent in the community arrest-free, the defendant's age when released and whether the offender resides with a responsible adult partner in an intimate relationship.

The Report recommends that the SORA guidelines be amended based on updated research to mirror scientifically validated and empirically tested assessments (e.g., STATIC-99, Minnesota Risk Assessment Instrument, Child Pornography Risk Assessment Tool), so that risk assessment becomes less of a guessing game which results in the over classification of lower risk offenders and may even underestimate some of the more serious ones.

FINAL THOUGHT

Representing clients charged with sex crimes, especially those involving children, has to be one of the most difficult assignments for any criminal defense attorney. Society (i.e., the jury) loathes them, communities understandably fear them and judges who see themselves as guardians of the public good tend to favor admissibility over exclusion of inculpatory evidence and are generally not bashful about lowering the boom at sentencing in the event of a conviction.

Although SORA certification and registration are considered collateral consequences of the conviction, they hang around the defendant's neck like a millstone for no fewer than 20 years at the lowest level and for life if they are adjudicated a level two or three sex offender. It not only brands the defendant a pariah but can create serious obstacles to finding housing and meaningful employment which are essential to reintegration into society.

That is why it is imperative for counsel when negotiating a plea disposition to urge the prosecutor to consider offering a non-registerable offense, which they will probably not be willing to do unless their case is very weak, a necessary witness is unable or unwilling to testify and they're just looking to salvage the case with a conviction of any kind.

Also, in addition to becoming familiar with CL section 168, counsel must scrutinize the RAI'S and supporting documents carefully to see if the recommended scores in each RF category are supported by facts contained in the materials offered by the prosecution. If there are documents (e.g., sworn statements, grand jury testimony, hospital records, other documents) that contradict or mitigate the People's proof, counsel should not hesitate to present it at the SORA hearing.

While People v Mingo supra permits the admission of reliable hearsay, counsel should point out any flaws in the proof (e.g., conclusory statements without factual back-up or attribution as to the source) to underscore the minimal weight that such evidence should be given in the court's analysis. It is also important to note that Mingo stressed the importance of providing the court with the BEST AVAILABLE INFORMATION (which requires a diligent, good faith search for relevant information) to ensure that the court makes an ACCURATE ASSESSMENT of the defendant's risk of re-offending.

Rather than roll over and accede to the Board's or the People's recommended risk level, counsel should prepare, as if for trial, by conducting an independent investigation (with the help of an ACP investigator, if needed), to identify any relevant records or documents pertaining to the client (e.g., school records, if relevant, prison records to verify the defendant's deportment and program participation, demonstrating an acceptance of responsibility and commitment to rehabilitation).

Counsel should also consult with an ACP SOCIAL WORKER and/or MITIGATION SPECIALIST and/or an EXPERT (e.g., psychologist who treats sex offenders) to assist with presenting any mitigating factors that might persuade the court to grant a DOWNWARD DEPARTURE from the presumptive risk level.

And while it's generally not a great idea to put the defendant on the stand, in appropriate cases, where counsel is confident that the client will present well (acknowledging his crime and explaining why he will not re-offend), it could be worthwhile to have the defendant testify. In some instances, the defendant may be his own best hope for a better outcome than otherwise expected.