29 Misc.3d 1206(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, New York County, New York.

The PEOPLE of the State of New York, Plaintiff,
v.
Elias McFARLAND, Defendant.

Oct. 4, 2010.

Attorneys and Law Firms

New York County District Attorney Cyrus Vance Jr. (Rachel Hochhauser, of counsel) for the People.

Legal Aid Society (Lorca Morello, of counsel) for the Defendant.

Opinion

DANIEL P. CONVISER, J.

***1** The Defendant in this case appeared before this Court for a risk level determination pursuant to the Sex Offender Registration Act (SORA).[1] He initially moved to have this Court declare SORA unconstitutional as applied and use the "Static 99" (*see* discussion *infra*) rather than the SORA Risk Assessment Instrument (the "RAI") to determine his risk for re-offense. He argues that the SORA Risk Assessment Instrument does not measure the risk of re-offense, as it purports to do, but reflects a moral judgment about how blameworthy sexually offending behavior is. He describes the instrument and risk level determinations under SORA as punitive rather than regulatory. For this reason, he alleges, the statute is unconstitutional.

Second, Defendant urges that the use of a "psuedo-scientific" instrument (the RAI) to deprive persons of a basic liberty interest violates due process. Defendant acknowledges that this claim was rejected by the First Department in *People v. Ferrer,* 69 AD3d 513 (1st Dept 2010), *lv denied,* 14 NY3d 709, but argues, *inter alia,* that "the decision is so conclusory that it cannot act as a barrier to consideration by this Court".[2] Finally, he argues that pursuant to the decision of the New York Court of Appeals in *People v. Johnson,* 11 NY3d 416 (2008) the RAI does not have any presumptive weight in a SORA risk assessment proceeding and the Court may disregard the instrument if it chooses to.

As discussed in more detail *infra,* the Court does not agree that the SORA statute as applied is "punitive" rather than "regulatory" and for that reason is unconstitutional. This Court does agree that the current procedures by which sex offenders are classified under the RAI are devoid of any rational basis and violate substantive due process. In the Court's view, as discussed in much greater detail *infra,* there is no evidence that the RAI provides probative information about the risk that a sex offender will re-offend. Its determinations in this respect are simply arbitrary. It is also this Court's view, for the reasons discussed *infra,* that the ability of courts to depart from the presumptive RAI score does not cure the due process deficiencies inherent in the instrument. Although this Court thus agrees with the second of Defendant's constitutional claims, those issues have already been rejected by the First Department in the *Ferrer* matter as well as numerous prior appellate rulings. This Court is obviously bound by those determinations and has followed them. For that reason, Defendant's second constitutional claim is also denied.

After the Court denied Defendant's constitutional claims, the Court scored the Defendant under the RAI and determined that he was a Level 3 offender at high risk for re-offense. Defendant then moved to have this Court depart from that initial Level 3 determination and classify the Defendant as a Level 1 offender at low risk for re-offense. He made additional written submissions in support of this application and the Court conducted a hearing. Following that hearing on June 8, 2010, the Court issued a brief written decision holding that there was no basis to depart from the Level 3 designation which the Court had found was appropriate under the RAI. The Court therefore classified the Defendant as a Level 3 offender at high risk for re-offense.

***2** Given its length, this Opinion is organized into a number of topical sections which are briefly outlined here:

Section II briefly outlines the nature of the adversary proceeding which occurred in this case and the primary sources of information relied upon by the Court in reaching its conclusions.

Section III provides a statement of facts concerning Defendant's instant crime and criminal history.

Section IV summarizes how risk assessments are made under SORA.

Section V outlines how professionals in the sex offender risk assessment field make such determinations.

Section VI outlines what, in the Court's view, are the most significant problems inherent in the RAI.

Section VII contains a detailed analysis of the individual risk factors scored under the instrument.

Section VIII briefly outlines some of the significant sex offender risk factors which are not captured by the RAI.

Section IX outlines the standards which Courts use in determining whether to depart from the RAI.

Section X analyzes Defendant's constitutional claims.

Section XI provides the Court's assessment of Defendant's risk classification.

Section XII briefly outlines the consequences of inaccurate classifications under SORA and presents recommendations for reform.

II

NATURE OF INSTANT PROCEEDINGS—EVIDENCE CONSIDERED AT HEARING

The Court relied upon a number of information sources in reaching its determinations. These are briefly outlined here. It is also important to note, in the Court's view, the way in which the adversary process in this case may have impacted on this Court's conclusions concerning SORA risk assessments.

The People in this case, represented by the New York County District Attorney, had experienced and able counsel. The New York County District Attorney's office, however, does not have any institutional interest in upholding the validity of the RAI. The goal of the District Attorney's office in this case was to ensure that the Defendant was assigned the proper risk level. The People urged the Court to find that the Defendant was a Level 3 offender at high risk for re-offense. The People fully prevailed in that goal.

The Attorney General's office did not appear in this case and the Court does not know why the Attorney General declined to appear. The procedures for assessing risk levels under SORA, however, have been repeatedly held to be valid by every appellate court which has considered that issue over a period of more than 13 years. Given this history, the Attorney General's office may well have concluded that there was no need to appear in this case and argue a proposition which is well-settled: that the RAI is a valid instrument for assessing sex offender risk.

These facts are outlined to point out, however, that while Defendant's counsel, the Legal Aid Society, presented extensive evidence and argument in support of Defendant's constitutional challenges, the People did not present extensive evidence or argument defending those procedures. In that sense, the adversary process in this case (through no fault of either the People or the Attorney General) was less than complete. The Court recognizes that if the Board of Examiners of Sex Offenders (which, as discussed *infra,* created the RAI) had been represented by an advocate who was intent on refuting the claims made by Defendant's counsel, such an advocate would doubtless have made points about SORA risk assessment procedures which have not been presented to this Court. This Court's findings would doubtless have been more informed had such a full adversary process occurred.

***3** In reaching its conclusions the Court, in addition to reviewing the facts of this case and relevant case law, considered the following:

1. The RAI Commentary

As discussed in more detail *infra,* the RAI Commentary is a guide to understanding and scoring the RAI which is published by the Board of Examiners of Sex Offenders and is widely cited and used by courts in setting risk levels. The most recent version of the RAI Commentary, published in 2006, is extensively relied upon here. The Court also reviewed the two earlier versions of the RAI Commentary which were published in 1996 and 1997.

2. This Court's Decision in *Santos*

This Court analyzed many of the issues discussed here in a much more cursory form in its recent decision in *People v. Santos,* 25 Misc.3d 1212(A), 2009 WL 3254563 (New York County Supreme Court, October 6, 2009). In *Santos,* however, the Defendant did not challenge the validity of the SORA statute, nor did he present any evidence or expert testimony about how risk determinations under the statute are made. Some language from the *Santos* decision is incorporated into the instant Opinion in either verbatim or modified form. Since those passages were recently

written by this Court on the same topic in an unpublished decision, they are not separately cited or identified here.

3. Testimony of Dr. Kostas Katsavdakis

Dr. Kostas Katsavdakis testified for the Defendant at a hearing to consider whether the Court should depart from the Level 3 designation scored under the RAI. The doctor is a clinical psychologist. He was asked by the defense to score the Defendant under the "Static 99" risk assessment instrument and compare the Static 99 to the RAI. He did not otherwise assess the Defendant, nor did he ever treat or interview him.

Dr. Katsavdakis earned a Ph.D. in clinical psychology in 1996 from the California School of Professional Psychology in San Diego. He then completed two fellowships, the first of which was in a hospital emergency room seeing psychiatric patients. The second was at the Menninger Clinic in Topeka Kansas, which he described as "one of the preeminent psychiatric institutions in the world". Transcript of Hearing on May 20, 2010 ("Tr.") at 7. After that fellowship, he was hired on staff at the clinic and has since taken continuing education courses and otherwise read journals to continue his education. He evaluated and treated sex offenders at the clinic. He also worked with sex offenders at the Kirby Forensic Psychiatric Center in Manhattan. At that facility, he developed an assessment tool to be used for sex offenders prior to the adoption of the sex offender civil management statute (Article 10 of the Mental Hygiene Law) which was enacted in 2007. Dr. Katsavdakis currently has a psychology practice which involves about 20–25% clinical work and 75% forensic work. His forensic work primarily concerns sex offenders. He assesses sex offenders for a variety of purposes including evaluations under the sex offender civil management statute. Those evaluations are roughly half at the request of the State and half at the request of respondents. He testified that he is familiar with SORA and the RAI and was a secondary author on a publication concerning Level 3 sex offenders in New York. He said he had testified as an expert in sex offender assessment 6–8 times in New York. He said he had testified once as an expert comparing the RAI and the Static 99. The Court qualified Dr. Katsavdakis as an expert in the field of sex offender risk assessment without objection. Tr. at 7–17. The Court found his testimony to be credible.

4. Defendant's Written Submissions

***4** The Defendant made extensive written submissions in support of his motion which are outlined here. The Court understood that a number of these submissions contained extensive hearsay. The Court received them for two reasons. First, the People did not object to the Court's consideration of any of these documents. Second, "reliable hearsay" is admissible at a SORA proceeding. *People v.. Mingo,* 12 NY3d 563 (2009). This "reliable hearsay" authority has been used in SORA proceedings to allow courts to consider a myriad of facts about defendants which are not derived from evidence which would be admissible at a criminal or civil trial. It has not been used to allow courts to consider scholarly articles or research studies on sex offender recidivism. Nevertheless, the Court found the documents outlined below to be sufficiently reliable under the general standard articulated in *Mingo* to be considered in this case.

A. Article by Laurie Guidry

The Court received an article by Laurie Guidry, Ph.D. which was published in "The Alliance", the quarterly publication of the New York State Alliance of Sex Offender Service Providers and the New York State Chapter of the Association for the Treatment of Sexual Abusers. The article was published in the winter of 2004/2005. This article contains Dr. Guidry's analysis of the RAI and the procedures through which sex offenders are evaluated under SORA.[3] Although Dr. Guidry did not testify at the hearing and her *curriculum vitae* was not provided to the Court as an exhibit in this matter, that *c.v.* is available from her website, laurieguidry.com. The Court reviewed that *c.v.* and provided it to the parties. It indicates that Dr. Guidry received a Bachelors degree in Psychology from Loyola University in 1993, a Master's Degree in Counseling Psychology from Antioch New England Graduate School in 1995 and a Doctorate in Clinical Psychology from that institution in 2000. She currently directs a program operated by the Massachusetts Department of Mental Health to provide assessment, treatment and risk management services for patients who are mentally ill and also exhibit problematic sexual or sexually offending behavior. She has served as a forensic sex offender evaluator since 2008. She has also had a private practice which provides psychological consultation, training and assessment services for persons including those with problematic sexual or sexually offending behavior.

Her 18 page *c.v.* lists numerous other professional employments, extensive publications and presentations and professional associations and honors, many of which are directly related to the assessment and treatment of sex offenders. Dr. Guidry has worked with survivors of sexual assault as well as mentally ill and sexual offenders. Her website indicates that Dr. Guidry has been "active in

efforts to inform public policy on rational, evidence based, and comprehensive approaches to maximizing public safety through the effective treatment and management of sex offenders". The Court believed that Dr. Guidry's professional qualifications, as well as the fact that her conclusions were largely consistent with the other evidence the Court received, made her article sufficiently reliable to be considered in this proceeding. Citations to Dr. Guidry's article herein are referenced as "Article".[4]

B. Affidavit & Power Point Presentation by Dr. Katsavdakis

***5** Dr. Katsavdakis also submitted an affidavit on behalf of Defendant's counsel, the Legal Aid Society, in 2005 in support of Defendant's SORA risk assessment arguments in an unrelated matter, *People v. Ferrer,* Indictment No. 6850–04 (New York County Supreme Court, 2008) (Yates, J.) which was received by the Court in the instant matter.[5] This is referenced below as "Affidavit". The trial Court's determinations in *Ferrer* were affirmed by the First Department in the case which also, as noted, *supra,* rejected a challenge by the Legal Aid Society on behalf of Defendant Ferrer to the validity of the SORA risk assessment process. *People v. Ferrer,* 69 AD3d 513 (1st Dept 2010), *lv denied,* 14 NY3d 709. Dr. Katsavdakis submitted a written version of a Power Point Presentation summarizing relevant research in the field of sex offender risk assessment which was received by the Court in the instant matter.[6] (referenced here as "Power Point"). The Defendant also submitted a transcript of the testimony of Dr. Katsavdakis in the *Ferrer* matter.[7] Since Dr. Katsavdakis testified in the instant matter, however, the Court did not consider this prior testimony.

With respect to his Affidavit and Power Point presentation, Dr Katsavdakis testified under oath at the hearing in this matter. His written submissions were consistent with his testimony, although those submissions were more detailed. His written submissions were mostly consistent with other evidence in this case. For all of these reasons, the Court found Dr. Katsavdakis' written submissions sufficiently reliable to be considered in this proceeding.

C. Information Concerning the Static 99

The Defendant submitted a volume of Exhibits (Volume 2) containing coding rules for the Static 99 and related materials relevant to the data supporting that instrument and the proper method of scoring it. The evidence at the hearing indicated that the Static 99 is the most widely used and widely accepted actuarial sex offender risk assessment instrument in use in the world today. For that reason, the Court found this submission sufficiently reliable to be considered at the hearing.

III

DEFENDANT'S INSTANT CRIME AND CRIMINAL HISTORY

Elias McFarland is 76 years old. He was convicted by plea of guilty on January 27, 2003 of one count of Assault in the Second Degree and one count of Attempted Sexual Abuse in the First Degree. On February 21, 2003, he was sentenced to a determinate sentence of imprisonment of 5 years with 5 years post-release supervision on the assault count and an indeterminate sentence of 2–4 years incarceration on the sexual abuse count, with those sentences ordered to run concurrently. The Court's review of the court file indicates that the Defendant repeatedly struck an 86 year old woman with a blunt object causing lacerations and a loss of consciousness. As the victim lost consciousness, she felt her attacker pull her pants down. When she awoke her pants and shoes had been removed. She had significant bruising on her hands and back and required surgery for an eye injury which was caused during the attack. She identified her attacker as a person she knew from the building she lived in and said he had lived there for about five years.

***6** The Defendant allegedly told the arresting police officer that he came out to the garden of the senior citizens housing complex where the assault occurred to get drunk and pass out. He also admitted that he knew the victim. When interviewed in preparation for his pre-sentence report, he denied his guilt but said he wanted his guilty plea to stand. He asserted that he had "blacked out" and that someone else had tried to rob the victim. In written submissions and at argument, Defendant's counsel argued that the evidence against Mr. McFarland was highly suspect and that despite his guilty plea and the complainant's grand jury testimony, there was not reliable evidence that Mr. McFarland was guilty of the instant crime.

The Defendant has a criminal history which dates back to the 1950's and includes a number of crimes committed in Virginia. The details surrounding those convictions are not completely clear from his criminal history. He was convicted of the crime of "Rape" in Virginia in 1955 and

initially received a five year prison sentence which may have been subject to early termination. He was convicted of a crime called "Felony Cutting with Intent to Maim", again in Virginia, in 1957. He apparently received a five year sentence for this crime. He was convicted again of the crime of "Rape" in 1962 and apparently given a sentence of 6 years and 8 months imprisonment. He was convicted of Arson in the Second Degree in New York in 1985. He received a sentence of 90 months to 25 years incarceration for that crime.

A reception and classification system report in the court file, which was apparently prepared by the Department of Correctional Services in 2003 when Mr. McFarland began his prison term for the instant offense, provides some additional information about the Defendant's crimes although the source and reliability of this information is unclear. In this report it is noted that his rape convictions involved both a juvenile and an elderly woman. It is noted that the maiming incident involved his wife while the arson case involved setting fire to his girlfriend's apartment. It is also noted that Mr. McFarland acknowledged drinking excessively and said he was friends with the victim in the instant offense. He denied committing the instant crime but also said he had blacked out and was unable to remember the crime. At argument, Defendant's counsel challenged criminal history information indicating that the Defendant had been convicted of rape in 1955 and 1962 urging that there was not a sufficient basis to determine that these convictions in fact concerned Mr. McFarland. Counsel further argued that the Court had not been provided with any information about what the elements of the crime called "Rape" were in Virginia in 1955 and 1962.

The Case Summary prepared by the Board of Examiners of Sex Offenders indicates that Mr. McFarland's behavior while incarcerated has been "satisfactory" and that he was progressing in a sex offender treatment program but was removed from that program "though no fault of his own" (the circumstances of his removal are not otherwise specified).

IV

HOW RISK ASSESSMENTS ARE MADE UNDER SORA

***7** The SORA statute, originally enacted in 1995 and significantly amended on multiple occasions since that time, created a "Board of Examiners of Sex Offenders" (hereafter the "Board") of five members appointed by the Governor. Three members under the statute are required to be employees of the Division of Parole who shall be "experts in the field of the behavior and treatment of sex offenders" and two members must be employees of the State Department of Correctional Services. No qualification requirements are imposed by the statute for those two members. Correction Law § 168–l (1). The Board is directed to establish "guidelines and procedures to assess the risk of a repeat offense by such sex offender and the threat posed to the public safety." *Id.* § 168–l (5).

The statute provides a list of non-exclusive factors the Board should consider in developing those guidelines. The Board is directed to use the guidelines to provide a "recommendation" to the sentencing court about an incarcerated offender's risk level prior to the offender's release. *Id.* § 168–l (6). Defendants are required to be designated by the Board into one of three risk categories: Level 1 for offenders whose risk of a repeat offense is low; level 2 if the offender's risk of repeat offense is moderate and level 3 where the risk of repeat offense is high "and there exists a threat to the public safety". *Id.*

After this recommendation is made, the sentencing court is required to make a judicial determination of the offender's risk level. The statute directs the court to consider the same guidelines factors that the Board is directed to consider and reach its own determination, after reviewing the Board's recommendation and conducting a hearing. *Id.* § 168–n. For defendants given a sentence which does not include incarceration, the sentencing court must make a risk level determination after a hearing applying the guidelines in the statute without receiving a Board recommendation. *Id.* § 168–d.

Governor Pataki appointed the members of the Board in January of 1996. The Board then created a mathematical "Risk Assessment Instrument" (the "RAI") in the form of a scoring sheet which assigns a designated number of points for defendants with various characteristics. Offenders who score from 0 to 70 points under the instrument are presumptively level 1; offenders who score from 75 to 105 points are presumptively level 2 and offenders who score from 110 to 300 points are presumptively level 3. The instrument also provides four "overrides" (facts about an offender's conduct, condition or criminal history) which make an offender presumptively a level 3 regardless of his score. These are:

1. The offender has a prior felony conviction for a sex crime;

2. The offender caused serious physical injury or death;

3. The offender made a recent threat that he will re-offend by committing a violent or sexual crime, or

4. There has been a clinical assessment that the offender has an abnormality decreasing the ability to control impulsive sexual behavior.

***8** The instrument allows a court to depart from the "presumptive" risk level contained in the instrument and finally asks that the court make a number of other determinations required by SORA about an offender's condition or history which are relevant to the Act's registration and community notification requirements. As noted, *supra,* the RAI was accompanied by a guide to applying the instrument, the "Sex Offender Registration Act Risk Assessment Guidelines and Commentary" (the "Commentary"). The original RAI was promulgated in January of 1996. The instrument was slightly revised in November of 1997 and has not been substantively modified since then. The current Commentary was published in 2006 but notes that "[t]he 2006 revisions do not change the scoring of the instrument but, rather, simply include updated statutory language and clarification." Commentary at 1. According to the Commentary: "[n]o one should attempt to assess a sex offender's level of risk without first carefully studying this commentary." Commentary at 1.

An offender's risk level designation results in a number of consequences under the Correction Law in addition to the designation itself. Level 3 offenders are subject to SORA registration for life. Level 2 offenders are also subject to such registration for life but some level 2 offenders may petition to be removed from the registry after 30 years. Level 1 offenders who are not subject to certain other SORA designations are required to register for 20 years. §§ 168–h; 168–o.

The degree of information which may be provided by law enforcement agencies to the public also varies depending on an offender's risk level. Information about level 1 offenders may only be disseminated to entities which serve "vulnerable populations" but such entities may further disseminate such information to the public. § 168–l (6). Information concerning level 2 and 3 offenders is made available on the Internet. Any person may receive automatic email notifications when an offender is placed on the Internet registry and will reside in a geographic area specified by the email recipient. § 168–q. Members of the public may also receive information about a specifically identified offender by calling a telephone number established by the statute. § 168–p. The State is required to provide information about level 2 and 3 offenders to public housing authorities in order to identify persons ineligible to reside in public housing. § 168–b (12).

Level 3 offenders must personally appear at a local law enforcement agency every year to have their photographs updated while other offenders must appear every three years. § 168–f. In addition, level 3 offenders and those designated as "sexual predators" must personally verify their address at a local law enforcement agency every ninety days. § 168–f (3). The failure of an offender to verify registration information is a Class E felony. § 168–t. Level 3 offenders on probation or parole as well as certain other SORA offenders are subject to additional statutory restrictions concerning their presence on or near school grounds and their use of the Internet. PL § 65.10; Executive Law § 259–c.

***9** The Development of the RAI

The Commentary explains that the "guidelines [the RAI] were developed with the assistance of a group of experts with diverse experience in dealing with sex offenders." Commentary at 1.[8] A draft of the guidelines was prepared in 1995 by the Director of the Office of Research and Statistics of the Colorado Division of Criminal Justice. The Board then modified the draft to make it "as objective as possible". This process lasted two months and included "testing the guidelines against a large sample of cases to insure that accurate results were produced." (The Commentary does not further explain what "accurate results" means). An expert panel consisting of two prominent and experienced assistant district attorneys specializing in sex offender prosecutions, a probation officer, a deputy attorney general, a police captain, the acting director of forensic services at the State Office of Mental Health a medical doctor and a sex offender treatment provider then met for two days, applied the guidelines to 20 cases and modified them. *See* Commentary, "Appendix: Development of the Guidelines".

V

HOW PROFESSIONALS MAKE SEX OFFENDER RISK ASSESSMENTS

In making predictions about whether a sex offender will commit a new crime, psychologists and psychiatrists generally rely upon two methods: clinical judgment and what are known as "Actuarial Risk Assessments" ("ARA's"). "Clinical judgment involves using experience

and training, along with an interview or evaluation of the client, to reach an opinion about risk." *See State v. Rosado,* 25 Misc.3d 380, 388 (Bronx County 2009)[9]. ARA's, on the other hand, take a group of sex offenders, measure how many of them are re-arrested or re-convicted for a sex offense over a given period of time and then identify the traits or risk factors shared by those re-offenders. By comparing the traits of a given individual to the traits of re-offending individuals, an actuarial assessment of the risk posed by a particular offender can be calculated. *Id.*

The most widely used ARA in the world is the "Static 99". *See* New York State Division of Criminal Justice Services, Office of Sex Offender Management, *Static 99 Clearinghouse,* 2009. The Static 99 was originally created by Drs. R. Karl Hanson, Ph.D and David Thornton, Ph.D. The original instrument developed in 2003 contained a list of ten scoring factors. It was a "Static" instrument because it looked at unchanging historical characteristics of an offender. Based on how the offender scored on each item in the Static 99 list, a ranking describing the offender as low risk, moderate risk, medium-high risk and high risk was obtained. *See State v. K.A.,* 18 Misc.3d 1116(A) (New York County Supreme Court, 2008) at 5. The Static 99, or indeed any ARA, cannot predict whether any particular sex offender will re-offend. It merely describes how an individual's characteristics compare with those of offenders who have re-offended at a given rate over a given period of time. As one Court explained:

> ***10** Actuarial instruments do not measure psychological constructs such as personality or intelligence. In fact, they do not measure any personal attributes of the particular sex offender at all. Rather, they are simply actuarial tables-methods of organizing and interpreting historical data. *Rosado, supra* at 7, *quoting In re Commitment of R.S.,* 339 NJ Super 507, 540, (App.Div.2001), *affd,* 173 NJ 134 (2002).

The use of ARAs in predicting sex offender recidivism was an outgrowth of what were seen as the predictive deficiencies of using subjective clinical judgment alone. The use of ARAs continues to generate controversy and arguments over methodology. But these instruments have also become widely used, along with clinical judgment, in making sex offender risk assessments. They have been asserted by their proponents to have "moderate predictive accuracy" in assessing risk. *See U.S. v. McIlrath,* 512 F3d 421 (7th Cir, 2008) (citation omitted). In 2009, the developers of the Static 99 completely revised the instrument because new data indicated a significantly lower recidivism rate for sex offenders than that derived from the data which had been collected from the 1960's through the mid–1990's and had been used to create the original scale. The new instrument contains a range of actuarial recidivism rates and recommends that evaluators make a risk assessment in two stages. First, an empirically derived recidivism rate range is calculated. Second, professional judgment is used to determine where a particular offender falls within that range. *See Rosado, supra* at 403–408.

Dr. Katsavdakis testified that he relied on risk assessment instruments when evaluating a sex offender's risk to re-offend and considered them important but that they were only one tool he used. Risk assessment instruments "minimize subjectivity". Tr. 29. With respect to the current version of the Static 99, once the instrument is scored on the basis of its 10 static factors, the offender is compared to one of four sample groups each of which has a recidivism rate over 5 or 10 years. This comparison process considers which of the four samples the offender most resembles.

The Static 99 has been rated for reliability. "Among the sex offender risk instruments it is one of the best at being able to predict sex offender recidivism." *Id.* at 37. It is used by a variety of professionals in the sex offender assessment field. Scoring the instrument should be done with original sources of information and does not require an interview with the subject. He said that the Static 99 was "[g]enerally accepted as a good instrument to use for sexual offense recidivism". *Id.* at 40.

At the hearing in this case, Dr. Katsavdakis also testified, in response to questions from the Defendant's attorney, about how he conducted sex offender risk assessments and what steps were necessary in order to make an accurate determination about a sex offender's risk to re-offend:

> ***11** ... [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 ...
>
> Q: And you would consider all of that to be necessary

to come up with a judgment that you could or an assessment that you are comfortable with?

A: Correct, if I am doing an evaluation at the request of the judge or the attorney, that is what I tell them what I need with regard to my evaluation. Tr. at 55–56.

This Court has presided over numerous proceedings under Article 10 of the Mental Hygiene Law. Those proceedings, including jury trials, often consist exclusively of testimony and evidence which is presented and evaluated by psychologists and psychiatrists who conduct risk assessments of sexual offenders and then opine as to whether an offender has a "mental abnormality" which is defined under the statute as a condition which predisposes an offender to commit a sex crime and results in the offender having serious difficulty in controlling his sexually offending behavior. The Court takes judicial notice of the fact that the procedures which Dr. Katsavdakis testified he used in conducting sex offender risk assessments are consistent with the procedures used by professionals generally in the field. Psychologists and psychiatrists evaluating the risk that a sex offender will re-offend, in the Court's experience, routinely seek to review relevant records, seek to interview an offender if possible and either score or review an offender's scores on actuarial risk assessment instruments like the Static 99. What Dr. Katsavdakis testified was necessary to make an accurate assessment of sex offender recidivism risk reflects what, in the Court's experience, professionals in the field generally seek to do in making such determinations.

VI

SALIENT CHARACTERISTICS OF THE RAI

The RAI is obviously not based on clinical judgment. That is, the score is not a psychiatric assessment of the individual before the Court. It is more akin to an ARA. It is an instrument which seeks to compare the characteristics of an offender to those of a group of offenders with the goal of developing an objective score upon which the individual's re-offense risk can be measured. But, as outlined *infra,* the RAI is not a valid risk assessment instrument.

In this section, the Court has summarized what it believes are the most significant problematic characteristics of the RAI. This discussion is then followed in Part VII with a detailed examination of the RAI's individual risk factors and how they support the general points made in Part VI.

1. The RAI is not a "Risk Assessment Instrument"

***12** It is important initially to recognize that the RAI is composed of purportedly objective components which claim to measure the risk of re-offense and at least three subjective or policy based determinations. The most significant of these subjective factors is the instrument's "harm" calculus. The RAI considers not only the statistical risk that an offender will re-offend, but the harm which would be caused by a re-offense. *See* Commentary, General Principles, n.1. This "harm" calculus is not based on objective data. It is a value judgment. The RAI assigns points based on its assessment of how harmful designated behaviors are (apart from any assessment that those behaviors will re-occur).

The subjectivity of the RAI's harm calculus does not primarily arise from the general distinctions it makes. It comes from the assessment of a particular numerical score which purports to designate, with mathematical precision, the degree of harm caused by specific behaviors. As the 2006 Commentary points out, for example, an offender who rubs himself against a woman in a subway car causes less harm than a child molester. General Principles n.1. That is a proposition almost anyone could agree with. But when constructing a numerical scoring instrument like the RAI, the decision about how many points (10, 20, 30 or 40, for example) should be added to the score of someone who molests a child as opposed to a person who rubs up against a woman in the subway is a value judgment.

At least one of the RAI's scoring factors is based on still a third consideration—the Board's judgment about the need for community notification. Pursuant to Factor 7, the RAI assesses 20 points if the offender's conduct was "directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization" or was an abuse of a professional or avocational relationship between the offender and the victim. These points are based, *inter alia,* on the Board's view that in such cases "the need for community notification ... is generally greater". *See* Commentary, Factor 7, n.8. Offenders in this category are assessed additional points not because of an increased recidivism risk or an assessment that such crimes are more harmful than others, but because a higher score will result in a greater likelihood that more extensive community notification will occur. Factors 6 & 15 provide another policy-based rationale for the assessment of points—the Board's view that some offenders should be scored with additional points because of the difficulty law

enforcement and prosecutorial agencies have in detecting and convicting them. For still other factors, it is difficult to determine on what basis points are assessed. *See e.g* . Factor 4, Duration of Offense. There is nothing inherently wrong with incorporating such value judgments or policy concerns in a scoring instrument. But those considerations do not have any necessary correlation with the risk that a sex offender will commit another crime. The RAI is thus not an "objective assessment instrument." *See* Commentary, General Principles, n.3.

2. The RAI Has Never Been Tested or Validated—

There is No Reason to Believe it Predicts Re–Offense Risk

***13** Actuarial risk assessment instruments have predictive validity because they are based on actuarial data which indicate how frequently offenders with similar characteristics have re-offended in the past. The RAI, however, unlike ARA's, was not created using actuarial data. That is, it cannot be said that an offender who scores, for example, 120 points on the RAI shares objective characteristics with offenders who have been demonstrated to re-offend at any particular rate over any period of time. Just as the RAI was not validated when it was created, it has also never been formally tested, as far as the Court is aware, to determine its accuracy in predicting recidivism. It would obviously be possible to take a sample of offenders who have been determined to be at high risk, moderate risk and low risk to re-offend in the years since 1995 and then determine the extent, if any, to which the RAI had been accurate in predicting re-offense risk. The data necessary to make such calculations is readily available to the state. But, as far as the Court is aware, no such analysis has ever been published.

As Dr. Guidry framed the issue:

> Although defined as an "objective assessment instrument" there is no indication that the RAI has been developed based on standard best practices of test construction nor does it appear to have been scientifically validated or demonstrated to be reliable in any form. As such, there is no way to confirm if the factors identified, operationalized, grouped together and used in these guidelines are associated with an accurate assessment of sex offender re-offense and potential for harm or threat to the community in a statistically significant way. Article at 7.

When asked whether the RAI is a "valid instrument", Doctor Katsavdakis responded:

> In my opinion, as an instrument, no. Partly because it has never been actually tested to see whether level one, two or three is predictive of those levels. There have been some studies looking at it in other realms including the one that we published, but not necessarily looking at it to see if level one re-offended lower than level two and lower than level three, and I think that would be an important process. And other states have done that, but I don't know if we have done that in the State of New York. I have not seen any publications noting that scientific publication. Tr. at 72–73.

The witness said he does not use the RAI because it is a "generally unaccepted risk assessment instrument". *Id.* at 74.

Given the current design of the RAI, however, no valid actuarial analysis would be possible. That is because the instrument mixes and matches purportedly objective factors related to the risk of re-offense with numerical value judgments about the degree of harm an offender's conduct causes and points which are added for policy reasons not directly related to either risk or harm. Because the instrument's recidivism risk parameters are not separately calculated from other considerations, however, it is not possible to analyze the extent, if any, to which its recidivism risk parameters are accurately correlated to the risk of re-offense. Indeed, as outlined *infra,* where individual RAI scoring factors are apparently based on a combination of an offender's purported risk of re-offense with the harm caused by a re-offense or other policy concerns, it is not clear what weight each of these considerations has been afforded.

***14** Dr. Katsavdakis said that it was his expert professional opinion that the RAI does not "accurately predict the relative degrees of risk for sexual re-offense in the community" and may result in "high rates of classification errors", *i.e.,* classifying an offender at high

risk for re-offense who was not in fact at high risk for re-offense. Affidavit at 19.

3. Most of the RAI's Scoring Factors Have No Known Relationship to Recidivism

As outlined in detail in Part VI of this Opinion, 13 of the RAI's 15 scoring factors purport to be based at least in part on re-offense risk. Of these 13 factors, however, 5, according to the evidence at the hearing, have no known relationship to recidivism. (Factors 3, 4, 6, 10 & 14). Two additional factors have a connection to risk but not as defined in the instrument. (Factors 5 & 12). One factor has a relationship to risk which was described in expert testimony as "tiny". (Factor 1). One of the three categories in Factor 7 also has a relationship to risk, but this appears to be inadvertent. The evidence received by the Court was conflicting as to whether Factor 15 is related to risk. At best, 6 of the 15 factors in the RAI state a proposition which, as that proposition is articulated in the instrument, is at least generally correlated to risk. (Factors 1, 8, 9, 11, 13 & 15). One of the three categories in Factor 7 is also correlated to re-offense risk.

4. None of the RAI's Re–Offense Risk Point Assessments

Are Based On Any Known Data. The Scores Appear to be Simply Arbitrary

Some of the RAI's scoring factors which are purportedly based on the risk for re-offense have a relationship to recidivism risk. The number of points assessed for these factors and the relationship of these point scores to other scores in the same factor or the instrument as a whole, however, appear to be simply arbitrary. For example, under Factor 9, an offender receives 3x more points for a prior non-violent felony conviction than for a prior non-violent misdemeanor conviction. While an offender's prior criminal history may be relevant to his re-offense risk, there is no support for the proposition that an offender who has committed a prior non-violent felony is three times more likely to commit a sex crime than an offender who has committed a prior non-violent misdemeanor. Nor is there any basis, when considering the RAI as a whole, to assign 15 points for such a non-violent felony, as opposed to, for example 10 or 30 points. None of the specific scores in the RAI appear to have any relationship to any known data or literature in the field.

Dr. Katsavdakis in his Affidavit outlined some additional problems with the instrument's scoring. He noted that the scoring range for some factors differs significantly from the range for other factors. For example, Factor 1 ranges from 10–30 points; Factor 8 is simply 10 points and Factor 14 ranges from 0–15 points. According to Dr. Katsavdakis, the Board "does not provide any rational basis for the discrepancy in the weighted scoring system." Affidavit at 18–19. He noted that in contrast, the New Jersey Risk Assessment Instrument has equally rated scoring ranges between items. The RAI in fact does provide a rationale for one distinction made by the instrument. The Commentary indicates that factors 14 and 15, which address an offender's post-release environment, are not scored as heavily as other factors because those "arrangements are prospective and can readily change". Commentary, General Principles, n.8. While these two factors are scored with a maximum of 15 and 10 points respectively, however, four other factors are also scored with a maximum of 15 or 10 points (factors 8, 10, 11 & 12).

***15** Actuarial risk assessment instruments like the Static 99 also assign specific point values for an offender's prior criminal history (*see discussion infra*). But these point values are based on actuarial data. They are a reflection of the fact that offenders with specific criminal histories share objective characteristics with offenders who have historically committed sexual offenses at specific rates. The RAI is not based on any such data. As Dr. Guidry framed the issue:

> The statistical rationale for the number of points awarded for each factor, and for the weighting of elements within each factor of the RAI appears arbitrary. The RAI gives no statistical, mathematical nor other rationale for the point values assigned to the factors identified. Similarly, the statistical rationale for determining who is at low, medium or high risk is undefined, and seemingly inconsistent with the strategies used in other states. Article at 4.

Dr. Katsavdakis made the same point during his testimony at the hearing. Tr. at 96–97.

5. Certain RAI Scoring Parameters Can Produce Patently Irrational Results

This is Particularly True for "Suggested Departures"

As outlined in Part VII, *infra,* certain RAI scoring parameters produce results which are obviously irrational.

This is particularly true where the instrument contains "Suggested Departures". As noted, *supra,* a "departure" means a determination by a court to raise or lower an offender's risk level above or below the risk which is indicated by the RAI. Such departures come in two forms. First, a court may depart from the RAI score, where, according to the Commentary, "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." Commentary, General Principles, n.6. The standards governing such "Discretionary Departures" are discussed in detail in Part IX of this Opinion. But the Commentary also contains a number of factors where courts are explicitly invited to consider departing from the instrument for specific reasons. Such departures are suggested because factors deemed potentially relevant by the RAI are *not* scored in the instrument. That is, in a number of instances, the Commentary indicates that a particular offender behavior, characteristic or thought process (for example, under Factor 1, that an offender "intended" to rape a victim) *might* be relevant to an offender's score. Courts are asked to consider whether such a factor is relevant in an individual case and if it is, consider a departure.

This raises two questions. The first is why these factors are not simply scored under the instrument (assuming the relevant criteria underlying the discretionary determination courts are asked to make has been met). Put another way, there is no indication in the Commentary that the factors which are scored under the RAI are capable of precise measurement (hence meriting a particular score) while those which are the subject of Suggested Departures are incapable of such measurement (and can thus only be addressed by a discretionary judicial determination).

***16** The more significant problem are the anamolous or even irrational results Suggested Departures may produce. That is because these factors, by raising or lowering an offender's risk by an entire level, may assume more importance than many other RAI factors combined. While factors which are scored by the RAI may merit assessments of 5, 15 or 30 points, suggested departures may result in effective scoring changes of 40 or 60 points or more. Yet these factors do not appear to be nor are they claimed by the Commentary to be more important than other factors.

To provide just one example of the Suggested Departure issues outlined in Part VII, *infra,* consider the case of an offender who has been convicted of the crime of Endangering the Welfare of a Child but the offense did not involve any sexual misconduct. The RAI scores an offender with 30 points if he has a previous conviction for a misdemeanor sex crime. The misdemeanor of Endangering the Welfare of a Child (PL § 260.10) is treated in the same way as a sex crime by the RAI (with a 30 point score) even though the crime includes no necessary sexual element and is not defined as a sex crime by the Penal Law or SORA. The Commentary recognizes that although the instrument treats this offense as a sex crime, it will sometimes not be. In such circumstances, the Commentary provides two options. The first is to assess the offender with 30 points, as if he had committed a sex crime, even though he did not. The second, is to depart down by one level. But in wide range of cases this will give such offenders a *benefit* for this conviction and treat such offenders as at *less* risk to re-offend than a person who had never been convicted of *any* crime. The simple math behind this anomaly is outlined in Part VII, Factor 9.

Other plainly irrational outcomes under the RAI arise simply because of the way certain scoring factors are defined. A good example occurs under Factor 10. This Factor assigns points for the "recency" of a prior felony conviction. Yet, as explained *infra,* because of the way this Factor is defined, it will often be *older* rather than more *recent* convictions which will be scored. *See* Part VII, Factor 10.

6. The RAI, For No Apparent Reason, Classifies the Vast Majority of Possible Scores as Level 3 Offenders at High Risk for Re–Offense

In his Affidavit, Dr. Katsavdakis noted that under the RAI, a Level 1 low risk classification exists if an offender scores in a 70 point range, the moderate risk classification exists if the offender scores within a 30 point range and the high risk classification must be found if the offender scores within a 190 point range. Thus, the low risk classification makes up approximately 23% of the scale, the moderate risk classification makes up approximately 10% of the scale and the high-risk classification makes up approximately 63% of the scale. In contrast, he noted, the New Jersey risk assessment instrument has three categories with practically identical ranges. Affidavit at 19. The Commentary provides no explanation for these discrepencies.

***17** Dr. Guidry said that most states assigned Level 3 or high risk designations to the most dangerous 10–20% of offenders. Early research on the Static 99 indicated that 12 % of the offender population fell into the high risk category. Current figures maintained by the New York State Division of Criminal Justice Services (DCJS) indicate that roughly 25% of the approximately 30,000

offenders currently classified under SORA are defined as being at a high risk for re-offense with the remaining two categories roughly equal in size.[10]

7. A Number of the Most Significant Re–Offense Risk Factors

Are Not Captured by the RAI

Actuarial risk assessment studies over the past 15 years have identified the most significant variables which are correlated with sex offender recidivism. At least some of these variables are captured by some factors in the RAI. A number of the most significant of these factors, however, are simply not incorporated into the RAI in any form. These factors are briefly outlined in Part VIII of the Opinion.

8. The RAI's Harm Assessments Are Largely Inconsistent With Those of the Legislature

Judgments about "harm" in the RAI are obviously subjective. They could not be otherwise. Judgments about the harm caused by various kinds of sexually offending behavior, however, are also made and continually revised by the Legislature, when they enact and amend criminal laws. The Penal Law, like the RAI, reflects a series of value judgments about how harmful the myriad of sexually offending behaviors are.

SORA is not a criminal statute and there is no requirement that the RAI mirror the Penal Law. In the Court's view, however, if the RAI is intent on making inherently subjective value judgments about the societal harm caused by various sex crimes, it should at a minimum be guided by the judgments the Legislature has made on those issues. The value judgments of the RAI were made once, in 1996, by three employees of the Division of Parole and two employees of the Department of Correctional Services. They have not been modified since that time nor have they ever been validated or approved by any other body. In contrast, the value judgments inherent in the Penal Law have been made and refined over decades by the elected representatives of the people of the State of New York and New York's elected governors. In the Court's view, those value judgments are entitled to more weight than the views which the five Board members expressed in 1996.

Yet, on multiple issues, as described *infra,* the value judgments of the RAI are flatly contradictory to the value judgments of the Legislature on the identical issues. As described *infra,* on issues as diverse as whether having sex without the use of forcible compulsion with a 16–year–old victim presents the same degree of harm as having sex with an 11–year–old; whether touching a victim sexually inside the victim's clothing is more harmful than touching outside the clothing or whether a forcible rape committed without a weapon is more harmful than sexually touching a victim while armed with a knife the harm assessments of the RAI are radically different from those which have been made by the Legislature.

9. The RAI's Harm Determinations Presume an Offender's Current Crime is Identical to the Crime He is at Risk to Commit in the Future

***18** Harm assessments under the RAI are based on the crime of conviction. If assessments about harm are appropriate to include in a numerical risk assessment instrument at all, however, what is relevant is not the crime an offender has committed. What is relevant is the crime the offender is at *risk* to commit. An offender's current crime will always be relevant in that inquiry and may often be dispositive. But an offender's most recent and most likely future crime will not always be identical, as the RAI implicitly presumes in all cases. Take the following hypothetical. An offender has for years repeatedly exposed himself in public. On one occasion he also sexually touches a victim outside her clothing and is assessed under the RAI for that crime. A psychologist evaluating such an offender might determine he is at tremendous risk to expose himself in public again. But that psychologist might also determine that the offender was at very little risk of committing another touching crime. The RAI will score the "harm" this offender risks in all cases as the harm caused by the touching crime. The instrument does not assess the harm an offender *risks* committing. It scores the harm the offender *has* committed. It then presumes he is most at risk to commit that identical crime again.

10. The RAI is More Than15 Years Out–of–Date. The Most Significant Knowledge in the Field, However, Has Been Obtained in the Past 15 Years

The study of sex offender recidivism, risk assessment and treatment is a dynamic and ever changing discipline, where new research findings continually modify the understanding of risk. To take just the most significant recent example, as noted, *supra,* the "Static 99", the most common ARA in use throughout the world today, was completely revised just last year. As noted, *supra,* the new Static 99 "norms" are based on the fact that recidivism rates for sex offenders are significantly lower now than

they were when the data supporting the original 2003 norms were compiled. *See Rosado, supra.*

The RAI, however, is frozen in time. As noted, *supra,* the RAI was developed in 1996. The Appendix to the 2006 Commentary lists 36 articles upon which the RAI was based. The most recent of these articles was published in 1995. The RAI has not been informed by any research which has been conducted or reported in the sex offender field during the past 15 years. The research supporting some of the RAI's factors is significantly older.

The problem is not simply that this research is outdated. The more significant problem is that the most important developments in the field have occurred in the past 15 years. Dr. Katsavdakis testified that there has been a significant amount of research over the past 15–20 years concerning the risk that sex offenders have to commit additional sex or non-sex crimes. He said that beginning in 1995 or 1996, after the enactment of federal sex offender laws, there was a realization in the profession that there was insufficient information about how likely sex offenders were to recidivate. From 1995 to 1998, there were a series of large or "meta-analytic" studies conducted on the subject. Tr. at 22. The first significant meta-analytic study was done by Hanson in 1998. A meta-analytic study is a study which combines the results of a number of individual studies. This identified risk factors like being male, being younger and selecting male victims. Additional meta-analytic studies were conducted in 2004 and 2009. In between were hundreds or thousands of individual studies. This provided a better understanding of sex offender recidivism. Dr. Katsavdakis testified that "the research has grown significantly in the last 20 years". Tr. at 23.

***19** The witness testified that the benefit of meta-analytic studies is that they provide sample sizes of 20,000 to 40,000 offenders. The disadvantage of such studies is that they may miss individual variations. A larger sample increases the "ecological validity" of a study or its predictive value. *Id.* at 24. The most recent meta-analytic study was conducted by Hanson and Bourgon in January of 2009. It had a sample size of 45,000 and reviewed 118 studies. The studies review not only U.S. offenders but offenders in Canada, New Zealand and Australia. These studies generally come to a consensus on risk factors. *Id.* at 25.

Dr. Guidry identified the fact that the RAI is based on outdated information as perhaps its most salient characteristic:

> [P]erhaps most importantly the RAI is based on outdated literature. Since the RAI's inception in 1995, seminal research on factors associated with sex offender recidivism has been produced [citations omitted]. In addition, researchers have produced significant improvement in the actuarial measures of sex offense recidivism (i.e. Static 99) ... Some of the factors of the RAI are now known to have no predictive utility whatsoever. Critical elements, which are now known to be among the most potent predictors, are not included. Article at 4.

Dr. Guidry also noted that the RAI does not reference a seminal piece of research completed by Hanson and Bussiere in 1998, *Predicting Relapse: A Meta–Analysis of Sexual Offender Recidivism Studies.* This meta-analysis examined over 23,000 sex offenders. Article at 5. In his Affidavit, Dr. Katsavdakis noted that the failure of the RAI to incorporate current research literature stands in contrast to other widely used sex offender risk assessment instruments which are regularly peer-reviewed and incorporate the findings of current literature. Affidavit at 4.

VII

ANALYSIS OF INDIVIDUAL RAI FACTORS

The general points made immediately, *supra* are reflected in the specific RAI scoring factors which define an offender's score and risk assessment. Each of these risk factors is analyzed here.

Factor#

1: Use of Violence

Used Forcible Compulsion:
10

Inflicted Physical Injury:
15

Armed with a dangerous instrument:
30

The Commentary makes clear that this factor is an amalgam of two considerations: risk of re-offense and harm caused by a re-offense. With respect to actuarial risk, the Commentary notes that "an offender's use of violence is positively correlated with his likelihood of re-offending". In support of this proposition, the Commentary cites two articles published in 1995 and one published in 1991.

Dr. Katsavdakis said that this factor was correlated to re-offense risk but that the correlation was not as strong as other factors. In his Affidavit, Dr. Katsavdakis explained that a recent meta-analytic study (2004) had determined that there was a statistically significant relationship between the degree of force used during a sexual offense and the risk of re-offense, but that the effect size was "tiny". He said that previous studies had indicated that there was no clear evidence of re-offense risk associated with this factor. He also noted that this factor was difficult to study empirically because offenders who used significant violence tended to be institutionalized for long periods of time (and there was thus limited data which could be used to determine if they would re-offend once released). His conclusion, with respect to the use of Factor 1 to assess risk was that "[g]iven the equivocal and inconsistent findings, the weighting of these items can not be justified as written". Affidavit at 5. In his Power Point presentation, Dr. Katsavdakis cited a 1998 meta-analytic study by Hanson and Bussiere as concluding that "[n]either the degree of sexual contact, or force used, nor injury to victim were significant predictors of sexual offense recidivism". Power Point at 7.

***20** Dr. Guidry noted that a conviction for a violent crime along with a sexual offense is related to recidivism. Article at 5. The Static 99, which is based on actuarial data, adds points to an offender's score for a concurrent conviction for a violent crime. The RAI, however, is inconsistent with this research in a number of significant ways. First, under the RAI, a concurrent conviction is not required. Some of the behaviors scored under RAI Factor 1 would not constitute concurrent violent crimes. Conversely, violent crimes which *are* correlated with re-offense risk and are thus included in the Static 99 are not scored under this RAI factor.[11]

With respect to re-offense risk, what is more problematic is that the differentiation among types of violent behaviors in the RAI with the instrument's concomitant scores for those behaviors have no empirical basis. Both Dr. Katsavdakis and Dr. Guidry made this point. *See* Tr. at 62; Article at 5. As Dr. Guidry explained: "[t]here is no clear statistical rationale or articulated basis to claim, for example, that an individual armed with a weapon is three times more likely to re-offend and harm their victim than someone who used forcible compulsion and twice as likely to re-offend as someone who inflicted injury against their victim". *Id.* This factor also illustrates the way in which the RAI mixes empirical considerations of risk with value judgments about harm. It is not clear whether this factor is, for example, based 90% on objective risk and 10% on subjective harm—or vice-versa.

Factor#

2: Sexual Contact with the Victim

Contact over clothing:
5

Contact under clothing:
10

Sexual intercourse, deviate sexual intercourse or aggravated sexual abuse:
25

According to Dr. Guidry: "Factor 2 has no current empirical basis for being correlated with an increased risk for sexual offense recidivism in the literature in the field". Article at 5. According to Dr. Katsavdakis: "The Guidelines cite no study to support the inclusion of this Factor. 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." Affidavit at 6. He testified that "there is no item similar in other assessment instruments that are currently used, whether it is over the clothes or under the clothes". Tr. at 63. He also said the research did not support a distinction between the intercourse and sexual abuse crimes on the one hand and the touching crimes on the other with respect to recidivism risk. *Id.* at 63–64. Like Dr. Guidry, he testified that this factor has no correlation with the risk of re-offense. It is apparent from the Commentary, however, that the Board did not include this factor based primarily on risk concerns. Rather, this is an example of a factor which is based on harm. As the Commentary explains, Factor 2 "is associated with the offender's danger to the community."

***21** This is a factor which illustrates the use of *Suggested Departures.* The Commentary invites the Board or a Court to depart from the RAI score if (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". The Commentary also notes that

consideration was given to assessing additional points where an offender intended to commit a forcible rape but was dissuaded from that action by some factor other than the offender's change of mind. The Commentary notes that this approach was rejected. But the Commentary also states that if it is determined that an offender "intended to rape his victim" an upward departure may be made by the Board or the Court "if the lack of points in this category results in an under-assessment of the offender's actual risk to public safety". Suggested Departures are significant, as noted, *supra,* because they may assume paramount importance, above all other factors, in setting a risk level. As with other suggested departures, the Commentary provides no explanation for why these factors are scored as departures rather than with a numerical score.

To see how these Suggested Departures might operate in a hypothetical case, consider the following example. A defendant commits a forcible rape and for that reason is assigned 25 points under Factor 2. If the Defendant only *intended* to commit a forcible rape, however, and for example received a combined score of 40 putting him at low risk of re-offense, the Board and Courts would be invited by the Commentary to use that intention as the possible basis for an upward departure to Level 2 (an effective scoring increase of at least 35 points in this example). On the other hand, a Court would also be justified in assigning no significance to that intention.

The suggestion that a downward departure may be granted where a victim's lack of consent is based only on the victim's age presents a more extreme example of the power of suggested departures because it explicitly authorizes a downward rather than an upward departure. The Commentary does not state the reason for this suggested departure. It can be presumed that it would not apply where a pedophile sexually assaulted a young child. The rationale is apparently based on the concern that some "Statutory Rape" (or Statutory Criminal Sexual Act, formerly known as Sodomy) crimes may involve an offender and a victim who are close in age and reflect conduct which is less culpable than other sex crimes. The authorization for a downward departure, however, means that this fact might be assigned an effective score of 50 points or more for a Level 3 offender, far outstripping any other fact under the RAI. That is because an offender assessed as a Level 3 may be as much as 195 points higher than a Level 2 offender (the difference between a maximum score of 105 [for a Level 2 offender] and 300 points [for a Level 3 offender]).

***22** The scoring of this factor also illustrates some of the differences between the value judgments of the RAI and the Legislature. The instrument assesses twice as many points for offenders who touch a victim inside the victim's clothing than for offenders who touch outside such clothing. The Legislature came to the opposite conclusion in enacting the Penal Law. Under the Penal Law's definition of "sexual contact", the definition used to subject offenders who wrongfully touch the sexual or intimate parts of another person to criminal liability, over and under-clothing touching are explicitly treated identically. *See* Penal Law § 130(3).

The combined value judgments provided by Factors 1 and 2 also treat an offender who sexually touches a victim outside of her clothing while armed with a knife as causing the same degree of harm as an offender who forcibly rapes a victim without using a weapon.[12] Under the Penal Law, however, a forcible rape can always be charged as among the most serious of all sexual offenses and charged as a significantly higher level crime than an offense involving the touching of the sexual or intimate parts of a victim.

The Suggested Departure for crimes based on victim age is another example of how the RAI's value judgments differ from those of the Legislature. There are obviously age-based sexual offenses where unfairness may arguably result under the criminal law because a defendant and a victim are close in age. But the Penal Law already accounts for those issues. In drafting Article 130 of the Penal Law, the Legislature deliberately imposed criminal liability and varied the degree of liability based not only on the age of the victim but the age of the defendant. Indeed, the specificity of these considerations goes so far as to make some age differences between offenders and victims defenses (which must be proven by the prosecution) and some affirmative defenses (which must be proven by the defense).[13] The RAI invites courts to come to completely different conclusions on that issue, however, when assessing the harm caused by such crimes.

The Suggested Departure for "intended" rapes is also inconsistent with the Penal Law because what is required for such an upward departure is an *intention* rather than an *attempt* to commit such a crime. *See* Commentary, Factor 2 (upward departure may be warranted "where it is evident that an offender *intended* to rape his victim"; no points should be assessed "even if his [the offender's] *intent* was to have forced sexual intercourse with his victim") (emphasis added). Under the Penal Law, the intention to commit a sexual offense without any act to effectuate that intention is not a crime. To be guilty of an attempt to commit a crime, an offender must "engage[s] in conduct which tends to effect the commission of such crime." Penal Law § 110.00.

Another problematic aspect of this departure consideration is the Commentary's statement that an upward departure for an "intended" rape is warranted if the lack of points for such an intent "results in an under-assessment of the offender's actual risk to public safety". The points assessed in this category do not appear to have been intended nor do they in fact have any known relationship to recidivism. This is an RAI factor which appears to be based only on perceived harm. It is obviously impossible to determine whether the number of points assessed under Factor 2 under-assess "the offender's actual risk to public safety" when that point assessment does not measure risk. The same issue arises with the suggested downward departure for age-based crimes. There, as noted, *supra,* this departure should be considered if "scoring 25 points in this category results in an over-assessment of the offender's risk to public safety". Again, since this factor was not intended to and does not in fact have any known relationship to risk it is difficult to understand how a court could make such a determination.

***23** Factor#

3: Number of Victims

Two
20

Three or more
30

This is another factor which appears to be based on an amalgam of risk and harm. As the Commentary explains: "[t]he existence of multiple victims is indicative of compulsive behavior and is, therefore, a significant factor in assessing the offender's risk of re-offense and dangerousness". Commentary, Factor 3. The Commentary cites four articles for this proposition, ranging from 1987–1995.

With respect to the risk of re-offense, according to Dr. Guidry: "[c]urrent literature does not support this factor as highly salient in determining long-term risk for sexual re-offense". Rather, she notes, it is the number of crimes committed *prior* to an instant offense which is predictive of recidivism. Article at 5. In his Affidavit, Dr. Katsavdakis explained that research studies have found that the number of past sexual offenses and sentencing dates are associated with re-offense risk. Like Dr. Guidry, however, he explained that "[t]he 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 of victims (e.g., greater than 10)". Affidavit at 6. He also noted in his testimony that the commission of numerous sex offenses against one victim (for which no points are scored in this category) might be more predictive of re-offense risk than the commission of, for example, one crime against two different victims (for which 20 points would be scored). Tr. at 66–67.

It is impossible to know to what extent this factor is intended to measure risk vs. harm. Offending against multiple victims is generally recognized, however, as causing greater harm than offending against one person. To that extent, the general "harm" assessment inherent in this factor is consistent with the Penal Law and obviously reflects a societal consensus.

Factor#

4: Duration of Offense Conduct with Victim

Continuing Course of Sexual Misconduct:
20

The Commentary defines this conduct as occurring when an offender engages in two or more acts of sexual contact, at least one of which is sexual intercourse, oral or anal sexual conduct or aggravated sexual contact which are separated in time by more than 24 hours or engages in three or more acts of sexual contact over a period of at least two weeks.

There is some indication in the Commentary that the Board considered this factor to be relevant to re-offense risk because it equates multiple sex crimes against the same victim with "compulsive behavior" which would imply an inability to control behavior and thus a heightened risk for re-offense. Dr. Guidry noted, however, that this behavior is not identified as a significant predictor for re-offense in the research literature. Article at 6. Dr. Katsavdakis indicated in his Affidavit, that, "... I could not locate any empirical or theoretical support for the inclusion of this item as a risk factor". Affidavit at 7. He also testified that this factor does not in fact have any "empirical or theoretical support" and is not included in any other risk assessment instrument. Tr. at 67. This factor may thus also simply reflect a value judgment that such behaviors are particularly egregious.

***24** With respect to harm, however, the Commentary's definition of the relevant behavior is at odds with the way such crimes are treated in the Penal Law. A continuing course of sexual conduct is treated as a separate crime under the Penal Law but under a definition which is significantly more limited than that outlined in the

Commentary.[14] The Penal Law makes such conduct a distinct crime only for victims who are under 11 or under 13 (depending upon the age of the defendant). Although the Commentary notes that this factor is of particular relevance to victims who are young children, it applies no matter what the victim's age is. Second, while the Penal Law requires that conduct occur over a period of no less than 3 months, the RAI scores this conduct if it occurs over as little as 24 hours. The 2006 version of the RAI, in one of the only modifications made to the instrument during the past 15 years, recognizes this last discrepancy. It argues, however, that the intent of the Legislature when it enacted the continuing course of sexual conduct statute in 1996 (shortly following the adoption of the RAI) indicated that the three month period was chosen because court decisions "related to the law of pleadings and particulars" mandated such an extended time period. The Commentary says that the Board's review of this legislative history did not indicate that the Legislature believed that offenses which occurred over less than a 3 month period "were *not* a sound basis for finding an offender to be compulsive in his misconduct." (emphasis added). For this reason, the Board "determined not to modify this guideline" in response to the statute. Commentary, Factor 4, n.7.

Factor#

5: Age of Victim

11 through 16:
20

10 or less, 63 or more:
30

With respect to minors, this factor appears to be an amalgamation of risk and harm considerations. According to the Commentary, "[o]ffenders who target young children as their victims are more likely to re-offend." (citing one article published in 1993 and one published in 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."

With respect to the risk for re-offense, Dr. Katsavdakis in his Affidavit indicated that there is significant research which supports the proposition that a deviant sexual interest in children, particularly boys, is correlated with a heightened re-offense risk. He indicated however that "there is no current empirical support to suggest that the age of the victim is significantly associated with an increased [risk] for sexual offense in the community. [citations omitted]. [W]ell 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". Affidavit at 7–8.

In his Affidavit, Dr. Katsavdakis said that determining whether an offender has a deviant sexual interest in children (which is a risk factor) cannot be assessed simply by knowing the age of a victim in an instant offense. Rather, he described such an assessment as a "difficult and lengthy process that includes inquiring into the offender's sexual attitudes, beliefs and behavior with adults and/or children". *Id.* In his testimony, Dr. Katsavdakis said that recidivism rates for adult offenders who committed crimes against children varied depending upon the type of offense. Thus, for example, an offender against a boy stranger would have a higher recidivism risk than one who offended against a girl family member. Similarly, he noted, offenders who committed crimes against adults have varying rates of recidivism. Tr. at 64–65.

***25** With respect to harm, this factor obviously reflects a societal consensus that sexual offenses against children are particularly heinous. The RAI, again, however, scores this consideration differently than the Legislature. The Legislature has created three age ranges in the Penal Law, which punish offenses against children with increasing degrees of severity depending upon the victim's age. The most serious punishments are imposed where a victim is 10 years old or less, or 12 or less if the offender is 18 years old or more. *See, e.g.* Rape in the First Degree, Penal Law § 130.35. The next level of severity occurs where a victim is 13 or 14 and the offender is at least 18. *See e.g.,* Rape in the Second Degree, Penal Law § 130.30. The third level occurs where a victim is 15 or 16 and an offender is 21 years old or more. *See e.g.,* Rape in the Third Degree, Penal Law § 130.25.

The RAI varies these value judgments in two respects. First it dispenses with the distinction made by the Penal Law between crimes committed against older teens and younger children. Thus, under the RAI, engaging in sexual relations with a 16 year old is treated in the identical way as sexually abusing an 11 year old. Second, under the Penal Law, for all but the youngest victims, the age of the defendant as well as the age of the victim must be considered in setting an offense level. Thus, for example, while a 45 year-old man who has sex with a 16 year-old girl is guilty of Rape in the Third Degree, an 18 year-old man who engages in the same conduct is not guilty of a felony.[15] The RAI does not vary its harm assessments in any respect based on the age of a defendant. Because liability under the Penal Law for age-based crimes is so carefully calibrated to defendant

age, however, this omission may not have much practical impact. The vast majority of teenagers who commit sex offenses against other teens which are criminal only because of a victim's age will likely never be convicted of a SORA eligible crime.[16]

As noted, *supra,* this factor also assigns 30 points if a victim is 63 or older. The Commentary provides no explanation for this assessment, stating simply that "[a]n 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". Commentary Factor 5. (The Commentary also provides no explanation for why 63 was chosen as the designated age). It is obvious that this factor has no correlation with an offender's re-offense risk. In his Affidavit, Dr. Katsavdakis noted that "I could not locate empirical or theoretical support for an association between sexual re-offending in the community and selection of a victim over age 63." Affidavit at 8. Dr. Guidry further noted that there was no support in the literature for the proposition that offenders against persons over the age of 63 shared re-offense risk characteristics with those who commit crimes against children under 11. This factor thus appears to be premised on the view that offenses against older persons are particularly harmful. As is true with respect to crimes against children, the RAI does not consider the age of a defendant. Thus, a 65 year-old man who offended against his 65 year-old companion would receive the same 30 point assessment as a 20 year old man who offended against an 80 year-old victim.

***26** Factor#

6: Other Victim Characteristics

Victim suffered from mental disability or incapacity or from physical helplessness:
20

This is another factor which has no known relationship to recidivism. As Dr. Katsavdakis noted in his Affidavit: "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." Affidavit at 8. Dr. Guidry similarly indicated that this factor was not highly correlated with the risk of re-offense. Article at 6.

The Board appears to have focused on a confluence of considerations here. The Commentary first notes that this factor is based on "much the same reason[s]" as the preceding factor, where extra points are added for child or older victims. Thus, the factor appears to be based on a perception that offenders against victims in this category have a heightened risk to re-offend as well as an assessment that such offenses are particularly harmful. It then adds a third policy consideration. The Commentary says that offenders in this category pose a greater risk to public safety "since their crimes are more difficult to detect and prosecute".

This factor contains the following proviso: "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". The Commentary does not explain why this limitation is imposed, why assessing points under both Factors 5 & 6 would be "double-counting" or what kind of "extraordinary circumstances" might justify such otherwise objectionable double-counting. Under this proviso, an offender who sexually assaulted a 16 year old victim who was mentally disabled would receive 20 points because the victim was 16 but would not be assessed 20 points because the victim was mentally disabled, absent "extraordinary circumstances". On the other hand, if a Little League coach sexually abused a 16 year-old year old he was coaching, the offender would be assessed 20 points because of the victim's age and 20 additional points because the assault was an abuse of a professional relationship between the offender and the victim (*see,* Factor 7 immediately *infra*). This would not be "double-counting".

The Penal Law punishes sex offenses against victims who are mentally disabled, mentally incapacitated or physically helpless. Under the Penal Law, however, it is an affirmative defense to such a charge that a defendant did not know about such an incapacity. PL § 130.10(1). No such limitation exists under the RAI. An offender who commits a sex offense against a victim who is incapacitated will be scored points for that incapacity even if the offender is not aware of the victim's condition.

***27** Factor#

7: Relationship between Offender and Victim

Stranger or established for purpose of victimizing or professional relationship:
20

According to the Commentary for this factor, 20 points should be assessed if a 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".

The Commentary gives no indication that these points were chosen because of any concern that they would increase the risk for re-offense. This factor rather appears to be based on policy concerns. According to the Commentary: "Each of these situations is one in which there is a heightened concern for public safety and the need for community notification". (citing one article published in 1995 and one published in 1991).

Offenders against strangers clearly present a heightened risk for re-offense. Katsavdakis Affidavit at 7; Guidry Article at 6. Thus, although it appears to be inadvertent (because this factor does not appear to be targeted to recidivism) the RAI does capture a clear re-offense risk factor in scoring points for stranger victims. The remaining offender categories in this factor have no known relationship to recidivism. Dr. Katsavdakis, in his Affidavit, noted that "there is not 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." Affidavit at 9. He also testified to that effect during the hearing. Tr. at 68. Dr. Guidry likewise noted, with respect to the risk for re-offense, that this factor was a mix of "apples and oranges." While offenders against strangers present a higher risk of re-offense, no similar data indicate a higher re-offense risk for those who exploit a professional relationship with a victim. Article at 6.

Like Factor 6, Factor 7 is a largely policy-driven point assessment that is not based on either perceived risk or harm. The Commentary notes that when the Board in 1996 consulted with the "panel of experts" (discussed, *supra*) who advised it in constructing the instrument:

[T]he 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. Commentary, Appendix at 24.

The SORA statute is premised on the notion that the degree of community notification should be based on the likelihood that an offender will re-offend. Factor 7, however, reverses this reasoning process. It provides that the risk for re-offense (as reflected in the RAI score) should be based on the degree of community notification which the Board in 1996 decided was appropriate. These extra points enhance the RAI's "objective" score. That objective score means the offender is more likely to re-offend. That increased risk justifies increased community notification. The final score, through a process of circular reasoning, thus justifies the conclusion the Board arrived at in the first place. An offender who abuses a professional relationship should be subject to greater community notification.

***28** Factor#

8: Age at First Sex Crime:

20 or less:
10

Both Dr. Katsavdakis and Dr. Guidry indicated that the early onset of sexually offending behavior was correlated with re-offense risk. The RAI also makes clear that this is a factor for which points are assessed because of an offender's risk of recidivism. The RAI does not explain why 20 was selected as the cut-off age for making this determination. Dr. Guidry indicated that "recent research" (her article was published in the winter of 2004–2005) indicated that individuals between the ages of 18 and 25 present an increased risk for re-offense. Article at 6.

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

This is also a factor which the RAI clearly intends to be based on the risk for re-offense. The Commentary indicates that 30 points should be scored for a prior misdemeanor sex crime, a violent felony offense, certain Class A felonies or the misdemeanor of Endangering the Welfare of a Child. Fifteen points are scored for other prior felonies and 5 points are scored for previous non-sex offense misdemeanors. Both Dr. Guidry and Dr. Katsavdakis opined that an offender's criminal history is relevant to his risk for re-offense. The problem with the scoring of this factor, however, is two-fold. First, like all of the RAI's risk parameters, there is no evidence that the number of specific points which are assessed are based on any empirical data. That is, there is no evidence that an offender who committed a prior non-violent felony (like

possessing an illegal drug) and was assessed 15 points would sexually re-offend at a rate triple that of an offender convicted of a prior misdemeanor drug crime, who would be given a 5 point assessment. Dr. Guidry also noted that re-offense risk considerations for offenders with prior violent felonies differ from those of offenders with prior sex crime convictions. Those two categories, however, are collapsed in this factor. Article at 6–7.

This is also a factor which illustrates the problem of Suggested Departures. According to the Commentary, the misdemeanor of Endangering the Welfare of a Child is treated as 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." (No evidence is provided to support the proposition that this crime "generally involves sexual misconduct"). In cases where there is clearly *no* sexual misconduct, however, the crime only *may* be a basis for a downward departure. Where a previous conviction for this crime was *not* sexual then, a court would have two choices. The first would be to score the offender with 30 points (as if the conviction were a sexual or violent crime, even though it was not). The second would be to depart downward. But in a large range of cases, as noted, *supra,* this may result in the offender receiving (depending upon his overall score) a tremendous unjustified windfall. An offender could actually *benefit* from this conviction and receive a lower score that he would have received if he had previously committed no crime. Moreover, the degree of positive benefit to the offender would *increase* to the extent his overall RAI score was higher and he was thus at a higher risk under the RAI to commit a sex crime. Consider these hypothetical cases.

***29** In case #

> 1, Defendant has an RAI score of 160, putting him 50 points above the threshold for Level 3. He has been scored 30 points because of a prior conviction for Endangering the Welfare of a Child, but it is undisputed that this conviction had no relationship to any sexual conduct or motivation. The Court's first choice would be to treat the conviction as if it were a sex crime even though it was not. The second choice would be to depart downward to a Level 2. This would effectively result in the offender's score being reduced by at least 55 points (from 160 to the highest possible score for a Level 2 offender, 105). This offender would then see his effective score and his risk level *reduced because of his criminal conviction.* Had this offender been convicted of no crime at all, his score would be 130, 20 points above the threshold for a Level 3. A downward departure, however, would mean that he would receive an effective score of 105 (the highest possible score for a Level 2 offender). This would be 25 points less than the score he would receive if he had no prior criminal convictions.

This windfall would increase to the extent the offender had a higher score and was therefore more likely to re-offend (according to the RAI). If the offender had a score of 160 and was granted a downward departure his criminal conviction would net him a decrease in his effective score of 25 points (from the 130 he would have been scored if he had committed no crime, to the 105 he would be scored by virtue of a downward departure for his endangering crime.) If the offender had a score of 180, however, his windfall would be 45 points; if his score was 200, his windfall would be 65 points, and so on.

Moreover, the RAI provides only two options in this scenario: (i) score the crime as a sex crime, even though it is not one, or (ii) depart downward, with the range of inevitable and patently irrational outcomes (depending on an offender's score) outlined here. What is *not* authorized is what (at least in the Court's view) is the obvious solution to what is not a difficult problem (assuming the RAI's formulations were otherwise appropriate). That is, if an endangering crime were determined to be non-sexual, the crime could be scored as a non-sex offense misdemeanor (which it would obviously be). A simple 5 point rather than 30 point assessment could be required. That is not an available option under the RAI.

This factor also contains a second much more significant suggested departure. The Commentary notes that this factor includes only crimes committed *prior* to an instant offense, not crimes committed concurrent with or after an instant offense. The Commentary goes on to provide, however, that 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". This last proviso raises a number of significant issues.

The RAI gives no reason why offenses committed at the same time or subsequent to a sex offense should be treated as possible departures while offenses committed prior to an instant crime should be assigned a specific point score. The Static 99 assigns points for prior and certain concurrent offenses. But the distinctions made by the Static 99 are based on actuarial data. The RAI presumes that offenses committed prior to, at the same time as and after an instant offense may *all* be relevant in assessing risk. But those offenses are scored under two radically different scoring formulations—for no apparent reason.

***30** Take these hypothetical examples. An offender is convicted for committing a felony drug crime one week before a sex offense. That offender would be scored with 15 points. The same offender commits the same felony drug crime one week after a sex offense. That offender would be scored with 0 points. On the other hand, this offender could be subject to an entire increase in his offense level, which could equal much more than 15 points.

Consider an offender who commits an non-sexual assault on a victim. The following week, he rapes her. The RAI would score 30 points for the non-sexual assault. On the other hand, consider an offender who rapes his victim and the next day assaults her in a non-sexual attack. 0 points would be scored for the assault. This assault might be the basis for an entire level increase or it might have no impact on a score at all. Either result would be proper.

Such seemingly arbitrary distinctions can have a significant impact on an offender's score. Consider an offender who is at moderate risk for re-offense with an RAI score (absent this factor 9) of 80, is convicted of petty larceny, a misdemeanor, and a week later commits a sex crime. Five points would be added to his score. On the other hand, assume the same petty larceny is committed a week after the sex offense. No points would be scored. But a court could choose to raise the defendant's entire risk classification to a Level 3 because of this misdemeanor conviction. This would be an effective numerical increase of 30 points. A court would have to score this crime with either 0 points, or effectively with 30 points. What would *not* be permitted would be an additional score of 5 points. That is because the crime was committed a week after (rather than a week before) the sex crime.

A final problem with these departures is the number of cases they apply to. The RAI is obviously premised on the notion that SORA assessments are made prior to an offender being released from prison or, in the case of a probation sentence, at the time sentence is imposed. When this schedule is indeed followed, crimes committed concurrently with a sex offense are subject to a departure as well as crimes committed after a sex offense. It can be expected in many such cases, however, that an offender may be arrested and convicted for a sex crime within some discrete time following his commission of that offense. Thus, there may be only a limited period following the commission of a sex crime within which an offender might commit an additional crime and then become subject to a departure determination.

These timing assumptions were all true when the RAI was created. But they are no longer true. In a stipulation entered in 2004 in the case of *Doe v. Pataki,* 3 FSupp2d 456 (SDNY 1998) (the "Stipulation") a large number of offenders were granted new SORA risk-level hearings to settle claims that the SORA statute deprived certain offenders of procedural due process of law. Many of these new hearings, however, have taken place many years after a defendant's conviction and can involve offenders who have been at liberty for extended periods of time. In the *Santos* case, for example, the Defendant was referred to this Court for a new risk classification proceeding 15 years after his initial release to parole supervision for the sex crime he had committed. He had been at liberty for approximately 14 years at the time his SORA assessment was made.

***31** As noted, *supra,* since the RAI has undergone virtually no modifications since it was created 14 years ago, it does not contemplate that risk assessment hearings are now taking place in many cases years or even a decade or longer after an offender's release from prison. If an offender commits any crime during those years, however, it cannot be scored under the RAI because it did not precede the instant offense. It can only be scored as a departure. It can only be scored with all of the potential anomalies such departure determinations entail.[17]

Factor#

10: Recency of Prior Felony or Sex Crime

Less than 3 years:
10

The Commentary does not say what this factor is based on. It simply states that "[i]n 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". In discussing the fact that the rule is measured only with respect to an offender's time at liberty (rather than in custody), however, the Commentary notes that it is this time at liberty "that is relevant in assessing his [an

offender's] likelihood to re-offend". Thus, this factor appears to be based on the perception that it is relevant to an offender's recidivism risk, rather than based on perceived harm or other policy concerns.

Both Dr. Guidry and Dr. Katsavdakis indicated that this factor has no basis in any research they are aware of. According to Dr. Guidry, "[t]he recency of an offender's prior crime within three years has not emerged as a relevant factor for consideration of risk for sexual re-offense in the current literature". Article at 7. Dr. Katsavdakis indicated in his Affidavit that "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' ... 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.' " Affidavit at 11.

The Commentary notes that this factor measures a prior felony or sex crime which takes place only within 3 years *prior* to the commission of an instant sex crime. No points are assessed for crimes which take place concurrently or after a sex offense. As noted in Factor 9, immediately, *supra,* that factor also does not assign points where a crime was committed at the same time or after a sex offense. Under Factor 9, it is suggested that a departure may be granted in such cases if such a concurrent or subsequent crime is "indicative that the offender poses an increased risk to public safety". Under Factor 9, however, no departures are suggested for such concurrent or subsequent crimes. They are simply not scored.

What makes this especially striking is that this factor is directed solely to the *recency* of prior crimes. This is because, according to the Commentary, "the recency of those crimes matters". Yet, under this formulation, in many cases, it will be older rather than more recent crimes which will be captured. Consider this hypothetical. Offender "A" commits a non-sexual assault felony then commits a sex crime three years later. He is convicted of that sex crime and has his risk level established a year after that crime's commission. He will be scored with 10 points because of the recency of his prior assault, even though that assault occurred four years prior to his risk level determination.

***32** Take this same hypothetical offender with all of the same facts except that the non-sexual assault felony, instead of occurring 4 years before the SORA hearing, occurred one month before the hearing. Under that scenario no points would be scored. Although this assault occurred almost 4 years later than the assault under the first hypothetical, no points would be assessed because it did not occur within 3 years before the sex offense. Unlike Factor 9, moreover, the Commentary does not suggest that a court should consider a departure in such a scenario. This crime would simply not be scored.

Factor#

11: Drug of Alcohol Abuse

History of Abuse:
15

According to the Commentary, "[a]lcohol and drug abuse are highly associated with sex offending" (citing articles published between 1976 and 1993). The Commentary describes the use of these substances as a "disinhibitor" and a "precursor" to sexually offending behavior. This is thus a factor which the Commentary views as related to re-offense risk.

According to Dr. Guidry and Dr. Katsavdakis, drug or alcohol abuse may be associated with sexually offending behavior in certain contexts. The operational definition of this factor, however, does not reflect known research. According to Dr. Guidry: "[h]aving a *history* of substance abuse problems does not appear to be highly correlated with risk for sexual re-offense". Rather, she emphasized, *using* alcohol or drugs might be associated with an acute risk for sexual re-offense at the time such substances were used. (emphasis added) Article at 7. Dr. Katsavdakis, in his Affidavit, cited a range of research literature recounting a more complicated picture. He said that a history of alcohol and substance abuse was associated with an increased risk for sexual re-offense but only among confined offenders. He further said that such a history was also associated with general criminality and violence among sex offenders and that the relationship between substance abuse and sexual violence was not clear. Affidavit at 11.

Under this factor, there is a scoring option which does not exist under any of the other factors. That is the option not to depart (upwards or downwards) but to simply not assess points. According to the Commentary, if an offender has abused drugs or alcohol in the "distant past" but has experienced a period of "prolonged abstinence", 0 points rather than 15 points may be scored.

Factor#

12: Acceptance of Responsibility

Not Accepted Responsibility:
10

Not accepted responsibility and refused or expelled from treatment:
15

This appears to be a factor which the Commentary deems relevant to the risk of re-offense. The Commentary explains that "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". (citing articles published between 1989 and 1995).

According to Dr. Guidry:

> ***33** Contrary to popular belief, there is no evidence that denial of responsibility for one's sexual offense is correlated with sexual re-offense. Article at 7.

Dr. Katsavdakis in his Affidavit likewise said that "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." (citation omitted). Dr. Katsavdakis, in his Affidvait, did indicate, however, that there may be an indirect relationship between the denial of responsibility and sexually offending behavior in some cases. He said that minimization and denial might impede sex offender treatment and that the failure to complete such treatment might result in an increased risk to re-offend. Affidavit at 12. Dr. Guidry, however, said that it is not clear whether such minimization was related to treatment participation. Under this factor, 5 additional points are added when an offender is expelled from treatment. These points are added because, according to the RAI, refusal or expulsion from treatment is "powerful evidence of the offender's continued denial and his unwillingness to alter his behavior". This issue is further explored under Factor 14, *infra.*

Factor#

13: Conduct While Confined Supervised

Unsatisfactory:
10

Unsatisfactory with sexual misconduct:
20

This is a factor which the Commentary deems relevant to re-offense risk. Both Dr. Guidry and Dr. Katsavdakis indicated that this is a factor which is clearly associated with re-offense risk. The problems in applying this factor come in determining whether or not an offender's conduct is "satisfactory" and in the RAI's directive to assign identical scores to widely varying kinds of misconduct. For example, under the Commentary, an offender on parole or probation who has "violated a condition of his release" must be assessed with 10 points. But this same ten points would be assessed for an offender in prison who "has incurred serious disciplinary violations". Under the first example, an offender who stayed out after his curfew on one occasion would be assessed with a ten point score. The same ten point score would be assessed for an offender who had committed ten violent assaults in prison. Similar anomalies could arise with respect to the 20 point assessment for unsatisfactory behavior with "sexual misconduct". An offender in prison, for example, who repeatedly exposed himself would be assessed with points in this category. But so, according to the Commentary, would an offender who was found in the possession of one adult pornographic picture. All of these examples might be relevant to an offender's propensity to commit another sex crime. But they might be relevant to widely varying degrees.

Factor#

14: Supervision

Released with specialized supervision: 0

Released with supervision:
5

Released without supervision:
15

The Commentary says that sex offenders should be supervised by probation or parole officers with specialized sex offender caseloads. This is because, according to the Commentary, such specialized caseloads allow for more intensive supervision "and provide for an offender's enrollment in a treatment program". Although the Commentary doesn't specify what this factor is based on, it can be presumed the Board deemed it relevant to an offender's recidivism risk.

***34** Dr. Katsavdakis indicated that "I could not locate any research finding linking the presence of supervision (post-release) and the likelihood of sexual re-offending in the community". Affidavit at 13. The Court is also not aware of any research indicating that offenders in specialized sex offender caseloads are less likely to re-offend than offenders in non-specialized caseloads. Dr. Guidry opined that the scoring of this factor was based on a logical fallacy:

> Individuals who are released in to specialized, high intensity sex offender probation programs are largely those who are considered to be at high risk of sexual re-offense. Yet they are scored 0 points on this factor. In turn, those who may require less supervision, i.e., standard supervision or less, perhaps because of the nature of their crimes, are penalized for being at less risk to re-offend and at lower threat to the community. Article at 7.

A different anomaly arises in cases where a redetermination hearing occurs many years after an offender is released from prison. One of the most significant factors which reduce an offender's risk for re-offense is the amount of time spent without committing another sex crime after release into the community. (*see* Part VIII, n.1, *infra*). If an offender remains offense-free in the community for ten years, for example, it scarcely matters that when the offender was initially released from prison ten years ago, he was subject to specialized supervision, unspecialized supervision or no supervision. (Such factors have no known relationship to recidivism in any event, but they would be especially irrelevant many years later). Courts have assigned points under the RAI, however, (as they are required to do) for not being subject to appropriate supervision even when a SORA redetermination hearing has occurred as long as a decade after an offender's initial release from prison. *See People v. McGrigg,* 67 AD3d 1426 (4th Dept 2009), *lv denied,* 14 NY3d 701 (2010) (upholding a 15 point assessment and the denial of a downward departure for being released from prison without supervision despite the fact that the Defendant had been out of prison for 10 years at the time of the SORA hearing without any evidence that he had committed a sex crime); *People v. Ferrara,* 38 AD3d 1302 (4th Dept 2007), *lv denied,* 8 NY3d 815 (15 point assessment for being released without supervision proper, even though Defendant had been released 8 years before SORA hearing).

A completely different rule applies, however, where an offender relocates to New York after being supervised in another jurisdiction. In such cases, no points are assessed if the offender has successfully completed his supervisory term. Commentary, Factor 14. It does not matter whether the offender was subject to non-specialized supervision or specialized supervision. All that matters is that the supervision period was successfully completed.

This factor along with Factor 12 and the Appendix to the Commentary also outline the Commentary's curious views on the efficacy of sex offender treatment. In the Court's view, it is not clear *what* evaluators scoring the RAI are supposed to do in considering an offender's participation in a sex offender treatment program:

> ***35** —Under Factor 12, 15 points are added if an offender has refused or been expelled from treatment. The reason is that "such conduct is powerful evidence of the offender's continued denial and his unwillingness to alter his behavior".
>
> —Under Factor 14, an offender receives 15 points less for being subject to specialized sex offender supervision than being subject to no supervision. The reason for this, *inter alia,* is that specialized supervision permits "enrollment in a treatment program".
>
> —Under Factor 14, *no* points are added if an offender *participates* in treatment. The reason is that "the efficacy of sex offender treatment is open to question".
>
> —The SORA statute, however, requires that the Board's guidelines and procedures consider whether an offender is "receiving counseling, therapy or treatment" (Correction Law § 168–l (5)(c). The RAI would thus appear to be inconsistent with the statute on that point.
>
> —Under Factor 14, an "exceptional" response to treatment may be the basis for a downward departure. That is, it may be the basis for the reduction of an entire level and assume more significance than numerous other factors combined. A Level 3 offender, for example, with a score of 180 would receive an effective benefit of 75 points for an "exceptional" treatment response (from 180 to the highest score under Level 2 of 105).
> —Despite this proviso, however, the Commentary also says that the "panel of experts" who reviewed the RAI, "encouraged skepticism toward treatment, recommending that an offender's participation in a treatment program, by itself, should not reduce his risk level". According to the Commentary: "[t]he Board accepted this recommendation ..." Commentary Appendix at 24.[18]

Factor#

> 15 Living or Employment Situation:
>
> Living or employment inappropriate:
> 10

The Commentary indicates that this factor is intended to target offenders whose living or employment situation

gives them ready access to victims. Dr. Guidry indicated that this is a factor which is related to re-offense risk. Article at 7. Dr. Katsavdakis disagreed and said in his Affidvait that this is not a factor which has been identified as related to recidivism. He did testify, however, that "[g]enerally as an indirect factor having a source of income for residence serves as a protective factor". Tr. at 70.

This factor is also, however, another example of a point assessment grounded on policy considerations having no relationship to risk or harm. The Commentary notes that in addition to being intended to prevent an offender's ready access to victims, this factor targets offenders who present a "reduced probability of detection". In *People v. Alemany,* 13 NY3d 424 (2009) the Court of Appeals approved the addition of 10 points for an offender because he was homeless and for this reason would be more difficult for law enforcement authorities to find if he committed another crime. The Court explained:

> ***36** A sex offender who has no address, does not frequent a shelter or participate in any community programs and is unemployed is, for these reasons, more difficult for law enforcement authorities to locate. This living situation presents a reduced probability of detection' because the inability to find a sex offender reduces law enforcement authorities' capacity to discover or investigate any future crimes the sex offender might commit, to connect him to those crimes or to apprehend him. And *a lessened likelihood of getting caught is thought to increase the risk of recidivism.* 13 NY3d at 430. (emphasis added).

The Court's assertion that being homeless (or a similar circumstance which might make an offender more difficult to detect) was "thought to increase the risk of recidivism" would appear to be based on the fact that the RAI adds points for such offenders. This provision of the Commentary, however, in the Court's view, was not intended to target an issue which the Board believed was relevant to re-offense risk. As is true under Factors 6 & 7, it was included in the instrument to advance a policy goal.

This Court is not aware of any evidence that a person who is "difficult to detect" is, for that reason, more likely to commit another sex crime. As was the case when the same policy goal (detecting and capturing offenders) was sought to be advanced under Factor 6, the RAI creates an objective basis to find such offenders more likely to recidivate through a process of circular reasoning. As noted, *supra,* the SORA statute is premised on the notion that the degree of community notification should be based on the likelihood that an offender will re-offend. Here, that reasoning process is reversed. A "reduced probability of detection" (*i.e.* being homeless) adds points because the Board in 1996 determined that greater community notification should be provided for such offenders. Being difficult to detect thus results in points being added to an "objective" score. This score then demonstrates that such offenders are more likely to re-offend (as the Court of Appeals noted, *"a lessened likelihood of getting caught is thought* [by the RAI] *to increase the risk of recidivism"*). A greater likelihood to re-offend requires more community notification. Thus, the RAI's objective score supports the Board's initial conclusion.

Overrides:
As noted, *supra,* the RAI provides four factors which make an offender presumptively a Level 3 regardless of his score. These are, a prior felony conviction for a sex crime, the infliction of serious physical injury or death, a "recent threat" to re-offend by committing a sexual or violent crime and a clinical assessment of an abnormality "that decreases ability to control impulsive sexual behavior". The Commentary does not indicate what these "overrides" are based on, although it may be surmised that they reflect a range of considerations including risk, harm and policy preferences.

***37** Dr. Katsavdakis testified that generally no one factor should be used to assign a risk level. An exception, he said, would be a sexually sadistic crime or a homicide committed with a sex crime. Override Factor 1 provides that an offender should be presumptively designated as a Level 3 offender if he has a prior felony conviction for a sex crime. The witness said that this alone would not be a factor he would use to designate an offender as being at high risk of re-offense. The same would be true for Override Factor 3, that the offender had made a recent threat that he would re-offend by committing a sexual or violent crime. He said that Override Factor 2 (the offender inflicted serious physical injury or death) or Override Factor 4 (a clinical assessment of a mental abnormality decreasing the ability to control sexually offending behavior) might be used in an appropriate case to designate someone as a Level 3 offender.

The Board obviously concluded that certain factors should result, standing alone, in an offender receiving a

Level 3 designation. The Commentary also, however, curiously argues that such an approach is contrary to the SORA statute. In discussing the fact that the Board determined not to give an offender a Level 3 designation if he was convicted of a violent sex crime, the Commentary opines that:

> A careful reading of the [SORA] 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 Control and Law Enforcement Act of 1994 (see 42 U.S.C. § 14071), with which the Legislature intended the Board comply. (footnote omitted). Commentary, General Principles, n.2.

VIII

RISK FACTORS NOT TAKEN INTO ACCOUNT BY THE RAI:

Extensive research over the past 15 years has identified a range of significant factors which are associated with the risk that a sex offender will commit another sex crime. These factors are broadly accepted and understood by professionals in the field. As outlined in the preceding section, the RAI implicates some of these risk factors. The RAI, however, also completely misses, in any form, a number of the most significant re-offense risk predictors. The most important of these are briefly outlined here.

1. Time Spent Offense–Free in the Community

According to Dr. Katsavdakis, a recent meta-analytic study found that the greater time a sex offender had remained offense-free in the community, the less likely he was to commit another sex offense. In a meta-analytic study by Harris and Hanson, for example, 14% of sex offenders who were released re-offended in the community within five years. Where an offender had already been offense free in the community for five years, however, the five year recidivism rate looking forward was cut in half to 7%. Affidavit at 15–16. This factor is not considered in the RAI.

2. Age at Time of Release

***38** This same meta-analytic study found that offenders aged 50 or older at the time of their release from custody re-offended at approximately ½ the rate of younger offenders. A recent United States Department of Justice study also found lower rates of sexual re-offense using age 45 as a cut-off. The RAI does not consider this factor. Affidavit at 17. The RAI Commentary acknowledges that "a physical condition that minimizes [an offender's] risk of re-offense, such as advanced age" may justify a downward departure. Commentary, General Principles, 6. This Commentary provision, however, appears to focus only on persons who are so old that their physical capacity to engage in a sex offense has been compromised. The data indicating that the risk of sex offender recidivism declines with age, however, is not limited to physically infirm offenders. The relevant criteria is age itself.

3. Intrafamilial or Girl Victims

According to Dr. Katsavdakis, "[t]here is consistent empirical support to suggest that offenders with intrafamilial or female victims have lower rates of re-offending in community." Affidavit at 17. (citations omitted). In the most recent meta-analytic study, the findings summarized that extended incest child molesters and child molesters whose victims were girls had lower rates of sexual re-offense in the community when compared to all types of sexual offenders." *Id.* (citations omitted). *See Rosado, supra* at 389: ("[I]ncest offenders recidivate at a significantly lower rate than offenders who target victims outside of the family. Child molesters who target male victims recidivate at a significantly higher rate than those targeting only female victims".) (citation omitted). The RAI does not capture this factor in any form.

4. Having Lived With an Intimate Partner For Two Years

"Research suggests that having a prolonged intimate connection to someone may be a protective factor against sexual re-offending". Static 99 Coding Rules, Item # 2, "Basic Principle" Exhibit "A" to Defendant's Second Volume of Exhibits (hereafter "Static 99 Coding Rules"). For this reason, the Static 99 scores offenders with one additional point if the offender has not lived with an

intimate partner for two years. The RAI does not capture this factor.

5. Paraphillic Interests

Dr. Katsavdakis testified that having a "paraphillic" interest which he defined as a "deviant" interest had been demonstrated to increase the risk for re-offense. He characterized interests in pornography, exhibitionism, voyeurism or sex toys as paraphillic interests. Tr. at 26. This factor is not specifically targeted by the RAI.

IX

"DISCRETIONARY" JUDICIAL DEPARTURES FROM THE RAI

Under the SORA statute, the Board is directed to both develop "guidelines and procedures" to assess the risk of re-offense and separately asked to make a recommendation in individual cases about an offender's risk level in those cases where an offender is released from prison. *See* Correction Law §§ 168–l (5) & (6). The statute has never explicitly authorized or directed the Board to create a mathematical risk assessment instrument like the RAI. The RAI was developed, presumably, to implement the "guidelines and procedures" requirement. The SORA statute provides a non-exclusive list of factors which the Board's re-offense risk guidelines shall be based on. Some of these are included in the RAI, some are provided for as overrides, some are provided for by the instrument but in a modified form and some of the statutory factors are simply not included in the instrument. *See* Correction Law § 168–l (5).

***39** Courts making risk level determinations are directed by the statute to apply the guidelines and procedures and consider Board recommendations, when they are made. *Id.* §§ 168–n (2); 168–d (3). While the statute distinguishes these two Board functions, in practical terms, the RAI was developed by the Board and where the Board adopts the RAI score as its recommendation, the RAI score and the Board's recommendation are indistinguishable. Case law has also often treated the RAI score and the Board's recommendation as fungible.

Under the SORA statute, the recommendations of the Board, in cases where such recommendations are made, do not have any presumptive effect on courts making risk level decisions. Rather, the statute describes such Board risk level assessments, when they are made at all, as "recommendations" and directs courts to make their own determinations about risk.

In the years since its creation, however, the RAI score, by judicial determination, has been determined to be presumptively correct in all cases in determining an offender's risk level. This presumption has been construed to apply even in cases where the statute provides that a hearing court should make a risk level determination without considering a recommendation from the Board (*i.e.,* cases where a defendant is not incarcerated).

The presumptively correct nature of the RAI score is derived from statements made by the Board itself in the Commentary. The Commentary asserts that "an objective instrument [the RAI] no matter how well designed" cannot capture the nuances of every case and thus provides that the Board or a court may depart from the risk level designated by the instrument. Departures are only authorized, however, if a specific departure standard has been met:

> 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. *citing,* federal sentencing guidelines departure provision. Commentary, General Principles, n.6.

The reason courts are not empowered to depart from the RAI unless the aggravating or mitigating factors standard has been met is also explained in the Commentary:

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. *Id.* n.5.

New York courts have repeatedly cited these two Commentary standards and they have become well-settled law. *See e.g., People v. Inghilleri,* 21 AD3d 404 (2d Dept 2005); *People v. Mount,* 17 AD3d 714 (3d Dept 2005); *People v. Townsend,* 60 AD3d 655 (2d Dept 2009), *lv denied.* 12 NY3d 713; *People v. Wheeler,* 59 AD3d 1007 (4th Dept 2009), *lv denied,* 12 NY3d 711; *People v. Barody,* 54 AD3d 1109 (3d Dept 2008); *People v.*

Hayward, 52 AD3d 1243 (4th Dept 2008); *People v. Taylor,* 47 AD3d 907 (2d Dept 2008), *lv denied,* 10 NY3d 709. The appellate courts have also determined that a departure must be proven by clear and convincing evidence. *Inghilleri, Mount, supra.*

***40** Other decisions cite similar language from the Commentary (*i.e.* that "special circumstances" must exist to warrant a departure[19]) or use similar standards in assessing whether a court may depart from the RAI. *See People v. Adams,* 52 AD3d 1237 (4th Dept 2008), *lv denied,* 11 NY3d 705; *People v. Aboy,* 60 AD3d 436 (1st Dept 2009), *lv denied,* 12 NY3d 711; *People v. Johnson,* 57 AD3d 294 (1st Dept 2008), *app dismissed,* 12 NY3d 805 (2009) ("special circumstances" must exist to warrant departure); *People v. O'Flaherty,* 23 AD3d 237 (1st Dept.2005), *lv denied,* 6 NY3d 705 (2006); *People v. Sullivan,* 46 AD3d 285 (1st Dept 2007), *lv denied,* 10 NY3d 704 (2008) (aggravating factors not adequately taken into account in RAI warranted upward departure); *People v. DeJesus,* 55 AD3d 472 (1st Dept 2008), *lv denied,* 11 NY3d 715 (2009) (since alleged mitigating factors were adequately considered by the RAI, downward departure denied).

A. Salient Characteristics of the Prevailing Departure Standard

In the Court's view, the prevailing standard courts use in determining whether to depart from the RAI is marked by four significant characteristics. First, it was written by the Board itself. The authors of the RAI and the Commentary also authored the standard courts use in reviewing the instrument.

Second, the standard holds the determinations of the RAI, on issues the instrument "adequately" considers inviolate. To depart from the RAI, as noted, *supra,* there must be an "aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines". The proviso in this standard which gives a court any power to review the determinations made by the RAI (as opposed to issues the RAI has *not* considered) is that the RAI's consideration of the relevant factor must be "adequate". In practice, this proviso seems to be applied most frequently by courts to find that the RAI has not added a sufficient number of points to an individual score for factors the instrument deems relevant and that an upward departure is thus justified. *See* examples cited *infra.* The standard is not applied nor was it apparently intended to be applied to authorize a court to scrutinize the RAI's *choice* of risk factors. A court reviewing an RAI score under this review standard does not make a *de novo* determination about risk. It does not review the RAI's determinations under an abuse of discretion standard. It does not review the RAI to see if a score is arbitrary or capricious. The only items a court may consider in a departure motion are those which the RAI has *not* considered or has considered to an inadequate degree. If the RAI deems a risk factor to be relevant, even if that determination is clearly wrong, a court applying this review standard is powerless to change it.

In practice the application of the standard is more complicated. A court making a departure determination can always characterize a variable which the court deems significant as something which the RAI has not adequately considered. The Commentary, however, explicitly directs courts *away* from any scrutiny of whether the RAI's basic determinations are correct. *See People v. Perez,* 61 AD3d 946 (2d Dept 2009), *lv denied,* 13 NY3d 702 (affirming denial of downward departure motion since "factors on which the defendant relies to support his argument that a downward departure was warranted are expressly addressed in the SORA Guidelines".)

***41** The third salient characteristic of this standard is what courts are directed to review in considering departure motions. Departures must be based on "an aggravating or mitigating factor" of a kind or degree not adequately considered by the RAI. This standard clearly defines what courts may *not* consider. It does not provide significant guidance as to what courts *should* consider. The Commentary provides three examples of what may be considered in making a discretionary departure determination. The first is a "a physical condition that minimizes ... risk of re-offense, such as advanced age or debilitating illness". Commentary, General Principles, n.6. The second is where an offender has admitted that he committed a prior sex offense, but was not convicted of that offense. In such cases there may be an upward departure if there is "clear and convincing evidence" that this prior sex crime occurred. Commentary, General Principles, n.10. (It is not clear why this same proviso would not also apply where an offender had admitted to committing a prior non-sex offense which was subject to scoring). Finally, the Commentary says that an offender who is convicted of a crime as an accomplice should normally be subject to the same scoring as a principal but may receive a downward departure if that conviction "results in an over-assessment of the offender's risk to public safety". Commentary, General Principles, n.11. (The Commentary does not make clear whether this accomplice liability provision applies only to an instant crime or would also apply to the scoring of a prior criminal conviction).[20]

The "aggravating or mitigating" factors standard is similar to the wide-ranging discretionary standards courts use in imposing criminal sentences. Indeed, the Commentary says that the standard is derived from the federal sentencing guidelines. Most states which impose the death penalty also direct juries to weigh aggravating and mitigating factors in making capital punishment decisions.[21] In determinations about sentence length, however, courts are guided by sentencing ranges which are based on an offender's crime and criminal history. Federal sentencing guidelines and death penalty statutes also provide general guidance as to the kinds of aggravating or mitigating factors courts may review.[22] The Commentary's guidance on such factors is significantly more limited. Moreover, to state the obvious, the expansive considerations courts or juries must analyze in determining sentences differ from the discrete issues which arise when a court must decide how likely it is that a sex offender will re-offend.

A final problem in discretionary departure determinations, in the Court's view, is that courts are rarely given the evidence necessary to make informed risk decisions. As noted, *supra,* psychiatric professionals who make sex offender risk assessments follow standard practices intended to produce the most accurate possible determinations. These assessments typically include a review of all relevant documentary evidence concerning the offender's crime and criminal and mental health history, an interview of the defendant and often the use of valid actuarial risk assessment instruments (like the Static 99). In court proceedings, like those which occur under Article 10 of the Mental Hygiene Law (the sex offender civil management statute), psychiatric experts testify about the offender's condition and likelihood to re-offend and are subject to cross-examination. Courts (in probable cause and dispositional hearings) or juries (in civil management trials) then make a final decision.[23]

***42** This Court has obviously not been privy to the precise manner in which each of the tens of thousands of SORA risk assessment proceedings which have occurred over the past 14 years have been conducted. There may certainly be examples of SORA hearings which have included a review by a psychiatric professional of an offender's criminal and mental health history, an interview of the defendant, the scoring of valid actuarial risk assessment instruments like the Static 99 and expert testimony about an offender's risk. In the Court's experience, however, such procedures are virtually never followed when SORA determinations are made.

Departure decisions, rather, are typically made by reviewing the RAI, a recommendation from the Board, whatever criminal history information is contained in a court file and argument by the parties. A decision is then made by the Court as to whether an "aggravating or mitigating factor" exists which warrants a departure. 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 assessment 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.

In the absence of discernable standards and without the evidence necessary to assess risk, courts are inevitably asked to make decisions about departures which are based on purely subjective value judgments about how bad an offender's conduct is and conceptions about risk which may or may not comport with empirical reality. Analyzing the factors which appellate courts rely upon in affirming or reversing trial court departure decisions is difficult because many decisions, quite understandably, do not provide extensive details about the evidence trial courts may have considered in ruling on departure motions. It is clear, however, that under controlling case law an "aggravating factor" may be related to risk or, alternatively, may simply indicate that an offender's crime was particularly horrible.[24]

For example:

> In *People v. Wasley,* 73 AD3d 1400 (3d Dept 2010), an upward departure to Level 3 was affirmed because the Defendant attempted to stop the victim's mother from rescuing her child by locking the door to his house. This "egregious conduct" was not properly considered by the RAI.
>
> In *People v. D'Adamo,* 67 AD3d 1132 (3d Dept 2009) an upward departure was affirmed because a second victim was the first victim's sister and because the defendant had the victim's mother alter her physical appearance to look like a girl. (The Defendant was apparently already scored points under the RAI for having two victims and would also presumably have been scored points for having child victims).
>
> ***43** —In *People v. Mantilla,* 70 AD3d 477 (1st Dept 2010), the fact that the victim was five years old justified an upward departure to Level 3. The Court acknowledged that the RAI had already added 30 points to the Defendant's score because the victim was

under the age of 11. The Court, however, found that while a 30 point assessment might be appropriate for the abuse of a 10 year old victim, it was inadequate for a 5 year old. The Court explained: "A five-year-old victim has a far more limited ability than a 10–year–old to recognize or identify mistreatment by a trusted adult". 70 AD3d at 478. (As noted in Part VII, n.5, *supra,* the evidence at the hearing indicated that while a deviant sexual interest in children is correlated with an increased risk for re-offense, there is no evidence that the risk to re-offend is correlated to specific child ages).

—In *People v. Leibach,* 39 AD3d 1093 (3d Dept 2007), *lv denied,* 9 NY3d 806, an upward departure to Level 3 was upheld because the defendant had sexually abused a child relative over a period of several years. The Board had recommended an upward departure because of the "extremely chronic nature of the crimes" and the Court determined to depart upward, despite the fact that the RAI had already scored the Defendant with 20 points for a continuing course of conduct. The court reasoned that the length and nature of defendant's sexual abuse of the victim justified an upward departure. (As noted in Part VII, n.4, the evidence at the hearing indicated that there is no known correlation between the duration of a sexual offense against a victim and an offender's likelihood to re-offend).

—In *People v. Sherard,* 73 AD3d 537 (1st Dept 2010) an upward departure was granted based on "the level of force and aggression involved in the underlying crime" and defendant's "failure to accept responsibility" among other factors. (As noted in Part VII, n.1, the level of force used in a sexual offense is already scored under the RAI but has only a tiny known relationship to recidivism. The failure to accept responsibility is also scored under the RAI although it has no known direct relationship to re-offense risk).

These examples are not cited to argue that the decisions of these courts were in any way legally incorrect. The "aggravating factors" which led to departures in these cases are obvious. The decisions are outlined simply to point out that departure determinations may often be based on factors other than an offender's re-offense risk.

Courts have also determined that factors which have been shown to *reduce* the risk for re-offense are actually predictive of an *increased* likelihood of recidivism. As noted, *supra,* the fact that a defendant abuses a female child who is a family member as opposed to a stranger is among the most well-established factors which significantly reduces the actuarial likelihood that an offender will re-offend. Yet, in rendering departure decisions, courts have consistently deemed the existence of a familial relationship to be an *aggravating* factor which *increases* a defendant's risk. Those decisions are based, in part, on the harm courts find are caused in such cases. But they are also based on an assessment that a defendant's actual *risk to re-offend* is increased when a family member is involved. As the Court in *Mantilla, supra,* held in affirming an upward departure by the trial court to a Level 3 for an offender who had sexually abused his daughter:

> ***44** [The Defendant's] ability and willingness to victimize not only a close family friend but even his own daughter in this way bespeaks *a degree of depravity indicative of a complete inability to exercise any self-control.* Yet a familial relationship with one of the victims is not specifically listed as a separate factor in the guidelines[25] (emphasis added).

See also, People v. Ferrer, 35 AD3d 297 (1st Dept 2006), *lv denied,* 8 NY3d 807 (2007) (upward departure affirmed, *inter alia,* because "the risk assessment instrument failed to adequately take into account the paternal relationship between defendant and the victim ..."); *People v. Frosch,* 69 AD3d 699 (2d Dept 2010), *lv denied,* 14 NY3d 707 (upward departure to Level 3 granted where the RAI "did not adequately take into account the egregious and abhorrent nature of the defendant's sexual abuse of his own daughter which occurred when she was between the ages of three and eight" as well as threats made to the daughter); *People v. Hill,* 50 AD3d 990 (2d Dept 2008), *lv denied,* 11 NY3d 701 (upward departure proper, *inter alia,* because the RAI did not consider the fact that the Defendant had sexually abused her own daughter). The First Department explicitly considered the argument that incest offenders were less likely to recidivate than other offenders in *People v. Rodriquez,* 67 AD3d 596 (1st Dept 2009), *lv denied,* 14 NY3d 706. In that case, the Court held that the argument was without evidentiary support and had been presented for the first time on appeal. The Court also held, however, that this contention was:

> ... repugnant to common decency, the plain language of the statute, and precedent in this Department. Even if we were to accept defendant's contention that the recidivist rate for incest child molesters is somewhat lower than that for other presumably more common child molesters, we would

> nonetheless decline to consider a discretionary downward departure.[26]

B. The Court of Appeals Evolving SORA Review Standard: *People v. Johnson*

The prevailing standards for RAI departures were virtually uniform until a 2008 decision by the New York Court of Appeals which signaled that courts had broader discretion in reviewing RAI determinations than the Commentary standard provided. *People v. Johnson,* 11 NY3d 416 (2008). In *Johnson,* the Court rejected a challenge by a Defendant convicted of possessing child pornography who was assessed 20 points under the RAI because his criminal conduct was "directed at a stranger". The Court noted that the rationale for these additional points in child pornography cases was "not at all obvious" and "seemingly anomalous" but held that the plain meaning of RAI dictated that these additional points be assessed. 11 NY3d at 419, 421.[27] The Court held that the remedy for cases in which a result dictated by the RAI "does not make sense" was not to distort the meaning of the instrument but to depart from it. 11 NY3d at 416. Since the Defendant in *Johnson* did not move for a departure, the Court held, he was not entitled to receive one but could petition the trial court in the future for an order modifying his risk level.

***45** In discussing departures, the Court first recited the well-established departure standards of the Commentary including the direction that a departure from the RAI is warranted where "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". 11 NY3d at 421. The Court then also emphasized, however, that judges were free to depart from Board recommendations and make their own independent decisions:

> The statute is quite clear: the Board's duty is to "make a recommendation to the sentencing court" (Correction Law § 168–l [6] and the court applying a clear and convincing evidence standard, is to make its determination after considering that recommendation, and any other materials properly before it (Correction Law § 168–n [3]). While departures from the Board's recommendations are of course the exception, not the rule, the possibility of such departures has been generally recognized (*see Matter of VanDover v. Czajka,* 276 A.D.2d 945, 946; *Matter of New York State Bd. Of Examiners of Sex Offenders v. Ransom,* 249 A.D.2d 891 [4th Dept 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"]; *see also,* 83 N.Y. Jur.2d Penal and Correctional Institutions § 319 [2d ed. Updated 2008] ["the court is not bound by the recommendation of the board in determining the appropriate risk level of an offender ... and, in the exercise of discretion, may depart from the board's recommendation"]). 11 NY3d at 421.

Johnson illustrates the tension between the SORA statute and the Commentary. On the one hand, according to *Johnson,* the Board's recommendations are no more presumptively correct than the sentencing recommendations routinely given to courts by probation departments, recommendations which have no presumptive weight. On the other hand, according to the Commentary, courts may only depart from the RAI when there is an aggravating or mitigating factor which the RAI has not adequately considered. Departures are the exception—not the rule. The Court of Appeals briefly reviewed the same issue in *People v. Mingo, supra.* There, in a footnote, the Court said that the RAI score would "presumptively place" an offender into the RAI's numerical risk category but that "the level suggested by the RAI is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level if it concludes that the factors in the RAI instrument do not result in an appropriate designation." *Mingo* at 568, n.2. This language, again, appears to differ from the more restrictive standards of the Commentary. While the Commentary says that departures may only be taken if there is an aggravating or mitigating factor which has not been adequately considered by the RAI, *Mingo* appears to indicate that departures may be taken if the RAI, in any respect, does not "result in an appropriate designation". A similar standard was articulated by the Court in *People v. Pettigrew,* 14 NY3d 406, 409 (2010). There again, the Court emphasized that the risk level established by the RAI was "merely presumptive, and the assigning of a risk level is within the sound discretion of the SORA court." (citing Correction law).

Lower Court Decisions Following *Johnson*

***46** Appellate cases following *Johnson,* however, with virtual uniformity, have continued to cite the departure standards articulated in the Commentary and related formulations rather than the more expansive standards outlined in *Johnson. See e.g., People v. Colavito,* 73 AD3d 1004 (2d Dept 2010); *People v. Cohen,* 73 AD3d 1003 (2d Dept 2010); *People v. Davis,* 66 AD3d 749 (2d Dept 2009), *lv denied,* 13 NY3d 715 (2010) ("utilization of the risk assessment instrument will generally result in the proper classification in most cases so that departures

will the exception not the rule"); *People v. Cruz,* 74 AD3d 1305 (2d Dept 2010); *People v. King,* 74 AD3d 1162 (2d Dept 2010); *People v. Barnett,* 71 AD3d 1296 (3d Dept 2010) (a departure is warranted where "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"); *People v. Jefferson,* 74 AD3d 1756 (4th Dept 2010) (clear and convincing evidence of "special circumstances" must exist to justify an RAI departure); *People v. Williamson,* 73 AD3d 1398 (3d Dept 2010) (clear and convincing evidence of "mitigating factors" must exist to justify downward departure); *People v. Wasley,* 73 AD3d 1400 (3d Dept 2010) (to justify an upward departure from the RAI's "presumptive" score, clear and convincing evidence of "an aggravating factor which was not otherwise adequately taken into consideration by the risk assessment guidelines" must exist); *People v. Burch,* 73 AD3d 1145 (2d Dept 2010) (mitigating factors "of a kind or to a degree, not otherwise adequately taken into account by the guidelines" must exist to justify downward departure.)

Indeed, appellate cases following *Johnson* which have cited *Johnson* have continued to apply the departure standards of the Commentary. *See People v. Stella,* 71 AD3d 970 (2d Dept 2010), *lv denied,* 15 NY3d 702 (citing *Johnson* and upholding the Court's denial of a downward departure where "defendant did not demonstrate that special circumstances existed which would warrant a departure from the presumptive risk level"); *People v. Worley,* 57 AD3d 753 (2d Dept 2008), *lv denied,* 12 NY3d 708 (2009) (citing *Johnson* and upholding an upward departure to Level 3 "based upon clear and convincing evidence of aggravating factors of a degree not taken into account by the risk assessment instrument and the guidelines"). *Johnson* and *Mingo,* in fact, are routinely cited in summary form to justify the denial of downward departure motions made by defendants. *See People v. Harrison,* 74 AD3d 688 (1st Dept 2010); *People v. Joe,* 74 AD3d 404 (1st Dept 2010); *People v. Medina,* 73 AD3d 667 (1st Dept 2010); *People v. Burton,* 71 AD3d 468 (1st Dept 2010), *lv denied,* 14 NY3d 714.

None of these cases applied an erroneous departure standard. *Johnson* itself repeated and endorsed the restrictive review standards of the Commentary. To the extent the Court of Appeals also indicated in *Johnson, Mingo* and *Pettigrew,* however, that courts have broader discretion than the Commentary provides, that suggestion has not been taken up by other courts. Nearly two years after its pronouncement, *Johnson* has had no discernable effect on the discretion courts use in considering SORA departure motions.

X

DEFENDANT'S CONSTITUTIONAL CLAIMS:

A. Claim that SORA Classification is "Punishment" & Hence Unconstitutional

***47** Defendant's initial claim is that the SORA statute is "punitive" rather than "regulatory". For this reason, he asserts, an offender subject to SORA is entitled to the full panoply of rights enjoyed by criminal defendants. The Second Circuit conducted an extensive analysis of that issue in *Doe v. Pataki,* 120 F3d 1263 (2d Cir.1997), *cert denied,* 522 U.S. 1122 (1998). The *Doe* Court analyzed the issue in order to determine whether SORA's retroactive application to offenders whose crimes had occurred before the statute's enactment violated the *ex post facto* clause. The Court concluded that SORA's notification and registration requirements were regulatory rather than punitive and could therefore be retroactively applied. The same conclusion has been reached by multiple New York appellate courts. *See e.g., People v. Hernandez,* 264 A.D.2d 783 (2d Dept 1999), *lv denied,* 94 N.Y.2d 863; *People v. Langdon,* 258 A.D.2d 937 (4th Dept 1999); *see also, People v. Windham,* 10 NY3d 801 (2008) (SORA is "designed not to punish, but rather to protect the public".)

The Defendant acknowledges the *Doe* ruling, but argues that amendments made to the SORA statute since *Doe* which have imposed significantly more stringent requirements on sex offenders now make the statute punitive. This Court does not agree. Amendments made to the SORA statute since 1997 have unquestionably made the statute's registration and community notification regime wider and more burdensome on offenders. As outlined in the instant Opinion, there are also multiple aspects of the current SORA risk determination process which bear a closer resemblance to criminal sentencing than risk prediction. But in the Court's view, neither those legislative amendments nor the current procedures through which SORA determinations are made have served to modify the fundamental purposes and provisions of the statute. SORA, in the Court's view, is a regulatory regime which is designed to protect public safety.

B. Defendant's Due Process Claim

Defendant also claims that SORA risk assessment procedures violate due process. The 5th and 14th Amendments to the United States Constitution and Article I, § 6 of the New York State Constitution provide that no person shall be deprived of life, liberty or property without due process of law. The courts have articulated two distinct doctrines which protect persons under the due process clause: procedural and substantive due process.

The Defendant does not indicate which doctrine he believes is violated by SORA risk assessment procedures. He cites, however, the United States Supreme Court decision which is normally cited in support of claims that the procedures for depriving a person of a protected liberty interest violate due process. *Matthews v. Eldridge,* 424 U.S. 319 (1976). Procedural due process places constraints on the government's deprivation of a person's liberty or property rights. It provides that a person must have notice of such a potential deprivation and a right to be heard and contest it.

***48** "Substantive due process", on the other hand, bars certain governmental actions regardless of their procedural fairness. It prohibits abuses of governmental power which are arbitrary and without "reasonable justification in the service of a legitimate governmental objective." *City of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998). Although the Defendant apparently urges that SORA classification procedures violate procedural due process, the New York Court of Appeals recently analyzed a claim with some similarity to the one here under the substantive due process doctrine. *People v. Knox,* 12 NY3d 60 (2009), *cert denied, Knox v. New York,* 130 SCt 552.

In *Knox,* the Court of Appeals held that the State did not violate the substantive due process rights of three defendants who had been classified as "sex offenders" under SORA for committing or attempting to commit kidnaping or unlawful imprisonment crimes against children who were not their own even though there was no evidence the defendants' crimes included any sexual component. The Court held that the Defendants had "a constitutionally-protected liberty interest, applicable in a substantive due process context, in not being required to register under an incorrect label". 12 NY3d at 66 (citations omitted). The Court held the Defendants' interest in not being inaccurately classified as sex offenders did not amount to a "fundamental right". For this reason, the Court held, due process required only that the State's classification process be "rationally related to legitimate government interests". *Id.* at 67 (citations omitted). The Court noted that the "rational basis" test was not a "demanding one" and that a party contending that a legislative enactment was unconstitutional bore "the heavy burden of showing that a statute is so unrelated to the achievement of any combination of legitimate purposes' as to be irrational". *Id.* at 69 (quotations omitted). The rational basis standard is a "paradigm of judicial restraint". *Affronti v.. Crosson,* 95 N.Y.2d 713, 719 (2001), *cert denied, Affronti v. Lippman,* 534 U.S. 826 (citations omitted).

While the Defendant has apparently styled his claim as one under procedural due process, the Court of Appeals' recent decision in *Knox* would seem to indicate that such a claim is best analyzed under the substantive due process doctrine. In addition to the fact that the *Knox* Court analyzed the issue that way, substantive due process is also, in the Court's view, the most appropriate vehicle for analyzing Defendant's claim. The Defendant is not asserting that he was not given notice of the factors which would be used to determine his risk level or a fair opportunity to contest them. His essential claim is that the SORA risk classification process is inherently arbitrary.[28]

The *Knox* Court outlined a number of reasons why the seemingly irrational designation of offenders for whom there was no evidence of sexual misconduct or motivation as "sex offenders" under SORA was permissible. The Court noted that a recently enacted federal statute required such offenders to register but acknowledged that this federal law did not require those offenders to be designated as sex offenders. The Court also reasoned that the Legislature may have concluded that the number of offenders convicted of kidnaping or unlawful imprisonment crimes against children who had not engaged in sexual misconduct were few and that the process of "separating those cases from the majority" would be "difficult, cumbersome and prone to error." This "administrative burden" and the risk that some offenders might escape registration in the absence of a hard and fast rule justified the Legislature's determination. The Court also reasoned that the only harm which would accrue from classifying the non-sex offenders at issue in the case as sex offenders was that those persons would be called "sex offenders" rather than "child predators". 12 NY3d at 69.

***49** The *Knox* decision held that the Legislature, consistent with due process, could brand certain criminal offenders whose crimes and motivations indisputably had nothing to do with sex as "sex offenders". Moreover, the effect of the decision is that such a clearly erroneous classification can, consistent with due process, be disseminated without limitation by the government to the public throughout an offender's entire lifetime. *See* Part IV, *supra.* Given the *Knox* decision, the bar which SORA

risk classification procedures must meet to satisfy the requirements of substantive due process is obviously not a stringent one. This Court is also mindful of the fact that the courts have been extremely reluctant, for very good reason, to extend the parameters of what may constitute a substantive due process violation. This reluctance has been due not only to general principles of judicial restraint but because "guideposts for responsible decision making in this unchartered area are scarce and open-ended". *Collins v. City of Harker Heights Texas,* 503 U.S. 115, 125 (1992). Despite all of these significant cautions, however, in the Court's view, certain aspects of New York's current procedures for making sex offender risk level determinations cannot meet even the minimal requirements of the rational basis test.

The distinction between the statute at issue in *Knox* and the risk assessment process here is not the degree of irrationality inherent in those two classification procedures. There could scarcely be anything less rational than classifying someone as a sex offender for life, with all of the stigma that entails, when there is no dispute that such a person is *not* a sex offender.[29] The distinction between *Knox* and the issues here are the justifications underlying the decisions of the Legislature (in *Knox*) and the Board of Examiners of Sex Offenders (here). In *Knox* the Court of Appeals surmised that there may have been multiple rational reasons for the Legislature's decision to classify certain kidnaping and unlawful imprisonment offenders as sex offenders. The Court cited federal law, the fact that the law must often inevitably draw lines which may produce some irrational results, the fact that many kidnaping and unlawful imprisonment offenders are sex offenders and the rationale that not designating such persons as sex offenders might mean that some sex offenders would escape registration.

Given the fact that Defendant's claims are subject only to rational basis scrutiny it is clear that many of the anomalies of the SORA classification process outlined in this Opinion are not constitutionally defective. In this category, in the Court's view, are the fact that the RAI includes points which are based on purely subjective "harm" determinations and policy preferences rather than risk assessments; the fact that the RAI classifies a significant majority of possible scores under the instrument as Level 3 offenders at high risk for re-offense for no apparent reason; the fact that the RAI's assessments of harm are largely inconsistent with those of the Legislature and the fact that the RAI presumes the harm caused by an instant offense is identical to the harm caused by any future offense.

***50** In the Court's view, however, a number of the RAI's characteristics are simply arbitrary and without any rational basis. In this category are the fact that:

—The RAI has not been updated for 15 years, even though the most relevant knowledge in the field of sex offender risk assessment has been obtained during that period;

—Most of the RAI's risk factors have no known relationship to the risk of recidivism;

—Many of the most significant factors known to be correlated to the risk for re-offense are not included in the RAI;

—The number of points assessed for the RAI's various risk factors appear to be simply arbitrary;

—The RAI has never been tested, measured or attempted to be validated to see if it has any predictive validity even though the data necessary for such an assessment is readily available to the State; and

—A number of the RAI's risk measurement parameters, including Suggested Departures, produce predictably patently irrational results in a wide range of cases.

It is the arbitrary nature of these risk assessment parameters which makes the RAI, in the Court's view, violative of due process. The RAI does not use scientific studies whose most recent vintage dates from 1995 because of a determination that, in the field of sex offender risk assessment, it is archaic rather than modern scientific evidence which is most valid. It has relied upon outdated and inaccurate assumptions to classify 30,000 sex offenders because for the past 15 years no one has bothered to update the instrument. The RAI does not designate multiple factors as correlated with the risk for re-offense which have no known relationship to recidivism because there is disagreement in the scientific community about the predictive value of such factors. Many of these factors simply have no known predictive validity at all. The RAI does not fail to incorporate some of the most significant factors which predict the risk of re-offense because the creators of the instrument made a considered judgment that those principles were not in fact predictive. The instrument simply omits those factors for no apparent reason. The RAI does not lead to predictably irrational results in many cases because those results are the necessary consequence of largely rational calculations and the necessity to draw lines somewhere. Those irrational results arise because the instrument's scoring parameters were drawn in 1996 by five state employees who apparently never considered how some of their

mathematical calculations might lead to patently irrational outcomes. The wellspring of these determinations is not reason.

As the United States Supreme Court held in the *County of Sacramento* case:

> Since the time of our early explanations of due process, we have understood the core of the concept [of substantive due process] to be protection against arbitrary action. The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely,* 17 U.S. 235 (1819): As to the words from Magna Carta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government ... *quoting Hurtado v. California,* 110 U.S. 516 (parallel citations omitted). *County of Sacramento* 523 U.S. at 845.

***51** *See also, Daniels v. Williams* 474 U.S. 327 (1986); *Wolff v. McDonnell,* 418 U.S. 539 (1974) (stating same principle). The word "arbitrary" is defined, *inter alia,* as a determination based on "chance, whim or impulse", "by prejudice or preference rather than on reason or fact".[30] It is the word Dr. Guidry chose to describe how the RAI arrived at its scoring formulations. (*see* Part VI, n.4 *infra*). It explains why a four year old crime can be more recent than a crime which occurred a month ago; why intended rapes may be more harmful than completed rapes; why circular reasoning may be used to transform policy preferences into objective mathematical risk measurements and how sex offender treatment can at once be ineffective and overwhelmingly effective at reducing risk. The most salient characteristic of the RAI is not that it is unduly punitive. The instrument's most problematic characteristic is that, with respect to risk assessment, it is random.

The arbitrary nature of the RAI means that offenders are classified as being at low risk, moderate risk or high risk of re-offense with no rational basis. This will inevitably result in classification errors in a wide range of cases.[31] Of course, the precise number of these errors cannot be tabulated, short of making informed assessments based on rational criteria in each case. Under the current system, however, it is inevitable that offenders who are at low risk for re-offense may frequently be erroneously classified as being at moderate or high risk for re-offense and that offenders who are moderate risk for re-offense may be erroneously classified as being at high risk for re-offense. It is also inevitable that offenders at high risk for re-offense may be erroneously classified as being at moderate or low risk for re-offense and that offenders at moderate risk for re-offense may be erroneously classified as being at low risk for re-offense. These latter classification errors do not present a due process problem. They present a public safety problem (which is briefly discussed in Part XII, *infra*).

Of course, some offenders under the RAI will inevitably also be classified accurately. With only three available options, even random chance could be expected to result in a correct classification one-third of the time. There is no evidence, however, that the RAI provides risk assessments which are any more accurate than that. Because the RAI imposes risk assessment classifications with no rational basis, in the Court's view, it does not comport with due process.

C. Effect of Court Departure Power on Due Process Analysis

Even if the RAI were held to violate due process, however, those deficiencies might be cured by courts exercising departure decisions. Courts ultimately impose risk levels. The prevailing standard which courts use in deciding whether to depart from the RAI, however, is the Commentary standard. Given this standard, it is difficult to see how the due process deficiencies of the RAI can be cured by departure determinations. This is true for multiple reasons.

***52** First, the Commentary and well-established case law explicitly instruct that "the expectation is that the instrument [the RAI] will result in the proper classification in most cases so that departures will be the exception-not the rule". In accordance with this standard, the vast majority of risk classifications should not be subject to departures. In the minority of cases in which departures are granted, moreover, pursuant to the Commentary, the basic determinations of the RAI are inviolate. Thus, while a court may properly consider issues the RAI does not consider or has considered to an inadequate degree, the instrument's basic irrational

conclusions cannot be modified.

Further, where a defendant is aggrieved by an RAI determination, it is the defendant, rather than the state, who bears the burden of demonstrating by clear and convincing evidence that the RAI has not resulted in an appropriate designation. If the RAI is, in fact, irrational however, requiring a *defendant* to prove that he is entitled to a lower risk level than the RAI provides by clear and convincing evidence is violative of procedural due process. As the Court of Appeals in the *David W.* case explained in finding that a SORA offender's right to seek a modification of his risk level after it had been determined was no substitute for a proper risk level determination in the first instance: "[d]ue process requires that the *State* bear the burden of providing at some meaningful time, that a defendant deserves the classification assigned to him". 95 N.Y.2d at 141 (emphasis added). Given the RAI's inherent irrationality, a defendant's risk level cannot be properly made by the RAI. It can only arise through an unlawful burden shifting process in which the defendant bears the burden of establishing a risk level. Even in the minority of cases in which departures are seriously considered, moreover, it is apparent that courts are rarely given the evidence necessary to make informed determinations.

In this case, the Court's ability to depart from the presumptive RAI score certainly did not obviate the due process problems inherent in the instrument. Here, as discussed *infra,* the Court determined that it had no grounds to depart from the RAI. It thus used the RAI as the sole basis on which to find the Defendant at high risk to re-offend.

D. Controlling Case Law Mandates the Denial of Defendant's Due–Process Claim

Despite the views of this Court however, it is bound to reject Defendant's claim because New York's appellate courts have consistently rejected every one of the numerous challenges which has been made over the past 13 years to the RAI's validity. The most recent and extensive of these decisions came in *People v. Ferrer,* 69 AD3d 513 (1st Dept 2010), *lv denied,* 14 NY3d 709. There, the Defendant was represented by the same counsel who appeared in this matter (the Legal Aid Society, by Lorca Morello) who presented much of the same evidence which was presented to this Court, including the testimony of Dr. Katsavdakis. The *Ferrer* court considered expert testimony that the RAI was not reliable and not generally accepted in the scientific community. It considered the claim that the RAI did not reflect valid statistical data which linked its scoring factors to actual recidivism rates among convicted sex offenders. It considered the argument made here that the Static 99, rather than the RAI, should be used to assess risk. The Court rejected all of those claims. It held that the use of the RAI did not deprive the Defendant of constitutional due process. The Court based its holding on two rationales. First, the Court held, the divergence between scientific knowledge about recidivism and the scores contained in the RAI did not serve to invalidate the instrument:

> ***53** Regardless of whether the RAI is the optimal tool of predicting recidivism, or whether another instrument might be better, defendant has not shown that the use of the RAI is unconstitutional. In imposing civil restrictions on liberty based on predictions of future dangerousness, governments have considerable latitude that does not necessarily "depend on the research conducted by the psychiatric community" (*Jones v. United States,* 463 U.S. 354, 365 n.13 [1983]; *see also Kansas v. Hendricks,* 521 U.S. 346, 360 n.3 [1997].

The Court also rejected Defendant's claims because "the risk level designated by the RAI is merely presumptive, and a court may depart from it as a matter of discretion." *citing Mingo* and *Johnson.*

The First Department also considered a constitutional challenge to the use of the RAI in *People v. Bligen,* 33 AD3d 489 (1st Dept 2006), *lv denied,* 8 NY3d 803 (2007). The *Bligen* Court found that the settlement stipulation in *Doe v. Pataki* (which is not applicable here) barred any such challenge. The Court also opined, in *dictum,* however, that were it to reach the merits of Defendant's claims, those claims would also be rejected. The Court noted that "[a]lthough defendant offers some scientific criticisms of their [the RAI's] predictive value, he has not shown that the factors on which the guidelines are based are unreliable indicators of the risk of re-offense by a sex offender so that their use violates the sex offender's right to due process." (citations omitted). *See also, People v. Witchley,* 9 Misc.3d 556 (Madison County 2005) (discussing but rejecting expert testimony that the RAI's risk factors "have no correlation with a sex offender's risk of re-offending"); *Bush v. New York State Board of Examiners of Sex Offenders,* 72 AD3d 1078 (2d Dept 2010) (SORA registration does not violate due process or equal protection).

Challenges to the RAI have also been rejected by every other appellate decision to consider them. *See e.g., People v. Bailey,* 52 AD3d 336 (1st Dept 2008), *lv denied* 11 NY3d 707; *People v. Howard,* 52 AD3d 273 (1st Dept 2008), *lv denied,* 11 NY3d 706; *People v. Pendergrast,* 48 AD3d 356 (1st Dept 2008), *lv denied,* 10 NY3d 714;

People v. Woods, 45 AD3d 408 (1st Dept 2007), *lv denied,* 10 NY3d704 (2008); *People v. Hingel,* 50 AD3d 501 (1st Dept 2008), *lv denied,* 11 NY3d 702; *People v. Marcus,* 36 AD3d 468 (1st Dept 2007), *lv denied,* 8 NY3d 811; *People v. Flowers,* 35 AD3d 690 (2d Dept 2006), *lv denied,* 8 NY3d 810 (2007); *People v. Joe,* 26 AD3d 300 (1st Dept 2006), *lv denied,* 7 NY3d 703; *People v. Vasquez,* 37 AD3d 193 (1st Dept 2007), *lv denied,* 8 NY3d 812; *People v. Miller,* 36 AD3d 428 (1st Dept 2007), *lv denied,* 8 NY3d 810; *People v. Ramirez,* 39 AD3d 404 (1st Dept 2007), *lv denied,* 9 NY3d 804; *People v. Wright,* 36 AD3d 465 (1st Dept 2007); *People v. O'Neal,* 35 AD3d 302 (1st Dept 2006), *lv denied,* 8 NY3d 809 (2007); *People v. Wilson,* 33 AD3d 488 (1st Dept 2006), *lv denied,* 8 NY3d 804 (2007); *People v. Mackie,* 33 AD3d 490 (1st Dept 2006), *lv denied,* 8 NY3d 804 (2007); *People v. Chipp,* 33 AD3d 508 (1st Dept 2006), *lv denied,* 8 NY3d 804 (2007); *People v. Guitard,* 57 AD3d 751 (2d Dept 2008), *lv denied,* 12 NY3d 704 (2009); *People v. Washington,* 47 AD3d 908 (2d Dept 2008), *lv denied,* 10 NY3d 709; *People v. Kraeger,* 42 AD3d 944 (4th Dept 2007).

***54** As noted, *supra,* Defendant asserts that this Court should not be bound by the First Department's recent holding in *Ferrer* because "the decision is so conclusory that it cannot act as a barrier to consideration by this Court." Defendant's Initial Affirmation ¶ 3. That contention, however, is in the Court's view, obviously incorrect for at least three reasons. First, the controlling authority of a court's decision is not contingent on its length. Second, brevity of expression is not necessarily indicative of a lack of analytic rigor. Indeed it is often more difficult and more clear to state a proposition succinctly than with extended prose. Finally, a review of the First Department's decision in *Ferrer* clearly indicates that the decision is not conclusory. The First Department, in fact, took pains to fairly articulate and analyze the primary arguments made by the Defendant. This Court, of course, believes that current SORA risk assessment procedures violate substantive due process and thus respectfully disagrees with the *Ferrer* holding for the reasons outlined, *supra.* This Court also believes that the arguments advanced by the *Ferrer* Court for rejecting the Defendant's claims in that case are inapplicable to the Court's analysis here and will briefly outline why. But this Court is also, obviously, bound to follow controlling appellate authority.

The *Ferrer* Court seemed to acknowledge that SORA risk assessment procedures might not be "optimal". It grounded its holding, however, as noted, *supra,* on two considerations. The first (as articulated in the authorities the Court cited) is that legislatures have broad discretion in making determinations which have been the subject of scientific debate and may properly come to conclusions which are different from those made by some in the scientific community. The *Ferrer* Court cited footnotes from decisions of the United States Supreme Court which have articulated that principle in sex offender civil management proceedings (in the *Kansas v. Hendricks* case) and the disposition of criminal offenders found not guilty by reason of insanity (in the *Jones v. United States* case). As the Supreme Court held in *Hendricks,* "when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative operations must be especially broad and courts should be cautious not to rewrite legislation' ". *Hendricks,* 521 U.S. 346, n.13, *quoting Jones* 463 U.S. at 370. The *Jones* Court instructed that "courts should pay particular deference to reasonable legislative judgments". 463 U.S. at 364, n.13.

This Court believes this doctrine is inapplicable to its findings in the instant matter for three reasons. First, the Court here has not found that the SORA statute or any action of the Legislature is in any respect unconstitutional. In fact, in certain respects, as noted, *supra,* the judgments which the Board of Examiners of Sex Offenders have made have been clearly contrary to those of the Legislature. What this Court *does* believe violates due process are decisions which were made in 1996 by three employees of the Division of Parole and two employees of the Department of Correctional Services. In the Court's view, those decisions are not entitled to the same deference as legislative enactments.

***55** Second, the specific risk assessment determinations of the RAI, in large part, do not address risk assessment parameters which are "fraught with uncertainty". Sex offender risk assessment to be sure is not in any respect an exact science. Experts conducting assessments of individual offenders may differ about how likely an offender is to recidivate. But, with respect to actuarial risk assessments, there was no evidence at the hearing which indicated that there was significant debate in the scientific community about the fact that certain variables have been found in actuarial studies conducted over the past 15 years to be correlated with re-offense risk while other variables have not been shown to have any such correlation. Nor do professionals in the field disagree about the fact that to conduct a valid risk assessment relevant information must be analyzed.

What is most significant in the analysis, however, as the Court outlined, *supra,* are the sources of the judgments supporting the RAI and the Commentary. The myriad individual judgments inherent in the instrument for the most part do not reflect scientific principles on which

there is significant disagreement in the scientific community. They largely reflect arbitrary determinations which, as far as the Court was able to ascertain from the evidence at the hearing, simply have no support at all. It is the arbitrary character of these judgments which violates due process. The fact that the sex offender risk assessment field is an imprecise and evolving scientific discipline does not give the government license to infringe on protected liberty interests with no rational basis.

This Court also respectively disagrees with the argument that the RAI's deficiencies do not violate due process because a Court may depart from the instrument. In support of this argument the *Ferrer* Court cited the decisions of the Court of Appeals in *Mingo* and *Johnson. Johnson,* of course, contains language which emphasizes the discretion courts possess in ruling on departure motions. As noted, *supra,* however, that expansive language has not had any discernable impact on departure determinations. This Court's research indicates, in fact, that the *expansive* standards of the *Johnson* decision have been cited in reported decisions twice.[32] The first occurred when this Court cited the standard in departing from the RAI score in *Santos* . The second occurred when the First Department cited the standard as obviating any due process challenge to the RAI in *Ferrer.* In any event, given the lack of competent evidence received by courts in SORA proceedings, the *standard* courts follow in making departure decisions is only half the problem. To reach a valid departure decision, courts must have competent evidence. In the Court's experience, as noted, *supra,* no such evidence is generally made available in SORA proceedings.

XI

DEFENDANT'S RISK ASSESSMENT

Despite all of these concerns, the Court has no choice other than to adopt the RAI score and classify the Defendant as a Level 3 offender at high risk of re-offense for the reasons outlined below.

A. Defendant's RAI Score

***56** As a part of these proceedings, the Court scored the RAI for the Defendant. The Court assessed the Defendant with 30 points under RAI Factor 1 for use of a dangerous instrument; 30 points under Factor 5 because the victim was 63 years old or more; 30 points under Factor 6 for a prior violent felony history; 15 points under Factor 11 for a history of drug or alcohol abuse and 10 points under Factor 12 for not accepting responsibility. This is a total of 115 points, 5 points above the threshold for a Level 3 offender. The Court also determined that the Defendant qualified for an "Override" under the RAI because he had a prior felony conviction for a sex crime. This also resulted in his classification as a Level 3 offender.

B. Assessment of Defendant by Dr. Katsavdakis

Dr. Katsavdakis testified about an assessment he had conducted of the Defendant's risk level under the "Static 99". As noted, *supra,* the Static 99 is a generally accepted actuarial instrument which scores an offender under ten "Static" or unchanging factors related to his crime, criminal history and life circumstances. The Defendant presented the testimony of Dr. Katsavdakis to outline the Defendant's score on the Static 99, why that score would classify the Defendant as at a low risk to re-offend and why the Static 99 score should be used by the Court as a basis to depart from the RAI's Level 3 score.

The Static 99 adds or subtracts designated numbers of points for 10 factors. These are the Defendant's age, whether he has lived with an intimate partner for at least two years, whether the offender was convicted of a non-sexual violent offense at the same time as the instant offense, whether the offender has a prior non-sexual violent offense, whether he was previously charged or convicted of a sex offense, whether the offender has four or more sentencing dates prior to the instant offense, whether he has a separate conviction for a non-contact sexual offense, whether an offender has sexual offense victims outside his immediate family, whether any victims of the instant offense were strangers to the offender and whether any of his victims were male.

Dr. Katsavdakis gave the Defendant a score of minus "3" on the first item because he is older than age 60. Mr. McFarland committed his crime when he was over the age of 60, however. Dr. Katsavdakis said there was not a lot of data about persons who committed sex offenses over the age of 60. Tr. at 44. Mr. McFarland was scored a "0" under the second factor because he had lived with someone for more than two years. He received a score of "1" under the third factor because he was convicted of an additional violent crime (assault) when he was convicted of the instant offense. Under factor 4, he received a "1" because he was convicted of arson in 1985. He received a "2" under factor 5 for his prior sex offenses. Under Factor 6, he received a score of "1" for having 4 prior sentencing dates. He received a score of "0" for non-contact sex

offenses under Factor 7. Under Factor 8, he received a "0" because he knew the victim of the instant offense. He received a "0" under Factor ten because his victims were not male. In total, Mr. McFarland received a score of "3" which put him at a low to moderate risk of re-offense. Dr. Katsavdakis then compared Mr. McFarland to the highest of the four risk category groups in this designation. He said that this meant that the Defendant's risk of re-offense would be approximately 15 % over five years and 25% over ten years. *Id.* at 44–52.

***57** The witness acknowledged that because Mr. McFarland committed his crime when he was over the age of 60 he could be at a much higher risk of re-offense than his age would otherwise suggest. He said that in assessing risk, he wouldn't just use the Static 99 because in a case like this, it would decrease the risk and not account for the fact that the Defendant was over the age of 60 when he committed his crime. Dr. Katsavdakis admitted that the Static 99 "may not be accurate [with respect to Mr. McFarland] given his age at the time of the crime." *Id.* at 54. He testified that because there are so few offenders who offend past the age of 65 or 70, there is a paucity of recidivism data for such offenders. *Id.*

Dr. Katsavdakis said that while he had scored the Defendant under the Static 99, he had not taken the necessary steps to evaluate the Defendant's risk to re-offend and had not interviewed Mr. McFarland. He testified that he was not opining as an expert that the Defendant was at a low to moderate risk of re-offending and did not have the information necessary to make such an assessment. With respect to the Static 99 and its subtraction of 3 points from the Defendant by virtue of his age, Dr. Katsavdakis testified that if these three points were not deducted, the Defendant would be classified as being at a high risk for re-offense. He also testified, however, that he would not manipulate the numbers in the Static 99 in that fashion because this would constitute an "adjusted actuarial" which would result in "the worst predictive abilities". *Id.* at 80.

The witness testified that had the Defendant been scored on the Static 99 prior to his most recent offense in 2002, he would have scored one point lower than at present and been classified at a low risk of re-offense. If a person re-offended over the age of 25, that could be a factor indicating that the person would re-offend again over the age of 25. Further, the more times a person re-offended over the age of 25, the greater the risk of re-offending would be. Using only meta-analytic studies, Mr. McFarland would have been considered to be extremely unlikely to commit his most recent offense. Tr. at 83–86.

The witness agreed that his assessment in the Static 99 of no additional points by virtue of the Defendant having engaged in an intimate relationship for more than two years had come from the Defendant's own report. He acknowledged that the fact that an offender had assaulted his wife or girlfriend would not be accounted for by the Static 99 but that this would increase the risk of re-offense. The witness testified that the Static 99 does not assess the seriousness of a crime an offender is at risk of committing. The instrument merely assesses the statistical risk that an offender will commit another sex crime. The Static 99 also does not take into account the vulnerability of victims. He agreed that the fact that Mr. McFarland had committed his most recent offense while being supervised on parole would affect his opinion of the Defendant's risk but that this fact is not considered by the Static 99. Tr. at 87–102.

C. Court's Determination of Defendant's Risk

***58** The Court's determination not to depart from the RAI score in this case is based on several considerations. First, it is clear that under applicable case law, this Court is required in making a risk assessment to first determine the RAI score. That RAI score designates the Defendant as a Level 3 offender. The Court may then depart from the RAI score. But there must be some basis for a departure. Here, there is no such basis. The Court found the testimony of Dr. Katsavdakis to be credible. However, Dr. Katsavdakis did not assess the Defendant's risk for re-offense nor offer any expert professional opinion as to how likely he was to re-offend. Thus, his testimony did not provide any basis on which the Court would be able to depart from the RAI score.

Defendant nevertheless posits that a departure is warranted because the Static 99 instrument scored the Defendant at a low to moderate risk of re-offense. It is clear to the Court that the Static 99 is a valid actuarial risk assessment instrument while the RAI has no validity in determining an offender's risk level. Defendant's argument, in the Court's view, however, both misapprehends the law and is not based on the facts which were presented at the hearing. With respect to the law, it is clear that the prevailing standards of case law assign a measure of validity to the RAI.

Second, it was patently obvious at the hearing that the Defendant's Static 99 score, in and of itself, did not properly assesses the Defendant's re-offense risk. Nor was it designed, standing alone, to do so. Dr. Katsavdakis clearly stated that. A trained psychologist or psychiatrist making a sex offender risk assessment does not simply score the Static 99 (or the RAI) and then use that score

standing alone as a basis on which to predict recidicivism. Dr. Katsavdakis clearly stated that he did not take the steps necessary to assess Mr. McFarland's risk of re-offense and could offer no opinion on that subject.

The instrument subtracted 3 points from Mr. McFarland's score because he was over the age of 60. In this case, however, being over the age of 60 was obviously not a protective factor for Mr. McFarland when he committed the instant crime. Dr. Katsavdakis testified that had the Defendant not had three points subtracted because of his age, he would be categorized by the Static 99 as being at a high risk for re-offense. The Static 99, likewise, did not account for other clearly relevant factors with respect to Mr. McFarland's re-offense risk including the fact that his instant offense occurred when he was on parole.

Here, the Defendant presented the scoring of a valid actuarial risk assessment instrument (the Static 99) which in this case quite obviously could not be used alone to determine the Defendant's risk level. This is not a critique of the instrument. The Static 99 is not intended to be used as the only factor in assessing risk. The Court did not receive any clinical assessment or expert opinion about the Defendant's actual risk for re-offense. It did not receive any evidence which would have justified a departure from the RAI.

***59** This Court does not know how likely Mr. McFarland is to re-offend. The RAI may have classified him as being at a higher risk to re-offend than justified. Or, just as plausibly, the instrument's point score putting him barely above the Level 3 threshold may have underestimated his re-offense risk or been roughly accurate. As in most SORA proceedings, the Court did not receive the evidence which was necessary to make an informed judgment on the matter.

XII

THE PUBLIC SAFETY CONSEQUENCES OF INACCURATE CLASSIFICATION:

BRIEF RECOMMENDATIONS FOR REFORM

The evidence at the hearing indicated that the RAI may tend to inaccurately increase more risk level classifications than it inaccurately decreases. Even if this is true, however, the arbitrary character of the instrument means that many offenders will also be classified as being at a *lower* risk to re-offend than is justified. In any event, the widespread inaccurate classification of large numbers of sex offenders, which, in the Court's view, is clearly occurring in this state, presents a public safety problem which should concern all New Yorkers.

Inaccurate risk classifications divert the scarce resources of law enforcement. To the extent police officers are forced to monitor offenders who are wrongly classified as being at a high risk for re-offense they are unable to allocate resources to other enforcement priorities. Conversely, inaccurate classifications allow high-risk offenders who are wrongfully characterized as being at a low risk to re-offend to escape enhanced scrutiny and thereby present a greater threat to public safety. Offenders who are wrongfully classified as being at a high risk to re-offend are forced to register for decades longer than the Legislature determined was appropriate. Conversely, where an offender is inaccurately classified as being at a low risk to re-offend, that offender will see his registration obligations terminate decades earlier than they should end. Inaccurate classifications also implicate every other restriction which arises from an offender's risk level, from whether the offender is permitted to be present on school grounds to whether he is allowed to use a social networking website. *See* Part IV, *supra.*

What is perhaps most troubling, at least to this Court, are the ways in which inaccurate classifications impact ordinary citizens. A mother who learns to her horror that a "high risk" sex offender has moved into her neighborhood has no way of knowing that the instrument used to make this designation has never been tested to see if it is accurate and is based on information which was outdated more than a decade ago. Nor is her primary concern likely to be how horrible that offender's crime was. Her concern will be for her children. Her concern will be the likelihood that the offender might strike again.

Risk determinations under SORA should not be based primarily on moral outrage, as satisfying as such emotions might be. As the Court of Appeals held in *Mingo,* "[A]n accurate determination of the risk a sex offender poses to the public is the paramount concern". 12 NY3d at 574. SORA risk level assessments may well have a rough correlation to how comparatively horrific an offender's crime and criminal history are. But the public should also have confidence that an offender's risk to commit another sex crime has been determined using the most rational, current and predictive tools available.

***60** This state should have no tolerance for a system which inevitably subjects large numbers of people to be

branded for life in error as being at a high or moderate risk of committing another sex crime. Nor should it tolerate allowing offenders at a high risk for re-offense to be wrongly classified as not posing a significant danger to public safety. This Court is obviously not a policy making body. But the way in which risk assessments must be conducted in order to obtain the most accurate possible results is not controversial. Dr. Katsavdakis outlined them at the hearing. A trained psychiatric professional (or a professional retained by each side) reviews records, interviews an offender, administers valid actuarial and other standardized tests as appropriate, makes an evaluation, testifies under oath at a hearing and is subject to cross examination. A judge reviews the evidence and makes a final determination based on information which is generally accepted as valid in the scientific community.

Harm assessments like those made by the RAI are not inherently inappropriate or irrational. If general assessments of harm are to be a component of risk assessment, however, in the Court's view, those assessments should be guided by the value judgments which have been made by the Legislature. Such harm calculations (as opposed to predictions about re-offense) should also be clearly and separately articulated. Otherwise, as is the case under the current system, assessments of risk will continue to be confused and amalgamated into the separate question of how harmful an offender's behavior would be if he did offend again.

The obvious impediment to such a rational, evidence-based sex offender risk assessment system would be its cost. Those costs would not be insignificant. But they could be significantly moderated through agreed-upon risk level determinations (made in many cases now), by the retention of a cadre of psychiatric professionals by district attorneys and public defense providers so that such professionals would not have to be paid on a contract basis in every case, by streamlined procedures and by the promulgation of meaningful standards (beyond "aggravating or mitigating factors") to intelligently guide the exercise of sound judicial discretion. In any event, a less efficient classification process is no justification for retaining a system which is suffused with error. As the Court of Appeals noted in rejecting a similar argument in the *David W.* case, "[t]he need for expediency cannot overshadow the fact that a critical decision was being made about defendant that determined his potential to commit further sex offenses, the extent to which he would have to register, and the extent to which his personal information and propensity for committing sex offenses could be distributed to his community". 95 N.Y.2d at 139 (citation omitted).

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.

All Citations

29 Misc.3d 1206(A), 958 N.Y.S.2d 309 (Table), 2010 WL 3892252, 2010 N.Y. Slip Op. 51705(U)

Footnotes

1 This Court previously issued brief rulings on Defendant's constitutional and other claims with an indication that detailed findings of fact and conclusions of law would follow at a later time. This Opinion contains those findings and conclusions.

2 *See* Respondent's Affirmation in Support of Motion to hold SORA unconstitutional as applied and designate the Defendant as a Level 1 offender, April 12, 2010 ("Defendant's Initial Motion") ¶ 3.

3 *See* Exhibit "A" to Volume 1 of Defendant's Exhibits received on April 12, 2010.

4 In Dr. Guidry's Article, she references the RAI and Commentary as the "New York Sex Offender Risk Assessment Guidelines and Commentary" which she abbreviates as "NYRAG". Dr. Guidry referenced the version of the RAI and Commentary published in 1997, but the 2006 version discussed here is substantively identical. For consistency of reference, citations in Dr. Guidry's Article to the "NYRAG" are referred to here as the "RAI" or the "Commentary".

5 *See* Exhibit "B" to Volume 1 of Defendant's Exhibits.

6 *See* Exhibit "C" to Volume 1 of Defendant's Exhibits.

7 *See* Exhibit "D" to Volume 1 of Defendant's Exhibits.

8 Unless otherwise noted, all further references to the "Commentary" refer to the most recent 2006 version of the document.

9 *Rosado* is cited a number of times in this portion of the opinion because it contains a recent extensive discussion, based on expert testimony, of the ways in which psychiatric professionals assess the risk of sex offender recidivism. The *Rosado* decision considered these issues in the context of sex offender civil management proceedings under Article 10 of the Mental Hygiene Law rather than SORA determinations.

10 According to DCJS data as of August 23, 2010, there were 11,625 Level 1 offenders, 11,005 Level 2 offenders and 7701 Level 3 offenders. *See* DCJS Website, "Registered Sex Offenders by County", 2010.

11 *See generally,* Exhibit "A" to Volume "2" of Defendant's Exhibits, *Static 99 Coding Rules, Item# 3, Non–Sexual Violence–Any Convictions* ". This Exhibit discusses the parameters of actuarial research indicating that an offender with a concurrent conviction for a violent crime committed with a sex offense has a higher likelihood of recidivism.

12 Under Factor 1, 30 points are scored for an offender who is armed with a dangerous instrument but only ten points are scored for the use of forcible compulsion. Under Factor 2, five points are scored for sexual touching outside the clothing and 25 points are scored for sexual intercourse. The two hypothetical cases described here would each be scored with a total of 35 points under Factors 1 and 2.

13 *See* PL §§ 130.30(1) (where a defendant is less than 18 years old or a victim is more than 15 years old, that is a defense to the charge of Rape in the Second Degree; 130.30 (where a defendant is less than four years older than the victim, that age difference is an affirmative defense to the same crime).

14 *See* Penal Law §§ 130.75 (Course of Sexual Conduct against a child in the first degree, a Class B felony) and 130.80 (Course of sexual conduct against a child in the second degree, a Class D felony).

15 These two examples presume that the sexual relations between these two hypothetical pairs would be criminal only because of the victim's inability to consent because of her age.

16 The Commentary for this factor notes that the age distinctions in the RAI "are adopted from the Penal Law". Commentary, Factor 5. That is correct. However, the instrument adopts only *some* of the Penal Law's age distinctions. It omits others. For this reason, the instrument's age based distinctions vary significantly from those provided by statute.

17 The *Doe v. Pataki* stipulation recognizes this problem and explicitly instructs courts to make determinations about whether an offender's behavior subsequent to initial registration makes the risk for re-offense more or less likely. These determinations, however, must be made through departure decisions, since they cannot be scored by the RAI. *See* Stipulation, ¶ 13.

18 According to the New York State Division of Criminal Justice Services (DCJS), the efficacy of sex offender treatment is a complex issue on which there have been conflicting studies although "for many sex offenders, treatment can be successful ... *Myths and Facts,* Current Research on Managing Sex Offenders, April, 2008 (available from DCJS website)(hereafter "*Myths and Facts* "). The point here is not that the RAI has reached incorrect conclusions on that issue. The point is that, at least in the Court's view, the RAI's conclusions on the issue are indecipherable.

19 Commentary, General Principles, n.5.

20 The accomplice liability example provided by the Commentary is a crime in which "an offender held the victim down while his co-defendant had sexual intercourse with her" and raises the same issues which arise under the more targeted suggested departures discussed, *supra.* First, with respect to harm assessments, it invites a value judgment which is plainly contrary to the Penal Law. Under the Penal Law, an offender convicted as an accomplice is as guilty as a principal. Second, because it is a potential downward departure, it can result in an offender receiving a benefit which far outstrips many other point scores combined. If applied to a prior conviction, moreover, it could result in an offender receiving a benefit for that prior conviction beyond what would occur if the offender had never been previously

convicted of *any* crime. *See* discussion of the downward departure for the crime of Endangering the Welfare of a Child, Part VII, n.9, *supra.*

21 *See Brown v. Sanders,* 546 U.S. 212, 216 (2006). New York's death penalty statute, which was enacted in 1995 shortly before the enactment of SORA, required capital juries weighing whether to impose a death sentence to consider whether established aggravating factors substantially outweighed mitigating factors. *See* CPL 400.27(11); L.1995, ch.1. New York's death penalty statute is still on the books although the imposition of the death penalty was declared unconstitutional by the New York Court of Appeals in *People v. LaValle,* 3 NY3d 88 (2004).

22 *See* Federal Sentencing Guidelines Manual and Appendices (2009); New York death penalty statute, n.21 immediately, *supra.*

23 The determinations which fact-finders make under the sex offender civil management statute differ from those made under SORA. In Article 10 proceedings, however, like SORA determinations, an offender's risk to commit another sex crime is a highly relevant issue.

24 Decisions citing aggravating factors rather than mitigating factors are outlined here because the vast majority of appellate decisions which review trial court departure rulings consider whether the granting of an upward departure or the denial of a downward departure by a trial court was proper.

25 The Court was, of course, correct in asserting that the RAI does not score additional points when a defendant and a victim have a familial relationship. Rather, the instrument scores points if the defendant and the victim are *strangers.* As noted, *supra,* the RAI's addition of points for stranger offenders is not apparently based on the risk such offenders have to re-offend. The instrument, however, apparently inadvertently, does capture a known risk factor in adding points to the scores of offenders who are strangers to their victims.

26 The *Rodriquez* Court did not indicate why considering evidence that incest offenders were less likely to recidivate than non-incest offenders would be repugnant to the plain language of the statute. According to the New York State Division of Criminal Justice Services, "93% of victims under the age of 17 ... were assaulted by someone they knew ... 34% of these offenders were family members and 59% were acquaintances". *Myths and Facts, supra, citing* U.S. Department of Justice, Bureau of Justice Statistics, 2000.

27 The Court also noted that this point assessment did not seem to be "written with possessors of child pornography in mind". 11 NY3d at 420. The reason may be that New York's child pornography statute became effective on November 1, 1996, after the RAI was initially developed. (*See* Chapter 11 of the laws of 1996, codified in Penal Law § 263.16). The drafters of the RAI did not likely contemplate how the instrument might effect a statute which did not yet exist. These same application difficulties may also arise for any other new sex offender laws which have been enacted over the past 14 years or any sex offender laws enacted in the future.

28 The Court of Appeals analyzed a procedural due process challenge to SORA in *People v. David W.,* 95 N.Y.2d 130 (2000). In the *David W.* case, the Court of Appeals invalidated provisions of the statute which allowed the Division of Probation and Correctional Alternatives or a local probation department to establish the risk level of a sex offender placed on probation without notice or a hearing. The Court held that these procedures violated procedural due process. The statute was later amended to correct these deficiencies. In *David W.,* the Court characterized the liberty interest at stake in being wrongly classified as a Level 3 offender as "substantial" and a determination "that can have a considerable adverse impact on an individual's ability to live in a community and obtain or maintain employment". Since the *David W.* case the restrictions placed on SORA offenders by legislative enactment have become much more stringent. Most significantly, while Level 3 offenders were required to register for at least ten years when the *David W.* case was decided, such offenders now must register for life.

29 Of course, a non-sex offender who must register as a sex offender under SORA must also be assigned a risk level. This led one trial court to remark on the "irony entailed in having to assess the likelihood that the defendant will reoffend sexually ... when he has never committed a crime involving any actual, intended or threatened sexual misconduct in the first instance". *People v. Taylor,* 12 Misc.3d 1201(A), 2010 WL 1173055 (Westchester County Supreme Court, 2010, Cohen, J.), Slip Op. at 7.

30 *See Webster's II Dictionary,* Third Edition, Houghton Mifflin Company, 2005; *Black's Law Dictionary,* Eight Edition, Thompson, West Publishing, 2005.

31 By "classification errors" the Court does not mean risk level designations which would, upon a retrospective analysis, have been found to be wrong because an offender classified as being at a low risk for re-offense, for example,

committed another sex crime. An accurate classification, as used here, means a judicial risk classification which is not tainted by an irrational risk classification instrument and is based on probative evidence of an offender's re-offense risk.

32 *Johnson* has been cited in reported decisions more than two times. Only two reported cases, however, have cited or alluded to the expansive discretionary authority which was articulated by the Court in that matter.

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