To be argued by
KERRY FULHAM
(10 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

SCI No. 30092/2014
Appellate Case No. 2016-1219

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

ROBERT SUTTLE,

Defendant-Appellant.

On Appeal from the Supreme Court of the State of New York, New York County

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BRIEF FOR RESPONDENT

INTRODUCTION

Defendant Robert Suttle[1] appeals from a January 28, 2015 order of the Supreme Court, New York County (Arlene Goldberg, J.), adjudicating him a level-one sex offender pursuant to the Sex Offender Registration Act ("SORA") (Correction Law Article 6-C). That adjudication arose out of defendant's 2009 Louisiana conviction, upon his guilty plea, of Intentional Exposure to AIDS Virus. *See* La. R.S. § 14:43-5. As a result of that conviction, defendant was required to register as a sex offender in Louisiana. La R.S. §§ 14:43-5, 15:541, 15:542. After completing his

[1] Defendant abbreviates his name in his opening brief as an attempt to protect his confidentiality on the basis of Public Health Law § 2785(1), (3). However, defendant is not entitled to confidentiality when he is required to register as a sex offender. *See* Civil Rights Law § 50-b(1) (making confidential the identity of victim of an offense involving HIV transmission). Further, as demonstrated below, the Public Health Law does not provide him with any confidentiality regarding proceedings against him, and in any event he has waived any right to confidentiality in his HIV status.

prison sentence, defendant left Louisiana and moved to New York. Because of his obligation to register as a sex offender in Louisiana, the Board of Examiners of Sex Offenders ("Board") required defendant to also register in New York under SORA—specifically, under Correction Law § 168-a(2)(d)(ii), which requires registration if an individual has been convicted of "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred."

The Louisiana statute at issue here makes it a felony to "intentionally expose another to the human immunodeficiency virus (HIV)" through sexual or other contact "without the knowing and lawful consent of the victim." La R.S. § 14:43-5(A). Defendant pleaded guilty under the statute when his male partner reported to police that they had had sexual intercourse without defendant ever informing the partner about his HIV-positive status. As a result of this conviction, defendant was indisputably required to register as a sex offender in Louisiana. *See* La R.S. §§ 15:541, 15:542. Defendant has never filed a notice of appeal from the judgment of conviction and has never challenged the constitutionality of the Louisiana statute.

In early 2014, defendant moved to New York. In April 2014, relying on Correction Law § 168-a(2)(d)(ii), the Board determined that he was required to register as a sex offender in New York because his Louisiana sex offense required him to register as a sex offender in Louisiana. Defendant moved to dismiss the SORA hearing on the ground that requiring him to register in New York violated his

constitutional and statutory rights. On November 20, 2014, a SORA hearing was held before Justice Arlene Goldberg, after which the court adjudicated defendant a level-one sex offender.

On appeal, defendant contends that the SORA court erred in determining that he was required to register as a sex offender in New York based on his Louisiana conviction for Intentional Exposure to AIDS Virus. Specifically, defendant argues that applying Correction Law § 168-a(2)(d)(ii) to him violates his substantive due process rights under the federal and state constitutions and his statutory rights under the Public Health Law, because his HIV status is protected information.

These claims are meritless, and this Court should affirm. Contrary to defendant's characterization, the Louisiana statute is not a disclosure statute, but rather one that prohibits intentionally exposing another to HIV without that other person's consent. Defendant's conduct in Louisiana was not constitutionally protected, and he is wrong to say that he has either a constitutional right to privacy or a statutory right to confidentiality regarding either his sexual conduct when that conduct exposes another to HIV or the name of the crime of which he was convicted. Moreover, New York registration would not result in the disclosure of any of defendant's private information. Further, by publicly broadcasting his HIV-positive status, defendant has waived any claim that revealing that status through the registration requirement violates any right of his. It is defendant's burden to prove

the claims of unconstitutionality he brings before this Court, and defendant has utterly failed to meet that burden here.

STATEMENT OF THE CASE

A. Statutory Background

This appeal concerns the requirement that defendant register under New York's SORA. Part of defendant's arguments on appeal turns on the asserted applicability of the Public Health Law. Both statutory schemes are briefly described below.

1. SORA

The Legislature enacted SORA "to protect the public from sex offenders." *People v. Mingo*, 12 N.Y.3d 563, 574 (2009). In furtherance of that purpose, offenders who are convicted in New York of any enumerated "sex offense" are required to register, with differing requirements depending on an offender's risk-level classification, which reflects the risk of repeat offense and dangerousness to the community. *See* Correction Law § 168-a *et seq.*

These registration requirements also extend to offenders who are convicted of sex offenses outside of New York and then move here. Out-of-state convictions can trigger registration requirements in New York State in one of two ways. First, under the "essential elements" standard, an offender is required to register in New York if he has been convicted of "an offense in any other jurisdiction which includes all of the essential elements" of any New York "sex offense." Correction Law § 168-

a(2)(d)(i). Second, and pertinent here, under the "reciprocity" standard, an offender is required to register as a sex offender in New York if he has been convicted of "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." Correction Law § 168-a(2)(d)(ii).

The Legislature intended the reciprocity standard to "set[] forth a clear method to determine whether registration in New York State is required: if registration is required in the jurisdiction of conviction, registration will be required in New York." *See* Senate Introducer's Mem. in Support, 1999 N.Y. Senate Bill S6100, 1999 McKinney's Session Laws of N.Y. at 1866; Assembly Mem. in Support, 1999 N.Y. Assembly Bill A9020. This "clear" standard thus provided a bright-line and easily administrable rule for when a New York registration would be triggered by an out-of-state conviction, in place of the more complex comparison of state statutes that was necessitated by the essential-elements standard. *Id.* The Court of Appeals has clarified that, under the reciprocity standard, the deciding factor is not an out-of-state registration obligation standing alone, but rather the requirement to register *as a sex offender*, rather than for some other, non-sex-offense-related reason. *See People v. Diaz*, 32 N.Y.3d 538, 544 (2018).

2. New York Public Health Law

In New York, the Public Health Law governs the release of confidential information, including the disclosure of "confidential HIV related information" in

certain instances. Public Health Law § 2782. "Confidential HIV related information" is defined as "any information . . . concerning whether an individual has been the subject of an HIV related test, or has HIV infection, HIV related illness or AIDS, or information which identifies or reasonably could identify an individual as having one or more of such conditions." *Id.* § 2780(7). However, under the statute, that "confidential HIV related information" must be "in the possession of a person who provides one or more health or social services or who obtains the information pursuant to a release of confidential HIV related information." *Id.*

Public Health Law § 2785 provides that, "[n]otwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information, except . . . in accordance with the provisions of this section." Those provisions state that a court may order disclosure upon a showing that there exists "a compelling need for disclosure" in a criminal or civil proceeding, or "a clear and imminent danger" to "the public health" or to an individual whose health may be at risk as a result of contact with the individual to whom the confidential HIV related information pertains. Public Health Law § 2785(2).

Even as to information that is covered by the Public Health Law, there are a number of exceptions when disclosure is permitted. *See* Public Health Law § 2782(1)(a)-(s), (2)-(4). Further, there are provisions in the Criminal Procedure Law regarding HIV testing and attendant disclosure. For instance, the People can seek to have an HIV test done "for use in the prosecution of a pending criminal

proceeding." *Donald P. v. Palmieri*, 246 A.D.2d 597, 598 (2d Dept. 1998), citing former CPL 240.40(2)(b)(v) (current CPL 245.40[1][e]); *see also* CPL 210.16 (requiring HIV testing of criminal defendants, indicted for certain sex offenses, upon the request of the victim, and allowing disclosure of the test results to the victim); CPL 390.15 (requiring HIV testing of criminal defendants, convicted of certain sex offenses, upon the request of the victim, and allowing disclosure of the test results to the victim).

B. The SORA Proceeding

1. Risk Assessment Instrument and Case Summary

The following facts are drawn from the Risk Assessment Instrument ("RAI") prepared by the Board on April 15, 2014, after defendant moved to New York.

On June 30, 2009, defendant was convicted on a plea of guilty to the felony of Intentional Exposure to AIDS Virus, in violation of Louisiana Revised Statutes § 14:43-5.[2] The charge against defendant was filed when a 28-year-old former sexual partner reported to the police that he and defendant had had sexual intercourse without defendant ever informing the partner about defendant's HIV-positive status (Case Summary). A Louisiana court sentenced defendant to two years of unsupervised probation, which was amended later to include a six-month prison term (Case Summary). In January 2011, defendant was released from prison without any

[2] At the time of his conviction, Louisiana Revised Statute § 14:43-5 was titled Intentional Exposure to AIDS Virus. Its title has since been amended, and is now labeled Intentional Exposure to HIV.

supervision (Case Summary). Louisiana law provides that the crime of Intentional Exposure to AIDS Virus requires sex-offender registration in Louisiana. *See* La. R.S. § 14:43-5. (Case Summary).

In January 2014, defendant left Louisiana and moved to New York (Case Summary). In April 2014, relying on Correction Law § 168-a(2)(d)(ii), the Board determined that defendant was required to register as a sex offender in New York because his Louisiana sex offense required him to register as a sex offender in Louisiana (Case Summary).

The Board recommended that defendant receive a Total Risk Factor Score of 40 points, which rendered him a presumptive level-one risk offender.[3] More specifically, the Board assessed defendant 25 points for sexual intercourse with the victim without disclosing his HIV status as legally required in Louisiana, explaining that defendant's crime was considered a "sex crime" and a "crime of violence" (Case Summary). Because defendant was released without supervision, the Board assessed defendant 15 points under risk-factor 14 for release without supervision (Case Summary). The Board scheduled a hearing (Case Summary).

[3] The point distributions enumerated by the RAI are as follows: level-one (low): 0 to 70 points; level-two (moderate): 75 to 105 points; level-three (high): 110 to 300 (RAI). *See* Risk Assessment Guidelines and Commentary: 3.

2. Defendant's Pre-Hearing Motion

On June 6, 2014, defense counsel moved to dismiss the SORA proceeding on the ground that requiring defendant to register in New York violated his constitutional rights to substantive due process and equal protection, and separately violated the privileges and immunities clause (Defendant's SORA Court Motion ["Def. Mot."] at 2). As pertinent to this appeal, defendant contended that his Louisiana conviction—Intentional Exposure to AIDS Virus—could not require registration under SORA because there is no equivalent statute under the Penal Law that criminalizes that behavior (Def. Mot. at 2, 10). Instead, defendant emphasized, the New York Public Health Law affords confidentiality protection to an individual's HIV-related information (Def. Mot. at 10). Thus, according to defendant, requiring him to register as a sex offender violates his constitutional rights because registration would allegedly disseminate his private HIV status, and no state interest justifies that intrusion (Def. Mot. at 18, 20). He further contended that requiring registration in his case would violate New York public policy, so Correction Law § 168-a(2)(d)(ii) should be construed so as not to require registration (*see* Def. Mot. at 10-12, 15-16).

In response, the People stated that because defendant was convicted of a felony in Louisiana that required registration, the Board was correct in determining that defendant also had to register in New York once he established residency here (People's Response ["Peo. Resp."] 1 at 2). The People noted that New York policies have focused on protecting confidentiality relating to HIV testing and disclosure (Peo.

Resp. 1 at 3). The People opined that, because New York does not have an equivalent statute that criminalizes intentionally exposing someone to HIV, the SORA court could exercise its discretion to find that defendant did not have to register as a sex offender in New York (Peo. Resp. at 3-4).

On September 9, 2014, the Office of the Attorney General submitted a memorandum of law as amicus curiae on behalf of the Board, arguing that: 1) the SORA court did not have the discretion to refrain from classifying defendant as a sex offender, and 2) defendant's constitutional challenges to his Louisiana conviction should be presented to a Louisiana court (Attorney General's Memo ["A.G. Mem."] at 2). The Board explained that under Correction Law § 168-a(2)(d)(ii), it was required to find defendant registrable in New York based on his Louisiana conviction (A.G. Mem. at 2). That provision provides that an individual who commits an out-of-state offense must register as a sex offender in New York if the conviction was for a felony in another jurisdiction and required the offender to register as a sex offender in that state (A.G. Mem. at 6). Alternatively, the Board stated, if defendant represented that he would challenge the constitutionality of the Louisiana statute in a court of that state, as opposed to collaterally attacking the constitutionality of that statute in New York, it would not oppose the court deferring ruling on defendant's motion (A.G. Mem. at 3, 10-11). Absent that constitutional challenge in Louisiana, New York law required registration (A.G. Mem. at 3).

The People then submitted an amended response to defendant's motion, explaining that they originally misinterpreted *People v. Liden*, 19 N.Y.3d 271 (2012), as allowing the SORA court discretion in all instances (Peo. Resp. 2 at 1). However, under a corrected reading of the case, the People argued that the SORA court was required to adjudicate defendant a sex offender (Peo. Resp. 2 at 1). Therefore, the People agreed with the Board's recommendation of classifying defendant as a level-one sex offender (Peo. Resp. 2 at 3).

In papers dated October 2, 2014, defense counsel replied that it was unfair to force defendant to challenge the constitutionality of the Louisiana statute in a Louisiana court because he no longer lived there and did not have an attorney there (Def. Reply at 7). Moreover, there was no "viable remedy" for defendant to challenge his conviction in Louisiana because he had failed to challenge the statute within five years of his conviction, as is required under Louisiana law (*see* Def. Reply at 7). In any event, defendant contended that he was not challenging the constitutionality of the Louisiana statute as applied to him (Def. Reply at 7). Instead, defendant framed his argument as contending that the Louisiana statute that he pled guilty to is "facially void under the New York State and federal constitutions," and so his challenge could be heard by the SORA court (Def. Reply at 7-8).

3. The SORA Hearing

On November 25, 2014, defendant, defense counsel, the People, and the Office of the Attorney General acting on behalf of the Board appeared before Justice

Goldberg. The court began by noting that Louisiana has already upheld the constitutionality of the Intentional Exposure to AIDS Virus statute, so it found "no reason" to require defendant to litigate the issue in Louisiana or federal courts (H: 4).[4] However, the court rejected defendant's arguments that the statute was unconstitutional as applied to him in New York (H: 4). Instead, the court concluded, defendant was required to register as a sex offender in New York under Correction Law § 168-a(2)(d)(ii) because he was convicted of a felony in Louisiana that required registration and defendant's crime therefore "fits the definition of sex offender" under New York law (H: 4-5). The court also rejected defendant's argument that the Louisiana statute "punished consensual contact" (H: 4). Further, the court explained that while New York does not have an equivalent statute criminalizing exposing others to the AIDS virus, New York prosecutes such conduct as an assault or reckless endangerment (H: 5).

The court then discussed the privacy protections set out in the Public Health Law and the possibility that requiring defendant to register would reveal his HIV status (H: 6). The Board explained that because defendant's underlying conviction occurred outside of New York, the only publicly available information would be that defendant was convicted of an "out-of-state felony offense," with no further

[4] Parenthetical references preceded by "H" refer to minutes of the November 25, 2014 SORA Hearing; "H2" refers to minutes of the hearing occurring on January 28, 2015.

disclosure of the name of the conviction (H: 5-6). Defense counsel responded by referencing Correction Law § 168-l(6)(a), stating that if defendant is required to register, information regarding his case could be disclosed to "all sorts of law enforcement entities" and "all sorts of community groups" (H: 6).[5] Accordingly, counsel argued that it was "very difficult to guarantee" that some kind of disclosure concerning defendant's HIV status would not occur (H: 6).

The Board explained that counsel's concerns regarding the possibility for disclosure under Correction Law §168-l(6)(a) only applied to "in-state offender[s]," and when someone commits an offense in New York, there is more information disclosed, including the name of the offense (H: 6). But for those who commit offenses outside New York—like defendant—the risk of disclosure is far lower (H: 6-7). The Board again reiterated that because defendant's underlying offense occurred outside of New York, the name of his underlying conviction would not be publicly

[5] Correction Law § 168-l(6)(a) provides: "If the risk of repeat offense is low, a level one designation shall be given to such sex offender. In such case the law enforcement agency or agencies having jurisdiction and the law enforcement agency or agencies having had jurisdiction at the time of his or her conviction shall be notified and may disseminate relevant information which may include a photograph and description of the offender and which may include the name of the sex offender, approximate address based on sex offender's zip code, background information including the offender's crime of conviction, modus of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled, attends, is employed or resides and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at its discretion."

disclosed anywhere (H: 7). In its papers, the Board included an affidavit from the Program Manager of the Sex Offender Registry affirming that if defendant were adjudicated a level-one offender, his crime of conviction would be disclosed only as a "Non-NYS Felony Sex Offense" (A.G. Mem., Ex. at ¶ 10). At the hearing, the Board offered to include more information from the Program Manager as to the specific disclosure regarding defendant if counsel or the court felt it was necessary (H: 7).

Defense counsel maintained that the statutory scheme under the Correction Law does not limit disclosure when the underlying offense occurred out-of-state, even if the Board's practice is not to disclose specific facts of the underlying crime if the crime occurred outside New York (H: 7). Counsel further argued that the Correction Law does not specify what "local law enforcement does with this information" once they receive it (H: 7). Thus, counsel contended that the Board's position did not provide defendant with "adequate protection" (H: 7).

The court concluded that there was no constitutional basis for not requiring registration in defendant's case (H: 7). However, the court would consider issuing a protective order limiting the nature of defendant's underlying conviction to prevent disclosure of his HIV status (H: 8-9).

Following an adjournment, on January 28, 2015, the court assessed defendant 25 points for sexual intercourse with the victim under risk-factor 2 and 15 points for release without supervision under risk-factor 14 (H2: 5-6). That same day, the court issued a written decision in which it rejected defendant's arguments and adjudicated

him a level-one sex offender based on his Louisiana conviction (1/28/15 Decision at 1). In light of the Public Health Law's confidentiality protections concerning a person's HIV status, the court, with consent from the Attorney General's Office and defendant and the People having taken no position, issued a limiting order. The order barred the Division of Criminal Justice Services ("DCJS"), the Board and their agents, and the New York State Sex Offender Registry from disclosing any information, including the "name of the Louisiana offense under which defendant was convicted, that would result in the disclosure of defendant's HIV status, except pursuant to a request by law enforcement for use in a criminal prosecution" (1/28/15 Decision at 2).

ARGUMENT

THERE IS NO CONSTITUTIONAL OR STATUTORY BARRIER TO REQUIRING DEFENDANT'S REGISTRATION BASED ON HIS OUT-OF-STATE CONVICTION (Answering Defendant's Brief, Points I and II).

The SORA court correctly determined that defendant was required to register as a sex offender in New York under Correction Law § 168-a(2)(d)(ii). That provision provides that an individual who commits an out-of-state offense must register as a sex offender in New York if the conviction was for a felony in another jurisdiction and required the offender to register as a sex offender in that state. Defendant has never disputed the fact that his Louisiana crime—Intentional Exposure to AIDS Virus—was a felony in that state, or that he was required to register as a sex offender in Louisiana. Thus, defendant's Louisiana conviction was, under the plain terms of Correction Law § 168-a(2)(d)(ii), for a crime that required him to register as a sex offender in New York.

Defendant nonetheless contends that the SORA court erred in determining that he had to register as a sex offender because the application of Correction Law § 168-a(2)(d)(ii) to his situation purportedly violated his privacy rights under both substantive due process and New York's public policy protecting the confidentiality

of one's HIV status.[6] But defendant's claim of a privacy violation mischaracterizes both Louisiana and New York law. Contrary to defendant's assertion, his Louisiana conviction was not for mere "non-disclosure of his HIV status" (DB: 14), but rather for intentionally exposing somebody else to HIV without that person's informed consent. Cases recognizing a constitutional or statutory right to "avoid[] disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599 (1977), do not forbid state regulations of conduct that risks harm to others without their consent—even if such consent might require disclosures in the first instance. Moreover, whatever the nature of the Louisiana conviction, nothing about New York's registration regime reasonably risks public disclosure of defendant's HIV-positive status in any event.

Thus, properly understood, the only question in this case is whether constitutional or statutory privacy protections bar New York from imposing reciprocal registration obligations when (a) an out-of-state conviction concerns harmful sexual conduct, not just compelled disclosure of purely private information; and (b) New York registration would not result in the disclosure of private information in any event. The trial court correctly found no barrier to registration under the circumstances. This Court should affirm.

[6] Defendant does not challenge the constitutionality of Correction Law § 168-a(2)(d)(ii) on its face, but only as applied to defendant (*see* DB: 2 n.2).

A. Defendant's Claimed Privacy Interests Are Not Implicated by Either His Louisiana Conviction or by New York's Registration Requirements.

Defendant asserts that his privacy rights are implicated in two distinct ways here that preclude application of SORA's registration requirements. First, defendant claims that "his Louisiana conviction is for non-disclosure of his HIV status"; that such "non-disclosure" is constitutionally protected by substantive due process and, if it occurred here, would further be protected by Public Health Law § 2782; and that SORA's plain terms should thus not be applied to his situation (DB: 14-15). Second, defendant claims that SORA registration here would, in itself, "necessarily result[] in the disclosure of his HIV status" (DB: 15). Defendant is wrong on both counts.[7]

1. Defendant's Louisiana conviction was for intentional harmful sexual conduct, not for mere non-disclosure of purely private information.

Defendant's first argument relies on the faulty premise that the Louisiana statute here "criminalizes non-disclosure of one's HIV status to an intimate partner" (*e.g.*, DB: 18) and that relying on the Louisiana statute for SORA purposes would thus be contrary to public policy here. The Louisiana statute, however, is not principally directed at disclosure of private information at all. To the contrary, the statute criminalizes the conduct of intentionally exposing another to HIV through sexual or

[7] Defendant contends that any argument advanced by the Office of the Attorney General, which appeared as an amicus instead of a party, is unpreserved (*see* DB: 24). But the Attorney General was acting on behalf of the Board, whose actions were being challenged. Moreover, the court plainly took the Board's argument into account and used it as its basis for rejecting defendant's constitutional claims, which preserved the issue. *See generally* CPL 470.05(2).

other contact without that other person's knowing consent. *See* La R.S. § 14:43-5(A); *see also State v. Gamberella*, 633 So. 2d 595, 603 (La. Ct. App. 1993) (applying statute to "[d]efendant's conduct" or "engaging in sexual intercourse with the victim without having told her he was HIV positive"). "Disclosure" of one's HIV status is relevant only insofar as doing so might be necessary to ensure that the other person has given their informed consent to being exposed to HIV.

This type of regulation—prohibiting harmful conduct and protecting informed consent—is categorically different from the intrusions on purely private information at issue in the cases cited by defendant. For example, in *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994), the plaintiff's HIV status was "an intensely personal matter which he did not share even with his family, his friends, or his colleagues," and that became public only because of a press release from his employer announcing the settlement of an employment-discrimination claim. *Id.* at 265-66. There is no indication that the plaintiff's HIV status risked harm to others in any way, let alone because the plaintiff himself had intentionally exposed others to HIV. Because the plaintiff's HIV status thus did not affect third parties, his personal health information was "within the private enclave where he may lead a private life." *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (quotation marks omitted).

Here, by contrast, defendant's HIV status was not a purely private matter because he had intentionally exposed his partner to HIV when that partner had not been aware that defendant was HIV-positive and had not consented to being thus

exposed. Privacy rights under federal substantive due process are not facially implicated by state regulation of such conduct: defendant cites no case where a court has extended confidentiality protections to include a right to have potentially harmful sexual relations with others without their full consent. And even assuming that the Louisiana statute could be read to require a limited form of disclosure of private health information—here, to one's sexual partner in order to establish his knowing consent to HIV exposure—any such disclosure would be consistent with a legitimate public interest in preventing the further transmission of HIV and securing informed consent to sexual contact. *See Whalen*, 429 U.S. at 599-600 (noting that individuals have a protectable "interest in avoiding disclosure of personal matters," but upholding a New York statute authorizing the state to record the names and addresses of patients who received prescriptions for certain drugs); *Powell v. Schriver*, 175 F.3d 107, 112-13 (2d Cir. 1999) (explaining that a prison could disclose an inmate's status as HIV-positive if disclosure "would further legitimate penological interests"). Indeed, many jurisdictions have recognized that informed consent requires that prospective partners be fully informed of an individual's HIV-positive status.[8]

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[8] *See, e.g.*, *State v. Whitfield*, 132 Wash. App. 878, 898-99 (Wash. Ct. App. 2006) (upholding trial court's decision preventing defendant from raising a consent defense when he did not disclose his HIV-positive status to his sexual partner because "a person cannot consent unless he or she knows all relevant facts"); *United States v. Johnson*, 27 M.J. 798, 803 (A.F.C.M.R. 1988), *aff'd*, 30 M.J. 53 (C.M.A. 1990) (ruling that the defendant was not permitted to raise the defense of consent where he engaged in consensual unprotected sex without informing his sexual partner that he was HIV-positive). Most notably, in *State v.*
(Continued…)

To be sure, New York does not have the same criminal prohibition as Louisiana. But defendant goes too far in asserting that the conduct for which he pleaded guilty would be "affirmatively protected" here (DB: 14). The State generally continues to recognize that HIV remains a serious and potentially fatal disease that requires, at minimum, lifelong disease management. For example, as recently as 2016, HIV has been included as a "severe debilitating or life-threatening condition," alongside such medical diagnoses as cancer and ALS, that could allow a practitioner to issue a certification for the use of medical marijuana. 10 NYCRR 1004.2(a)(8)(ii).

Because of HIV's continued threat to health, the protection of victims who have been exposed to HIV is a state interest that is explicitly recognized in the Penal Law.[9] For example, Penal Law § 390.15 provides that, in any case where a defendant is convicted of an enumerated felony sex offense, "the court must, upon a request of

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(…Continued)
S.F., 483 S.W.3d 385, 386 (Mo. 2016), the Supreme Court of Missouri held, "the right to privacy does not permit [d]efendant to expose others to HIV in the course of sexual activities without first securing their knowing consent to such exposure."

[9] Defendant is preoccupied with the correlation between his actions and an actual risk of exposure (s*ee* DB: 9-10, 18). To that end, defendant contends the Louisiana statute is overbroad because it covers conduct that, in his view, poses no risk of AIDS transmission. However, defendant does not have standing to raise this claim as part of an as-applied challenge. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) ("a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court"). That is because defendant does not dispute that he in fact had the type of contact with his partner that could lead to transmission. *See United States v. Smith*, 945 F.3d 729, 736 (2d Cir. 2019) (holding defendant lacked standing when he challenged only portions of certain gun regulations that were "wholly unrelated to the proscription of his conduct").

the victim, order that the defendant submit to human immunodeficiency (HIV) related testing." Significantly, that provision authorizes disclosure of test results to various people, including "contacts" who are at reasonable risk of HIV transmission. *See* Penal Law § 390.15(6)(a)(ii). Additionally, as the SORA court explained, while New York does not have a statute that is the precise equivalent of the Louisiana provision criminalizing the intentional exposure of others to HIV, in some situations that conduct may be prosecuted as an assault or reckless endangerment (H: 5). *See People v. Williams*, 24 N.Y.3d 1129 (2015) (lower courts concluded that defendant could be prosecuted for second-degree reckless endangerment where he prevented partner from using condom, repeatedly reassured partner that it was safe for them to engage in unprotected sex, but infected partner with HIV).

Similarly, New York courts have found that a victim's knowledge of the defendant's HIV status may be relevant to consent for various purposes. *See People v. Serrano-Gonzalez*, 146 A.D.3d 1013, 1014 (3d Dept. 2017) (victim's knowledge of defendant's HIV status was "highly probative evidence" regarding the victim's choice to stop having sexual intercourse with defendant); *see generally People, on Complaint of Burke, v. Steinberg*, 190 Misc. 413, 417 (N.Y. Magis. Ct. 1947) (consent not a defense to a criminal assault charge where victims unaware of true facts). Thus, defendant goes too far in asserting that the conduct for which he pleaded guilty under Louisiana law would be constitutionally protected under New York law (DB: 14).

Defendant is also wrong to assert that the Public Health Law would protect the confidentiality of his HIV status if he were to engage in similar conduct here. The provisions cited by defendant are simply inapplicable to him. Under the Public Health Law, the "confidential HIV related information" that is protected must be "in the possession of a person who provides one or more health or social services or who obtains the information pursuant to a release of confidential HIV related information." Public Health Law § 2780(7); *see also* Bill Jacket, Letter from Senate Majority Leader John R Dunne, at 12 (The purpose behind Public Health Law § 2782 is to "keep HIV-related information within the health and social service setting and away from those who may use the information to discriminate against an individual who seeks testing, treatment or other services"). Neither factor is present here: defendant is not a provider of health or social services, and did not learn of his own HIV status as a result of a signed release. And, although defendant refers broadly to a purported public policy of confidentiality in New York, he does not actually point to any specific provision of the Public Health Law, or any other New York statute, that affords a person an untrammeled right to intentionally expose others to HIV without their knowing consent. Thus, defendant's assertion that the Public Health Law provides a reason to ignore the plain terms of SORA is flatly contradicted by the terms of the Public Health Law.

2. Requiring defendant to register on account of his Louisiana crime does not risk revealing any confidential information.

Defendant's second challenge to his SORA registration fails because registration under SORA would not, in fact, "necessarily result[] in the disclosure of his HIV status" (DB: 15, 19). Notably, defendant's concern centers solely on his fears about public disclosure of the title of his Louisiana conviction; he does not contend that the Board or the SORA court had any other medical records detailing his HIV history or any other personal medical records, or that any such information would or could be revealed to the public. Even as limited to the name of his crime, though, defendant is wrong. First, as a factual matter, defendant's registration as a level-one offender poses no risk of disclosing the name of the Louisiana statute under which he was convicted, and any claim to the contrary is not ripe. Second, and in any event, the name of defendant's conviction is not covered by the constitutional right to privacy or the Public Health Law. Finally, defendant has waived any right to confidentiality he might have had by his open advocacy about his own circumstances.

i. Defendant's HIV status will not be revealed by his SORA registration, and any claim to the contrary is not ripe for review.

To begin, defendant's legal claims are beside the point because his registration will not lead to dissemination of his HIV status, including through disclosure of the name of the Louisiana statute under which he was convicted. At defendant's urging, the court below issued an order specifically precluding DCJS, the Board, and the New York State Sex Offender Registry from disclosing *any* information to the public,

including the "name of the offense under which defendant was convicted, that would result in the disclosure of defendant's HIV status" (1/28/15 Decision at 2; H2: 3, 8).

The limited exception in the court's order—permitting disclosure "pursuant to a request by law enforcement for use in a criminal prosecution" (1/28/15 Decision at 2)—does not support defendant's privacy concerns (*see* DB: 15, 23). This exception is consonant with other provisions of the Criminal Procedure Law. *See* CPL 245.40(1)(e) (when accusatory instruments are pending and upon the People's motion, the court may order samples taken of bodily material, including for HIV tests). Even defendant acknowledges that HIV testing can be done for use in a criminal proceeding (*see* DB: 21, citing former CPL 240.40[2][b][v], now codified as CPL 245.40[1][e]); *see also Palmieri*, 246 AD2d at 598 (cited in DB: 22) (the People can seek to have an HIV test done "for use in the prosecution of a pending criminal proceeding"). In short, in including this exception, the court simply incorporated an exception the law already recognizes.

The court's order by itself defeats defendant's claim that SORA registration here would violate any rights he has to keep his HIV status confidential. But even setting the court's order aside, the name of defendant's Louisiana conviction would still not be disclosed as a result of his registration as a level-one sex offender in New York. As a level-one offender, defendant's registry information is not released on the Internet. *See* Correction Law § 168-q (requiring a subdirectory of registered level-two and -three sex offenders on the internet). Instead, upon a telephone request about a

specific individual, DCJS is permitted to inform the caller that defendant is a registered sex offender, but is *not* permitted to disclose significantly more information than that. *See* Correction Law §§ 168-p(1), 168-q(1). Instead, as the Board explained to the court below, the only information that the caller would learn is that defendant is a registered sex offender based on "an out-of-state felony" (H: 5-6). There would be no further disclosure of the name of the crime of which he was convicted, or to any of the underlying facts, and thus no mechanism for disclosing defendant's HIV status (H: 5-6).

Defendant nevertheless argues that Correction Law § 168-l(6)(a) authorizes a law enforcement agency to disseminate the "crime of conviction" to "any entity with vulnerable populations related to the nature of the offense," and that any entity who receives such information may "further disseminate" it at its "discretion" (DB: 22-23). At the hearing, however, the Board explained that, for out-of-state offenders, the name of the underlying conviction would *not* be publicly disclosed anywhere (H: 6-7). In its papers, the Board included an affidavit from the Program Manager of the Sex Offender Registry affirming that if defendant were adjudicated a level-one offender, his crime of conviction would be disclosed only as a "Non-NYS Felony Sex Offense" (A.G. Mem., Ex. at ¶ 10). The explanation and assurances the Board gave to the court obviate defendant's concerns about exposure of his HIV status, even apart from the court's order prohibiting disclosure.

At minimum, this information makes defendant's concerns about public disclosure of his Louisiana criminal conviction premature and unripe. *See Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996). Defendant can rely on nothing other than speculation to support his fear that, notwithstanding the Board's representations and the lower court's order precluding disclosure, his information might somehow become public in the future. Accordingly, defendant has failed to allege a cognizable injury from the court's order adjudicating him a level-one sex offender and, thus, his claim is not ripe for review. *See Doe v. Cuomo*, 755 F.3d 105, 114 (2d Cir. 2014).

ii. The title of defendant's crime of conviction is not confidential information under the Public Health Law or substantive due process in any event.

At any rate, defendant has neither a right under the Public Health Law nor a substantive due process right to non-disclosure of the mere title of his Louisiana conviction. First, the name of defendant's crime of conviction is not "confidential HIV related information" under the Public Health Law. As discussed above, information so qualifies only if it was obtained "in the course of providing any health or social service or pursuant to a release of confidential HIV related information." Public Health Law §§ 2780(7), 2782. New York authorities did not learn the title of defendant's crime by either of those means. Moreover, the HIV confidentiality provisions of the Public Health Law do not "bar the public from knowledge of" a court proceeding. *Flynn v. Doe*, 146 Misc. 2d 934, 936 (Sup. Ct., N.Y. Co. 1990)

(finding that article 27–F of the Public Health Law does not provide authority to provide anonymity to an AIDS patient who was a defendant in a suit alleging fraud related to sexual transmission).

To the extent defendant relies on the limits on court-ordered disclosures pursuant to Public Health Law § 2785 (*see* DB: 29), here, too, defendant's argument is misplaced. Public Health Law § 2785 only deals with material that falls under the definition of "confidential HIV related information," which, once again, does not apply here. Perhaps more fundamentally, there was no court-ordered disclosure of defendant's HIV status. To the contrary, the court expressly *precluded* any disclosure of his underlying crime that would result in the disclosure of defendant's HIV status, providing only an exception that, as demonstrated, parallels existing law.

Nor does defendant have a substantive due process right to non-disclosure of the title of his Louisiana conviction. *Doe* itself states that the confidentiality right in one's HIV status does not cover information that is a matter of public record. *Doe*, 15 F.3d at 268 ("Certainly, there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record."). Louisiana included the challenged information in the name of its statute, and the name of defendant's conviction is a matter of public record in Louisiana. *See Roshto v. Hebert*, 439 So. 2d 428, 432 (La. 1983) (newspaper could not be liable for invasion of privacy for accurately describing details of local criminal convictions for which plaintiffs were subsequently pardoned, as their convictions were matters of public record). Similarly,

New York "has a policy of open access to public records, including criminal convictions." *Lawrence v. State*, 180 Misc. 2d 337, 342 (Ct. Cl. 1999) ("Claimant's prior conviction was not something for which he can claim a reasonable expectation of confidentiality or privacy").

iii. Defendant has waived his right to confidentiality in his HIV status.

Finally, defendant has waived any right to confidentiality in his HIV status because he has repeatedly shared his HIV diagnosis with the public.

The Second Circuit held that the right to maintain confidentiality in one's HIV status may be subject to waiver. *See Doe*, 15 F.3d at 270; *Powell*, 175 F.3d at 112 n.1. Here, defendant has waived any confidentiality interest he may have had by widely broadcasting his HIV status. Defendant himself emphasizes that he has discussed his HIV status and his underlying conviction "on panels around the country and internationally, including at a meeting of the Joint Co-Sponsored Programs of the United Nations on HIV/AIDS in Geneva, Switzerland" (DB: 5), and at "UNAIDS meetings in Switzerland, Norway and scores of other venues around the U.S., including law schools, graduate schools of public health, community and professional organizations" (Def. Mot. at Ex. A). Defendant has become a public "advocate" (*see id.* at Ex. E) and has regularly spoken and written about his HIV status and his conviction in the hopes that statutes like the one under which he pled guilty will be reformed (*see id.* at Ex. A; *id.* at Exs. B, D [for three years defendant has spoken "on panels around the country and the world" and has "educat[ed] legislators and

organiz[ed] allies around this issue"]). Defendant's HIV diagnosis is the subject of a short documentary entitled *HIV Is Not A Crime (see id.* at Ex. A). Simply put, defendant cannot seek to invalidate New York's SORA requirements based on his purportedly private HIV status when he has affirmatively and repeatedly announced it in the public domain for so long. *See Application of Gribetz*, 159 Misc. 2d 550, 553 (Co. Ct., Rockland County 1994) (finding that defendant waived her privacy interest in the results of her HIV test when she "announced publicly on more than one occasion that she was H.I.V. positive"); *see also Trevino v. Davis*, 283 A.D.2d 156, 156 (1st Dept. 2001) (where defendant volunteered his HIV positive status in response to questions at his deposition, his motion for protective order against use of his medical records was properly denied).

B. Requiring Reciprocal Registration Here Is Consistent with New York Public Policy.

For the reasons given above, and contrary to defendant's characterization, this case does not involve a situation where a defendant's out-of-state conviction involves either a clear violation of constitutional or statutory privacy rights, or conduct that would be "affirmatively protected" if it took place here (DB: 14). Instead, defendant's out-of-state conviction involves sexual misconduct that, while not criminal here, implicates public interests that New York recognizes in other ways. Requiring reciprocal registration under the circumstances is consistent with New York public policy.

As an initial matter, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." *People v. Bloomfield*, 6 N.Y.3d 165, 170 (2006). Thus, defendant was required to register because the terms of Correction Law § 168-a(2)(d)(ii) are plain on their face—he was convicted of a felony in a state that required him to register as a sex offender, so he must also register in New York.

The legislative history confirms this conclusion. The Legislature's purpose in enacting Correction Law § 168-a(2)(d)(ii) was to provide "a clear method" for determining whether a person convicted of a felony in another jurisdiction is required to register as a sex offender in New York. A straightforward process for deciding whether registration is required was the touchstone. Indeed, the enactment of this provision was motivated by the passage of federal statutes that were designed to encourage States to effectively gather registration information and share it with other States as registered offenders moved throughout the country. *See* 139 Cong. Rec. H10321 (Nov 20, 1993) (statement of Rep. James M. Ramstad) (federal statutes designed to "prod all States to enact similar laws and to provide for a national registration system to handle offenders who move from one State to another").

Moreover, requiring defendants to continue to register even after they move to another State is substantially related to the important governmental objectives underlying the adoption of SORA. "States have a legitimate interest in requiring offenders who commit registerable offenses in other jurisdictions to register in their

new state of residence. If provisions like Correction Law § 168-a[2][d][ii] did not exist, an offender could avoid sex offender registration requirements simply by moving his state of residence, thereby frustrating the purpose behind sex offender registration laws." *People v. McGarghan*, 18 Misc. 3d 811, 814 (Sup. Ct., N.Y. Co. 2007), *aff'd*, 83 A.D.3d 422 (1st Dept. 2011); *see Dewine v. State of New York Bd. of Examiners of Sex Offenders*, 89 A.D.3d 88, 92-93 (4th Dept. 2011) (discussing "the unintended and undesirable effect of encouraging sex offenders convicted in other states to evade the registration requirements of those states by relocating to New York"). The need to ensure that sex offenders cannot avoid registration requirements simply by moving exists even if the offense would not require registration if it had been committed in the state to which the registrant moves. In addition, in enacting this provision, the Legislature recognized that there could be additional circumstances justifying registration not covered by New York criminal provisions, and requiring out-of-state offenders thus further advances SORA's public safety goals. *See* Bill Jacket, Arguments in Support, L. 1999, ch. 453 ("[e]nactment of this legislation [Correction Law § 168-a(2)(d)(ii)] is essential to public safety as it widens the number of sex offenses deemed predictive of continuing criminal behavior after conviction").

Appellate courts in other States have recognized this core purpose of foreign registration provisions and upheld the validity of laws such as Correction Law § 168-a(2)(d)(ii). For example, in *Hendrix v. Taylor*, 353 S.C. 542 (2003), *overruled on other grounds*, *Powell v. Keel*, 433 S.C. 457 (2021), the Supreme Court of South Carolina ruled

that the defendant's equal protection rights were not violated when he was forced to register on the South Carolina sex offender registry for an offense he committed in Colorado when the equivalent offense, if committed in South Carolina, would not have triggered the requirement that he register. *Hendrix*, 353 S.C. at 547. That court reasoned, "the state's action is reasonable because the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal. Registering persons who committed crimes in another state when they move to South Carolina is a reasonable method of achieving this goal." *Id.* at 551; *see also Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005) (in discussing constitutionality of Florida's Sex Offender Act, noting that "[w]ithout such a [registration] requirement, sex offenders could legally subvert the purpose of the statute by temporarily traveling to other jurisdictions for long periods of time and committing sex offenses without having to notify law enforcement").

Thus, even though defendant emphases that his offense supposedly had no registrable New York equivalent (*see* DB: 14, 25), that fact alone does not excuse defendant from registering under Correction Law § 168-a(2)(d)(ii). This Court has already recognized that the Legislature deliberately chose to make some out-of-state felonies registrable based solely on how they are treated in the foreign jurisdictions, with no equivalency requirement. *See People v. Hoyos-Sanchez*, 147 A.D.3d 701, 702 (1st Dept. 2017); *see also Matter of Kasckarow v. Bd. of Examiners of Sex Offenders*, 33 Misc. 3d 1028, 1035 (Sup. Ct., Kings Co. 2011) ("[T]he lack of an equivalent New York felony

conviction is not grounds for exempting petitioner from the registration requirement"), *aff'd*, 106 A.D.3d 915 (2d Dept. 2013), *aff'd*, 25 N.Y.3d 1039 (2015).

There are certain instances under SORA that allow defendants to move for an exemption from registration based on the individual circumstances of the defendant's case. Significantly, though, this fact-specific inquiry is limited to those defendants convicted of unlawful surveillance. Correction Law § 168-a(2)(e). The Legislature's failure to carve out a similar exception for offenses falling within § 168-a(2)(d)(ii) is further confirmation that SORA was intended to apply to these offenses, regardless of their particular facts. *Coleman v. City of New York*, 91 N.Y.2d 821, 823 (1997).

Defendant nonetheless argues that the Legislature did not intend SORA to apply to his underlying conviction due to the confidentiality concerns embodied by and the legislative intent underlying the Public Health Law (DB: 19-20). But, as explained above, the Public Health Law would not impose confidentiality requirements here in any event, so the very premise of defendant's argument is wrong. Nor can defendant rely upon selected legislative memoranda from an entirely separate Public Health Law statute to justify overruling the unequivocal language in the SORA statute.

Finally, defendant relies on this Court's opinion in *People v. Diaz*, 150 A.D.3d 60 (1st Dept. 2017), *aff'd*, 32 N.Y.3d 538 (2018) (cited in DB: 25). The defendant in *Diaz* murdered his 13-year-old half-sister, and was required to register in Virginia under a system that required registration for both sex offenders and offenders who committed

nonsexual crimes against minors. This Court concluded that Correction Law §168-a(2)(d)(ii), as applied to the specific facts of the case, violated the defendant's substantive due process rights because the defendant's Virginia offense did not involve any sexual motivation or conduct or have a "sexual component" whatsoever, and so having the defendant register as a sex offender in New York was not rationally related to the purpose behind SORA—to protect people from potential harm posed by sex offenders. *See Diaz*, 150 A.D.3d at 65.

Diaz is wholly inapplicable to the instant case for two reasons. First, the Court of Appeals decided the case on a different ground, holding that registration here was not required because, under Virginia law, the defendant was not registering "as a sex offender" but instead for a different reason. *Diaz*, 32 N.Y.3d at 545. By contrast, here, defendant was indisputably required to register as a sex offender in Louisiana.

Second, to the extent this Court's decision in *Diaz* still has precedential value, it is readily distinguishable. Unlike the defendant in *Diaz*, defendant's offense involved a sexual component—defendant intentionally and non-consensually exposed his former partner to HIV through sexual intercourse (*see* RAI Factor 2 scoring defendant 25 points for sexual intercourse with victim). And, as noted, his offense involved depriving his sexual partner of the ability to give truly knowing consent to sexual conduct. As such, requiring defendant to register in New York is substantially related to protecting the public from future acts of sexual misconduct.

* * *

In sum, the court correctly determined that, under the plain terms of Correction Law § 168-a(2)(d)(ii), defendant was required to register in New York on account of his Louisiana conviction. The confidentiality protections of the Public Health Law and substantive due process are not implicated here, nor do they provide any reason to ignore the plain language of the Correction Law.

CONCLUSION

The order of the Supreme Court should be affirmed.

Respectfully submitted,

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