SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

FILED

DEC 08 2016

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

-against-

JASON ALEXANDER,

Defendant.

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FILED and ENTERED

12/8/16

WESTCHESTER
COUNTY CLERK

DECISION AND ORDER

Superior Court Information
No. 15-0910

CACACE, J.

On December 6, 2016, upon the appearance of the defendant with his retained attorney, Andrew Rubin, Esq., and the appearance of Assistant District Attorney Laura Forbes, this Court conducted a risk level determination proceeding under the dictates of Article 6-C of the Correction Law, otherwise known as the Sex Offender Registration Act (hereinafter, SORA). Pursuant to the requirements of Correction Law § 168-d, this proceeding was conducted in a manner consistent with the guidelines set forth in subdivision five of Correction Law § 168-l, which require the hearing court to determine the duration of the sex offender's registration obligations under Correction Law § 168-h, the degree of risk of re-offense presented by the sex offender insofar as same is relevant to the nature of the sex offender's notification obligations under Correction Law § 168-l(6), and the designation of the sex offender as either a "sexually violent offender", a "predicate sex offender" or a "sexual predator" within the meaning of Correction Law § 168-a(7). Upon completion of the instant SORA risk level determination proceeding, this Court makes the following findings of fact and conclusions of law:

Findings of Fact

Upon his entry of his guilty pleas before this Court under the instant indictment on January 19, 2016, the defendant was convicted of a single count of Promoting an Obscene Sexual Performance by a Child in violation of Penal Law § 263.10, and a single count of Possessing an Obscene Sexual Performance by a Child in violation of Penal Law § 263.11. In connection with the entry of his guilty pleas, the defendant admitted that he knowingly produced, directed and promoted an obscene performance on a computer file on or about June 23, 2015, which depicted sexual conduct by a child of less than 17 years-of-age while knowing the content and character thereof, and he further admitted that on July 24, 2015 he knowingly had in his possession and control, and knowingly accessed with intent t to view, a sexual performance which depicted sexual conduct by a child of less than 16 years-of-age while knowing the content and character thereof. On June 28, 2016, the defendant was sentenced by this Court to serve a 10 year term of probation supervision for each of the crimes of conviction, designating them to run concurrently with one another, in conjunction with the imposition of the mandatory surcharge, DNA Databank Fee, Crime Victim Assistance Fee, Sex Offender Registration Fee, and Supplemental Sex Offender Victim Fee.

During the course of the instant risk assessment determination proceeding, the People submitted material for the Court's consideration, including the Risk Assessment Instrument (RAI) prepared by ADA Forbes which was admitted into evidence as People's Exhibit #1, a copy of the instant superior court information (SCI) which was admitted into evidence as People's Exhibit #2, a copy of the defendant's pre-sentence investigation report (PSR) which was

admitted into evidence as People's Exhibit #3, a copy of an affidavit from Criminal Investigator Andrew Grascia which was admitted into evidence as People's Exhibit #4, a copy of an optical disc containing image files which was admitted into evidence as People's Exhibit #5, a copy of another optical disc containing image files which was admitted into evidence as People's Exhibit #5a, a list of the Frostwire files retrieved from the defendant's computer which was admitted into evidence as People's Exhibit #6, a list of Torrent File Fragments retrieved from the defendant's computer which was admitted into evidence as People's Exhibit #7, and a Psychosexual Evaluation of the defendant prepared by Dr. N.G. Berrill, Ph.D. which was admitted into evidence as People's Exhibit #8. In reliance upon their submission of the above-referenced materials and the oral argument they presented, the People submit that the defendant should be designated a Risk Level Two sex offender based upon the allocation of eighty (80) points to his Total Risk Factor Score. As proposed by the People, the recommended Total Risk Factor Score of eighty (80) points would be derived from the allocation of thirty (30) points pursuant to Risk Factor #3 "Number of Victims", thirty (30) points pursuant to RAI Risk Factor #5 "Age of victim", and twenty (20) points pursuant to RAI Risk Factor #7 "Relationship with victim". In addition, the People have advised the Court and the defense that they do not seek an adjudication of the defendant as either a "sexually violent offender", "predicate sex offender", or a "sexual predator", nor do they seek an upward departure from the defendant's presumptive Risk Level Two designation.

During the course of the instant risk assessment determination proceeding, the defense also submitted material for the Court's consideration, including the Clinical Treatment Report prepared by Dr. Douglas Martinez, Ph.D., a letter prepared by Cititherapy Counseling Services, a

Psychiatric and Risk Assessment Report prepared by Dr. Richard B. Krueger, M.D., and a Polygraph Examination Report prepared by Vescio Family Advisors, all of which were collectively admitted into evidence as Defense Exhibit A, and a Psychosexual Evaluation Report prepared by Dr. N.G. Berrill, Ph.D. which was admitted into evidence as Defense Exhibit B. Specifically, the defense challenges the People's recommendations in support of a Risk Level Two designation in reliance upon their argument that the Court should allocate only sixty (60) points to his Total Risk Factor Score which would result in a presumptive designation of the defendant as Risk Level One sex offender. In connection therewith, although the defense concedes the propriety of allocating twenty (20) points pursuant to RAI Risk Factor #5 "Age of victim", the defense challenges the propriety of allocating thirty (30) points pursuant to RAI Risk Factor #3 "Number of Victim", and twenty (20) points pursuant to RAI Risk Factor #7 "Relationship with victim".

Conclusions of Law

Pursuant to Article 6-C of the Correction Law, this Court is required to determine the duration of the defendant's registration obligations upon application of the guidelines set forth in Correction Law § 168-l(5), and to determine the defendant's level of notification upon consideration of the factors set forth in Correction Law § 168-l(6). In conjunction with a determination of the duration of the defendant's registration obligations, this Court must also determine whether the defendant shall be designated a sexual predator, sexually violent offender, or a predicate sex offender as defined in Correction Law § 168-a(7).

Upon considering the recommendations of the People, as evinced through the RAI prepared in connection with the instant proceeding, this Court has considered the Risk Assessment Guidelines and Commentary (hereinafter, the Guidelines) prepared by the Board in connection with the calculation of the defendant's Total Risk Factor Score and presumptive risk assessment level. In connection with the calculation of a sex offender's Total Risk Factor Score, the Court is mindful that "[p]oints should not be assessed for a factor . . . unless there is clear and convincing evidence of the existence of that factor" (*see* "Sex Offender Registration Act": Risk Assessment Guidelines and Commentary, at 5 [2006]; *see also People v Salaam*, 174 Misc.2d 726). As the defense does not oppose the allocation of twenty (20) points to the defendant's Total Risk Factor Score under RAI Risk Factor #5, the Court will only address the merits of the People's proposed allocation of points to the defendant's Total Risk Factor Score under RAI Risk Factors #3 and #7.

Turning first to consider the People's application seeking the allocation of thirty (30) points to the defendant's Total Risk Factor Score pursuant to RAI Risk Factor #3 "Number of victims", the Court notes that in support thereof the People rely upon Exhibit #2 which reflects two separate video files seized from the defendant's possession, as well as Exhibit #4 which reflects Investigator Grascia's forensic examination-based findings that the video files located on the defendant's computer contained images of seven distinct children between 6 and 16 years-of-age who are engaged in sexual performances and conduct. The defense opposes the People's application in this regard, arguing that the Court should follow the Board's 2012 Position Statement, and should not follow the Court of Appeals' decisions in *People v Johnson* and *People v Gillotti*, presumably to the extent that the reasoning therein requires consideration of the

children whose images appear on the defendant's video files to be victims of a nature sufficient to justify the allocation of points to the defendant's Total Risk Factor Score pursuant to RAI Risk Factor #3.

Having considered the defense challenge, this Court conducted a scrutinizing examination of People's Exhibit #4, which included Investigator Grascia's stated level of experience regarding his numerous investigations involving "computer-related child endangering and collectors of child pornography", as well as his stated findings based upon his "extensive training in the area of computer forensics" that the video images recovered from the defendant's computer included images which "contain obscene sexual performances of children ages ten and under". As an affidavit prepared by a law enforcement official upon the conclusion of a criminal investigation has been held to constitute reliable hearsay evidence for consideration by the hearing courts under SORA, this Court credits the conclusions reached by Investigator Grascia in People's Exhibit #4 regarding the ages of the children depicted in the video files recovered from the defendant's computer (*see People v Mingo*, 12 NY3d 563; *see also People v Epstein*, 89 AD3d 570). Additionally, the Court notes that the Court of Appeals recently held in *People v Gillotti* (23 NY3d 841) that the Position Statement prepared by the Board in 2012 does not serve to preclude a SORA court's authority to allocate points under RAI Risk Factor #3 to the Total Risk Factor Score of child pornography offenders. Furthermore, this Court finds that the defendant's argument concerning Risk Factor #3 is unsupported by the Board's Position Statement and is patently inconsistent with the holding of the Court of Appeals in *People v Johnson* (11 NY3d 416), which specifically held that a defendant who has been charged with the possession of images of child pornography depicting several (more than three) distinct children

who are unknown to him or her, will be deemed to have victimized more than three child victims who were strangers within the meaning of RAI Risk Factors #3 and #7 (*People v Bretan*, 84 AD3d 906; *People v Blackman*, 78 AD3d 803; *People v Yen*, 33 Misc.3d 1234[A]). Accordingly, based upon the unambiguous guidance provided by the precedent case law cited herein which defines the scope of RAI Risk Factor #3, and the inapplicability of the Board's Position Statement to the scoring methodology pertaining to this Risk Factor, the People's application seeking the allocation of thirty (30) points to the defendant's Total Risk Factor Score under RAI Risk Factor #3 "Number of victims" is granted.

Turning next to consider the People's application seeking the allocation of twenty (20) points to the defendant's Total Risk Factor Score under RAI Risk Factor #7 "Relationship with victim", the People argue that the Court should allocate twenty (20) points thereunder toward the defendant's Total Risk Factor Score in reliance upon a finding that the defendant was a stranger to each of the children whose images were depicted in the video files recovered from his computer. The defense opposed the People's application in a conclusory manner by simply asserting that the evidence proffered in support thereof was insufficient. Upon consideration of the People's application, the Court notes that it is now well-settled by the holding of the Court of Appeals in *People v Gillotti* (23 NY3d 841), which stands for the proposition that a defendant who is convicted of a sex offense involving the possession of child pornography may be assessed the applicable number of points under RAI Risk Factors #3 and #7 where the pornographic images he or she possessed depicted three or more children who were not known to the defendant, based upon the well-settled premise that children depicted in pornographic images constitute "victims" for the purpose of calculating a sex offender's Total Risk Factor Score under

SORA (*see People v Johnson*, 11 NY3d 416; *see also People v Brown*, 116 AD3d 1017, *lv. denied* 24 NY3d 901; *People v Perahia*, 57 AD3d 865). Accordingly, the People's application seeking the allocation of twenty (20) points toward the defendant's Total Risk Factor Score under RAI Risk Factor #7 is granted.

Upon consideration of the foregoing, the Court finds that after allocating the applicable point total to each of the statutory recidivism risk factors set forth in the RAI, a total of eighty (80) points is appropriately allocated to the defendant's Total Risk Factor Score, which provides for a presumptive finding that the defendant should be classified as a Risk Level Two sex offender. As the defendant's Total Risk Factor Score results in a presumptive finding that he is a Risk Level Two sex offender, and noting that the People have not moved the Court for either an upward departure from that presumptive risk level, or for the application of an override, the Court will next consider the defense application seeking a downward departure from the presumptive Risk Level Two designation to a Risk Level One designation.

Although the presumptive risk level provides a rebuttable presumption, the calculation reached by the courts upon utilization of the RAI will generally "result in the proper classification in most cases so that departures will be the exception not the rule" ("Sex Offender Registration Act": Risk Assessment Guidelines and Commentary, at 4 [2006]; *see People v Williams*, 19 AD3d 388, *lv. denied* 5 NY3d 713; *see also People v Guaman*, 8 AD3d 545). Upon consideration of an application seeking a departure from a presumptive risk assessment level, the courts are specifically authorized to depart upwardly or downwardly from same when "there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines" (Board of Sex Offense Examiners, "Sex Offender

Registration Act": Risk Assessment Guidelines and Commentary, at 4 [2006]; *see People v White*, 25 AD3d 677, *lv. denied* 6 NY3d 715; *People v Henry*, 91 AD3d 927). In this regard, the SORA courts have the discretion to grant the application of a sex offender seeking a downward departure from his or her presumptive risk level when he or she makes a twofold showing, first identifying "as a matter of law, an appropriate mitigating factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines" (*People v Wyatt*, 89 AD3d 112, 128; *see People v Benjamin*, 105 AD3d 926; *People v Washington*, 105 AD3d 724; *People v Madison*, 98 AD3d 573, 574), and second, proving by a preponderance of the evidence that the facts alleged to constitute a mitigating factor are sufficient to warrant a departure from the presumptive risk level (*see People v Wyatt*, 89 AD3d at 127-128; *see also People v October*, 101 AD3d 975, 976; *People v Watson*, 95 AD3d 978, 979).

Here, the defense supports their application for a downward departure from the presumptive Risk Level Two designation to a Risk Level One designation in reliance upon Defense Exhibits A and B which are collectively comprised of a multitude of psychiatric diagnostic and treatment reports prepared by the defendant's several treatment providers. Upon consideration of these reports it is evident that the defendant has been particularly responsive to his psychiatric treatment regimen, which provides for clinical treatment and counseling services related to the defendant's child pornography interests, as well as his own sexual victimization by an older male child when both of them were pre-pubescents. In addition, the defense has submitted the Clinical Treatment Report prepared by Dr. Douglas Martinez, Ph.D., and a Psychiatric and Risk Assessment Report prepared by Dr. Richard B. Krueger, M.D., which

collectively relate that the defendant is not a pedophile and that he has developed a deep sense of remorse for his criminal conduct, which lead them to conclude that he presents a low risk to re-offend. Although these reported findings are significant to an assessment of the degree of risk to the public posed by the defendant, the Court finds even greater significance in the defendant's demonstrated degree of insight into his criminal behavior, as he has demonstrated to his therapists that he now possesses an appreciation of the harm that is caused to the innocent children who are victimized by criminal conduct such as that underlying the instant conviction. Accordingly, upon due consideration of the defense application for a downward departure from the defendant's presumptive Risk Level Two designation, this Court concludes that the defendant has successfully met his burden to establish by a preponderance of the evidence that he presents such a low risk of reoffense and danger to the community that a downward departure from his presumptive Risk Level Two designation is warranted. Consequently, having found that the defendant has satisfied his burden of proof with regard to the requisite two-fold showing established in *People v Wyatt* (89 AD3d at 121), this Court hereby grants the defendant's application to downwardly depart from his presumptive Risk Level Two designation to a Risk Level One designation (*see People v Henry*, 106 AD3d 796, *lv. denied* 21 NY3d 863; *People v Washington*, 105 AD3d 724; *People v Shepard*, 101 AD3d 978, 979; *People v Martin*, 90 AD3d 728).

With respect to the Court's additional obligation to determine whether the defendant shall be designated a sexually violent offender, predicate sex offender or sexual predator within the meaning of Correction Law § 168-a(7), the Court finds that the defendant's crime of conviction does not satisfy the criteria necessary to require that he be designated thereunder for the purpose

of determining his applicable level of notification.

Accordingly, as the record of this proceeding establishes that the defendant has met his burden to provide this Court with the discretion to downwardly depart from his presumptive designation as a Risk Level Two sex offender, the defendant is hereby classified a Risk Level One sex offender and is hereby directed to timely comply with the registration provisions which are implicated by this Decision and Order, as set forth in Article 6-C of the New York State Correction Law.

The foregoing shall constitute the Decision and Order of this Court.

Dated: White Plains, New York
December 8, 2016

Honorable Susan Cacace
Acting Justice of the Supreme Court

TO:

Honorable James McCarty
Acting Westchester County District Attorney
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