



**JUDGE SHOULD NOT HAVE, SUA SPONTE, ASSESSED POINTS ON A THEORY NOT RAISED BY THE BOARD OF EXAMINERS OF SEX OFFENDERS OR THE PEOPLE; DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW (FOURTH DEPT).**

The Fourth Department, reversing County Court, determined the judge should not have, sua sponte, assessed points on a theory not raised by the Board of Examiners of Sex Offenders or the People:

... [D]efendant contends, and the People correctly concede, that County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners of Sex Offenders or the People ... . The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment ... . Here, no allegations were made either in the risk assessment instrument (RAI) or by the People at the SORA hearing that defendant should be assessed 30 points under risk factor 3, and defendant learned of the assessment of the additional points under that risk factor for the first time when the court issued its decision ... .

The court stated that, if defendant were a presumptive level one risk, an upward departure to level two would be warranted based on certain aggravating factors stemming from the nature of the crimes. Because those factors were not presented as bases for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to them ... . [People v Wilke, 2020 NY Slip Op 02002, Fourth Dept 3-20-20](#)