DEFENDANT'S CHALLENGE TO CERTIFICATION AS A SEX OFFENDER WAS FIRST RAISED IN THE APPELLATE DIVISION AND WAS NOT PRESERVED FOR CONSIDERATION BY THE COURT OF APPEALS; THE ILLEGAL SENTENCE EXCEPTION TO THE PRESERVATION REQUIREMENT DOES NOT APPLY BECAUSE SORA CERTIFICATION IS NOT PART OF THE SENTENCE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Cannataro, over a two-judge dissent, determined the challenge to the legality of defendant's certification as a sex offender, first raised on appeal to the Appellate Division, was not preserved and the illegal sentence exception to the preservation requirement did not apply:

> Defendant thereafter pleaded guilty to … burglary in the first degree as a sexually motivated felony … . … [T]he court … advised defendant that he would have to register pursuant to SORA upon his release from prison. * * *
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> On appeal to the Appellate Division, defendant argued for the first time that his certification as a sex offender was unlawful because his crime of conviction is not an enumerated registerable sex offense under Correction Law § 168-a (2) (a). * * *
>
> The Appellate Division agreed with defendant that under the "clear and unambiguous" language of Correction Law § 168-a (2) (a) "burglary in the first degree as a sexually motivated felony is not a registerable sex offense under SORA" … . * * *
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> "We have recognized 'a narrow exception to the preservation rule' where a court exceeds its powers and imposes a sentence that is illegal in a respect that is readily discernible from the trial record" … . However, "not all claims arising during a sentencing proceeding fall within the exception" … . * * *
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> … {S]ex offender certification is effectuated by the court pursuant to Correction Law § 168-d and is not addressed in either the Criminal Procedure Law or Title E of the Penal Law. … SORA certification is not part of a sentence and the illegal sentence exception to the preservation requirement does not apply to challenges to certification as a sex offender. People v Buyund, 2021 NY Slip Op 06529, CtApp 11-23-21

THERE WAS NO PROOF IN THE RECORD SUPPORTING THE FINDING THAT THE MISSOURI CONVICTION WAS THE EQUIVALENT OF A NEW YORK FELONY; THEREFORE THE RISK-LEVEL ASSESSMENT WAS REDUCED BY 10 POINTS (THIRD DEPT).

The Third Department, reversing County Court and remitting the matter, determined there was no proof in the record to support the finding that a Missouri conviction was the equivalent of a New York felony. The 15 points assessed for the foreign conviction was reduced to 5 points:

> The Missouri statute under which defendant was convicted requires that a person "knowingly possesses a controlled substance" (Mo Ann Stat § 579.015 [1] …), with no minimum drug quantity required … . Although criminal possession of a controlled substance is, most often, a felony in New York (see Penal Law §§ 220.21, 220.18, 220.16, 220.09, 220.06), the felony provisions all contain a weight element or require an intent to sell or a predicate conviction, whereas possession of a quantity of a controlled substance below the felony threshold constitutes a class A misdemeanor (see Penal Law § 220.03). Here, the facts and conduct underlying the Missouri conviction of criminal possession of a controlled substance are not in the record and, thus, it is unclear if the conduct underlying that conviction would constitute a felony in New York … . Accordingly, we are constrained to conclude that the record only supports the assessment of 5 points, not 15 points, under risk factor 9. Deducting 10 points from the total score of 110 results in a score of 100, placing defendant in the classification of a presumptive risk level two sex offender. However, the People expressly argued that, if defendant were found to be a risk level two sex offender, an upward departure would be warranted. In light of our holding that defendant is a presumptive risk level two sex offender, the matter must be remitted for County Court to consider whether an upward departure is warranted … . People v Smith, 2021 NY Slip Op 06403, Third Dept 11-18-21

THE LEVEL-THREE RISK ASSESSMENT WAS NOT MANDATORY AND THE EVIDENCE

IN SUPPORT OF A DOWNWARD DEPARTURE SHOULD HAVE BEEN CONSIDERED; ON REMAND WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the SORA court should not have considered the level three risk assessment mandatory and should have considered the evidence submitted in support of a downward department. On remand, the SORA court was directed to make findings of fact and conclusions of law in writing:

> Where a "defendant's prior felony conviction of a sex crime raised his [or her] presumptive risk level from level two to level three . . . , the [SORA] court is not mandated to apply the override but may, in appropriate circumstances, impose a lower risk level"… .
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> … Supreme Court, in its oral decision, incorrectly treated defendant's presumptive level three classification as mandatory, and the court therefore never ruled on his downward departure application. We reject the People's assertion that the court corrected that error in its subsequent written decision. … [T]he written decision explicitly "incorporates . . . [the] oral decision" and again failed to rule on defendant's downward departure application. … [T]he "compelling evidence" line in the written decision merely summarized the findings of the Board of Examiners of Sex Offenders and was not … an independent holding or ruling by the court. People v Douglas, 2021 NY Slip Op 06229, Fourth Dept 11-12-21

DEFENSE COUNSEL SUBMITTED EVIDENCE IN SUPPORT OF A DOWNWARD DEPARTURE FROM THE PRESUMPTIVE RISK LEVEL BUT COUNTY COURT DID NOT RULE ON IT; MATTER REMITTED FOR FINDINGS OF FACT AND CONCLUSIONS (THIRD DEPT).

The Third Department, remitting the matter, noted that defense counsel submitted evidence in support of a downward departure from the presumptive risk level but County Court made no findings on the request:

> The record reflects that defendant's counsel submitted various evidence, including a letter from a social worker who apparently was treating defendant and information regarding, among other things, defendant's consistent compliance with probation, in support of the request for a downward departure. As County Court did not set forth on the record any findings or conclusions on that request, we are unable to assess the court's reasoning. As such, we reverse and remit the matter for County Court to determine whether a departure from the presumptive risk level indicated by defendant's point total is warranted and to set forth its requisite findings of fact and conclusions … . People v Hoffman, 2021 NY Slip Op 06013, Third Dept 11-4-21

DEFENDANT IN THIS CHILD PORNOGRAPHY CASE DEMONSTRATED MITIGATING FACTORS WARRANTING A DOWNWARD DEPARTURE TO SORA RISK LEVEL ONE (FOURTH DEPT).

The Fourth Department determined defendant in this child pornography case established mitigating circumstances that warranted a downward departure of the risk level to level one:

> We agree with defendant … that he established by a preponderance of the evidence that there are other mitigating factors that were "not otherwise adequately taken into account by the guidelines" … . Defendant established that he suffered from a rare, congenital disease that resulted in significant disfigurement and medical issues, requiring numerous surgeries throughout his life. Defendant was bullied as a child, primarily due to his disfigurement and, as a result, was socially isolated, having no significant peer relationships. Defendant has only one prior crime on his record, a misdemeanor for which he was referred to Mental Health Court, and, in the case at hand, the court sentenced him to probation pursuant to the People's recommendation, thus indicating that defendant does not pose a significant threat to the community. We also note that defendant will be under supervision by the Probation Department for 10 years.
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> As a result of the depression and related mental health issues that flowed from such a difficult childhood, defendant turned to alcohol and drugs, some of which had been properly prescribed to him following many of his surgeries. Defendant's use of child pornography generally occurred while he was under the influence of drugs. Inasmuch as defendant was sentenced to a 10-year term of probation, which would ensure that he continued to participate in all of his treatment programs, we conclude that, in light of the totality of the circumstances, a downward departure to risk level one is warranted in the exercise of our discretion … . People v Morana, 2021 NY

Slip Op 05188, Fourth Dept 10-1-21

THE RECORD WAS NOT SUFFICIENT FOR THE APPEAL OF THE SORA RISK LEVEL CLASSIFICATION; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined the appeal of the Sex Offender Registration Act (SORA) risk level classification could not be heard because the record was not sufficient. The matter was remitted:

> "Although the short form order utilized by County Court contains the ordered language required to constitute an appealable paper, the written order fails to set forth the findings of fact and conclusions of law required by Correction Law § 168-n (3)" ... . "The hearing transcript is similarly deficient as it does not contain clear and detailed oral findings to support County Court's risk level classification" ... . The scant record before us is not sufficiently developed to enable this Court to make its own factual findings and legal conclusions — particularly with respect to the number of victims and the points assessed under risk factor three. Accordingly, County Court's order is reversed, and this matter is remitted for further proceedings. People v Kwiatkowski, 2021 NY Slip Op 04934, Third Dept 9-2-21

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE IN THIS STATUTORY RAPE CASE; ALTHOUGH NOT PRESERVED BY A REQUEST FOR A DOWNWARD DEPARTURE, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing County Court, determined defendant was entitled to a downward departure in this statutory-rape SORA risk level proceeding. The issue was not preserved because defendant did not request a downward departure but the appeal was considered in the interest of justice:

> "In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety" ... . The Guidelines provide that a downward departure may be appropriate where "(i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for risk factor 2, sexual contact with the victim,] results in an over-assessment of the offender's risk to public safety" ... .
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> Since the defendant did not request a downward departure from his presumptive risk level in the County Court, his contentions on appeal regarding a downward departure are unpreserved for appellate review ... . However, under the circumstances of this case, we address those contentions in the interest of justice ... .
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> Considering all of the circumstances presented here, including that the subject offense is the only sex-related crime in the defendant's history, and that the defendant accepted responsibility for his crime, the assessment of 25 points under risk factor 2 resulted in an overassessment of the defendant's risk to public safety ... . Accordingly, a downward departure is warranted, and the defendant should be designated a level one sex offender. People v Maldonado-Escobar, 2021 NY Slip Op 04502, Second Dept 7-2-21

THE JUDGE'S SUA SPONTE ASSESSEMENT OF RISK LEVEL POINTS WHICH WERE NOT REQUESTED BY THE PEOPLE OR THE BOARD VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS (SECOND DEPT).

The Second Department, reversing County Court, determined defendant's due process rights were violated when the judge, sua sponte, assessed risk-level points which were not requested by the People or the Board of Examiners of Sex Offenders:

> "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" ... . "A defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be

afforded a meaningful opportunity to respond to that assessment" … . Thus, "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond" … .

Here, as correctly conceded by the People, the County Court's assessment of these points, without prior notice to the defendant, deprived him of a meaningful opportunity to respond to the assessment … . People v Montufar-Tez, 2021 NY Slip Op 04158, Second Dept 6-30-21

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE (LEVEL TWO TO ONE) IN THIS CHILD PORNOGRAPHY CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for a downward departure in this child pornography case should have been granted:

> At a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C) to determine the defendant's risk level, defense counsel requested that, despite the defendant's score on the risk assessment instrument, which placed him at the lower end of the presumptive level two risk category, the Supreme Court should exercise its discretion to grant a downward departure and designate the defendant a level one sex offender … . …
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> Under the circumstances of this case—including, among other things, the small number of images found on the defendant's cell phone and the absence of any evidence of child pornography on his laptop, the brief period of time during which the defendant is alleged to have collected child pornography, the defendant's lack of criminal history, and a psychosexual evaluation report finding that the defendant's risk of reoffense was low—we find that a preponderance of the evidence established that the risk assessment instrument overassessed the defendant's risk of reoffense, and that his request for a downward departure should be granted in the exercise of discretion … . People v Sestito, 2021 NY Slip Op 03859, Second Dept 6-15-21

A FAMILY RELATIONSHIP WITH THE VICTIM, STANDING ALONE, DOES NOT WARRANT AN UPWARD DEPARTURE FROM THE SORA RISK ASSESSMENT GUIDELINES (SECOND DEPT).

The Second Department, reversing Supreme Court's imposition of an upward departure from the SORA risk assessment guidelines, explained that the existence of a family relationship with the victim, standing alone, does not warrant an upward departure:

> People seek an upward departure, they must identify an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines, and prove the facts in support of the aggravating factor by clear and convincing evidence … .
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> Here, as we held in People v Rodriguez (_____ AD3d _____, 2021 NY Slip Op 03475 [2d Dept]), the existence of a familial relationship between the offender and the victim, standing alone, does not constitute an aggravating factor for purposes of granting an upward departure. That relationship has already been taken into account by the Guidelines … , in which the board deliberately excluded familial relationships from the assessment of points on the RAI [risk assessment instrument] and expressly determined that intrafamilial offenders do not pose a comparatively higher risk of recidivism or danger to the community … . People v Velasquez, 2021 NY Slip Op 03625, Second Dept 6-9-21