

SUPREME COURT, NASSAU COUNTY

SUPREME COURT: PART 45

INDICTMENT NO. 8N-12

PRESENT:

HON. ANGELO A. DELLAGATTI, Acting Supreme Court Justice

PEOPLE OF THE STATE OF NEW YORK,

: KATHLEEN RICE
: District Attorney
: Nassau County
: Mineola, New York
: By Rachel Grinspan, Esq.

-against-

:
: Gottlieb & Gordon
: Attorney for the Defendant
: Suite 701
: 111 Broadway
: New York, NY 10006

JAMES J. LYNOTT,

Defendant.

The following papers read on this motion: 2

Notice of Motion.....1
Affirmation in Opposition.....1

DECISION AFTER HEARING

On March 27, 2013 the Court held a hearing in accordance with the *Sex Offender Registration Act* (hereinafter *SORA*) to determine what classification the above defendant would be assessed, pursuant to *Article 6-C of the Corrections Law, §168-[a] et seq.* The basis of the hearing was the defendant's conviction by way of a plea of guilty in *Federal Court* to a violation of *18 USC § 2252A [a][1]* (Transportation of Child Pornography) on April 20, 2007. The defendant served sixty months in Federal Prison for the charge and was sentenced to five years of supervised release, by the *United States Department of Probation.*

It was un-controverted that the defendant's conviction for the crime he plead guilty to requires that the defendant be assessed by this Court in keeping with the requirements of *SORA.*

Findings of Fact

The defendant's "risk assessment instrument" (hereinafter RAI) scored the defendant with a point total of forty-five. This score standing alone classifies the defendant as presumptively a level one sexual offender for registration pursuant to *SORA*.

Nonetheless, the RAI sets forth in Section A, number four, "overrides," that the defendant should be assessed a level three offender based upon a "clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases [his] ability to control impulsive sexual behavior." This is the only reason given for an "override" of the RAI score of forty-five assessed in the risk factor section. The RAI did not ask for a "departure" in section B.

Most telling to the Court was the defendant's submission of significant forensic medical data by both a clinical psychiatrist and clinical psychologist that support the premise that the defendant never had any sexual or even non-sexual contact with a child of any kind or nature.

The Court credits the submissions of Dr. Richard B. Krueger who states that the defendant's "risk of actually victimizing a child is remote." *See pg. 13 letter of Dr. Richard B. Krueger, dated January 2, 2007, as presented in the defendant's papers as exhibit "I"*

The drafter of the RAI in this matter is the *Board of Examiners of Sex Offenders* (hereinafter "Board"), for New York State. The *Board* is a five (5) member panel appointed by the Governor. The *Board* prepares the *SORA* guidelines, determines who must register and when and scores the initial RAI for those who are incarcerated in State or Federal Penitentiary. *See Correction Law §168-1*

That initial RAI score is the defendant's presumptive level for *SORA* purposes. An "override" or "departure" could be asked for and that could also change the level asked for by the *Board*.

It is un-controverted that the *Board* rated the defendant presumptively at level 1 based on a raw score of forty-five (45). Nonetheless, the Board asked that the defendant be assessed as a level three based upon a finding that the defendant is a pedophile. The basis for this initial conclusion was drawn from the defendant's own psychiatrist, Dr. Richard Krueger, M.D.. (Dr. Krueger is a clinical and forensic psychiatrist with approximately thirty years experience in diagnosing and treating sexual offenders. *See defendant's initial moving paper, pg. 6.*) This first diagnosis was given by Dr. Richard Krueger, M.D., was in January of 2007. A second evaluation of the defendant was undertaken by Dr. Krueger in October of 2007.

Why the Court credits the second evaluation given by Dr. Krueger of the defendant more than the initial encounter is that a polygraph test was taken of the defendant and those test results substantiated the defendant's claim that he never: 1.) Never approached a minor child for sex. 2.) Never had any type of physical contact with a child and 3.) Never attempted to have sexual relationships with a child.

The Court found Dr. Krueger, second evaluation more persuasive based upon the extensive work done by Dr. Krueger in determining that the defendant is not a sexual predator. In the second evaluation further extensive medical and psychological testing was done on the defendant by his Doctors, but the Court need not delineate said tests for the sake of brevity and clarity.

In reaching its decision the Court finds that it must read Dr. Krueger two evaluations of the defendant together as one and not as single isolated interviews and tests of the defendant.

The Court credits the second evaluation of the defendant by Dr. Krueger for the procedures and tests administered by the Doctor of the defendant in support of his conclusion that the defendant was at low risk to re-offend and that he was not a threat to

public safety. The Court notes that Dr. Krueger evaluated the defendant for over a year in drawing his final conclusion regarding the defendant. The Court further notes that the defendant was analyzed by a clinical psychologist who further supported the conclusions reached by Dr. Krueger regarding the defendant's risk of re-offending and danger to the community.

CONCLUSIONS OF LAW

From the *RAI* the defendant scored a point total of forty-five points making the defendant presumptively a level one offender for *SORA* purposes.

The initial scoring done by the *Board* herein serves only as a guide and opinion that is similar to the role served by a probation department in submitting a sentencing recommendation to a court; see also *83 NY Jur 2d, Penal and Correctional Institutions 319 [2d ed updated 2008]*. This Court is not bound by the recommendation of the *Board* in determining the appropriate risk level of an offender and, in its exercise of discretion, may depart from the board's recommendation from facts and circumstances set forth on the record.

The People herein are asking that the Court "override" the defendant's initial presumptive level scoring as level one which was done by the *Board* and score the defendant as a level three offender. The People in this application must prove aggravating factors by a *clear and convincing* evidence that an "override" is warranted herein. See *People v. Smith, 78AD3rd 805 (2nd Dept. 2010)*

The definition of *clear and convincing* evidence in New York State is evidence of such a nature as is entirely satisfactory and creates a genuine belief in that what is said is true. *In re Katrina M., 227 AD2nd 977 (4th Dept., 1996)*

From the record that is before this Court the only initial diagnosis of pedophilia was that of Dr. Krueger (which was later changed) and not from any other clinician involved in

this matter.

The Court credits the Assistant District Attorney in her zealous advocacy but nonetheless the premise of the *Boards* asking for an "override" to hold the defendant for *SORA* purposes as a presumptive level three has not been shown to this Court by *clear and convincing evidence*. The People failed to proffer any expert medical testimony besides that of the treating psychiatrist and psychologist of the defendant. The Court is cognizant that the defendant did exhibit criminally abhorrent behavior in acquiring pornography of children but the basis of the *Board* asking for an "override" as set forth in section four of the RAI is as follows:

A clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases [his] ability to control impulsive sexual behavior.

This has not been shown to this Court by *clear and convincing evidence* and as such it is hereby ordered that the Court adjudges the defendant as a level one sexual offender for *SORA* registration purposes. The Court finds the remainder of the People's argument not relevant to the present application before the Court.

ENTER:



Angelo A. Delligatti, A.J.S.C.

Dated: July 5, 2013

HON. ANGELO A. DELIGATTI

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 45

PRESENT:

HON. ANGELO A. DELIGATTI

PEOPLE OF THE STATE OF NEW YORK:

-against-

JAMES J. LYNOTT,

Defendant

Order Pursuant to Correction Law Article
6c Sex Offender Final Risk Level
Determination

IND. No. 8N-12

The above named Defendant having been certified by this court a Sex Offender,
 having requested a hearing to determine his risk level in accordance with Correction Law Article 6-c and having appeared with counsel, Derrelle M. Janey, Esq., and such hearing having been held on March 27, 2013,

and at sentencing having waived the right to a Risk Level Determination hearing,

having been notified at sentencing of the appearance date for the Sex Offender Risk Level Determination, and defendant having not appeared at the initial appearance date, it is hereby determined that the defendant has waived the right to a Risk Level Determination Hearing,,

having not responded to the Notice of right to a Hearing and such Notice not having been returned as "undeliverable" and defendant thereby being presumed to have received the Notice and defendant having not appeared at the initial appearance date, nor at the subsequent adjourned date, it is hereby determined that the defendant has waived the right to a Risk Level Determination hearing, and is hereby determined to have the following level of risk of re-offense:

Risk Level One (Low) Risk Level Two (Moderate) Risk Level Three (High)

designated a Sexual Predator designated a Sexually Violent Offender

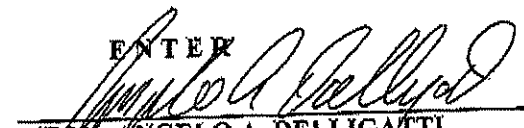
designated a Predicate Sex Offender assigned no additional designation

It is hereby ORDERED that defendant's risk level and designation shall be entered into the Sex Offender Registry administered by the Division of Criminal Justice Services.

SO ORDERED

Dated: July 5, 2013

Kathleen Rice, District Attorney
262 Old Country Rd.
Mineola, NY 11501
Attn: Rachel Grinspen, Esq.

ENTER

HON. ANGELO A. DELIGATTI
Acting SUPREME COURT JUSTICE

Derrelle M. Janey, Esq.
Suite 701
111 Broadway
New York, NY 10006