

four counts of Sodomy in the Second Degree. Defendant's conviction arose out of a series of acts in which it was alleged that he forcibly raped and sodomized his two stepdaughters, who were aged 12 and 14 when they testified and recounted abuse dating back to when they were 8 years old. He was originally sentenced to a combined indeterminate term of 25 to 50 years.

Defendant moved to set aside his conviction and that motion was granted in 1991. The Court has not been able to obtain, after a diligent search, any written or oral decision granting Defendant's motion and thus is not certain why Defendant's conviction was overturned. A notation in the court file on December 16, 1991 indicates only: "440.10 motion is granted. Sent. set aside". At oral argument on Defendant's instant motion, the People indicated that, based on a review of their office records, the People consented to Defendant's motion to set-aside his conviction in 1991 on the condition that he agree to plead guilty to one count of Rape in the First Degree with an agreed-upon sentence. The People understand that Defendant's motion concerned the fact that the counts against him were duplicitous and that his conviction was therefore invalid. *See People v. Keindl*, 68 NY2d 410 (1986), *rearg denied*, 69 NY2d 823 (1987). In any event, it is clear that upon the overturning of Defendant's conviction, he pled guilty in 1991 to one count of Rape in the First Degree and was given an agreed-upon indeterminate sentence of 5 to 15 years.

The Court has received a letter from the State Board of Examiners of Sex Offenders, dated September 26, 2008, by Board Examiner Floyd E. Epps recounting facts and making a recommendation about Defendant's risk level (the "Epps Letter"). The Epps Letter asserts that the Defendant repeatedly raped, sodomized, threatened and sexually abused his two stepdaughters over an extended period of time. The Epps letter further indicates that the Defendant has maintained that the charges against him were fabricated at the urging of his wife,

who was angry that the Defendant at the time was having affairs with other women. Defendant, in his instant motion, also continues to assert that he is not guilty of the charge he pled guilty to.

In addition to his sex offense conviction, Defendant has one felony conviction which occurred approximately seven weeks after the instant offense, for two counts of Criminal Sale of the Controlled Substance in the Third Degree. He was given concurrent indeterminate sentences of 3 to 9 years for those convictions, which were apparently served concurrently to his sex offense convictions.¹ According to the Epps letter, Mr. Santos was released to parole supervision on May 23, 1994 with a maximum expiration date of May 23, 1999. At some point, it was apparently determined that he was a Level 3 sex offender under SORA. He was violated on parole and returned to prison in January of 1997. According to the Defendant, this first parole violation was assessed because of a charge that he consorted with a known criminal. He was again released on April 14, 1997 and his parole was again revoked on August 22, 2003. According to the Defendant, this second parole violation was assessed because of a charge that he had failed to report to the Division of Parole. He was reparaoled in February of 2004 and finally released from further supervision on June 27, 2004. Mr. Santos also pled guilty to failure to verify his residence address as a Level 3 sex offender in 2004 and was sentenced to time served. Mr. Santos avers that since that time, he has reported as a Level 3 sex offender every 90 days and maintained employment as an auto mechanic. He currently resides in Puerto Rico with his mother. Defendant holds a Bachelors Degree and Master's Degree and was honorably discharged from the military.

As noted *supra*, Mr. Santos was originally determined to be a Level 3 sex offender and

¹While the Epps letter asserts that “[a]n arrest for Criminal Sale of a Controlled Substance 3rd Degree was still pending when convicted and there is still no disposition reported for that arrest”, a Certificate of Disposition in the Court file reflects the fact that Defendant was convicted and sentenced for this crime.

was then one of the parties to litigation challenging his risk assessment pursuant to the *Doe v. Pataki* matter. Pursuant to a stipulation of settlement in that matter (the “Stipulation”), Defendant was offered and availed himself of a new risk assessment proceeding conducted before this Court. The Stipulation provides that the People shall, using the guidelines in the statute, prepare a new Risk Assessment Instrument (the “RAI”, discussed in great detail *infra*) and provide it to the Court. The Stipulation also provides a number of rules which must be followed in a *Doe v. Pataki* redetermination proceeding which differ from those followed in other SORA risk level proceedings. A new proposed RAI prepared by the People was presented to the Court and a hearing was conducted to determine the Defendant’s risk level.

At the hearing, the Court made findings of fact and conclusions of law concerning each element of the instrument. The Court determined that the Defendant’s RAI score was 115, 5 points above the minimum score for a level 3 designation. The Defendant was assessed 10 points for the use of forcible compulsion, 25 points because the offense involved sexual intercourse or deviate sexual intercourse, 20 points because there were two victims, 20 points because of the age of the victims, 20 points because of a continuing course of conduct, 10 points for not accepting responsibility and 10 points because of Defendant’s two technical parole violations. The Court did not find that any of the presumptive Level 3 overrides applied in the Defendant’s case.² Defendant then moved for a discretionary downward departure to Level 2.³

²“Overrides” under the RAI are facts about the offender which make him presumptively a Level 3 offender regardless of his RAI score. See Sex Offender Registration Act Risk Assessment Guidelines and Commentary, 2006 (discussed *infra*) “A Note on Overrides” These overrides are a previous felony conviction for a sex crime, the infliction of serious physical injury or the causing of death, a “recent threat to reoffend by committing a sexual or violent crime” and a clinical assessment indicating that the offender has an abnormality which “decreases his ability to control impulsive sexual behavior”. *Id.*

³At the hearing, the Court, without objection by the Defendant, considered extensive credible evidence that the Defendant raped and sodomized his two stepdaughters over an extended period of time, notwithstanding the fact that his original conviction was overturned and he subsequently pled guilty to only one count of Rape in the First Degree. This evidence

Defendant's argument for a downward departure is based on the fact that during approximately 14 years at liberty since 1994, he has never been charged with committing any sex offense or other crime (other than the conviction noted *supra* for failure to verify his address in 2004). Defendant asserts that this long period without any evidence of sexual or other criminal conduct is sufficient to warrant a downward departure to Level 2. Defendant's motion is opposed by the People and the Board of Examiners of Sex Offenders, who both urge that Defendant's Level 3 designation be maintained.

CONCLUSIONS OF LAW

The SORA statute, originally enacted in 1995 and significantly amended on multiple occasions since that time, created a "Board of Examiners of Sex Offenders" (hereafter the "Board") of five members appointed by the Governor. Three members under the statute are required to be employees of the Division of Parole who shall be "experts in the field of the behavior and treatment of sex offenders" and two members are required to be employees of the State Department of Correctional Services. No qualification requirements are imposed by the statute with respect to these two members. Correction Law § 168-1 (1). The Board is directed to establish "guidelines and procedures to assess the risk of a repeat offense by such sex offender and the threat posed to the public safety." *Id.* § 168-1 (5).

The statute provides a list of non-exclusive factors the Board should consider in developing those guidelines. The Board is directed to use the guidelines to provide a "recommendation" to the sentencing court about an incarcerated offender's risk level prior to the

included the Grand Jury testimony of the victims and the Board's case summary, evidence which has been held to be reliable at SORA hearings. *See People v. Mingo*, 12 NY3d 563 (2009). According the RAI, "evidence can be derived from the sex offender's admissions; the victim's statements; the evaluative reports of the supervising probation officer, parole officer or corrections counselor; or from any other reliable source. Notably, the Board is not limited to the crime of conviction but may consider the above in determining an offender's risk level." RAI, General Principles, n. 7.

release of the offender. *Id.* § 168-l (6). Offenders are required to be designated by the Board into one of three risk categories: Level 1 for offenders whose risk of a repeat offense is low; level 2 if the offender’s risk of repeat offense is moderate and level 3 where the risk of repeat offense is high “and there exists a threat to the public safety”. *Id.*

After this recommendation is made, the sentencing court is required to make a judicial determination of the offender’s risk level. The statute directs the court to consider the same guidelines factors the Board is directed to consider and reach its own determination, after reviewing the Board’s recommendation and conducting a hearing. *Id.* § 168-n. For offenders given a sentence which does not include incarceration, the sentencing court must make a risk level determination after a hearing applying the guidelines in the statute without receiving a recommendation from the Board. *Id.* § 168-d.

Governor Pataki appointed the members of the Board in January of 1996. The Board then created a mathematical “Risk Assessment Instrument” (the “RAI”) in the form of a scoring sheet which provides a designated number of points for offenders given various offender characteristics. Offenders who score from 0 to 70 points under the instrument are presumptively level 1 offenders; offenders who score from 75 to 105 points are presumptively level 2 offenders and offenders who score from 110 to 300 points are presumptively level 3 offenders. As discussed *supra*, the instrument also provides four “overrides” (facts about the offender’s conduct, condition or criminal history) which make an offender presumptively a level 3 regardless of the score he receives

The instrument provides that a court can depart from the “presumptive” risk level contained in the instrument and finally asks that the Court make a number of other determinations required by SORA about an offender’s condition or history which are relevant to

the Act's registration and community notification requirements. The RAI was accompanied by a guide to applying the instrument, the "Sex Offender Registration Act Risk Assessment Guidelines and Commentary" (the "Commentary"). The original RAI was promulgated in January of 1996. The instrument was slightly revised in November of 1997 and has not been substantively modified since that time. The current Commentary was published in 2006 but notes that "[t]he 2006 revisions do not change the scoring of the instrument but, rather, simply include updated statutory language and clarification." 2006 Commentary at 1. According to the Commentary: "[n]o one should attempt to assess a sex offender's level of risk without first carefully studying this commentary" 2006 Commentary at 1.

The parties in this case did not challenge the validity of the RAI and the Court did not hear any expert testimony concerning the instrument. However, in assessing whether to depart from the RAI in this case, the Court believed that it was nevertheless appropriate to consider a number of salient features of the RAI which are apparent from the face of the instrument and the Commentary. In the Court's view, even without considering whether any of the scientific assumptions behind the RAI's scoring parameters are valid, the instrument has a number of significant limitations which should be considered when determining whether a departure is justified.

Risk Assessment Parameters of the RAI

In making predictions about whether a sex offender will commit a new crime, psychologists and psychiatrists generally rely upon one or both of two methods: clinical judgment and what are known as "Actuarial Risk Assessments" ("ARA's"). "Clinical judgment involves using experience and training, along with an interview or evaluation of the client, to reach an opinion about risk" *See State v. Rosado*, 2009 WL 1911953, at 5 (Bronx County 2009)⁴.

⁴*Rosado* is cited a number of times in this opinion because it contains a recent extensive

ARA's, on the other hand, take a group of sex offenders, measure how many of them are re-arrested or re-convicted for a sex offense over a given period of time and then identify the traits or risk factors shared by those reoffenders. By comparing the traits of a given individual to the traits of reoffending individuals, an actuarial assessment of the risk posed by a particular offender can be calculated. *Id.*

The most widely used ARA in the world is the "Static 99". *See* New York State Division of Criminal Justice Services, Office of Sex Offender Management, *Static 99 Clearinghouse*, 2009. The Static 99 was originally created by Drs. R. Karl Hanson, Ph.D and David Thornton, Ph.D. The original instrument developed in 2003 contained a list of ten scoring factors. It was a "Static" instrument because it looked at unchanging historical characteristics of an offender. Based on how the offender scored on each item in the Static 99 list, a ranking describing the offender as low risk, moderate risk, medium-high risk and high risk was obtained. *See State v. K.A.*, 18 Misc3d 1116(A) (New York County 2008) at 5. The Static 99, or indeed any ARA, cannot predict the risk that any particular sex offender will reoffend. It merely describes how an individual's characteristics compare with those of offenders who have reoffended at a given rate over a given period of time. As one Court explained:

Actuarial instruments do not measure psychological constructs such as personality or intelligence. In fact, they do not measure any personal attributes of the particular sex offender at all. Rather, they are simply actuarial tables – methods of organizing and interpreting historical data. *Rosado, supra* at 7, quoting *In re Commitment of R.S.*, 339 NJ Super 507, 540, (App. Div. 2001), *affd*, 173 NJ 134

discussion, based on expert testimony, of the ways in which psychiatric professionals assess the risk of sex offender recidivism. The *Rosado* decision considered these issues in the context of proceedings for sex offender civil management pursuant to Article 10 of the Mental Hygiene Law and did not consider how such assessments are made under SORA.

(2002).

The use of ARAs in predicting sex offender recidivism was an outgrowth of what were seen as the predictive deficiencies of using subjective clinical judgment alone. The use of ARAs continues to generate controversy and arguments over methodology. But these instruments have also become widely used, along with clinical judgment, in making sex offender risk assessments. They have been asserted by their proponents to have “moderate predictive accuracy” in assessing risk. *See U.S. v. McIlrath*, 512 F3d 421 (7th Cir, 2008)(citation omitted). In 2009, the developers of the Static 99 completely revised the instrument because new data indicated a significantly lower recidivism rate for sex offenders than the data which had been collected from the 1960's through the mid-1990's and had been used to create the original scale. The proper method of applying these new norms has not been finalized, but the new instrument contains a range of actuarial recidivism rates and recommends that evaluators make a risk assessment in two stages. First, an empirically derived recidivism rate range is calculated. Second, professional judgment is used to determine where a particular offender falls within that range. *See Rosado, supra* at 17-19.

As is true in most other SORA risk assessment determinations, the Defendant in this case was not evaluated or interviewed by any psychiatric professional for the purpose of determining his recidivism risk. Rather, the Court was simply presented with a letter from the Board which made a risk level assessment based on a review of available records, a proposed RAI completed by the district attorney's office and argument by the parties.

The RAI is obviously not based on clinical judgment. That is, the score is not a psychiatric assessment of the individual before the Court. It is more akin to an ARA. It is an

instrument which seeks to compare the characteristics of an offender to the characteristics of a group of offenders with the goal of developing an objective score upon which the individual's reoffense risk can be measured. But in the Court's view, the RAI is not a valid Actuarial Risk Assessment Instrument. This is true for a number of reasons.

First, the RAI is composed of purportedly objective components which measure the risk of reoffense and at least three separate subjective or policy based determinations. The most significant of these subjective factors is the instrument's "harm" calculus. The RAI considers not only the statistical risk that an offender will reoffend, but the harm which would be caused by a reoffense. *See* 2006 Commentary, General Principles, n.1. This "harm" calculus is not based on objective data. It is a value judgment. The RAI assigns points based on its assessment of how harmful designated behaviors are (apart from any assessment that those behaviors will reoccur).

The subjectivity of the RAI's harm calculus does not primarily arise from the general distinctions it makes. It comes from the assessment of a particular numerical score which purports to designate, with mathematical precision, the degree of harm caused by specific actions. As the 2006 Commentary points out, for example, an offender who rubs himself against a woman in a subway car causes less harm than a child molester. General Principles at 1. That is a proposition almost anyone could agree with. But when constructing a numerical scoring instrument like the RAI, the decision about how many points (10, 20, 30 or 40, for example) should be added to the score of someone who molests a child as opposed to a person who rubs up against a woman in the subway is a subjective value judgment.

Numerous parameters of the RAI reflect such judgments about harm (rather than judgments about recidivism risk). Offenders who touch a victim under clothing receive twice as many points as offenders who touch a victim over clothing. *See* Commentary, Factor 2.

Offenders who use violence are assessed additional points not only because such violence is, according to the RAI, correlated with recidivism risk but because this factor is “associated with how dangerous an offender is to the community”. Under this scoring parameter, an offender who is “armed with a dangerous instrument” receives three times more points than an offender who actually uses forcible compulsion to commit a sex crime. *See* Commentary, Factor 1.

A person who commits a sex offense against a person 63 or older is treated the same way as an offender who commits a sex offense against a child under the age of 10 (with a 30 point assessment). The Commentary does not indicate that this is based on any data indicating that the small minority of offenders who might commit a sex offense against a person 63 or older pose a heightened risk of reoffense. The Commentary simply explains that “[a]n offender who preys on an elderly person, defined as a person 63 years or more, is treated the same as one who chooses a young child as his victim.” Commentary, Factor 5.

At least one of the RAI’s scoring factors is based on still a third consideration – the Board’s judgment about the need for community notification. Pursuant to Factor 7, the RAI assesses 20 points if the offender’s conduct was “directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization” or was an abuse of a professional or avocational relationship between the offender and the victim. These points are based on the Board’s view that in such cases “the need for community notification . . . is generally greater”. *See* 2006 Commentary, Factor 7, n.8. Offenders in this category are assessed additional points not because of an increased recidivism risk or an assessment that such crimes are more harmful than others but because a higher score will result in a greater likelihood that more extensive community notification will be made. As the Commentary explains, when the Board in 1996 consulted with a “panel of experts” to finalize the

RAI, (see further discussion *infra*):

[T]he panelists noted that the guidelines as then proposed, failed to assess points if an offender had exploited a professional relationship to abuse his victim. The panelists emphasized that where such exploitation had occurred, there was a heightened need for community notification. Factor 7 was modified to incorporate this concern. 2006 Commentary, Appendix at 24.

Factor 6 provides another policy based rationale for the assessment of points – the Board’s view that some offenders should be assessed additional points because of the difficulty law enforcement and prosecutorial agencies have in convicting them. This is the assessment of 20 points for offenders if the victim suffered from a mental disability, mental incapacity or was physically helpless (for example, sleeping when an offense occurred). According to the Commentary, points are assessed for offenders in this category, among other reasons, because “[s]uch offenders pose a greater risk to public safety since their crimes are more difficult to detect and prosecute”. Commentary, Factor 6.

All of these judgments are similar to the kinds of determinations that legislatures collectively make, when they determine how serious a sex offense is, what that offense’s sentencing parameters should be or how other policy issues should be addressed. Assessments about harm are also integral, obviously, to the type of discretionary determinations which courts make when imposing sentences.

The RAI’s numerical value judgments, in some cases, differ from the judgments which have been made by the legislature on the same issues. For example, as noted *supra*, the RAI assesses twice as many points for offenders who touch a victim inside the victim’s clothing as it

does for offenders who touch a victim outside the victim's clothing. The legislature came to the opposite conclusion in enacting the Penal Law. Under the Penal Law's definition of "sexual contact", the definition used in subjecting offenders who wrongfully touch the sexual or intimate parts of another person to criminal liability, over and under-clothing touching are explicitly treated identically. *See* Penal Law §130(3).

The RAI's determinations about which risk factors to consider also differ in some respects from the provisions the Board is required to adopt by the SORA statute. For example, SORA requires that the Board's guidelines and procedures consider whether an offender is "receiving counseling, therapy or treatment" (Correction Law § 168-1 (5) (c)). The RAI, however, does not add or subtract points based on an offender's participation in a sex offender treatment program. The reason, according to the Commentary, is that "the efficacy of sex offender treatment is open to question" (citing one article published in 1993 and one article published in 1990) *See* Commentary, Factor 14, Supervision.⁵

As far as the Court is aware, the RAI, unlike ARAs, has never been validated by any empirical data. That is, it cannot be said that an offender who scores, for example, 115 points (as Defendant did here) shares objective characteristics with offenders who have been empirically demonstrated to reoffend at any particular rate over any given period of time. Just as the RAI was not validated when it was created, as far as the Court is aware, it has also never been formally tested to see how accurate it has actually been in predicting recidivism risk. It would obviously be possible to take a sample of offenders who have been determined to be at high risk to reoffend, moderate risk to reoffend and low risk to reoffend in the years since 1995 and then

⁵The Commentary goes on to say, however, that an offender's response to treatment, if "exceptional" can be the basis for a downward departure. This proviso may be in response to a second SORA statutory provision which, in addition to directing that an offender's *participation* in treatment should be considered in determining his risk to reoffend, directs that an offender's "response to treatment" should be separately considered. *Id.* § 168-1 (5) (f).

determine the extent to which, if any, the RAI had been accurate in predicting their recidivism risk. But, as far as the Court is aware, no such analysis has ever been published.

Indeed, given the current design of the RAI, no such actuarial analysis would be possible. That is because the instrument mixes and matches purportedly objective factors related to the risk of reoffense, with numerical value judgments about the degree of harm an offender's conduct causes and policy considerations. Some RAI factors are based on "harm", some on recidivism risk, some on both of those factors, some on policy grounds and for some factors, it is not clear on what basis points are assessed.⁶ But because the recidivism risk parameters are not separately calculated from other considerations, it is not possible to analyze the extent, if any, to which the instrument's recidivism risk parameters are accurately correlated to the risk of reoffense.

Next, the number of points assessed for factors that are assessed because of the risk of reoffense do not appear to be based on actuarial data. For example, an offender is assessed 5 points if the offender is released under the supervision of a parole, probation or mental health professional, but that professional does not "specialize in the management of sexual offenders or oversees a sex offender caseload" (Factor # 14). Fifteen points are assessed for offenders who are released without supervision. This factor is "premised on the theory that a sex offender should be supervised by a probation or parole officer who oversees a sex offender caseload or who otherwise specializes in the management of such offenders." Commentary, Factor 14.

Assuming, *arguendo*, that the RAI's theory in this regard is supported by any empirical evidence, there is no indication that the number of points which are assessed correlate to the

⁶In this latter category, for example, Defendant here was assessed 20 points for engaging in a "continuing course of sexual misconduct" with the same victim. The Commentary does not indicate whether this assessment is based on the harm caused by such conduct, the likelihood that offenders who engage in such conduct would be more likely to reoffend, both such considerations or other factors.

degree of increased risk which such data might indicate are appropriate. That is, assuming an offender who is supervised by a parole officer without a sex offender caseload would be more likely to reoffend than an offender who is supervised by a parole officer with a specialized case load, the five extra points an offender receives for this factor, as far as the Court is aware, do not correlate with data indicating that offenders subject to similar conditions have committed new offenses at a rate which correlates to 5 extra points (as opposed to say, 10 or 15 extra points) over a given period of time.

Complicating the picture further is that some recidivism risk, “harm” or other factors are incorporated into the guidelines while, with respect to others, courts are explicitly invited to depart from the RAI because factors the Commentary deems relevant are not part of the instrument. For example, if an offender committed a misdemeanor sex crime prior to the conviction for which they are undergoing a risk level hearing, they are assessed 30 additional points. If the same conviction occurs after the instant sex offense, no points are scored, but the conviction may be the basis for an upward departure. *See* Commentary, Factor 9. No explanation is given in the Commentary for this distinction. What seems clear, however, is that the distinction is not based on any difference in the empirical data supporting these considerations. That is, there is no indication in the Commentary that a misdemeanor sex crime committed prior to an instant offense would result in a recidivism risk which was quantifiable (thus, resulting in a 30 point assessment) while a misdemeanor offense committed after the date of the instant offense would result in an increased risk of reoffense which was not quantifiable (and therefore could only be dealt with by a purely discretionary, non-point driven judgment by the hearing court).

Such seemingly arbitrary distinctions can have significant consequences for an offender’s

risk assessment. In this case, for example, the Defendant was charged with a narcotics sale felony prior to his sex offense conviction. He was convicted of that narcotics crime, however, approximately seven weeks after his sex offense conviction. For this reason, pursuant to the Commentary, the 15 points which would have been assessed against the Defendant if his conviction had occurred prior to the commission of his sex offense instead resulted in no points being assessed. Defendant's drug offense was not a "prior conviction".

The RAI assigns 10 additional points if the offender's prior criminal conduct was within 3 years of the instant offense. Factor # 10. These points are apparently assessed because recent criminal behavior would be more probative of reoffense risk than behavior which had taken place at a more distant time. However, again, if the conviction occurred *after* the instant offense, no points are added, even though such behavior would be an even *more* recent indicia of criminality than an offense which had occurred within three years of a sex crime. The Defendant in this case arguably got a windfall (under the RAI) by the fortuitous fact that his controlled substance plea occurred shortly after, rather than shortly before, his sex offense conviction. Had his plea taken place 7 weeks earlier, he would have been assessed 25 additional points.

The Court is not arguing that incorporating subjective or policy based determinations into the RAI is necessarily inappropriate. Nor is it arguing that the three Division of Parole and two Department of Correctional Services employees who made all of these decisions in 1996 made wrong determinations. These facts are outlined simply to point out that the RAI is not an "objective assessment instrument" (*See* 2006 Commentary, General Principles, at 3). It is not an ARA. It does not tell you that an offender with any particular score shares characteristics with offenders who have committed new offenses at any particular rate. It does not provide any objective assessment of an offender's recidivism risk.

A final salient fact about the RAI is that it is obviously outdated. The study of sex offender recidivism, risk assessment and treatment is a dynamic and ever changing discipline, where new research findings continually modify the understanding of risk. To take just the most significant recent example, as noted *supra*, the “Static 99”, the most common ARA in use throughout the world today, has been completely revised just this year. As noted *supra*, the new Static 99 “norms” are based on the fact that recidivism rates for sex offenders are significantly lower now than they were when the data supporting the original 2003 norms were compiled. *See Rosado, supra.*

The RAI, however, is frozen in time. As noted *supra* the RAI was developed in 1996. The Appendix to the 2006 Commentary lists 36 articles upon which the RAI was based. The most recent of these articles was published in 1995. The RAI has not been informed by any research which has been conducted or reported in the sex offender field during the past 14 years. The research supporting some of the RAI’s factors is more outdated. As one trial Court noted in rejecting the research findings upon which the Board had directed that 10 points should be added to the RAI score of an offender who committed his first crime at age 20 or less, “these articles [on which the cited RAI score was derived] base their findings largely on studies which are decades old.” *People v. Justino* 11 Misc3d 470, 480 (New York County 2005)(discussing RAI factor # 8).

None of this discussion is meant to intimate that the RAI is not based on relevant information about sex offenders or informed judgment. Nor it is meant to impugn the good faith of the professionals who designed the instrument. Predicting whether a sex offender will reoffend is notoriously difficult. Even with the most informed and insightful clinical judgment and the best designed objective assessment instruments, it is usually not possible to predict with

any reasonable certainty whether a particular sex offender will commit another sex crime. That task is even more difficult in the typical SORA risk assessment procedure, like the one conducted here, where there has been no individualized psychiatric assessment of the offender.

The Commentary notes that the “guidelines [the RAI] were developed with the assistance of a group of experts with diverse experience in dealing with sex offenders.” 2006 Commentary at 1. A draft of the guidelines was prepared in 1995 by the Director of the Office of Research and Statistics of the Colorado Division of Criminal Justice. The Board then modified the draft to make it “as objective as possible”. This process lasted two months and included “testing the guidelines against a large sample of cases to insure that accurate results were produced.” (The Commentary does not further explain what “accurate results” in this context means). An expert panel consisting of two prominent and experienced assistant district attorneys specializing in sex offender prosecutions, a probation officer, a deputy attorney general, a police captain, the acting director of forensic services at the State Office of Mental Health a medical doctor and a sex offender treatment provider then met for two days, applied the guidelines to 20 cases and modified them. *See* 2006 Commentary, “Appendix: Development of the Guidelines”. All of these facts show that the Board was diligent in developing its guidelines. But none of these facts indicate that the RAI is a valid Actuarial Risk Assessment Instrument.

This Court obviously sees significant limitations in the efficacy of the RAI as an instrument to assess recidivism risk. Beyond the significant issues addressed here, the Court is also aware that experts in the field of sex offender recidivism and treatment have opined that even some of the RAI’s risk factors which are purportedly based on an offender’s risk of committing another crime have no correlation with recidivism risk. *See People v. Witchley*, 9 Misc3d 556 (Madison County 2005)(discussing but rejecting expert testimony that the RAI’s risk

factors “have no correlation with a sex offender’s risk of reoffending”).

But the Court also accepts that the RAI score must be treated as completely valid in this case, for two important reasons. First, the parties in this case did not present any evidence challenging the RAI. Second, New York’s appellate courts have consistently rejected every one of the numerous challenges which has been made over the past 13 years to the RAI’s validity. This Court is obviously bound by those determinations.

In a 2006 case, the First Department considered a constitutional challenge to the use of the RAI and found that the settlement stipulation in the *Doe v. Pataki* matter (which also binds Defendant here) barred any such challenge. *People v. Bligen*, 33 AD3d 489 (1st Dept 2006), *lv denied*, 8 NY3d 803 (2007). The Court also opined, in *dictum* that were it to reach the merits of Defendant’s claim, it would also be rejected. The Court noted that “[a]lthough defendant offers some scientific criticisms of their [the RAI’s] predictive value, he has not shown that the factors on which the guidelines are based are unreliable indicators of the risk of reoffense by a sex offender so that their use violates the sex offender’s right to due process.” (citations omitted). Challenges to the RAI have also been rejected by every other appellate decision to consider them. *See e.g. People v. Bailey*, 52 AD3d 336 (1st Dept 2008), *lv denied* 11 NY3d 707; *People v. Howard*, 52 AD3d 273 (1st Dept 2008), *lv denied*, 11 NY3d 706; *People v. Pendergrast*, 48 AD3d 356 (1st Dept 2008), *lv denied*, 10 NY3d 714; *People v. Woods*, 45 AD3d 408 (1st Dept 2007), *lv denied*, 10 NY3d 704 (2008); *People v. Hingel*, 50 AD3d 501 (1st Dept 2008), *lv denied*, 11 NY3d 702; *People v. Marcus*, 36 AD3d 468 (1st Dept 2007), *lv denied*, 8 NY3d 811; *People v. Flowers*, 35 AD3d 690 (2d Dept 2006), *lv denied*, 8 NY3d 810 (2007); *People v. Joe*, 26 AD3d 300 (1st Dept 2006), *lv denied*, 7 NY3d 703; *People v. Vasquez*, 37 AD3d 193 (1st Dept 2007), *lv denied*, 8 NY3d 812; *People v. Miller*, 36 AD3d 428 (1st Dept 2007), *lv denied*, 8 NY3d

810; *People v. Ramirez*, 39 AD3d 404 (1st Dept 2007), *lv denied*, 9 NY3d 804; *People v. Wright*, 36 AD3d 465 (1st Dept 2007); *People v. O'Neal*, 35 AD3d 302 (1st Dept 2006), *lv denied*, 8 NY3d 809 (2007); *People v. Wilson*, 33 AD3d 488 (1st Dept 2006), *lv denied*, 8 NY3d 804 (2007); *People v. Mackie*, 33 AD3d 490 (1st Dept 2006), *lv denied*, 8 NY3d 804 (2007); *People v. Chipp*, 33 AD3d 508 (1st Dept 2006), *lv denied*, 8 NY3d 804 (2007); *People v. Guitard*, 57 AD3d 751 (2d Dept 2008), *lv denied*, 12 NY3d 704 (2009); *People v. Washington*, 47 AD3d 908 (2d Dept 2008), *lv denied*, 10 NY3d 709; *People v. Kraeger*, 42 AD3d 944 (4th Dept 2007).

In *People v. Di John*, 48 AD3d 1302 (4th Dept 2008), the Court upheld the trial court's refusal to adjourn a SORA risk assessment hearing for the purpose of allowing the Defendant to present expert testimony challenging the RAI's validity. The Court held that the statutory language of SORA, providing that adjournments of hearings must be granted "[w]here there is a dispute between the parties concerning the determinations" made at the hearing and a party wishes to "obtain materials relevant to the determinations . . ." would not permit an adjournment to present expert testimony challenging the RAI.

This Court does believe, however, that it is proper to understand the RAI's design and its inherent limitations when deciding whether to depart from it. In order to understand whether the RAI resulted in an appropriate risk assessment in this case, the Court believes it is proper to understand what that designation is based on.

Judicial Departures From the RAI – An Evolving Standard

The SORA statute directed the Board to develop guidelines and procedures to assess the risk of reoffense by sex offenders and the danger they posed to public safety. The statute has never explicitly authorized or directed the Board to create a mathematical risk assessment instrument like the RAI. Moreover, as noted *supra*, SORA does not provide that the

recommendations of the Board, in cases where such recommendations are made, have any presumptive effect on courts making risk level decisions. Rather, the statute describes such Board risk level assessments, when they are made at all, as “recommendations” and directs courts to make their own determinations about offender risk levels.

It should also be noted that under the SORA statute, the Board is directed to both develop “guidelines and procedures” to assess the risk of reoffense and separately asked to make a recommendation in individual cases about an offender’s risk level in those cases where an offender is released from prison. *See* Correction Law §§ 168-l (5) & (6). The RAI was developed, presumably, to implement the “guidelines and procedures” requirement. Courts making risk level determinations are directed by the statute to apply the guidelines and procedures and consider Board recommendations, when they are made. *Id.* §§ 168-n (2); 168-d (3). While the statute distinguishes these two Board functions, in practical terms, the RAI was developed by the Board and where the Board adopts the RAI score as its recommendation, the RAI and the Board recommendation are indistinguishable. Case law has also often treated the RAI score and the Board’s recommendation as the same thing.

In the years since its creation, the RAI score, by judicial determination, has been determined to be presumptively correct in all cases in determining an offender’s risk level. This presumption has been construed to apply even in cases where the statute provides that a hearing court should make a risk level determination without considering a recommendation from the Board (i.e., cases where a defendant is not incarcerated).

The presumptively correct nature of the RAI’s risk assessment instrument is derived from statements made by the Board itself in its Commentary. The Commentary asserts that “an objective instrument [the RAI] no matter how well designed” cannot capture the nuances of

every case and thus provides that the Board or a court may depart from risk level designated by the RAI. Departures are only authorized, however, if a specific departure standard has been met:

Generally, the Board or court may not depart from the presumptive risk level unless it concludes that there exists an aggravating or mitigating factor of a kind, or to a degree not otherwise taken into account by the guidelines. *citing*, federal sentencing guidelines departure provision. RAI Commentary, 1997 and 2006 edition “General Principles”, n. 6.

The reason courts are not empowered to depart from the RAI unless the aggravating or mitigating factors standard has been met is also explained in the Commentary:

The expectation is that the instrument will result in the proper classification in most cases so that departures will be the exception – not the rule. *Id.* n. 5.

New York courts have repeatedly cited these two Commentary standards and they have become settled law governing the authority of a court to override an RAI score. *See e.g.*, *Ventura, supra*; *People v. Inghilleri*, 21 AD3d 404 (2d Dept 2005); *People v. Mount*, 17 AD3d 714 (3d Dept 2005); *People v. Townsend*, 2009 Slip Op. 01631 (2d Dept 2009); *People v. Wheeler*, 59 AD3d 1007 (4th Dept 2009), *lv denied*, 12 NY3d 711; *People v. Barody*, 54 AD3d 1109 (3d Dept 2008); *People v. Hayward*, 52 AD3d 1243 (4th Dept 2008); *People v. Taylor*, 47 AD3d 907 (2d Dept 2008), *lv denied*, 10 NY3d 709. The appellate courts have also determined that a departure must be proven by clear and convincing evidence. *Ventura, Inghilleri, Mount supra*.

Other decisions do not cite verbatim to the Board’s judicial departure standard but use

similar standards in assessing whether a court may depart from the RAI. *See People v. Adams*, 52 AD3d 1237 (4th Dept 2008), *lv denied*, 11 NY3d 705; *People v. Aboy*, 60 AD3d 436 (1st Dept 2009), *lv denied*, 12 NY3d 711; *People v. Johnson*, 57 AD3d 294 (1st Dept 2008), *app dismissed*, 12 NY3d 805 (2009) (“special circumstances” must exist to warrant departure); *People v. O’Flaherty*, 23 AD3d 237 (1st Dept. 2005), *lv denied*, 6 NY3d 705 (2006); *People v. Sullivan*, 46 AD3d 285 (1st Dept 2007), *lv denied*, 10 NY3d 704 (2008) (aggravating factors not adequately taken into account in RAI warranted upward departure); *People v. DeJesus*, 55 AD3d 472 (1st Dept 2008), *lv denied*, 11 NY3d 715 (2009) (since alleged mitigating factors were adequately considered by the RAI, downward departure denied).

The Court of Appeals in a recent decision, however, emphasized a less restrictive review standard for departures than that articulated in the Commentary. *People v. Johnson*, 11 NY3d 416 (2008). In *Johnson*, the Court rejected a challenge by the Defendant convicted of possessing child pornography who was assessed 20 points under the RAI because his criminal conduct was “directed at a stranger”. The Court noted that the rationale for these additional points in child pornography cases was “not at all obvious” and “seemingly anomalous” but held that the plain meaning of RAI dictated that these additional points be assessed. 11 NY3d at 419, 421.⁷ The Court held that the remedy for cases in which a result dictated by the RAI “does not make sense” was not to distort the meaning of the instrument but to depart from it. 11 NY3d at 416. Since the Defendant in *Johnson* did not move for a departure, the Court held, he was not entitled to receive

⁷The Court also noted that this point assessment did not seem to be “written with possessors of child pornography in mind”. 11 NY3d at 420. The reason may be that New York’s child pornography statute became effective on November 1, 1996, after the RAI was initially developed. (*See* Chapter 11 of the laws of 1996, codified in Penal Law § 263.16). The drafters of the RAI did not likely contemplate how the instrument might effect a statute which did not yet exist. These same application difficulties may also arise with respect to any other new sex offender laws which have been enacted over the past 13 years or any sex offender laws enacted in the future.

one but could petition the trial court in the future for an order modifying his designation.

In addition to citing the well-established departure standards created by the Board which limit the discretion of courts to override the RAI, however, the Court also emphasized that judges were free to depart from Board recommendations and make their own independent decisions. The language of *Johnson* cites not only the restrictive review standards of the Commentary but the very different provisions of the SORA statute, which do not bestow any presumptive validity on Board recommendations or the RAI:

The statute is quite clear: the Board's duty is to "make a recommendation to the sentencing court" (Correction Law § 168-l [6] and the court applying a clear and convincing evidence standard, is to make its determination after considering that recommendation, and any other materials properly before it (Correction Law § 168-n [3]). While departures from the Board's recommendations are of course the exception, not the rule, the possibility of such departures has been generally recognized (*see Matter of VanDover v. Czajka*, 276 AD2d 945, 946; *Matter of New York State Bd. Of Examiners of Sex Offenders v. Ransom*, 249 AD2d 891 [4th Dept 1998] ["The Board serves only in an advisory capacity that is similar to the role served by a probation department in submitting a sentencing recommendation"]; *see also* 83 N.Y. Jur. 2d Penal and Correctional Institutions § 319 [2d ed. Updated 2008] ["the court is not bound by the recommendation of the board in determining the appropriate risk level of an offender . . . and, in the exercise of discretion, may depart from the board's recommendation"]). 11 NY3d at 421.

Johnson illustrates the tension between the SORA statute and the Commentary. On the

one hand, according to *Johnson*, the Board's recommendations are no more presumptively correct than the sentencing recommendations routinely given to courts by probation departments, recommendations which courts are free to accept or reject without according them any presumptive weight. On the other hand, according to the Commentary, courts may only depart from the RAI where there is an aggravating or mitigating factor which the RAI has not considered. Put another way, if the RAI *has* reached a judgment about a particular issue, a Court is precluded from reaching a different judgment. *See People v. Perez*, 61 AD3d 946 (2d Dept 2009) (affirming denial of downward departure motion since "factors on which the defendant relies to support his argument that a downward departure was warranted are expressly addressed in the SORA Guidelines".)

The Court of Appeals recently again reviewed the standards applicable to a court's consideration of the RAI score in *People v. Mingo, supra*. There, in a footnote, the Court said that the RAI score would "presumptively place" an offender into the numerical risk category determined by the RAI but also that "the level suggested by the RAI is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level *if it concludes that the factors in the RAI instrument do not result in an appropriate designation.*" *Mingo* at 577, n. 2. (emphasis added). The italicized language, again, would appear to differ from the more restrictive standards of the Commentary. While the Commentary indicates that departures may only be taken if there is an aggravating or mitigating factor which has not been considered by the RAI, *Mingo* appears to indicate that departures may be taken if the RAI, in any respect, does not "result in an appropriate designation". As was true in the Court's earlier decision in *Johnson*, *Mingo* emphasizes the discretion SORA courts possess in considering RAI departures.

Justification for Departure

In the Court's view, a departure from the RAI score and the Board's recommendation is justified in this case and the Defendant should be classified as a Level 2 offender because in the roughly fourteen years Mr. Santos has been at liberty since being released from prison, there is no evidence he has engaged in any sexual or criminal misconduct, other than his 2004 conviction for failing to verify his address as a sex offender. The Court believes that a departure is justified in this case based on clear and convincing evidence regardless of whether the standard used is that provided by the SORA statute (which treats a recommendation by the Board as having no presumptive effect), or the standard espoused by the Commentary, (under which a departure is only justified if there is an aggravating or mitigating factor which is not taken into account by the RAI).

There are a number of important factors in this case which argue that a departure is *not* justified. With respect to the harm caused by Defendant's crimes, there is certainly no basis to depart from the RAI's Level 3 score. The crime the Defendant pled guilty to – the rape of a child – is as heinous and harmful as any which could be imagined. If Defendant's risk level under SORA were based solely on the seriousness of his conduct, a Level 3 designation would obviously be appropriate.

The Board, through the Epps letter, also opposes a downward modification to Level 2 for other reasons. Mr. Epps acknowledges that the Defendant has remained crime free since being released from prison in 1994 (with the one exception previously noted). The Board argues, however, that no downward departure should be considered until Mr. Santos accepts responsibility for his crimes and participates in sex offender programming. As noted *supra*, the RAI does not add or subtract any points because of an offender's participation in sex offender programming because of its assessment that "the efficacy of sex offender treatment is open to

question” (citing articles published in 1993 and 1990) *See* Commentary, Factor 14, Supervision. In this case, however, ironically, the Board urges that a departure from a Level 3 score should not be considered until the Defendant participates in sex offender programming.⁸ That may reflect a more modern understanding of the efficacy of sex offender treatment than existed 16 years ago, when the most recent article on which the RAI’s conclusions on this issue was published.

The Court agrees with the Board that Defendant’s failure to accept responsibility for his crimes is a factor which should weigh against granting his departure motion. The Court is not aware of the facts underlying the Board’s determination that, according to the Board, there is no evidence which would indicate that Mr. Santos has engaged in sex offender programming. The Defendant asserts that he did complete a sex offender treatment program. But the Court does agree that participation in such programming would be a factor weighing in favor of a departure.

The factors which argue against a departure in this case, in the Court’s view, are outweighed by Defendant’s long period at liberty without any evidence of sexual misconduct. Pursuant to the Stipulation, the SORA court’s “findings of fact and conclusions of law should address the extent, if any, to which the plaintiff’s behavior since his or her initial registration makes the risk of reoffense more or less likely”. Stipulation, ¶ 13. The Defendant was released from prison in May of 1994. He was returned to prison on two occasions for parole violations. One such additional period of incarceration which lasted for approximately four months occurred in 1997 and a second period of incarceration lasting approximately 6 months occurred in 2003. Subtracting these two periods, the Defendant has been at liberty with no evidence that he has committed an additional sex offense for roughly 14 years. Defendant further avers that he holds a Bachelors degree and Master’s Degree, served in the Army and was honorably discharged, is

⁸According to the Epps letter: “[a] request for modification should not be entertained until he [the Defendant] participates in sex offender programming and accepts full responsibility for his transgressions”.

employed as an auto mechanic, successfully completed sex offender treatment and has been a productive and law abiding member of society since his release from prison.

Courts considering departure motions premised on similar criminal histories have concluded that an offender's long period at liberty without any indication of a new sex offense warranted a downward departure. Motions for such departures have arisen in a number of *Doe v. Pataki* cases. Such cases often concern offenders, like Defendant here, who have been at liberty since their sex offense convictions for a long period of time and thus have a track record on which their actual rate of reoffense can be judged. In *People v. Witchley, supra*, for example, the Court conducted a *Doe v. Pataki* redetermination proceeding for a Defendant who had been convicted of forcibly sodomizing two 13 year old girls and had received a 135 RAI score (25 points above the Level 3 threshold). The Court ruled that the Defendant should be classified as a Level 2 offender largely because the Defendant had been in the community and not reoffended for more than 6 years. The Court explained that in *Doe v. Pataki* cases, the RAI did not consider an offender's post-release behavior, because it was not designed to do so, but that such behavior was nevertheless strongly probative of an offender's risk of reoffense:

Under normal circumstances, a sex offender's risk assessment is made within sixty days of his release from incarceration. The risk assessment is, in the final analysis, nothing more than an educated guess as to whether the defendant will offend again. . . . What the RAI does not take into consideration (because it was not designed to be applied retroactively and because the assessment is ordinarily made pre-release) is actual post-release behavior by the defendant. . . . the best indicator of a sex offender's likelihood of reoffending is his actual post-release history. 9 Misc3d at 558.

In *People v. Abdullah*, 31 AD3d 515 (2d Dept 2006), the Court found that a departure from a presumptive level 3 to a level 2 designation was justified where the offender had been rehabilitated and led an “exemplary” life for the past 17 years. Similarly, in *People v. Thompson*, 34 AD3d 661 (2d Dept 2006), the Court invalidated the trial Court’s designation of the offender, in a *Doe v. Pataki* redetermination proceeding as a Level 3 offender and designated the offender as a Level 1 offender while also considering similar facts. The Court held that the “override” factor imposed by the Court for a recent threat to reoffend was not met by the Defendant’s two prior convictions for criminal possession of a weapon. The Court noted that in the 27 years since being convicted of a sex offense, although the Defendant had been convicted twice on weapons charges, he had not been convicted of any subsequent sex offense. *See also, People v. Laraby* 32 AD3d 1130 (3d Dept 2006) (in *Doe v. Pataki* rehearing, court properly considered defendant’s exemplary conduct since initial registration, including employment and clean parole record, but nevertheless continued to classify defendant as a Level 3 offender).

The People note, correctly, in the Court’s view, that Defendant’s behavior since 1994 does not indicate that he has been a “model citizen”. The People point to Defendant’s parole violations in 1997 and 2003 and his conviction for failure to verify his address as a sex offender in 1994 which the People indicate arose from Defendant’s failure to appear for a required 90 day appointment at the NYPD offices of the Sex Offender Monitoring Unit. A further caveat which should be considered, in the Court’s view, is that many sex offenses are never detected or prosecuted. The fact that there is no evidence that the Defendant has engaged in sexual misconduct for the past 14 years does not necessarily mean that he has not done so, only that there is no evidence of such conduct. Even assuming that the Defendant has not reoffended for

14 years, of course, that does also not mean that he will never reoffend. Nevertheless, in the Court's view, a fourteen year history without any evidence of sexual or other criminal behavior (with the one caveat noted *supra*) is highly probative evidence of Defendant's reoffense risk. In the Court's view, that evidence is more persuasive, with respect to Defendant's recidivism risk, than the fact that he scored 115 points on the RAI.

Several other factors not taken into account by the RAI might argue that a departure in this case is warranted. The first is Mr. Santos's age. He will be 50 years old in October. The Court is aware of numerous research studies indicating that the risk of reoffense for sex offenders declines with advancing age.⁹ The Commentary acknowledges that "a physical condition that minimizes [an offender's] risk of reoffense, such as advanced age" may justify a downward departure. Commentary, General Principles, #6. This Commentary provision appears to focus only on persons who are so old that their physical capacity to engage in a sex offense has been compromised. There is no evidence that Mr. Santos meets that criteria. But the data indicating that the risk of sex offender recidivism declines with age is not limited to physically infirm offenders. In this case, however, there was no expert testimony or any argument made that a 50 year old man with Mr. Santos's characteristics would be statistically less likely to recidivate than a younger man. Thus, the Court does not believe that Mr. Santos's age can be considered as a factor warranting a downward departure.

Research also indicates that offenders who commit sex offenses against family members, as Defendant did here, are less likely to reoffend than offenders who commit non-familial offenses and that offenders who commit sex offenses against girls (as Defendant did here) are

⁹See e.g. *State v. Karl Ahlers* (Unreported Decision by this Court), Index # 30063-08 (New York County Supreme Court, June 10, 2009)(discussing expert testimony about the inverse statistical relationship between advanced age and sex offender recidivism.)

less likely to reoffend than offenders who commit sex offenses against boys.¹⁰ As is true of Defendant's age, neither of these additional significant actuarial risk factors are considered in any respect by the RAI. Because the parties in this case did not address these two issues in any respect either, however, or present any arguments about how such factors might or might not be applicable in Defendant's case, the Court does not believe it would be appropriate to base a departure decision on them.

Risk classifications under SORA are not judgments about moral blameworthiness. If they were, this Court would have no hesitation in simply denying Defendant's motion. SORA is "designed not to punish, but rather to protect the public". *People v. Windham* 10 NY3d 801 (2008); *see also People v. Thompson, supra*. "[A]n accurate determination of the risk a sex offender poses to the public is the paramount concern". *People v. Mingo, supra* at 574.

As noted above, while the Court does not believe a departure is warranted in this case based on any considerations regarding the seriousness of Defendant's crimes, it does believe that a level 2 designation is warranted because of this Court's assessment of Defendant's recidivism risk. The RAI score did not consider or assign any weight to the fact that the Defendant has been at liberty for approximately 14 years without committing a sex offense or any other crime (with the one exception noted *supra*). The Court believes that this long history is probative of the fact that the Defendant at this time is not at a high risk of reoffense.

For all of these reasons, Defendant's motion is granted and Defendant is classified under the Sex Offender Registration Act as a Level 2 offender at moderate risk of reoffense.

¹⁰*See Rosado, supra* at 8 "[I]ncest offenders recidivate at a significantly lower rate than offenders who target victims outside of the family. Child molesters who target male victims recidivate at a significantly higher rate than those targeting only female victims". (Harris and Hanson, *Sex Offender Recidivism: A Simple Question 2004-03*, at <http://www.psepc-sppcc.gc.ca>, petitioner's exhibit 10.)

Dated: New York, New York

October 6, 2009

Daniel P. Conviser, A.J.S.C.