To be argued by
Patrick Michael Megaro
(15 Minutes)

# NEW YORK SUPREME COURT

## APPELLATE DIVISION - SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

A.D. Docket # 2018-02323

-against-

THOMAS D. COX,

Nassau County Supreme Court
Indictment # 1200N-15

Defendant-Appellant.

**INITIAL BRIEF FOR DEFENDANT-APPELLANT**

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2. Whether the County Court's Upward Departure from the Preliminary Risk Level Based on the Defendant-Appellant's Criminal History Constituted Impermissible Double Counting Because His Criminal History was Properly Assessed Through the Risk Assessment Instrument?

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT
---------------------------------------------------------------X **Docket # 2018-02323**

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

THOMAS D. COX,

Defendant-Appellant

---------------------------------------------------------------X

**STATEMENT PURSUANT TO <u>CPLR § 5531</u>**

Nassau County
Indictment # 1200N-15

1. The indictment number in the court below was Indictment # 1200N-15

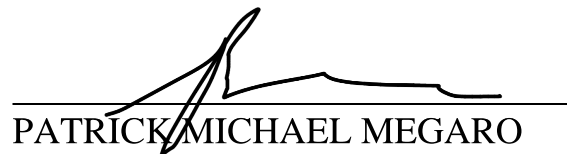
2. The full names of the original parties were the People of the State of New York against Thomas Cox.

3. This action was commenced in the Nassau County Supreme Court, Criminal Term with the filing of Indictment # 1402/2016.

4. This is an appeal as of right from an Order of the Supreme Court, Nassau County (Honorable Robert A. McDonald, J.S.C.), entered January 18, 2018, designating the Defendant-Appellant a Level 3 Sex Offender after a Sex Offender Risk Level Determination Hearing pursuant to Corrections Law Article 6-C.

5. The Defendant-Appellant is appealing on the original record.

Dated: August 20, 2018



PATRICK MICHAEL MEGARO

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------------------------------------------------------------X **Docket # 2018-02323**

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

**CERTIFICATE OF COMPLIANCE**

THOMAS D. COX

Defendant-Appellant

Nassau County
Indictment # 1200N-15

----------------------------------------------------------------X

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows under penalty of perjury pursuant to 22 NYCRR § 670.10.3(f):

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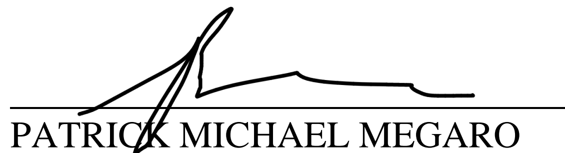

PATRICK MICHAEL MEGARO

## PRELIMINARY STATEMENT

This is an appeal as of right from an Order of the Supreme Court, Nassau County (Honorable Robert A. McDonald, J.S.C.), entered January 18, 2018, designating the Defendant-Appellant a Level 3 Sex Offender after a Sex Offender Risk Level Determination Hearing pursuant to Corrections Law Article 6-C. This determination follows Defendant-Appellant's conviction upon his plea of guilty to Sex Trafficking (Penal Law § 230.34(5)) and sentence thereon to an indeterminate term of imprisonment of 1-3 years on June 27, 2017.

Defendant-Appellant is appealing on the original record and is represented by Patrick Michael Megaro, Esq. There were no co-defendants in this action. Defendant-Appellant remains incarcerated pursuant to the judgment of conviction referenced above. No application for a stay has been made to this Court or any other court of competent jurisdiction.

## QUESTIONS PRESENTED

1. Whether the Defendant-Appellant Should Have Been Assessed Points Under Risk Factor Number 1 For Forcible Compulsion Where the People Used Impermissible Double Hearsay and Did Not Prove by Clear and Convincing Evidence These Points Should Have Been Allotted?

2. Whether the Supreme Court's Upward Departure from the Preliminary Risk Level Based on the Defendant-Appellant's Criminal History Constituted

Impermissible Double Counting Because His Criminal History was Properly Assessed Through the Risk Assessment Instrument?

## STATEMENT OF FACTS

Background

Defendant-Appellant was convicted upon a plea of guilty to Sex Trafficking (Penal Law § 230.34(5)(a)) and was sentenced to 1 to 3 years in the NYS Department of Corrections and Community Supervision on June 27, 2018. (court file, judgment of conviction). Defendant-Appellant was simultaneously prosecuted in the United States District Court for the Western District of New York in Docket # 1:16-CR-00012-RJA-HKS in a six-count indictment for the crimes of 18 U.S.C. § 2421 (Interstate Transportation for Purposes of Prostitution) (three counts) and 18 U.S.C. § 1591(a) (Sex Trafficking) (three counts) . In the concurrent Federal prosecution, he was convicted upon his plea of guilty to one count of Sex Trafficking of a Minor in violation of 18 U.S.C. § 1591(a), and sentenced to 175 months incarceration and 5 years supervised release. (court file, Hearing Exhibit # 1). This conviction was based, in part, on the same conduct for which he was convicted in the instant case in the Nassau County Supreme Court. (Id.). The remaining counts were dismissed in satisfaction.

A Risk Assessment Instrument was prepared on July 24, 2017, and the Defendant-Appellant was scored at 105 points, this placed him in the Level 2 or

moderate factor range. (court file, Risk Assessment Instrument). There were no overrides present in the Risk Assessment Instrument, but an additional memorandum in support of an upward departure was attached thereto. (court file, Risk Assessment Instrument).

The SORA Hearing

A hearing pursuant to Corrections Law § 168-n was held on January 10, 2018 and January 18, 2018 before the Honorable Robert McDonald, J.S.C.

At the start of the hearing, the People sought to admit four exhibits into evidence for the court's consideration. Those exhibits were as follows:

> Exhibit 1 – Federal Sentencing Memorandum by the United States Attorney
>
> Exhibit 2 – Defendant-Appellant's criminal history
>
> Exhibit 3 – Risk Assessment Instrument with accompanying memorandum
>
> Exhibit 4 – Nassau County Department of Probation Pre-Sentence Investigation Report

(H:3).

Defense counsel objected to Exhibit #1, the United States Attorney's Sentencing Memorandum, arguing that People's Exhibit #1 was an advocacy document and impermissible hearsay. (H:3-4). Counsel complained that the Federal prosecutor's memorandum referenced the contents of the Federal Pre-Sentence Report, which was not provided to the defense. (Id.).

The People responded by erroneously arguing that because the Defendant-Appellant pled guilty to the entire Federal indictment, all of the underlying conduct set forth the in Federal prosecutor's memorandum was admissible and relevant. (H:4-5). The People further indicated they were not in possession of the Federal PSR, nor gave a reason as to why not. (H:5).

The court overruled the defense's objection, stating while prosecutors are advocates, they are also officers of the court; they provide information with the intent of it being used in a presentation to a judge well versed in the facts of the case. (H:5-6). The court did still recognize the sentencing memorandum as an advocacy document. (H:6).

All four exhibits were received in evidence, and the People argued for an upward departure to classify Defendant-Appellant as a Level 3 sex offender. (H:6-10). Under risk factor number 1, use of violence, the People requested 10 points be assessed, relying upon the Nassau County Pre-Sentence Report for factual basis. (H:6-7). For risk factor number 2 the People requested 25 points be assessed for sexual intercourse, deviate sexual intercourse, or aggravated sexual abuse against the victim, relying upon Exhibits # 3 and # 4, Defendant-Appellant's criminal history and the Nassau PSR, respectively. (H:7). Regarding risk factor number 5, the People requested an assessment of 20 points because the victim was between the ages of 10 and 16. (Id.). The People said this was supported by Exhibit # 4, similar

to the justification of risk factor number 7. (H:7-8). The People argued the Defendant-Appellant only established a relationship with the victim to victimize her, and further requested 15 points for risk factor number 9, relying upon the Defendant-Appellant's prior criminal history. (H:8).

Finally, the People requested 15 points for risk factor number 11, referencing the case summary in the Risk Assessment Instrument (RAI) and a previous drug conviction listed in People's Exhibit # 2 as well as Defendant-Appellant's own admission of using marijuana in Exhibit # 4. (H:10-11).

The defense objected to the assessment of points for risk factor number 2, arguing there was no basis for a finding of sexual intercourse between the Defendant-Appellant and the victim. (H:9-11). In response, the People relied upon the Nassau PSR, which attributed a statement to the arresting officer in which he alleged Defendant-Appellant forced the victim to engage in sexual intercourse, according to the victim. (H:11). Defendant-Appellant objected to the use of officer's statement, insisting the statements made by the officer are impermissible use of double hearsay. (Id.).[1]

The court questioned the People as to where in the record the sexual contact between Defendant-Appellant and the victim was present. (H:12). The People

[1] Technically, this was triple hearsay. The PSR was hearsay, which reference the arresting officer, which in turn, referenced a statement made by the victim.

responded it was the threat of violence inferred from the officer's testimony. (H:11). The court determined case law was needed to support a finding of sexual contact. (Id.). The People then argued that a finding was justified under a theory of accessorial liability. (H:17-24). They contended even if the Defendant-Appellant was not the one engaging in the sexual act, he should still be held liable because his actions led the victim to be in the room leading to the sexual conduct. (Id.). The defense opposed a finding under this theory, arguing that the case law cited by the People was inapposite. (H:27-28). Ultimately, the court rejected the People's theory of accessorial liability. (H:26). Defense counsel further argued that the People failed to establish forcible compulsion for the same reasons – that the case law cited by the People was inapposite to the facts of this case. (H:27-28).

The People requested an upward departure from the presumptive risk level 2, relying mainly upon the allegations contained in the Federal sentencing memorandum (Exhibit #1) as justification for this departure. (H:29-33). The factual allegations contained in the Federal sentencing memorandum were for conduct that Defendant-Appellant did not admit to, nor was he convicted of, in either the Nassau County Supreme Court or the Federal court. These "facts" were expressly taken from allegations from the Federal Pre-Sentence Report, which was not provided to the defense. (Id.). The People continuously referenced this Exhibit and its contents

while they made their argument about Defendant-Appellant's criminal history and future risk. (Id.).

In response, the defense objected to an upward departure, arguing the standard of review the court must use is clear and convincing evidence of aggravating circumstances not adequately taken into consideration through the RAI. (H:33). Counsel submitted that the People failed to satisfy this burden. (Id.). She reasserted her objection to Exhibit # 1 being entered into evidence, and argued the People failed to present clear and convincing evidence to corroborate the allegations contained in Exhibit # 1. (H:33-34). Counsel further argued the use of the Defendant-Appellant's criminal history as an aggravating factor was incorrect because it was already accounted for in the RAI. (Id.).

The court assessed points for risk factor numbers 1, 5, 7, 9, and 11. (H:35-36). The court decided not to assess points under risk factor number 2, for the aforementioned reasons, which gave Defendant-Appellant a preliminary score of 80 points, placing him at the bottom of the presumptive Level 2 range. (H:35-36).

The court then granted the People's application for an upward departure, and adjudicated Defendant-Appellant a Level 3 Sex Offender, providing the basis as follows:

> Now, the People are seeking an upward departure, based upon the fact that, following this conviction -- as I'm recalling, following this conviction, defendant was convicted federally of a series of charges, and People produced a sentencing memorandum that was given by the United States attorney. I do find that that sentencing memorandum does lay out specific crimes the defendant has been convicted of, and the specific nature of those crimes the defendant was convicted of, I believe, warrant the upward departure.
> ...
> As I said, I am finding the upward departure is warranted. I find clear and convincing evidence to support the conclusion that there is no special designation, and I find clear and convincing evidence defendant should be rated Level 3. This constitutes the decision of the Court.
> A short form order will follow to constitute an appealable order.

(H:36-37).

The court then issued a short-form order, which set forth the court's reasoning for the upward departure on January 18, 2018 as follows:

> However, the People further proved by clear and convincing evidence the existence of aggravating factors not taken into account by the guidelines warranting an upward departure of the defendant's classification to a Level 3 Sex Offender. The basis for the upward departure is the Court's consideration of the totality of Defendant's criminal history which is not completely captured in scoring on the risk level instrument.

(court file, Short Form Order entered January 18, 2018).

Defendant-Appellant timely filed and served a Notice of Appeal. This appeal follows.

## ARGUMENT

**POINT I – AN ADDITIONAL 10 POINTS FOR USE OF FORCIBLE COMPULSION SHOULD HAVE NOT BEEN ASSESSED BECAUSE DOUBLE HEARSAY WAS THE SOLE BASIS UPON WHICH IT WAS ESTABLSHED**

Pursuant to Correction Law § 168-n, a court may apply statutory Guidelines to determine a sex offenders risk level after receiving a recommendation from the Board of Examiners of Sexual Offenders. People v. Wyatt, 89 A.D.3d 112, 117 (2d Dept. 2011). The Board, which is comprised of experts in the treatment and behavior of offenders, analyze various risk factors. Id. The Guidelines created by the Board are based on, but not wholly limited to, factors provided in statutes. Id. However, the sentencing court is "required to consider 'any relevant materials and evidence' submitted by the sex offender, the district attorney and the Board, which may include 'reliable hearsay.'" Id. Therefore, the submitted evidence must consist of reliable hearsay and be proven by clear and convincing evidence.

The Court of Appeals has held that "hearsay is reliable for SORA purposes – and, therefore, admissible- if, based on the circumstances surrounding the development of the proof, a reasonable person would deem it trustworthy." People v. Mingo, 12 N.Y.3d 563 (2009). The Court deemed it would be impossible to list all the types of applicable evidence; however, there are factors that indicate trustworthiness. Id.

> A higher quality of proof may be expected where the proof relates to a criminal case that was recently adjudicated versus one that was resolved decades ago. Among the factors considered in evaluating the reliability of proffered hearsay evidence are the age of the conviction and the efforts made to locate relevant documents; whether the proof is corroborated either by the nature of the conviction or other evidence in the record; whether the declarant was under oath or was acting under a duty to accurately report, record or convey information; and whether the circumstances surrounding the making of the statement otherwise bear indicia of reliability. . . The District Attorney's office documents may be reliable for reasons similar to the business records exception to the hearsay rule. . .

Id. at 574-75.

"Appellate Divisions have also routinely upheld determinations based on information found in case summaries prepared by the Board of Examiners of Sex Offenders and presentence reports prepared by a probation department for use by sentencing courts." Id. at 572. (see e.g. People v. Lewis, 45 A.D.3d 1381, 845 N.Y.S.2d 585 [4th Dept.2007]; People v. Craig, 45 A.D.3d 1365, 845 N.Y.S.2d 594 [4th Dept. 2007]). Additionally, the Fourth Department has found that adequate documents, such as sworn affidavits and grand jury testimony, met the clear and convincing evidence burden placed upon the People and constituted "reliable hearsay." People v. Wroten, 286 A.D.2d 189, 522 (4th Dept. 2001) (defendant appealed from an amended order granting a higher risk level after issuing a final order). "[F]acts previously proven at trial or elicited at the time of entry of a plea of

guilty shall be deemed established by clear and convincing evidence." Mingo, 12 N.Y.3d 563, 576, See People v. Fiene, 56 A.D.3d 921 (3d. Dept. 2008).

In sum, courts have held "reliable hearsay" is clear and convincing when it includes, but is not limited to, sworn affidavits, facts previously proven at trial, facts elicited when pleading guilty and grand jury testimony. Because these types of evidence are deemed clear and convincing, their trustworthiness is not in question.

In Mingo, the Court of Appeals decided the court erred in allowing the District Attorney to submit internal office documents as "reliable hearsay," and as a result a remittal was required. Id. at 563. The Court reasoned that the internal documents neglected to establish an indicium of reliability, and therefore the People failed to prove by clear and convincing evidence the admissibility of the internal office documents. Id.

The Mingo court held that the internal office documents supplied by the District Attorney differed significantly from normal case summaries and presentence reports because there needed to be some explanation of how and by whom the documents were prepared, and what sources were relied upon before they could be deemed trustworthy. Id. The Court held that if any submitted documents specifically referenced outside document not present in the record, this outside document should be presented into evidence. Id. Because the District Attorney in Mingo submitted documents such as Data Analysis Form and an Early Case Assessment Bureau Data

Sheet, these documents improperly referenced outside information that was not presented into the record. Id. at 568, 576.

This outside evidence needs be presented through "a prehearing affirmation, an offer of proof or witness testimony." Id. at 575-76. The proof should generate foundational evidence supplying the requisite indicia of reliability. Id. If the document is unable to be located, there needs to a showing of the effort taken in finding the document. Id.

The Mingo court determined there was no indicia of reliability to the trustworthiness of the internal office document, and therefore the document failed constituted by clear and convincing evidence. Id. The admission of the internal office document was impermissible hearsay. Id.

If the indicia of reliability and clear and convincing evidence standard is not met, then the proceeding should be remitted to the SORA court to establish a foundation supporting the admissibility of the document. Id. at 576.

The instant case is analogous to Mingo. Here, like in Mingo, the People relied upon the Nassau PSR, which was impermissible double hearsay and bore no indicia of reliability.

The information from the PSR was not directly provided by the officer himself, instead it was taken from "available police reports." These reports were not made available to the Defendant-Appellant. Further, the statements attributed to the

officer concerned a conversation the officer allegedly had with the victim – providing a further layer of hearsay. It is noteworthy that the victim did not provide a direct statement to the Department of Probation in preparation of the Nassau PSR, rather her statement was made to another, which was made to another, which was made to the Department of Probation. Finally, the People presented no sworn testimony in the form of either affidavits or live witness testimony to corroborate the double and triple hearsay. Accordingly, because the double hearsay was uncorroborated, it bore no indicia of reliability, and therefore, the People failed to satisfy their burden by clear and convincing evidence.

Nor could the People rely upon Exhibit # 1 to establish forcible compulsion by clear and convincing evidence. The People's argument was essentially that because Defendant-Appellant used forcible compulsion in the Federal case (involving different victims), Defendant-Appellant necessarily used force in this case involving this victim. The People's argument was essentially propensity – because Defendant-Appellant was convicted of a similar crime in Federal court, that meant he used forcible compulsion here. This fails for several reasons.

First, there is no record that Defendant-Appellant admitted to, or was adjudicate to have committed, any act of forcible compulsion in the Federal case. Because the People failed to introduce any other Federal records other than the prosecutor's sentencing memorandum, which contained allegations of crimes for

which Defendant-Appellant was not convicted, the People failed to establish clear and convincing evidence of forcible compulsion in the Federal case.

Even if they had, just because Defendant-Appellant may have committed such an act in another case, involving other victims, that did not equate to forcible compulsion in this case involving this victim. This is especially so where the People relied solely upon double and triple hearsay accounts which were uncorroborated.

This was not harmless error. Without the 10 points for forcible compulsion, Defendant-Appellant's score would have been 70, placing him in the presumptive Level 1, rather than Level 2, category. The difference between the two is profound; this is the difference between lifetime registration versus a set period of years.

If a trial court fails to set forth the required findings of fact and conclusions of law, an appellate court may do so only when the record is sufficient; then it may make its own determinations of whether the points assessed is supported by clear and convincing evidence. People v. Leopold, 13 N.Y.3d 923, 924 (2010), People v. Vega, 79 A.D.3d 718, 719 (2d. Dept. 2012).

Here, there is no sufficient record for this Court to rely upon. Accordingly, this Court should reverse and modify the order to designate Defendant-Appellant a presumptive Level 1 Sex Offender.

**POINT II – BECAUSE THE PEOPLE FAILED TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE AGGRAVATING FACTORS THAT WERE NOT ALREADY PROPERLY TAKEN INTO ACCOUNT BY THE RISK ASSESSMENT INSTRUMENT, THE UPWARD DEPARTURE WAS IMPROVIDENTLY GRANTED BECAUSE IT WAS BASED UPON IMPERMISSIBLE DOUBLE COUNTING**

According to the New York Court of Appeals, in order to determine whether a departure is warranted from a presumptive risk level indicated by the Risk Assessment Instrument at a SORA proceeding, a court must adhere to three analytical steps. People v. Gillotti, 23 N.Y.3d 841 (2014).

> Under SORA, a court must follow three analytical steps to determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score. At the first step, the court must decide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines (see Guidelines at 4; People v. Vaillancourt, 112 A.D.3d 1375, 1376 [4th Dept. 2013], lv denied 22 N.Y.3d 864 [2014]; see also Johnson, 11 N.Y.3d at 418, 420-422 [treating the interpretation of guidelines factors as a legal issue]). At the second step, the court must decide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand (see Correction Law § 168-n [3]; Guidelines at 4, 7; see also People v. Balic, 12 N.Y.3d 563, 570-577 [2009] [analyzing whether reliable hearsay met clear and convincing standard of proof and therefore warranted an upward departure]). If the party applying for a departure surmounts the first two steps, the law permits a departure, but the court still has discretion to refuse to depart or to grant a departure. Thus, at the third step, the court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the

> circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism (see People v. Knox, 12 N.Y.3d 60, 70 [2009]; Johnson, 11 N.Y.3d at 421).

Id.

In People v. Wyatt, 89 A.D.3d 112, 121 (2d Dept. 2011), this Court reaffirmed several prior decisions that all stand for the proposition that where an aggravating or mitigating factor is already taken into account by the Guidelines or the Risk Assessment Instrument, it may not form the basis for a departure.

Likewise, the Third Department has questioned the validity of an upward departure based on a factor that had been properly accounted for on the Risk Assessment Instrument. In People v. Miranda, 24 A.D.3d 909, 910 (3d. Dept. 2005), the defendant was convicted of Rape in the Third Degree and scored to a Level 2 Sex Offender on the Risk Assessment Instrument. The Board of Examiners of Sex Offenders and the People applied for an upward departure based upon the defendant's propensity to associate with underage girls. The court granted the upward departure based upon the defendant's criminal history, which had already been accounted for by assessing points in the Risk Assessment Instrument under risk factor 9.

The Third Department reversed, finding that the trial court failed to fulfill its statutory mandate of setting forth findings of fact and conclusions of law. However, the Third Department remanded with instructions that the criminal history was

insufficient to justify an upward departure because they were already taken into account by the Risk Assessment Instrument. Id. at 911.

Here, like Miranda and Wyatt, the trial court upwardly departed based upon Defendant-Appellant's criminal history, while simultaneously assessing 15 points under risk factor 9. Thus, his criminal history was already taken into account by the Risk Assessment Instrument. Using that to upwardly depart constituted impermissible double counting.

Additionally, the statements by the court on the record and the short form order that followed failed to sufficiently set forth findings of fact and conclusions of law as required by statute. The court below was unclear in that it did not identify specific instances in the Defendant-Appellant's history which led to a determination of an upward departure. The court did not specify whether it considered prior arrests for which no conviction followed, uncharged offenses, or which convictions to establish "the totality." Because there is no sufficient, clear record, Defendant-Appellant is precluded from meaningful appellate review.

## CONCLUSION

For the reasons set forth above, Defendant-Appellant respectfully requests that this Court reverse the order of the court below, modify the same to adjudicate Defendant-Appellant as a Level 1 sex offender, reverse the portion of the order granting the People's application for an upward departure, and grant such other and further relief as this Court may deem just, proper, and equitable.

Dated:

Respectfully Submitted,

PATRICK MICHAEL MEGARO