Court of Appeals of the State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

ALBERT COTTO,

Defendant-Appellant.

ON APPEAL FROM THE APPELLATE DIVISION, FIRST DEPARTMENT
APL-2022-00129

BRIEF OF AMICI CURIAE SCHOLARS OF SEXUAL OFFENDING AND SEXUAL RECIDIVISM, RESTORATIVE ACTION ALLIANCE, AND THE NEW YORK CIVIL LIBERTIES UNION

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

DANIEL R. LAMBRIGHT
MOLLY K. BIKLEN
125 BROAD ST., 19TH FLOOR
NEW YORK, NY 10004
TELEPHONE: (212) 607-3300
FACSIMILE: (212) 607-3318

Attorneys for Amici Curiae

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Scholars on Sexual Offending and Sexual Recidivism consists of Dr. Kelly M. Socia who is a Professor at the School of Criminology and Justice Studies at University of Massachusetts Lowell, Dr. Emily Horowitz who is the Professor and Chair of Sociology & Criminal Justice at St. Francis College, and Eric Janus who is the President and Dean Emeritus at Mitchell Hamline School of Law. University affiliation is only noted for identification purposes. This brief reflects the views of Professors Socia, Horowitz, and Janus as scholars and not University of Massachusetts Lowell, St. Francis College, Mitchell Hamline School of Law, or any other institution. Restorative Action Alliance hereby discloses that it is a non-profit, 501(c)(4) organization. The New York Civil Liberties Union hereby discloses that it is a non-profit, 501(c)(4) organization, and is the New York State affiliate of the American Civil Liberties Union.

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PRELIMINARY STATEMENT

This case raises the question of whether holding an individual's Sex Offender Registration Act ("SORA") hearing remote in time from their release into the community violates due process. New York's process for assessing the risk level of people convicted of sexual offenses for purpose of SORA registration has an unacceptably high likelihood of error based on its overreliance on a flawed risk assessment instrument. While judicial hearings can offer some ability to mitigate the risk of error through the possibility of obtaining downward departures from the assessed scores, this is significantly undermined when hearings occur far before release.

Since 1996, New York has used a risk assessment instrument (RAI) to classify tens of thousands of people convicted of sex offenses as either high, medium, or low risks. Risk assessments based on this instrument and subsequent judicial determinations often result in the lifetime placement of personal information on the state's public internet registry and significant restrictions on movement. The consequences of these assessments for society are dire. Individuals who are assessed at erroneously higher risk levels face restrictions that can significantly impede their ability to reintegrate into society, and individuals erroneously assessed low risk levels can pose safety concerns.

Despite the significance of these assessments, the RAI has never been updated to incorporate major scientific advances in the field of studying sexual recidivism. As a result, it is both *overinclusive* of factors with no correlation to risk and *underinclusive* of the

factors researchers have consistently shown correlate to higher risk. The RAI also assigns arbitrary weights to the various factors and has risk level ranges that make it easier to be assessed at the highest risk level. This fundamentally flawed instrument creates a significant risk that people are being mislabeled and erroneously having their rights restricted.

When a hearing does not occur close in time to release into the community, it exacerbates the problems in New York's method for assessing risk. Because the RAI is in part reliant upon factors that change with time, risk assessments through this tool are inherently time dependent. This means that premature hearings do not accurately reflect the risk of an individual *when they are released into the community*, and instead rely on evidence that is stale by the time that an individual is actually released. Such premature hearings deprive individuals of the ability to argue that relevant circumstances have changed in the time period from the premature hearing to actual release that warrant a lower risk level.

As academics who have extensively studied sexual offending and recidivism and advocates, we write as amici curie in support of Defendant-Appellant's arguments and to expand on the fundamental due process requirements for risk assessments. This Court should find that premature risk assessment hearings that occur remotely before an individual's release in to the community violate the due process rights of those individuals subject to SORA.

INTEREST OF AMICI CURIAE

Amici Scholars on Sexual Offending and Sexual Recidivism have devoted much of their careers to teaching, writing about, and studying sexual offending and sexual recidivism. Dr. Kelly M. Socia (Ph.D., University at Albany, SUNY) is a professor at the School of Criminology and Justice Studies at University of Massachusetts Lowell. Dr. Socia's work covers crime control policies, violent crimes, and individuals returning to the community. He has a special focus on reentry policies for people convicted of sexual offenses. Dr. Socia has extensively studied New York's policies for regulating people convicted of sex offenses. He has authored and co-authored, *Examining the Concentration of Registered Sex Offenders in Upstate New York Census Tracts*, Crime & Delinquency, 62(6), 748-776 [2016], *The Efficacy of County-Level Sex Offender Residence Restrictions in New York*, Crime & Delinquency, 58(4), 612-642 [2012], *The Implementation of County Residence Restrictions in New York*, Psychology, Public Policy, and Law, 18(2), 206-230 [2012], *The Policy Implications of Residence Restrictions on Sex Offender Housing in Upstate, NY*, Criminology & Public Policy, 10(2), 351-389 [2011], and *Does a Watched Pot Boil: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, Psychology, Public Policy, and Law, 14(4), 284-302 [2008] with Jeffrey C. Sandler, and Naomi J. Freeman.

Dr. Emily Horowitz is the Professor and Chair of Sociology & Criminal Justice at St. Francis College in Brooklyn, New York. She holds a Ph.D. from Yale University

in Sociology, and is the author of *Protecting Our Kids? How Sex Offender Laws Are Failing Us* [Praeger, 2015] and *From Rage to Reason: Why We Need Sex Crime Laws Based on Facts, Not Fear* [Bloomsbury, 2023]. Dr. Horowitz has conducted extensive research on the harms and ineffectiveness of conviction registries for over two decades.

Eric Janus (J.D., Harvard Law School) is President and Dean Emeritus at Mitchell Hamline School of Law, a scholar and expert in sex offense civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State*, and numerous peer-reviewed articles on risk assessment of people convicted of sexual offenses, and director of the Sex Offense Litigation and Policy Resource Center, at Mitchell Hamline School of Law, established in 2017.

Amici Restorative Action Alliance is a not-for-profit, non-partisan, social welfare organization that advocates on behalf of individuals impacted by the criminal legal system and those seeking restorative justice in New York, Connecticut, and New Jersey. Restorative Action Alliance seeks to reduce harm and create a better, safer world by addressing intimate and gender-based violence, including sexual harassment, sexual abuse, sexual exploitation, rape, assault, and other types of intimate harm. Restorative Action Alliance also actively opposes the ineffective approaches which our criminal legal system utilizes to address sexual harm including conviction registries, community notification, and overreaching and punitive probation and parole practices.

Amici the New York Civil Liberties Union ("NYCLU"), the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with more than 85,000 members and supporters. The NYCLU's mission is to defend and promote civil rights and liberties as embodied in the United States Constitution, the New York State Constitution, and state and federal law. The NYCLU brings substantial expertise to the issues before the Court in this case, most recently as counsel in *Krull v Annucci,* 21-cv-03395 [SD NY] which challenged the New York state Department of Corrections and Community Supervision and the Board of Examiners of Sex Offenders' policies and practices of the forcing individuals to admit to committing sexual offenses for facing expulsion from treatment and additional points on the risk assessment instrument. The NYCLU has long been concerned about bias in the SORA risk assessment process and published a report in 2006 identifying significant racial disparities among people designated as Level 3 offenders (*see* Christian Smith-Socaris, Robert A. Perry, Lisa Fox-Mullen, *Racial and Ethnic Demographics of the New York State Level 3 Sex Offender Population*, available at https://www.nyclu.org/sites/default/files/sexoffender_analysis_121106.pdf).

ARGUMENT

A core procedural due process requirement is that hearings must occur at a meaningful time and in a meaningful manner to prevent erroneous deprivations of rights and liberties. When a SORA hearing occurs far in time from an individual's actual release into the community, it does not occur at a meaningful time. Premature hearings do not accurately consider dynamic risk factors that change with time and will likely be different from when the individual is released into the community like age and response to treatment. Further, they deprive individuals of the ability to argue that such changing factors have actually reduced their risk such that they should be adjudicated a lower risk level than the one suggested by the flawed risk assessment instrument.

I. THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE PROTECTS INDIVIDUALS REQUIRED TO REGISTER UNDER SORA FROM ERRONEOUS AND PREMATURE RISK ASSESSMENTS.

The Fourteenth Amendment to the U.S. Constitution and the New York Constitution prohibit the state from "depriv[ing] any person of life, liberty, or property, without due process of law" (US Const Amend XIV, § 2; NY Const art. I, §6). As this Court recognized in *People v David W.*: "The commonsense principle at the heart of the due process guarantees in the United States and New York Constitutions is that when the State seeks to take life, liberty or property from an individual, the State must provide effective procedures that guard against an erroneous deprivation" (95 NY2d 130, 136 [2000]). In order to establish a violation of procedural due process rights, litigants must

"demonstrate (1) that [the Court] deprived [them] of a cognizable interest in 'life, liberty, or property,' (2) without affording [them] constitutionally sufficient process" (*Proctor v LeClaire*, 846 F3d 597, 608 [2d Cir 2017], citing *Wolff v McDonnell*, 418 US 539, 556 [1974]).

A. Procedural Due Process Protections Extend to Individuals Facing Risk Assessments Pursuant to SORA.

Federal and state procedural due process protections attach to situations where the State labels or stigmatizes its citizens (*see Wisconsin v Constantineau*, 400 US 433, 437 [1971] ["Where the State attaches 'a badge of infamy' to the citizen, due process comes into play"]; *Siegert v Gilley*, 500 US 226, 233 [1991] [holding litigants must show stigma plus serious consequences from the labeling for due process to attach]). This includes when New York labels people convicted of sex offenses as either high, medium, or low risk "sex offenders" (*see Doe v Pataki*, 3 F Supp 2d 456, 459 [SD NY 1998]; *People v David W.*, 95 NY2d 130, 137 [2000] [holding "a defendant's private interest, his liberty interest in not being stigmatized as a sexually violent predator, is substantial"]).

In *Doe*, the SDNY applied the stigma plus jurisprudence to find that parolee-probationers who were required to register pursuant to SORA had a liberty interest sufficient to trigger procedural due process protections because of the stigma of being "branded as convicted sex offenders who may strike again and who therefore pose a danger to the community," plus the dangers of widespread dissemination of personal information as a result of being put on the registry, and that the dissemination of that

information "is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences" (*id.*). The court concluded that hearings for the class had to comport with "[t]he minimum requirements of due process" including "notice and an opportunity to be heard, and the hearing must be held at a meaningful time and in a meaningful manner" (*id.* at 469). Here, Defendant-Appellant Cotto has been labeled as the highest risk level with such significant consequences for his liberty and property interests. There is no question that due process attaches to this process.

B. The Requirement that a Hearing Must Occur at a "Meaningful Time" Is to Ensure that Determinations Are Not Based on Stale Evidence and Accurately Assess Risk.

In terms of core due process requirements, the Supreme Court and this Court have held that an individual's opportunity to be heard must occur within a meaningful time (*see Mathews v Eldridge*, 424 US 319, 333 [1976] ["The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"], citing *Armstrong v Manzo*, 380 US 545, 552 [1965]; *Kigin v State of New York Workers' Compensation Bd.*, 24 NY3d 459, 469 [2014]). Here, that meaningful time must be relatively close in time to release to the community.

While Respondent concedes that due process requires a meaningful time to be heard, it contends that this merely means that the hearing must occur before the deprivation (*see* Respondent's Br. at 37-38 [stating that the meaningful time requirement

"simply means the affected party must be heard before its liberty interest is impacted"]). However, this narrow view of due process confuses necessity and sufficiency. Certainly, in most cases, a hearing prior to a deprivation is *necessary* for it to be a meaningful hearing but it will not be both *necessary* and *sufficient*. In other words, something more is needed than just occurring before a deprivation to adequately guard against erroneous deprivations.

This is particularly true where deprivations are based on the risk an individual is alleged to pose. In the context of administrative segregation in prisons the meaningful time requirement of due process mandates periodic and timely reviews of the security risk that individuals in confinement pose to ensure that they are being deprived of their liberty for no longer than is required by their *current* risk level (*Hewitt v Helms,* 459 US 460, 477 n 9 [1983], abrogated in part on other grounds by *Sandin v Conner,* 515 US 472 [1995]; *Proctor v LeClaire*, 846 F3d 597, 609 [2d Cir 2017]). In *Proctor*, the Second Circuit acknowledged that "[i]t is well established that whenever process is constitutionally due, no matter the context, '[i]t . . . must be granted at a meaningful time and in a meaningful manner'" and an essential part of this requirement are meaningful periodic reviews for individuals in solitary confinement (*id.* at 609-10). "The purpose of these periodic reviews is to ensure that the state's institutional interest justifying the deprivation of the confined inmate's liberty has not grown stale . . ." (*id.* at 609). In terms of the review conducted, the court held that prisons must "take into account prison conditions and

inmate behavior as they *change over time*; those changes may modify the calculus of whether the inmate presents a current threat to the safety of the facility . . . We conclude merely that prison officials must look to the inmate's present and future behavior and *consider new events to some degree to ensure that prison officials do not use past events alone to justify indefinite confinement*" (*id.* at 611 [emphasis added]).

The logic of *Proctor* is applicable to SORA hearings similarly used to assess the risk level of individuals and deprive liberties commensurate to that risk level. SORA hearings that occur far in time from the release of an individual do not occur in a meaningful time to assess their risk when being released (*see Doe v Sex Offender Registry Bd.*, 472 Mass 475 [2015]). In *Doe*, the Massachusetts Supreme Judicial Court held that classifying an individual who was placed into civil confinement proceedings prior to release as a level three "based on evidence presented . . . at least eighteen months away [from release], risked classifying [him] based on factors that would be stale at the time of his discharge, in violation of due process protections" (*id.* at 478). In a subsequent case also called *Doe v Sex Offender Registry Bd.*, the Supreme Judicial Court reaffirmed its prior holding that premature hearings violate due process, recognizing that by holding the hearing too early the court was not able to consider the individual's positive response to treatment that occurred after the hearing took place while the defendant was civilly confined (472 Mass 492, 494–95 [2015]).

In sum, the courts in *Proctor* and the Massachusetts *Doe* cases have recognized that procedural due process's meaningful time requirement mandates that hearings occur in a timeframe where courts can consider changes in risk factors, such as age or treatment, that may have occurred over the course of confinement such that they are not making deprivation determinations based on stale evidence that does not accurately reflect risk.

II. PREMATURE SORA HEARINGS AMPLIFY THE ALREADY HIGH RISKS OF ERRONEOUS ASSESSMENT CAUSED BY THE RAI AND DO NOT ACCORD WITH DUE PROCESS.

A high risk of erroneous labeling and deprivations of liberty is inherent in the process used to assess the risk of people convicted of sex offenses because of its reliance on New York's arbitrary RAI.[1] When risk assessments occur prematurely, they amplify the high risk of erroneous deprivation by evaluating an individual without considering changes to factors correlated to risk that change over time and that rendering the information relied upon stale at the time of release. These premature hearings deprive

[1] The RAI has received harsh criticism from judges and the legal community (s*ee People v Romulus*, 189 AD3d 553 [1st Dept 2020, Acosta, P.J., Dissenting] ["I believe that this case highlights problems with the RAI. Perhaps it is time for the legislature to update the current RAI in order to incorporate current research on recidivism"]); Report on Legislation by the Criminal Courts Committee, the Criminal Justice Operations Committee, and the Corrections and Community Reentry Committee, New York City Bar, reissued January 2020, available at 1 https://s3.amazonaws.com/documents.nycbar.org/files/20072469–SexOffenderRegistrationActReport.pdf.

individuals of the ability to argue for downward departures based on changes to these factors and violate due process.

A. SORA Hearings in New York Have Unacceptably High Risks of Erroneous Stigmatization and Deprivation of Liberty Given Their Overreliance on the Flawed RAI.

1. The RAI is overinclusive of factors not correlated to risk and underinclusive of factors correlated to risk.

The Board of Examiners of Sex Offenders created the RAI in 1996, and it remains completely unchanged since that time (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [2006] at 23). While the Guidelines do cite to scientific studies to support the inclusion of each factor on RAI, these studies are wholly outdated. The most recent study used to support the inclusion of a factor is from 1995, while many of the studies are from the 1980s, and the oldest study is from 1976, almost fifty years ago (*id.*). Thirteen years ago, after reviewing expert testimony, New York County Supreme Court Justice Daniel Conviser recognized that the RAI is "frozen in time" and is "more than 15 years out–of–date" because "[t]he most significant knowledge in the field . . . has been obtained in the past 15 years" (*People v McFarland*, 29 Misc 3d 1206 [A] [Sup Ct 2010], *affd*, 88 AD3d 547 [1st Dept 2011]).

One of the most important developments in the field of studying sexual recidivism since the creation of the RAI has been greater clarity on the "static" and "dynamic" factors actually correlated to risk. Static factors are features of individuals' histories that predict recidivism but are not amenable to deliberate intervention (*see*

Pamela M. Casey et al., *Offender Risk and Needs Assessment Instruments: A Primer for Courts*, National Center for State Courts, 6 [2014]. Dynamic factors are factors associated with recidivism but are amenable to change, for example through treatment or the passage of time (*id.*). The RAI includes factors that are "static" and "dynamic" in nature but many of these factors are not actually correlated to an increased risk of sexual recidivism or harm.

The static factors that are "[t]he strongest predictors of sexual recidivism are . . . a demonstrated sexual interest in children, a history of prior sexual offenses, the age of onset of sexual offending behavior, and having committed a variety of sexual offenses" (Kevin Baldwin, *Sex Offender Risk Assessment*, Sex Offender Management Assessment and Planning Initiative, https://smart.ojp.gov/somapi/chapter-6-sex-offender-risk-assessment; *see also* R. Karl Hanson & Kelly E. Morton-Bourgon, *The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies*, Journal of Consulting and Clinical Psychology, 73(6), 1157–1159 [2005], available at https://doi.org/10.1037/0022-006X.73.6.1154; R. Karl Hanson & Monique T. Bussière, *Predicting relapse: A meta-analysis of sexual offender recidivism studies,* Journal of Consulting and Clinical Psychology, 66(2), 351–358 [1998], available at https://doi.org/10.1037/0022-006X.66.2.348). The RAI does not incorporate most of these factors and only uses the risk factor of age at first crime as Factor Eight.

The dynamic factors empirically correlated to increased risk are negative social influences, intimacy deficits, sexual self-regulation, attitudes tolerant of sexual assault, and lack of cooperation with supervision (Baldwin, *Sex Offender Risk Assessment*; R. Karl Hanson, et al., *Sexual Offender Recidivism Risk What We Know and What We Need to Know*, Annals of the New York Academy of Sciences, 162 [2003]). The only one of these dynamic factors that the RAI accounts for is negative social influences in Factor 11. Additionally, "[o]ne dynamic risk factor that has received considerable attention in this context is the offender's age at the time of assessment. The inverse relationship between age and criminal offending—as age increases, offending decreases—is one of the more robust findings within criminology" (*id.)*. The RAI does not have a factor dedicated to the age of the individual required to register. Finally, certain types of therapeutic treatment regiments have also been shown to lessen the risk of recidivism (*see* Kristen M. Zgoba & Jill Levenson, *Variations in the Recidivism of Treated and Nontreated Sexual Offenders in New Jersey: An Examination of Three Time Frames*, Victims & Offenders, 3(1), 10–30 [2008]). The RAI does not have a factor dedicated to an individual's response to treatment, though it does negatively assess points to individuals who are terminated from treatment under Factor 12.

Decades of research has also identified factors not predictive of recidivism. These factors include victim empathy, denial of sex offending, the lack of motivation for treatment, general psychological problems, sexual abuse as a child, and the degree

of sexual contact (*see* Hanson et. al at 162-63). In terms of the factors not correlated to risk, the RAI incorporates denial of sexual offending by negatively assessing individuals required to register 10 points for "not accept[ing] responsibility for his sexual misconduct." Factors 2 and 4 are focused on the degree of sexual contact.

Reflecting on the factors used on the RAI, Justice Conviser summarizes that of the thirteen factors on the RAI that are purportedly related to recidivism, "5 . . . have no known relationship to recidivism. (Factors 3 [Number of Victims], 4 [Duration of Offense Conduct with Victim], 6 [Other Victim Characteristics], 10 [Recency of Prior Felony or Sex Crime] & 14 [Supervision])," "[t]wo additional factors have a connection to risk but not as defined in the instrument. (Factors 5 [Age of Victim] & 12 [Acceptance of Responsibility]), and only "[o]ne of the three categories in Factor 7 [Relationship Between Offender and Victim] also has a relationship to risk, but this appears to be inadvertent" (*McFarland*, 29 Misc 3d 1206[A]). Only Factors 1 (Use of Violence), 8 (Age at First Sex Crime), 9 (Number and Nature of Prior Crimes), 11 (Drug or Alcohol Abuse), 13 (Conduct While Confined or Under Supervision) and 15 (Living or Employment Situation) are generally correlated to risk (*id.*).

Put in another way, it is possible for an individual to score 140 points, making them a Level Three and subjecting them to the state's movement restriction, based solely on factors with no known correlation to increased risk.[2]

2. The RAI assigns arbitrary weights and scoring ranges that likely lead to overestimations of risk.

In addition to the specific factors on the RAI, the RAI is fundamentally arbitrary in the weighing of the various categories of factors, the points assigned to the factors, and the risk level ranges. Of the possible maximum 300 total points that an individual can score, 175 of those points (58.3%) derive from an assessment of the current offense, while an individual required to register's past conduct only makes up 21.7% of the maximum point total, conduct while confined equals 11.7% of the total maximum, and conditions of release make up only 8.3%. Given the aforementioned studies on

[2] For risk assessment instruments, scientific validation is the process of determining how well a tool performs at predicting risk (Bureau of Justice Assistance, *Risk Validation*, https://bja.ojp.gov/program/psrac/validation/risk-validation). The Department of Justice's Bureau of Justice Assistance and the National Center for State Courts strongly recommend that risk assessment instruments be scientifically validated (*id.*; Casey at 20). Additionally, it is recommended that tools are constantly revalidated. As the BJA states, "It is important to note that the performance of risk assessment tools may change over time and differ across populations. As test settings in which a risk assessment tool was developed change (e.g., characteristics of criminal justice populations, criminal justice interventions), the tool should be reevaluated and recalibrated for optimal performance" (*see* Bureau of Justice Assistance). The RAI has never been validated, nor has it been revalidated in the 27 years of its existence. It appears as though there has only been one unpublished study on the predictive validity of the RAI. In this study, the researchers reviewed a sample of 3,633 individuals required to register under SORA in New York and looked at 5 years of their post-release information. For risk of recidivism, the study found that the RAI only barely predicted above chance. For predicting the harm caused by any possible future offending, the RAI performed worse than chance. (*See* Jeffery C. Sandler, Naomi J. Freeman & Kelly M. Socia, *Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law*, Psychology, Public Policy, and Law, 14(4), 284–302 [2008], available at https://doi.org/10.1037/a0013881.).

recidivism, it is almost certainly false that the current offense of conviction is the most important factor for evaluating risk. Further, given that the vast majority of points derive from static factors, the RAI fails to accurately weigh the dynamic risk factors such as age and negative social influences.

Similarly, the point totals assigned to various individual factors are arbitrary. As Justice Conviser explains,

> For example, under Factor 9, an offender receives 3x more points for a prior non-violent felony conviction than for a prior non-violent misdemeanor conviction. While an offender's prior criminal history may be relevant to his re-offense risk, there is no support for the proposition that an offender who has committed a prior non-violent felony is three times more likely to commit a sex crime than an offender who has committed a prior non-violent misdemeanor. Nor is there any basis, when considering the RAI as a whole, to assign 15 points for such a non-violent felony, as opposed to, for example 10 or 30 points. None of the specific scores in the RAI appear to have any relationship to any known data or literature in the field.

(*McFarland*, 29 Misc 3d 1206 [A]).

Even more troublingly, the RAI risk level ranges are weighted toward assessing individuals at the highest risk classification. The range for level one (low risk) is 0 to 70, the range for level two (medium risk) is 75 to 105, and the range for the highest risk level three (high risk) is 110 to 300. Thus, "the low risk classification makes up approximately 23% of the scale, the moderate risk classification makes up approximately 10% of the scale and the high-risk classification makes up approximately

63% of the scale" (*id.*). The RAI does not provide any scientific support for this skewed weighing.

B. Premature Hearings Amplify the Risk of Erroneous Deprivation and Deny Civilly Confined Individuals the Ability to Argue for Downward Departures Based on Changes in Dynamic Risk Factors.

By producing a presumptive risk level that is based on factors largely not correlated to risk and arbitrary in their weight, the use of the RAI in itself creates significant risks that an individuals will be erroneously assessed, and thus subjected to restrictions that are harsh and unnecessary. SORA hearings provide some protection against some of the risk that the RAI introduces by allowing judges to depart from the risk level produced by the RAI (s*ee People v Johnson*, 11 NY3d 416, 421 [2008] ["The court is free to depart from the presumptive risk level even if the Board does not recommend such a departure"]). However, this protective function is undermined when hearings are far in time from an individual's release into the community. Hearings that occur prematurely evaluate risk based on dynamic risk factors that will become stale by the time the individual required to register is actually released and thus do not occur in a meaningful time to be heard as required by procedural due process.

As discussed previously, an individual's risk to recidivate is determined in part by dynamic risk factors that change over time (*see supra* Section A [b]). Accordingly, the risk that an individual poses at the time that they have their SORA hearing will not be

the same as when they are released into the community if those events occur far in time from each other.

Courts in New York have recognized that that changes in dynamic factors can serve as the basis for downward departures from presumptive scores that the RAI produces. For example, "advanced age" can serve as a basis for a downward departure (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [2006] at 5; *People v Jimenez*, 178 AD3d 1099, 1101 [2d Dept 2019] ["debilitating illness and/or advanced age may constitute a basis for a downward departure"]). When SORA hearings occur prematurely in relation to release into the community, they deprive individuals of the ability to argue that their aging means that they would have a lower risk level. This is particularly important because civil confinement is indefinite and periods of confinement can be long (*State v Floyd Y.*, 22 NY3d 95, 106 [2013] [observing that "an adverse determination [in a civil confinement proceeding] can lead to indefinite detention."]).

Similarly, an exceptional record in treatment can also serve as a basis for a downward departure (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17; *People v Migliaccio*, 90 AD3d 879, 880 [2d Dept 2011] [remanding for the SORA court to consider the individual required to register's response to treatment]). This is relevant for people like Defendant-Appellant Cotto who are civilly committed because they are required to undergo intensive treatment overseen by the

Office of Mental Health (*see* Mental Hygiene Law § 10.10 [a] [c] ["If the respondent is found to be a dangerous sex offender requiring confinement and committed to a secure treatment facility, that facility shall provide care, treatment, and control of the respondent until such time that a court discharges the respondent in accordance with the provisions of this article"]). If a SORA hearing occurs prior to receiving this treatment, then it cannot meaningfully assess the impact of such treatment. It also deprives individuals of the ability to argue to the court that their response to treatment has diminished their risk level such that a downward departure is warranted.

In both situations, individuals who significantly age before release from civil confinement or who do exceptionally in treatment could be mislabeled by the government as a higher risk offender and face harsh and unnecessary deprivations as a result of premature hearings. While age and response to treatment are two of the most prominent dynamic risk factors, many other dynamic risk factors like positive social influences or prospects for employment could change in a way that would impact the actual risk an individual required to register poses to the community.

Premature hearings do not accurately consider these changes to the dynamic risk factors that occur during the pendency of an individual's civil confinement proceedings and time being civilly confined. This means that these individuals are being assessed based on information that is likely stale by the time they are actually released and amplifies the risks erroneous deprivations. In sum, such risk assessments that occur

prematurely do not comport with procedural due process's requirement that hearings occur in a meaningful time to prevent the erroneous deprivations.

CONCLUSION

For the foregoing reasons, this Court should hold that premature risk assessment hearings violate procedural due process.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

DANIEL R. LAMBRIGHT
MOLLY K. BIKLEN
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300
dlambright@nyclu.org

Counsel for Amici Curiae

Dated: November 21, 2023
New York, NY

CERTIFICATE OF COMPLIANCE

Pursuant to the State of New York, Court of Appeals Rules of Practice, 22 NYCRR Part 500.1 §§ (j)(l) and Part 500.13 §§ (c)(1) and (c)(1)(3), I certify that the foregoing brief was prepared on a word processor, using 14-point Garamond proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, table of contents, table of citations, certificate of compliance, and affidavit of service is 5, 224.

Dated: November 21, 2023
New York, New York

Daniel R. Lambright
Attorney for *Amici Curiae*