

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

748

**KA 22-01851**

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID C. VANDERMALLIE, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered September 29, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). As the People correctly concede, County Court improperly assessed 10 points under risk factor 15 because the People did not establish by the requisite clear and convincing evidence (*see People v Pettigrew*, 14 NY3d 406, 408 [2010]) that defendant's living situation was inappropriate (*see People v Hagen*, 193 AD3d 991, 992 [2d Dept 2021]; *People v Morris*, 140 AD3d 843, 844 [2d Dept 2016], *lv denied* 28 NY3d 904 [2016]). The evidence relied on by the People at the hearing established, at most, that defendant's living situation was uncertain, which, standing alone, is insufficient to show that the living situation was inappropriate (*see People v Patel*, 192 AD3d 1052, 1053 [2d Dept 2021]; *People v Rodriguez*, 130 AD3d 897, 898 [2d Dept 2015]; *see generally People v Alemany*, 13 NY3d 424, 432 [2009]). The court determined that defendant's score on the Risk Assessment Instrument should be assessed at 110 points, but that score must therefore be reduced by 10 points, which results in a total score of 100 and renders defendant a presumptive level two risk. We modify the order accordingly.

In light of our determination, defendant's remaining contention

is academic.

Entered: November 17, 2023

Ann Dillon Flynn  
Clerk of the Court