

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18144  
O/nl

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Submitted - January 22, 2008

ROBERT A. SPOLZINO, J.P.  
FRED T. SANTUCCI  
DANIEL D. ANGIOLILLO  
EDWARD D. CARNI, JJ.

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2006-10938

DECISION & ORDER

People of State of New York, respondent,  
v Barry Wilkes, appellant.

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Jeanne E. Mettler, Bedford Hills, N.Y., for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Lois Cullen Valerio and Anthony J. Servino of counsel; Alan Williams on the brief), for respondent.

Appeal by the defendant from an order of the County Court, Westchester County (R. Bellantoni, J.), dated November 3, 2006, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is affirmed, without costs or disbursements.

The defendant was appropriately assessed points based on the victim's physical helplessness (*see People v Davenport*, 38 AD3d 634), and for having inflicted a physical injury on her (*see People v Bogan*, 70 NY2d 860; *People v Cannon*, 300 AD2d 407). The County Court's determination to designate the defendant a level three sex offender was supported by clear and convincing evidence (*see People v Smith*, 46 AD3d 791; *People v Morris*, 33 AD3d 778).

The issue of whether an automatic override is applicable in this case has been rendered academic given the determination that the defendant is, by score, a level three sex offender.

SPOLZINO, J.P., SANTUCCI, ANGIOLILLO and CARNI, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court

February 26, 2008

PEOPLE OF STATE OF NEW YORK v WILKES