

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

D18360
Y/prt

_____AD3d_____

Submitted - February 1, 2008

PETER B. SKELOS, J.P.
STEVEN W. FISHER
JOSEPH COVELLO
RANDALL T. ENG, JJ.

2006-09067

DECISION & ORDER

People of State of New York, respondent
v Omar Fabara, appellant.

Lynn W. L. Fahey, New York, N.Y. (William Kastin of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,
Nicoletta J. Caferri, and Aisha S. Greene of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Queens County (Wong, J.), dated September 11, 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.

Although departures from the presumptive risk level determined by the risk assessment instrument are the exception rather than the rule, a departure is warranted where clear and convincing evidence demonstrates the existence of an aggravating or mitigating factor that in kind or degree is not otherwise taken into account by the risk assessment guidelines (*see People v Thompson*, 31 AD3d 409; *People v Forney*, 28 AD3d 446, 447; *People v White*, 25 AD3d 677). Contrary to the defendant's contention, the Supreme Court's determination to depart from the presumptive risk level and designate him a level three sex offender was supported by clear and convincing evidence based, inter alia, on the case summary prepared by the Board of Examiners of Sex Offenders, the defendant's statements to the police, and the victims' statements (*see People v Leibach*, 39 AD3d 1093, 1093-1094; *People v Allen*, 24 AD3d 979, 980).

SKELOS, J.P., FISHER, COVELLO and ENG, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court

March 11, 2008

PEOPLE OF STATE OF NEW YORK v FABARA