

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

D18588
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_____AD3d_____

Submitted - February 28, 2008

REINALDO E. RIVERA, J.P.
ROBERT A. LIFSON
ANITA R. FLORIO
CHERYL E. CHAMBERS, JJ.

2006-01146

DECISION & ORDER

People of State of New York, etc., respondent,
v Jose Fiol, appellant.

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

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,
Jeanette Lifschitz, and Tamara Daniels of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Queens County (Aloise, J.), dated January 5, 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.

A departure from the presumptive risk level, as determined by the defendant's total Risk Factor score on the Risk Assessment Instrument submitted by the New York State Board of Examiners of Sex Offenders (hereinafter the Board), is warranted where "there exists an aggravating or mitigating factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines. The court's finding in this regard must be supported by clear and convincing evidence" (*People v Hands*, 37 AD3d 441 [internal citations omitted]).

Contrary to the defendant's contention, the Board's case summary, together with the information in the probation report, provided clear and convincing evidence that aggravating factors existed which were not fully taken into account by the guidelines, and which supported the Board's strong recommendation that an upward departure to a level three designation was warranted. Accordingly, the Supreme Court providently exercised its discretion in making an upward departure from the presumptive level one designation, as determined by the defendant's score, to a level three

March 25, 2008

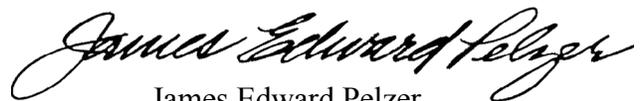
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designation (*see People v Mudd*, 43 AD3d 1128, 1129; *People v Hands*, 37 AD3d 441; *cf. People v Burgos*, 39 AD3d 520).

There is no merit to the defendant's contention that, in making an upward departure as to the defendant's risk level determination, the Supreme Court was restricted to a one-level upward departure (*see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, at 4-5 [2006 ed.]; *see also People v Thorton*, 34 AD3d 1026; *People v Kwiatkowski*, 24 AD3d 878).

RIVERA, J.P., LIFSON, FLORIO and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court