

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

D27433
Y/ct

_____AD3d_____

Submitted - April 26, 2010

JOSEPH COVELLO, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
LEONARD B. AUSTIN, JJ.

2008-08934

DECISION & ORDER

People of State of New York, respondent,
v Michael Colavito, appellant.

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

Daniel M. Donovan, Jr., District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart
and Michael Shollar of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Richmond County (Rienzi, J.), dated August 29, 2008, which, after a hearing to redetermine the defendant's sex offender risk level pursuant to the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456), designated him a level two sex offender pursuant to Correction Law article 6-C.

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

A court has the discretion to depart from the presumptive risk level, as determined by use of the risk assessment instrument, based upon the facts in the record (*see People v Bowens*, 55 AD3d 809, 810; *People v Taylor*, 47 AD3d 907, 907; *People v Burgos*, 39 AD3d 520, 520; *People v Hines*, 24 AD3d 524, 525). However, "utilization of the risk assessment instrument will generally 'result in the proper classification in most cases so that departures will be the exception not the rule'" (*People v Guaman*, 8 AD3d 545, 545, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed]; *see People v Bowens*, 55 AD3d at 810; *People v Taylor*, 47 AD3d at 908; *People v Burgos*, 39 AD3d at 520; *People v Hines*, 24 AD3d at 525). A departure from the presumptive risk level is warranted where "there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed]; *see People v Bowens*, 55 AD3d at 810; *People v Taylor*, 47 AD3d at 908; *People v Burgos*, 39 AD3d at 520;

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People v Hines, 24 AD3d at 525). Further, there must be clear and convincing evidence of the existence of a special circumstance to warrant such a departure (*see People v Bowens*, 55 AD3d at 810; *People v Burgos*, 39 AD3d at 520; *People v Agard*, 35 AD3d 568, 568; *People v Ventura*, 24 AD3d 527, 527; *People v Dexter*, 21 AD3d 403, 404).

Here, the Supreme Court providently exercised its discretion in denying the defendant's request for a downward departure, as the defendant failed to present clear and convincing evidence of special circumstances warranting such a departure (*see People v Bowens*, 55 AD3d at 810; *People v Taylor*, 47 AD3d at 908; *see also People v Wragg*, 41 AD3d 1273, 1274; *People v Santos*, 25 Misc 3d 1212[A], 2009 NY Slip Op 52040[U]; *cf. People v Stevens*, 55 AD3d 892).

COVELLO, J.P., DICKERSON, ENG and AUSTIN, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court