

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

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Submitted - June 14, 2010

PETER B. SKELOS, J.P.  
RANDALL T. ENG  
L. PRISCILLA HALL  
PLUMMER E. LOTT, JJ.

2008-06750

DECISION & ORDER

People of State of New York, respondent, v  
Victor Cruz, appellant.

Lynn W. L. Fahey, New York, N.Y. (Anna Pervukhin 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 June 20, 2008, 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 Supreme Court's determination to designate the defendant a level three sex offender is supported by clear and convincing evidence and, thus, should not be disturbed (see Correction Law § 168-n[3]; *People v Lewis*, 56 AD3d 447; *People v Solis*, 52 AD3d 800; *People v Warren*, 42 AD3d 593; *People v Bula*, 41 AD3d 569; *People v Morris*, 33 AD3d 778; *People v Baylor*, 19 AD3d 467; *People v Cureton*, 299 AD2d 532).

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]; *People v Bowens*, 55 AD3d 809, 810; *People v Taylor*, 47 AD3d 907, 908; *People v Hines*, 24 AD3d 524, 525; *People v Ventura*, 24 AD3d 527; *People v Dexter*, 21 AD3d 403, 404).

June 29, 2010

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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 a 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]; see *People v Kraus*, 66 AD3d 854; *People v Jacobs*, 61 AD3d 835, 836; *People v Bowens*, 55 AD3d at 810; *People v Taylor*, 47 AD3d at 908; *People v Wragg*, 41 AD3d 1273, 1274; *People v Burgos*, 39 AD3d 520; *People v Agard*, 35 AD3d 568).

SKELOS, J.P., ENG, HALL and LOTT, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court