

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1428

KA 10-00180

PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN CULLEN, ALSO KNOWN AS JOHN MCCARTHY,  
DEFENDANT-APPELLANT.

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ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF  
COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered October 27, 2009. The order denied the petition of defendant for a modification of his Sex Offender Registration Act classification.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the determination that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] § 168 *et seq.*). We note that many of the factors upon which defendant relies in support of his modification petition were previously considered by this Court in his prior appeal from the order determining that he is a level three risk (*People v Cullen*, 60 AD3d 1466, *lv denied* 12 NY3d 712). With respect to any additional factors set forth by defendant in support of his modification petition, we conclude that defendant failed to meet his "burden of proving the facts supporting the requested modification by clear and convincing evidence" (§ 168-o [2]; *see People v Higgins*, 55 AD3d 1303).

The further contention of defendant that County Court erred in assessing 20 points against him under the risk factor for his relationship with the victims is unreserved for our review inasmuch as defendant failed to raise that contention in either of his prior appeals or in support of his modification petition (*see generally People v Smith*, 17 AD3d 1045, *lv denied* 5 NY3d 705). Defendant also failed to preserve for our review his contention that he is not subject to SORA (*see People v Windham*, 10 NY3d 801). In any event,

those contentions are without merit.

Entered: December 30, 2010

Patricia L. Morgan  
Clerk of the Court