

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

D54912  
M/htr

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - December 14, 2017

REINALDO E. RIVERA, J.P.  
SHERI S. ROMAN  
COLLEEN D. DUFFY  
FRANCESCA E. CONNOLLY, JJ.

---

2016-13039

DECISION & ORDER

People of State of New York, respondent,  
v David Martinez, appellant.

---

Seymour W. James, Jr., New York, NY (Michael C. Taglieri of counsel), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove and Joyce Adolfsen of counsel; Walker Halstad on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Michael J. Brennan, J.), dated November 16, 2016, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

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

The Supreme Court did not err in denying the defendant's request for a downward departure from his presumptive risk level to risk level one. A defendant seeking a downward departure from the presumptive risk level has the initial burden of "(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [Sex Offender Registration Act (hereinafter SORA)] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" (*People v Wyatt*, 89 AD3d 112, 128; *see People v Gillotti*, 23 NY3d 841, 861; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]).

Here, the mitigating circumstances identified by the defendant either were adequately taken into account by the SORA Guidelines, or were not proven by a preponderance of the evidence (*see People v Velasquez*, 145 AD3d 924, 924-925; *People v Game*, 131 AD3d 460, 461; *People v*

April 11, 2018

Page 1.

*Coleman*, 122 AD3d 599, 599-600; *People v Wyatt*, 89 AD3d 112, 131).

Accordingly, the Supreme Court properly denied the defendant's request for a downward departure from his presumptive risk level designation.

RIVERA, J.P., ROMAN, DUFFY and CONNOLLY, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court