

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

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Submitted - May 1, 2018

JOHN M. LEVENTHAL, J.P.  
SANDRA L. SGROI  
SYLVIA O. HINDS-RADIX  
COLLEEN D. DUFFY, JJ.

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2016-01845

DECISION & ORDER

People of State of New York, respondent,  
v Mozard Fleurimond, appellant.

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The Legal Aid Society, New York, NY (Adrienne M. Gantt of counsel; Elizabeth Wu on the brief), for appellant.

Eric Gonzalez, District Attorney, Brooklyn, NY (Leonard Joblove, Morgan J. Dennehy, and Daniel Berman of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Elizabeth A. Foley, J.), dated February 9, 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.

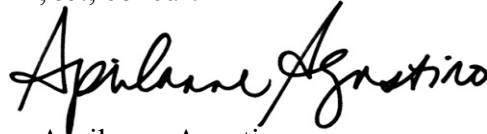
A defendant seeking a downward departure from the presumptive risk level has the initial burden of “(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [Sex Offender Registration Act] 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]). If the defendant makes that twofold showing, the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant’s dangerousness and risk of sexual recidivism (*see People v Gillotti*, 23 NY3d at 861; *People v Champagne*, 140 AD3d 719, 720).

The defendant failed to identify, as a matter of law, an appropriate mitigating factor

and failed to establish the facts in support of its existence by a preponderance of the evidence (*see People v Curry*, 158 AD3d 52, 60-62; *People v Rocano-Quintana*, 149 AD3d 1114, 1115). Accordingly, we agree with the Supreme Court's determination to deny the defendant's application for a downward departure from his presumptive risk level and its determination to designate him a level two sex offender.

LEVENTHAL, J.P., SGROI, HINDS-RADIX and DUFFY, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court