

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 16, 2026

CV-23-1756

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

RONALD OCCHIPINTI,

Appellant.

Calendar Date: June 1, 2026

Before: Clark, J.P., Fisher, Powers, Mackey and Corcoran, JJ.

Angela Kelley, East Greenbush, for appellant.

Brian P. Conaty, District Attorney, Monticello (*Thomas W. Raleigh* of counsel),
for respondent.

Corcoran, J.

Appeal from an order of the Supreme Court (Stephan Schick, J.), entered April 26, 2023 in Sullivan County, which classified defendant as a risk level three sex offender pursuant to the Sex Offender Registration Act.

In May 2006, defendant pleaded guilty in Queens County to two separate superior court informations, charging him with course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second degree. Later in May 2006, defendant pleaded guilty in Sullivan County to a superior court information charging him with course of sexual conduct against a child in the first degree, aggravated sexual abuse in the second degree and use of a child in a sexual performance. The victim

in the Sullivan County action was also the victim in one of the crimes alleged in the Queens County superior court informations. Pursuant to a global resolution, defendant was sentenced in Sullivan County to 20 years in prison, to be followed by five years of postrelease supervision.

In anticipation of defendant's release from incarceration, the Board of Examiners of Sex Offenders prepared a risk assessment instrument (hereinafter RAI) regarding only the Sullivan County offenses and presumptively classified defendant as a risk level two sex offender (100 points) pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C). The Board recommended an upward departure to risk level three, stating that "the RAI does not capture [the] totality of [defendant's] offenses that includes a second underage victim." Following a hearing, Supreme Court found that defendant's presumptive risk level was properly scored as a risk level two (100 points) but adopted the Board's recommendation for an upward departure and classified defendant as a risk level three sex offender without further designation. Defendant appeals.

"An upward departure from a presumptive risk level classification is justified when an aggravating factor exists that is not otherwise adequately taken into account by the risk assessment guidelines and the court finds that such factor is supported by clear and convincing evidence" (*People v Sandikci*, 246 AD3d 1210, 1211 [3d Dept 2026] [internal quotation marks and citations omitted]). "When assessing whether an upward departure is warranted, the court may consider reliable hearsay evidence such as the case summary, presentence investigation report and RAI, as well as statements made by the victims to law enforcement, the defendant's past misconduct and any other proof that a reasonable person would deem trustworthy" (*People v Dawson*, 243 AD3d 1024, 1025-1026 [3d Dept 2025] [internal quotation marks and citations omitted]). "An aggravating factor, in turn, is one which tends to establish a higher likelihood of reoffense or danger to the community than the presumptive risk level calculated on the RAI" (*id.* at 1025 [internal quotation marks, brackets and citations omitted]; *see People v Maurer*, 220 AD3d 1061, 1062 [3d Dept 2023]). "Upon such a showing, the court makes a discretionary determination whether the overall circumstances warrant a departure to prevent an underassessment of the offender's risk of sexual recidivism and dangerousness" (*People v Furgeson*, 230 AD3d 1488, 1489 [3d Dept 2024] [internal quotation marks and citations omitted]; *see People v Johnson*, 205 AD3d 1236, 1237-1238 [3d Dept 2022]).

At the hearing, the People adopted the Board's recommendation for an upward departure for the reasons stated by the Board. The People also highlighted evidence in the

case summary that defendant accessed sexually inappropriate content on a facility computer while incarcerated. At the conclusion of the hearing, Supreme Court determined that an upward departure was warranted based upon evidence of defendant's conduct related to the Queens County crimes, as well as the evidence in the case summary that defendant accessed sexually inappropriate content on a facility computer.¹ Initially, defendant failed to preserve his contention that his conduct while incarcerated should not have been considered as a basis for an upward departure due to a lack of notice (*see People v Charache*, 9 NY3d 829, 830 [2007]; *People v Ross*, 37 AD3d 1117, 1118 [4th Dept 2007], *lv denied* 9 NY3d 802 [2007]) or because his conduct was taken into account in the RAI (*see People v Washburn*, 206 AD3d 1313, 1315 [3d Dept 2022], *lv denied* 39 NY3d 903 [2022]; *People v McKenna*, 186 AD3d 1542, 1543 [2d Dept 2020], *lv denied* 36 NY3d 903 [2020]). In any event, the Board recommended an upward departure based upon evidence of defendant's contemporaneous convictions in Queens County found in the case summary and the presentence report. These convictions were not taken into account in the RAI and are indicative that defendant "poses an increased risk to public safety," providing a basis for an upward departure (*People v Waters*, 198 AD3d 1024, 1025 [3d Dept 2021] [internal quotation marks and citation omitted], *lv denied* 37 NY3d 919 [2022]; *see People v Ryan*, 96 AD3d 1692, 1693 [4th Dept 2012], *lv dismissed* 20 NY3d 929 [2012]).

We agree with defendant, however, that Supreme Court erred in not considering his age and current medical conditions as mitigating factors when determining whether the upward departure was warranted. The record reflects that, based upon issues raised at the hearing by defendant in opposition to the upward departure, the court concluded that defendant is "elderly" as well as "legally blind, . . . physically feeble and [the court does not] think he's in a position to manhandle anybody, not even a 12-year-old, at this point." Instead of considering defendant's condition as a mitigating factor when determining if an upward departure was warranted, the court relied on defendant's condition as the mitigating factor in its decision not to designate defendant as a sexually violent offender. Significantly, "the decision whether to designate a defendant a sexually violent offender is not a matter with respect to which the adjudicating court may exercise discretion" (*People v Talluto*, 39 NY3d 306, 315 [2022]; *see People v Lockwood*, 308 AD2d 640, 640-641 [3d Dept 2003]). Inasmuch as defendant was convicted of aggravated sexual abuse in the second degree (*see* Penal Law § 130.67), which is one of the statutorily

¹ In contrast, Supreme Court's written order and finding of facts cite to defendant's conduct resulting in the Queens County convictions as the sole determining factor for the upward departure.

enumerated sexually violent offenses for Sex Offender Registration Act purposes (*see* Correction Law § 168-a [3] [a] [i]; [7] [b]), the court had no discretionary authority and was statutorily bound to designate defendant as a sexually violent offender (*see People v Talluto*, 39 NY3d at 315; *People v Montesquieu*, 217 AD3d 548, 549 [1st Dept 2023], *lv denied* 40 NY3d 909 [2023]; *People v Williams*, 216 AD3d 438, 439 [1st Dept 2023], *lv denied* 40 NY3d 904 [2023]; *People v Lockwood*, 308 AD2d at 640-641)). Accordingly, the court erred in failing to designate defendant as a sexually violent offender.

In light of Supreme Court's finding regarding defendant's medical condition, and given that, when determining whether an upward departure is warranted, the court "must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an . . . under-assessment of . . . defendant's dangerousness and risk of sexual recidivism" (*People v Gillotti*, 23 NY3d 841, 861 [2014]), Supreme Court should have considered his medical condition when determining whether an upward departure was warranted. Because we cannot ascertain whether the court, in its discretion, would have ordered an upward departure and classified defendant as a risk level 3 sex offender had it taken into consideration defendant's medical condition, we remit for a redetermination based upon the 2023 hearing record. Upon remittal, the court is instructed to designate defendant as a sexually violent offender. Defendant's remaining contentions have been considered and found to be without merit.

Clark, J.P., Fisher, Powers and Mackey, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large initial "R" and a distinct "D" for the middle name.

Robert D. Mayberger
Clerk of the Court