

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

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_____AD3d_____

Submitted - January 4, 2010

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
THOMAS A. DICKERSON
SHERI S. ROMAN, JJ.

2007-10104

DECISION & ORDER

The People, etc., ex rel. James Burgess, appellant,
v Robert Ercole, etc., respondent.

(Index No. 1595/07)

Gary E. Eisenberg, New City, N.Y., for appellant.

Cyrus R. Vance, Jr., District Attorney, New York, N.Y. (Amyjane Rettew and Olivia Sohmer of counsel), for respondent.

In a proceeding pursuant to CPLR article 70 for a writ of habeas corpus, the petitioner appeals from a judgment of the Supreme Court, Dutchess County (Dolan, J.), entered August 2, 2007, which, without a hearing, denied the petition and dismissed the proceeding.

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

“A writ of habeas corpus may not be used for review of issues that have been, or could have been, reviewed on direct appeal or by a postjudgment motion addressed to the court in which an underlying judgment of conviction was rendered” (*People ex rel. Dushain v Ercole*, 64 AD3d 669, 669; see *People ex rel. Abdul-Aziz v Marshall*, 68 AD3d 902, lv denied 13 NY3d 709; *People ex rel. Barnes v Fischer*, 303 AD2d 526). Here, the petitioner raised the identical issue in two prior unsuccessful motions for postconviction relief under CPL article 440. Leave to appeal from the orders determining those motions was denied. Where a petitioner presents no fundamental constitutional or

statutory claim that was not already reviewed on a prior CPL article 440 motion, the petition is procedurally barred (*see People ex rel. Almeyda v Schultz*, 18 AD3d 582, 582-583).

Therefore, the Supreme Court properly denied the petition and dismissed the proceeding without conducting a hearing.

SKELOS, J.P., SANTUCCI, DICKERSON and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court