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

D28362
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_____AD3d_____

WILLIAM F. MASTRO, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS

2010-06358 DECISION, ORDER & JUDGMENT

In the Matter of Salvatore Emma, petitioner,
v Robert J. Collini, etc., respondent; Daniel J.
Donovan, Jr., nonparty.

Salvatore Emma, Fishkill, N.Y., petitioner pro se.

Andrew M. Cuomo, Attorney General, New York, N.Y. (Roberta L. Martin of counsel), for respondent.

Daniel M. Donovan, Jr., District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart of counsel), nonparty pro se.

Proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent Robert J. Collini, a Justice of the Supreme Court, Richmond County, to vacate an order of protection dated June 11, 2010, and entered in an underlying criminal action entitled *People v Emma*, prosecuted in that court under Indictment No. 345/09, and application by the petitioner for poor person relief.

ORDERED that the application for poor person relief is granted to the extent that the filing fee imposed by CPLR 8022(b) is waived, and the application is otherwise denied; and it is further,

ADJUDGED that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal*

Aid Socy. of Sullivan County v Scheinman, 53 NY2d 12, 16). The petitioner has failed to demonstrate a clear legal right to the relief sought. The propriety an order of protection issued against the petitioner during a sentencing proceeding could have been raised on a direct appeal from the judgment of conviction (*see People v Nieves*, 2 NY3d 310, 312).

MASTRO, J.P., SANTUCCI, ANGIOLILLO and CHAMBERS, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court