

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**KAH 12-00123**

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
MITCHELL MONTGOMERY, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DALE ARTUS, SUPERINTENDENT, GOWANDA CORRECTIONAL  
FACILITY, RESPONDENT-RESPONDENT.

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DAVID J. PAJAK, ALDEN, FOR PETITIONER-APPELLANT.

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered November 29, 2011 in a habeas corpus proceeding. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that he was improperly sentenced as a persistent violent felony offender on his 1998 conviction of burglary in the second degree (Penal Law § 140.25 [2]). We conclude that Supreme Court properly denied the petition. "Habeas corpus relief is unavailable because petitioner's contention[s] in support of the petition 'could have been . . . raised on direct appeal or by a motion pursuant to CPL article 440' " (*People ex rel. Lewis v Graham*, 96 AD3d 1423, 1423, *lv denied* 19 NY3d 813; *see People ex rel. Martinez v Graham*, 98 AD3d 1312, 1312, *lv denied* 20 NY3d 853; *People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, 1351, *lv denied* 12 NY3d 714).

Entered: February 7, 2014

Frances E. Cafarell  
Clerk of the Court