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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 203 SSM 31
In the Matter of Gary DeFilippo,
Appellant,
v.
Hon. Stephen J. Rooney, &c.,
et al.,
Respondents.

Submitted by Michael Handwerker, for appellant.
Submitted by Ann Bordley, for respondents.

MEMORANDUM:

The judgment of the Appellate Division should be affirmed, without costs, and the certified question not answered on the ground that it is unnecessary.

The Appellate Division correctly concluded that petitioner failed to meet his burden of demonstrating that the

alleged prosecutorial misconduct was conducted in a deliberate attempt to provoke him to move for a mistrial (see Matter of Gorghan v DeAngelis, 7 NY3d 470 [2006]). The Appellate Division also properly concluded that petitioner failed to demonstrate a clear legal right to the remedy of prohibition (see Matter of Rush v Mordue, 68 NY2d 348, 352 [1986]; Matter of State of New York v King, 36 NY2d 59, 62 [1975]).

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On review of submissions pursuant to section 500.11 of the Rules, judgment affirmed, without costs, and certified question not answered on the ground that it is unnecessary, in a memorandum. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided September 16, 2008