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

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KAH 14-00819
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ERICK M. CAMPBELL, PETITIONER-APPELLANT,

V   MEMORANDUM AND ORDER

SUPERINTENDENT, J. COLVIN, MID-STATE CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Oneida County (Samuel D. Hester, J.), entered January
16, 2014 in a habeas corpus proceeding. The judgment, inter alia,
dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment that, inter alia,
dismissed without a hearing his petition pursuant to CPLR article 70.
Petitioner's contention that respondent failed to file a proper return
under CPLR 7008 is unpreserved for our review (*see People ex rel.
Mitchell v Cully*, 63 AD3d 1679, 1679, *lv denied* 13 NY3d 708), and we
decline to exercise our power to review it as a matter of discretion
in the interest of justice.

Contrary to petitioner's further contention, the motion to
dismiss, which Supreme Court converted to a return, established that
petitioner was lawfully detained pursuant to an undischarged sentence
of incarceration, and the petition was therefore properly dismissed
(*see People ex rel. Allen v Hammock*, 128 AD2d 657, 657).

Lastly, we reject petitioner's contention that it was an abuse of
discretion for the court to deny his request for assigned counsel.
Petitioner failed to make that request until briefs had been filed
with the court, and we therefore conclude that petitioner suffered no
prejudice from a lack of assigned counsel (*see People ex rel. Eaddy v
Wilkins*, 27 AD2d 984, 984).

Entered: March 31, 2017   Frances E. Cafarell
                                                 Clerk of the Court