

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

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**KAH 13-00585**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, SCONIERS, AND VALENTINO, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
DWIGHT M. DILBERT, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MARK BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL  
FACILITY, RESPONDENT-RESPONDENT.

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ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered January 2, 2013 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 the evidence adduced at trial was legally insufficient to support the conviction of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference]) inasmuch as the evidence established that his acts against the victim were intentional and manifested an intent to kill. We conclude that Supreme Court properly denied the petition. " 'Habeas corpus relief is not an appropriate remedy for asserting claims that were or could have been raised on direct appeal or in a CPL article 440 motion' " (*People ex rel. Martinez v Graham*, 98 AD3d 1312, 1312, lv denied 20 NY3d 853; see *People ex rel. Smith v Graham*, 109 AD3d 1113, 1113; *People ex rel. Lewis v Graham*, 96 AD3d 1423, 1423, lv denied 19 NY3d 813).

Entered: May 2, 2014

Frances E. Cafarell  
Clerk of the Court