STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JAMES PETTUS,

Petitioner,

-against-

ADA RANDOLPH CLARKE, JR.; ROBERT MORGENTHAU, GOV. PATAKI; ELIOT SPITZER; VANESSA WOOTEN; CAROL HOLMES,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-06-ST6991 Index No. 4884-06

Appearances:

James Pettus
Inmate No. 03-R-3597
Petitioner, Pro Se
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Michael A. Cardozo
Corporation Counsel of the
The City of New York
Attorney For Respondents
Robert M. Morgenthau and
Randolph Clarke, Jr.
100 Church Street, Room 2-180
New York, NY 10007
(Marilyn Richter, Assistant Corporation Counsel, of Counsel)

Robert M. Morgenthau
District Attorney of the
County of New York

One Hogan Place
New York, NY 10013
(Morrie I. Kleinbart, Esq.
Assistant District Attorney, of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

As relevant here, on October 20, 2003 judgment was entered convicting the petitioner of two counts of forgery in the second degree and two counts of offering a false instrument for filing in the first degree (see People v Pettus, 20 AD3d 369 [1st Dept., 2005], lv to app denied 5 NY3d 855]). The petitioner alleges that respondent Vanessa Wooten investigated the case and initiated the prosecution. He alleges that respondent Randolph Clarke, Jr., an Assistant District Attorney of New York County, prosecuted the case. The petitioner commenced the above-captioned CPLR Article 78 proceeding for an order directing the New York State Governor to compel respondent Morgenthau to have respondents Clarke and Wooten arrested and removed from their respective positions of employment. He sought an order directing the Governor to compel the New York State Attorney General to investigate any and all cases prosecuted by respondent Clarke; and an order directing the Governor to compel respondent Morgenthau to forward to the petitioner the minutes of grand jury proceedings underlying his prosecution.

Petitioner advances several arguments in an effort to demonstrate that his criminal

convictions were wrongfully obtained. Among them, he maintains that the District Attorney failed to sign the indictment; that he was prosecuted in the wrong county (New York County, rather than Bronx County); that the criminal charges were known to be false; that he was indicted for filing a false instrument in the second degree, but prosecuted for filing a false instrument first degree; and that respondent Vanessa Wooten was (in petitioner's words) "manipulated" by respondent Clarke[1].

Respondents Clarke, Morgenthau, Wooten and Holmes did not initially appear in the proceeding. Respondents George Pataki and Eliot Spitzer made a motion to dismiss the petition pursuant to CPLR 3211. The motion was granted by decision-order dated January 23, 2007. In the same decision-order the Court, pursuant to CPLR 7804 (e), directed that respondents Clarke, Morgenthau, Wooten and Holmes either serve an answer or make an appropriate motion. Respondents Clarke and Morgenthau have made a motion to dismiss the petition. Respondents Wooten and Holmes have made a cross-motion for the same relief.

Respondents Clarke and Morgenthau, in support of their motion to dismiss, have submitted a copy of a decision-order dated July 31, 2006 of Supreme Court Justice Judith J. Gische. The decision-order was issued in a proceeding entitled "James Pettus, Petitioner - against- Eliot Spitzer, Robert Morgenthau, A.D.A. Randolph Clarke, Jr., Respondents"

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[1]The Court observes that the issues concerning improper venue, disclosure of grand jury minutes, and petitioner's assertions that the prosecutor intentionally presented false evidence at trial were considered and rejected by United States District Judge Lewis A. Kaplan in a decision dated September 16, 2006 (see Pettus v Superintendent McGinnis, 2006 U.S. Dist. Lexis 65660 [06 Civ. 2054 [LAK], Southern District of New York]).

(Supreme Court, New York County, Index Number 401423-06). Said respondents maintain that Justice Gische's order operates to bar petitioner's present claims under principles of res judicata. The petitioner in that proceeding, as here, sought to have respondent Clarke arrested by reason of actions he took in connection with the petitioner's criminal prosecution. In addition, as is the case here, the petitioner sought to have the grand jury minutes unsealed; and to have respondent Clarke discharged from his position as Assistant District Attorney. Justice Gische, after a careful analysis of petitioner's claims, determined that the petition must be dismissed.

The doctrine of res judicata "is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again" (Gramatan Home Investors Corp. v Lopez, 46 NY2d 481, 485). It gives "'binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein'" (Comi v Breslin & Breslin, 257 AD2d 754, 757 [Third Dept., 1999], quoting Watts v Swiss Bank Corp., 27 NY2d 270, 277, quoting Matter of Shea, 309 NY 605, 616). The doctrine operates to bar future litigation between the same parties of a cause of action based on the same transaction where the cause of action was raised or could have been raised in a prior proceeding (see, O'Brien v City of Syracuse, 54 NY2d 353, 357; Evergreen Bank v Dashnaw, 246 AD2d 814, 815 [3rd Dept., 1998]).

The Court finds that the decision-order of Supreme Court Justice Judith J. Gische, under principles of res judicata, is a complete bar to the relief requested by the petitioner.

Apart from the foregoing, to the extent that the petitioner seeks to compel respondent Morgenthau to perform a specific act, the Court is mindful that mandamus is an extraordinary remedy, available, as against an administrative officer, only to compel the performance of a duty enjoined by law (see, Klostermann v Cuomo, 61 NY2d 525, 539, 540). It is only appropriate where the right to relief is "clear" and the duty sought to be enjoined is performance of an act commanded to be performed by law, purely ministerial and involving no exercise of discretion (Mtr Hamptons Hosp v.Moore,52 NY2d 88, 96 [1981]; Matter of Legal Aid Socy. Of Sullivan County v Scheinman, 53 NY2d 12, 16). "'The general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty'" (Klostermann v Cuomo, supra, p. 540, quoting People ex rel. Schau v McWilliams, 185 NY 92, 100).

"It is well-settled that the decision whether to prosecute is entrusted to the sole discretion of the District Attorney" (see Matter of Nieblas v Kings County District Attorney, 209 AD2d 703 [2nd Dept., 1994]). Thus, mandamus does not lie to compel the District Attorney to initiate a criminal prosecution. To no less extent, the act of hiring and firing employees is one exercised within the broad discretion of the employer. As such, absent other facts, the remedy of mandamus to compel is not available to force an employer to

discharge an employee.

Notably, in a recent decision-order (dated January 25, 2007) Supreme Court Justice William A. Wetzel denied petitioner's request to "view and inspect" the grand jury minutes in connection with the underlying indictment (see People v Pettus, New York County Index No. 6117-02, Wetzel, J., January 25, 2007). This decision operates, under principles of collateral estoppel and/or res judicata, to bar petitioner's request for disclosure of the grand jury minutes[2]. Apart from the foregoing, grand jury proceedings are secret (see CPL 190.25 [4] [a]), and may not be disclosed except as authorized under CPL 210.30. In this instance there has been no showing of a compelling and particularized need for access (see Matter of Nelson v Mollen, 175 AD2d 518 [3rd Dept., 1991]; see also Matter of Lustberg v Curry, 235 AD2d 615 [3rd Dept., 1997]).

The Court finds that the petition fails to state a cause of action against respondents Morgenthau and Clarke.

Turning to the cross-motion of respondents Wooten and Holmes, the Court first observes that from a review of the petition, it does not appear that the petitioner requests any specific relief with regard to respondent Holmes. Thus, the complaint fails to state a cause of action against said respondent.

Respondent Wooten correctly points out that if the petitioner is attempting to state a cause of action in malicious prosecution, that the petitioner has failed to allege a necessary

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[2] As does the decision-order of Supreme Court Justice Judith J. Gische (supra).

element of the cause of action: the favorable termination of the criminal action (see MacFawn v Kresler, 88 NY2d 859). In addition, for the reasons cited above, the Court discerns no legal grounds to direct that respondent Wooten be arrested and/or discharged from her employment.

Petitioner has also submitted a motion for an order granting a copy of the indictment signed by Robert Morgenthau and certified by the County Clerk, New York County. There is no evidence that the motion was served upon any of the remaining respondents, or the New York County Clerk. Moreover, it appears from petitioner's own submission that he already has a certified copy of the indictment. The Court will therefore deny the motion.

Lastly, the Court echos the comment made by Supreme Justice Judith J. Gische in her decision-order (supra), that a CPLR Article 78 proceeding may not be employed to collaterally attack a conviction in a criminal case (see e.g., State v King, 36 NY2d 59 [1975]; Hennessy v Gorman, 58 NY2d 806 [1983]; Matter of Garcha v City Court [City of Beacon], 39 AD3d 645 [2nd Dept., 2007]). His only remedy (which apparently was exercised) was by way of direct appeal.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

Under the circumstances, the Court finds that the petition fails to state a cause of action. The Court concludes that the motion and cross-motion must be granted and the petition dismissed.

Accordingly it is

ORDERED, that petitioner's motion for a certified copy of the indictment is denied; and it is further

ORDERED, that the motion of respondents Robert Morgenthau and Randolph Clarke, Jr. is granted; and it is further

ORDERED, that the cross-motion of respondents Vanessa Wooten and Carol Holmes is granted; and it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed as to all said respondents.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for respondents Robert Morgenthau and Randolph Clarke, who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: June 20, 2007
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated August 11, 2006, Supporting Papers and Exhibits
2. Notice of Motion dated October 3, 2006, Supporting Papers and Exhibits
3. Letter dated November 6, 2006 of Marilyn Richter, Esq., Assistant Corporation Counsel of the City of New York
4. Letter dated November21, 2006 of Morrie I. Kleinbart, Esq., Assistant District Attorney

5. Notice of Motion dated February 7, 2007 of Respondents Morgenthau and Clarke, Supporting Papers and Exhibits
6. Notice of Cross-Motion dated March 9, 2007 of respondents Wooten and Holmes, Supporting Papers and Exhibits
7. Petitioner's Letter sworn to February 21, 2007
8. Petitioner's "Notice of Albany" dated February 12, 2007 with Exhibits
9. Petitioner's Undated Letter filed April 11, 2007