

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

1434

KAH 08-02636

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
VARSEY JOHNSON, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

CHARLES A. MARANGOLA, MORAVIA, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered December 5, 2008 in a habeas corpus proceeding. The judgment dismissed 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 indictment underlying his conviction is jurisdictionally defective because, although he is named as the sole defendant in the indictment, his name is not specifically mentioned in the sole count thereof. Supreme Court properly dismissed the petition. "Petitioner could have raised his challenge to the . . . indictment on his direct appeal from the judgment of conviction or by way of a motion pursuant to CPL 440.10, and thus habeas corpus relief is not available" (*People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, *lv denied* 12 NY3d 714; see *People ex rel. Lewis v Graham*, 57 AD3d 1508, *lv denied* 12 NY3d 705; *People ex rel. Curry v Girdich*, 290 AD2d 912, *lv denied* 98 NY2d 602). In any event, petitioner's contention is without merit (see *Lewis*, 57 AD3d 1508).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court