

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

511

KAH 09-00756

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAVID DONATO, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 12, 2009 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: Supreme Court properly dismissed the petition for a writ of habeas corpus. The contention of petitioner that he was improperly sentenced as a persistent violent felony offender could have been raised on direct appeal from the judgment of conviction or by way of a motion pursuant to CPL article 440 and thus habeas corpus relief does not lie (see *People ex rel. Sims v Senkowski*, 226 AD2d 800, lv denied 88 NY2d 807; see generally *People ex rel. Johnson v Graham*, 67 AD3d 1452, lv denied 14 NY3d 704).

Entered: May 7, 2010

Patricia L. Morgan
Clerk of the Court