SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In The Matter of the Application Of	:	
MALCOLM HARRIS,	:	
Petitioner,	:	
For A Judgment Under Article 78 of the CPLR,	:	
- against -	:	
MATTHEW A. SCIARRINO, Judge, Criminal Court Of The City Of New York, County of New York,	:	
Respondent, and	:	Index No. 103569/2012 (Hon. Carol E. Huff)
CYRUS R. VANCE, JR., ESQ., District Attorney, New York County,	:	
And	:	
TWITTER, INC., Additional Parties Respondent	:	

PETITIONER'S MEMORANDUM OF LAW
IN OPPOSITION TO THE DANY'S CROSS-MOTION TO DISMISS

Martin R. Stolar, Esq.
351 Broadway, 4th Floor
New York, N.Y. 10013
(212) 219-1919
mrslaw37@hotmail.com

Emily M. Bass, Esq.
551 Fifth Avenue, 28th Floor,
New York, N.Y. 10176
(212) 260-3645
emilybassesq@gmail.com

Attorneys for Petitioner

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PETITIONER'S MEMORANDUM OF LAW
IN OPPOSITION TO THE DANY'S CROSS-MOTION TO DISMISS

The principal issues in *Harris* have arisen as a result of the advent of cloud computing. Personal communications, daily schedules and travel itineraries that you once stored in a desk drawer or dedicated directory on a home computer are now stored *for you* by your ISP or social-networking site, somewhere in the cloud. The information is still yours. You still have control over it, but both technically and technologically someone else is now its custodian.

The question this case poses to the Court is: What, if anything, does the change in architecture and protocols of the Internet mean for the relationship between the individual and the state?

Obviously, if the minutiae of your daily wanderings or transcripts of your communications were still updated to and stored on your laptop or cell phone, no one would doubt the answer. Everyone would agree that the First and Fourth Amendments[1] and privacy laws still apply, as they always have, to protect that information. They would also agree that law enforcement would still have to go directly to you to obtain the information, either voluntarily or through compelled discovery in court.

[1] For ease of reference, a reference to an Amendment to the U.S. Constitution shall also refer to its counterpart in the New York Constitution. By the same token, unless the context suggests otherwise, a reference to Respondent Sciarrino's "Orders" refers to the Decisions & Orders of April 20, May 4 and June 30, 2012. "Respondent" in the singular refers to His Honor, Matthew A. Sciarrino. "Respondents" in the plural refers to His Honor and the DANY.
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From Harris' perspective, not much has changed – only the address of your e-storage locker. Law enforcement is still seeking your information, still has to go to you for it, and still has to get your consent or obtain the information via discovery.

From the DANY's perspective, the rise of e-storage has changed everything. The advent of cloud computing releases the DANY from any obligation to ask you for the information or obtain it from you through discovery. From its perspective, it can deal with the owner of the e-storage locker as though that person were the principal, rather than your agent. Since the owner of the storage locker does not have a proprietary interest or expectation of privacy in the stored information, however, that means there are no meaningful constitutional constraints on law enforcement, and your First and Fourth Amendment rights have vanished.

The Parties, The Motion And A Threshold Issue

As Petitioner has noted in previous papers, the principal Respondent in this action is His Honor, Matthew A. Sciarrino, not the District Attorney ("DANY").[2] All of the claims are asserted against His Honor; only the prohibition claims are, secondarily, asserted against the DANY.

Paradoxically, however, the only motion to dismiss in this matter is the motion to dismiss filed by the DANY. His Honor, Judge Sciarrino, has chosen not to enter a formal appearance in this matter: he has neither filed an

[2] Since the DANY cannot exercise the "judicial function," the mandamus claims have obviously not been asserted against him.

answer nor a motion to dismiss. This raises several questions: Since His Honor has not moved to dismiss the Petition, is he deemed to have conceded its legal sufficiency? Put another way, is Petitioner entitled to proceed with an Article 78 proceeding against Respondent Sciarrino, regardless of the outcome of the present cross-motion? Alternatively, will His Honor be deemed, *sub silentio*, to have piggybacked on the DANY's motion to dismiss? If he is to be deemed the DANY's silent partner, does that give the DANY standing to move to dismiss claims that only lie against the Judge?

However many motions to dismiss are deemed to have been made in this matter, each must be measured against His Honor's actual Decisions & Orders and not the decisions & orders as rewritten or reinterpreted by the DANY. We emphasize this for a simple reason: Respondent Sciarrino and the DANY could not be further apart in their positions as to what was ordered in this case, why it was ordered and the applicable law. Indeed, not only has the DANY disavowed the scope of Respondent's Orders,[3] it has also repudiated His Honor's reasoning, legal analysis and conclusions.[4] The DANY even goes so far in the Memorandum in Support of its Cross-Motion to

[3] Towards this end, it rejects so much of His Honor's Orders as directs Twitter to turn over all "content information." It rejects so much of His Honor's Orders as expressly requires Twitter to turn over "geographic location" information. And, it rejects so much of His Honor's Orders as requires Twitter to turn over any "subscriber information" beyond the most basic information that would be needed to "link" Harris with his account.

[4] More specifically, it disagrees with His Honor's finding that the Stored Communications Act applies to Harris' electronic communications. It disagrees with His Honor's finding that its subpoena was ineffective in its own right to require their production. It disagrees with His Honor's decision to substitute a Section 2703(d) Order for that subpoena. And, it

- assert that "only … [its] subpoenas … were needed to obtain … the Tweets …. [and] other information … [it] sought," DANY Memo In Support of Cross-Motion To Dismiss at p. 18 n. 2,[5]

- question whether the Court even "issued" a disclosure order under §2703(d), id. at p. 18, and

- suggest, that "[e]ven assuming" it did, its Order was "superfluous" to its decision. DANY's Cross-Motion Mem at 18.

For His Honor's part, far from agreeing with the DANY that its subpoenas were sufficient and a §2703(d) Order was unnecessary, Respondent Sciarrino unmistakably found the opposite. He found the subpoenas alone were ***in***effective to obtain what the DANY said, at the time, it wanted and that an Order or Orders under §2703(d) were needed. His Honor entered orders under §2703(d) *sua sponte* -- apparently, to the displeasure of the DANY.

The Court will be relieved to hear that it is not being called upon to referee the dispute between the Criminal Court and the DANY. It is being *asked to decide whether Respondents exceeded, are exceeding or are about* to act in excess of their authority and/or whether His Honor failed to perform duties enjoined upon him by law. Obviously, the principal documents the Court must look to in deciding these questions are the actual Decisions & Orders His Honor issued, and not the DANY's reprise.

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disagrees with His Honor's finding that the DANY would need to obtain a search warrant in order to access communications sent or received on December 31, 2011.

This said, however, the DANY obviously wants the benefit of the extensive discovery His Honor's Orders have afforded it. Hence, its motion to dismiss all of the Petitioner's claims.

[5] For ease of reference, we shall hereinafter refer to the DANY's Memorandum of Law In Support of the District Attorney's Cross-Motion To Dismiss" as "DANY Cross-Motion Mem."

The Standards Applicable To This Motion

Since the DANY has moved to dismiss Harris' Petition on the grounds that it fails to state a claim or claims upon which relief can be granted, the standards applicable to this motion are those applicable under CPLR 3211(a)(7). See, e.g., *Matter of Nistal v. Hausauer*, 308 N.Y. 146, 149 (1954); *Matter of Schwab v. McElligott*, 282 N.Y. 182, 184-185 (1940); *Matter of Lichtensteiger v. Housing & Development Administration*, 40 A.D.2d 810 (1st Dept 1972).

Those standards may be summarized as follows: "When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action..." *Sokol v Leader*, 74 AD3d 1180,1180-1181 (2d Dept 2010). *See also Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *Foley v. D'Agostino*, 21 A.D.2d 60 (1st Dept 1964). "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokol v Leader*, 74 AD3d at 1181 (internal quotation marks omitted). *See also Nonnon v City of New York*, 9 NY3d 825, 827 (2007); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005).

ARGUMENT

The DANY has attempted to create a series of obstacles to the consideration of Petitioner's claims. As we shall hereinafter see, the obstacles it has created are artificial.

I. HARRIS HAS STATED VALID CLAIMS UNDER C.P.L.R. Section 7803 (2).

A. There are No Obstacles To This Court's Consideration Of Petitioner's Claims For Prohibition

Harris has included four claims in the nature of "prohibition" in his Petition. They have been denominated counts # 1 through # 4. The DANY asserts they fail to state valid claims for each of six reasons.[6]

It asserts that Harris' Petition is really an improper "interlocutory appeal" in disguise. (DANY Cross-Motion Memo. at pp. 3,7,8, 16). It suggests that prohibition will never lie to challenge a determination in a *pending* action. (DANY Cross-Motion Memo. at pp. 3, 5). It then suggests that prohibition will *only* lie where a court's actions "implicate the legality of the entire proceeding." (DANY Cross-Motion Memo. at p. 6). It suggests that prohibition is not generally available where a "purported judicial error is of constitutional dimension." (DANY Cross-Motion Memo. at pp. 8-9). It suggests that "prohibition cannot be used to challenge the validity of a subpoena." (DANY Cross-Motion Memo. at p. 10). Finally, it suggests that

[6] For ease of reference, Petitioner will continue to refer to claims asserted under CPLR 7803 (2) as claims in the nature of "prohibition," and claims asserted under CPLR 7803 (1) as claims for "mandamus."

prohibition will never lie where there is an alternative, "adequate remedy." (DANY Cross-Motion Memo. at p. 7).

The DANY's arguments are misconceived and do not stand in the way of this Court's consideration of Petitioner's claims on the merits.

1. Harris Has Not Appealed; He Has Instituted An Article 78 Proceeding

In its Memorandum in support of its Cross-Motion, the DANY repeatedly chides Harris for having instituted an "interlocutory appeal." See, e.g., DANY's Cross-Motion Memo at p. 3 ("interlocutory appeal"), p. 7 ("premature appeal"), p. 7 ("interlocutory appeal"), p. 8 ("interlocutory appeal"), p. 16 ("interlocutory appeal"). As the DANY knows full well, the accusation is unwarranted. Harris instituted an Article 78 proceeding, not an appeal. The two are not equivalent.

Indeed, only two weeks ago, in papers it submitted in Twitter's appeal, the DANY berated Harris for, allegedly, *not* recognizing the difference between the two proceedings. It suggested that difference is stark:

> [T] he Article 78 proceeding that … [Harris] initiated in Supreme Court [i.e., this proceeding] and Twitter's direct appeal are entirely different proceedings involving entirely different legal questions. First, different rulings are at issue in each case. The criminal defendant's Article 78 petition apparently pertains to all of Judge Sciarrino's rulings, while Twitter's appeal is only from Judge Sciarrino's June 30th ruling denying the corporation's motion to quash. But even were the same underlying Criminal Court ruling at issue in both, the question of whether Harris is entitled to the extraordinary relief of mandamus or prohibition is *completely different* from review of the merits of the ruling on direct appeal.

DANY's Memorandum of Law, dated September 11, 2012 at pp. 8-9 (emphasis added).

2. Prohibition Lies To Challenge Rulings In Pending Proceedings

The DANY's suggestion that prohibition does not lie to challenge a ruling that has been made in a pending proceeding is absurd. Conclusive proof that the opposite is the case can be found on the face of CPLR §§7803(2) and 7804(i).

Section 7803 of the CPLR sets forth the "only questions that may be raised in a proceeding under … [the] article." CPLR §7803. Five questions are posed. Each of the first four questions derives from and is associated with one or more writs that Article 78 supplanted. The question posed in §7803(1) is associated with "mandamus to compel." The question posed in §7803(2) with "prohibition." The questions posed in §7803(3) and (4) are associated with "mandamus to review" and "certiorari."

That means that to the extent that someone institutes a proceeding in the nature of prohibition, he or she is entitled to ask the following three questions:

> "whether the body or officer [being sued] … *proceeded*, *is proceeding* or *is about to proceed* without or in excess of jurisdiction"

CPLR §7803(2)(material in brackets and emphasis added). See CPLR §§7802(a) and 7804(i) ("[t]he expression 'body or officer' includes every court, tribunal, board," and every "justice, judge, referee or judicial hearing

officer"). Obviously, it would make absolutely no sense to permit the second and third questions to be asked unless a person instituting a claim for prohibition is entitled to challenge actions a judge *is currently taking* or *threatening to take* in proceedings *that are still pending*.

CPLR §7804(i) eliminates all doubt on the subject, making it explicit that pendency is *not* a bar to a claim for prohibition. CPLR §7804 sets forth the procedures to be followed in Article 78 proceedings. Subparagraph (i) of that section states the following:

> …[W]here a proceeding is brought under this article against a justice, judge, referee or judicial hearing officer appointed by a court and (1) ***it is brought by a party to a pending action or proceeding***, and (2) ***it is based upon an act or acts performed by the respondent in that pending action or proceeding*** either granting or denying relief sought by a party thereto, and (3) the respondent is not a named party to the pending action or proceeding, in addition to service on the respondent, the petitioner shall serve a copy of the petition together with copies of all moving papers upon all other parties to the pending action or proceeding … Upon election of the justice, judge, referee or judicial hearing officer not to appear, any ruling, order or judgment of the court in such proceeding shall bind said respondent. If such respondent does appear he shall respond to the petition and shall be entitled to be represented by the attorney general. If such respondent does not elect to appear all other parties shall be given notice thereof.

CPLR 7804(i)(emphasis added).

Nor is it simply a matter that the statute says that claims can be brought against judges concerning pending proceedings. Case law reflects the fact that such claims are routinely brought and entertained by the

courts,[7] and it could not be otherwise. For, as Weinstein Korn & Miller has recognized, "the prohibition remedy would be rendered almost completely ineffective if it could not be issued against judges presiding over civil or criminal proceedings to prevent them from acting without or in excess of jurisdiction." Weinstein Korn & Miller, 14-7801 *New York Civil Practice*: CPLR P 7801.02 at p. 14.

The DANY relies on two authorities to counter this logic: CPLR §7801(2)[8] and a handful of cases. At first blush, each appears to lend support to its position. Upon closer investigation, neither lends support at all. Many of the cases turn out to stand for the rather unexceptional proposition that parties should not be permitted to utilize "prohibition" to challenge a "trial error" or *mid-trial* ruling.[9] *See, e.g.*, *Matter of Lipari v. Owens*, 70 N.Y.2d 731, 33 (1987)("[d]eterminations regarding … the timely and proper trial of a case are squarely within the power and jurisdiction of the trial court" and a not proper

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[7] *See*, *e.g.*, *Pirro v. Angiolillo*, 89 N.Y.2d 351 (1996)(prohibition to prevent judge from altering sentence); *Brown v. Blumenfeld*, 296 A.D.2d 405 (2d Dept 2002)(prohibition to prevent trial judge from requiring complaining witness to undergo psychiatric examination). Also, see all of the cases referred to in Point I(A)(3), *post*.

[8] This is the first authority the DANY cites in its Memorandum and, it would appear, the principal authority upon which it relies for this proposition. CPLR §7801(2) reads:

> *Except where otherwise provided by law*, a proceeding under … [Article 78] shall not be used to challenge a determination …
>
> (2) which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

CPLR §7801(2)(emphasis added).

[9] The other cases the DANY relies upon were decided prior to enactment of CPLR §7804(i) in its current form.

basis for prohibition); *Matter of Rush v. Mordue*, 68 N.Y.2d 348, 353 (1986) ("prohibition will not lie as a means of seeking collateral review of mere trial errors"); *LaRocca v. Lane*, 37 N.Y.2d 575, 579 (1975) (dicta to effect that "[t]he extraordinary remedy of prohibition is never available merely to correct or prevent trial errors…"); *Matter of State v. King*, 36 NY2d 59 (1975)(ruling during jury selection challenged); *Matter of Johnson v. Torres*, 259 A.D.2d 370 (1st Dept 1999)(mid-trial ruling requiring in-court identification in the form of a line-up); *Matter of O'Neill v. King*, 108 A.D.2d 772 (2d Dept 1985)(decision during competency hearing to conduct *in camera* interview); *Matter of Arnou v. Leggett*, 79 A.D.2d 623 (2d Dept 1980), *app dismissed*, 54 NY2d 833 (1981)(mid-trial ruling).[10]

Even more significantly, perhaps, the restriction in CPLR §7801(2) applies to certiorari and mandamus-to-review claims *only*. Weinstein Korn & Miller, 14-7802 *New York Civil Practice*: CPLR P 7801.02 at p. 14. It does not apply either to prohibition or mandamus-to-compel claims. *Id*.[11] Therefore, it has no application to this case.

In sum, the DANY's contention that prohibition does not lie to challenge a judge, justice's or prosecutor's actions in a pending proceeding has no viable support and cannot be sustained.

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[10] There are even exceptions to this rule. On rare occasions, a petition in the nature of prohibition is entertained mid-trial. *See*, *e.g.*, *LaRocca v. Lane*, 36 N.Y.2d 575 (1975).

[11] Weinstein Korn & Miller explains that "[t]he 'except where otherwise provided by law' language creates a substantial exception to CPLR 7801(2) in that, under long-standing common-law principles, courts are able to issue the extraordinary writs of prohibition and mandamus to compel …". 14-7802 *New York Civil Practice*: CPLR P 7801.02 at p. 14.

3. Rulings That Are Challenged Need Not Implicate The Entire Proceeding

CPLR § 7804(i) also disproves the DANY's third argument – that prohibition will only lie to challenge judicial or quasi-judicial acts that implicate an entire proceeding's legality and will lead to its disposal. Let us return to CPLR § 7804(i)'s text. Again, it states:

> (i) … [W]here a proceeding is brought under this article against a justice, judge, referee or judicial hearing officer appointed by a court and (1) *it is brought by a party to a pending action or proceeding*, ***and*** (2) ***it is based upon an act or acts*** performed by the respondent in that pending action or proceeding **either granting or denying relief sought by a party thereto,** … the petitioner shall serve a copy of the petition … upon all other parties to the pending action or proceeding …

CPLR § 7804(i)(emphasis added). This language clearly contemplates that individual rulings will be challenged, granting or denying discrete relief. There is absolutely no suggestion that the only "relief" that qualifies for Article 78 treatment is the dismissal or refusal to dismiss an entire proceeding or indictment. Had that been the Legislature's intent, presumably it would have used very different language.

Given the language the Legislature did use, it is not surprising that the cases are legion in which petitioners challenge a discrete issue or ruling rather than the legality of an entire investigation, prosecution or proceeding.[12] *See, e.g.*, *In the Matter of Smith*, 2012 N.Y. Slip Op. 04664 (N.Y. Ct. of Appeals June 12, 2012)(petition challenged determination made in con-

[12] In each of these cases, the court found that a claim or petition for prohibition was properly brought. That does not necessarily mean the petitioner ultimately prevailed on the merits.

nection with application for counsel fees); *Pirro v. Angiolillo*, 89 N.Y.2d 351 (1996)(petition challenged alteration of sentence in a criminal matter); *Schumer v. Holtzman*, 60 N.Y.2d 46 (1983)(petition challenged appointment of a special prosecutor pursuant to a memorandum of understanding, not the right to investigate or prosecute); *LaRocca v. Lane*, 37 N.Y.2d 575, 579 (1975)(petition challenged order that Catholic priest remove clerical garb before appearing as counsel); *Sedore v. Epstein,* 56 A.D.3d 60 (2d Dept 2008)(petition challenged prosecution of charges by private attorney rather than by DA or ADA); *Brown v. Blumenfeld*, 296 A.D.2d 405 (2d Dep't 2002) (petition challenged order that a witness undergo psychiatric examination); *Matter of Morgenthau v. Williams*, 229 A.D.2d 361 (1st Dept 1996)(petition challenged refusal to accept waiver of sequestration), app den'd, 88 N.Y.2d 813 (1996); *Matter of Kaplan v Tomei*, 224 A.D.2d 530 (2d Dept 1996) (petition challenged 3 discrete orders); *People v. Ohrenstein*, 153 A.D.2d 342 (1st Dept 1989) (petition challenged dismissal of 265 counts out of a 665 count indictment and the striking of 89 overt acts), aff'd, 77 N.Y.2d 38 (1990); *Matter of Agnew v Rothwax*, 121 A.D.2d 906 (1st Dept 1986) (petition challenged the vacation by one judge of plea entered by another); *Scott v. McCaffrey*, 12 Misc.2d 671 (Sup.Ct. Bronx County 1958)(petition challenged refusal to accept waiver of right to trial by jury).[13]

[13] To be fair, although there is no longer any warrant for such a limitation, language to the effect that prohibition lies to challenge judicial or quasi-judicial acts implicating the legality of an entire proceeding still appears in some cases. Presumably, it has been carried over

Of course, the fact that individual issues or rulings may be challenged does not mean that all issues afford an appropriate basis for a claim for prohibition. One must always distinguish between a mere "error in procedure or substantive law … and the arrogation of power which is subject to correction by prohibition." *La Rocca*, 37 N.Y.2d at 580. We address this distinction in subparagraph (5), below.

4. Prohibition Will Lie To Challenge A Subpoena

The short answer to the DANY's contention that prohibition cannot be used to challenge a subpoena is: *Matter of Nicholson v. State Commission on Judicial Conduct*, 50 N.Y.2d 597 (1980).

A fuller answer is contained in the next section.

5. Prohibition Will Lie Where Constitutional Rights Are Implicated.

At pages 8 – 9 of its memorandum, the DANY addresses the relationship between prohibition and the protection of constitutional rights. In its view, there is either *no* necessary relationship or, at most, a tenuous one. It sums this position up in a single sentence: "Prohibition is not available simply because the purported judicial error is of constitutional dimension." DANY's Cross-Motion Memo at 8-9.[14]

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or picked up from earlier cases. In any event, it is no longer the only circumstance under which prohibition lies. This is especially so where acts implicate constitutional rights.

[14] It cites four cases in support of this proposition: *Matter of Lipari v. Owens*, supra; *Matter of O'Neill v. King*, supra; *Matter of Arnou v. Leggett*, supra; and *Rush v. Mordue*, supra. However, it omits to mention a salient fact: In three of those cases, prohibition did not lie because the rulings being challenged were made during the course of a trial or hearing. In the fourth case, *Rush v. Mordue*, *supr*a, prohibition was granted.

The view that there is no nexus between the writ and constitutional rights stands in stark contrast to the position of the Court of Appeals and Appellate Divisions. In their view, "prohibition has evolved into a basic protection for the individual in his relations with the State." *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 12 (1976); *La Rocca v. Lane*, 37 N.Y.2d at 578-579. This means that prohibition's primary function has become to prevent "an arrogation of power in violation of a person's rights, ***particularly constitutional rights***." *Matter of Nicholson v. State Commission on Judicial Conduct*, 50 N.Y.2d 597, 606 (1980)(emphasis added). *Accord*, *Matter of Dondi, supra*; *La Rocca v. Lane*, supra; *Matter of Lee v. County Court of Erie County*, 27 N.Y.2d 432, 437-438 (1971); *Appo v. People*, 20 N.Y. 531, 541-542 (1860); *Vinluan v. Doyle*, 60 A.D.3d 237, 243 (2d Dept 2009); *National Equipment Corp. v. Ruiz*, 19 A.D.3d 5, 14 (1st Dept. 2005); *Matter of Santiago v Bristol*, 273 A.D.2d 813 (4th Dept 2000); *People v. Ohrenstein*, 153 A.D.2d 342 (1st Dept 1989); *Matter v. Moxham v. Hannigan*, 89 A.D.2d 300, 302 (4th Dept 1982).

Thus, [w]hen a petitioner, whether party or not, … presents an arguable, substantial, and novel claim that a court has exceeded its powers," 37 N.Y.2d at 581, and "it affirmatively appears that this will be done in violation of a person's, even a party's … constitutional rights, prohibition will lie to restrain the excess of power." *La Rocca*, 37 N.Y.2d at 580. Put another way,

> the presentation of an 'arguable and substantial claim' which implicates a fundamental constitutional right generally results in the availability of a proceeding in the nature of prohibition …

Nicholson, 50 N.Y.2d at 606.

This, then, is the principal difference between the two cases the DANY relies on most heavily and the instant case. Harris has presented substantial claims that the acts officers are taking and threatening to take will infringe his constitutional rights. The petitioners in *Matter of Cohen v. Demakos*, 144 A.D.2d 605 (2d Dept 1988), and *People ex rel Livingston v. Wyatt*, 186 N.Y. 383 (1906), made no such showing – or, indeed, even such claims - because their constitutional rights were not implicated.

Lest the Court doubt that Petitioner has made such a showing, we ask Your Honor to review our earlier papers. *See, e.g.*, Petitioner's Original Memorandum at pp. 8–15, 31-35; Petition at ¶¶ 19, 41-45, 79, 177-180, 214-235. There, we established that the DANY's subpoenas and Respondent's Orders implicated Harris' First and Fourth Amendment rights. *See, e.g.*, Petitioner's Original Memorandum at pp. 8–15, 31-35. *See also People v. Weaver*, 12 NY3d 433, 441-445 (2009)(GPS data implicates rights of personal and political association), *Anonymous v. Rochester*, 13 N.Y.3d 35, 46 (2009)("[F]reedom of movement is the very essence of our free society, … [l]ike the right of assembly and the right of association, it often makes all other rights meaningful — knowing, studying, arguing, exploring, conversing,

observing and even thinking"); and *United States v. Jones*, 565 U.S. ___ (2012)(GPS data implicates privacy rights under the Fourth Amendment).

We now briefly address whether Respondent's actions also *violated* those rights. Rather than reprise all of our arguments, we limit our focus for this discussion to "location data," and whether the compelled disclosure of such information violates Harris' First Amendment rights.

For the compelled disclosure of information that implicates rights of association to pass First Amendment muster, it is clear under New York law that "the subordinating interests of the state must survive exacting scrutiny." *Nicholson*, 50 N.Y.2D at 608. To survive such scrutiny, the compelled disclosure must satisfy two tests. It must be justified by or necessary to promote a compelling State interest[15] and be narrowly tailored to achieve that purpose.[16] *See generally*, *Golden v. Clark*, 76 N.Y.2d 618, 623 (1990).

The compelled disclosure of location data in this case flunks both tests. It cannot be said to be supported by *any* governmental interest, let alone a compelling one. *See, e.g.,* DANY's Mem in Opp to Motion To Intervene In Twitter's Appeal at p. 10 (where the DANY not only vociferously disclaims any interest in location data, it claims never to have asked for such data).[17]

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[15] *See Nicholson*, id. at 608 ((“[s]ignficant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest …").

[16] *Nicholson* also requires the government to demonstrate a "substantial relation" between the State's interest and the information required to be disclosed. *Id*. at 608.

[17] The DANY's precise words are: "The People have never sought 'location data,' but only the tweets that Harris publicly posted … and the records necessary for the admission of those messages in court."

And, it cannot be said to have been "narrowly tailored" when the scope of the compelled disclosure is nearly four times as great as the monitoring found unreasonable in *United States v. Jones*, *supra*. *See* Pet. Exh. 3; Pet. Exh. 10 at p. 11; and Pet. Exh. 17 at p. 11 (compelled disclosure of 107 days of "content" and "location" information, notwithstanding the charge against the defendant is not even a misdemeanor).

A similar analysis could be done with respect to the compelled disclosure of tweets and other electronic communications. However, one observation should suffice: If it violates a citizen's Fourth Amendment rights simply to capture 28 days of "location data," then it must violate those rights several times over to capture "location data" ***and*** political and personal communications over a period of 107 days. It cannot be otherwise.

Because the actions Respondents have taken, are taking and are about to take threaten fundamental constitutional rights, Harris is justified in seeking prohibition and prohibition lies.

6. Prohibition Lies Even Though There May Be Another Remedy

The DANY suggests throughout his papers that the existence of a post-conviction right of appeal dooms Petitioner's application. It insists that such a right constitutes an adequate remedy and that an adequate remedy necessarily bars Article 78 relief. The DANY is mistaken on both counts.

While the existence of an alternative remedy may once have served as an automatic bar to the ability to pursue an Article 78 proceeding, that is no

longer the case. The approach is now more nuanced. "[A]n alternative remedy will not be deemed an adequate one where an applicant will suffer irreparable injury if he or she is relegated to such other course." *Matter of City of Newburgh v. P.E.R.B.*, 63 N.Y.2d 793, 795 (1984). In this case, as in other cases where fundamental constitutional rights are being infringed and the infringements are the subject of the Petition, requiring the petitioner to wait until the infringements have fully run their course does not afford him *any* effective remedy.

Even assuming, for the sake of argument, that affording a defendant post-conviction review *did* afford him a remedy, it is no longer true that the existence of such a remedy necessarily bars relief in the nature of prohibition. The current rule is a relative one: "if … prohibition would furnish a more complete and efficacious remedy, it may be employed even though other methods of redress are technically available." *La Rocca v Lane,* 37 N.Y.2d at 579-580*. See, e.g., Matter of Rush v. Mordue,* 68 N.Y.2d 348, 354 (1986). Here, prohibition will obviously furnish a more complete and efficacious remedy because the alternative is simply a post-mortem on Petitioner's rights.

Another factor that may be taken into account in making a determination of the efficacy of prohibition is "the desirability of the prompt settlement of an important jurisdictional question …". *Matter of Dondi*, 40 N.Y.2d at 14. In *Dondi*, the Court of Appeals concluded that it was not

"jurisprudential folly" to proceed to the merits of a petition where there were alleged to be 30 other cases that presented the same question. *Id*. At the risk of stating the obvious, the issues presented here are likely to affect a much, much larger universe of cases. *See* Eric Lichtblau, "Wireless Firms Are Flooded by Requests To Aid Surveillance," *New York Times*, July 8, 2012 (the article begins: "In the first public accounting of its kind, cellphone carriers reported that they responded to a startling 1.3 million demands for subscriber information last year from law enforcement agencies seeking text messages, caller locations and other information in the course of investigations").[18]

For each of the foregoing reasons, the DANY's objections to Petitioner's prohibition claims should be rejected.[19] None of them stands as an obstacle to this Court's deciding those claims on their merits.

B. Petitioner Has Stated Valid Claims for Prohibition.

A claim for prohibition states a valid cause of action if it contains allegations to the effect that respondent: (1) is acting in a judicial or quasi-judicial capacity and (2) has acted, is acting or is about to act in excess of his jurisdiction. CPRL § 7803(2).[20]

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[18] It is worth noting that the "public accounting" to which Mr. Lichtblau refers does not even take into account law enforcement subpoenas and demands that were made on non-carrier social media or networking sites.

[19] Since the DANY has not raised any objections that only go to the fourth cause of action, we do not discuss that cause of action separately.

[20] Once the Court determines that the issues presented are of the type for which the remedy of prohibition may be granted, it proceeds to a second inquiry - whether, as a matter of discretion, a proceeding for prohibition should proceed. As we have already noted, in making that determination, the court considers several factors, including: "the

A judge or justice is a proper respondent by definition, see CPLR §§ 7802(a) and 7804(i); the District Attorney is an appropriate respondent under the relevant case law. *See*, *e.g., Matter of Dondi*, *supra*. In any event, the DANY has only expressly questioned the "jurisdictional" allegations.

Insofar as the first cause of action is concerned, it denies the claim that Respondent exceeded his jurisdiction by (i) affording it discovery to which it was not entitled by statute, and (ii) enabling it to obtain that discovery through the improper use of a subpoena *duces tecum* or trial subpoena.[21] Insofar as the second cause of action is concerned, it denies the claim that Respondent exceeded his jurisdiction by issuing § 2703(d) orders (i) without the DANY having made any application for them; (ii) where there was no "ongoing criminal investigation," and (iii) where the Criminal Court was not competent to issue the orders.

None of DANY's assertions are well taken. Some are demonstrably wrong as a matter of law. Others are wrong as a matter of fact because they are contrary to allegations in the Petition that must, for purposes of the DANY's cross-motion to dismiss, be taken as true.

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gravity of the harm caused by the act sought to be performed …; whether the harm can be adequately corrected on appeal …; and whether prohibition would furnish 'a more complete and efficacious remedy … even though other methods of redress are technically available.'" *Matter of Dondi,* 40 N.Y.2d at 14; *La Rocca,* 37 N.Y.2d at 579-580. Since we have already addressed these discretionary factors, we focus here on jurisdiction.

[21] As far as its own actions are concerned, the DANY denies that it (i) sought discovery to which it was not entitled to by statute, and (ii) improperly used a trial subpoena or subpoena *duces te*cum to obtain it.

Respondent Has Exceeded And Is Exceeding His Jurisdiction
In Enforcing The DANY's Trial Subpoenas

Petitioner has alleged that Respondent exceeded his jurisdiction by affording the DANY discovery to which it was not entitled by statute and, further, by permitting it to obtain it under the guise of a trial subpoena. (See Petitioner's Opening Mem. at pp. 15-17; Petition at ¶¶ 110-136).

The DANY does not so much respond to this argument as attempt to avoid it. Thus, first, it acknowledges that Petitioner is "correct" in "observ[ing] that a subpoena cannot be used to obtain discovery outside the bounds of CPL article 240." (DANY's Cross-Motion Mem. at p. 14). Then, it maintains that because it chose to make its demand for Harris' tweets and location data from Twitter rather than from Harris himself, its demands did not constitute "discovery" and were not constrained by the CPL § 240.

The DANY's argument is pure sophistry, and untenable both as fact and as law. The communications and subscriber's information the DANY subpoenaed were Harris', not Twitter's. Twitter was only their custodian. The fact that the DANY demanded the information from Twitter rather than Harris does not change who owned or legally controlled it.

For purposes of the arguments advanced on this motion, the following must be taken as true: Harris wrote the tweets. Harris posted the tweets. Harris was their author. (See, e.g., Petition at ¶¶ 42, 248). Accordingly, under copyright law, the communications belonged to him and not to Twitter. (See Petitioner's Original Mem. at pp. 25 – 28).

The DANY is estopped to argue otherwise. After all, its present position is that all its subpoenas sought were the "Twitter messages, or 'Tweets,' that the user [Harris] had 'posted' for the period of September 15, 2011 to December 31, 2011." (Affirmation in Support of the District Attorney's Cross-Motion To Dismiss at p. 3, ¶3; p. 6 n. 7. *See also* Pet. Exh. 16-1, 16-2 and 16-3, i.e., the subpoenas the DANY issue.) Since "posting" effectively equates with ownership under copyright law, the DANY cannot escape the fact that what it was seeking was Petitioner's property.[22]

In any event, the provisions of the Stored Communications Act, 18 U.S.C. §§ 2701 et seq., and in particular Section 2702 are conclusive in this regard. They recognize that it is the subscriber or parties to communications who should control their release and not the electronic service that carries or stores them. Towards this end it provides that, absent a grave emergency or permission from a court, a communications service such as Twitter is prohibited from disclosing "the contents" of stored communications to law enforcement without the "lawful consent" of the subscriber, originator of the communication or intended recipient. 18 U.S.C. §§ 2702(a), (b).[23]

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[22] Copyright vests initially in whoever creates an original work of authorship fixed in a tangible medium of expression. See generally 17 U.S.C. §201(a) and 101 (statement as to when a work is "created," and definition of "copies"). The copyright holder is not divested of any part of his property right when he transfers a "non-exclusive license." See 17 U.S.C. §201(a) and 101 (definition of "transfer of copyright").

[23] At ¶ 18, the Petition alleges that Twitter is both an ECS and RCS, and Respondent Sciarrino found that it acted as both. *See* Pet. Exh. 17 at p. 3 ("While Twitter is primarily an ECS, … it also acts as an RCS").

Section 2702(c) is to similar effect with respect to "non-content" or subscriber information. Absent permission from a court, the only circumstance other than a serious emergency in which an RCS or ECS can provide subscriber information to a governmental entity is "with the lawful consent of the customer or subscriber." 18 U.S.C. § 2702(c)(2).

Insofar as the DANY was concerned, therefore – as between Twitter and Harris - Harris retained legal ownership and control of the subpoenaed material at all times. The fact that Twitter had possession or custody of the information neither made CPL § 240.30 inapplicable nor relieved the DANY of the obligation to demand its production from Harris.

To the contrary, as even the most cursory examination of CPL § 240.30 will make clear, the opposite is the case. **CPL § 240.30 does not simply cover information in the hands of the defendant, but also information in a third party's "possession, custody or control."** The section is divided in two. The first paragraph defines the categories of information and materials a prosecutor may discover. The second paragraph delineates how he can obtain the information to which he is entitled when it is "not within … [the] possession, custody or control of the defense." C.P.L. § 240.30(2). The paragraph specifies two methods. First, it imposes an obligation on the defense to make a "diligent good faith effort" to obtain the information from the third party *for* the prosecutor – without requiring that the defendant issue a subpoena *duces tecum*. Second, where the defense's

efforts are unavailing, it provides that the prosecutor may obtain the information by subpoena. C.P.L. § 240.30(2). Were the DANY correct that C.P.L. Article 240 only "controls discovery between the People and a defendant, not what information can be obtained from a third party such as Twitter," the inclusion of paragraph (2) in C.P.L. § 240.30 would be anomalous.

It follows that the demands the DANY made on Twitter were governed by C.P.L. § 240.30 and, since they did not comport with its terms, they were unauthorized. It further follows, necessarily, that the DANY utilized a trial subpoena improperly "to obtain discovery outside the bounds of C.P.L. article 240." As the DANY concedes, such a use of a subpoena is prohibited. (DANY Cross-Motion Mem. at 14, where the DANY characterizes Petitioner's "observation that a subpoena cannot be used to obtain discovery outside the bounds of C.P.L. article 240" as "correct").

Since a court cannot condone such a use of a trial subpoena or grant discovery for which there is no statutory basis, Respondent Sciarrino acted in excess of his jurisdiction in enforcing the DANY's subpoenas and a proceeding for prohibition will lie. *See*, *e.g.*, *Pirro v. LaCava*, 230 A.D.2d 909, 910 (2d Dept 1996), *lv den'd*, 89 N.Y.2d 813 (1997)(where the Appellate Division rejected an argument similar to the argument made by the prosecutor here – that a demand made by subpoena did not constitute "discovery"); *Matter of Catterson v. Rohl*, 202 A.D.2d 420 (2d Dept 1994), *lv*

den'd, 83 N.Y.2d 755 (1994)(prohibition available where court grants discovery that is not authorized by statute); *Matter of Hynes v. Cirigliano*, 180 A.D.2d 659 (2d Dept 1992), *lv den'd*, 79 N.Y.2d 757 (1992)(same). *See also* Petitioner's Opening Mem. at pp. 15-17 (for fuller discussion and additional cases).[24]

Both Respondents exceeded their jurisdiction with respect to the subpoena in one final and critical respect. They did not simply utilize the trial subpoena to obtain information to which they were not statutorily entitled, they used it *to ascertain whether evidence existed*. As we argued at pages 15-16 of our Opening Memorandum, that is absolutely forbidden under a long line of precedents. Nor can it be doubted that this is what the DANY did for it gave only one justification for demanding Harris' tweets:

> that "defendant ***may*** have used … [his Twitter] account to make statements while on the bridge that were inconsistent with his anticipated trial defense."

(Petition at ¶54, quoting from Pet. Exh. 5, p. 4 at ¶9)(emphasis added). Obviously, as we have alleged in the Petition, "[t]he object of the trial subpoena was to ascertain whether any such tweets existed." (Petition at ¶55).

[24] The DANY suggests at p. 15 of its Cross-Motion Memorandum that only prosecutors are entitled to avail themselves of this argument, not defendants. The contention must be rejected. Not only would such a rule transgress equal protection guarantees, it would turn "prohibition" on its head. Rather than serve – as the New York Court of Appeals has said it should - as "a basic protection for the individual in his relations with the State" and protect citizens against an unconstitutional "arrogation of power," prohibition would become, instead, simply a further instrument of that power.

That is why the subpoena was so breathtakingly overbroad, demanding information, 24/7, from a few weeks prior to the march to three months after. (Pet. at ¶¶ 57-58).

Assuming, as this Court must, that the allegations in the Petition are true and that the DANY utilized a trial subpoena in order to ascertain whether there was evidence, the DANY and Respondent Sciarrino both acted in excess of their authority and are subject to prohibition. CPL § 89.05.10(3) neither validates their actions nor provides "ample and broad statutory authority" to support the subpoenas, as the DANY claims. (DANY Cross-Motion Mem. at p. 17). Rather, it defines the term "subpoena duces tecum" restrictively so as to include only those subpoenas "requiring the witness to bring with him and produce ***specified*** physical evidence." CPL § 610.10(3) (emphasis added). There is simply no construction of the DANY's trial subpoenas under which they could be said to make the grade.

Respondent Exceeded His Jurisdiction In Issuing Orders Under 18 U.S.C. §2703(d) And Continues To Exceed His Authority In Enforcing Them.

At ¶¶'s 68, 72, 138, 149 and 150 of his Petition, Petitioner states:

i) that there was "no ongoing criminal investigation" when Respondent issued his orders under 18 U.S.C. §2703(d), and

ii) that the DANY did not, in any event, make application for them. Respondent issued the §2703(d) orders *sua sponte*.

Each of these allegations is an allegation of fact that must be taken as true for purposes of the DANY's cross-motion.

Under the reasoning in *Matter of B.T. Productions, Inc. v. Barr*, 44 N.Y.2d 226 (1978), it necessarily follows that Respondent's acts were in excess of his jurisdiction. In *Matter of B.T. Productions*, petitioner challenged a search warrant pursuant to which New York's Organized Crime Task Force had seized two years' worth of petitioner's business records. Petitioner brought an Article 78 proceeding in the nature of prohibition, contending that "it was an excess of jurisdiction for the court to issue the warrant at the behest of the Task Force and to entrust the seized material to the Task Force's custody purportedly pursuant to CPL 690.55." 44. N.Y.2d at 232. The court identified the penultimate question in the case as whether agents of the Task Force had the power to obtain a search warrant. Id. at 234.

The Task Force, it held, "had no power other than that given it by the Legislature." *Id*. at 236. The Legislature gave it two distinct powers - investigatorial powers to exercise during a criminal investigation, and prosecutorial powers, during a prosecution. *Id.* at 235.[25] The Court concluded that the Task Force's purely investigatory powers did not "include the power to apply for a search warrant." *Id*. Its conclusion on the fundamental jurisdictional issue followed as a matter of course:

> In view of the absence of any statutory authority to obtain a search warrant, it is clear that the Task Force lacked the power to make such an application, and thus the court exceeded its jurisdiction in issuing the warrant. *Id*. at 236.[26]

[25] See also, e.g., 18 U.S.C. §§ 3512(a)(1) and (h)(2), for another statute in which the distinction is made between the "investigation" and "prosecution" of a criminal offense.

[26] The DANY's pretends that Petitioner has sought prohibition, in his second cause of action, based upon a challenge to "the existence of probable cause." (See DANY Cross-

At the risk of stating the obvious, if the Respondent in *B.T. Productions* exceeded his authority by issuing a search warrant where the application for it was invalid, then the Respondent here must have exceeded his authority where there was no application at all!

Petitioner has also alleged that Respondent exceeded his jurisdiction because the Criminal Court was not competent to issue the orders. The DANY responds to this assertion with two claims. It claims that the Criminal Court is a court of "general criminal jurisdiction," DANY Cross-Motion Mem. at 18, and that it is authorized by the law of the State to issue search warrants, including warrants to be executed outside the State.[27]

Both propositions are unsustainable as a matter of law. There is only one "court of general jurisdiction" in the State of New York: the Supreme Court. *See generally*, *People v. Correa*, 15 N.Y.3d 213 (2010); *People ex rel. Folk v. McNulty*, 256 A.D. 82, 89 (1939), *aff'd*, 279 N.Y. 563 (1939). The Criminal Court's jurisdiction is limited. CPL § 10.30 (1) and (3). In any event, contrary to the DANY's supposition, *see* DANY Cross-Mem. at 21, rather than eschew the idea of territorial limitations, the Stored Communications Act and ECPA affirmatively embrace the concept. *See*, *e.g.*,

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Motion Memo at 16). Not so. Like the challenge in *B.T. Productions*, *supra*, Petitioner's challenge here "goes to jurisdiction rather than simply to the existence of probable cause …". 44 N.Y.2d at 233.

[27] The DANY takes an astounding position: that state courts can lawfully "issue" warrants that, on their face, cannot be lawfully executed. (See DANY Cross-Mem. at 21.) The CPL does not permit of such game-playing. Rather, it restricts the right to issue search warrants to search warrants that can be executed. See CPL §§690.05(1), 690.20(1), 690.10(4), 690.35(2)(a).

18 U.S.C. §§ 2711(3)(a)(ii) (defining a federal court, judge or magistrate as "competent" to issue a § 2703(d) order as any federal court, judge or magistrate that "is in or for a district in which the provider of a wire or electronic communication service is located or in which the wire or electronic communications, records, or other information are stored").[28]

Since the Act places territorial restrictions on the ability of *federal* courts to issue SCA orders, it presumably incorporates any like restrictions imposed on *state* courts by state law. See also Pet. at ¶ 152. Here, the Criminal Procedure Law imposes such restrictions in no uncertain terms. It incorporates them into the very grant it makes of authority to issue search warrants. Thus, it does not state in CPL §690.05 that

> A local criminal court may, upon application of a police officer, a district attorney or other public servant acting in the course of his official duties, issue a search warrant.

Rather, it states:

> ***Under circumstances prescribed in this article***, a local criminal court may … issue a search warrant.

CPL 690.05(1). By virtue of this prefatory limitation, a local criminal court does not have authority to issue a search warrant where (i) the object of the

[28] The definition in 18 U.S.C. 2711(a)(3)(A) has three subparts. The first subpart would appear to define the federal courts that can issue orders in connection with an "investigation." (Subpart (a)(i) of the definition is obviously not applicable here.) The second and third subparts (Subparts (a)(ii) and (iii)) define the courts that can issue orders or process in connection with a prosecution. Both the second and third subparts (Subparts (a)(ii) and (iii)) have geographic limitations built in to their definitions. The objective of these limitations, it would appear would be to minimize any inconvenience to the ECS's and RCS's being asked to produce information.

search is personal property of the kind described in C.P.L. §690.10 and (ii) the location to be searched *is outside the state*. *See* Petition at ¶¶ 145-146 and Petitioner's Opening Memorandum at p. 19. Both of these circumstances obtained here. For these additional reasons, the Criminal Court was without authority to issue the 2703(d) orders.

Finally, Respondent acted in excess of his jurisdiction in issuing orders under 18 U.S.C. §2703(d) because Section 2703(d) forbids issuing orders that are "prohibited by the law of such State." 18 U.S.C. §2703(d). The orders in question were prohibited by New York law because they (1) afforded the DANY discovery he was not statutorily authorized to obtain, and (2) permitted him to misuse a trial subpoena towards that end. See Pet. at ¶¶ 110-136 and Petitioner's Opening Memo at pp. 15-17.

In sum, for all of the foregoing reasons, Petitioner has stated valid claims for prohibition and there are no obstacles to their consideration.

II. HARRIS HAS STATED VALID CLAIMS UNDER C.P.L.R. Section 7803 (1).

A. There are No Obstacles To This Court's Consideration Of Petitioner's Mandamus Claims

The DANY moves to dismiss Petitioner's mandamus claims on one ground and one ground only: It claims they improperly ask this Court "to direct … [Respondent Sciarrino] to decide an application in a particular manner,'" DANY Memo at p. 22, and that mandamus cannot be used towards that end.

While there is a kernel of truth in what the DANY says, his position is overstated and subject to three objections. First, there is serious question whether the DANY has standing to move to dismiss the mandamus claims since they do not apply to him.

Second, it is clear, contrary to his suggestion, that "mandamus will lie to compel the determination of a motion" or application. *Weinstein v. Haft*, 60 N.Y.2d 625, 627 (1983). *See also*, *e.g.*, *In re Pitt*, 69 A.D.3d 860, 861 (2d Dept 2010)(lower court directed to rule on merits of motion to dismiss indictment on speedy trial grounds);[29] *In the Matter of Law Offices of Marnell*, 26 A.D.3d 495 (2d Dept 2006)(finding that motion had been "fully submitted" and was ready for decision, App Div directed lower court to issue a written order deciding it within 10 days of service); *In the Matter of Decintio v Cohalan*, 18 A.D.3d 872 (2d Dept 2005)(Supreme Court Justice directed to decide motion to vacate a default judgment); *Matter of Silk & Bunks v Greenfield*, 102 A.D.2d 734 (1st Dept 1984); *Matter of National Auto Weld v. Clynes*, 89 A.D.2d 689 (3d Dept 1982)(City Court Judge directed to hear and decide claim that he had dismissed on improper grounds); *Matter of Briggs v. Lauman*, 21 A.D.2d 734 (3rd Dept 1964), *leave den'd*, 15 N.Y.2d

[29] This case is of particular relevance since the lower court deferred deciding the motion because there had not yet been a determination that the defendant was fit to stand trial. Concluding that standing to make the motion and "fitness to stand trial" were two different things and that defendant had "a clear statutory right to a determination of his motion," the Appellate Division granted mandamus and directed the lower court to determine the motion within 90 days.

481 (1964)(Justice of the Peace directed to decide motions addressed to the sufficiency of three separate informations).

Third, the restriction against using mandamus to direct a judge or justice to decide an issue in a particular way *only* applies to "merits" determinations, not to preliminary, non-merits issues. Thus, it does not apply to preliminary issues such as subject matter jurisdiction, personal jurisdiction, or the ripeness or prematurity of claims.

Accordingly, where a lower court fails to entertain a motion, claim or cause because it has erroneously concluded that it lacks the power or authority to do so, mandamus will generally lie to correct that threshold misconception and direct the lower court to proceed to the merits. In so ruling, a higher court does not encroach upon the lower court's jurisdiction or disrespect its authority. It does the opposite. It restores the lower court's power, affirms its authority and sets its jurisdiction "in motion." A higher court would only be precluded from proceeding in this manner where it was required to find a fact contrary to the manner in which it had been found by the lower court. Where, as here, the preliminary issue can be decided as a matter of law, mandamus is not only available, it is appropriate.

These principles are not new ones. They have been part of the law of mandamus since time immemorial and are discussed in the classic treatises. Indeed, Tapping summed them up succinctly in his enunciation of the following rule:

> [I]f justices reject an application in the exercise of the discretion vested in them by the Legislature, the Court of B. R. will not interfere; but if they reject it on the ground that they have no power to grant it the Court will interfere, so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application.

Thomas Tapping, *The Law and Practice of the High Writ of Mandamus as It Obtains Both in England and in Ireland* (1853)(emphasis added); Thomas Carl Spelling, *A Treatise on Injunctions and Extraordinary Remedies Covering Habeas Corpus, Mandamus, Quo Warranto and Certiorari or Review* (1901), §1394 ("[Mandamus] May be resorted to, to set Courts in Motion") at pp. 1210-121.[30]

Logic dictates that this rule applies to "standing" just as it does to subject matter jurisdiction, prematurity or ripeness since, like them, standing is a *preliminary, non-merits issue*. *See, e.g.*, *Landau v. LaRossa,* 11 N.Y.3d 8, 14 (2008)("when the disposition of a case is based upon a lack of standing only, the lower courts have not yet considered the merits of the claim"); *Navigation Corp. v. Sanluis Corp.,* 81 A.D.3d 557 (1st Dept 2011) (dismissal for lack of standing is not a decision on the merits). *See also,*

[30] *See also*, *generally*, Halsey H. Moses, *The Law of Mandamus and the Practice Connected with it* (1878) at p. 30, 41, 51, 52 ("where an inferior judicial tribunal declines to hear a case upon a preliminary objection, and that objection is purely a matter of law, mandamus from a superior court will be granted, if the inferior court has misconstrued the law"). Also, "where a judicial tribunal, having found all the facts necessary to a judgment, so that the judgment would be nothing but a conclusion of law upon those facts, the entering up of the proper judgment may be regarded as in its nature ministerial, and in the absence of any other remedy may be a proper subject for mandamus." *Id*. at 51.

generally, *Ass'n of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150, 153 (1969)(the issue of standing does not involve an inquiry into the merits; it merely requires a party seeking relief to allege a colorable claim of injury to an interest that is arguably protected by the statute or constitutional guarantee in question). It follows that a higher court does not violate the rule against directing a lower court to reach a particular result where it limits itself to ruling, as a matter of law, on standing.

In sum, this Court will not run afoul of the basic tenets of mandamus if it entertains Petitioner's fourth through tenth causes of action. Nor is it precluded by those tenets from finding, as a matter of law, that Harris had standing before the lower court, and directing Respondent to rule on the merits of Harris' motions.

B. Petitioner Has Stated Valid Claims for Mandamus.

In four of the seven causes of action Petitioner has stated for mandamus, the test for standing presents purely legal issues. (See Pet. at Causes of Action #'s 7, 8, 9 and 10). Accordingly, this Court can properly determine whether Petitioner met each of those tests and the Criminal Court had the authority to rule on his substantive statutory, First Amendment and common law challenges. Since he clearly had standing in each instance to make the motion he did, this Court can then direct the lower court to reach and rule on the merits of Petitioner's challenges. (Petitioner's Opening Memorandum at pp. 31-43).

The remaining three mandamus claims (See Pet. at Causes of Action #'s 4, 5 and 6) concern Petitioner's motions in the Criminal Court under the Fourth Amendment and N.Y. Constitution Art. I, § 12. Although the test for standing under these provisions is a hybrid one[31] – requiring both a factual and legal determination – *at this juncture*, the issue of whether Petitioner had standing before the lower court can be decided as a matter of law. This is so because the Criminal Court has already decided the factual question. (*See* Pet. Exh. 10 at p.4). It explicitly determined that Harris had an actual expectation of privacy in the information subpoenaed and his Twitter account as a whole. *Id*. Since the only remaining question (i.e., whether Petitioner had a "reasonable" expectation of privacy) is a strictly legal one, even as to claims # 5 and 6, then, the overall standing question is now ready for determination by this Court. Assuming the Court finds, as Petitioner believes it will, that Petitioner clearly had standing under the Fourth Amendment and New York Constitution to challenge the DANY's subpoenas and Respondent's Orders, this Court can direct the lower court to reach and rule on the merits of Petitioner's Fourth Amendment challenges.

In sum, since it can clearly be determined as a matter of law that Petitioner had standing in each instance to move as he did, he states valid claims for mandamus to compel the Criminal Court to reach and rule on the merits of his motions.

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[31] This is the much touted "Katz test." Under it, to prove standing, a person must prove: (1) that he had an actual (subjective) expectation of privacy in the communications, items or area being searched, and (2) that his expectation is "reasonable." 389 U.S. at 361.

CONCLUSION

For all of the foregoing reasons, the DANY's cross-motion to dismiss should be rejected in its entirety.

The District Attorney's Request With Respect To His Answer: The DANY seeks twenty (20) days after this motion is decided to file an answer. Because the underlying criminal case is scheduled to go to trial on December 12, he is likely to argue this proceeding is moot when it does and our Petition was filed over seven (7) weeks ago, we respectfully request that the DANY be held to the strict language of the statute and be afforded only five (5) days to answer. Were there no time constraints in this matter, we would of course not object to his request.

Submitted By,

Martin R. Stolar, Esq.
351 Broadway, 4th Floor
New York, N.Y. 10013
(212) 219-1919
mrslaw37@hotmail.com

_____
Emily M. Bass, Esq.
551 Fifth Avenue, 28th Floor,
New York, N.Y. 10176
(646) 810-3117
emilybassesq@gmail.com

Attorneys for Petitioner Harris