

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

DAVID F. PARENTE, John Doe and Jane Doe,
on behalf of themselves and all other petitioners
similarly situated and THOMAS F. LIOTTI, ESQ.,
an attorney, individually and as a taxpayer on
behalf of himself and all other criminal defense
attorneys similarly situated,

TRIAL/IAS PART 17

Petitioners,

Index No. 012475/06

- against -

HONORABLE ANTHONY MARANO, Administrative
Judge of Nassau County and KATHLEEN M. RICE,
District Attorney of Nassau County,

Sequence No. 001,002
Motion Date: Aug. 29, 2006

Respondents.

The following papers read on this motion:

Order to Show Cause	1
Notice of Cross-Motion to Dismiss	2
Memorandum of Law	3,4
Reply Affidavit	5
Memorandum of Law	6
Reply Affirmation	7
Reply Memorandum of Law	8,9

Petitioners have commenced this Article 78 proceeding against the
Administrative Judge of Nassau County, the Hon. Anthony Marano, seeking to declare
the newly created Nassau County District Court DWI Part 7 to be unconstitutional, and
disbanded forthwith; and against the District Attorney of Nassau County, Kathleen M.
Rice, declaring the plea bargaining policies and guidelines of the newly elected District

Attorney to be unconstitutional. Oral arguments were presented in court by counsel for the parties on November 21, 2006. The applications made by petitioners' in their reply papers for a change in venue, and for a recusal by this court were denied for the reasons stated on the record.

Petitioner David F. Parente, and his attorney Thomas F. Liotti brought this Article 78 proceeding in response to criminal charges brought against petitioner David F. Parente for an alleged Driving While Intoxicated. The criminal action is currently pending in the Nassau County District Court in the DWI Part 7.

In March of 2006, the newly elected District Attorney established plea bargaining guidelines for the disposition of DWI cases that superceded the guidelines set forth by her predecessor, Denis Dillon. As of May 22, 2006, the Administrative Judge of Nassau County, the Hon. Anthony Marano established a DWI Part 7 in the Nassau County District Court specializing in the trial and disposition of DWI cases. Petitioners claim that the new plea guidelines, which effectively deny a plea bargain in certain DWI cases, such as where the blood alcohol level exceeds .13, is draconian and unconstitutional, and forces defendants to trial or to take a plea to the charge. Therefore, petitioners contend that the establishment of the special DWI Part 7 is also unconstitutional.

For the reasons set forth herein, the petitioners' Article 78 proceeding is denied, and the petition is dismissed.

Both petitioners and respondents overlooked an important issue in their briefs submitted to this court, as well as in their respective oral arguments presented to the court on November 21, 2006. This court lacks subject matter jurisdiction over this

Article 78 proceeding. An Article 78 proceeding brought under the Civil Practice Law and Rules naming a Supreme Court Justice as a respondent must be commenced in the Appellate Division. (CPLR §506 [b][1]; *Santorelli v. District Attorney of Westchester County*, 252 A.D.2d 504; *Baba v. Evans*, 213 A.D.2d 248; See, *Nolan v. Lungen*, 61 N.Y.2d 788).

Accordingly, the petitioners improperly commenced this Article 78 proceeding in the Supreme Court when they named the Hon. Anthony Marano as a respondent. This Article 78 proceeding should have been commenced in the Appellate Division of the Second Department.

Furthermore, petitioners' constitutional challenge to the creation of a DWI Part 7 in the Nassau County District Court by the Administrative Judge of Nassau County, the Hon. Anthony Marano, and the new plea bargaining guidelines of the District Attorney, are more appropriately raised on appeal within the context of the DWI proceeding that petitioner David Parente is being prosecuted for in the Nassau County District Court. The petitioners cannot circumvent the normal appellate process by submitting an Article 78 proceeding outside the context of the existing DWI litigation. [*Gardner v. Evans*, 60 N.Y.2d 781, 783].

Even if the court were to consider the substance of petitioners arguments, the court finds that the establishment of the special DWI Part 7 in the Nassau County District Court by the Administrative Judge is clearly constitutional. Section 28 (b) of Article 6 of the New York State Constitution endows the Chief Judge and the Chief Administrative Judge with the Constitutional power to supervise the administration and

operation of the unified court system. [*Corkum v. Bartlett*, 46 N.Y.2d 424]. The New York State Legislature has delegated to the Chief Administrative Judge the constitutional power to “establish the hours, terms and parts of court, assign judges and justices to them, and make necessary rules therefor.” [Judiciary Law §212 (1)C]. Further, the Uniform Rules of the New York State Trial Courts provides that “The Chief Administrator may authorize the establishment in any court special categories of actions and proceedings, including but not limited to matrimonial actions, medial malpractice actions, tax assessment review proceedings, condemnation actions and actions requiring protracted litigation...” [22 NYCRR §202.2 (c)(2)]. The administrative power and function of the Chief Administrator may be delegated to the local Administrative Judge of the county. [22 NYCRR §80.1 (b)(4)]. The court takes judicial notice of the fact that special categories of parts have already been created in the Supreme Court of Nassau County for matrimonial actions, commercial actions, tax certiorari actions, domestic violence, and substance abuse, as well as special parts created in Nassau County District Court to handle landlord and tenant, small claims, and criminal cases. Petitioners have improperly attempted to bootstrap the constitutionality of the creation of the DWI Part 7 to the constitutionality of the new plea bargaining guidelines set forth by the District Attorney which the court finds are two separate and distinct issues.

In considering the petitioners argument that the newly established plea bargaining guidelines are unconstitutional, the court must be cognizant of the powers and duties of the District Attorney to conduct all prosecutions and offenses in Nassau County, and to decide whether, and in what manner, to prosecute a suspected offender. [County Law

§700; *Baez v. Hennessy, Jr.*, 853 F.2d 73]. Further, the law is clear that an offer of a plea bargain is not a fundamental constitutional right, but a matter of prosecutorial discretion. [*People v. Cohen*, 186 A.D.2d 843, 844; See, *Weatherford v. Bursey*, 429 U.S. 545, 561]. However, the prosecutorial discretion is not unfettered. Because there is no fundamental, or suspect classification involved here, this court need only find that there is a rational basis for the strict plea-bargaining policies established in Nassau County by the District Attorney, Kathleen Rice.

Petitioners have failed to meet their burden of showing that the District Attorney's plea bargaining guidelines lack a rational basis. The record is devoid of relevant evidence produced by the petitioners that the new guidelines would not foster the stated aims of the District Attorney which is to curtail drunk driving and recidivism. The record before this Court is equally silent as to the considerations which may have led to the new guidelines set by the District Attorney whose stated aim is to provide greater protection for the public from drunk drivers. However, the court is mindful that the Judiciary cannot impose its will upon the District Attorney who is a member of the Executive Branch of State Government and who possesses broad discretion in prosecuting those who commit criminal offenses. [*People v. Harmon* 181 A.D. 2d 34]

Dated: 12/18/06

ENTERED

DEC 21 2006

NASSAU COUNTY
COURT CLERK'S OFFICE


_____ J.S.C.