

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

PRESENT:

*ARTHUR F. ENGORON*  
~~ARTHUR F. ENGORON~~

Justice

PART

~~30~~ 37

*THOMAS, RICHARD*

-v-

*BARBARA D. UNDERWOOD, ET AL*

INDEX NO. 154456 / 18

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

 MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated:

*5/18/18*

*(Signature)*

J.S.C.

**HON. ARTHUR F. ENGORON**

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----X  
In the Matter of the Application of  
RICHARD THOMAS,

Petitioner,

For Judgment Pursuant to Article 78 of the Civil  
Practice Law & Rules,

Index Number: 154456/2018

Sequence Number: 001

-against-

Decision and Order

BARBARA D. UNDERWOOD, in her official capacity  
as Acting Attorney General of the State of New York;  
and STATE OF NEW YORK,

Respondents.

-----X  
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on petitioner's Article 78 petition seeking this Court (1) to declare that respondent's March 11, 2018 felony complaint was issued in violation of lawful procedure; and (2) to issue a preliminary injunction against respondent, ordering it to cease and desist any enforcement actions:

Papers Numbered:

Notice of Petition - Affirmation - Exhibits .....	1
Opposition Letter and Exhibits .....	2
Reply Letter .....	3

Upon the foregoing papers, the petition is denied and the proceeding is dismissed.

**Background**

In or about 2015, petitioner, Richard Thomas, launched a campaign for Mayor of the City of Mount Vernon. On November 3, 2015, petitioner was elected as Mayor, and on January 4, 2016, he was sworn in. Thereafter, the New York State Comptroller's Office referred to the New York State Attorney General's Office ("AGO") an inquiry into petitioner's alleged misuse or misappropriation of his campaign and inaugural funds ("the Funds"). On March 11, 2018, then-Attorney General ("AG") Eric Schneiderman filed a felony complaint in Westchester County against petitioner alleging, inter alia: (1) that petitioner had misappropriated \$57,900 from the Funds; and (2) that petitioner failed to make required disclosures related to the Funds. On March 12, 2018, Schneiderman issued a joint press release with Comptroller Thomas DiNapoli, wherein Schneiderman stated that "this was an investigation that was undertaken with a referral from State Comptroller Tom DiNapoli." Petitioner was arrested and arraigned ("the Criminal Proceeding") in Westchester County Court. On May 15, 2018, a local grand jury indicted petitioner ("the Indictment"), charging him with six felonies and two misdemeanors.

On May 14, 2018, by way of an Order to Show Cause, petitioner commenced the instant CPLR Article 78 Petition asking this Court: (1) to declare that the Comptroller and AG did not have the authority to investigate the Funds as the Comptroller's authority is limited to the use of state funds, and it cannot confer upon the AG authority which it itself does not possess; (2) to declare that respondent Barbara Underwood, in her (alleged?) (contested?) official capacity as Acting AG, does not have the legal authority to carry out official enforcement actions, such as seeking an indictment from a grand jury; (3) to declare that the felony complaint was issued in violation of lawful procedure, was affected by errors of law, was arbitrary and capricious, was in excess of jurisdiction, and/or was an abuse of discretion; (4) to issue a preliminary injunction against the AG's taking any enforcement actions related hereto; and (5) to cease and desist from any continued enforcement operation. Petitioner argues that if the petition is not granted, he will suffer irreparable harm

in his personal and official capacities. By email dated May 16, 2018, the AGO opposed the petition, arguing, *inter alia*: (1) that pursuant to Executive Law § 63(3), the AG has the authority to prosecute petitioner; (2) that pursuant to Public Officers Law § 9, Underwood is acting as AG pursuant to a properly filed designation under the statute; (3) that pursuant to case law, this Court lacks subject matter jurisdiction over the proceeding because it may not entertain a collateral proceeding challenging a pending criminal action; and (4) that to the extent petitioner seeks to challenge jurisdiction, the denial of this petition will not prejudice him, as he may do so in the Criminal Proceeding. In reply, petitioner argues that the petition does not allege an “error of law” in the Criminal Proceeding, but rather that the entire investigation and prosecutorial activity of the AGO is beyond its jurisdiction, which is proper for this Court to review.

### Discussion

As here relevant, pursuant to Executive Law § 63(3), the AG “shall,” upon request of the Comptroller, “investigate the alleged commission of any indictable offense or offenses in violation of the law which the officer making the request [i.e., the Comptroller] is especially required to execute or in relation to any matters connected with such departments, and to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both, including but not limited to appearing before and presenting all such matters to a grand jury.” Pursuant to the New York State Constitution (“the NYS Constitution”), the outer boundaries of the Comptroller’s authority are matters involving the use or misuse of state funds by the State and/or political subdivisions thereof. See N.Y. Const., art. V, § 1.

Petitioner has seriously questioned whether the AG could have lawfully investigated petitioner’s alleged misuse or misappropriation of the Funds based on the Comptroller’s referral. Petitioner cites to People v Cuttita, 7 NY3d 500, 508 (2006), for the proposition that 63(3) limits the AG’s power to “investigate” a matter to the statutory powers of the referring agency, which in the instant proceeding limits the AG’s power to investigate to the contours of the Comptroller’s authority over state funds. See id. (“when presented with a proper Executive Law § 63(3) request, the [AG] may investigate and prosecute alleged illegal activity that falls under the statutory or regulatory authority of the officer making the referral”). On the other hand, New York courts have held that the AG has broad investigative and prosecutorial authority. See Landau v Hynes, 49 NY2d 128, 135-37 (1979) (“the courts of this State have uniformly construed this section as bestowing upon the Attorney-General the broadest of powers. ... the plain language of [63(3)] itself [provides] the [AG] or his deputy with broad investigative and prosecutorial powers whenever an investigation is requested by a head of a department”).

In the final analysis, if this Court were forced to decide whether or not the AG had the authority to investigate the matters at hand, it would decide that it did not. Applying *expressio unius est exclusio alterius*, if the AG can properly investigate matters over which a referring entity had authority, then the AG, an entity with broad but limited powers, cannot properly investigate matters over which the referring entity did not have authority. Applying the rule that the specific controls the general, general language about broad powers cannot overrule the specific limit here found. Finally, applying Cuttita, the AG simply did not have the power here claimed.

However, on May 16, 2018, a Westchester Grand Jury indicted petitioner for fraud. As a result of the indictment, what had been an attempt to prevent an investigation is now a collateral attack on a criminal case pending in another county. The “investigation” has become a “prosecution.” Case law precludes petitioner from seeking injunctive relief in this Court to quash an ongoing criminal prosecution or other proceeding elsewhere. See Matter of Steingut v Gold, 42 NY2d 311, 315 (1977) (“The writ [of prohibition] does not lie as a means of seeking a collateral review of an error of law, no matter how egregious that error might be, in a pending criminal proceeding, but only where the very jurisdiction and power of the court are in issue”) (emphasis added). The jurisdictional issue exception applies only to the jurisdiction of the courts, not to administrative entities, such as the AGO. Here, petitioner does not allege that the Westchester County Court lacks subject matter jurisdiction over the Criminal Proceeding, but, rather, alleges that the AGO is acting beyond the scope of its jurisdiction, which is insufficient to overcome the collateral review prohibition. To the extent that petitioner seeks to challenge that jurisdiction, he must do so in the Criminal Proceeding. See La Rocca v Lane, 37 NY2d 575, 579 (1975) (“The orderly administration of justice requires that correction of litigation errors merely be left to the ordinary channels of appeal or review. Otherwise one would erect an additional avenue of judicial scrutiny in a collateral proceeding and thus frustrate the statutory or even constitutional limits on review”).

Petitioner's secondary argument is, essentially, that Barbara Underwood may not act as Attorney General absent being elected to the office or being approved by the state legislature. However, as noted above, petitioner does not argue that the Westchester Court does not have jurisdiction over the Criminal Proceeding. Thus, the exception to the rule against collateral attacks does not apply. Rather, petitioner may challenge Ms. Underwood's authority in that other court.

This Court notes in passing that whatever are the rules of succession for the New York State Attorney General, the idea that the office would not be able to function at all based simply on a vacancy is, to say the least, counter-intuitive.

The Court has considered petitioner's other arguments and finds them to be unavailing and/or non-dispositive.

Accordingly, the petition is denied and the proceeding is dismissed.

**Conclusion**

Petition denied. The Court hereby directs the clerk to enter judgment denying the petition and dismissing the proceeding.

Dated: May 18, 2018



\_\_\_\_\_  
Arthur F. Engoron, J.S.C.