

State of New York Court of Appeals

BEFORE: HONORABLE PAUL G. FEINMAN
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RASHEEN J. GAMBLE, A/K/A SHEENIE,

Appellant.

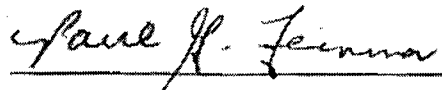
**ORDER
DENYING
LEAVE**

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: April 27, 2020.



Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered January 28, 2020, affirming a judgment of the Supreme Court, Bronx County, rendered November 13, 2013, and order, same court, entered on or about December 20, 2017.

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10873-
10873A &
M-65

Ind. 1347/09

The People of the State of New York,
Respondent,

-against-

Rasheen J. Gamble also known as Sheenie,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York
(Abigail Everett of counsel), for appellant.

Rasheen Gamble, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of
counsel), for respondent.

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.),
rendered November 13, 2013, convicting defendant, after a jury
trial, of murder in the second degree and attempted assault in
the second degree, and sentencing him to an aggregate term of
26½ years to life, and order, same court and Justice, entered on
or about December 20, 2017, which denied defendant's CPL 440.10
motion to vacate the judgment, unanimously affirmed.

The court properly denied, without a hearing, defendant
pro se's CPL 440.10 motion and appellate counsel's supplemental
CPL 440.10 motion asserting ineffective assistance of counsel.
Defendant argues that there was no legitimate strategic reason

for pretrial counsel's consent, without first consulting defendant, to the People's untimely (see CPL 240.90) motion to compel a DNA sample. Assuming that counsel's consent under these circumstances was objectively unreasonable, we find that defendant was not prejudiced under either the state or federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668, 694 [1984]). Independent of any DNA evidence, there was overwhelming evidence of defendant's guilt, including, among many other things, the presence of defendant's fingerprints at a location that unequivocally connected him to the crime (see *People v Lewis*, 44 AD3d 422, 422-23 [1st Dept 2007], *lv denied* 9 NY3d 1035 [2008]). The court also providently exercised its discretion in determining that a hearing would serve no useful purpose, particularly in light of defendant's detailed submissions regarding his interactions with pretrial counsel, who was deceased.

The court providently exercised its discretion in precluding defendant from cross-examining a witness about an arrest that had resulted in a dismissal, because trial counsel had insufficient information to demonstrate that the charges were not dismissed on the merits, and thus failed to demonstrate a good faith basis for

the inquiry (see *People v Padilla*, 28 AD3d 365 [1st Dept 2006], lv denied 7 NY3d 792 [2006])). Counsel presented only unsupported speculation that the charges were dismissed on speedy trial grounds. Moreover, based on information that the trial prosecutor received from the prosecutor who had handled the witness's case, it appeared that the dismissal may have been on the merits. In any event, any error was harmless (see *People v Crimmins*, 36 NY2d 230 [1975])). We also find no violation of defendant's right to cross-examine witnesses (see *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986])).

The challenged portions of the prosecutor's summation do not warrant reversal (see *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], lv denied 81 NY2d 884 [1993])). Although the prosecutor's comments on the lack of an "innocent explanation" for certain evidence tended to shift the burden of proof, the court's curative instructions were sufficient to prevent any prejudice. However, the prosecutor's arguments about defendant's failure to make a 911 call at the time of the incident, or to assert his innocence during a call to his mother after his flight, were inappropriate under the facts of the case, and the court should not have permitted the jury to consider them. Nevertheless, these errors were harmless in light of the

overwhelming evidence.

The court providently exercised its discretion in denying an adverse inference instruction regarding evidence rendered unavailable by the flooding of a storage facility by Hurricane Sandy (see e.g. *People v Daly*, 140 AD3d 593, 594 [1st Dept 2016]), and defendant's arguments to the contrary are unavailing.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

M-65 - *People v Gamble*

Motion for an adjournment and permission to file a pro se supplemental reply brief, denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 28, 2020



CLERK

UNIFORM SENTENCE & COMMITMENT

UCS-854(8/2011)

STATE OF NEW YORK
SUPREME COURT, COUNTY OF BRONX
PRESENT: HON CLANCY, M

Court Part: 79
Court Reporter: J.FERRERIS
Superior Ct. Case #: 01347-2009



The People of the State of New York

-vs-

RASHEEN J GAMBLE

Defendant

Male	08/06/1986	02023648K	63441190Z
Sex	DOB	NYSID #	Criminal Justice Tracking #

Accessory Instrument Charge(s)	Count #	Law/Section & Subdivision
1 CPW3	5	PL 265.02(03)
2 ATT-MURDER2	3	PL 110-125.25(01)
3 MURDER2	1	PL 125.25(01)
4 ASLT2	4	PL 120.05(02)

Date(s) of Offense: 02/08/2009 To

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED BY [☐ PLEA OR ☒ VERDICT], THE MOST SERIOUS OFFENSE BEING A [☒ FELONY OR ☐ MISDEMEANOR OR ☐ VIOLATION], IS HEREBY SENTENCED TO:

Crime	Count #	Law/Section & Subdivision	SMF, Hate or Terror	Minimum Period	Maximum Term	Definite / Determinate **	Post-Release Supervision	CJTN
1 MURDER2	1	PL 125.25(01)		25 Y	Life			
2 ATT-ASLT2	6	PL 110-120.05(02)		1 1/3 yrs	4 Y			
3								
4								
5								

** NOTE: For each DETERMINATE SENTENCE imposed, a corresponding period of POST-RELEASE SUPERVISION MUST be indicated [PL § 70.45].

☐ Counts shall run CONCURRENTLY with each other ☒ Count(s) 6 shall run CONSECUTIVELY to count(s) 1

☐ Sentence imposed herein shall run CONCURRENTLY with and/or CONSECUTIVELY to

☐ Sentence imposed herein shall include a CONSECUTIVE term of [☐ PROBATION OR ☐ CONDITIONAL DISCHARGE], with an Ignition Interlock Device condition, that shall commence upon the defendant's release from imprisonment [PL § 60.21]

☐ Conviction includes: WEAPON TYPE: and/or DRUG TYPE:

☐ Charged as a JUVENILE OFFENDER- age at time crime committed: years ☐ Court certified the Defendant a SEX OFFENDER [Cor. L § 168-d]

☐ Adjudicated a YOUTHFUL OFFENDER [CPL § 720.20] ☐ CASAT ordered [PL § 60.04(6)]

☐ Execute as a sentence of PAROLE SUPERVISION [CPL § 410.91] ☐ SHOCK INCARCERATION ordered [PL § 60.04(7)]

☐ Re-sentenced as a PROBATION VIOLATOR [CPL § 410.70]

☐ As a: ☐ Second ☐ Second Violent ☐ Second Drug ☐ Second Drug w/prior VFO ☐ Predicate Sex Offender ☐ Persistent Sex Offender ☐ Persistent Violent **FELONY OFFENDER**

☐ Predicate Sex Offender w/prior VFO ☐ Second Child Sexual Assault ☐ Persistent

Paid Not Paid Deferred (If deferred, court must file written order [CPL § 420.40(5)]) Paid Not Paid Deferred (If deferred, court must file written order [CPL § 420.40(5)])

<input checked="" type="checkbox"/>	<input type="checkbox"/>	Mandatory Surcharge	\$325.00	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Crime Victim Assistance Fee	\$25.00
<input type="checkbox"/>	<input type="checkbox"/>	Fine	\$	<input type="checkbox"/>	<input type="checkbox"/>	Restitution	\$
<input checked="" type="checkbox"/>	<input type="checkbox"/>	DNA Fee	\$50.00	<input type="checkbox"/>	<input type="checkbox"/>	Sex Offender Registration Fee	\$
<input type="checkbox"/>	<input type="checkbox"/>	DWI/Other	\$	<input type="checkbox"/>	<input type="checkbox"/>	Supplemental Sex Off. Victim Fee	\$

THE SAID DEFENDANT BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE:

- ☒ NYS Department of Correctional Services (NYDOCS) until released in accordance with the law, and being a person sixteen (16) years or older not presently in the custody of the NYDOCS, (New York City Department of Corrections) is directed to deliver the defendant to the custody of NYDOCS as provided in 7 NYCRR Part 103.
- ☐ NYS Department of Correctional Services (NYDOCS) until released in accordance with the law, and being a person sixteen (16) years or older presently in the custody of NYDOCS, defendant shall remain in the custody of the NYDOCS.
- ☐ NYS Office of Children and Family Services in accordance with the law, being a person less than sixteen (16) years of age at the time the crime was committed.
- ☐ County Jail/Correctional Facility

TO BE HELD UNTIL THE JUDGMENT OF THIS COURT IS SATISFIED.

REMARKS:

Continuation, Order of Protection & Pre-Sentence Report received by Correctional Authority as indicated:

Official Name

Shield No.

Pre-Sentence Investigation Report Attached: ☒ Yes ☐ No

Order of Protection Issued: ☐ Yes ☒ No

Order of Protection Attached: ☐ Yes ☒ No

☐ Amended Commitment: Original Sentence Date:

11/13/2013 LUIS M. DIAZ

by:

SCC

Date

Clerk of the Court

Signature

Title



F-19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: PART 28

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Ind. No. 01347-2009

-against-

CPL § 440.10 DECISION

RASHEEN GAMBLE,

Defendant.
-----X

Clancy, J:

On October 11, 2013, defendant was convicted, following a jury trial, of Murder in the Second Degree (PL § 125.25[1]) and Attempted Assault in the Second Degree (PL §§ 110/120.05[2]). The charges stemmed from two separate shootings in defendant's apartment building. In the first shooting, defendant fired a shotgun twenty-three times at the door of an apartment, striking Luis Lopez in the stomach and leg. Mr. Lopez survived. Approximately twenty-five minutes later, defendant shot security guard Brian McCray to death inside the building's security booth. Video surveillance showed defendant shooting Mr. McCray three times, with the third and final shot at close range as Mr. McCray lay defenseless on the floor.

On November 13, 2013, the court sentenced defendant to twenty-five years to life in prison for the murder, and a concurrent term of one and one third to four years in prison for the attempted assault. Defendant has yet to perfect his appeal of these convictions.

Defendant now moves to vacate this judgment, pursuant to CPL § 440.10, on the ground that it is the result of the ineffective assistance of counsel under state and federal law.¹ The People oppose. For the following reasons, the motion to vacate is denied.

After the entry of a judgment, a defendant may move to vacate the judgment on the

¹ Although defendant initially filed a *pro se* motion to vacate, the court subsequently appointed the Center for Appellate Litigation, at appellate counsel's request, to represent defendant on the motion to vacate as well. Appellate counsel adopted defendant's *pro se* motion and filed a supplemental motion in support.

ground that it was obtained in violation of defendant's rights under the State or Federal Constitutions. (CPL § 440.10[1][h]). A motion to vacate must be denied when the judgment is pending on appeal and there are sufficient facts on the record of the underlying proceedings to permit adequate review on appeal. (CPL § 440.10[2][b]). In contrast, where an ineffective assistance of counsel claim is based on something that purportedly occurred outside the record that is not subject to appellate review, the failure to appeal is irrelevant to the analysis and the claim may properly be raised in a collateral attack upon a judgment of conviction. (See *People v Angelakos*, 70 NY2d 670, 673 [1987] [citations omitted]). A motion to vacate may also be denied where an essential allegation of fact is contradicted by a court record. (CPL §440.30[4][d]).

Defendant was represented by two separate attorneys. Patrick Bruno, who has since passed away, represented defendant pre-trial. Maria Tobia, who was appointed to replace Mr. Bruno at defendant's request, represented defendant up to, and including, the trial. The most damaging evidence against defendant consisted of latent fingerprints connecting defendant to the shotgun used in the murder of security guard Brian McCray and the attempted assault of Luis Lopez, a DNA match between defendant's DNA profile and forensic evidence recovered from the crime scene, eyewitness testimony identifying defendant as the shooter, and evidence of defendant's flight.

Defendant alleges various pre-trial deficiencies by Mr. Bruno. Defendant claims that Mr. Bruno was ineffective for failing to conduct any investigation and for failing to inspect evidence that was destroyed by Hurricane Sandy. Defendant also claims that Mr. Bruno was ineffective for consenting to an untimely discovery motion, filed by the People, to compel him to provide a DNA sample to compare to the forensic evidence recovered from the crime scene. Defendant claims that Ms. Tobia was also ineffective for failing to conduct any investigation or inspect evidence. Defendant also claims that Ms. Tobia was

ineffective for not raising Mr. Bruno's ineffectiveness, failing to challenge the legality of a search warrant, failing to move to reopen a suppression hearing based on the trial testimony, failing to request a missing witness charge, and for entering into a stipulation with the People at trial. Finally, defendant claims that Ms. Tobia was ineffective in failing to request that a lesser-included offense be submitted to the jury and, instead, leaving the decision to defendant.

First and foremost, the court notes that most of these claims, except for counsels' alleged failure to investigate and Ms. Tobia's purported conversation with defendant about a lesser-included offense, are record-based and would permit adequate review on appeal. As such, defendant's motion to vacate on these individual bases is denied. (CPL § 440.10[2][b]).

The court also notes that defendant has failed to provide any affidavit from trial counsel to support his claims.² "The failure to include an affirmation from counsel, or an explanation for the failure to do so, . . . warrant[s] the summary denial of a defendant's postconviction motion." (See *People v Wright*, 27 NY3d 516, 522 [2016] [citation omitted]).³ It is evident that appellate counsel communicated with Ms. Tobia, *via* email,

² Defendant purportedly sent a letter to Ms. Tobia seeking an affidavit in support of his *pro se* motion. (Notice of Motion to Vacate Judgment CPL § 440.10, Exhibit 3A). This letter, however, was sent to the wrong address. As such, there is no evidence that this letter was ever received by Ms. Tobia.

³ Although defendant relies on Second Department case law for the proposition that an affidavit from counsel is not necessary where defendant's claim is hostile and adverse to trial counsel (see *People v Radcliffe*, 298 AD2d 533 [2d Dept 2002]), the court notes that where an ineffective assistance claim requires an expansion of the trial record, the First Department has consistently held that summary denial of a such a motion is proper where the moving papers either fail to include an affirmation by trial counsel or an explanation for the absence of such an affirmation. (See, *People v Stewart*, 295 AD2d 249, 249-50 [1st Dept 2002] [citing *People v Chen*, 293 AD2d 362, 363 [1st Dept 2002], *appeal denied*, 98 NY2d 696 [2002]], *appeal denied*, 99 NY2d 540 [2002]; *People v Johnson*, 292 AD2d 284 [1st Dept 2002] [citing *People v Morales*, 58 NY2d 1008 [1983]], *appeal denied*, 98 NY2d 698 [2002]).

concerning this case. (Defendant's Reply Affirmation in Support of § 440.10 Motion to Vacate Conviction, Exhibit I). In the email exchange, Ms. Tobia referred to the case being difficult and a "disaster" prior to her entry. Ms. Tobia also appeared to be willing to help appellate counsel and answered questions regarding evidence that appellate counsel found in Ms. Tobia's file. Noticeably absent is any indication that Ms. Tobia was aware that defendant was questioning her own effectiveness. Therefore, contrary to defendant's position, the email exchange does not demonstrate that trial counsel "is not willing to admit that she was ineffective," thereby relieving defendant of the obligation to substantiate all the essential facts through sworn allegations from counsel. (CPL § 440.30[1]). Accordingly, defendant's motion to vacate based on Ms. Tobia's claimed ineffectiveness, including her failure to investigate and her purported off-the-record conversation with defendant about submission of a lesser-included offense, is denied. (CPL § 440.30[4][b]. *Wright*, 27 NY3d at 522).

Defendant's claim that counsel failed to challenge the legality of the search warrant is summarily rejected. In a decision dated September 14, 2012, this court specifically denied defendant's motion to controvert the search warrant. As such, this portion of defendant's motion is also denied in that an essential allegation of fact is contradicted by the record. (CPL § 440.30[4][d]).

Defendant's claim of ineffective assistance based on Mr. Bruno's alleged failure to investigate "is unreviewable on direct appeal since it involves matters outside the record that would require an expansion of the record by way of a" motion to vacate. (*People v Bello*, 23 AD3d 152, 153 [1st Dept 2005] [citations omitted]). However, given Mr. Bruno's death and defense counsel's assertion that Mr. Bruno's closed files were discarded after his death (Notice of Motion to Vacate Judgment CPL § 440.10, Exhibit 2E), it would now be impossible to expand the record in any way beyond the parties' submissions. As such,

this portion of defendant's motion is denied without a hearing. (*People v Cotto*, 259 AD2d 288, 289 [1st Dept 1999] [motion properly denied without a hearing where trial counsel was deceased and was the only person who could have provided material information before the motion court], *appeal denied*, 93 NY2d 1002). Nevertheless, the court finds that all of defendant's ineffective assistance claims fail on the merits as well.

It is well-settled that effective assistance of counsel under New York law is provided by "meaningful representation" when viewed in light of the evidence, the law, and the circumstances of each particular case, when viewed in totality. (*People v Ford*, 86 NY2d 397, 404 [1995] [citing *People v Baldi*, 54 NY2d 137, 147 [1981]]). Moreover, the test of an attorney's effectiveness is not perfect representation but reasonable competence (*People v Modica*, 64 NY2d 828, 829 [1985]). To prevail on such a claim the defendant must demonstrate that he was deprived of a fair trial by less than meaningful representation. (*People v Flores*, 84 NY2d 184, 187 [1994] [citing *People v Benn*, 68 NY2d 941, 942 [1986]], *revd on other grounds by Flores v Demskie*, 215 F3d 293 [2d Cir 2000]). To meet this burden, defendant must "demonstrate the absence of strategic or other legitimate explanations" for trial counsel's allegedly deficient conduct. (*People v Caban*, 5 NY3d 143, 152 [2005] [quoting *People v Rivera*, 71 NY2d 705, 709 [1988]]).

Meaningful representation under the New York State standard for effective assistance encompasses a prejudice component that focuses on the fairness of the process as a whole instead of its particular impact on the outcome of the case. (*People v Caban*, 5 NY3d 143, 156 [2005] [citing *People v Benevento*, 91 NY2d 708, 714 [1998]]). Although the New York standard for ineffective assistance does not require the same showing of prejudice as the federal standard, it remains a significant, though not

indispensable, element in assessing whether a defendant has received meaningful representation. (*People v Stultz*, 2 NY3d 277, 283-84 [2004]).

In contrast, to prevail on a Federal claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient in that the attorney's representation fell below an objective standard of reasonableness, in light of prevailing professional norms. (*Strickland v Washington*, 466 US 668, 668-69 [1984]). Defendant must also show that the claimed deficiency prejudiced him to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, 466 US at 694). For the following reasons, the court finds that defendant has failed to demonstrate that Mr. Bruno or Ms. Tobia were ineffective under both state and federal law.

Had defendant been convicted of both murder and attempted murder, defendant would have been facing a term of imprisonment of fifty years to life. Despite the strength of the People's case, however, Ms. Tobia obtained an acquittal on the attempted murder charge. On the existing record, the court finds that defendant received meaningful representation and that defendant has failed to demonstrate "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings." (*People v Gil*, 285 AD2d 7, 11 [1st Dept 2001] [citing *People v Rivera*, 71 N.Y.2d 705, 709 [1988]]). Nor has defendant established that he was prejudiced by these alleged shortcomings.

Defendant claims that Ms. Tobia was ineffective for failing to object to a criminologist's testimony on confrontation clause grounds. Counsel can hardly be deemed ineffective for failing to raise an issue that would not be decided for another four years. (See *People v John*, 27 NY3d 294 [2016]). As such, Ms. Tobia's failure to raise a

confrontation clause objection was consistent with the prevailing professional norms at the time of the trial. (See *People v Brown*, 13 NY3d 332 [2009]).

As to defendant's claim that Ms. Tobia was ineffective for failing to request the lesser-included offense of Manslaughter in the First Degree, the trial record demonstrates that Ms. Tobia consulted defendant several times on this issue before the jury was instructed. Accordingly, the court finds that defendant's claim that Ms. Tobia left the decision up to him is not credible considering her involvement and engagement with the court in the charge conference. Moreover, the court notes that the defenseless victim was shot at close range with a shotgun, making it less likely that a jury would find that the shooter intended anything other than death. The court also notes that Ms. Tobia's defense was focused on the mis-identification of defendant. As such, the decision not to pursue the manslaughter charge was strategically sound.

Likewise, Ms. Tobia's decision to enter into a stipulation with the People concerning defendant's phone call to his mother was strategically sound. That decision avoided the mother being called as a witness and limited the facts that went to the jury.

The court also finds that there was no basis for Ms. Tobia to move to reopen the suppression hearing during the trial because the trial testimony would not have materially affected the court's determination of the suppression motion. (See *People v Clark*, 88 NY2d 552, 555 [1996]). As the People correctly note, it is not ineffective assistance where counsel forgoes a strategy that would have been unsuccessful. (*People v Gray*, 27 NY3d 78, 83 [2016]).

Nor was there any basis upon which to request a missing witness charge. Defendant has not shown that the uncalled detective would have provided non-cumulative

testimony regarding a material issue about evidence that was already in the case. (See generally, *People v Gonzalez*, 68 NY2d 424 [1986]).

As the People correctly argue, there are several reasons why a defense attorney would consent to a motion to compel a DNA sample, not the least of which is the potential exclusion of defendant as a contributor to the forensic evidence recovered from the crime scene. Moreover, the preclusion of evidence is never required for the violation of a statute unless a constitutionally protected right is implicated. (See generally, *People v Patterson*, 78 NY2d 711, 717 [1991]; see also *People v Beecham*, 25 Misc3d 1214A [Sup Ct Westchester Co 2009] [citing *Patterson*, *supra*]). Given that a discovery motion implicates a statutory, as opposed to a constitutional right, this court has routinely exercised its discretion⁴ by granting late motions to compel DNA samples, particularly in the most serious of cases. In this regard, this court would likely have granted the People's motion to compel even if Mr. Bruno had challenged it as untimely, and the court does not find that defendant has demonstrated the lack of a strategic basis for Mr. Bruno's decision to consent to the People's motion to compel.

In any event, even if the court were to assume that Mr. Bruno's failure to challenge the People's motion to compel was a deficiency that fell below an objective standard of reasonableness, defendant has not established that he was prejudiced by this deficiency. A police officer who responded to the shooting observed a trail of blood leading to defendant's mother's apartment. The officer also observed the trail of blood continue into

⁴ The statutory framework gives the court the discretion to fashion the appropriate remedy for a parties' failure to comply with any of the discovery provisions. This discretion includes ordering discovery, granting a continuance, issuing a protective order, prohibiting the introduction of certain evidence, or taking "any other appropriate action." (CPL § 240.70[1]).

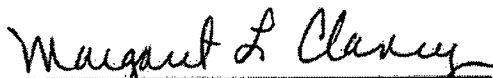
the apartment and into a bedroom, where the officer also observed blood on the floor and walls of the bedroom. Defendant's mother reported that the bedroom belonged to defendant and, pursuant to a search warrant for hair, fibers, and serological evidence (Affirmation in Opposition, Exhibit 4), the police recovered a hair pick, hair brush, and four swabs of serological evidence from the apartment. The hairs and serological evidence recovered pursuant to the search warrant were not tested by the People. Nevertheless, if counsel had successfully opposed the discovery motion as untimely, the People clearly would have tested this other evidence already in their possession to connect defendant to the biological evidence recovered from the crime scene. As such, defendant could not have suffered prejudice from counsel's decision to consent to the motion because the result of the proceedings would not have been different.⁵

As to Mr. Bruno's purported failure to investigate or inspect the evidence that was subsequently destroyed, defendant fails to establish how any particular investigatory steps that were lacking, or the inspection and testing of the evidence, would have been reasonably likely to have changed the result of the proceedings.

Based on the foregoing, defendant's motion to vacate is denied.

This constitutes the order and decision of the Court.

Dated: December 20, 2017
Bronx, New York


MARGARET L. CLANCY, JUDGE

⁵ The fact that this evidence was subsequently destroyed due to contamination by Hurricane Sandy is of no moment given the time line of this case.