No. 21-5713

IN THE

SUPREME COURT OF THE UNITED STATES

Qabail HIZBULLAHANKHAMON
N.Y.S.I.D.# 6131217z — PETITIONER
(Your Name)

vs.

State of NEW YORK — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

Qabail HizbullahAnkhAmon, N.Y.S.I.D.# 6131217z
(Your Name)
Wende Correctional Facility, 3040 Wende Road,
P.O. Box 1187, Alden, New York 14004-1187
(Address)

Alden (near Buffalo), Erie County, New York 14004
(City, State, Zip Code)

(716) 937-4000 Warden: Steward Eckert (who has custody over me)
(Phone Number)

QUESTION(S) PRESENTED

1. **Jurisdiction and the Teague Standard**:

Does the Court have the power to review a State Collateral Review Court's failure to give Retroactive Effect to new substantive rules of Federal Constitutional Law under the Teague Framework?

2. Montgomery's Expansion Of Miller's Standard:

(A). Does the Court's logic of Roper, Graham, Miller, Montgomery & Adams, which prohibit under the Eighth Amendment mandatory Life Sentences without Parole for Juvenile Offenders, announce a new substantive Constitutional rule that was retroactive on State Collateral Review even for, de facto Life Sentence, basically whether Montgomery expanded Miller's holding, and whether any such expansion can be applied retroactively?

(B). What is to be done with cases where a juvenile is sentenced to life **with** the possibility of Parole arising only after an extraordinarily lengthy term of years that exceed the juvenile's life expectancy constituting de facto Life Without Parole?

3. **Can Lower Court's Circumvent Miller**:

(A). Is it now allowable, after a review of the logic of Roper, Graham, Miller, Montgomery & Adams, which unavoidably extends not only to de jure Life Without Parole, but also to de facto ones, for a Lower Court to Circumvent Miller by sentencing a juvenile to a term of years beyond his life span?

(B). Is N.Y. State's Sentencing of Juveniles as if they were not children, sentencing them to die in prison that exceeds his life expectancy, defying decency without considering the fact that he is a child, and making the sentence all that counts, without consideration of rehabilitation, a circumvention of Miller?

4. **Retroactive Effect of Law Applies to Petitioner**:

(A). Petitioner has a sentence of 92 yrs-to-Life, did the Bronx Court err in ruling that the retroactive effect did not apply to Petitioner's de facto Life Without Parole (Functional Equivalent of

L.W.P.), who will die in prison, has been in prison for 33 yrs since he was 17 yrs old, has more time in prison than he was alive in free society, with 60 yrs to go, is now 50 yrs old with diabetes, also short life expectency, who was denied even a hearing?

(B). Whether the cruel & unusual clause in the N.Y.S. Constitution, as in the U.S. Constitution, is also violated when Petitioner was sentenced to 92 yrs to Life and he was a juvenile at the time of crime...where Bronx Judge never once mentioned Petitioner's YOUTH when he sentenced teenage defendant to die in prison under abuse of discretionary powers...?

5. **Increase in the Minimum Activates Due Process Clauses**:

Here the Petitioner has been sentenced to 92 yrs to Life as a teenager, does the due process of U.S. Constitution, or N.Y.S. Constitution, require that a factual determination, authorizing an increase in the Minimum Part of the Prison Sentence, for an offense that is not to exceed the 25 year Minimum for Second Degree Offenses of Murder, but by a judge on basis of proof beyond a reasonable doubt?

6. **Functional Equivalent Factor-Imposing Punishment for 2nd Degree Crimes As If 1st Degree Conviction Occurred**:

(A). Whether the Functional Equivalent Factor can stand against Petitioner, whose crimes occurred when he was 17 yrs old, under the age for N.Y.'s 1st Degree Murder Offense to apply, but He was convicted by a Bronx Jury to Second Degree Murder, a lesser included offense, but then this factor allows a "judge" to enhance sentence by imposing punishment identical to what NY provides for 1st Degree Crimes?

(B). Does the Apprendi Standard apply, where the sentence imposed is greater than the prescribed statutory laws for the offense of 2nd Degree Murder (25 yrs-to-Life), here Petitioner was sentenced beyond the statutory laws to 92 yrs-to-Life, it exceeds the 25 year Maximum for the crime created by NYS Legislature (where Parole is denied, beyond ones life expectancy) after allowing a Bronx Jury to convict Petitioner of 2nd Degree Crimes?

7. **Vindictive Sentencing & Cumulative Review of All Issues:**

Did the Bronx Court err, without cumulatively reviewing all past & present issues, in light of retroactive effect in Miller & Montgomery when Petitioner has made a preliminary showing that he was penalized for asserting his Constitutional right to a jury trial where he received a punishment in the form of a Super Enhancement of Incarceration due to his rejections of Plea Bargains and asserting his innocence at trial, testifying in his own behalf at his 1989 trial, and today proffers his actual Airline Ticket & DNA Data Profile from C.O.D.I.S. to compare with C.S.U. trial exhibits by Preponderance of Evidence?

8. **Gateway through which Procedural Bars Must Pass:**

Is it still the Rule of Law that a Petitioner may have his Constitutional claim considered on the merits, if he makes proper showing of Actual Innocence, if so, should have N.Y. Courts applied the standard announed in Murray v. Carrier, rather than more stringent standard of Sawyer v. Whitley where Petitioner must show by clear & convincing evidence that, but for a constitutional error, no reasonable Juror would have found him guilty?

9. **Prima Facie Showing of Actual Innocence & Failure to Investigate Alibi Defense:**

(A). Did the Petitioner make a prima facie showing based upon his proffered actual Airline Ticket sent to him by NYS Attorney General's Office via Legal Mail after 30 yrs; as documentary evidence supporting the allegations of his Alibi Defense by the Preponderance of the Evidence, and Sworn allegations by Petitioner who testified in his own behalf at trial as a teenager averring to be in another State at the time, even proffering his D.N.A. data Profile from C.O.D.I.S. to compare with C.S.U. trial exhibits & Forensic Reports that there should be a hearing on the claim of actual innocence?

(B). Did the Bronx Court err in Summarily Denying Petitioner's Collateral Motion requesting a hearing about the Defense Counsel's failure to investigate defendant's Alibi Defense amounting to ineffect iveness; and Did the Petitioner establish by the Preponderance of the Evidence that there was no strategic or other

legitimate explanation for defense counsel's failure to investigate Alibi Defense? In a case where there was no physical evidence connecting defendant to crime;

10. **Prejudice**:

Has this Court held that prejudice is implied in Actual Innocence cases?

11. **The Brady Claim & Princples with Specific Request**:

(A) Was the Petitioner denied fair trial, when Defense made a specific request for particularized material dealing with promises made to Co-defendant, who became State Witness, by Bronx Prosecutor's failure to produce correspondence between itself & Parole Division advising of cooperation between Co-defendant & Bronx Prosecutor that if Co-defendant agreed to testify at Petitioner's trial the Prosecutor would write a letter of recommendation to the Board of Parole for Co-defendant, expressing hope that such cooperation would be taken into account when witness was considered for parole for the first time in order to be released?

(B). The Napue v. Illinois Standard:

Whether the failure of the Prosecutor to Correct the testimony of the witness which he knew to be false denied Petitioner due process of law in violation of the 14th Amendment to the U.S. Constitution, because important witness for the State in Murder prosecution of Petitioner falsely testified that he received no promise of consideration in return for his testimony though in fact Bronx Prosecutor had promised witness consideration recommendation letter to the Parole Board?

(C). **Jurors Right to Consider**:

Did the Bronx Court err in summarily denying collateral motion without a hearing, where the material sought by Defense Counsel were of such a nature that the Trial Jury could have found that, despite the witness's protestation to the contrary, there was indeed a tacit understanding between the witness and the Prosecution, or at least so the witness hoped, and that the existence of such an agreement might be a strong factor in the minds of the Bronx Jurors in assessing the witness's credibility and in evaluating the worth of his testimony?

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PAGES#:

Note: The word "Appendix" is abbreviated twice throughout this Writ with the Letters "App" & "A"; and the word "Page" is abbreviated as "Pg" or "Pgs"(pages).

Also: The Appendix Table of Contents starts with the Roman Number pg #I and ends with Roman Number pg# III, and remaining Roman Numbered pages are the Constitutional Provisions, statutes and Rules involved that are lengthy, I have provided their citation at Roman Numbers #Iv to # IX; The Remaining Roman Numerals are separating the subjects of the Appeandix Table of Contests, and each page has its own page number from A1 to A894.

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Dealing With Topics Mentioned

SUBJECTS: **PAGES**

TABLE OF CASES

Appendix: Table of Contents for Exhibits

EXHIBITS: Copy of the Record in the Bronx Supreme Court below:

Total of 85 Exhibits
A number of exhibits were removed
because they are cumulative/ or
deal with Petitioner's prior Appeals
inside another Volume;

OPINION BELOW

The Opinions of the lower courts dealing with these issues at hand were never published, each New York Court gave an unpublished opinion.

The Petitioner is asking this Court to review a decision of a New York State Court from the County of the Bronx, see Appendix (Exhibits: Lower court opinion[s] appended: (III) Bronx Sup.Ct. decision, pages# A5 -to- A24).

The Petitioner appealed said decision to the second tier court called Appellate Division-First Department- who denied Petitioner the right to appeal, stating that there was no question of law to be reviewed, see Appendix (Exhibits: Lower court opinion appended (II) Appellate Div. 1st Dept., pages# A3 -to- A4).

Then the Petitioner appealed to the New York State's highest court called the New York Court of Appeals, who dismissed the appeal as unappealable on **March 26th 2021**, see Appendix (Exhibits: Lower court opinion appended (I) N.Y. Court of Appeals, pages# A1 -to- A2).

The order of the New York Court of Appeals denied the Petitioner's motion for review on March 26th, 2021, was the highest court in New York State in which a decision could be had, denying discretionary review, a copy of order is appended at Appendix (Exhibits: Lower court opinion appended (I) N.Y. Court of Appeals, pages# A1 -to- A2).

STATEMENT OF JURISDICTION

The statutory source for this Court's jurisdiction is invoked under Title 28 U.S.C. §1257(a). This petition is filed within 90 days from New York State's highest court denial of discretionary review, on or before **March 26th, 2021** (Friday), and Petitioner mailed this petition originally on **June 24th, 2021**, "Notarized Proof of Service" placed within the prison-house mailbox (Petitioner is confined to an institution called Wende Correctional Facility) on that date in order to determine whether this petiton is timely filed.

An extension of time within which to file the petition for a writ of certiorari was granted to correct and resubmit the petition within 60 days starting from **July 12, 2021** by Clayton R. Higgins,Jr. (202) 479-3019 within the Clerk's Office, and the requested info pertaining to the extension was dealing with page limitations for petition, and the opinion of the lower court in the appendix.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED:

VIII Amendment to the United States Constitution provides in pertinent part: "[N]or cruel and unusual punishments inflicted."(1791 A.D.);
VI Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a ***trial [] by an impartial jury *** [and] to be confronted with the witnesses against him *** [and] to have compulsory process for obtaining witnesses in his favor *** [and] to have the Assistance of Counsel for his defense."(1791 A.D.);
V Amendment to the United States Constitution provides in pertinent part: "[N]or be deprived of liberty without due process."(1791 AD);
XIV Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process."(1868 A.D.);

New York State Constitution, Article-1, §6 (Right to defense counsel in open court *** Defend in person with counsel*** shall be informed of the nature and cause of the accusation ***Be confronted with the witnesses against him *** [N]o person shall be deprived of life, liberty or property, without due process of law); **Appendix**,pg#**V**;
New York State Constitution, Article-1, §5 (Punishments: "[N]or cruel and unusual punishments,"); **Appendix**,pg#**IV** (after table of Con.III);

New York State Statutes: Permitting Collateral review of conviction
Criminal Procedure Law §440.10 (1)(f)(Prejudicial Conduct); **App.#VI**;
Criminal Procedure Law §440.10 (1)(g)(New Evidence discovered);**App#VI**
Criminal Procedure Law §440.10 (1)(H)(Constitutional Violation);**Ap#VI**
Criminal Procedure Law §440.20 (To set aside sentence);**Appendix# VII**
Criminal Procedure Law §40.10(2)(a)&(b)(Same Criminal Transaction);**A#Viii**
Penal Law §70.25(2)(Concurrent and Consecutive Sentences);**Appendix**,p#**IX**

Note: The provisions involved are lengthy, I have provided their citation (which can be found on WestLaw under Mckinney's Consolidated Laws of New York), and indicated where in the Appendix to this petition the text of the provisions appear in-full (after the table of Contents for Appendix,pgs#IV-IX).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASE (PROCEDURAL HISTORY)

Petitioner was indicted in 1988 by a Bronx County Grand Jury, and was convicted in 1989 before Hon. Daniel J. Sullivan, Bronx Supreme Court Judge, after a jury trial, during which petitioner testified.

The Petitioner was represented at trial by attorney Frank Loverro, Esq., Said conviction was for the crimes of Murder in the Second Degree (3 Counts) and Attempted Murder in the Second Degree (2 counts).

Petitioner was sentenced on August 8th, 1989, to the following term of imprisonment: 92 Years to Life, Consecutive Sentences (See, **HizbullahAnkhAmon v. Walker**, 105 F.Supp.2d 339, at 341 [Facts & Procedural History][S.D.N.Y. 2000]).

A timely direct appeal was taken, and defendant's conviction was affirmed on March 12th, 1992, by the Appellate Division, First Dept, **People v. Johnson**, 181 A.D.2d 509, 580 N.Y.S.2d 357. On June 19th, 1992, the New York State Court of Appeals denied leave to appeal from the Appellate Divisions Order of affirmance **People v. Johnson**, 80 N.Y.2d 833, 587 N.Y.S.2d 917.

Petitioner's case history within the Court System is as follows:

1. **People v. Johnson**,181 AD2d 509, 580 NYS2d 357 (**Direct Appeal 1992**)
2. **People v. Johnson**,80 NY2d 833, 587 NYS2d 917 (**Leave Denied 1992**);
3. **People v. Johnson**,81 NY2d 763, 594 NYS2d 725 (**Reconsideration 92**);
4. **Hizbullahankhamon v. Coughlin**, 216 AD2d 869,628 NYS2d 909 (1995);
5. **Hizbullahankhamon v. Goord**, 522 US 935,118 S.Ct.344(**Cert.Denied 97**);
6. **People v. Johnson**, 242 AD2d 408,661 NYS2d 689(**Coram Nobis 1997**);
7. **People v. Hizbullahankhamon**, 90 NY2d 1012,666 NYS2d 107(**Lv.Dismiss**);
8. **People v. Hizbullahankhamon**, 91 NY2d 834,667 NYS2d 688(**Reconsid.98**);
9. **People v. Johnson**, 258 AD2d 977,685 NYS2d 568(**Coram Nobis 1999**);
10. **People v. Hizbullahankhamon**,93 NY2d 899,689 NYS2d 711(**Lv.Dismiss**);
11. **Hizbullahankhamon v. Walker**, 105 F.Supp.2d 339(**S.D.N.Y.2000**);
12. **Hizbullahankhamon v. Walker**, 255 F.3d 65 (**Fed.Habeas Corp.2001**);
13. **Hizbullahankhamon v. Walker**, 536 US925,122 S.Ct.2593(**Cert.2002**);

14. **People v. Johnson (A.K.A. Hizbullahankhamon)**, __Misc.2d__ (Bx Sup. Ct.2005)(C.P.L. §440.10 Motion denied 7-7-2005, Bx Court, Judge J.N. Byrne);

15. **People v. Johnson (A.K.A. Hizbullahankhamon)**, __A.D.3d__ (1 Dept 2006)([M-3874] Judge Richard T. Andrias Denying Certificate of Lv to Appeal §440.10 upon the date of 1/17/06,entered 1/24/06; same Judge upon Reargument[M-1138] denied on 12/24/06, entered 12/14/06);

16. **People v. Hizbullahankhamon**, __A.D.3d__ (1 Dept.2006)(**Coram Nobis**) ([M-1136] denied, entered 7/13/2006); 2006 NY App Div.LX 9318.

17. **People v. Hizbullahankhamon**, 7 NY3d 848, 823 NYS2d 778 (Ct. App. 9/26/2006)(**Coram Nobis denied leave**);

18. **In an unpublished opinion**, the New York State Bronx Supreme Court for the 12th Judicial District, Judge M.Marcus entered an order denying the defendant's collateral motion (Appendix, pages# A5 -to- A24; A646 -to- A665 (Exhibit# B, Bronx Supreme Court Decision on 7/17/20 [Friday]);

19. Petitioner applied for permission to appeal to the N.Y. Appellate Division, First Judicial Department, Judge M.J.Mendez entered an order denying the application, see Appendix, pages# A3 -to- A4; A644 -to- A645 (Exhibit# A, App.Div. decision entered 11/5/2020 [Thurs]).

20. Petitioner applied for a Certificate for leave to appeal to NYS highest court, the N.Y. Court of Appeals, Judge R.J.Wilson dismissed the application as non-appealable on (Friday) **March 26th, 2021**, see Appendix, pages# A1 -to- A2; A618 -to- A619 (Exhibit: N.Y. Collateral Appeals to the App.Div. and Court of Appeals). It is an unpublished decision.

STATEMENT OF THE CASE:

Only evidence at trial was the testimony of three drug dealers, who were according to the Bronx Prosecutor co-conspirators with Petitioner in a drug outfit that had disputes over drug selling territory in the Soundview section of the Bronx New York in 1987 -to- 1988.

According to the Bronx Prosecutor's Office, overwhelming evidence at trial established that Petitioner, acting in concert with four others, went to a Bronx apartment known as a drug processing mill, to straighten out a dispute over drug-selling territory. After directing the five drug dealers in the apartment to strip, Petitioner and his accomplices took their jewelry, money and drugs. When an accomplice announced that all conspirators in the drug outfit would be killed and opened fire at the naked drug dealers of the outfit, Petitioner fired all five rounds contained in his shotgun at the group.

All were hit by bullets, and three of the drug outfit members died.

Two survivors identified Petitioner at trial as one of the two shooters, as did an accomplice who had agreed to testify against Petitioner in exchange for 15 counts of the indictment dropped, out of the 16 counts, within indictment# 3205/88. See Appendix Pages# A131--A132, A505-A538, A539-A563, A839-A871; all these pages explain the Prosecutor's view.

The Petitioner's story was that he had a viable Alibi Defense, he testified in his own behalf stating that he was in Seattle Washington at the time that the crime occurred, informing his defense counsel of his Alibi months before the trial, and the lawyer failed to obtain the **Flight Manifest** from the Airline establishment in order to support my claim ... 30 years later, the N.Y.S. Attorney General's Office sent to the Petitioner and the Bronx Prosecutor's Office **my** Airline Ticket (Boarding Pass) for Continental Airline showing a reasonable doubt that I was in another State on January 9, 1988 (Saturday) hours before the crime occurred at 3:00 am January 10, 1988 (Sunday), see Appendix, Pages# A127-A130 (Exhibit# 1, herein: Airline Ticket from the NY A.G.'s Office); A494-A497 (Contempt Motion, Exhibit# F); A564-A567 (People Affirmation, Exhibit#2); A577-A579 (Reply Motion, Ex#1); A738-A741 (XXiv. Exhibit# K).

The Petitioner stated during his trial testimony as a teenager that his real birth name is **Kirk Johnson** (Appendix, page# A301, A310 (Trial pages# 621-622, 646-647), And the Petitioner also went by the name of **Kirk Kittrel** (Appendix, page# A25, A313). In 1993, the Petitioner changed his name legally due to religious reasons by the N.Y.S. Wyoming County Supreme Court, Index No.#26962 (Appendix, pgs# A158 [Defendant's Change of Name, Exhibit# 13]; see Appendix, pg# A142 [Rap Sh-

eet of HizbullahAnkhAmon, NYSID# 6131217z, Exhibit# 6); Showing that Kirk Johnson & Qabail Hizbullah Ankh Amon is the same person who has been in Prison for 33 years, since he was 17 yrs old, trial & sentence at 18 yrs old.

The reason why he went to trial was due to his Alibi Defense, and an alibi instruction was given by the Bronx Supreme Court Judge to the Bronx Jury because the Petitioner took the witness stand in his own behalf informing the Jury that He was in Seattle Washington at the time. The Bronx Jury should have been allowed to view the Airline Ticket for their consideration. Due to that, Defendant filed a 440.10 motion in Bronx Sup.Ct. to attack the Judgment of Conviction. In order to prove that He was not the Killer, He submitted his D.N.A. Data from C.O.D.I.S.- N.Y.S. DNA Data Bank, see Appendix, pgs# A196-A204 (Exhibit#19, Petitioner's D.N.A. Profile & Marker); A498-A504 (Contempt Motion, Exhibit# G); A582-A587 (Reply Motion, Ex.#3); A742-A747 (XXv, Exhibit# L: DNA Profile); Petitioner submitted his DNA Profile because within his case the true Killer left behind his black jacket outside of the crime scene, which had blood on it, and other biological data that was never tested. There is biological evidence from this triple homicide case that still exist, and a DNA Test will be able to exonerate him completely.

There is a Two Page Forensic Report created by NY City's Crime Scene Unit (C.S.U.) of 1/10/1988, which is depicting photographs numbered #24 & #25, which display a bloody black jacket at the crime scene (I put Check Marks by them), see Appendix, pgs# A159-A160 (Exhibit# 14, Forensic Report by CSU); A748-A749 (XXvi, Exhibit# M). This Forensic Report was spoken about & shown to my Jury with photos. Due to these facts, petitioner included a request for DNA Testing within his newly filed 440 motion under actual innocence.

This triple homicide took place within a drug processing mill, the only witnesses were three drug dealers (black males, who were also addicts), all of them made a deal with the Bronx Prosecutor's Office not to be prosecuted for the A-1 Felony Drugs found in the Apartment of Soundview Projects, see Appendix, page# A245 (Trial page# 203).

The dealers said Petitioner made them strip butt naked and placed their clothes in the bathtub **before** the shooting started, so the bloody black jacket could not have been theirs. The Wounds of the

naked were large: 1.# 3-by-3½ inches; 2.# 4-by-3 inches; 3.# 3-by-2½ inches and 2-by-1¼ inches; The depths of those wounds caused blood & flesh to spray on (transmitted to) the true shooter, which caused him to take the jacket off and leave it at the foot of the building on the sidewalk, so that he could make a clean get away, Appendix, pg# A299-A300 (Trial pgs#559-560 [Pathologist testimony]),A228 (Size of wounds [Trial pg# 121]); A211-A212,A214-A218,A222-A224 (Trial Pgs# 61-63,73,76-81,95-100 [Photographs and V.H.S. Cassette Tape was viewed by the Judge, and he made a ruling]; pgs#77-81,99-100 [Bronx DA did not employ 15 Photos nor the V.H.S. Cassette Tape]); **A235** (Trial pg# 143 [C.S.U. identified clothes in the bathtub for Jury]); **A237** (Trial pgs# 146-147 [**Jurors shown photographs**]); **A239** (Trial pg# 150 [**Crime Scene Unit Forensic Report shown to Jury**]); **A230-A236** (Trial pgs#133-145 [Detective W. Barney of the 1988 C.S.U. took the Photos of the Triple Homicide Crime Scene on Jan. 10, 1988]); **A240** (Trial pg# 168 [C.S.U. investigated Crime Scene from 6am-1pm]). Therefore, **the Photographs** of the **bloody jacket** Outside of the apartment building of the triple homicide were analyzed by the Bronx Judge of the trial and the Bronx Prosecutor conducting the trial, but the actual jacket that was labelled as Evidence, was not tested for Deoxyribo Nucleic Acid (DNA) or even blood tested, but its likeness was shown to the Jurors.

Therefore, DNA is inside the jacket, upon the collar (Ring around the collar [skin cells]) sweat under the armpits, hair, saliva, mucous, or some unknown biological data Petitioner may have no knowledge of, etc. Once the shooting started, the shotgun blast in close quarters would cause blood & flesh to spray.

All 3-State-Witnesses (Raymond Reid, Timothy Clark, Samuel Hull) stated that Petitioner killed these men, but Mr. Clark & Mr. Hull (both who were shot) both stated that their **eyes were closed** during the shooting, and **played dead**, they did not see who pulled the trigger, so their testimony was called into question, see Appendix, Pgs# **A249** (Trial pgs# 231-232 [Clark played dead]); **A259** (Trial pgs# 316-317 [Hull played dead]); **A346** (Trial pg#798 [Hull shut his eyes]).

Petitioner's defense was that he didn't do it, due to his Alibi, and there was "no" fingerprints; "no" D.N.A. Testing, "no" blood samples tested, "no" Weapons found, Petitioner **wasn't found** at the crime scene, and he made "no" confessions, see Appendix, pgs# **A241-**

A242 (Trial pgs# 169-171 [No Fingerprints of Petitioner were found, no Weapons found, nor was Petitioner found at scene]).

At trial, it was Petitioner's word against the word of the three drug dealers ... 3 against 1 ... whose words do you believe was the bottomline!

If the jury would have saw the Airline ticket, it would have tilted the scales! Eyewitness testimony is inherently proven false in the face of DNA evidence.

Clark, Hull and Reid had criminal records prior to this incident, and Petitioner didn't have a record and was 17 yrs old at the time.

It was **Mr. Reid**, who didn't reveal his "PROMISE" that was made to him by Prosecutor James Palumbo, who said at trial that **No Promises were made to him about four times**, see Appendix, pgs# A287 (Trial pg# 470,line 11); A288 (Trial pg# 472,lines 14-17 [Here he said the Judge didn't make any promise]); A288 (Trial pg# 473,line 7); and A289 (Trial pg# 474,lines 1-8).

The Bronx Prosecutor's Office should have fully disclosed the cooperation Agreement made with witness that the Bronx District Attorney's Office promised to Write, and in fact Wrote, a **Letter of Recommendation to the N.Y.S. Board of Parole** in behalf of the State Witness, which detailed His Cooperation with the Prosecutor's Office and Communicating a recommendation for his release on Parole, at his first Parole Hearing. See Appendix, pgs# A423-A424 (Reid's Parole Hearing of June 12, 1991 [The Parole Board was unaware that such a promise had taken place because another Bronx Prosecutor had recommended that Reid serve the Maximum term without being aware of the promise Prosecutor Palumbo had made with witness Reid some 3 years before, it was Reid's Lawyer (Ronald Garnett, Ex-Bronx Crim. Judge) who also wrote a letter initially informing the NYS Parole Board about the Future Promise the Bronx Prosecutor made to his client for agreeing to testify at trial against Kirk Johnson for the State of NY, so the NYS Parole Board adjourned the Hearing, in order to findout the truth of this "PROMISE" because they were planning to deny him parole for three reasons: 1. It was an extremely violent crime; 2. He admitted to being armed with a Gun; 3. He was on Felony Probation at the time of the instant offense, see Appendix, pg#

A427)]); and at the very next Parole Hearing dated August 13, 1991, the NYS Parole Board received corroboration of what Reid told the other board from the Bronx Prosecutor, and Reid was released, see Appendix, pgs A431-A432, A441-A442 [Certificate of Release to Parole]).

Not only did Reid receive a Letter of Recommendation for release from the Bronx Prosecutor & Reid's Attorney Garnett, but also from the Sentencing Judge, see Appendix, pgs# **A438 (Official Recommendations)**; A440-A441 (Recommendations, DA-2; Judge-2; Other-2); after stating that judge didn't make any promises, Appendix pg# A288 **(Trial pg# 472,lines 14-17).** The Sentencing Judge was the Trial Judge of Petitioner's trial (Daniel Sullivan, see Appendix pgs# A220, and A394), and also Petitioner's Sentencing Judge, Appendix pg# A381. Within Mr. Reid's sentencing Record, it makes mention of the deal he made with the Prosecution, but not spelling it out, due to the fact that it was mentioned at Petitoner's Trial, page#474 (lines 9-13), which is Appendix #A289 (Reid's deal was that if he agreed to testify against Petitioner at trial, the Bronx Prosecutor would "drop" 15 counts from the Indictment 3205/88 [that was the exchange], and Reid said "No Promises" were made to him), but according to the sentencing record the Prosecutor **hinted** to the Judge about an "additional promise," see Appendix pgs# A396-A397.

How can anyone know "**without being informed**" **that the Prosecutor James Palumbo** would write a letter to the Parole Board in behalf of his Prosecution witness "Years After" the witness testified at defendant's trial that "No Promises" has been made "for his testimony." Defendant was clearly entitled to discovery of the "PROMISE" that Mr. Reid would be recommended for release by the NYS Parole at his first Board appearance, see "**Specific Request Made**" within the Omnibus Motion of the Defense in 1988, Appendix pgs# A451, and A453.

The Bronx Prosecutor sat by silently while permitting his witness to testify falsely **before the Jury** that he had not received Promises in return for his testimony.

It took the Petitioner over 25 years to collect these documents, due to the fact that they are exempt from disclosure in the State of New York, see Appendix page# A445, and based on misrepresentations

to the defense, so Petitioner had to come up with a clandestine way of obtaining these documents.

These factors cumulatively cause an egregious effect that prejudiced Petitioner. The Bronx Prosecutor refused to satisfy their onus of notice requirements.

Also raised by the Petitioner in a 440.20 Motion to set aside his sentence are the Petitioner's Eighth Amendment claims that he was sentenced to a de facto Life Sentence beyond his Life Expectancy for crimes committed (according to the Bronx Prosecutor) when Petitioner was a Juvenile (17 yrs old) making the sentencing unconstitutional according to the U.S. Supreme Court, and retroactively applies to him as mentioned in U.S. Supreme Court Case Precedent of Montgomery v. Louisiana, and Miller v. Alabama.

Due to this retroactive effect in law, Petitioner filed a 440.20 to vacate his sentence of **92 Years to LIFE**.

Petitioner was sentenced beyond the measures of New York's Law, beyond what NYS Legislature created for Murder in the Second Degree, which is 25 years to Life. The Bronx Supreme Court Judge gave the Petitioner the "**Functional Equivalent**" of Life without Parole as he stated at Petitioner's sentencing, see Appendix, page# **A389**(Exh.#40) (Sentencing Record, page# 17). In fact, the Bronx Judge gave the Petitioner the punishment for New York's First degree Murder knowing that the Petitioner was to young to be indicted for Murder in the First Degree (Which begins at 18 yrs old).

The sentence is a Vindictive Sentence because Petitioner was penalized for exercising his right to have a Public Trial in NYS, and not once did the Judge consider Petitioner's YOUTH, because it was the sentence that mattered, it is vindictive because it is way beyond the Plea Bargain proffered by the State times Six (15 yrs to Life), Appendix Pages# **A207-A208** (Trial pages# 2-3 [Plea offer and warning to consider]). Basically, Petitioner was warned that if he went to trial that he would never see the light of day again, as the defense lawyer mentioned to Petitioner in the cell behind the door of the Court Room And at Sentencing, Appendix Pages# A207-A208, and"**A386**"(Tr Sentencing pgs# 11-12 [He will Never see the light of day again]).

REASONS FOR GRANTING THE PETITION

Point-1: PETITIONER IS SEEKING EXCUSAL OF PROCEDURAL ERROR THE GATEWAY THROUGH WHICH PETITIONER MUST PASS:

"Actual Innocence" and "Ineffective Assistance of Counsel" are the two GATEWAYS that a Petitioner may have his Federal Constitutional claim:

> (de facto life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments [as to Juvenile Offenders], announced a new substantive constitutional rule that was retroactive on State Collateral Review)

Considered on the merits if he makes proper showing of actual innocence; Actual Innocence is not itself constitutional claim justifying "Habeas Relief," but instead is "**gateway**" through which habeas petitioner must pass to have his otherwise Procedurally Barred constitutional claim considered on Merits, see Herrera v. Collins, 506 US 390, 113 S.Ct. 853 (1993)(at issue# 5), which is clearly established law requirement of Supreme Court Precedence.

Petitioner must be denied federal Relief absent an independent constitutional violation occurr ing in the Course of the underlying State Criminal Proceedings (Herrera, 113 S.Ct. at 855).

Petitioner must seek excusal at this time of any Procedural errors, so that he may bring an independent constitutional claim challenging his conviction, or sentence (Herrera, 113 S.Ct. at 863).

The Fundamental Miscarriage of Justice **Exception** is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence, Kuhlman v. Wilson, 477 US 436, 454 106 S.Ct. 2616, at 2627 (1986).

Petitioner herein states that Constitutional Errors at his trial deprived **the Jury** of critical evidence that would have established his innocence:

> "Defense Counsel's duties include a duty to investigate the defendant's most important defense, and a duty to adequately investigate and introduce into evidence records of Petitioner's **Alibi** defense that demostrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict," **Strickland v. Washington, 466 US 668, at 691;** and Bragg v. Galaza, 242 F.3d 1082, at 1088 (9th Cir. 2001);

The Logic of Murray v. Carrier, 477 US 478, at 488, 106 S.Ct. 2639,

at 2645...Explicitly says that, in **absence** of a **Constitutional violation**, the Petitioner bears the risk in Federal Habeas for **all Attorney errors made in the Course of the representation**...

...Petitioner must show "not merely that the errors at trial created a Possibility of Prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions"...(Murray, Id. at pg# 2648).

Petitioner Hizbullah-Ankh-Amon is requesting an excusal of Procedual Bar and is requesting that the Murray standard be applied as in **Schlup v. Delo**, 513 US 298, at 322-323, 115 S.Ct. 851, at 864-865 (Standard of **Murray v. Carrier**, which requires habeas Petitioner to show that a Constitutional Violation **Probably Resulted** in the conviction of one who is actually innocent, rather than more stringent **Sawyer v. Whitley**, 505 US 333, 336, 112 S.Ct. 2514, 2517 [Showing actual innocence, Petitioner must demonstrate, **by clear and convincing evidence**, no juror would have found him guilty] in demonstrating actual innocence to permit a court to consider merits of claims, governs Miscarriage of Justice Inquiry when a Petitioner who has been Sentenced to Death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his Constitutional claims); **Murray**, Id. at pg#496, 106 S.Ct. at pg# 2649.

As a preliminary matter, it is important to explain the difference between **Schlup's claim of actual innocence** and the claim of actual innocence asserted in **Herrera v. Collins** (Supra, 506 US 390); In Herrera, the petitioner advanced his claim of innocence to support a novel substantive constitutional claim, namely, that the **Execution of an innocent person would violate the Eighth Amendment**. Under Herrera's theory, even if the proceedings that had resulted in his conviction and sentence were entirely fair and error free, his innocence would render his execution a "constitutionally intolerable event."

Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based **not** on his innocence, but rather on his contention that the ineffectiveness of his counsel, see Strickland v. Washington, 466 US 668, 104 S.Ct. 2052 (1984); and the withholding of evidence by the prosecution, see Brady v. Maryland, 373 US 83, 83 S.Ct. 1194 (1963), denied him the full panoply of protections afforded to criminal defendants by the

Constitutional Provisions.

THE CLEARLY ESTABLISHED LAW REQUIREMENT:

The Bronx Supreme Court ruled Contrary to, and applied an unreasonable application of the Miller & Montgomery Standards of U.S. Supreme Court Precedence.

Petitioner Hizbullah-Ankh-Amon argues that Frank J. Loverro (Bronx Defense Attorney appointed by Bx Sup. Ct.) rendered ineffective assistance of counsel by **failure to investigate** in violation of U.S. Supeme Court Precedence, see Williams v. Taylor, 529 US 362, at 390, 120 S.Ct. 1495, at 1511 (2000)(Trial Lawyer failed to investigate).

To establish ineffective assistance of counsel, Petitioner must demonstrate the two prong test:

(1) That **Loverro's** performance was a deficient performance that fell below an objective standard of reasonableness, it was unreasonable under prevailing professional standards, **Strickland v. Washington**, 466 US 668, at pg# 687, 104 S.Ct. at p.#2064.

(2) That deficient performance prejudiced the defense, **Strickland v. Washington**, 466 U.S. at pg#. 687, 104 S.Ct. at pg#2064.

"These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in Strickland," Id. pg.#690-691, and 104 S.Ct. at pg# 2066.

Unless a defendant makes **both showings**, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable, Strickland, Id. pg#687, and 104 S.Ct. at 2064.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance, Strickland, Id. pg# 688, and 104 S.Ct. at pg# 2064 (Issue# 6); But the performance inquiry looks to "reasonableness" within the norms of practice as reflected in American Bar Association standards and the like, e.g., A.B.A. standards for Criminal Justice sections 4-1.1 to 4-8.6 (2d ed. 1980)("The Defense Function") are guides to determining what is reasonable, Strickland, Id pg# 688, and 104 S.Ct. at pg# 2065 (Issue# 10);

PREJUDICE & REASONABLE PROBABILITY:

Any deficiencies in Counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution ... In certain Sixth Amendment contexts, prejudice is presumed. Actual or Constructive denial of the assistance of Counsel

altogether is legally presumed to result in prejudice, Strickland, Id pg# 692, and 104 S.Ct. at pg.#2067 (Issues# 15 & 16);

Accordingly, the appropriate test-for-Prejudice finds its roots in test-for-materiality of exculpatory information not-disclosed-to-the-defense by the prosecution, see U.S.-v.-Agurs, 427 US 97, at pgs# 104 112-113, and 96 S.Ct. 2397 at pg# 2401-2402 (1976); and Strickland, Id pg# 694, and 104 S,Ct. at pg#2068 (Issue# 19);

The defendant must show that there is a reasonable-probability that but for counsel's unprofessional errors, the result of the proceeding "would-have-been-different." A reasonable-probability is a probability sufficient to undermine-confidence in the outcome, Strickland Id. 694, and 104 S.Ct. at 2068 (Issue# 19);

In New-York-State, where a defendant-makes-a-"specific-request" for a document, "the-materiality-element" under Brady-v.-Maryland is established, see People-v.-Fuentes, 12 N.Y.3d 259, at 263 (Ct.App. of N.Y. 2009 [Issue# 4]).

For a claim of actual innocence to be credible, claim requires Petitioner asserting actual innocence to Support his allegations of constitutional error with-new-reliable-evidence, whether it be exculpatory scientific evidence, #(2) trustworthy eyewitness accounts, or #(3) critical-physical-evidence, that was not presented at trial, Schlup-v.-Delo, 513 US 298, at pg#324, 115 S.Ct. 851, at pg# 865.

POINT-2: "There Has Been A Retroactively Effective Change In The Law ... The Supreme Court Of The U.S. Has Held That Mandatory Life Imprisonment Without Parole For Those Under-The-Age of 18 At The Time-Of-Their-Crimes Violates The Eighth Amendment's Prohibition On Cruel and Unusual Punishment... Also see N.Y.S. Constitution, Article 1§5 (Cruel and Unusual Clause)"

Petitioner Hizbullah-Ankh-Amon, was born Kirk Duval Johnson on the date: January 4th, 1971, see (Exhibit# 6) & (Exhibit# 13), and was 17 years old in January of 1988 when the Bronx District Attorney (Prosecutor's Office) said that the Petitioner was the Trigger-man in a Triple Homicide within the Soundview Section of the Bronx, New York City, and after the July 1989 trial - Petitioner was found guilty - and sentenced in August of 1989 by Bronx Supreme Court Justice Daniel J. Sullivan to 92 years to LIFE.

Petitioner first appealed his sentence in 1991-1992 in the NY State Appellate System claiming that his sentence was in violation of the 8th Amendment of the U.S. Constitution and was denied as meritless, and now after 33 years within the NYS Prison System and the Petitioner is 50 years old with the chronic disease of Diabetes, a Retroactive Effective change in the law by U.S. Supreme Court who has held that **Mandatory** Life Imprisonment Without Parole for those **Under The Age of 18** at the **Time of Their Crimes** violates the Eighth Amendment's Prohibition on Cruel and Unusual Punishment.

By Notice of Motion dated **October 3rd, 2019**, the Petitioner moved to vacate his sentence pursuant to Criminal Procedure Law (C.P.L.) §440.20 based on the following grounds: **Retroactive Application Grounds**: "It is Unconstitutional to sentence a '**Youth**' to Life Imprisonment Without Parole for Second Degree Offenses (Lesser Included Crimes of First Degree Murder), and '**Fact**' (other than prior conviction to treat recidivism) that **increases the penalty** for the crime **must** be charged in an **indictment**, submitted to a jury, and proven **beyond** a reasonable doubt. N.Y.S. Legislature has acted properly within its broad power to define crime and their punishment. For Second Degree Murder, it is 25 years to Life. Instead, the Bronx Supreme Court Justice has sought **to evade** the Constitutional requirements associated with the characterization of a '**Fact**' as an offense element, and evaded the **Rehabilation of the YOUTH**, which is a **factor** associated in defining punishment by N.Y.S. Legislature under Ex Post Facto approval."

After a review of the logic of Roper, Graham, Miller, Montgomery, and Adams, which unavoidably extends not only to de jure life without parole sentences, but also to de facto ones (both types of sentences deny a child offender a chance to return to society), for a lower court to circumvant Miller by sentencing juveniles to a term of years that exceeds the Juvenile's projected lifespan, the question put forward to this Court: "Is this an aburd result?"

Is NY State's sentencing of juvenile offenders as if they were **not children**, sentencing them to die in prison that exceed his life expectancy, defying decency without clearly considering the fact that

he is a **child**, and making the **sentence** all that counts, without consideration of his chances of rehabilitation: "Is it an aburd result?"

The Bronx Supreme Court Judge denied the Petitioner the relief requested herein after the Petitioner displayed the clearly established law requirement of the Supreme Court Precedence, which the Petitioner now puts forward that the Bronx Court's decision is "**contrary**" or an "**unreasonable application**" of Supreme Court Precedence.

The next question, does the Supreme Court's decision in Miller v. Alabama,(77) and **Montgomery v. Louisiana**,(78) as well as **Adams v. Alabama**,(86) prohibit under the Eighth Amendment mandatory life sentence without parole for juvenile offenders, announced a new substantive constitutional rule that was retroactive on State Collateral Review even for, **de facto Life Sentence**, basically whether Montgomery **expanded** Miller's holding, and whether any such **expansion** can be applied **retroactively**?

The Bronx Supreme Court's decision clearly views the de jure life without parole sentence as the only sentence that the Miller Standard was to be applied for, and not the de facto, but also de facto life sentences of 90 yrs and 100 yrs, and the like, actually deny a child offender a chance to return to society, which is the intent as mentioned by the Bronx Judge D.J. Sullivan when he mentioned the **Functional Equivalent Factor** in order to give the Petitioner Life without parole, see Appendix pg# **A389** (Exhibit# 40, page# 17 [Sentencing Minutes]); and Appendix pg# **A880** (Exhibit# S, page# 17).

When Petitioner was arrested, convicted and sentenced after a trial by a Jury of the Bronx, he was a "**Youth**" at all times, see Appendix pgs# **A379**-**A380** (Exhibit# 27 [Arrested in Washington State as a Juvenile]), and **A142** (Exhibit# 6 [Rap Sheet]). "Youth" means a person charged with a crime alleged to have committed when he was at least Sixteen years old and less than Nineteen years old within NY State (definition of terms for "Youth Offender" at Criminal Procedure Law [C.P.L. §720.10]).

The Bronx Sentencing Judge had sentenced Petitioner to **Consecutive** terms of imprisonment, using the "**Functional Equivalent Factor**" in

order to give Petitioner Life Imprisonment Without Parole, which is the punishment for NY States' First Degree Murder Offenses, not for Murder in the Second Degree crimes, Petitioner was sentenced on August 8th, 1989, as follows:

25 Years to Life (Count-1);
25 Years to Life (Count-2);
25 Years to Life (Count-3);

$8\frac{1}{2}$ Years to 25 Years (Count-7);
$8\frac{1}{3}$ Years to 25 Years (Count-8);

} Indictment No.# 3205/88

The Sentencing Judge of the Bronx, was the Trial Court Justice of Petitioner's 1989 trial, **he understood** that the Triple homicide -&- Double Attempt Murder took place within **one** location, **one** particular place, at **one** partitular time (according to the Bronx D.A. [within Milliseconds <One thousandth (10^{-3}) of a second> of each other]), it was one **single criminal transaction** (Operation), which took place in **temporal proximity** of each other, under one **motivational unity** (intentional killing: Mens Rea & Actus Reus), but Petitioner was given these consecutive sentences in violation of New York Penal Law §70.25(2) and its Exegesis C.P.L. §40.10(2)(a)&(b). Thus, it was the Bronx Judge's intention to deny Petitioner Parole consideration, Petitioner's sentence is unlawful because it denies him parole consideration for second degree crimes.

Petitioner's Youth Status was not considered, but was overlooked as meritless, that consideration is the minimal procedural requirement necessary to ensure the substantive 8th Amendment Protections.

The Bronx Sup.Ct. Judge in 2020 abused his discretion in denying Petitioner a hearing on this matter, see Appendix pages# **A20-A21** (Exhibit# III, Bx.Sup.Ct Ruling, pgs# 16-17); and **A661-A662** (Exhibit#8, pgs# 16-17). Other Jurist around the U.S. have ruled that this Class of Juveniles who were sentenced to die in prison are entitled to a hearing on this matter:

In New York County (Manhatten) **People v. Lora**, 2020 WL 5824162 (NY Co 9/30/20); **People v. Lora, 71 Misc.3d 221** (NY Co. 1/22/2021)(**Lora** was sentenced to **83 years to Life**, due to an event that occurred when he was a Juvenile, and the NY Court granted a hearing due to the Sup.Ct. ruling in Miller, which was granted in January 2021);

McKinley v. Butler, 809 F.3d 908 (7th Cir.2016)(Overturning 100 year sentence due to Miller -&- Montgomery);

Budder v. Addison, 851 F.3d 1047 (10th Cir.2017)(Overturning three consecutive life sentences totaling 131 years due to the Miller -&- Montgomery);

Malvo v. Mathena, 893 F.3d 265 (4th Cir.2018)(Four consecutive life sentences of the D.C. Sniper, Lee Malvo, who committed these crimes at 17 yrs old, were reversed due to Miller -&- Montgomery).

Petitioner Hizbullah-Ankh-Amon is a part of this Class of Juveniles (17 year olds) sentenced to die in prison, which is now a violation of the Cruel & Unusual Punishment Clauses of both U.S. and N.Y.S. Constitutions.

WHEREFORE, the Petitioner's Collateral Motion (CPL 440.20) should be granted in accordance with a Supreme Court Justice's Order; or a Hearing be Ordered as to those issues mentioned above; or in the Interest of Justice Powers and fair powers of discretion.

POINT-3: The Defendant Was Found Guilty of a Second Degree Crime by a Bronx Jury and then A Judge Imposed Punishment Identical To N.Y. State's First Degree Crimes, Violates P.L. 70.25(2) and its Exegesis C.P.L. 40.10(2)(a)&(b), Because it Allows a Jury To Convict The Defendant of N.Y. State's Lesser Included Offenses (created by N.Y.S. Legislature), But Then a Bronx Judge's Imposition of Consecutive Sentences for Second Degree Murders (That took place during the same Criminal Transaction), as the Functional Equivalent of LIFE WITHOUT PAROLE, allows a Judge to Impose Punishment Identical To N.Y. State's First Degree Crimes -For- N.Y. State's Lesser Included Offenses in Violation of U.S. Constitution, 14th Amendment (Due Process Clause), and N.Y.S. Constitution, Article 1 Sec. 6 (Due Process Clause);

VINDICTIVE SENTENCING ISSUE:

SUBTOPIC: Petitioner Was Penalized For Asserting His Constitutional Right To a Trial By Jury Where He Received A Punishment In A Form Of A Super-Enhancement Of Incarceration By The Trial Judge Due To Petitioner's Rejections of Plea Bargains And Asserting His Innocence, in Violation Of Due Process In The Sentencing Procedures, As Mentioned Within Apprendi Doctrine;

The Multiple Murder Section of First Degree Murder P.L. 125.27(1)(a)(viii) is impossible to commit without also simultaneously committing Intentional Murder in the Second Degree P.L. 125.25(1); Vocabulary of C.P.L. 1.20 (37).

N.Y. State Legislature made Murder in the Second Degree as a Lesser Included Offense of Murder in the First Degree because it is subject

to a lesser penalty, see P.L. sections 60.06, 70.00(3)(a)(i), 70.00(5); C.P.L. section 400.27(10).

And if found guilty of the First Degree Count and also the Second degree Count, the Lesser Included Offense "**Must**" be dismiss as Inclusory Concurrent Counts under C.P.L. sec.s 300.30(4), 300.40(3)(b).

Under the Multiple Murder Statute meaning two or more homicides can't be run "**Consecutively**" if it took place as a "**Single Act**" in temporal proximity to each other, C.P.L. section 40.10(2)(a)&(b) and P.L. section 70.25(2), nor can its Lesser Included Offense ... Which is the narrow constitutional question presented: "Whether Sentence was permissible, given it exceeds the 25 Year Minimum for crimes"...

Within this case, Petitioner was actually penalized for asserting his Constitutional Right to a trial by Jury where he received a punishment in the form of a Super-Enhancement of Incarceration by the Trial Judge due to Petitioner's rejections of plea bargains, in violation of due process in the sentencing procedures.

If the Petitioner elected to plead guilty **prior** to the time of trial, the Bronx County Prosecution Office would have **recommended** the imposition of **one indeterminate sentence** of incarceration of from Fifteen Years To Life in full satisfaction of the charges contained in the Sixteen Count Indictment Numbered# 3205/88, see (Exhibit# 20, Trial Record, Pages# 2-3); see (Exhibit# 22, Indictment No.# 3205/88 filed by A.D.A. Peter Creedon); also note that Eleven Counts were dismissed during trial orders of dismissal, leaving Five Counts for the Jury to deliberate upon in 1989, see (Exhibit# 20, Trial Records, pages# 93-95 [Dismissal of 11 Counts]), and the Bronx Jury found Petitioner guilty (Exhibit# 20, Trial Record pg# 870-871 [Juror's Verdict]). At Sentencing, the Trial Court imposed **Consecutive Sentences** for each of the Five Counts totalling 92 (Ninety-Two) Years To LIFE, and issuing Five indeterminate sentences, which were **Part of the same Criminal Transaction** (C.P.L. section 40.10[2][a]&[b]).

The actual colloquy that took place is proof of the willingness on the part of the Trial Court to accept the plea offer the Bronx D.A.'s Office was asking for, see (Footnote#1); During this time period, in the courtroom, it was the Judge who was coercing the defense to forfeit all Constitutional Rights as a penalty, if the plea bargain was accepted by

the defense.

Proof of that forfeiture of right to appeal was included, Nelson Burgos (another Co-defendant upon indictment) pleaded guilty to Robbery and Burglary in the First Degree (which were dismissed as to Petitioner at Trial), and on May 23rd, 1989, he was sentenced to indeterminate "concurrent terms" of imprisonment Eleven -to- Twenty Two years on the Robbery Count and and from Seven -to- Twenty One years on the Burglary Count ... On Oct.23rd, 1990, the Appellate Division First Judicial Department of NY affirmed his conviction, stating: "Defendant was sentenced in accordance with his plea bargain and within the statutory guidelines. 'Having received the benefit of his bargain, defendant should be bound by its' terms,'" see **People v. (Nelson) BURGOS**,(2), (1st Dept.1990); and Leave to Appeal to the Court of Appeals was denied on Jan. 4th, 1991, **People v. Burgos**,(3), (Ct.App.1991)... And Finally, the last Codefendant Raymond Reid pleaded guilty to Burglary in the First Degree and on July 28th, 1989, he was sentenced to an indeterminate term of imprisonment of Three/& One-Third to TEN years...He has never filed a Notice of Appeal, see (Exhibit# 41, Reid's Sentencing Record).

Secondly, Petitioner states that the Sentencing Court could not have imposed a sentence without first reviewing the **PreSentence Report** (P.S.R.), he contends that in light of the facts that this was the Petitioner's first conviction and Arrest (Connected with this case at hand), and that it occurred according to the Bronx D.A. when he was only 17 years old, nothing contained in such a **report** would have encouraged the sentencing Court to upwardly depart or Super-Enhance from the Sentencing Guidelines or totally depart from the offer made by the Bronx D.A. if the defendant in fact entered a plea...Defense Lawyer,Loverro, actually "protested this error" that took place at Sentencing Record, (4), and (Exhibit# 40)... There were "No Recidivism Factors" implicated in allowing a Judge to determine a "**FACT**" increasing punishment beyond the Statutory Range, see **Almendarez-Torres v. U.S.**,(5), nor would have the First Degree Multiple Killing Statute been "invoked" because Petitioner was not 18 Years Old at the time of the commission of the crime, P.L. sec. 125.27.

MITIGATING FACTORS: The Bronx Supreme Court must weigh age at time Bronx Prosecutor claimed that the crimes occurred. The U.S. Supreme

Court concluded, in imposing punishment, there is less of a need for retribution and removal from society in order to prevent future unlawful conduct for juveniles who are convicted of homicide, a mandatory sentence of life without the possibility of parole is an **excessive sentence**, as set forth by the U.S. Supreme Court in **Graham v. Florida**, (76), and **Miller v. Alabama**,(77), also **Montgomery v. Lousiana**,(78), as well as in New York County (Manhatten) **People v. Lora**, 2020 WL 5824162 (NY Co. 9/30/20); **People v. Lora**, 71 Misc.3d 221 (NY Co. 1/22/21)(Lora was sentenced to **83 years to Life** for Three Counts of Murder in the Second Degree & one count of Conspiracy, NY County Court ruled that Lora's sentence was against U.S. Supreme Court rulings due to events that occurred when he was a Juvenile); Also within the NYS Third Department Appellate Division, **In the Matter of Hawkins v. NYS DOCCS**,(79).

Penalized For Asserting His Right To A Trial

Under these circumstances, it's submitted that Petitioner's choice to assert his constitutional right to a Jury Trial resulted in a sentence which is **Shockingly Disproportionate** to that which he would have received for entering a plea, and **Shockingly Disproportionate** to what his co-defendants received for their plea bargains, who were also coerced and threatened with LIFE Sentences. Their plea bargains were not voluntary, nor made without coercive means.

The lawyer for Petitioner, **Frank J. Loverro**, was acting in behalf of the Sentencing Judge, who appointed this attorney to the Defendant under **County Law section 18-b**: the Sentencing Judge was using him as a **third-party lawyer** to control Courtroom plea bargains, in order to **dispose of Petitioner's case from his Calendar** by denying Petitioner his Constitutional Rights even if he accepted the plea bargain, it would be with heavy penalty,(6).

Petitioner also argues that, to the extent that the Trial Judge found different purpose for **Super Enhancing** Petitioner's sentences by giving him five "**consecutive**" LIFE Sentences for asserting his right to a trial such a finding would violate **Apprendi v. New Jersey**,(7):

"New Jersey's Sentencing Enhancement practice can not stand. It allows a Jury to convict a defendant of a Second Degree Offense on its finding beyond a Reasonable Doubt, and then allows a Judge to impose punishment identical to what New Jersey provides for First Degree Crimes on the Judge's finding by a preponderance of the evidence."

For asserting his right to a trial, the Petitioner received a punishment in the form of additional incarceration, see People v. Patterson, (8).

There were no aggravating circumstances listed into categories by N.Y. State Legislature for Murder-2 Sentencing.

In New York State, People v. Peterson, (9), (The Appellate Division Second Department Modified the judgment of conviction making two consecutive sentences to run concurrently because the Court observed that it appeared that he was impermissibly penalized for asserting his right to a trial).

There is no other "legal view" as to why a defendant would receive such a Super-Enhancement for Second Degree Murder, which is a "Lesser Included Offense" for Murder in the First Degree, see People v. Miller, (10). Significantly, Murder in the First Degree under N.Y. Penal Law 125.27 stands alone in that, when enacting the statute, the legislature of N.Y.S. made it punishable by DEATH or LIFE without Parole (C.P.L. 400.27 [1]; Penal Law 70.00 [5]). On the otherhand, Second Degree Murder (P.L. 125.25 [1][Intentional Killing]) carries 15 -to- 25 Years To Life (P.L. 70.00 [2][a];[3][a][i]).

The Statutory mandated Jury Instruction, which informs a "Jury" which is about to consider whether to impose a Sentence Of DEATH, or LIFE Imprisonment that if they fail "to reach unanimous agreement" with respect to the sentence, The Court will sentence the Defendant to a term of imprisonment with a Minimum Term of between "20 and 25 Years" and a Maximum Term of Life (C.P.L. section 400.27 [10]), in People v. LaValle, (11), the Court of Appeals declared unconstitutional this Jury Instruction because the Jurors are presented with an unacceptable risk that it may result in a coercive, arbitrary, and unreliable sentence, (12). Thus, no constitutional procedure in place that the Sentence Of DEATH can be imposed in N.Y.S.

Even where "Multiple Killings Occur" as part of the "Same Criminal Transaction," P.L. 125.27(1)(a)(viii), P.L. 70.25(2), C.P.L. sec.40.10(2)(a)&(b) no consecutive sentences are allowed, the court has "no discretion"; concurrent sentences mandated, as proof of this view, see People v. (Abel) ROSAS, (13), (2d dept.2006 [Life sentences imposed for double murder should have run concurrently, not consecutively, even though two separate "shots" fired, it was same actus reus]), and also as proof, remember "The HappyLand Social Club Killings" in the Bronx, People v. (Julio) Gonzalez, (80), He killed "87 people" within the HappyLand Social Club in the year of 1990. He was charged with 174 counts of Murder in the Second Degree, see People v. Gonzalez, (81), but only sentenced to 25 Years to Life, because the Trial Judge (Burton B. Roberts, Bx Sup. Judge) held that it was One Actus Reus that took place

caused the death of 87 people, (80). This Supreme Court Justice was not alone in his understanding dealing with Multiple Murder Sentencing, see People v. (Christopher) THOMAS, (82), where he was convicted of killing 10 people in Brooklyn on April 15th, 1984 (Known as the "Palm Sunday Massacre") ... he killed TEN people in his family while intoxicated on Cocaine Base (Crack)... He had a Jury Trial for TEN counts of Murder in the Second Degree, but the Jury said he was intoxicated under Extreme Emotional Disturbance and found him guilty of Manslaughter in the First. Judge Aiello, Kings Co. Sup.Ct. sentenced Mr. Thomas to "TEN" consecutive terms of $8\frac{1}{3}$ to 25 YEARS for the B-Felonies. By the operation of the law, the illegal sentence was reduced to 25 -to- 50 YEARS. Mr. Thomas was paroled in 2018 after serving "34 Years in State Prison."

Because both cases, the defendant's homicidal acts, shared either the temporal proximity necessary to be a Single Criminal Incident, under CPL 40.10(2)(a), or the "Motivational Unity" called for in CPL 40.10(2)(b), so as to "constitute elements or integral parts of a Single Criminal Venture."

But somehow within Petitioner's Triple Homicide, which took place at one location, within one room, within milliseconds of each other, within a drug processing mill according to the Bronx D.A.'s Office ... Somehow doesn't fall under CPL sec. 40.10(2)(a)&(b) that will trigger P.L. sec. 70.25(2) ...

Recommendation for the Funtional Equivalent Factor

In Ring v. Arizona, (14), the Supreme Court of the U.S. overruled Walton v. Arizona, (15), to the extent that it allows a Sentencing Judge, sitting without a Jury, to find an aggravating circumstance necessary for imposition of the DEATH PENALTY. Under N.Y. Law, Penal Law section 125.27(1)(a), N.Y.S. Legislature created thirteen (xiii[13]) categories of aggravating circumstances necessary for imposition of the DEATH PENALTY or LIFE in Prison without Parole! N.Y.S. Legislature never created one category of aggravated circumstances for Murder in the Secord Degree P.L. 125.25 subdivision-1 (Intention Murder), which under N.Y.S. Law is not even listed as a violent crime, see (Sentencing Guildelines for N.Y. Violent Crime Categories), going back to 1967 when the statute was first created, 25 to Life was listed as the Maximum Sentence for Murder in the Second Degree; and anyone sentenced prior to 1967 under the old law (P.L. sec. 1044) was allowed to petition for a reduction under Executive Law sec. 259-h in order to receive a sentence of 20 -to-Life, so anyone sentenced under that in 1966 was eligible for parole in 1986 even for Multiple Killings under the Same Criminal Transaction, C.P.L. sec.40.10(2).

"Temporal Proximity & Motivational Unity Of A Single Criminal Incident":

The N.Y. Court of Appeals interpretation of the Statute was mentioned in People v. Duggins, (39), stated: "By the incorporation of that definition of "Criminal Transaction," liability under this section is predicated upon committing at least two homicidal acts sharing either the "temporal proximity" necessary to be a "single criminal incident" under CPL sec.40.10(2)(a), or the "motivational unity" called for in CPL sec.40.10(2)(b), so as to "constitute elements or integral parts of a single criminal venture." (40). In the Duggins' case, there were two killings, within 90 minutes of each other, fueled by a common motivation, (41). Notwithstanding the 90-minute interval between the killings (one hour and a half), the Court found that "defendant's two homicidal acts were part of a continuous course of conduct sufficient to establish the contemporaneous conduct necessary to constitute same transaction," (42).

The "Serial-killings" provision (P.L. 125.27[1][a][xi]) requires the killing of at least "three people" within the State in separate criminal transactions within 24 months, and it further requires that killings be committed in a "similar fashion" or pursuant to a common scheme or plan. Thus, multiple killings in New York within 24 months will not suffice!

Petitioner's case entails the killing of three drug dealers within their apartment in the Bronx that the Police called a drug processing mill, by herding Five dealers into one room of the apartment, shooting them at close range with a shotgun. Thus, the basis for Intentional Murder (PL 125.25[1]) 3-counts, and 2-counts of Attempted Intentional Murder (PL 110/ 125.25[1]), see People v. Johnson, (43) supra, this case has the same criminal transaction, shares both "temporal proximity" for a single criminal incident under CPL sec. 40.10(2)(a), and the "motivational unity" called for in C.P.L. 40.10(2)(b), so as it constitutes elements or integral parts of a single criminal venture, and that is according to the Peoples Theory at Trial!

Unlike "Felony Murder" P.L. 125.25(3)(Non-intent killing/ Felony must be intended) the D.A. quoted People v. Brathwaite, (44), in which a defendant was sentenced to consecutive terms of 25 Years to Life for two counts of "Felony Murder" (while during his robbery of a Grocery Store, its owner & employee were shot and killed), it was SEPARATE ACTS that caused the deaths, (45). In People v. Rosas, (46), the Court of Appeals re-visited Brathwaite (supra) analyzed that it is distinguishable from all "Intentional Killings in New York" because Brathwaite was a Felony Murder (another Theory of Murder), and Rosas fired two separate intentional shots (a culpable mental state [a felony Murder Paradigm not involved as a predicate]) shots that caused the

deaths of victims here are one actus reus for the purposes of this sentencing statute (PL 70.25[2]) under intentional murder (Penal Law 15.00[6] a state of mind, or mens rea to kill); within Brathwaite, the sentencing Issue: Section 70.25 of the Penal Law was reviewed 35 years ago by the Court who agreed that the two deaths had occurred in course of a single extended transaction (the robbery [which was the intended act]), but "disregards" CPL 40.10(2)(a) temporal proximity, and (b) motivational unity... as an exegesis for P.L. 70.25(2) was ignored...

Years later the Court of Appeals sidesteps Braithwaite in dealing with the other "predicate tenses," People v. Parks, (83), defendant was indicted on several counts of murder and robbery, along with other related crimes. The Felony Murder Paradigm charged Parks with having killed one of the victims in the course and furtherance of a "robbery." He was also charged with other victims at the scene of the Felony Murder! The indictment, however, did not "identify" which robbery served as the as the Predicate for the actual Felony Murder, nor did the Court at Trial in its instructions to the Jury (C.J.I.); because it was impossible to tell "which robbery" was "separate and distinct" from the Felony Murder, N.Y. Court of Appeals held that the Trial Court improperly sentenced defendant to consecutive sentences (PL 70.25[2]) on two robberies.

Logically, why then, would it not be, legally feasible for the defendant herein to be taken to trial five different times, for each shooting, if they are separate acts?

Because they are One Event, which occurred in a few seconds, in one apartment, in one room, on one day, at one location, P.L. section 70.25(2), and C.P.L. sec. 40.10(2)(a)&(b) (as the exegesis for P.L. 70.25[2]).

Also Brathwaite was convicted of "Depraved Indifference Murder, and after 20 years, People v. Brathwaite, (44) supra, was abrogated due to all of the Court Of Appeals' ruling on "Depraved Indifference Murder" (P.L. sec. 125.25[2]) can not stand if it is a "Gun Shot Murder," new logic after 2004-2005 People v. Gonzalez, (84), and it was abrogated as to the question about a murder defendant being properly sentenced to two consecutive LIFE sentences although the two deaths occurred in a single extended transaction (P.L. 70.25[2]), see People v. Rosas, (50) supra (2007)(Reversed this logic), and People v. Duggins, (39) supra, explained that for multiple killings during the same criminal transaction CPL sec. 40.10(2)(a)&(b) govern intentional murder liability (PL 125.25[1]) limiting liability for intentional killers, and not felony murder cases (PL 125.25[3] "no intent") because intentional homicidal acts sharing either the temporal proximity necessary to be a "single criminal incident" under C.P.L. 40.10(2)(a), or the motivational unity called for in C.P.L. 40.10(2)(b),

so as to constitute elements or integral parts of a single criminal venture.Id.,pgs# 532-533.

Due to the N.Y. Legislature's use of the Present-Tense ("Cause" or "Causes")... intent to cause the death (Mens Rea), and then causes the death (Actus Reus) because every First Degree Murder must include an intentional (Second Degree) Murder (PL 125.25[1]). An additional aggravating-factor -- Murder "Plus"-- raises the crime to Murder in the First, see Id.,pgs# 532.

Also in another view point or theory of homicide, murder in the second degree (subdivisions 1,2, and 3) under the same-section originating from one-act can not run consecutively meaning Intentional-Murder (subd.1) cannot run consecutively with Felony-Murder (subd. 3), nor can either one run consecutively with Depraved Indifference (subd. 2)(which is any murder done without a firearm ... in a nutshell paraphrase)... The single act is either intended or-not intended, it cannot simultaneously-be-both, as stated in People-v.-Gallagher, (85), because guilty of one necessarily negates-guilt of the other, intentional and depraved indifference murder are inconsistent-counts.

Petitioner should not been sentenced consecutively, but as the Sentence Record shows PL sec. 70.25(2) was ignored and CPL sec. 40.10(2)(a)&(b) were disregarded as an exegesis for PL 70.25(2). According to the due process clause of the Constitution, concurrent sentences are mandated, as in People-v.-Rosas, (47), the court has no discretion ... In Rosas, LIFE sentences imposed for murder of a husband and wife should have run concurrently, not consecutively, even though two-separate shots-were-fired; the-act underlying one count, the-double-murder-of-the-wife as primary victim and the husband as secondary victim, was "the-identical-act" underlying the other count), leave to appeal was denied, (48); Leave to appeal granted, (49); Affirmed-the-Prosecution's-appeal at People v. Rosas, (50), (Same Actus-Reus, specifically intentional-murder of same two victims, was basis for two first degree murder convictions, which thus triggered-statute requiring concurrent rather-than-consecutive sentences; although order was reversed in each count, as to which victim was primary and which was aggravator, and two-separate-shots-caused deaths-of-victims, it was same two murders that formed basis for each offense under statute); The Court stated: "violates Penal Law sec. 70.25(1)&(2)."

Thus, by violating PL 70.25(2), the Court's sentence was a clear abuse of discretion, it had no discretion, because concurrent sentences are mandated, according to law.

Apprendi: "SENTENCING FACTOR"

In Hizbullah-Ankh-Amon's case at hand, the narrow constitutional question presented -- Whether the Due Process Clause of the Fourteenth Amendment requires that a "factual determination," authorizing an "increase in the minimum part" of the prison sentence, for an offense that is not to exceed the 25-Year Minimum for the Second Degree Offense of Murder "be made by a judge on basis of proof" beyond a reasonable doubt -- Whether Hizbullah-Ankh-Amon's sentence was permissible, given it exceeds the 25-Year Minimum for the offense of Second Degree Murder by 70 Years -- In re Winship, (57), (Beyond a reasonable doubt, basis of due process).

While Judges in the Country have long exercised discretion in sentencing, such discretion is bound by range of sentencing options prescribed by Legislature; see U.S. v. Tucker, (58), and Apprendi, (59).

But the constitutional violation expressed here (the Functional Equivalent Factor), this practice can not stand, because it allows a jury to convict a defendant of a Second Degree Offense ... and then allows a judge to impose punishment identical to what New York provides for First Degree Crimes ...

In N.Y.S., Murder in the Second Degree is also a crime of lesser "grade" than Murder in the First Degree because it is subject to a "lesser penalty," see People v. Diaz, (60); People v. Flores, (61); People v. Rodriguez, (62); as well as Penal Law sections 60.06; 70.00(3)(a)(i); 70.00(5); and C.P.L. section 400.27(10).

It is impossible to commit intentional murder 1st First Degree without at the same time committing intentional murder 2nd degree, see Miller, (63) supra.

The Judge D.J. Sullivan invented a non-existed aggravated circumstance for Murder in the Second Degree called "Functional Equivalent" to life without parole for a 17 year old, in order to make necessary for the imposition of his execution of Five Consecutive Sentences as punishment for defendant asserting his right to a trial;

This type of sentence is presumed to be vindictive that is driven by anger, resentment, and/or revenge, see People v. Van Pelt, (65), (retaliation or vindictiveness). The Petitioner herein has been buried alive using the functional equivalent factor! **It is a Vindictive Sentencing method.**

BIAS FACTOR: The Effect Of Not Correcting Sentence Under P.L.70.25(2) And C.P.L.40.10(2)(a)&(b) Is Administrative Interpolation Of Miscalculated Sentences ... Outcome Civil Death...

Petitioner wrote a letter to the Commissioner of the Division of Criminal Justice Services for his Repository Inquiry (Rap Sheet info), see (Exhibit# 6), and to the Administrtive Judge of the Bronx Supreme Court of the 12th Judicial District of N.Y. about the clear **Omissions** upon his **Commitment Orders** of 1989.

Petitioner had noticed that his Legal Date Computation from Reception (Classification) into NYS Prison System had been changed (Administratively Interpolated),(66)(Computation of time Sheets) by only a few months without authorization! Petitioner has Five Commitment Orders that have "**Omissions Upon Them**"(to leave out)! The assumption used, or premise (of all opposing parties) is that after you read the Petititoner's Sentencing Record, the sentences run consecutively "**with one another**," with an "**aggregate minimum**" sentence of 91 years, 8 months (92 Years) ... This is an "**inference**" of what the commitment orders draw a person to conclude, (67), and the two computations,(68)

A key fact that must be pointed out, are words that "**do not**" appear upon the Petitioner's Commitment Orders, which are:"**With One Another**" ... This is the anomaly, or set of anomalies that do not appear upon Petitioner's actual Commitment Orders,(69).

Thus, to the naked-eye, it can be inferred:"With One Another,"which results into an Arithmetic Problem for the third-party reader. But, the fact is, it does not say:"**With One Another**"...that facts is clear ... **Secondly**, due to the **Omissions** upon Petitioner's Commitment Orders, Petitioner's actual highest **aggregate minimum** sentence is 25 Yrs to Life, proof of which was "**Certified**" by the Bronx Supreme Court Clerk's Office and Investigated by the Administrative Judge of Bronx Supreme Court,(70). Mr. Robert E. Torres, Admin. Judge (Chambers) in the Bronx Hall of Justice (Telephone# 718-618-3700).

Thirdly, Petitioner's actual highest **aggregate minimum** sentence is 25 Years to Life; the Clerk of the Supreme Court immediately notified the Commissioner of the Division of Criminal Justice Service (DCJS) that the Petitioner was convicted in Bronx Sup.Ct. and sentenced to that highest **aggregate minimum**, and issued an N.Y.S.I.D. number# 6131217z upon each Commitment Order at the top (below the caption).

When the Petitioner requested D.C.J.S. of a copy of his Rap Sheet Information, under N.Y.S.I.D. no# 6131217z, it clearly has the Petitioner's sentence as 25 Years to Life, see (71)(Page# 2 [Backside of Page]). That department was instructed on the day of Petitioner's sentence, that Petitioner was given 25 Years to Life, and a copy of the Commitment Orders were forwarded to **The Board of Elections**, who also has Petitioner listed as being convicted of 25 Years to Life by Bronx Justice D.J.Sullivan, 1989, Mr. Michael C. Green, Exec. Deputy Commissioner of D.C.J.S. (Tel.# 1-800-262-DCJS).

Fourth, the **Second OMISSION** upon the Commitment Orders" "Why would-not the Judge simply **put on one paper**: 91 Years + 8 months to LIFE, total aggregate?" That the Judge never added the aggregate within the **Sentencing Record** during sentencing, see (72), it was the Prosecutor James Palumbo, who requested such a sentence,(73), but it is **OMITTED** by the Judge in writing upon the Commitment Orders, which were also sent to **The Board of Elections**, who have the same copies.

Fifth, in fact, one department-head said that the Petitioner should get a lawyer, see (74), after he investigated Petitioner's aggregate sentence, and analyzed the omitted matters!

Sixth, Petitioner wrote to N.P. Effman, Executive Director of Wyoming County Legal Aid, who answered him stating that Petitioner should write to Mr. Richard DeSimone in Albany, and that he couldn't take the case due to jurisdictional issues, (75), that was explained in a similar letter as Exhibit# 26.

After receiving all documents, it is revealed that D.O.C.S. and the Bronx D.A.'s Office are the only two departments or agencies that has Petitioner listed with a sentence "beyond" 25 years to Life. No other department or agency has the Petitioner with a sentence of "beyond" 25 years to Life. This has prejudiced the defendant. This illegal sentence is bias as to him, and the sentence has to be "corrected" with these two departments, because they are violating Petitioner's rights.

Without this Sentence being corrected in accordance with P.L. 70.25(2) under the view of C.P.L. 40.10(2)(a)&(b), Petitioner will remain Civilly Dead within the Society of N.Y. State since the age of 17 years old (1988).

"CONCLUSION"

WHEREFORE, Petitioner's 440.20 Motion to set aside the sentence should be granted in accordance with a Supreme Court Justice's Order; or a Hearing be Ordered as to these Issues mentioned above; or In the Interest Of Justice Powers of the Supreme Court, Order what is deemed just and fair in your Powers of Discretion.

ISSUE: ACTUAL INNOCENCE CLAIM

POINT-4: NY States's Attorney General's Office Issued Petitioner's Airline Ticket Showing Absolute Proof that Petitioner Is Actually Innocent of the Crime The Jury Convicted Him of in 1989; Absolute Proof of Being In Seattle At The Time of the Crime (Alibi Preserved For Review); CPL 440.10(1)(g)&(h).

Subtopic: Petitioner is Requesting that D.N.A. Testing Be Performed Upon The Bloody Black Jacket That Was Left Behind By The True Killer At The Crime Scene, And Was Found By C.S.U. Along With Blood Collected With Jacket On Sidewalk And The Biological data Found Inside And Outside of said Jacket; C.P.L. 440.10(G-1[2]); 440.30(1-a)(a)(1).

Facts Not Reflected in the Record:

Petitioner received by way of Legal Mail from NYS Attorney General's Office (of E.T.Schneiderman [who resigned: May 8, 2018, Tuesday]) Department of Law in Albany (State Capitol), a copy of his Continental Airline Flight Ticket that he had boarded a plane on January 9th, 1988 (Saturday), see Appendix pg# **A127-130** (Exhibit# 1, Boarding Pass), it is stemped "**One day before the Killings**" in the Soundview section of the Bronx, which the Bronx Prosecutor's Office said took place on January 10th, 1988 (Sunday Morning, approx, 3:00am), see (Footnote# 87), some hours before the Petitioner traveled a minimum of five hours in the dead of Winter.

Petitioner requested of his Court appointed Lawyer, 33 years ago, to obtain the Flight Logs of PAN AM, UNITED, CONTINENTAL, or TWA for those first 10 days of January 1988, and he refused to do pain staking research.

Petitioner's ex-attorney (who knows him as Kirk Johnson), once asked him: "Kirk, do you have absolute proof of being in Seattle at the time of the Crime?" I said to him absolutely!

It was at that moment, I informed him to obtain the January 1st - 10th flight logs of Continental Airlines of 1988 (along with the three other Airlines, just to be sure), which I am on board as a passenger from New York City "Laguardia Airport in Queens NY," going to "Seattle," and this colloquy took place between us (Kirk Johnson & Frank Loverro) at the Bronx Supreme Courthouse (the Original One) within the Bull-Pens connected to Courtroom Part 33 of the Bronx Judge D.J. Sullivan, Appendix pgs# **A207-A208** (Trial pages# 2-3 [Plea offer and warning to consider]).

Petitioner informed Loverro about this Alibi document that would support his claim with documentary proof, also Petitioner informed Loverro about his Seattle friends as Alibi witnesses in his behalf, and that the Police from N.Y. & Seattle were "**intimidating his alibi witnesses**." Petitioner was **still in touch** with them back then, and had a few telephone numbers for Seattle contacts,(136); but his Lawyer's response on that occasion, as on a number of occasions prior to trial was that "He" was "**not**" going to travel to Seattle Washington to look for any witnesses for Petitioner, "**nor**" fly anyone to NYC, "**nor**" look through a **paper-hay stack of airline logs**, because he was "**backed-up**

with case loads!" And the Bronx still had to prove their case! Witnesses Clark, Hull, and Reid, all had Criminal Records **prior** to this incident (105). During the incident Mr.Hull said he was intoxicated on Crack Cocaine (106). Both Hull & Reid were incarcerated at Riker's Island (107), so their testimonies were in question (104).

This is the sub par legal representation, the bad action that curtailed the defense from the start, and the outcome of poor work that negatively affected the outcome, which **prejudice the defense entirely**.

When the Petitioner informed Loverro about obtaining a Court Ordered Subpoena for just one day from those Airlines, he said he would not do it because it was **too broad of a spectrum** to ask that many Private Industries to produce, and the Trial Judge wouldn't approve of such a broad spectrum subpoena, it has to be pinpointed; He wouldn't ask the judge for a subpoena to produce Petitioner's witnesses from Seattle.

Actual Innocence was Petititoner's defense, it was the essential principle and basis as to why Petitioner refused all plea bargains offered by the Bronx Prosecutor's Office, asserted his Constitutional Right under due process & 6 Amendment.

He never would come to see Petitioner on Riker's Island to discuss the triple homicide case with Petitioner, he would only see Petitioner in the Bronx Court Bull-Pens every 60 days or so for **minutes at a time**.

Petitioner learnt that the Bronx D.A.'s Homicide Major Case Squad detective, named **George Ortiz** (Shield No.# 782/ Tax Registry# 412798), had intimidated & scared Petitioner's Alibi Witnesses with Seattle P.D. detective **Jim Yoshida** (Japanese) by helping them to be placed under arrest, my witnesses for petty offenses, and telling each one that they would get in trouble if they decided to help "**Kirk**" in his New York Case,(137). Witness Intimidation is what happened to Petitioner's witnesses Troy Taylor & June Simmons, and in fact the A.D.A. Palumbo had a copy of Troy Taylor's Affidavit at Petitioner's Trial,(100). It was ineffective of counsel for the failure to raise issue of witness intimidation, as in the case of **Hemstreet v. Greiner**,(138).

The Bronx A.D.A. Palumbo never used George Ortiz as a Prosecution witness at trial, and "Ortiz" was the lead detective in the case, nor did the Defense Counsel call Ortiz, nor did he call Petitioner's alibi witnesses to trial, and the Trial Judge asked Loverro about wanting to

add any to the potential witness list, Loverro said: "**No**"(139). Nor did Loverro call as a witness Mr. Nelson Burgos (Codefendant) in order to refute or verify the other witnesses "**Hearsay Statement**" that he said: "You're all going to die,"(125). Petitioner's convictions are based upon a "**theory of vicerious liability.**" The Bronx Prosecutor said Petitioner acted with Nelson Burgos' intent to kill, who plead guilty (103), imputed to defendant another's intent (125).

Petitioner was **forced** to take the Stand in his own behalf, or there **would not** have been a "**defense phase**" of the trial (140). When a defendant elects to testify, he subjects himself to an **evaluation** of his credibility by the trier of fact, and runs the risk that might **bolster** the government's case **rather than** help his own cause, quoted from the case of **Vazquez** (141), and **Dashney** (142).

A classic case of the failure of the defense attorney to prepare an **alibi defense**, as in **People v. Sullivan** (143), and the failure of the attorney to conduct appropriate investigation, or adequate investigation, as in the case of **People v. Bennett** (144); **People v. Labree** (145); **People v. Gill** (146)... failed to prepare alibi defense...

Also the failure to locate and call significant witnesses is ineffective, as in **People v. Droz** (147); **People v. Sullivan**, supra (148); **People v. Simmons** (149); **People v. Jones** (150); **People v. Maldonado** (151).

As well as the failure to "**subpoena documents**" is also ineffectiveness of trial counsel, **People v. Sullivan**, supra (152).

Furthermore, it is also ineffective to fail to meet with client until the day of the trial, **People v. Droz**, supra (153); or failure to conduct more than a single interview with client before trial, **People v. Sullivan**, supra (154).

There was no possible way that the Petitioner would of discovered this Airline Ticket without the help of a Professional, after he has been in NYS Prison for 33 years ... buried alive ... this is documentary proof beyond a preponderance of the evidence (89), that Petitioner received ineffective assistance by the defense attorney for failure to prepare an alibi defense and or conduct appropriate investigation, failure to subpoena documents, and failure to meet & interview defendant for at least **one hour** in 17 months prior to trial for a Triple Homicide! This

is the showing of different "**bias factors**," as to why an informa pauper defendant, couldn't find this document 30 years ago, in order to support his claim back then (88). Petitioner had a "**faulty memory**," and was also facing tremendous difficulty on Riker's Island in that time Era, going through hours of Bull-Pen Therapy, and his codefendants were being asked to become State Witnesses against him. Petitioner, put the issue on the record (his alibi) his lawyer followed-up and requested of the Judge for an alibi instruction (95), and he got a ruling on the alibi (96), and the Lawyer mentioned it during summation (97), and the Prosecutor challenged oral Alibi of defendant during his summation (98), which caused the Judge to instruct the jurors on the matter (99).

What Was The Petitioner's Psychological State during That Era

Due to Petitioner's faulty memory (Short Term Memory Lost [Partial Amnesia], Appendix pg# **A592** [Exhibit# 5 of Reply brief]) because of the shock of being incarcerated on Riker's Island as an **Adolescent** being outcast by family & friends due to **societal stigma** of being called a Murderer, being engaged in **numerous fights** on Riker's Island ... Petitioner could not concentrate or focus like an adult facing the same Criminal Charges of **Six counts** of Murder, **Two counts** of Attempted Murder, **Two counts** of Assault, **Five counts** of Robbery, and **One count** of Burglary in the First Degree. Petitioner was in a state of Anxiety and Disquietude, he was unable to remember the "**actual date**" he travelled to Seattle within the beginning part of January 1988; Petitioner at that time was unaware of the **Psychosomatic Symptoms** (120) of being incarcerated during "**adolescence**"(121) for 17-months, and at times enclosed in Solitary Confinement, due to disciplinary infractions.

When the Petitioner took to the Stand and testified in his own behalf at the defense phase of the trial, the Bronx Prosecutor had already knew about the Petitioner's Alibi defense, and that the Petitioner was unable to pinpoint (to identify and locate precisely) his whereabouts before Jan. 10th, 1988 (approx. 3:00 am), so he hammered and battered at the Petitioner's alibi in a professional manner so that without "**documentary proof**" he made defendant appear to be foolish within his adolescence (121)(Petitioner's period of physical and psychological development), and the Prosecutor shifted the burden of proof to the defendant as he testified in his own behalf making it appear as if the defendant had to show his innocence. The Prosecutor had 20 years of education and trial

experience, more time than the Petitioner "**had been alive**" at the time of his trial.

What Were The Main Steps Of How Defendant Was Convicted?

Answer: Lack of funding and sub par legal representation is why defendant was convicted (lost the trial).

According to NY Legislative Statute, P.L. 125.25, subd.(1)(Intentional Murder), the Bronx Prosecutor **must prove** two elements of this Second Degree Offense: 1# Intent (acted with Intent), and 2# Causes the death of a person. Mens rea & Actus reus!

Prosecutor presented 3-witnesses to the event (122), each witness stated that Petitioner **never stated one word** throughtout the entire event (123); The witnesses said Codefendants Burgos & L.O. Torres were the only ones **they saw talking**, the Prosecutor charged Petitioner as **acting in concert with each other & another** on or about Jan. 10, 1988, in the County of the Bronx, did, with intent to cause the death of a person, caused the death of Michael Allen (Counts 1 & 4), Derrick Coleman (Counts 2 & 5), Waverly Waddler (Counts 3 & 6) by shooting him (124). Thus, using the **acting in concert doctrine** (theory of vicarious liability), Prosecutor said that the Petitioner **shared** intent to kill with his Codefendant Nelson Burgos, who exclaimed (according to the witnesses): "You're all going to die,"(125). Burgos plead guilty in 1989 and never was called to trial in order to verify his **Hearsay Statements**.

The Trial Judge's instruction to the Jurors also contributed to the guilty verdict, stating:

"**that the defendant or his accomplice**" shot Allen(Coleman, Waddler) with the intent to cause the death of Allen(Coleman, Waddler)...It is not necessary for the **People to establish** that the intent to kill was present in the mind of the **defendant or his accomplice** for any period of time before Allen (Coleman, Waddler) was shot...(126);

In all murder cases dealing with **intent**, the State **allocates or shifts** some burden of proof to a defendant charged with **intent**, see **Sandstorm v. Montana** (132). Defense Counsel **Frank J. Loverro**, intentionally never **objected** to the judge's illegal instruction on intent (127), which barred the Petitioner from Appellate Court Review of the error (C.P.L. section 470.05(2)(**must** make a "**protest**" to instructions), see **People v. Johnson** (128), and the trial judge gave Nine different definitions of reaso-

nable doubt (129), which was illegal under **Gaines v. Kelly** (130). Also the Trial Judge's other instructions on intent were a **Presumed Intent** (131), which was a Premissive **inference** in instruction deemed illegal in **Sandstorm v. Montana** (132). Basically, the element of intent was **imputed** to defendant, such intent must be proved by the People on the part of the defendant, and his accomplice's intent shouldn't be **imputed** to him, see **People v. Bray** (133). Trial Lawyer failed to object, barring defendant from Appellate Court review, which "**prejudice**" the antire defense becauss **it effected** the outcome of the trial & appeal by his performance.

Subtopic-B: Petitioner is Requesticng D.N.A. Testing be Performed Upon The Bloody Black Jacket That Was Left Behind By The True Killer At The Crime Scene, And Was Found by C.S.U. Along With Blood Collected With Jacket On Sidewalk and the Biological Data Found Inside & Outside of said Jacket; C.P.L. sections 440.10(G-1[2]), 440.30(1-a)(a)(1).

Subjugare: Petitioner's D.N.A. data Profile from State Computer System is Exhibited herein so that Comparsion Can Be Performed with The Bloody Black Jacket Worn by the True Killer in order to Elimainate Petitioner as a Suspect; CPL sec.440.10(G-1[2]), 440.30(1-a)(a)(1).

Petitioner is seeking to subject the Black Jacket was left behind on the Sidewalk in front of the building by the True Killer (that is blood stained) to "D.N.A. Testing," which if compared with Petitioner's DNA that is stored already within the N.Y. State Identification Index, see Appendix Exhibit# 19 (DNA of defendant from State Computer System) that was taken from him on 10/10/2001 (Monday), it will "**not**" match, and prove Petitioner is not the Killer. There were **Alternate Killer** mentioned in this case.

ALTERNATE KILLERS:

Prior to indictment, according to Prosecutor Palumbo, the First was **Harkeem Harris** (Muslim Harkeem), who was also present during the incident according to Police Reports, but nothing happened to him physically, in fact, he was given immunity from prosecution for his testimony at the Grand Jury, and fled before he could be cross-examined at trial (168); the Second was **Larry Thomas** (E.T. Larry), who Police Reports claim: Just only a few days before, fired gun shots at the Murdered drug dealers(168), and Third was **Alberto Martinez (Alpo)** a darkskin Puerto Rican from East River Projects in Spanish Harlem, who Troy Taylor stated in a Police Report in Washington when the H.B.S. arrested him, claimed "Alpo" did it! Mr. Martinez (169) had admitted to 14 murders in N.Y.City, VA., and D.C. for a quid pro quo with the F.B.I. & A.U.S.A. to testify against Wayne

Perry from Washington D.C. in 1992 (170). Martinez was released from Federal Custody in 2000 A.D. The Prosecutor put out an arrest warrant for Harris (171).

Requesting Performance Of A Forensic Test:

Specific Evidence: Black Leather Jacket (blood stained) and Blood samples taken from Sidewalk at 1680 Randall Avenue, Bronx N.Y., 10473 on January 10th, 1988 (Sunday);

Clearly Identified: Testing with STR analysis, which can pick-up D.N.A. from dead skin cells on articles of clothing. Bagged into Evidence by C.S.U. Detective Wayne Barney on January 10th, 1988, in the County of the Bronx, between the hours of 6:00am -to- 1:00pm, was also Photographed as Photos No.#24 -&- #25 in C.S.U. Report.

D.N.A. Test On Items: Testing with STR analysis, which can pick-up D.N.A. from dead skin cells on articles of clothing. Inside the Jacket's Pockets may be biological items such as hair, skin cells, blood, sweat, saliva, mucous, the Petitioner would like tested; Also Inside the Jacket's Lining (material used to cover or coat an inside surface) sweat under the armpits, hair, saliva, mucous, blood drops, or some unknown biological data Petitioner may not have knowledge of, etc.; Also Inside the Collar of the Jacket (Ring-around-the Collar Material), which may be sweat, skin cells, or hair, or blood drops; Also, the inside Sleeve Cuffs, Cuff links (buttons or snaps that fasten the cuffs of the jacket) and the inside Sleeves leading to the wrist and forearm of jacket for unknown biological data, blood drops, mucous, saliva, skin cells, sweat, hair, etc.; Finally, the blood samples from the Sidewalk!

Case Support For D.N.A. Testing: People v. Tankleff, (173), (Teenager's Mother & Father had been killed, confession had been taken, but DNA Testing of Fingernail clippings & scrapings from parent reveals someone else as killer); and see Echols v. State, (174), (Three White teenagers [West-Memphis Three] who were convicted for killing three White Children within a Satanic Ceremony based upon a confession of one of the West Memphip Three; All three were released due to DNA Testing of the True Killer's blood found at the Crime Scene, which didn't match the D.N.A. Profilings of the convicted).

The Cost For D.N.A. Testing: $1,095 per test.

Relevance -&- Reasonable Possibility:

Had the D.N.A. Testing result been introduced (172), then the reasonable possibility is solved because "ignorance of it" contributed to the verdict at the old trial, it would have tilt the scale of the jury's deliberations.

POINT-5:The Bronx Prosecutor's Office Should Have Fully Disclosed The Co operation Agreement Made With Witness That The Bronx D.A.'s Office Promised To Write, And In Fact Wrote, A Letter of Recommendation To The N.Y. State Boerd of Parole in behalf of the State Witness, Which Detailed His Cooperation with the Prosecutor's Office And Communicating A Recommendation For His Release On Parole. Conviction Obtained in Violation of U.S. Const. Amend. 5th, 6th, & 14th; N.Y. Const. Art.1 sec.6; C.P.L. sec.440.10(1)(f)(g)(h):

As Petitioner detailed on pages# 8-10 herein, it was **Witness Reid**, who didn't reveal his "PROMISE" that was made to him by Bronx Prosecutor Palumbo, who said at trial that **No Promises were made to him four times**.

The Bronx Prosecutor's Office should have fully disclosed the Cooperation Agreement made with Witness that the Bronx D.A.'s Office promised to Write, and Wrote, a **Letter of Recommendation to the NYS Board of Parole** in behalf of **Reid**, which detailed his Cooperation with the DA's Office and Communicating a recommendation for his release on Parole at his first Parole Hearing, Appendix, pgs# A423-A424,A427,A431-A432, & A438,A440-A441; In fact, he received 6-recommendations, DA-2, Judge-2, and from his Lawyer-2; It was Petitioner who made a "**Specific Request**" for such in his Omnibus Motion of the Defense in 1988, Appendix# A451-&-A453 (Made prior to trial). The Bronx Prosecutor sat by silently while permitting his witness to testify falsely **before the Jury** that he had not received Promises in return for his testimony, in Violation of U.S. Supreme Court precedence, **Napue v. Illinois**, 360 US 264, 79 S.Ct. 1173 (1959); Similar events that happened in Napue that took place with witness in my case, see pgs#266-267 (FN.1,2,3), and JURY had already been apprised of some prior deal he made with Officials...this is why the State Court had affirmed his appeal... Petitioner recently obtained this evidence (Outside of the Trial Record) that proves by the **Preponderance of the evidence** that "PALUMBO" had promised to REID that in the Future (3 years later) that he would bring to the attention of the State Parole Authorities his cooperation so he will be released, and this violation has been done before by the Bronx Prosecutor, see **People v. Cwikla** (180), and **Taylor v. State of N.Y.** (181), (Taylor's case **Palumbo** was again involved)!

Q. Hyllahawkhanon Verified

CONCLUSION: Petitioner requests of this Court for his conviction to be reversed, this writ granted and new trial ordered, or an evidentary hearing on all matters mentioned. Thus, the reasons why this Petition for Writ of Certiorari should be granted.

Footnotes: **PAGES:**