A2

State of New York
Court of Appeals

BEFORE: HON. ROWAN D. WILSON, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

KIRK JOHNSON, a/k/a,
QABAIL HIZBULLAH-ANKH-AMON,

Appellant.

ORDER DISMISSING LEAVE

Ind. No. 3205/1988

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

UPON the papers filed and due deliberation, it is

ORDERED that the application is dismissed because the order sought to be appealed from is not appealable under CPL § 450.90(1).

Dated: MAR 26 2021

Associate Judge

*Description of Order: Order of a Justice of the Appellate Division, First Department, entered November 5, 2020, denying permission to appeal to the Appellate Division from an order of Supreme Court, Bronx County, entered on or about July 17, 2020.

A4

Supreme Court of the State of New York
Appellate Division, First Judicial Department

BEFORE: Hon. Manuel J. Mendez
Justice of the Appellate Division

The People of the State of New York,
Respondent,

-against-

Kirk Johnson a/k/a Qabail Hizbullah-Ankh-Amon,
Defendant-Appellant.

Motion No. 03002
Ind. No. 3205/1988
Case No. 2005-14621

CERTIFICATE DENYING LEAVE

I, Manuel J. Mendez, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 440.10, 440.20 440.30, 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, Bronx County, entered on or about July 17, 2020 is hereby denied.

Dated: October 26, 2020
New York, New York

Hon. Manuel J. Mendez
Associate Justice

ENTERED:
NOVEMBER 5, 2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 78

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THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 3205/88

QABAIL HIZBULLAH-ANKH-AMON,
a/k/a KIRK JOHNSON,

Defendant.

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Marcus, J.:

On August 8, 1989, in the Supreme Court, Bronx County (Sullivan, J.), the defendant was convicted after a jury trial of three counts of Murder in the Second Degree (Penal Law § 125.25[1]), and two counts of Attempted Murder in the Second Degree (Penal Law §§ 110/125.25[1]) for the January 10, 1988 shooting deaths of Waverly Waddler, Derrick Coleman and Michael Allen, and shootings of Timothy Clark and Samuel Hull. The defendant was sentenced to consecutive indeterminate prison terms of twenty-five years to life on each murder count and eight and one-third to twenty-five years on each attempted murder count.

The defendant's conviction was unanimously affirmed on appeal, People v. Johnson, 181 A.D.2d 509 (1st Dept. 1992), and leave to appeal to the Court of Appeals was denied. People v. Johnson, 80 N.Y.2d 833 (1992), 81 N.Y.2d 763 (1992). The Appellate Division, First Department, denied the defendant's two *pro se* writ of error *coram nobis* applications. People. v. Johnson, 258 A.D.2d 977 (1st Dept. 1999); People v. Johnson, 242 A.D.2d 408 (1st Dept. 1997). The defendant's 1999 federal *habeas corpus* petition was dismissed as untimely by the Honorable Shira A. Sheindlin,

Hizbullahankhamon v. Walker, 105 F. Supp.2d 339 (S.D.N.Y. 2000), the United States Court of Appeals for the Second Circuit affirmed the District Court ruling, Hizbullahankhamon v. Walker, 255 F.3d 65 (2d Cir. 2001), and a petition for a writ of *certiorari* was denied. Hizbullahankhamon v. Walker, 536 U.S. 925 (2002). In 2004, the defendant filed a *pro se* CPL § 440 motion that was denied by a judge of this Court in a July 7, 2005 decision, and on January 17, 2006, leave to appeal that decision was denied by a Justice of the Appellate Division, First Department. In February 2006, the defendant moved to reargue/renew the denial of the leave application and filed another *coram nobis* application. Both were denied. See People's Affirmation in Opposition, p. 5.

The defendant now moves, *pro se*, to vacate the judgment pursuant to CPL § 440.10, to set aside the sentence pursuant to CPL § 440.20, for DNA testing, for an Order of Contempt against the People, and for Poor Person relief. The People oppose the defendant's CPL §§ 440.10, 440.20 and DNA motions, and do not respond to his other motions. For the reasons set forth below, the defendant's motions are summarily denied in their entirety.

THE CPL § 440.10 MOTION

ACTUAL INNOCENCE

To prove a freestanding actual innocence claim, a defendant must show that there is clear and convincing evidence that he is innocent. People v. Hamilton, 115 A.D.3d 12, 15 and 27 (2d Dept. 2014). The clear and convincing evidence standard requires the proponent to present sufficient evidence to establish that his factual innocence is "highly probable." People v. Velazquez, 143 A.D.3d 126, 136 (1st Dept. 2016). It must be

based upon reliable evidence that was not presented at the trial, and mere doubt as to the defendant's guilt or a preponderance of conflicting evidence is insufficient, since a convicted defendant no longer enjoys the presumption of innocence and is in fact presumed to be guilty. See Bousley v. United States, 523 U.S. 614, 623-24 (1998); Schlup v. Delo, 513 U.S. 298, 324 and 326, n. 42 (1995); Herrera v. Collins, 506 U.S. 390, 398 (1993); Hamilton, 115 A.D.3d at 23. In order to be entitled to a hearing on a claim of actual innocence, the defendant must make a *prima facie* showing of actual innocence, which requires "a sufficient showing of possible merit to warrant a fuller exploration by the court." Hamilton, 115 A.D.3d at 27 (citations and internal quotation marks omitted); Velasquez, 143 A.D.3d at 136.

Appended to the defendant's motion as exhibit 1 is a poor photocopy of a document the original of which itself appears to be of poor quality. The defendant alleges that the document is a Continental Airlines boarding pass, dated January 10, 2018, and that, by establishing his alibi, is conclusive proof that he is actually innocent of the crimes of which he was convicted. For many reasons, the exhibit is neither conclusive proof -- nor clear and convincing evidence -- of his innocence.

On its face, the authenticity of the purported boarding pass is highly suspect. While parts of the document are illegible, conveniently, the name "Kirk Johnson," the date, and the locations of departure and arrival are clearly visible. The date of the alleged flight is larger and in a different font than the other information on the document. And, while an airport is listed for the departure location, the name of the airport is missing and only the city and state appear as the destination.

Additionally, the defendant misleadingly claims to have received the purported boarding pass from the New York State Attorney General's Office, when in fact, the Attorney General's Office received the document from an anonymous source and merely forwarded it to the defendant. See People's exhibit 2. The defendant's attempt to bolster the significance of the document by claiming its source to be the Attorney General's Office calls into question both the defendant's credibility and the authenticity of the boarding pass. According to the letter accompanying the purported boarding pass, an anonymous person claiming to have gone to school with the defendant thirty years earlier was in possession of the boarding pass, which the person described as "absolute proof" that the defendant was "set-up" for the murders.[1] There is no information provided as to how the anonymous source came to possess the boarding pass or why that person decided to turn it over to authorities three decades after the defendant's conviction.

The defendant's current claim also contradicts his trial testimony. In support of the alibi defense he presented at trial, the defendant testified that he had flown to Seattle prior to his birthday on January 4, 1988 and remained there until April 2, 1988. See defendant's exhibit 20, partial trial transcript, pp. 645-647. The defendant also testified that when he travelled by plane, he did not use his real name, which at that time was Kirk Johnson. Instead, the defendant said, he used aliases, though he could not recall what alias he had used when he flew to Seattle because he had used "thousands" of different names. See defendant's exhibit 20, pp. 649-652. The defendant's attempt to address the

[1] Mysteriously, the anonymous source also claimed to know "biological data (evidence)" from the case would exonerate the defendant, an apparent reference to the defendant's request that DNA testing be conducted on a jacket allegedly found in the vicinity of the scene of the crime, a matter addressed later in this decision.

contradiction between the purported boarding pass and his trial testimony - that his youth, the trauma of standing accused of these crimes and "Anterograde amnesia" from "numerous fights on Riker's Island receiving concussions" led to his confusion about the exact date he traveled - is both unsubstantiated and unbelievable.

Finally, although the defendant claims that a number of witnesses and hotel records could prove he was in Seattle on January 10, 1988, he does not supply any affidavits, documents or other evidence in support of that claim. In fact, these alleged alibi witnesses, specifically Troy Taylor and Gladys Taylor (AKA June Simmons), when interviewed, provided the police with no evidence supporting his alibi. Troy Taylor, in fact, said the "the word was" that the defendant had "gotten together" with others to commit the crimes. See defendant's exhibit 4, DD5 78. June Simmons, when she was interviewed, said nothing about the defendant having been in Seattle on or before January 10, 1988. See defendant's exhibit 4, DD5 84. Two other witnesses who were interviewed in Seattle on February 21, 1988, but whose names were redacted from the police reports, also said nothing supporting an alibi for the defendant on the date of the crimes. See defendant's exhibit 4, DD5s 81, 82.

He brushes aside the interview reports and his failure to provide affidavits from these alleged alibi witnesses with another self-serving and unsubstantiated statement: that the police officer who arrested him in Seattle in 1988 told every alleged alibi witness at that time they "would get in trouble if they decided to help [him] in his New York case." Even accepting his unsupported and improbable assertion, what the defendant alleges happened in 1988 does not justify his failure to provide such evidence now.

The alleged boarding pass and the defendant's alibi claims not only fall far short of clear and convincing evidence that his factual innocence is highly probable, they even fail to present evidence requiring a hearing, that is, "a sufficient showing of possible merit to warrant a fuller exploration by the court." Hamilton, 115 A.D.3d at 15 and 27; Velazquez, 143 A.D.3d at 136. For these reasons, the defendant's actual innocence claim is summarily denied. It is also summarily denied because [a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true." CPL § 440.30(4)(d).

THE BRADY CLAIM

To succeed in his Brady claim, the "defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material." People v. Garrett, 23 N.Y.3d 878, 885 (2014) (internal citation and quotation marks omitted). The defendant has failed to meet this burden.

The defendant alleges that the People withheld information concerning promises they made to co-defendant Raymond Reid in exchange for his testimony. Specifically, he alleges that, while Reid repeatedly testified at trial "that he had not received any Promises in return for his testimony," that:

> [t]he Bronx prosecutor James Palumbo had Promised to bring to the attention of the "State Parole Authorities," Raymond Reid's cooperation with the Prosecutor's office in the Bronx as principal witness within Petitioner's Trial ... (in a form of a recommendation) expressing the hope that such cooperation with the State of New York would be taken into account when this witness was considered for parole, and he was released based upon the Bronx prosecutor's (James Palumbo) Recommendation ....

Defendant's "Memorandum of Law 440.10," p. 16. In support of his claim, the defendant has provided minutes from Reid's parole hearings in June and August of 1991. See defendant's exhibits 69, 70 and 71.

The defendant's claim that Reid testified at trial that the People had made no promises to him in exchange for his testimony is belied by the trial transcript. In fact, Reid testified that he had entered into an agreement with the People to plead guilty to Burglary in the First Degree in exchange for his cooperation and testimony. While Reid also told the jury that he was promised no particular sentence on his plea (and the defendant has not provided any evidence to the contrary), on cross-examination he testified that he knew the sentencing range for Burglary in the First Degree was between two to six years and eight and one-third to twenty-five years in prison, that another co-defendant had been sentenced to six to eighteen years, and that the prosecutor had told him that if he testified he could or should "do better than that." The jury was thus aware that by pleading guilty to the burglary charge, Reid avoided going to trial for murdering three people and attempting to murder two more, and that testifying for the People could further benefit him in the sentence ultimately imposed upon his plea.

Furthermore, the parole hearing minutes do not establish that the People promised to recommend Reid's release to the parole board in exchange for his testimony. In the

June 12, 1991 parole hearing, one of the parole board Commissioners referred to a letter from the Bronx County District Attorney's Office recommending Reid serve the maximum allowable sentence. However, because Reid's attorney had submitted a letter stating that the prosecutor, as part his plea agreement, would "bring to the attention of . . . parole officers [Reid's] cooperation with the District Attorney's Office," the parole board adjourned the proceeding to receive clarification. For the follow-up hearing on August 13, 1991, the trial prosecutor had submitted a letter which, according to the hearing minutes said:

> in essence, that ... an agreement was reached in which [Reid] agreed to testify against any and all of [his] co-defendants and that [Reid] did fully cooperate with the District Attorney's Office and did testify at the trial ...."

See defendant's exhibit 70, p. 4.[2] Thus, as described in the transcripts of the hearings, neither Reid's attorney's letter, nor the prosecutor's letter, substantiate the defendant's claim that the prosecutor promised to recommend that Reid be released on parole.

While the prosecutor's letter, as it is recounted in the second hearing, is silent as to whether, as Reid's attorney had claimed, it was a condition of Reid's plea agreement that the prosecutor would inform the Parole Board about his cooperation, it may be that the People did make that promise. Furthermore, given that it was not a subject of cross-examination at the defendant's trial, it is also possible that they did not disclose that promise to the defendant. Nonetheless, the defendant has failed to demonstrate that he thereby suffered any prejudice. Because he had specifically requested from the People

[2] Informed of Reid's cooperation, one of the members of the Parole Board panel before which Reid appeared indicated that his cooperation, taken together with other factors, "suggest[ed] to [the panel] that it would be appropriate for [them] to make a recommendation for release." Id.

information concerning "any deals, promises or inducements made by law enforcement officials ... to prospective prosecution witnesses, including codefendant[s]," see defendant's exhibit 75, excerpt from defendant's omnibus motion, it is his burden to demonstrate that there is a reasonable possibility that, had the information been disclosed to the defense, the result of the trial would have been different. See People v. Vilardi, 76 N.Y.2d 67 (1990). He has failed to do so.

First, the trial jury learned a great deal about Reid's incentive to testify for the People. Reid testified about the favorable plea he received and the dramatic effect it had on his sentencing exposure. He also acknowledged that the prosecutor had told him that, if he testified, he could or would receive a sentence lower than six to eighteen years imprisonment. The defendant's trial attorney drew the jury's attention to this agreement in his summation. He reminded the jury of the substantially reduced sentencing range Reid faced on his guilty plea and of the prosecutor's statement to him that he would most likely receive a sentence less than six to eighteen years, contrasting that with the seventy-five years to life he potentially face if he went to trial on the murder charges. "Now ask yourselves," defense counsel told the jury, "is this guy going to say whatever he has to say to get around this thing? I think he would say his mother was there." Defendant's exhibit 20, pp. 729-30.

Second, as the First Department held on direct appeal, the People presented "overwhelming" evidence at trial establishing that,

> after directing five occupants of the apartment to strip, defendant and his accomplices took their jewelry, money and drugs. When an accomplice announced that all occupants would be killed and opened fire at the huddled victims,

> defendant fired all five rounds contained in his shotgun at the group. All were hit by bullets, and three of the victims died. Two survivors identified defendant at trial as one of the two shooters, as did an accomplice who had agreed to testify against defendant in exchange for a favorable plea bargain.

Johnson, 181 A.D.2d at 509-10; see also People's exhibit 1, Respondent's brief on direct appeal (summarizing the evidence); defendant's exhibit 20.

Because there is no reasonable possibility that the promise to bring Reid's cooperation to the attention of the Parole Board, if made, would have affected the jury's verdict, this claim is denied pursuant to CPL § 440.30(4)(d).

The defendant's claim is also denied because he was in an adequate position to raise it in his previous CPL § 440 motion, but he did not do so. See CPL § 440.10(4)(c). The defendant's attempt to cast his claim as being based upon newly discovered evidence is unavailing. When moving for vacature based upon newly discovered evidence, the motion "must be made with due diligence after the discovery of such alleged new evidence." CPL § 440.10(1)(g). As noted above, Reid testified at the defendant's trial about the cooperation agreement he entered into with the People, and he was extensively cross-examined about its terms. See defendant's exhibit 20, pp. 429-431, 468-476. According to the defendant's own exhibits, he only attempted to obtain the parole records in 2008, some seventeen years after Reid's parole hearing.

INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant's ineffective assistance of counsel claim also fails. When a defendant raises the issue of ineffective assistance of counsel, the court must first "determine on [the] written submissions whether the motion can be decided without a

hearing," and the defendant is required to show that the facts he seeks to establish are "material and would entitle him to relief." People v. Satterfield, 66 N.Y.2d 796, 799 (1985) (citing CPL §§ 440.30[1]; 440.30[4][a]). Under New York law, to prevail on a claim of ineffective assistance, a defendant must demonstrate that his attorney failed to provide meaningful representation. People v. Benevento, 91 N.Y.2d 708, 713 (1998). Under federal law, a defendant must show, first, "that counsel's representation fell below an objective standard of reasonableness," and, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). While in New York the Strickland prejudice prong is not "applied [] with [] stringency," it is "a significant but not indispensable element in addressing meaningful representation." People v. Stultz, 2 N.Y.3d 277, 283-84 (2004).

The defendant faults his attorney for not effectively raising an alibi defense at trial. The defendant contends that to corroborate his claim that he was in Seattle at the time of the murders, he directed his attorney to obtain every flight log from Pan Am, United Airlines, Continental Airlines and TWA for the first ten days in January 1988, but he refused. The defendant also claims he told his attorney to contact his friends in Seattle as alibi witnesses, but again his attorney refused.

Initially, the defendant has failed to submit an affidavit from his attorney, who is currently registered to practice law in New York and has a publicly listed Bronx County office address. Nor has he presented any other evidence tending to substantiate his claim, such as affidavits from his supposed alibi witnesses. As noted earlier, although the

defendant maintains his alibi witnesses were intimidated by a police officer at the time of his trial, he has utterly failed to substantiate that claim, and he does not explain why he did not include affidavits from them thirty years later.

Since the defendant's conclusory, self-serving allegations are insufficient to warrant a hearing, see People v. Ozuna, 7 N.Y.3d 913, 915 (2006) (CPL § 440.10 motion based on ineffective assistance of counsel properly denied without a hearing where the defendant failed to submit affidavits corroborating his claim), his ineffective assistance of counsel claim is denied. CPL § 440.30(4)(b) (court may deny motion without a hearing where the moving papers do not contain sworn allegations tending to substantiate all the essential facts).

Additionally, there is nothing in the defendant's current allegations that could not have been raised in his 2004 CPL § 440 motion. Notably, in that motion he had argued that his attorney was ineffective for other reasons. The defendant's claim is, therefore, also denied pursuant to CPL § 440.10(3)(c) ("court may deny a motion to vacate a judgment when . . . [u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so").

The portions of the trial record provided by the defendant establish, not that his attorney provided ineffective assistance, but that he was thoroughly knowledgeable about the facts of the case, well-versed in the applicable legal principals and, faced with overwhelming evidence, zealously advocated on the defendant's behalf. Even assuming the defendant's attorney did not seek to obtain every flight record from four airlines

operating out of LaGuardia Airport for the first ten days of 1988, his actions would not render him ineffective, especially given the defendant's admission that he used aliases when flying and could not recall the alias he used when he flew to Seattle. See People v. Flowers, 28 N.Y.3d 536, 541 (2016) (attorney will not be deemed ineffective for failing to pursue arguments that have little or no chance of success). Likewise, as set forth above, there is no indication in the police interview reports, which defense counsel possessed, that the alleged Seattle "witnesses," including Troy Taylor and Gladys Taylor (AKA June Simmons), would have provided evidence supporting his alleged alibi. See People v. Chen, 293 A.D.2d 362 (1st Dept. 2002) (hind-sight disagreement over trial strategy insufficient to establish ineffective assistance of counsel).

The defendant has failed to meet his burden of demonstrating that his attorney did not provide meaningful representation, Benevento, 91 N.Y.2d at 713, that his "representation fell below an objective standard of reasonableness," or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 688, 694. Since his motion fails under both the state and federal standards, the defendant's ineffective assistance of counsel motion is denied.

DNA TESTING

The defendant moves to have DNA testing conducted on a leather jacket he claims was recovered from the sidewalk in front of the building where the shooting took place, alleging that the DNA results would exonerate him because the jacket belonged to the "True Killer." Such an application may only be granted if the court determines that "any

evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment," and "if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonably probability that the verdict would have been more favorable to the defendant." CPL § 440.30(1-a)(a)(1). The defendant bears the burden of establishing there exists a "reasonable probability" the DNA results would have resulted in a more favorable verdict. See People v. Sposito, 30 N.Y.3d 1110 (2018). The defendant's baseless, unsubstantiated allegation falls far short of that burden.

The defendant claims that he was informed by police detectives that "crackheads" told them that a bloody, black leather jacket recovered near the crime scene was worn by the defendant during the shooting. However, other than a forensic report indicating photographs had been taken of the "sidewalk front of 1686 Randall Ave. showing black jacket (Blood stained)," defendant's exhibit 14, the defendant has provided no substantiation for his claim that unnamed witnesses identified that jacket as having been worn by the defendant. Neither Timothy Clark nor Samuel Hull testified that the defendant wore a black leather jacket during the shooting. Likewise, Detective Wayne Barney, of the New York Police Department Crime Scene Unit, did not mention during his testimony that a black leather jacket belonging to the defendant was recovered from the vicinity of the crime scene.

In any case, the absence of the defendant's DNA and/or the presence of DNA belonging to others would not exonerate the defendant or prove someone else committed the crimes. The two surviving victims, as well as one of the defendant's accomplices, all

of whom knew the defendant prior to the incident, testified against him and identified him as one of the shooters. At trial, the defendant's attorney exploited the fact no fingerprint evidence from the defendant was recovered from the apartment where the shooting occurred, despite the prolonged nature of the crime, that the weapons were not recovered, and that the trial witnesses had criminal records. Yet, by virtue of their guilty verdict, the jury credited the witnesses' testimony. In the best case scenario for the defendant, that is, DNA is found on the jacket but is not a match to him, it is complete speculation that the jury would have concluded that this fact alone exonerated the defendant in the face of the overwhelming evidence of his guilt.

Since there is no "reasonable probability" that the results of DNA testing on the jacket would have led to a verdict more favorable to the defendant, his motion is denied. See CPL § 440.30(1-a)(a)(1).

THE CPL § 440.20 MOTION

The defendant argues that the consecutive sentences imposed upon his conviction are unlawful because: (1) they constituted a punishment by the trial judge for exercising his right to go to trial; (2) they violated the Eighth Amendment prohibition against "cruel and unusual punishment;" (3) they were improper because the shootings occurred "in temporal proximity of each other" and were therefore part of a single criminal transaction; (4) they violated the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000); and (5) the omission of the phrase "with one another" in the sentence and commitment sheets required that the sentences to be treated as having been imposed concurrent to one another.

On appeal, the defendant argued that he was improperly penalized for exercising his right to go to trial, pointing to the fact that the sentence exceeded the one offered as part of a plea deal. The Appellate Division rejected that claim. Johnson, 181 A.D.2d at 359 ("We have reviewed defendant's remaining claims and find them to be both unpreserved for appellate review as a matter of law and meritless"). The defendants claim is, therefore, denied. CPL § 440.20(2) ("the court must deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence"). In any event, the defendant has provided no evidence that the court sentenced him based upon his failure to accept a plea, rather than based upon the brutal nature of the triple-homicide and attempted murders of Timothy Clark and Samuel Hull.

The defendant also argued on appeal that his sentence violated the Eight Amendment's ban on cruel and unusual punishment, a claim the First Department also rejected. However, the defendant's current Eighth Amendment claim is based on Miller v. Alabama, 567 U.S. 460 (2012), a Supreme Court decision issued after his appeal was decided, which the Court has determined should be applied retroactively. See Montgomery v. Louisiana, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). In Miller, the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole under a mandatory sentencing scheme that precluded consideration of the juvenile's age. While the defendant was only seventeen years old at the time of his crime, his claim is nonetheless unavailing because, unlike in Miller and the other cases

upon which he relies, his convictions did not carry with them mandatory sentences of life without parole or its functional equivalent.

In any case, there is no indication in the record, and the defendant has provided no proof, that the judge failed to take the defendant's age into account. The defendant's trial attorney specifically pointed out to the judge during the sentencing that "the fact that the [defendant] was seventeen ... is an important factor to take into consideration." Defendant's exhibit 40, sentencing minutes, p. 12. And while, in imposing sentence, the judge did not explicitly mention the defendant's age, he described the nature of the crimes of the defendant's horrific crimes in a way that made clear that, in the lawful exercise of his discretion, he concluded that the consecutive sentences he was about to impose were appropriate even after taking the defendant's age into consideration. Specifically, noting that the sentences "reflect[ed] not only ... my views but the unanimous views of the Judicial Sentencing Board," he observed that this was not the kind of murder case "we normally encounter," and that it could "clearly be described as a massacre." Defendant's exhibit 40, pp. 16-17.

The consecutive sentences the judge imposed were lawful under the sentencing statutes. The five victims were shot by the defendant and co-defendant Nelson Burgos, the defendant wielding a sawed-off shotgun and Burgos a handgun. Clark was shot with a handgun; the other four victims with a shotgun. Upon each of his three convictions of second-degree murder for killing Waverly Waddler, Derrick Coleman and Michael Allen, the defendant was sentenced to twenty-five years to life in prison. Penal Law §§ 70.00(2)(a) and (3)(a). Upon each of his two convictions of attempted second-degree

murder for the shootings of Clark and Hull, he was sentenced to eight and one-third to twenty-five years in prison. Penal Law § 70.00(2)(b) and (3)(b). Those sentences, for the shootings of five different victims using two different guns, were properly imposed consecutively. See Penal Law § 70.25; People v. Smith, 171 A.D.3d 1102 (2d Dept. 2019); People v. Rivera, 262 A.D.2d 31 (1st Dept. 1999).

The Supreme Court's decision in Apprendi v New Jersey, 530 US 466 (2000) did not render the defendant's sentence in this case unconstitutional. See People v. Holmes, 92 A.D.3d 957, 957–58 (2d Dept. 2012) ("The defendant's contention that New York's sentencing scheme with respect to the imposition of consecutive sentences was rendered unconstitutional by Apprendi v New Jersey ... and its progeny ... is without merit") (citations omitted); People v. Murray, 37 A.D.3d 247 (1st Dept. 2007) (Apprendi not violated because "[i]n imposing consecutive sentences for defendant's convictions of robbery in the first degree and assault in the first degree and a concurrent sentence on the conviction of criminal possession of a weapon in the second degree, the court did not engage in any fact-finding, but instead made a legal determination based on facts already found by the jury").

No specific language is mandated in a sentence and commitment sheet in order to render the imposition of consecutive sentences valid. Here, in the sentence and commitment sheets for each conviction, the box labeled "consecutively" was checked off and handwritten next to that were all the counts that specific sentence was to run consecutive with. See defendant's exhibit 21.

Accordingly, the defendant's motion is denied because the defendant has not established his sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law." CPL § 440.20(1).

THE MOTIONS FOR CONTEMPT ORDER AND POOR PERSON RELIEF

The defendant's request that the Court hold the People in contempt for failing to timely respond to his CPL §§ 440.10, 440.20 and DNA motions is denied. The People made appropriate extension requests as needed, which were granted by the court, and the People's response was filed one day before the February 21, 2020 return date. In light of the multiple motions filed by the defendant, multiple claims within each motion, and voluminous exhibits accompanying his motions, none of the People's requests for additional time to respond were unreasonable.

The defendant's motion for poor person relief is also denied. CPLR § 1101 authorizes the court in which an action is "triable" or to which an appeal has been or will be taken to grant poor person relief. The defendant has neither a triable action nor an appeal before this Court. Additionally, while County Law § 722(4) authorizes the assignment of counsel to indigent defendants, it does so only when a hearing has been ordered pursuant to CPL § 440. County Law § 722(5), as amended,

> includes authorization for representation by appellate counsel, or an attorney selected at the request of appellate counsel by the administrator of the plan in operation in the county (or city in which a county is wholly contained) where the conviction was entered, with respect to the preparation and proceeding upon a motion, pursuant to article four hundred forty of the criminal procedure law, to vacate a judgment or to set aside a sentence.

No such request has been made on the defendant's behalf by appellate counsel or an attorney selected at appellate counsel's request, and upon review of the defendant's claims in his motion, to the extent authorized, the Court finds requesting former that such counsel assist the defendant with his *pro se* CPL § 440 motions unwarranted.

CONCLUSION

For the reasons set forth above, the defendant's CPL §§ 440.10, 440.20 and 440.30(1-a)(a)(1) motions, motion for an Order of Contempt, and motion for Poor Person relief are all summarily denied.

Dated: July 17, 2020

MARTIN MARCUS
J.S.C.

Additional material from this filing is available in the Clerk's Office.