Docket No. _____

In THE

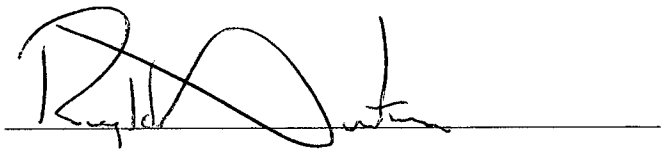
United States Supreme Court

In re., REGINALD SWINTON, Petitioner

ON PETITION FOR WRIT OF HABEAS CORPUS

Appendices

Book One of Four



REGINALD SWINTON,

PETITIONER, PRO-SE

SULLIVAN CORRECTIONAL FACILITY

325 RIVERSIDE DRIVE

P.O. BOX 116, #07-A-3279

FALLSBURG, NEW YORK 12733-0116

INDEX TO APPENDICES

APPENDIX

A

INVESTIGATION

Date

A. D. A.

Steno.

Ind. Bur. A. D. A.

GRAND JURY

Date

A. D. A.

Steno.

Witnesses:

No. 3109/74

Filed, 16 day of Dec, 1974

THE PEOPLE OF THE STATE OF NEW YORK

vs.

[redacted],

Defendant

INDICTMENT

RAPE IN THE FIRST DEGREE,
SEXUAL ABUSE IN THE FIRST DEGREE,
SEXUAL MISCONDUCT

Penal Law § 130.35, 130.65, 130.20
[redacted]

MARIO MEROLA,
District Attorney

A TRUE BILL

Foreman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK,

— against —

REGINALD SWINTON,

Defendant

THE GRAND JURY OF THE COUNTY OF BRONX, by this indictment, accuse the defendant of the crime of RAPE IN THE FIRST DEGREE, committed as follows:

The defendant in the County of Bronx, on or about November 12, 1974, being a male, engaged in sexual intercourse with one [redacted] a female, by forcible compulsion.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SEXUAL ABUSE IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about November 12, 1974, subjected the said [redacted] to sexual contact, by forcible compulsion.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SEXUAL MISCONDUCT, committed as follows:

The defendant, in the County of Bronx, on or about November 12, 1974, being a male, engaged in sexual intercourse with the said [redacted], a female, without her consent.

XXXXXXXXXXXX

FOURTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of SODOMY IN THE FIRST DEGREE,

committed as follows:

The said defendant ,

in the County of Bronx, on or about November 12, 1974 engaged in deviate sexual intercourse with the said [redacted] by forcible compulsion.

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SEXUAL ABUSE IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about November 12,1974 subjected the said [redacted] to sexual contact by forcible compulsion.

SIXTH COUNT :

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of BURGLARY IN THE SECOND DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about November 12,1974 knowingly entered and remained unlawfully in the dwelling of the said [redacted] at night, with intent to commit a crime therein.

SEVENTH COUNT:

THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of RAPE IN THE FIRST DEGREE, committed as follows:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant of the crime of SODOMY IN THE FIRST DEGREE,

committed as follows:

The said defendant ,

in the County of Bronx, on or about November 12, 1974 engaged in deviate sexual intercourse with the said [redacted] by forcible compulsion.

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SEXUAL ABUSE IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about November 12,1974 subjected the said [redacted] to sexual contact by forcible compulsion

SIXTH COUNT :

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of BURGLARY IN THE SECOND DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about November 12,1974 knowingly entered and remained unlawfully in the dwelling of the said [redacted] at night, with intent to commit a crime therein.

SEVENTH COUNT:

THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of RAPE IN THE FIRST DEGREE, committed as follows:

The defendant in the County of Bronx, on or about April 25, 1974 being a male, engaged in sexual intercourse with one [redacted] a female, by forcible compulsion.

EIGHTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of **SEXUAL ABUSE IN THE FIRST DEGREE,**

committed as follows:

The said defendant ,

in the County of Bronx, on or about **April 25, 1974 subjected the said [redacted] to sexual** contact, **by forcible compulsion.**

NINTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SEXUAL MISCONDUCT, committed as follows:

The defendant, in the County of Bronx, on or about April 25, 1974 being a male, engaged in sexual intercourse with the said [redacted] a female, without her consent.

TENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SODOMY IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about April 25, 1974 engaged in deviate sexual intercourse with the said [redacted] by forcible compulsion.

ELEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SEXUAL ABUSE IN THE FIRST DEGREE, committed as follows:

TWELFTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of BURGLARY IN THE SECOND DEGREE,

committed as follows:

The said defendant ,

in the County of Bronx, on or about April 25, 1974 knowingly entered and remained unlawfully in the dwelling of the said [redacted] at night, with intent to commit a crime therein.

THIRTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant, of the crime of ROBBERY IN THE THIRD DEGREE committed as follows:

The said defendant, in the County of Bronx, on or about April 25, 1974 forcibly stole property from the said [redacted] having an aggregate value of approximately $ 20.00, to wit, lawful U.S. currency.

FOURTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about January 23, 1974 forcibly stole certain property from one [redacted] having an aggregate value of approximately $ 30.00, to wit, lawful U.S. currency and in the course of the commission of the crime and of the immediate flight therefrom, he was armed with and used and threatened the immediate use of dangerous instrument, to wit, a knife.

The said defendant ,

in the County of Bronx, on or about April 25, 1974 knowingly entered and remained unlawfully in the dwelling of the said [redacted] at night, with intent to commit a crime therein.

THIRTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant, of the crime of ROBBERY IN THE THIRD DEGREE committed as follows:

The said defendant, in the County of Bronx, on or about April 25, 1974 forcibly stole property from the said [redacted] having an aggregate value of approximately $ 20.00, to wit, lawful U.S. currency.

FOURTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about January 23, 1974 forcibly stole certain property from one [redacted] having an aggregate value of approximately $ 30.00, to wit, lawful U.S. currency and in the course of the commission of the crime and of the immediate flight therefrom, he was armed with and used and threatened the immediate use of a dangerous instrument, to wit, a knife.

FIFTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said defendant of the crime of POSSESSING A WEAPON, DANGEROUS INSTRUMENT AND APPLIANCE, as a Misdemeanor, committed as follows:

The defendant, in the County of Bronx, on or about January 23, 1974 carried and possessed a knife with intent to use the same unlawfully against another.

SIXTEENTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of **AN ATTEMPT TO COMMIT THE CRIME OF RAPE IN THE FIRST DEGREE**

committed as follows:

The said defendant ,

in the County of Bronx, on or about **January 23, 1974, being a male, Attempted to engage in sexual intercourse with the said [redacted], a female by forcible compulsion.**

MARIO MEROLA,

District Attorney.

INVESTIGATION

:e

D. A.

no.

l. Bur. A. D. A.

GRAND JURY

te Dec. 11, 1974 B Panel

D. A. BASSIK

:no. TUCKMAN

itnesses:

Cal. No. 3201/74 3042/74	No.

Filed, 16 day of Dec, 1974

THE PEOPLE

vs.

REGINALD SWINTON,

Defendant

INDICTMENT

VIO. SEC. 110-~~135.30~~ 130.35,130.65,140.30,160.15, 265.01, ~~135.30~~ 130.35, 130.20,130.50, 110-160.15

MARIO MEROLA

District Attorney

A True Bill

Walter Langmaack
Foreman

COPY

Form 1B- 20M-313085(72)

COPY

SUPREME COURT

IN AND FOR THE COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK

against

REGINALD SWINTON,

Defendant

3201-74

The Grand Jury of the County of Bronx, by this indictment accuse defendant ,

of the CRIME OF AN ATTEMPT TO COMMIT THE CRIME OF RAPE IN THE FIRST DEGREE,

committed as follows:

The said defendant ,

in the County of Bronx, on or about September 9, 1974, being a male attempt to engage in sexual intercourse with one [redacted] a female, by forcible compulsion.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime ~~xx~~ of SEXUAL ABUSE IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about September 9, 1974 subjected the said [redacted] to sexual contact, by forcible compulsion.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of BURGLARY IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about September 9, 1974 knowingly entered and remained unlawfully in the dwelling of the said [redacted] at night, with intent to commit a crime therein, and in

FOURTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of **ROBBERY IN THE FIRST DEGREE,**

committed as follows:

The said defendant ,

in the County of Bronx, on or about **September 9, 1974, forcibly stole certain property from the said [redacted] having an aggregate value of approx. $20.00, to wit, lawful money and in the course of the commission of the crime and of the immediate flight therefrom, used and ~~threatened~~ threaten the immediate use of a dangerous instrument, to wit, ~~a~~ a knife.**

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said defendant of the crime of CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH DEGREE, committed as follows:

The said defendant, in the County of Bronx, on or about September 9, 1974, possessed a dangerous instrument, to wit, a knife, with intent to use the same unlawfully against another.

SIXTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of **RAPE IN THE FIRST DEGREE,**

committed as follows:

The said defendant ,

in the County of Bronx, on or about **November 17, 1974, being a male, engaged in sexual intercourse with one [redacted], a female, by forcible compulsion.**

SEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment further accuse said defendant of the crime of SEXUAL ABUSE IN THE FIRST DEGREE, committed as follows:

Said defendant, in the County of Bronx, on or about November 17, 1974, subjected the said [redacted] to sexual contact, by forcible compulsion

EIGHTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment further accuse said defendant of the crime of SEXUAL MISCONDUCT, committed as follows:

Said defendant, in the County of Bronx, on or about November 17, 1974, being a male, engaged i sexual intercourse with the said [redacted], a female, without her consent.

NINTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of SODOMY IN THE FIRST DEGREE,

committed as follows:

The said defendant ,

in the County of Bronx, on or about November 17, 1974 engaged in deviate sexual intercourse with the said [redacted] by forcible compulsion.

TENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant of the crime of SEXUAL ABUSE IN THE FIRST DEGREE, committe as follows:

The defendant, in the County of Bronx, on or about November 17, 1974 subjected the said [redacted] to sexual contact by forcible compulsio

ELEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said defendant of the crime of BURGLARY IN THE FIRST DEGREE, committed as follows:

The defendant, in the County of Bronx, on or about November 17, 1974 knowingly entered and remained unlawfully in the dwelling of the said [redacted] at night, with intent to commit a crime therein, and in effecting entry and while in the said dwelling and in the immediate flight therefrom, used and threatened the immediate use of a dangerous instrument, to wit, a scissors.

TWELFTH COUNT:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendant , of the crime of AN ATTEMPT TO COMMIT THE CRIME OF ROBBERY IN THE FIRST DEGREE, committed as follows:

The said defendant ,

in the County of Bronx, on or about November 17, 1974 attempted to forcibly steal certain property from the said [redacted] and in the course of the commission of the crime and of the immediate flight therefrom he used and threatened the immediate use of a dangerous instrument, to wit, [redacted] swissors.

THIRTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said defendant of the crime of CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH DEGREE,

committed as follows:

The defendant, in the County of Bronx, on or about November 17,1974 possessed a dangerous instrument, to wit, a swissors with intent to use the same unlawfully against another.

MARIO MEROLA,
District Attorney.

APPENDIX

K

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR AN ORDER AUTHORIZING THE DISTRICT COURT
TO CONSIDER A SUCCESSIVE OR SECOND HABEAS CORPUS APPLICATION
PURSUANT TO 28 U.S.C. § 2244(b), 2254
BY A PRISONER IN STATE CUSTODY

Name
REGINALD SWINTON

Place of Confinement	Prisoners Number
SULLIVAN CORRECTIONAL FACILITY	07-A-3279

Instructions—Read Carefully

(1) This motion must be legibly handwriting or typewritten and signed by the movant under penalty of perjury. All documents must be on 8½ x 11 inch paper; the Court will not accept other paper sizes. Any false statements of a material fact may serve as the basis for prosecution and conviction for perjury.

(2) All questions must be, answered concisely in the proper space on the form.

(3) Movant seeking leave to file a second or successive petition is required to use this form. In capital cases only, the use of this form is optional.

(4) Movant may use additional pages only to explain additional grounds for relief and set forth additional facts and documents supporting any alleged grounds. Separate petitions, motions, briefs, arguments, etc. should not be submitted

(5) In capital cases only, the use of this form is optional, and separate, petitions, motions, briefs, arguments, may be submitted.

(6) Movant must show in the motion to the Court of Appeals that the claim to be presented in a second successive habeas corpus application was not presented in a prior application and that

(1) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(2) (a) the facts underlying the claim could not have been discovered previously through the exercise of due diligence; and

(b) those facts, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.
28 U.S.C. § 2244 (b)

(7) Send the complete motion, the original and two copies, to:

Clerk of Court
United States Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

MOTION

1. (a) Name and location of court entered the judgment of conviction under attack:

BRONX COUNTY SUPREME COURT, 851 GRAND CONCOURSE, BRONX N.Y. 10451

(b) Case number: 3109/1974 AND 3201/1974

2. Date of judgment of conviction: MAY 13, 1975\ September 5, 1975

3. Length of sentence: 5-15 YEARS Sentencing Judge: JOSEPH QUINN

4. Nature of offense for which you were convicted: RAPE IN THE FIRST DEGREE

5. Have you ever filed a post-conviction petition, application, or motion for collateral relief in any federal court related to this conviction and sentence?

Yes **X** No ☐
If "yes," how many times? TWICE (if more than one, complete 6 and 7 below as necessary)
(a) Name of court: SOUTHERN DISTRICT COURT OF NEW YORK

(b) Case number: 77 CIV. 2532

(c) Nature of proceeding: FEDERAL WRIT OF HABEAS CORPUS

(d) Grounds raised (list all grounds; use extra page if necessary): SEE, APPENDIX "A"

(e) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes ☐ No **X**

(f) Result: N/A

(g) Date of result: JANUARY 5, 1978

6. As to any second federal petition, application, or motion, give the same information:

(a) Name of court: SOUTHERN DISTRICT COURT OF NEW YORK

(b) Case number: 15-CV-2821(VSB)

(c) Nature of proceeding: RULE 60(b) RELIEF

(d) Grounds raised (list all grounds; use extra pages if necessary): SEE, APPENDIX "B"

(e) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ☐ No **X**
(f) Result: _____
_____
(g) Date of result: _____

7. As to any third federal petition, application, or motion, give the same information: **N/A**
(a) Name of court: _____
(b) Case number: _____
(c) Nature of proceeding: _____
_____
_____
(d) Grounds raised (list all grounds; use extra pages if necessary): _____
_____
_____
_____
_____
(e) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ☐ No ☐
(f) Result: _____
_____
(g) Date of result: _____

8. Did you appeal the result of any action taken on your federal petition, application, or motion? (Use extra pages to reflect additional petitions if necessary)
(1) First petition, etc. No **X** Yes ☐ Appeal No. _____

(2) Second petition etc. No ☐ Yes **X** Appeal No. 17-2105

(3) Third petition, etc. No ☐ Yes ☐ Appeal No. N/A

9. If you did not appeal from the adverse action on any petition, application, or motion, explain briefly why you did not: DID NOT KNOW OR MADE AWARE OF RIGHT

10. State concisely every ground on which you now claim that you are being, held unlawfully Summarize briefly the facts supporting each ground

A. Ground one: APPELLATE COUNSEL DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO PRESENT THE COURT ACCEPTANCE OF AN INVOLUNTARY GUILTY PLEA; AND SENTENCING WITHOUT REASONABLE CONSIDERATION OF AN ELIGIBLE DEFENDANT FOR YOUTHFUL OFFENDER TREATMENT AS LAWFULLY REQUESTED.

Supporting FACTS (tell your story briefly without citing cases or law):

The stenographic record of the May 12, 1975, proceeding demonstrates petitioner voiced vehemently his rejection and refusal to plead guilty to crimes he did not do. Both he and counsel retained to represent him, Robert Sackett, moved to be relieved from further service of the other. But on May 13, 1975, defendant was coerced and reluctantly entered into a guilty plea. However, not made known beforehand to this 19-year-old, first-time felony offender, is that the guilty plea is conditioned on a waiving of his right to be lawfully considered for Youth Offender treatment. Formerly retained attorney, Mr. Robert Sackett, did not advise petitioner of this particular direct consequence of the guilty plea before or after its acceptance. Neither did Judge Quinn during the allocution of the taking of the guilty plea, informs or ensures that petitioner before pleading guilty had a full understanding of what the plea connotes and all its direct consequences. A fact former attorney Sackett did not object to. Petitioner, with newly retained counsel, Stephen Hyman, did move to withdraw the involuntary guilty plea before sentencing, but is not provided by the court, the prosecution and formerly retained counsel with information regarding all the direct consequences made part of the guilty plea deal. After a hearing the court denied the motion to withdraw. It is at petitioner's re-sentencing proceeding, held on September 5, 1975, and upon newly retained counsel, Stephen Hyman's timely request that petitioner be considered for Youthful Offender treatment, that petitioner and counsel are informed and made aware for the first time, from the Sentencing Court's terse, "No", response and the prosecution's admission, that petitioner had been previously made ineligible, for youthful offender consideration, and that this procedural right had been waived away. Newly retained counsel duly lodged an objection to the Sentencing Court actions, noting that, "that too, would be in consideration on our appeal with regard to the correctness of this plea". But he failed to raise the constitutional errors complained of, which forms the basis for this successive petition request, on the direct appeal. Appendix "D", and "E", attached.

Was, this claim raised in a prior federal petition, application, or motion?
Yes ☐ No **X**

Does this claim rely on a "new rule of constitutional law?" Yes **X** No ☐
If "yes," state the new rule of law (give case name and citation):
EVITTS V. LUCEY, 469 U.S. 387 (1985)
STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984)

Does this claim rely on "newly discovered evidence?" Yes ☐ No **X**
If "yes," briefly describe the newly discovered evidence, attach a copy (if available), state when you obtained it, and why it was not previously available to you: N/A

B. Ground two: N/A

Supporting FACTS (tell your story briefly without citing cases or law):

Was, this claim raised in a prior federal petition, application, or motion?
Yes ☐ No ☐

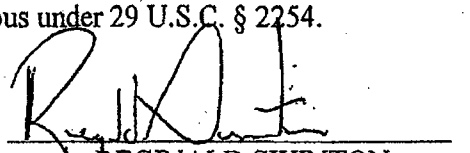
Does this claim rely on a "new rule of constitutional law?" Yes ☐ No ☐
If "yes," state the new rule of law (give case name and citation):

Does this claim rely on "newly discovered evidence?" Yes ☐ No ☐
If "yes," briefly describe the newly discovered evidence, attach a copy (if available), state when you obtained it, and why it was not previously available to you:

[Additional grounds and facts and documents supporting any alleged grounds may be set forth on extra pages if necessary]

11. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes ☐ No **X**
If yes, Name of court _____ case number _____

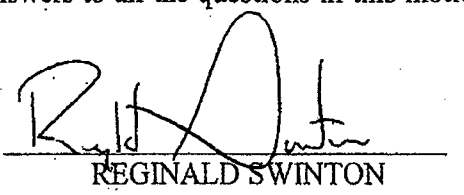
Wherefore, movant prays that the United State Courts of Appeals for the Second Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Petition for a Writ of habeas Corpus under 29 U.S.C. § 2254.



REGINALD SWINTON

I declare under Penalty of Perjury that my answers to all the questions in this motion are true and correct.

Executed on **OCTOBER 24, 2022**
[date]



REGINALD SWINTON

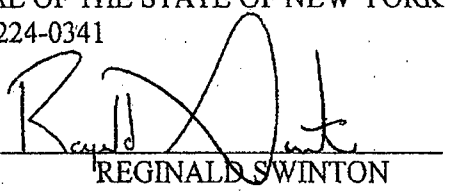
PROOF OF SERVICE.

Movant must send a copy of this motion and all attachments to the attorney general of the state in which applicant was convicted.

I certify that on OCTOBER 24, 2022, I mailed a copy of this motion*

and all attachments to HON. LETITIA A. JAMES, at the following address:

NEW YORK STATE ATTORNEY GENERAL OF THE STATE OF NEW YORK
THE CAPITOL, ALBANY NEW YORK 12224-0341



REGINALD SWINTON

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* Pursuant to FRAP 25 (a), "Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day of filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

MANDATE

S.D.N.Y.—N.Y.C.
77-cv-2532
15-cv-2812
Broderick, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of November, two thousand twenty-two.

Present:

Guido Calabresi,
Gerard E. Lynch,
Joseph F. Bianco,
Circuit Judges.

Reginald Swinton,

Petitioner,

v. 22-6516

Walter Fogg,

Respondent.

Petitioner moves for leave to file a successive 28 U.S.C. § 2254 petition based on new rules of constitutional law. Upon due consideration, it is hereby ORDERED that the motion is DENIED.

First, Petitioner may not challenge his 1975 judgment of conviction under § 2254 since he has not satisfied the jurisdictional "in-custody" requirement of § 2254 as to that judgment. *See Maleng v. Cook*, 490 U.S. 488, 490–91 (1989); *Williams v. Edwards*, 195 F.3d 95, 96 (2d Cir. 1999). New York State records indicate that Petitioner's term of imprisonment for the 1975 judgment has expired and that he is currently in custody pursuant to a 2007 judgment of conviction.

Second, even if Petitioner's papers are construed as directly challenging his 2007 sentence as having been improperly enhanced by his now-expired 1975 conviction, he has not made a prima facie showing that the requirements of 28 U.S.C. § 2244(b)(2) are satisfied, or, if considered pursuant to pre-Anti-Terrorism and Effective Death Penalty Act ("AEDPA") law, that the proposed § 2254 petition presents grounds that would permit the district court to grant relief. *See*

MANDATE ISSUED ON 12/20/2022

McCleskey v. Zant, 499 U.S. 467, 493–94 (1991); *Torres v. Senkowski*, 316 F.3d 147, 151–54 (2d Cir. 2003). Such a claim may only be brought under limited circumstances and Petitioner has not made a showing that those circumstances apply here. *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 404–06 (2001); *Daniels v. United States*, 532 U.S. 374, 382 (2001).

However, even if Petitioner's claims are not barred under *Lackawanna* and *Daniels*, Petitioner has not otherwise made the required showing under pre-AEDPA law or AEDPA. Under pre-AEDPA law, Petitioner is required to make a showing of "cause and prejudice" or that a fundamental miscarriage of justice would result if his claims are not considered on the merits. *See McCleskey*, 499 U.S. at 494–95; *Torres*, 316 F.3d at 152–53. Petitioner has not made a showing of cause and, in fact, the factual predicates for his claims—which he has raised in previous proceedings—appear to have been available to him since his sentencing. He also has not made a showing that a fundamental miscarriage of justice would result, because he has not made the required showing of factual innocence. *See McCleskey*, 499 U.S. at 494–95 (stating that a petitioner can make a showing of a fundamental miscarriage of justice by "supplement[ing] a constitutional claim with a 'colorable showing of factual innocence.'").

Petitioner also has not made a prima facie showing under AEDPA. To the extent Petitioner repeats claims that he raised in his prior § 2254 proceedings, they must be dismissed under 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). However, even if both of Petitioner's claims are considered new, he has not made a showing that they satisfy § 2244(b)(2). Petitioner does not rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). The Supreme Court decisions cited by Petitioner—*Evitts v. Lucey*, 469 U.S. 387 (1985), and *Strickland v. Washington*, 466 U.S. 688 (1984)—are not new rulings and could have been raised in his prior § 2254 proceedings. Petitioner also has not demonstrated that the facts presented in his motion "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i), or that those facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty," 28 U.S.C. § 2244(b)(2)(B)(ii).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

APPENDIX

P

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

REGINALD SWINTON,

Defendant.

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DECISION AND ORDER
INDICTMENT NO. 3109/74

LIEB, J.

By pro se motion (the "Motion") dated April 30, 2019,[1] the defendant moves for an Order, pursuant to Criminal Procedure Law ("CPL") § 440.10 (1)(f) and (h) and § 440.20 (1), vacating his September 5, 1975, judgment of conviction, following a guilty plea, for one count of Rape in the First Degree, or to set aside his sentence. The defendant argues (1) the trial court abused its discretion in denying a continuance to allow the defendant to retain new counsel; (2) the defendant's guilty plea was not knowing and voluntary; and (3) the trial court abused its discretion in refusing to grant a continuance to newly retained counsel in connection with the defendant's motion to withdraw his guilty plea. By Affirmation in Opposition, dated September 15, 2020, and filed on September 16, 2020, the People oppose the Motion.[2] For the reasons that follow, the defendant's motion to vacate this 45-year-old conviction, or to set aside the sentence, is denied.

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1 The Notice of Motion was accompanied by the defendant's affidavit, sworn to the 3rd day of April, 2019 (the "Affidavit in Support"), and filed on August 1, 2019, and then supplemented on December 18, 2019, by the defendant's Memorandum of Law (the "Memorandum in Support").

2 The Affirmation in Opposition was delayed because of difficulties obtaining the file and further difficulties occasioned by the global pandemic.

PROCEDURAL HISTORY

A. Charges

The Court sets forth a synopsis of the relevant facts, based on the court file, the exhibits attached to the Motion, and the exhibits attached to the Affirmation in Opposition:[3]

In December 1974, the defendant was charged by Indictment 3109/74 and Indictment 3201/74 with a total of three counts of Rape in the First Degree, two counts of Attempted Rape in the First Degree, three counts of Sodomy in the first Degree, two counts of Robbery in the First Degree, two counts of Burglary in the First Degree, and seventeen lesser charges. These charges arose out of incidents involving five different women on five different occasions. The two indictments were consolidated for trial. The defendant was represented by retained counsel, the firm of Rothblatt, Seijas and Peskin, by Robert A. Sackett, Esq.

On or about May 9, 1975, the defendant was charged, under Criminal Court Docket Number X511485-75[4], with Assault in the First Degree, and related charges, in connection with an alleged attempt to escape from a holding pen in the Bronx County Supreme Court. Affirmation in Opposition, ¶ 7.

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[3] The eleven exhibits attached to the Motion papers are lettered A through K. Exhibit G comprises 24 pages of the transcript of proceedings that took place on May 12, 1975, and will be referred to as "May 12, 1975, Tr., p. _____." Exhibit H consists of the transcript of the plea proceeding that took place on May 13, 1975, and will be referred to as "Plea Tr., p. _____." Exhibit I contains a partial transcript of the hearing on the defendant's plea withdrawal application and the subsequent sentencing proceedings, both of which took place on August 6, 1975, and will be referred to as "August 6, 1975, Tr., p. _____." There are ten pages that are missing from Exhibit I's August 6, 1975, transcript. Exhibit K consists of the transcript of the defendant's resentencing on September 5, 1975, and will be referred to as "Resentencing Tr., p. _____." There are

There are two exhibits attached to the Affirmation in Opposition. People's Exhibit One consists of the defendant's Appellate Brief filed on June 3, 1976, (referred to herein as the "Appellate Brief, p. _____") and the People's Responsive Brief, dated April, 1976 and referred to herein as the "Responsive Appellate Brief, p. _____." The People's Exhibit Two is the People's Affirmation in Opposition to the defendant's motion for a writ of error coram nobis, which will be referred to as "Affirmation in Opposition to Coram Nobis Motion."

[4] The Criminal Court Docket Number is set forth as "X-51485/75" in the Affirmation in Opposition, but as "X-5114851" in the transcript of the May 12, 1975, proceeding and as "X514851" in the transcript of the May 13, 1975 plea proceeding. _____

According to the Pre-Sentence Report, the defendant's date of birth is September 2, 1955. Defendant's Exhibit J.

B. Pre-Trial Proceedings

On May 7, 1975, a Wade hearing – at which complainants testified -- began and was continued until May 12, 1975. Appellate Brief, p. 2; May 12, 1975, Tr., p. 296.

On May 12, 1975, before further proceedings on the Wade motion, the parties informed the Court that they had reached a disposition. However, during the allocution, the defendant maintained his innocence and requested time to get new counsel. After a recess, granted at the request of the parties, Mr. Sackett requested to be relieved. The Court terminated the plea proceeding and denied the defense application for a continuance to obtain new counsel, finding that "the application made by defense counsel upon the request of the defendant is no more than a ploy to stave off the trial of these causes." May 12, 1975, Tr., p. 315. Thereafter, the Court heard argument on the defendant's motion to suppress the identification testimony of the witnesses and denied that motion. Then the Court sent for a panel of jurors, a prospective juror was sworn as a trial juror, and then that juror and the rest of the panel of prospective jurors were excused until the next day. Appellate Brief, p. 6; August 6, 1975, Tr., p. 16.

On May 13, 1975, Mr. Sackett advised the Court that he had met with the defendant for almost two hours that morning and that the defendant had informed him that he wished to accept the People's plea offer and to plead guilty to "the commission of the crime of rape in the first degree, under the first count of the Indictment No. 3109 of 1974, to cover all of the counts contained in that indictment, and...in full satisfaction of the other indictment, No. 3201 of 1974," and the pending

Criminal Court case. May 13, 1975 Tr., p. 2. The defendant then entered a plea of guilty to one count of Rape in the First Degree. [5]

On the date of sentence, August 6, 1975, newly retained counsel, Stephen Hyman of the firm of Kunstler, Kunstler, Hyman and Goldberg, appeared on behalf of the defendant, and Mr. Sackett was relieved. New counsel informed the Court that the defendant wished to withdraw his guilty plea. When the Court stated that it would conduct a hearing as to the voluntariness of the plea, new defense counsel requested an adjournment of the hearing, but the application was denied,[6] and the matter put over until the afternoon. After the hearing, at which the defendant testified, the Court denied the defendant's motion to withdraw his guilty plea. [7]

Immediately after the hearing, on August 6, 1975, the Court sentenced the defendant to a term of imprisonment of five to fifteen years.

On September 5, 1975, the Court vacated the sentence imposed on August 6, 1975, as the Court had erroneously directed that the defendant serve his sentence at a facility for which he was too young. Resentencing Tr., p. 3. Defense counsel asked that the sentence be set aside, for the same reasons that were raised on August 6, 1975. The Court reminded defense counsel that a hearing had already been held on the question of the voluntariness of the defendant's guilty plea, and the Court stated it was adhering to the decision made on August 6, 1975, which was a denial of the application to withdraw the guilty plea. Resentencing Tr., p. 7. Defense counsel then raised the issue of youthful offender treatment,

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5 A full description of the relevant facts concerning the voluntariness of the plea is set forth in the Decision and Order of the Honorable Joseph Dawson, dated February 7, 2008, People v. Swinton, 19 Misc.3d 247 (Sup. Ct. Bronx Co. 2008), and is incorporated herein.

6 The Court stated that it expected an immediate hearing, but then agreed to an adjournment to August 18, 1975, when the assigned prosecutor was returning from vacation. However, Mr. Hyman was not free that day, so the Court decided to adjourn the hearing until after the lunch break on August 6, 1975.

7 In the decision denying the defendant's initial CPL 440 motion, Judge Dawson states that the Trial Court denied the defendant's application to vacate the plea "on the grounds that [the defendant] was not credible" (Swinton, 19 Misc.3d at 250) and cites to a page of the August 6, 1975 transcript that is missing from the defendant's Exhibit I that was submitted to this Court.

pointing out that some of the alleged crimes with which the defendant had been charged had occurred prior to the defendant's 19th birthday.[8] However, both the Assistant District Attorney and the Court (correctly) stated that the defendant was not eligible for youthful offender treatment as he was 19 years old at the time of the crime for which he was convicted. Resentencing Tr., pp. 12-16. The defendant was then resentenced to the same term of imprisonment, and the Court directed that the defendant serve his sentence at a different facility.

The defendant appealed his conviction. In his Appellate Brief, the defendant argued that his plea of guilty should be vacated because it was coerced due to the alleged violation of his Sixth Amendment right to counsel. Specifically, he claimed that his Sixth Amendment right to counsel was violated because of the trial court's refusal to permit him to substitute counsel on what the defendant conceded was the eve of trial (Appellate Brief, p. 11) and that the violation resulted in a coerced plea because it forced the defendant to choose between pleading guilty and being represented at trial by an attorney the defendant did not trust. The Appellate Division, First Department, affirmed the judgment of conviction without opinion. People v. Swinton, 52 A.D.2d 1098 (1st Dept. 1976). Leave to appeal to the Court of Appeals was denied on July 8, 1976. People v. Swinton, 39 N.Y.2d 1066 (1976).

In 2007,[9] the defendant filed his first pro se motion to vacate his conviction pursuant to CPL § 440.10. In relevant part, he argued that his plea was involuntary because of the trial court's

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8 The sixteen counts of Indictment Number 3109/1974 included Rape in the First Degree, to which the defendant pled guilty, and five additional sex offense counts, based on an incident that occurred on November 12, 1974, when the defendant was 19. Indictment Number 3109/1974 also included a count of Rape in the First Degree, and four additional sex offense counts, based on an incident that occurred on April 25, 1974, when the defendant was 18. Indictment Number 3109/1974 included a count of Attempted Rape in the First Degree, based on an incident that occurred on January 23, 1974, when the defendant was 18. Exhibit E. The thirteen counts of Indictment Number 3201/1974 included one count of Attempted Rape in the First Degree and one count of Sexual Abuse in the First Degree, based on an incident that occurred on September 9, 1974, when the defendant was 19. Indictment Number 3201/1974 also included a count of Rape in the First Degree, and four additional sex offense counts, based on an incident that occurred on November 17, 1974, when the defendant was 19.

9 The Court file does not contain records indicating the precise date the defendant filed his first CPL § 440.10 motion.

refusal, on the eve of trial, to allow him to substitute counsel in violation of his Sixth Amendment right to counsel. By Decision and Order dated February 7, 2008,[10] the Court ruled that this claim was procedurally barred, as it was raised and rejected on direct appeal. CPL § 440.10(2)(a).[11] The Court also noted that the claim was record-based and therefore procedurally barred. CPL § 440.10(2)(c).

On September 1, 2001, the defendant moved for a writ of error coram nobis in this case. The defendant argued that he had received ineffective assistance of appellate counsel because counsel had failed to argue, inter alia, that (1) the Trial Court erred when it denied his motion to relieve trial counsel and failed to inquire about his disagreement with trial counsel, and (2) the defendant's plea was not voluntary or intelligent because he was denied his Sixth Amendment right to effective counsel, and the plea was the result of coercion and duress. Affirmation in Opposition, ¶ 37. On November 26, 2013, the Appellate Division, First Department denied the writ of coram nobis. People v. Swinton, 2013 N.Y. Slip Op. 92467(U) (1st Dept. 2013), and on February 20, 2014, the Court of Appeals (Graffeo, J.) denied leave to appeal. People v. Swinton, 22 N.Y.3d 1141 (2014).

DISCUSSION

POINTS I AND III

The defendant argues that the trial court abused its discretion in refusing to grant a continuance, on the eve of trial, to permit the defendant to retain new counsel (Point I) and that the trial court abused its discretion in refusing to grant a continuance on August 6, 1975, when newly retained defense counsel requested an adjournment to prepare for the voluntariness hearing (Point III).

A court must deny a motion to vacate a judgment where, as with Point I, the "ground or issue raised upon the motion was previously determined on the merits upon an appeal from the

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10 People v. Swinton, 19 Misc.3d 247 (Sup. Ct., Bronx Co. 2008).

11 The Court rejected the defendant's argument that his claim was not barred under CPL § 440.10(2)(a) because of a retroactively effective change in the law after the appeal was resolved.

judgment." CPL § 440.10(2)(a). Such is the case with the defendant's argument in Point I of his Memorandum in Support. Point I is the same as the single point that was made in 1976 by the defendant on his direct appeal. Specifically, in his Appellate Brief, the defendant stated: "It is appellant's contention on this appeal that his plea was in fact coerced and not voluntary in that his Sixth Amendment right to the effective assistance of counsel was denied him," (Appellate Brief, p. 10) and "notwithstanding that jury selection was about to begin, it was error to deny the motion to relieve counsel." Appellate Brief, pp. 11-12. The issue raised in Point I of the instant Motion was previously determined upon direct appeal from the judgment entered August 6, 1975, by the Appellate Division, First Department, when it affirmed without decision the Trial Court's conviction of the defendant following his plea of guilty. Therefore, under CPL 440.10(2)(a), Point I of the Motion is denied on procedural grounds.

A court must deny a motion to vacate a judgment when there are sufficient facts on the record to have permitted appellate review, yet no review occurred because the defendant failed to advance the argument on appeal. CPL § 440.10(2)(c). Such is the case with defendant's argument in Point III of his Memorandum in Support. Specifically, the request of new defense counsel for an adjournment to prepare for a hearing on the voluntariness of the defendant's guilty plea was discussed at great length and included several of the trial judge's statements about the testimony he had heard at the Wade hearing (August 6, 1975, Tr., pp. 11-12), his reasons for wanting to move the case forward (August 6, 1975, Tr., pp. 13, 16), his recollection about all of the matters that were satisfied by the defendant's pleading guilty to one count of one indictment (August 6, 1975, Tr., p. 12), and what the parameters of the voluntariness hearing would be (August 6, 1975, Tr., pp. 13-15). Although there were sufficient facts on the record to have permitted appellate review of whether the trial Court abused its discretion in refusing to grant the request of the defendant's new counsel for an adjournment in order to

prepare for the voluntariness hearing, the defendant failed to present that argument to the Appellate Court on direct appeal. Therefore, under CPL 440.10(2)(c), Point III of the Motion is denied on procedural grounds.

Further, even if the Court were to reach the merits, the Trial Court's decision not to grant an adjournment, after a trial juror was sworn, for the purpose of retaining new counsel (Point I) or when the defendant sought to withdraw his guilty plea (Point III) was not an abuse of discretion, and therefore does not serve as the basis for vacatur.

With respect to Point I, while a defendant has the right to defend against criminal charges in person or by counsel of his own choosing (People v. McLaughlin, 291 N.Y. 480, 482-83 (1944)), "when the case is pending in the courts, a request to change counsel previously retained or assigned must be addressed to the Trial Judge's discretion to insure that the defendant's purported exercise of the right does not serve to delay or obstruct the criminal proceedings." People v. Tineo, 64 N.Y.2d 531, 536 (1985); see also People v. Torres, 60 A.D.3d 584, 584 (1st Dept. 2009), in which the Appellate Division, First Department, held that the trial court "properly exercised its discretion when it denied defendant's eve-of-trial request for an adjournment to obtain new retained counsel, since defendant did not establish compelling circumstances, or any legitimate basis for the substitution." Indeed, as held by the Supreme Court, a trial court has "wide latitude in balancing the right to counsel of choice against . . . the demands of its calendar." United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006).

Prior to May 12, 1975, the defendant had pled not guilty to all of the counts of the two indictments; a Wade hearing had been conducted over a period of days, during which complainants had testified; and the defendant had made a motion to suppress those complainants' identifications of him as their assailant. Except for completion of the hearing on the defendant's motion to suppress, the case was ready for trial. On the morning of May 12, 1975, defense counsel stated that, after several conversations he had had with the defendant, the defendant had decided to plead guilty. However, several minutes into

the allocution (May 12, 1975, Tr., pp. 297-304), the defendant stated that he did not want to plead guilty, and he asked for an adjournment in order to retain new counsel. The Court denied that application but allowed the defendant to speak to his attorney over the lunch break. Upon the parties' return to the courtroom in the afternoon, defense counsel asked to be relieved, and the Trial Judge denied that application as well, stating that he considered the application to be nothing more than an attempt to delay trial. May 12, 1975, Tr., p. 314. On that same day, the Trial Judge completed the suppression hearing and denied the defendant's suppression motion, after which the Court began jury selection. Given all of these facts, it is clear that the Trial Judge did not abuse his discretion to control his calendar and to prevent unnecessary delays by denying the defendant's request, made on the eve of trial, that his attorney be relieved and that the defendant be allowed to secure the services of a new attorney.

With respect to Point III, the Court of Appeals has held that the question of whether to grant an adjournment is within the trial court's discretion. People v. Spears, 24 N.Y. 3d 1057 (2014) (on date of sentencing, trial court did not abuse its discretion in refusing to grant new attorney, hired after defendant had pled guilty, an adjournment to discuss with defendant his options to withdraw his plea); People v. Wilkov, 77 A.D.3d 12 (1st Dept. 2010) (trial court properly exercised its discretion in denying defendant's request for adjournment to retain new counsel before court considered defendant's motion to withdraw her guilty plea). Under the circumstances detailed above, including the fact that the defendant was scheduled to be sentenced on August 6, 1975, and the fact that the Court allowed the defendant's new counsel time to review the plea colloquy and to confer with the defendant during the lunch break, the Court did not abuse its discretion in denying new counsel's request for an adjournment.

POINT II

The defendant claims that his plea of guilty was involuntary because the court refused to allow him to change counsel. This claim is procedurally barred because the claim was advanced and rejected on direct appeal (CPL § 440.10(2)(a)) and because the claim is record-based (CPL § 440.10(2)(c)).[12]

The defendant also claims that his plea of guilty was unknowing. Specifically, he asserts that the Court failed to advise him that, although he was an "eligible youth," he would not be accorded youthful offender treatment pursuant to CPL Article 720. He makes the related claim that the Court failed to make a reasoned judgment as to whether to adjudicate him a youthful offender. This claim fails on procedural grounds, as there was a rather lengthy discussion, on September 5, 1995, relating to whether the defendant could be accorded youthful offender treatment. During that discussion, defense counsel pointed out that some of the counts of the indictments related to incidents alleged to have taken place prior to the defendant's 19th birthday, and the prosecutor pointed out (correctly) that the defendant had been 19 when he committed the act to which he had pled guilty on August 6, 1975. Resentencing Tr., pp. 12-16. The defendant could have raised the issue on appeal, but – without justification – he did not. Accordingly, the defendant's arguments that the Trial Court failed to inform him that he would not be accorded youthful offender status and failed to make a reasoned judgment as to whether to adjudicate him a youthful offender are record-based and, therefore, procedurally barred under CPL §440.10(2)(c).

In additional to the procedural reason for denial, the record clearly shows that the claims must be denied on the merits. According to the Probation Report, the defendant's date of birth is

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[12] The Court notes that the claim was also advanced in 2007 and rejected by Judge Dawson in 2008.

September 2, 1955. The crime for which he was convicted occurred on November 12, 1974, when the defendant was 19 years old. Accordingly, he was not eligible for youthful offender treatment.

MISCELLANEOUS

To the extent the defendant requests an order (1) directing his original attorneys to file affidavits responding to the allegations made; (2) assigning new counsel and/or an investigator; or (3) granting an evidentiary hearing, those applications are denied.

CONCLUSION

For the foregoing reasons, Defendant's Motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: October 9, 2020
Bronx, New York

JUDITH LIEB, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, CRIMINAL DIVISION: PART T31

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THE PEOPLE OF THE STATE OF NEW YORK, :

: **DECISION AND ORDER**

-against-

:

Indictment No. 3109/1974

REGINALD SWINTON, :

Defendant. :

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JOSEPH J. DAWSON, J.:

Defendant Reginald Swinton ("Swinton") moves pro se pursuant to CPL Section 440.10(h) to vacate a judgment dated September 5, 1975, convicting him, after a plea of guilty on May 13, 1975, of Rape in the First Degree, and sentencing him to a prison term of from five to fifteen years. In addition, Swinton seeks forensic testing of any rape kits or clothing related to his case that may contain deoxyribonucleic acid ("DNA") pursuant to CPL Section 440.30(1-a). Finally, Swinton seeks a temporary injunction directed at unnamed persons to prevent any "outside questioning" of him concerning this matter pending resolution of the motion. For the reasons set forth below, the motion is denied in its entirety.

The gravamen of Swinton's motion is that his plea was involuntary on the theory that the trial court denied Swinton his Sixth Amendment right to counsel, that the plea was the result of ineffective assistance of counsel who failed to have defendant's mental competency evaluated or advise him on the use of a possible affirmative defense, and that the terms of the plea were not clearly placed on the record and were not subsequently kept. See Affidavit of Reginald Swinton sworn to April 28, 2007 ("Swinton Aff.") at ¶¶ 5-7.

Statement of Facts

In December 1974, Swinton was charged by Indictment 3109/1974 and by Indictment 3201/1974 with three counts of Rape in the First Degree, two counts of Attempted Rape in the First Degree, three counts of Sodomy in the First Degree, two counts of Robbery in the First Degree, two counts of Burglary in the First Degree, and seventeen lesser charges arising out of incidents involving five different women on five different occasions. See Affirmation of ADA Bryan C. Hughes dated August 7, 2007 ("Hughes Aff.") at ¶¶ 4-5. In connection therewith, Swinton was represented by retained counsel, the firm of Rothblatt, Seijas and Peskin, by Robert A. Sackett, Esq. (now Justice Sackett, Supreme Court, Sullivan County). See Defendant's Appendix ("Def. App.") Exhibit 1 at 2.

The two indictments were consolidated for trial and Wade hearings commenced on May 7, 1975 before Justice Quinn. Id. On May 12, the day the trial was to commence, defense counsel advised the court that Swinton had agreed to plead guilty to one count of Rape in the First Degree in exchange for a sentence of from five to fifteen years imprisonment to cover both indictments, a pending matter in Bronx Criminal Court (Docket No. X5114851), and any other pending criminal cases or investigations in Bronx County, other than Class "A" felonies. See Def. App. Exhibit 4 at pp. 1-6. During the plea allocution, Swinton admitted to the rape and acknowledged the consequences of the change of plea, but claimed at the end of the allocution that he was innocent. Id. at 7-13. The court refused to accept the plea. Id. at pp. 13-14. Swinton then asked for a change of counsel, which was denied. Id. at pp. 14-15.

Following the luncheon recess, defense counsel asked to be relieved because Swinton no longer trusted him and because counsel felt that he could no longer trust himself due to his

efforts to get Swinton to plea guilty and his lack of preparation for trial. Id. at 17-21. The trial court denied the application on the grounds that it was merely a ploy to delay the trial and because Swinton's attorney had demonstrated exceptional ability. Id. at 22-24. The trial court then denied the Wade motion, sent for a jury, and seated one juror. See Def. App. Exhibit 1 at 6.

The next day, after conferring with Swinton for almost two hours, defense counsel advised the court that Swinton wished to avail himself of the plea bargain discussed earlier. See Def. App. Exhibit 4 at pp. 26-27. Swinton was sworn in and during the plea allocution acknowledged discussing the case with his counsel, his mother and fiancé; that he understood the consequences of his guilty plea; that he committed Rape in the First Degree; that he waived certain constitutional rights; and that he was not coerced into pleading guilty. Id. at pp. 28-34. The trial court further stated that it would not accept a guilty plea from an innocent man, and that it would only accept the guilty plea if Swinton would again admit to committing the crime of Rape in the First Degree. Swinton admitted that he did so. Id. at p. 34. The matter was adjourned for sentencing.

On the date of sentence, August 6, 1975, new retained counsel, Stephen Hyman of the firm of Kunstler, Kunstler, Hyman and Goldberg, appeared on behalf of Swinton. Id. at p. 40. Swinton had obtained new counsel to apply to the court to withdraw his previously entered plea of guilty. Id. at pp. 40-41. The court indicated that it would consider affording a hearing to Swinton on the question of the voluntariness of his plea without formal motion papers. Said hearing occurred later that same day with Swinton's new attorneys after speaking with a representative of Swinton's prior attorneys. Id. at pp. 42-57.

Following oral argument on the application, Swinton testified on his own behalf at the

hearing. Id. at pp. 58-78. In response to the question of whether his plea voluntarily made, Swinton replied, "[n]ot really" (id. at p. 79), and testified that he did not want to go trial with his prior attorney, who repeatedly counseled him to accept the plea. Id. at pp. 78-89. On cross-examination, Swinton acknowledged that he had been sworn under oath on May 13, that he had not been truthful during the plea allocution, but that he was just repeating yes or no answers given to him by counsel. Id. at pp. 89-91. Swinton then stated that he knew what questions he was answering, but later claimed he was not even listening to the judge's questions. Id. at pp. 91-92. Swinton testified that all he did was say "yes, yes, yes, yes," but then acknowledged answering some questions in the negative, including whether he was coerced into pleading guilty. Id. at pp. 92-98. Ultimately, the court denied his application to vacate the plea on the grounds that Swinton was not credible, and sentenced him to from five to fifteen years imprisonment in accordance with the plea agreement. Id. at p. 108. Swinton was re-sentenced to serve the same term of imprisonment in a different correctional facility on September 5, 1975. See Def. App. Exhibit 4 at pp. 117-134.

Swinton appealed the conviction through his new counsel. Swinton's appellate brief asserted that his plea of guilty should have been vacated because his plea was coerced due to the alleged violation of his Sixth Amendment right to counsel. See Def. App. Exhibit 1 at pp. 9-10. Specifically, Swinton claimed on appeal that his Sixth Amendment right to counsel was violated because of the trial court's refusal to permit Swinton to substitute counsel on the eve of trial, resulting in a coerced plea. Id. at pp. 11-20. The Appellate Division, First Department, affirmed the judgment of conviction without opinion. See People v. Swinton, 52 A.D.2d 1098 (1st Dept. 1976). Leave to appeal to the Court of Appeals was denied. See Defendant's Memorandum of

Law ("Def. Mem.") at p.10.

In the intervening years, Swinton did not seek any other relief with respect to this conviction. See Swinton Aff. ¶ 10. Swinton has, however, had numerous contacts with the criminal justice system. In 1980, Swinton was convicted after a jury trial of Burglary in the [illegible] Second Degree and sentenced to one year in prison. In 1986, Swinton was convicted after a jury trial of Robbery in the First Degree and Burglary in the First Degree and sentenced to from twelve and one-half to twenty-five years imprisonment. In 2007, Swinton was convicted after a jury trial of two counts of Rape in the First Degree, three counts of Criminal Sexual Act in the First Degree, two counts of Robbery in the Third Degree, one count of Attempted Robbery in the Third Degree, and three counts of Burglary in the Second Degree. In that case, Swinton was sentenced to a term of imprisonment from one hundred and twenty-five years to life. See Hughes Aff. at ¶¶ 10, 12-13, 25-27.

On the instant application, Swinton asserts his innocence, but, in the past, has acknowledged committing the rape in other legal proceedings. For example, in a 2003 appearance before the Board of Parole, Swinton explained the rape by stating that a girlfriend had humiliated him, and that "I got really tired of being hurt and I just lashed out . . . and that's the consequence of that . . . that was an isolated incident in time." See Hughes Aff. Exhibit 8 at pp. 7-8. In addition, on an appeal to the Appellate Division, First Department from an adverse determination of Swinton's risk level assessment pursuant to the Sexual Offender Registration Act, Swinton's appellate brief argued that Swinton "did accept responsibility for his crime" -- namely, the rape. See Hughes Aff. Exhibit 11 at pp. 14-15.

Legal Analysis

The Court "must deny" a motion to vacate a judgment where the "ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment . . ." CPL § 440.10(2)(a). That is the case here. Swinton appealed the conviction, claiming that the trial court erred when it denied the motion to withdraw his plea, and that his plea was coerced due to the purported denial of his Sixth Amendment right to counsel. See Def. App. Exhibit 1. The First Department rejected this argument without opinion, 52 A.D.2d 1098 (1st Dept. 1976), and leave to appeal to the Court of Appeals was denied. See Def. Mem. at p.10. Since Swinton has previously appealed the judgment of conviction on the same grounds and issues as are raised in the current motion, the motion "must be" denied pursuant to CPL Section 440.10(2)(a). See People v. Skinner, 154 A.D.2d 216, 221 (1st Dept.), appeal denied, 76 N.Y.2d 796 (1990). Further, review of plea bargains is typically barred by CPL Section 440.10(2)(c), as they are record-based. See People v. Cooks, 67 N.Y.2d 100, 104 (1986); People v. Jackson, 266 A.D.2d 163 (1st Dept. 1999), appeal denied, 94 N.Y.2d 921 (2000).

Swinton attempts to circumvent this bar by claiming that there has been a retroactive change in the law controlling the issue since the appellate determination. CPL § 440.10(2)(a). Specifically, Swinton asserts that the case of United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557 (2006) created a retroactive change in the right to counsel guaranteed by the Sixth Amendment. The scope of the right to counsel has long been defined by both the state and federal courts. Under the Sixth Amendment to the United States Constitution and under Article I, Section 6 of the New York State Constitution, "a defendant has the right to defend in person or by counsel of his own choosing." People v. McLaughlin, 291 N.Y. 480, 482-83 (1944)

(emphasis added). A "defendant's right to counsel of his own choosing includes the right to change counsel at any time, without good cause, for any reason, or for no reason, if such change of counsel does not unreasonably interfere with the orderly course of the trial." People v. DeChiaro, 48 A.D.2d 54, 56 (3rd Dept. 1975) (emphasis added). Thus it has long been established that the right to substitute counsel "cannot be invoked to delay the course of justice." Id. at 57. Indeed, the Supreme Court in Gonzalez-Lopez "recognized a trial court's wide latitude in balancing the right to counsel of choice against . . . the demands of its calendar." Gonzalez-Lopez, 126 S.Ct. at 2565-66. Thus, on the eve of trial, "absent exigent or compelling circumstances, a court may, in the exercise of its discretion, deny a defendant's request to substitute counsel . . . if the defendant has been accorded a reasonable opportunity to retain counsel of his own choosing before that time." People v. Arroyave, 49 N.Y.2d 264, 271-72 (1980). At that point, the "it is incumbent upon the defendant to demonstrate that the requested adjournment has been necessitated by forces beyond his control and is not simply a dilatory tactic." Id. Against this background, Swinton asserts that Gonzalez-Lopez constitutes a controlling change of law that requires vacatur of the plea. The Court disagrees.

In Gonzalez-Lopez, the district court denied the defendant his right to choice of counsel by erroneously refusing to admit the defendant's first choice of attorney *pro hac vice*. Gonzalez-Lopez, 126 S.Ct. at 2560-61. The government conceded the error before the United States Supreme Court, but claimed that the error must also have prejudiced the defendant. Id. at 2561-62. The Supreme Court, however, found the error to be a structural one that was not subject to a harmless error analysis and required automatic reversal of the conviction. Id. at 2562-65. In so holding, the Supreme Court was careful to point out that its ruling was predicated on the

government's concession and was limited to whether the error should be reviewed under a harmless error analysis or whether it was a structural error requiring *per se* reversal. Id. at 2565-66. Indeed, the Supreme Court stated that "[n]othing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice . . ." Id. at 2565.

Thus, Gonzalez-Lopez did not affect the scope of the Sixth Amendment right to counsel; rather, it merely clarified whether such error was subject to harmless error analysis. See United States v. Hasmi, 2008 WL 216936 at *5, No. 06 Cr.442 (LAP) (S.D.N.Y. Jan. 15, 2008) (stating that a "careful reading of *Gonzalez-Lopez* demonstrates that it is a case more about harmless error review than about defining the content to the right to choice of counsel") (italics in original); Persad v. Conway, 2008 WL 268812 at *8, No. 05-CV-4199 (CBA)(SMG) (E.D.N.Y. Jan. 30, 2008) (stating that Gonzalez-Lopez merely "reiterated that the right to choose particular counsel is not absolute") (emphasis added). Accordingly, it cannot be said that the scope of a defendant's right to counsel under the Sixth Amendment has changed since Swinton originally pled guilty and appealed his conviction. Indeed, Swinton's brief on direct appeal and his brief on the instant application cite to some of the same legal authorities to support the claim that Swinton's right to counsel was violated, e.g., People v. DeChiaro, 48 A.D.2d 54 (3rd Dept. 1975). Compare Def. App. Exhibit 1 at pp. 11-14 with Def. Mem. at p. 16. Accordingly, this argument by Swinton is barred by CPL Section 440.10(2)(a) and must be denied.

Swinton's other claims are denied as well. To the extent Swinton claims that his counsel was ineffective for failing to advise him regarding a potential affirmative defense or to request a competency hearing, no facts of an evidentiary nature are set forth to establish what defense was

purportedly available to Swinton or that Swinton was not legally competent (indeed, Swinton's last three trials resulted in convictions, not findings that he was incompetent). Thus, this branch of the motion is denied pursuant to CPL Section 440.30(4)(b), as is Swinton's claim that the terms of his plea bargain were not kept. Next, Swinton's request to have DNA testing performed is denied pursuant to CPL Section 440.30(1-a). Under that section, relief is available to defendants who have been convicted at trial, but not to defendants who have pled guilty. See People v. Allen, ---- N.Y.S.2d ----, 2008 WL 222351 (1st Dept. Jan. 29, 2008). Finally, Swinton's application for injunctive relief is denied as he has not demonstrated any entitlement to such an extraordinary remedy. See Cox v. J.D. Realty Assocs., 217 A.D.2d 179, 181 (1st Dept. 1995).

The foregoing constitutes the Decision and Order of the Court.

Dated: February 7, 2008
Bronx, New York

Joseph J. Dawson, A.S.C.J.

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