To be argued by
JOHN T. KOMONDOREA
(10 minutes requested)
IND. NO.: 1832/1992; APPELLATE CASE NO.: 2020-03839

New York Supreme Court

Appellate Division – First Judicial Department

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JOSE MATIAS,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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THE PEOPLE OF THE STATE OF NEW YORK Respondent, - against - JOSE MATIAS, Defendant-Appellant.

BRIEF FOR RESPONDENT

STATEMENT

Defendant appeals, with permission from the Honorable Lizbeth González, an Associate Justice of this Court, from an Order of the Supreme Court, Bronx County (Barrett, J.), rendered April 23, 2020, denying his motion, under Criminal Procedure Law ("CPL") Section 440.20, to set aside his sentence (*People v Matias*, 68 Misc 3d 352 [Sup Ct, Bronx County 2020]).

By underlying judgment, rendered June 2, 1994, defendant was convicted in the same court (Barrett, J.), after jury trial, of Murder in the Second Degree (Penal Law § 125.25 [1]) (two counts), and Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03), and

sentenced to two consecutive, indeterminate terms of from twenty-five years to life imprisonment, and a concurrent, indeterminate term of from five to fifteen years imprisonment, respectively.

Defendant is incarcerated on these convictions and a subsequent, consecutively imposed sentence as an adult for first-degree promoting prison contraband.

QUESTIONS PRESENTED

1. Whether the 1994 sentencing court's discretionary imposition of consecutive maximum sentences totaling fifty years to life imposed on defendant for killing two brothers in cold blood at the age of 16 violates *Miller v Alabama*, 567 US 460 (2012), which prohibited the mandatory imposition of life without parole on a juvenile.

The motion court—the same court that sentenced defendant 30 years ago—found that defendant did not fall under the purview of *Miller* because defendant was not sentenced to mandatory life without parole, but rather under the court's discretion, and that the sentence imposed was not a *de facto* life without parole sentence. After this Court granted leave to appeal, the Supreme Court decided *Jones v Mississippi*, --- US ----, 141 S Ct 1307 (2021), which similarly held that *Miller* only applies when juvenile murders are mandatorily sentenced to life without parole, preventing the sentencing court from considering defendant's youth.

2. Whether the court abused its discretion when it denied defendant's motion to set aside the sentence on the grounds of ineffective assistance of counsel during sentencing.

The court rejected defendant's claims as uncorroborated and unlikely to be true under CPL § 440.30 (4)(d). On the merits, the court found counsel provided meaningful and effective representation and that defendant could not establish prejudice.

THE FACTS

The Indictment

By Indictment Number 1832/92, filed on March 13, 1992, the Bronx County Grand Jury charged defendant and Roberto M.[1] with second-degree murder (Penal Law § 125.25) (four counts), second-degree criminal possession of a weapon (Penal Law § 265.03), and first-degree reckless endangerment (Penal Law § 120.25).

The Trial[2]

On February 22, 1992, 17-year-old Osvaldo "Ozzie" Lucero and his 22-year-old brother, Jacinto "Jay" Lucero, Jr., attended a party at the apartment of Ozzie's girlfriend of two years Melissa; it was her sixteenth birthday (R.B. at 4; A.B. at 9). Ozzie and Melissa recently reunited after a brief two-week break up (R.B. at 4; A.B. at 9). During that brief period, defendant, at sixteen-years old, began pursuing Melissa, who kept rebuffing his advances (R.B. at 4-5; A.B. at 9).[3] During the party, Melissa,

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[1] The records for Roberto M. have been sealed. Respondent cannot verify whether he was acquitted or received a youthful offender adjudication.

[2] References preceded by "A.B." and "R.B." refer to the Brief for Defendant-Appellant and Respondent's Brief on the direct appeal from 1997, respectively, as included in the judgment roll.

[3] Defendant incorrectly asserts that Melissa was his ex-girlfriend (Def.'s Br. at 5 [citing A.B. at 10; R.B. at 7]). On direct appeal, the defense brief stated: "[Melissa]

Ozzie, and Jay stayed in the kitchen to avoid confrontation with defendant; Melissa's roommate invited defendant against her wishes (R.B. at 4-5; A.B. at 9-10). Defendant came to the party armed with a silver .25 caliber pistol (R.B. at 5). Within ten minutes of consuming a mescaline tab and some alcohol, defendant and his friends were asked to leave when one of them discharged a firearm while dancing in the living room (R.B. at 5-6; A.B. at 10). While waiting for a cab in the bedroom, defendant unloaded his pistol, cleaned it, cleaned each bullet, and then reloaded it (R.B. at 6).

Defendant and his friends left the bedroom, and as the roommate held the door open for defendant to leave, defendant called to Melissa, who refused to speak to him (R.B. at 6-7; A.B. at 10). Defendant addressed Ozzie, "tell your girlfriend I want to speak to her"; Ozzie replied, "we came in peace we didn't come here for any problems" (R.B. at 7; A.B. at 10). Defendant had his pistol in hand (A.B. at 10-11). Neither brother had consumed drugs or alcohol (R.B. at 12). Everyone stood up, and Melissa yelled at defendant to get out (R.B. at 7, A.B. at 10). Melissa

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told [defendant] that she was not romantically interested in him in light of her recent break up with Ozzie, but that [defendant] wanted to continue dating her" (A.B. at 9).

was holding a hammer at the time but did not recall throwing or swinging it at anyone (R.B. at 8-9; A.B. at 10).

From six feet away, defendant shot the unarmed Jay in the side of his chest (R.B. at 7, 11-12; A.B. at 10-11). After Jay fell to the ground and tried to crawl to safety, defendant continued to fire, shooting Jay in the back, killing him (R.B. at 7, 11-12; A.B. at 11). As Melissa moved toward Jay, defendant shot Ozzie in the back of the head, instantly killing him, and the abdomen (R.B. at 7, 12). Defendant confessed to detectives that he shot Jay and Ozzie and that he disposed of the weapon (R.B. at 9-11; A.B. at 14-15).[4]

The Sentencing

Before sentencing, defendant declined to be interviewed by the New York City Department of Probation for the presentence report (PSR.3).[5] The report detailed the fatal injuries to the victims (PSR.3), acknowledged this was defendant's first contact with the criminal justice

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[4] In defendant's statement he claimed that "'someone' with a knife, the 'older one,' of the two came toward him" (R.B. at 10). A knife was recovered from underneath Jay's body (A.B. at 12).

[5] References preceded by "PSR." refer to that presentence report; references preceded by "S." refer to the minutes of the sentencing proceedings dated June 2, 1994.

system (PSR.3), and recommended defendant for counseling (PSR.4). Since the murders, Jay and Ozzie's family sought therapy to deal with the feelings of "anger, grief, and fear" at losing the two. Jay could never go to college like he had dreamed, while Ozzie, who had enlisted in the Marines, was "cheated" from graduating high school (PSR.4). The report concluded that defendant's actions "demonstrate[d] his capacity for brazen, violent conduct wherein he shows little or no regard for the life and safety of others" (PSR.3), which "not only reveals his capacity to pose a threat to society but warrants as well, a pessimistic outlook for a future conforming community adjustment" (PSR.5).

On June 2, 1994, defendant appeared for sentencing. After recounting the tragic loss of Jay and Ozzie, both of whom defendant had shot from behind, the prosecutor asked for maximum consecutive sentences for the murders, emphasizing that "there will come a time, based on [defendant's] age, when he will have the opportunity to walk out the doors of the prison as a free man and when that time comes, Jay and Osvaldo Lucero will be but fading memories to the people who loved and cared for them" (S.5-6).

Before the court imposed sentence, defense counsel, Peter Gersten, Esq., argued:

> I'm not going to try or even attempt to try to minimize the tragedy of this event. . . . But I would just remind the Court that not only has there been a tragedy to the family of the two dead boys, but also it's a tragedy to the family of my client. It's a tragedy as far as my client is concerned also. He's nineteen years of age. This occurred when he was seventeen years of age. His life is totally ruined, no matter what the sentence is, for all intents and purposes. I know Your Honor in the past has been fair and just and the only thing I'm going to ask you now, under the circumstances, you take into consideration the fact that he's had no prior involvement with the law, the fact that this particular incident could be an aberration, that it would never have happened but for certain circumstances that occurred that evening and might never happen again.

(S.6-7).

The court, having presided over the trial, heard counsels' arguments and reviewed the presentence report, reasoned as follows:

> This case is unusual even in this violent county. We, of course, in this part have an enormous number of homicides. And even in the context of that kind of experience, one can't help but be shocked and deeply affected by the tragedy which was presented by the facts of this case. Murder, of course, is a special kind of crime. . . [T]here is an obvious permanence to the consequences and enormous enhancement of the loss that occurs when somebody is murdered. And those are the kind of considerations that force a Court not to give as much consideration as would otherwise give to the fact that an individual who has been convicted of such a crime has not previously been convicted of a crime.

The effect on the victims and the family in this case is particularly poignant because of the characteristics of the two individuals who were murdered. This is a community where many poor people reside and where people of Hispanic origin have an enormous struggle to enter into main stream society. And here we had two young men, seventeen and twenty-one, as I recall, who were truly the hope of the generation; one who was about to enter the Marine Corps, the other one who was planning to go to college.

Two young men with no prior criminal involvements, clean cut, honorable men. The last words of one of them as he was being shot was, "We come in peace." The measure of this case to some extent has to take into account the terrible tragedy of losing these two men and the measure of appropriate punishment also has to take into account the information that we have concerning the individual who's held responsible for that killing, [defendant]. The actions in this case, as I think the district attorney has aptly pointed out, were striking in not only their violence, but also the casualness by which that violence is perpetrated. These young men were shot for no reason. This takes the notion of being murdered for being "dissed" to a new dimension. The individual who was shot was with his girlfriend and the defendant, apparently for reasons of envy or dissatisfaction with the choice freely made by two other human beings, decided to destroy one of those individuals and then just for good measure, destroy his brother. I can't be fully moved by the fact that the defendant has not come before me with a long criminal record because I am unable to ignore the consequences of this act, the enormous loss that we have all suffered by losing these two young men. The family has suffered of course even more. And predominantly because I have yet to see anything by reason of the actions, by reason of the conduct following the murders, the callousness, the lack of contrition to recommend that the defendant [], be regarded as somebody who can rejoin society or has any true hope for returning to us as a contributing

> member. The prognosis is so awful that given all the circumstances of this case my general practice that when separate crimes are committed, consecutive sentences are imposed and I'm satisfied that in this case that separate crimes were committed as to each murder. . . . Each young man's life can't be replaced by a jail sentence, but my feeling is that consecutive sentences as to the two murders at least reflects Court's view that there were two horrendous crimes committed.

(S.7-10).

The Direct Appeal

On direct appeal defendant, through assigned counsel, Jane Levitt Esq. of the Legal Aid Society, raised the following pertinent claims:

> Point I. The court deprived appellant of his due process right to a fair trial and his right to have the jury instructed on his theory of defense by refusing to charge justification where a reasonable view of the evidence supported such a defense.
>
> Point II. Appellant was deprived of his due process right to a fair trial and his right to have the jury instructed on his theory of defense where the court denied counsel's request to charge intoxication despite appellant's consumption of mescaline, marijuana, and alcohol immediately prior to the incident, and prosecution testimony that he was "drunk."
>
> Point III. The imposition of consecutive, statutory maximum sentences, totaling fifty years' to life imprisonment, was unduly harsh given appellant's age and lack of prior involvement with the criminal justice system, and should be reduced in the interest of justice.

(*see* A.B. at i-ii).

On January 21, 1997, this Court unanimously affirmed defendant's judgment of conviction (*see People v Matias*, 235 AD2d 298 [1st Dept 1997]). This Court held:

> The trial court properly declined to charge the jury on justification. The only evidence supporting such an instruction was defendant's vague statement to the police that the "older one" was advancing towards him with a knife while defendant and his friend were armed with guns. Moreover, there was ample opportunity for defendant to retreat from the apartment (*People v Watts*, 57 NY2d 299). Although a knife was recovered, the circumstances of its recovery did not support defendant's contentions
>
> The court also properly declined to deliver an intoxication charge. Defendant was not entitled to such a charge based on a witness's testimony that he appeared "drunk" and defendant's post-arrest statement to the police that he had ingested one tab of mescaline and some alcohol and had smoked marijuana prior to the shooting, since there was no evidence tending to corroborate his claim of intoxication such as the quantity or quality of the marijuana and alcohol nor any expert testimony regarding the effect of mescaline or its duration (*People v Gaines*, 83 NY2d 925).
>
> We perceive no abuse of sentencing discretion.

(*id.* at 298).

The Post-Conviction Motion

In motion papers dated April 10, 2019, defendant moved to set aside his sentence of fifty years to life imprisonment so he could be resentenced in accordance with *Miller v Alabama*, 567 US 460 (2012). Relying on

Miller, defendant characterized his sentence as a "*de facto*" sentence to life without parole ("LWOP") and argued that, because of his sentence, the constitution required a new sentencing hearing for the court to consider defendant's "youth and attendant circumstances." Defendant also argued that trial counsel was ineffective at sentencing because counsel conducted no investigation into defendant's background and failed to present "any mitigating evidence" (*see generally* Judgment Roll: Def.'s CPL 440.20 Motion and Reply).

In opposition, the People argued that *Miller* and its progeny only applied to mandatory sentencing schemes that required courts to impose life without parole on defendants who committed murder while under the age of eighteen. *Miller* did not apply to defendant's claim because the court exercised its discretion, considered his youth, and did not sentence him to life without parole. Highlighting defendant's 40 tier two and three violations between August 1994 and May 2019, the People asserted that defendant was permanently incorrigible. The People also argued defendant's claims for ineffective assistance of counsel were belated, unsubstantiated, uncorroborated, and unlikely to be true (*see generally* Judgment Roll: People's Opposition to CPL 440.20).

This office also highlighted defendant's unrelated judgment from 1997, convicting him of first-degree promoting prison contraband. There, he received a consecutive, indeterminate sentence of two-and-one-half to five years, resulting in a new aggregate sentence of from fifty-two-and-one-half to life imprisonment. That crime occurred when defendant was 21 years old.[6]

On October 4, 2019, the court invited both parties to present evidence of defendant's rehabilitation or lack thereof (*People v Matias*, 68 Misc 3d 352, 366 n.18 [Sup Ct, Bronx County 2020]). On October 23, 2019, the People submitted a letter with nine exhibits reflecting some of defendant's misconduct while in prison, including: (1) possession of drugs in 2018 after being found unconscious; (2) possession of gang related material (letters) linked to the Latin Kings and drugs in 2015; (3) performing a sexual act/lewd conduct with his wife in a pavilion around thirteen other families with minors present in 2015; (4) an officer observed defendant fighting another inmate in 2013, and defendant appealed claiming he was knocked out from behind and never threw a

[6] In footnote two of defendant's brief, defendant incorrectly claims this conviction occurred when defendant "was 19, still a teenager and in prison." Defendant, who was born on June 6, 1975 (PSR. 1), possessed the contraband underlying his arrest on June 17, 1996, at the age of 21.

punch; (5) conspiring with his wife to smuggle heroin and marijuana into the facility in 2011; (6) fighting another inmate in 2010; (7) fighting other inmates 2007, for which he received sixty days in the secured housing unit and loss various privileges "to dissuade this inmate from acting this way" in the future; (8) cutting the neck of an inmate in a bathroom in 2005; and (9) presence of opioids in his urine in 2004 (Judgment Roll: People's Letter dated October 23, 2019 [Exhibits 1-9]).[7] Defendant supplied no submission, nor did counsel convey to the court that counsel was trying to get information.[8]

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[7] In footnote two of defendant's brief, counsel omits that defendant cut a victim in the side of the neck, engaged in sexual activities in front of minors, conspired to bring drugs into the prison, and denied throwing punches while appealing a violation, claiming to be the victim despite an officer having observed otherwise. Counsel misleadingly highlights that he committed "22 Tier III violations" while omitting that the People provided a summary of at least 40 tier two and three violations attached as Exhibit 3 to the People's opposition. That summary of every violation, which is missing from the record on appeal, will be provided under separate cover.

On March 21, 2022, the undersigned called Sullivan Correctional Facility, where defendant is now housed (*Inmate Lookup*, NY STATE DEPT OF CORR AND CMTY SUPERVISION, *available at* http://nysdoccslookup.doccs.ny.gov [last visited March 21, 2022]). The undersigned learned that defendant was originally transferred to Greenhaven because that was his area of preference. However, upon transfer, he committed three Tier two violations over the course of his short stay at Greenhaven before his transfer to Sullivan for medical reasons.

[8] In footnote four of defendant's brief, defendant offers that the defense was still obtaining defendant's entire prison disciplinary record and that an expert would have interpreted those records at a *Miller* hearing. Of course, this belated proffer was never before the court below and only comes after the court noted: "It is noteworthy that defendant does not include any such studies in his motion, and although he requests a *Miller* hearing, nowhere does he state what evidence he would proffer at such a

The parties made a joint request for the court to hold its decision on the motion in abeyance while the Supreme Court decided *Mathena v Malvo*, Dkt. No. 18-217, to address whether *Miller* applies to discretionary sentencing schemes like New York (Judgment Roll: People's Letter dated October 23, 2019). On February 26, 2020, the Supreme Court dismissed *Mathena v Malvo*, 140 S Ct 919 (Mem), 206 LEd 2d 250 (2020).

The Decision

On April 23, 2020, six months after asking the defense for any evidence of rehabilitation and receiving none, Justice Barrett denied defendant's motion (*Matias*, 68 Misc 3d at 371). After noting that the law undisputedly authorized the sentence the court imposed twenty-six years earlier (*id.* at 359-60), it turned to defendant's Eighth Amendment claims by first recounting the jurisprudence of *Miller* and its progeny (*id.* at 359-364): "When sentencing juvenile homicide offenders, *Miller* prohibits the imposition of a [LWOP] sentence where such sentence is mandated by the governing sentencing statute and the sentencing authority therefore

hearing, including whether he would call any expert witness in adolescent psychology or neuroscience" (*Matias*, 68 Misc 3d at 366 n.18).

has no discretion to take into account the offender's age or any other mitigating circumstances" (*id.* at 364-65).

The court rejected that *Miller* applied to defendant:

> [D]efendant was sentenced pursuant to a statute that gave the Court discretion to sentence defendant . . . . And, in exercising its discretion and sentencing defendant to the maximum term permissible, the record reflects that after reviewing the pre-sentence report and hearing from counsel, the Court was made aware of, and properly considered: 1) all mitigating factors—including defendant's age and lack of criminal history; 2) all aggravating factors—including the gravity of the crimes, the severity of the loss, the manner in which the crimes were committed, and defendant's lack of remorse; and 3) the penological purposes that would be served by imposing the maximum sentence. Thus, the record reflects that the Court imposed the type of individualized sentence required by *Miller* and the Eighth Amendment.

(*id.* at 364 [footnote omitted]). The court explained it was certainly aware of defendant's age and that its failure to mention defendant's age while imposing sentence was not because it failed to consider it, but rather "it was not such a compelling consideration as to outweigh the aggravating factors the Court explicitly set forth in its statement" (*id.* at 364 n.15).

The court also found that it did not impose a LWOP sentence:

> [D]efendant was sentenced to 50 years to life and (had he not been subsequently convicted and sentenced consecutively for promoting prison contraband) he would be eligible for his initial parole hearing at the age of 66 which is an age within his expected natural life time. . . . [A]t his initial parole

> hearing, defendant will be afforded an opportunity to present evidence and have the Parole Board consider his youth and its attendant characteristics at the time he committed the murders, and any other evidence he adduces that demonstrates his maturity and rehabilitation. Thus, even if the initial sentencing proceeding that took place in 1994 did not pass constitutional muster, the fact that defendant will be afforded a parole hearing during his expected lifetime would certainly do so

(*id.* at 364-66 [citations and footnote omitted]). In determining defendant's life expectancy, the court looked to the Center for Disease Control and compared the 1994 life expectancy of a person born in 1975, which did not consider race, and the 2017 life expectancy of a man defendant's age at the time, which reflected Hispanic males outlive their white and black counterparts (*id.* at 365 n.17).

The court went further and explained that even if defendant's sentence fell under *Miller*, and even if it credited defendant's proffered mitigation, setting aside and resentencing was not required because "it would not result in the Court altering defendant's sentence" (*id.* at 366). The proffered mitigation was not "compelling when compared to the two murders that occurred" (*id.*). The court noted that defendant supplied no evidence of insight into the pain caused, remorse to the family, responsibility for his actions, or programs completed showing

rehabilitation in his papers or even upon the court's request (*id.* at 366 & n.18). Rather, defendant's conduct in prison "leads to the opposite conclusion—that defendant has not matured and has not been rehabilitated" (*id.*). Taking judicial notice of the recent psychological and neurological developments of juveniles that defendant did not include in his motion, and:

> notwithstanding defendant's age when he fatally shot the two victims, the Court would again impose consecutive maximum sentences due to the severity of defendant's crimes, the magnitude of the loss suffered by the Lucero family who lost two sons and brothers, and the fact that defendant still has not accepted responsibility for his actions and has not adduced one scintilla of evidence that establishes that he has become a model prisoner and that his crimes were the product of "the transient immaturity of youth." Rather, the totality of the record as it now exists demonstrates that defendant is one of those rare juvenile offenders, whose crimes reflect "irreparable corruption," and who tragically can be characterized as "permanently incorrigible"

(*id.* at 367-68 [citations omitted]).

The court then rejected defendant's ineffective assistance of counsel claim on both procedural and substantive grounds. It found defendant provided no corroboration to his claims that counsel failed to visit and communicate with him during his pretrial incarceration and trial, and to conduct any investigation into defendant's childhood and background

before sentencing (*id.* at 368). Defendant's claim was implausible because a review of the entire record "makes clear that trial counsel provided exemplary representation," where, relevantly, counsel "argued for a lesser sentence and cited as a basis for leniency the most significant mitigating factors available—defendant's youth and lack of criminal history" (*id.* at 369).

The court determined that "not only was defendant afforded meaningful representation at sentencing, he was also not prejudiced by any purported deficiencies in counsel's performance at sentencing" because "the quality of information that [counsel] conceivably could have obtained and disclosed to the Court would not have caused the Court to alter its view of the propriety of a maximum sentence" (*id.* at 370).[9]

On November 12, 2020, the Honorable Lizbeth González, an Associate Justice of this Court, granted defendant leave to appeal.

On April 22, 2021, a year after Justice Barrett's decision, the Supreme Court of the United States decided *Jones v Mississippi*, --- US ----, 141 S Ct 1307 (2021). It held, "[i]n a case involving an individual who

[9] In footnote four of defendant's brief, counsel incorrectly claims this was a harmless error analysis despite the court explicitly saying it was a prejudice analysis.

was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient" (*id.* at 1313).

ARGUMENT

POINT ONE

MILLER AND ITS PROGENY DO NOT APPLY TO A DISCRETIONARY SENTENCE, NOR WHERE DEFENDANT WILL BECOME ELIGIBLE FOR PAROLE IN HIS NATURAL LIFETIME.

Reading defendant's brief, one would not realize that he murdered two brothers, executing each from behind in cold blood as his victims sought a peaceful resolution. Defendant received two consecutive, maximum sentences for that heinous crime. Likewise, one would not find any discussion in his brief of this Court's decision on direct appeal affirming that sentence as entirely appropriate.

Most troubling, reading defendant's brief, one would be left with the impression that *Jones v Mississippi*, --- US ----, 141 S Ct 1307 (2021) has little to no significance here. Indeed, defendant discusses *Jones* only to highlight that the Court held a sentencing court need not explicitly or implicitly find a defendant permanently incorrigible before imposing a sentence of life without parole on a juvenile murderer. Otherwise,

defendant asserts that *Miller v Alabama*, 567 US 460 (2012) controls here (Def.'s Br. at 29-30).

However, *Jones*' holding disposes of this appeal and confirms Justice Barrett's prescient and correct analysis. Before denying defendant's motion, Justice Barrett had hoped that the Court would settle "whether the *Miller* rule applied *beyond* situations in which a juvenile homicide offender received a mandatory [LWOP] sentence" (*People v Matias*, 68 Misc 3d 352, 362 n.13 [Sup Ct, Bronx County 2020] [emphasis added]). It did not. Instead, a year later, the Court answered that question. It held, "In a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient" (*Jones v Mississippi*, 141 S Ct at 1313). In other words, *Miller* does not apply to defendant, who was sentenced in New York under its discretionary sentencing system. *Miller* also does not apply because defendant did not receive a sentence of life without parole.

a. *Miller* does not apply to defendant who was sentenced under New York's two-tiered discretionary sentencing system.

In its most recent decision, the Supreme Court narrowed the application of *Miller v Alabama*, 567 US 460 (2012). It held, courts may

impose LWOP "sentences for defendants who committed *homicide* when they were under 18, but only so long as the sentence is not mandatory—that is, only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment" (*Jones*, 136 S Ct at 1314, citing *Miller v Alabama*, 567 US 460, 476 [2012]; *see also Matias*, 68 Misc 3d at 363 ["When sentencing juvenile homicide offenders, *Miller* prohibits the imposition of an [LWOP] sentence where such sentence is mandated by the governing sentencing statute and the sentencing authority therefore has no discretion to take into account the offender's age or any other mitigating circumstances"]).

"*Miller* mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence" (*Jones*, 136 S Ct at 1314, citing *Miller*, 567 US at 483; *see Matias*, 68 Misc 3d at 361 [*Miller* "required a sentencing court to follow a certain process before imposing [LWOP], one in which the sentencing court must consider an offender's youth and its attendant characteristics prior to sentencing a juvenile homicide offender"]). "That sentencing procedure ensures that the sentencer affords individualized 'consideration' to, among other things, the

defendant's 'chronological age and its hallmark features'" (*Jones*, 141 S Ct at 1316).

Nor did *Miller* require the sentencer to "make a separate finding of permanent incorrigibility" or "an on-the-record sentencing explanation with an implicit finding of incorrigibility" before imposing life without parole on a juvenile murderer (*Jones*, 141 S Ct at 1316, 1321; *see also id.* at 1317 ["to reiterate [*Montgomery v Louisiana*, 577 US 190, 211 (2016)] explicitly stated that "a finding of fact regarding a child's incorrigibility … is not required."]). In rejecting the requirement that a sentencer make a factual finding, the Court explained *Miller* cited statistics from states with discretionary sentencing regimes to show that those regimes rarely imposed life-without-parole sentences for juvenile murders, and that the Court did not change procedures for those states with discretionary sentencing schemes (*id.* at 1318 ["the Court did not suggest that the States with discretionary sentencing regimes also required a separate factual finding of permanent incorrigibility, or that such a finding was necessary to make life-without-parole sentences for juvenile offenders relatively rare."]).

In rejecting the requirement for an on-the-record explanation, the court reasoned:

> But if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor

(*id.* at 1319 [footnote omitted] [emphasis in the original]). Recognizing that sentencing courts may weigh the defendant's youth differently, the Court emphasized, "the key point remains that, in a case involving a murderer under 18, a sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider the mitigating factor" (*id.* at 1319-1320).

Under *Jones*, there can be no question that Justice Barrett correctly denied defendant's *Miller* challenge. Justice Barrett astutely found that defendant's sentence, a discretionary fifty-years-to-life term for executing two brothers by shooting them from behind, did not fall under *Miller*'s purview. "Initially, defendant was sentenced under a statue that gave the court discretion to sentence defendant to a minimum term of imprisonment of between 15 and 25 years, and also gave the court

discretion to sentence defendant to concurrent or consecutive terms" (*Matias*, 68 Misc 3d at 364). That defendant could have received as little as fifteen-years-to-life for these crimes remains undisputed (*see* Penal Law §§ 70.00 [2][a], [3][a][i]; 70.25 [1]).

Likewise, New York's statutory sentencing scheme is even more protective. It grants plenary discretion to the Appellate Division to reduce any unduly harsh and excessive sentence in the interest of justice (CPL §§ 470.15 (2)(c), (3)(c); *People v Delgado*, 80 NY2d 780 [1992]). That review has always included consideration of defendant's youth and attendant circumstances (*People v Garcia*, 84 NY2d 336, 342-43 [1994] ["defendant's age, background, criminal history and drug habit" constitute "traditional sentencing factors"]; *accord People v Arzon*, 80 AD2d 786, 787 [1st Dept 1981] [reducing sentence for manslaughter because, *inter alia*, "defendant was 17 years old at the time of the crime"]; *People v Martinson*, 35 AD2d 521 [1st Dept 1970] [reducing sentence "in view of defendant's youth at the time of the deed" after having served 15 years in prison]; *People v Bryant*, 93 AD2d 749 [1st Dept 1983] [reducing sentence for convicted murderer who was 18 at the time of crime with no criminal record]; *People v Yuan*, 65 AD2d 714 [1st Dept 1978] [reducing

sentencing for manslaughter because, *inter alia*, defendant was "17 years of age at the time"]).

Here, defendant asked this Court on direct appeal to reduce his sentence to the statutory minimum, a concurrent term of from fifteen-years-to-life (A.B. at 32-35). He argued that his age of sixteen, which was "barely older than a child," lack of a criminal history, and emotional state, including being intoxicated, warranted a reduction (A.B. at 34-35). This Court rejected that claim, finding "no abuse of sentencing discretion" (*People v Matias*, 235 AD2d 298 [1st Dept 1997]). Thus, since New York employs a two-tier discretionary sentencing scheme, designed to prevent the imposition of excessive sentences, *Miller* does not apply.

b. *Miller* does not apply to defendant who was not sentenced to life without parole and will become eligible for parole within his natural life.

Nor was defendant sentenced to life without parole: "[D]efendant was sentenced to 50 years to life and (had he not been subsequently convicted and sentenced consecutively for promoting prison contraband) he would be eligible for his initial parole hearing at the age of 66, which is an age within his expected natural lifetime" (*Matias*, 68 Misc 3d at 364-65, citing *United States v Mathurin*, 868 F3d 921, 934-35 [11th Cir 2017]).

Indeed, defendant will have what defendants sentenced to life without parole will not—a parole hearing where he can present evidence and have the board "consider his youth and its attendant characteristics at the time he committed the murders, and any other evidence he adduces that demonstrates his maturity and rehabilitation" (*Matias*, 68 Misc 3d at 365, citing *Matter of Rivera v Standford*, 172 AD3d 872, 875 [2d Dept 2019] and *Matter of Hawkins v New York State Dept. of Corr. & Community Supervision*, 140 AD3d 34, 39 [3d Dept 2016]).[10] Thus,

[10] Notably, LWOP did not become a possible sentence in New York until the legislature added it to the Penal Law in 1995 (see William C. Donnino, Practice Commentary Penal Law § 60.00, *Legislative History* ["Separate legislation introduced the sentence of death and life imprisonment without parole for the substantially redefined crime of 'murder in the first degree.' L.1995, c. 1, effective September 1, 1995"]). A Westlaw search of "life without parole" (quotation marks included) produces 117 cases in the state of New York, the earliest of which is from 1993, which quoted a transcript of a parole hearing where the interviewer brought up life without parole, but not in relation to any New York law (*see King v New York State Div. of Parole*, 190 AD2d 423, 429 [1st Dept 1993]). The next earliest case is from 1996 and directly states that life without parole is an authorized sentence on first-degree murder (*see People v Prater*, 170 Misc 2d 327, 331 [Sup Ct, Kings County 1996] ["The statue provides that once the Grand Jury returns an indictment of murder in the first degree the only permissible sentences are death, life without parole, or incarceration for a minimum period of 20 to 25 years and a maximum of life."]).

In 2017, after *Miller*, the Legislature amended Penal Law § 70.00. First, it amended the mandatory terms of life without parole to only apply to individuals 18 and older convicted of specific crimes. Second, it allowed courts to sentence individuals who were 17 or younger at the time of the crime to be sentenced to an indeterminate sentence rather than life without parole—making life without parole wholly discretionary for defendants under 18 at the time of the crime (2017 Sess. Law News of N.Y. Ch. 59 [A. 3009C]).

Justice Barrett was correct, defendant was not entitled to relief under *Miller* and its progeny (*Jones*, 141 S Ct at 1313).

Defendant faults the court for following *Mathurin* and taking judicial notice of the CDC's life expectancy charts from 1992 and 2017 (which included life expectancy by demographic) in finding he was not sentenced to life without parole because they were for "non-incarcerated men" (Def.'s Br. at 28 n.5). Yet, defendant provided neither Justice Barrett nor this Court with any information or studies on the life expectancy of incarcerated men. Presumably defendant would have provided a life expectancy study of incarcerated men had one existed. Thus, this Court should not now credit defendant's belated complaints that the court erred by not taking judicial notice of statistics that very likely do not exist.

Instead, defendant claims that defendant has a life expectancy of 57 years while in DOCCS custody (Def.'s Br. at 28, citing DOCCS, Inmate Mortality 2009-12 at 2 [81% of the 404 deaths *in prison* during that year died of natural causes at an *average age of 57*] [emphasis added]). That

is a gross misrepresentation of what that statistic means.[11] That statistic does not take into account inmates released to parole for medical reasons or due to completion of their minimum term (*Medical Parole: Directive # 4304*, NY STATE DEPT OF CORR AND CMTY SUPERVISION [dated April 4, 2014], *available at* http://www.doccs.ny.gov/Directives/4304.pdf [last visited March 18, 2022]). It only addresses a very narrow category of inmates who actually died in prison. And, even then DOCCS' statistic is an average meaning it could have included individuals who were in their 20's and 90's who died of natural causes (such as cancer, heart attacks, asthma, or other ailments). The use of these statistics as his sole basis for determining life without parole is untenable, and it sorely undercuts his already refuted claim that he received life without parole.

Defendant relies on several unpersuasive, non-binding state and federal cases where courts outside of this jurisdiction found the sentence imposed to be a *de facto* life sentence under *Miller*. But none of those cases dealt with a defendant serving a 50-to-life sentence for a double

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[11] The federal litigation that would occur if the life expectancy of an inmate under DOCCS' care was 57 years, would be dizzying (*see generally Helling v McKinney*, 509 US 25 [1993] [allowing eighth amendment deliberate indifference claims for defendant's alleging future harm to health]).

murder, who will have a parole hearing.[12] Notably, defendant cites *People v Lora*, 70 Misc 3d 181 (Sup Ct, NY County 2020) (*Lora I*), to support the proposition that *Miller* applies to *de facto* LWOP sentences. There, Lora was sentenced to an aggregate 83 1/3 years to life for murders he committed at the age of 17 (*Lora I*, 70 Misc 3d at 182). The court found "under the unique facts and circumstances of this case, the combined sentence [of 83 1/3 years to life] constitutes a *de facto* life sentence" (*Lora I*, 70 Misc 3d at 193).

However, defendant omits *People v Lora*, 71 Misc 3d 221 (Sup Ct, NY County 2021) (*Lora II*), where the court found that defendant's first sentence of 58 1/3 to life was not a *de facto* sentence to life without parole (*Lora II*, 71 Misc 3d at 228). Indeed, *Lora II* noted there "is no 'bright line'

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[12] *See McKinley v Butler*, 809 F3d 908 (7th Cir 2016) (defendant sentenced to two consecutive 50 year jail terms with no possibility of parole or early release); *McCullough v State*, 192 A3d 695 (Md 2018) (aggregate prison sentence of 110 years for convicted of assault-based offenses when defendant would not become eligible for parole for fifty years); *United States v Grant*, 887 F3d 131, 134 (3rd Cir 2018), *reh'g en banc granted, opinion vacated* 905 F3d 285 (3rd Cir 2018) (65-year-prison-sentence imposed on defendant convicted of racketeering and conspiracy offenses under RICO with no possibility of parole); *Moore v Biter*, 725 F3d 1184 (9th Cir. 2013) (sentence of 254 years' imprisonment for non-homicide offenses where defendant had to serve 127 years and 2 months before obtaining parole eligibility); *People v Caballero*, 282 P3d 291 (Cal. 2012) (sentence of 110 years to life imposed for attempted murder convictions where defendant would not become parole eligible for 100 years); *Casiano v Commissioner of Correction*, 115 A3d 1031 (Conn. 2015) (50 years' imprisonment with no possibility of parole for felony murder conviction).

rule for what constitutes a *de facto* life sentence in federal or state law" (*Lora II*, 71 Misc 3d at 227). Most importantly, at the time of writing, *Lora II* explained that "*Miller* did not decide whether its sentencing extended to both mandatory *and* discretionary sentences of life without parole . . . and the question remains unsettled" (*Lora II*, 71 Misc 3d at 227).[13] Of course, that is no longer the case since the Supreme Court decided *Jones*.

Nor does defendant ever address that his sentences merged when he was subsequently convicted, as an adult, for first-degree promoting prison contraband (Penal Law § 70.30 [1][b]). For that crime, defendant received a consecutive sentence of from two-and-one-half to five years. Not only was that sentence more than the minimum and less than the maximum he could have received as a second felony offender (Penal Law §§ 60.05 [6]; 70.06 [3][d], [4][b], 70.25 [2-a]), but he could have also received a persistent felony offender adjudication (Penal Law § 70.10 [1]). The statute for persistent felony offenders does not require sequentiality,

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[13] The court resentenced Lora on June 23, 2021, and that appeal is pending before this Court (*see People v Lora*, M2021-02854, NY Slip Op 72508[U] [1st Dept Sept. 30, 2021]). On February 24, 2022, the Honorable Peter H. Moulton, Associate Justice of this Court, granted defendant leave to appeal from the decision in *Lora II* dated January 22, 2021, and the August 16, 2021, denial of defendant's request to reargue (*see People v Lora*, M2021-203154, NY Slip Op 62102[U] [1st Dept Feb. 24, 2022]).

and second-degree murder is not defined as a violent felony offense. That under New York law, a court could have lawfully adjudicated defendant a PFO as an adult, and imposed a sentence of from twenty-five years to life for that subsequent crime (Penal Law § 70.10 [2]), should render any challenge on the grounds of Cruel and Unusual punishment here academic.

c. The sentencing court gave defendant the individualized consideration of youth that *Miller* requires.

Justice Barrett, who was the sentencing judge in 1994 and the CPL § 440.20 judge in 2020, gave the constitutionally required "individualized sentence required by *Miller* and the Eighth Amendment" (*Matias*, 68 Misc 3d at 364). There can be no doubt that the court was aware of defendant's age: the court presided over the trial, the presentence report indicated defendant's age, and counsel argued for a lower sentence based on defendant being under the age of 18 at the time of the murders as well as having no criminal record (*id.* at 364 n.16).

Still, defendant baselessly attacks Justice Barrett's "recollection," asserts that Justice Barrett "completely ignored" his age, and claims that Justice Barrett imposed the maximum sentence as a "general practice"

(Def.'s Br. at 32-33),[14] despite the overwhelming, consistent, and detailed records that Justice Barrett painstakingly created when he imposed sentence and then denied defendant's CPL 440.20 motion 28 years later. This Court can rely on Justice Barrett's explanation:

> The mere fact that the court in its statement at sentencing did not explicitly identify defendant's age as a mitigating factor is of no moment and does not mean the court failed to consider it. . . . The fact that the court made such a statement and omitted any mention of defendant's age at the time of the murders suggests not that the court failed to consider defendant's age, but that it was not such a compelling consideration as to outweigh the aggravating factors the court explicitly set forth in its statement

(*id.*; *see also Jones*, 141 S Ct at 1319 [rejecting defendant's argument that there had to be an on-the-record sentencing explanation because "the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances the argument based on the defendant's youth"]).

Indeed, Justice Barrett recounted:

> [I]n exercising its discretion and sentencing defendant to the maximum term permissible, the record reflects that after reviewing the pre-sentence report and hearing from counsel, the Court was made aware of, and properly considered: 1) all

[14] The amici call the sentencing (and motion) justice implicitly racist in having imposed this sentence (Brief of *Amici Curiae* at 21, 25). In so doing, the amici accuse the panel of this very Court that heard and rejected the excessive sentence claim on direct appeal of the same. A friend of the court they are not.

> mitigating factors—including defendant's age and lack of criminal history; 2) all aggravating factors—including the gravity of the crimes, the severity of the loss, the manner in which the crimes were committed, and defendant's lack of remorse; and 3) the penological purposes that would be served by imposing the maximum sentence.

(*id.* at 364). And the record at sentencing shows that Justice Barrett did not impose the maximum sentence as a matter of his general practice:

> Two young men with no prior criminal involvements, clean cut, honorable men. The last words of one of them as he was being shot was, "We come in peace." The measure of this case to some extent has to take into account the terrible tragedy of losing these two men and the measure of appropriate punishment also has to take into account the information that we have concerning the individual who's held responsible for that killing, [defendant]. The actions in this case . . . were striking in not only their violence, but also the casualness by which that violence is perpetrated. These young men were shot for no reason. This takes the notion of being murdered for being "dissed" to a new dimension. The individual who was shot was with his girlfriend and the defendant, apparently for reasons of envy or dissatisfaction with the choice freely made by two other human beings, decided to destroy one of those individuals and then just for good measure, destroy his brother. I can't be fully moved by the fact that the defendant has not come before me with a long criminal record because I am unable to ignore the consequences of this act, the enormous loss that we have all suffered by losing these two young men. The family has suffered of course even more. And predominantly because I have yet to see anything by reason of the actions, by reason of the conduct following the murders, the callousness, the lack of contrition to recommend that the defendant [], be regarded as somebody who can rejoin society or has any true hope for returning to us as a contributing member. The prognosis is so awful that given all the

> circumstances of this case my general practice that when separate crimes are committed, consecutive sentences are imposed and I'm satisfied that in this case that separate crimes were committed as to each murder. . . . Each young man's life can't be replaced by a jail sentence, but my feeling is that consecutive sentences as to the two murders at least reflects Court's view that there were two horrendous crimes committed.

(S.8-10). Thus, the court considered the most crucial mitigating factors—defendant's age and lack of criminal history—satisfying *Miller*'s mandate for an "individualized consideration of youth" (*Jones*, 141 S Ct at 1320; *see also id.* at 1315, 1316, 1321).

d. Even taking defendant's arguments as true, the sentencing court would not have changed defendant's sentence because defendant is permanently incorrigible.

Upon considering defendant's alleged mitigation, Justice Barrett found that he would not have imposed a different sentence because defendant was "permanently incorrigible" (*Matias*, 68 Misc 3d at 368). Initially, while the court found the proffered mitigating factors (poor, school dropout, allegedly abusive father, drug and alcohol use, incarcerated brothers) "unfortunate," it was "not the type of mitigation that the court finds compelling when compared to the two murders that occurred here" (*Matias*, 68 Misc 3d at 366; *see also Jones*, 141 S Ct at 1319-1320 [recognizing the constitution does not require sentencing

courts to weigh the mitigating factors in the same way, it just requires that they "have discretion to consider that mitigating factor"]).

The court then noted defendant supplied no evidence of remorse, rehabilitation, or insight into the pain caused, meanwhile defendant's conduct in prison, including his subsequent conviction, "leads to the opposite conclusion—that defendant has not matured and has not been rehabilitated" (*Matias*, 68 Misc 3d at 366, 366 n.18). Even taking judicial notice of all the developments in juvenile psychology, the court would impose the same sentence, "notwithstanding defendant's age when he fatally shot the two victims" because of the severity of the crime, loss suffered by the victims and the family, and that defendant "has not accepted responsibility for his actions and has not adduced one scintilla of evidence that establishes that he has become a model prisoner and that his crimes were the product of 'the transient immaturity of youth'" (*id.* at 367). Thus, setting aside the sentence and resentencing would have been literal form over substance, exactly what defendant argues against (*see* Def's Br. at 18 ["[T]his Court should not place form over substance . . . ."]).

Instead, defendant claims he is not permanently incorrigible by minimizing his brutal murder. Twisting the facts, defendant claims it was a "high paced emotional environment" because he "saw his ex-girlfriend on the lap of another, someone lunged with a knife or hammer" (Def.'s Br. at 33). That recitation is fantasy. To be clear, Melissa was never defendant's ex. Ozzie pleaded for "peace" when defendant already had his pistol in hand. Both Ozzie and Jay were executed from behind. Any suggestion that the unarmed and unintoxicated Jay decided to lunge at defendant, who was holding a pistol, is not only unreasonable, but was also rejected by this Court (*People v Matias*, 235 AD2d 298 [1st Dept 1997]). Likewise, this Court should not credit defendant's claim that he was susceptible to the influences of his criminal brothers and trying to prove himself to his peers—raised for the first time in thirty years (Def.'s Br. at 37). There is no evidence of that anywhere. That defendant, through his attorney, appears to still maintain he was justified after all this time only proves that he is permanently incorrigible.

Nor is it surprising that defendant maintains he was justified: while in prison he claimed he was knocked out from behind, despite an officer observed him throwing punches. Equally alarming is defendant's

conduct in prison. Since imprisonment he committed at least 40 tier two and three violations. Unlike defendant's blatant attempts to avoid the most unflattering facts (Def.'s Br. at 13 n.2), defendant cannot escape that he cut an inmate in the neck, conspired to smuggle drugs into the prison, overdosed on drugs, and engaged in sexual conduct in front of minors. Indeed, while serving a term of fifty-years-to-life, the State felt it necessary to take defendant to trial again, convict him of first-degree promoting prison contraband, in order to lengthen his minimum sentence. That only happens when the prison has run out of other mechanisms to stop a prisoner's continuous, incorrigible behavior.

To overcome this, defendant shifts the burden, claiming the People's documentation of his prison conduct "certainly does not establish that [defendant] is 'permanently incorrigible'" (Def.'s Br. at 17 n.4). But it was defendant's burden to come forward with evidence to rebut the presumption that his sentence was lawful (CPL § 440.20; *People v Session*, 34 NY2d 254, 255-56 [1974]). "[D]efendant provide[d] *no evidence whatsoever* that establishes that he has transformed while in prison by having a positive disciplinary record or having engaged in and completed any rehabilitation programs" (*Matias*, 68 Misc 3d at 366

[emphasis added]). Nor did he proffer what he hoped to elicit at a hearing (*Matias*, 68 Misc 3d at 366 n.18). Instead, defendant offers this Court an excuse, "Counsel was gathering information when the court denied the motion" (Def.'s Br. at 17 n.4). The court effectively granted the defense six months to supply evidence of mitigation. Never once did defendant respond to the court's invitation to provide evidence of mitigation, let alone indicate he was obtaining evidence. This Court should not believe such belated excuses that were never made to the court below.

While defendant cited the New York constitution in parallel citations below, he never once argued that the court should expand *Miller* beyond its holding, relying instead on "precedents interpreting the Eighth Amendment" to argue it applies to *de facto* life without parole (*see Matias*, 68 Misc 3d at 360 n.1). As such, any argument that the New York Constitution should expand *Miller* beyond what the Supreme Court proscribed is unpreserved (*see People v Gordon*, 36 NY3d 420, 434 [2021]). Likewise, defendant never raised any of the arguments surrounding the United Nation's or Model Penal Code's view on sentencing juveniles, despite all of them having been available at the time he submitted his motion (*see Matias*, 68 Misc 3d at 367 n.19). These too are unpreserved

and unreviewable here. Regardless, general complaints that the United States does not follow European practice reflects an argument more aptly raised to the Supreme Court of the United States, not this Court.

Absent statutory authority, the Legislature prohibits modifying sentences authorized by law (*see* CPL § 430.10 ["Except as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed . . . once the term or period of the sentence has commenced]; CPL § 440.20 ["the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.]). Defendant's sentence was neither unconstitutional nor unauthorized, illegally imposed, or otherwise invalid. As *Jones* recognized, "States . . . make the broad moral and policy judgments in the first instance when enacting their sentencing laws" (141 S Ct at 1322). This Court should not "usurp the legislature's role to prescribe punishments and make policy choices with respect to affording favored treatment to youths at sentencing" (*Matias*, 68 Misc 3d at 370). Defendant's CPL § 440.20 motion was correctly denied (*see* CPL § 440.30

[4][a] ["the court may deny [a motion] without conducting a hearing if [t]he moving papers do not allege any ground constituting a legal basis for the motion"]).

POINT TWO

THE MOTION COURT EXERCISED SOUND DISCRETION IN DENYING DEFENDANT'S UNCORROBORATED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

A court, in the first instance, must determinate whether a motion to set aside a sentence "is determinable without a hearing to resolve questions of fact" (*see* CPL § 440.30 [1][a]; *People v Satterfield*, 66 NY2d 796, 799 [1985]). A court should deny the motion if it determines that:

> An 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]). To obtain a hearing, a "[d]efendant must show that the nonrecord facts sought to be established are material and would entitle him to relief" (*Satterfield*, 66 NY2d at 799). An appellate court may overturn the denial only if it finds the lower court abused its discretion in reaching its decision (*see People v Jones*, 24 NY3d 623, 635

[2014]; *People v Samandarov*, 13 NY3d 433, 436 [2009]).

A judgment of conviction is presumed valid; thus, defendant bears the burden of producing evidence sufficient to create an issue of fact, and "bare allegations are insufficient to carry this evidentiary burden" (*People v Session*, 34 NY2d 254, 255-56 [1974]; *People v Gross*, 26 NY3d 689, 693 [2016]). When a defendant claims that counsel provided ineffective assistance, "the failure to include an affirmation from counsel, or an explanation for the failure to do so, has been held to warrant the summary denial of a defendant's postconviction motion" (*People v Wright*, 27 NY3d 516, 522 [2016]).

Justice Barrett properly denied defendant's motion without a hearing because defendant provided no corroboration to his unsupported claims (*see* CPL § 440.30 [4][d]; *see also Matias*, 68 Misc 3d at 368-70). Moreover, the court properly evaluated the credibility of defendant's contentions by weighing them against the record (*Matias*, 68 Misc 3d at 368-70; *see also Samandarov*, 13 NY3d at 439-40 [concluding that the motion court properly summarily denied the defendant's post-conviction motion when the contemporaneous record and the People contradicted those claims, even though it was "theoretically possible that a hearing

could show otherwise"]).

Here, there was no reasonable possibility that defendant's allegations were true (*Matias*, 68 Misc 3d at 368-69). Defendant alleged as follows:

> I was assigned a lawyer. I don't remember him ever coming to see me at Rikers Island where I was detained for 2 years. I don't even remember him coming to talk to me in the pens before going to court. I remember exchanging a few words with him at the table in the courtroom. He never asked me about school or about my family or about anything.

(Judgment Roll: Def.'s CPL 440 Motion, Exhibit A at ¶¶ 7-8). Defendant could not even recall counsel's name. Then—attached to his reply motion—defendant provided trial counsel's sworn statement: "I literally remember nothing about this case described to me as involving a 16 year old defendant, 2 murders, and a sentence of 50 years to life" (Judgment Roll: Def.'s CPL 440.20 Reply, Exhibit A at ¶ 5). Defendant further alleged, as he does here, that counsel "fail[ed] to present *any mitigating evidence at sentencing* against the imposition of the maximum permissible sentence . . ." (Judgment Roll: Def.'s CPL 440.20 Motion, Memo of Law at 11, Point II [emphasis added]; Def.'s Br. at 41, Point II).

Without defendant supplying any corroboration that counsel failed to communicate with him and his family or conduct an investigation

before sentencing, the court properly found defendant's claim implausible:

> A review of the entire record, including pretrial motions and hearings, the trial itself, and sentencing, makes clear that trial counsel provided exemplary representation. Prior to trial, [counsel] filed motions and obtained a pretrial hearing, during which counsel vigorously opposed the admission of statement and identification evidence. Once trial began, [counsel] ably cross-examined the People's witnesses and made numerous objections on defendant's behalf, many of which were sustained. Further, [counsel] skillfully elicited testimony from the People's witnesses in attempting to build the foundation for justification and intoxication defenses without having defendant testify and exposing him to cross-examination. [Counsel] attempted to secure jury instructions with respect to those defenses and then delivered a cogent summation in which he outlined what he perceived to be the prosecution's weaknesses. Finally, after defendant was convicted, at sentencing, albeit briefly, [counsel] argued for a lesser sentence and cited as a basis for leniency the most significant mitigating factors available—defendant's youth and his lack of criminal history. Thus, when viewed in totality, and as of the time of the representation, the record fails to establish that defendant was deprived of effective assistance of counsel at sentencing.

(*Matias*, 68 Misc 3d at 369 [footnote and citations omitted]).

Still, defendant claims "[c]ounsel's performance pretrial and at trial did not—as the motion court implied—cure his lack of the most minimal effort at sentencing" (Def.'s Br. at 48). In other words, defendant claims Justice Barrett should have ignored defendant's sworn allegation that

counsel barely talked to him before, during, and after trial, or that counsel failed to present any mitigating factors, and only focused on what benefited defendant's claim. That is not the law (*see Samandarov*, 13 NY3d at 439-40 [concluding that a motion court evaluating an affidavit properly considered its credibility in light of other sworn statements contained therein]).

Defendant waited almost 30 years before claiming that his trial counsel "conducted no investigation" and "did not even meaningfully interview [defendant] and his mother" before sentencing (Def.'s Br. at 46). Yet, defendant provided nothing more than his own bare allegations. Trial counsel, who has since retired, has no recollection and no file for this matter. That counsel subtracted defendant's birth year, 1975, from the year of crime, 1992, to say defendant was 17 at the time of the murders is of no moment.[15] There is no proof that counsel did not perform an investigation, and that is due to defendant's lack of diligence in presenting these claims (*cf. People v Friedgood*, 58 NY2d 467, 471, 473 [1983] [trial court did not abuse discretion in denying CPL § 440.10

[15] Especially since appellate counsel incorrectly claims defendant was 19 in 1996 (Def.'s Br. at 13 n.2), when he was 21 and committed another crime.

motion without hearing where defendant waited over three years to bring the proceeding]). Under these circumstances, counsel is entitled to a strong presumption that he rendered effective assistance (*Burt v Titlow*, 571 US 12, 22 [2013] ["It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance"] [internal citations and quotations omitted] [alteration in the original]).

Defendant can only cite the lack of a record made during sentencing to argue counsel was ineffective. However, that lack of a record is due, in part, to defendant refusing to speak to probation about his home and social environment, and education (PSR.3). Whether or not counsel conducted an investigation, defendant's refusal to be interviewed undercut the persuasiveness and credibility of any argument counsel could have made regarding poverty, abuse, or educational troubles in seeking a reduced sentence. Counsel's performance was meaningful.

Justice Barrett also found that "not only was defendant afforded meaningful representation at sentencing, he was also not prejudiced by any purported deficiencies in counsel's performance" (*Matias*, 68 Misc 3d at 370). He reasoned, "even if [counsel] could be faulted for not doing a

more comprehensive investigation and making a more detailed presentation to the court at sentencing, the quality of information that he conceivably could have obtained and disclosed to the court would not have caused the court to alter its view of the propriety of a maximum sentence" (*id.*).

Now, defendant dismisses Justice Barrett's prejudice analysis as "the idiosyncrasies of a particular decision maker" and argues that "[w]hile the motion court found that nothing would have affected its sentencing decision, the evidence presented established a reasonable probability that a court would have reached a different outcome" (Def.'s Br. at 49). Defendant's argument fails for two reasons. First, as previously stated, bare allegations do not constitute evidence sufficient to meet his burden (*see Session*, 34 NY2d at 255-56; *Gross*, 26 NY3d at 693). The only "evidence" counsel supported this motion with was bare allegations from defendant that counsel never spoke with him, investigated his background before sentencing, or provided mitigating factors—all of which were unlikely to be true. And counsel's representation that she was obtaining prison records and would have had an expert testify to the record's significance at a *Miller* hearing—an

allegation that was never made to Justice Barrett (Def.'s Br. at 17 n.4)—does not change this analysis because that proffer is irrelevant. An expert explanation for defendant's conduct after sentencing cannot form the basis of an ineffective assistance of counsel claim that occurred at sentencing.

Equally important, counsel's attack on Justice Barrett ignores that the Supreme Court rejected that argument after a trial judge performed a similar analysis in *Williams v Taylor*, 529 US 362 (2000), a case on which counsel heavily relies. In finding counsel ineffective at sentencing, the Supreme Court emphasized:

> We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of Strickland. After hearing the additional evidence developed in the postconviction proceedings, *the very judge who presided at Williams' trial*, and who once determined that the death penalty was "just" and "appropriate," *concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence*. We do not agree with the Virginia Supreme Court that Judge Ingram's conclusion should be discounted because he apparently adopted "a per se approach to the prejudice element" that placed undue "emphasis on mere outcome determination."

(*Williams*, 529 US at 396-97 [emphasis added] [citations omitted]). Again, this Court can rely on the original sentencer's representations

that it would not have changed his outcome.

Thus, the court correctly rejected defendant's ineffective assistance of counsel claim and properly denied a hearing (*Satterfield*, 66 NY2d at 799).

CONCLUSION

This Court Should Affirm Defendant's the Denial of Defendant's CPL 440.20 Motion.

Respectfully Submitted,

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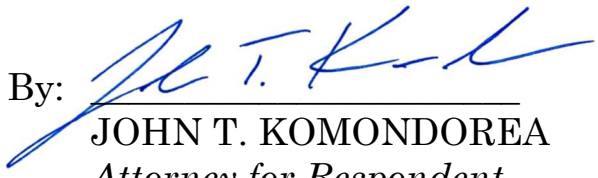
By: 
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