SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY YARBOUGH,

Defendant.

NOTICE OF MOTION FOR LEAVE TO RENEW

Ind. No. 7325/92

TO: Kings County District Attorney's Office
350 Jay Street
Brooklyn, NY 11201

PLEASE TAKE NOTICE, that upon the annexed affirmation of Zachary Margulis-Ohnuma, an attorney duly admitted to practice law in the State of New York, the annexed exhibits and all prior proceedings and papers submitted herein, the undersigned will move this Court at the courthouse thereof at 320 Jay Street, Brooklyn, New York as soon as counsel can be heard for an Order:

1. GRANTING leave to renew the Court's Decision and Order dated January 4, 2012;

2. VACATING the Judgment of Conviction pursuant to CPL §§ 440.10(1)(g) and (h); or, in the alternative,

    a. GRANTING a hearing on the issues raised in the underlying 440.10 Motion,

    b. DIRECTING the People to make all autopsy files and, under reasonable conditions, physical evidence available to the defense,

    c. APPOINTING a forensic pathologist pursuant to County Law 18-b, to assist in perfecting the instant motion; and

    d. DIRECTING the People to cause forensic DNA testing pursuant to CPL § 440.30(1-a) of certain evidence gathered at the crime scene; and

3. For such other relief as this Court may deem just and proper.

Dated: New York, New York
March 15, 2012

Respectfully submitted,

Law Office of Zachary Margulis-Ohnuma

By: _____

Zachary Margulis-Ohnuma
260 Madison Avenue, 17th Fl.
New York, NY 10016
(212) 685-0999
zach@zmolaw.com

Law Office of Philip J. Smallman
32 Court Street
Brooklyn, NY 11201

Copies to: Clerk of Court
Kings County District Attorney's Office

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ANTHONY YARBOUGH,

Defendant.

ATTORNEY AFFIRMATION IN SUPPORT OF MOTION TO RE-NEW POST-CONVICTION MOTIONS

Ind. No. 7325/92

I, Zachary Margulis-Ohnuma, an attorney duly licensed to practice law in the State of New York, do hereby state and affirm under penalty of perjury as follows:

1. I represent the defendant Anthony Yarbough with respect to post-conviction proceedings. This Affirmation is submitted in support of Mr. Yarbough's motion pursuant to CPLR Rule 2221(e) for leave to renew his motions to vacate his conviction under CPL § 440.10 and to compel DNA testing of certain evidence under CPL 440.30(1-a).

2. The basis of this motion to renew consists of four documents that were not previously available and support Mr. Yarbough's claims for relief based on (1) ineffective assistance of counsel at trial, (2) newly discovered evidence and (3) actual innocence. True copies of the new documents are attached hereto as exhibits as follows:

(a) Exhibit A is an Affirmation executed by Mr. Yarbough's attorney, Irene Elliott, describing her failings at trial ("Elliott Aff.");

(b) Exhibit B is an Affidavit executed by Sylvia Vivas, the defendant's grandmother, describing interviews by Ms. Elliott with uncalled witnesses ("Vivas Aff.");

(c) Exhibit C is an Affidavit by Martha Lineberger, Esq., describing the contents of the file on direct appeal; and

(d) Exhibit D is a copy of the minutes of co-defendant Sharrif Wilson's parole hearing on October 7, 2009 in which he denies committing the murders.

3. This motion and affirmation are meant to supplement the Motion to Re-Argue previously submitted. The Motion to Re-Argue and all accompanying papers are hereby specifically incorporated by reference as though fully set forth herein.

PROCEDURAL HISTORY

4. The underlying Notice of Motion and Attorney Affirmation ("Mot.") were filed on or about July 19, 2010. The motion sought to vacate the judgment on various grounds or, in the alternative, to appoint a private investigator and forensic pathologist pursuant to County Law § 18-b and compel DNA testing pursuant to CPL § 440.30(1-a).[2]

5. Our initial papers included several documents that were obtained in 2009 via a request to the Kings County District Attorney's Office under the Freedom of Information Law. Mot. ¶¶ 60 – 65. These included what we believed at the time were notes by the medical examiner who arrived at the scene, Dr. Jonathan Eckert, Mot. Ex. M; a DD-5 of a police interview with Major Yarbough, the defendant's uncle to whom he reported the murders, Mot. Ex. D; and notes of a police interview with trial witness Charnette Loyal that had been conducted the day the bodies were found, Mot. Ex. B. As

[2] We have not attached additional copies of the initial motion papers or the People's initial response to this Affirmation because they are voluminous. However, if needed, copies will be made available to the Court upon request.

discussed in further detail below, these items were not available to the defense previously and were not part of the record.

6. The People responded to our papers with an Attorney Affirmation attaching a Memorandum of Law filed on November 30, 2010 ("Opp."). The People's response to our motion shed new light on the key piece of documentary evidence supporting Mr. Yarbough's claims: the notepad entry indicating that the murders occurred 8-10 hours before the bodies were found or before the medical examiner arrived. Mot. Ex. M; Opp. Aff. Ex. VI. In an Affidavit submitted by Detective Peter McMahon, the People explained that the notes were actually made by Detective McMahon, who had testified at Mr. Yarbough's trial. *Id.* Det. McMahon further suggested in his affidavit that the notepad was handed over to defense lawyer Irene Elliot during Det. McMahon's trial testimony. Id., *citing* Tr. 529-31. Thus we were mistaken in our initial assertion that these notes indicating the time of death were made by Dr. Eckert. As argued in our prior motion to reargue, we concede that these exculpatory documents were given to defense counsel. However, they were not introduced at trial: as a result, they constitute outside-the-record evidence of ineffective assistance of counsel. *See People v. Davis* 261 A.D.2d 411, 412 (2d Dep't 1999) ("To the extent that the defendant's claim of ineffective assistance of counsel is premised upon his attorney's failure to present certain evidence, it involves matters which are *dehors* the record[.]").

7. After the People responded, I sent a letter to the Court requesting (1) a court conference to discuss the appointments I had requested under County Law § 18-b and (2) that the court hold any decision on the merits in abeyance until experts could

be retained so that I could respond to the deficiencies the People noted in my initial papers. A true copy of this letter is attached hereto as Exhibit E.

8. The People responded with a detailed letter dated December 22, 2010 once again opposing our request for public funds for an investigator and forensic pathologist, and stating that some of the physical evidence had been located. A true copy of this letter is attached hereto as Exhibit F.

9. Specifically, the People advised that an official at the Office of the Chief Medical Examiner ("OCME") had located the following items:

> (a) The remains of three cigarette butts that were found in the trash in the kitchen in the crime scene, Ex. B at 2;
>
> (b) pulled head hair, pulled pubic hair, left and right hand fingernail clippings, and a control envelope from the body of the defendant's mother, Annie Yarbough, Ex. B at 3;
>
> (c) pulled head hair, pulled pubic hair, pubic hair combings, and a control envelope from the body of victim Chavonne Barnes, Ex. B at 3;
>
> (d) pulled head hair, pubic hair combings, pulled pubic hair, fingernail clippings from the left and right hands, a wad of tissue found in the underwear, and a control envelope for the defendant's 12-year-old sister, Latasha Knox, Ex. B at 3; and
>
> (e) stains of the blood of each of the victims taken during the autopsies, Ex. B at 3.

10. In their response, the People agreed to submit documentation of these items to the Court after the OCME official returned from vacation. Ex. B at 3. The People also agreed to DNA testing of these materials (other than the cigarette butts), assuming they were suitable for testing. *Id.* at 3-4.

11. As far as I know, no such documentation was ever submitted to the Court. No such documentation has been served on this office. I am unaware of any DNA testing being done.

12. My office was in touch with assigned ADA Camille Gillespie in early 2011, but Ms. Gillespie has never indicated that progress had been made on obtaining the documentation or testing of the items.

13. In particular, I wrote to Ms. Gillespie on February 15, 2011, requesting the OCME reports, some missing portions of the transcripts, and minutes of parole hearings of co-defendant Sharrif Wilson. A copy of that letter is attached hereto as Exhibit G. I was provided with the missing transcript pages, but the OCME reports and parole minutes were never turned over. I obtained the parole minutes directly from the Board of Parole.

14. In his 2009 parole hearing, Mr. Wilson stated that he did not commit the murders. *See* Ex. D.

15. Based on the correspondence with the Court, I believed during this period and through the beginning of 2012 that the case was being held in abeyance in order to give the defense time to continue investigating, to file reply papers and additional affidavits, and to give the People time to keep their promise to test the outstanding items.

16. On Friday, January 13, 2012 I received from the Court the Court's Decision and Order dated January 4, 2012 denying are motions, except insofar as the People agreed to test certain items.

17. In the meantime, in the spring of 2011, I raised donated funds from my own network of family and friends on behalf of Mr. Yarbough in order to engage the

services of a private investigator, Jay Salpeter, who is a former Brooklyn homicide detective and experienced in post-conviction investigations.

18. Mr. Salpeter has made extensive efforts to locate the medical examiner at the scene, Dr. Eckert, but Dr. Eckert cannot be located.

19. In addition, Mr. Salpeter has uncovered additional extra-record evidence of the ineffectiveness of trial counsel which would be presented at a hearing. An affidavit from Sylvia Vivas, obtained with the assistance of Mr. Salpeter, is attached which explains that she helped trial counsel find and interview exculpatory witnesses but trial counsel inexplicably failed to call these witnesses during the trial.

20. Before filing the underlying CPL § 440.10 motion, my office made extensive efforts to obtain the autopsy files from the Office of the Chief Medical Examiner in order to have a factual basis for an expert affidavit. However, the Kings County District Attorney's office intervened to prevent us from accessing the file. In particular, I am informed that on or about April 8, 2010, John Besunder of the Kings County District Attorney's Office spoke to a law student intern working as a volunteer for my office, Martha Lineberger, and told her that the only way the autopsy files would be released was through a court order. *See generally* Ex. C at 2.

21. Since filing the 440.10 motion, I have spoken to several experts in the field of forensic pathology, despite the fact that Mr. Yarbough is at present unable to pay for an expert evaluation. However, the experts I spoke to stated that an evaluation would be pointless without access to the autopsy files.

22. On Wednesday, February 1, 2012 I filed a motion for leave to reargue portions of the Court's Decision and Order that denied the defendant's motion to vacate the conviction and DNA testing of certain items collected at the crime scene. That motion is pending and the information and evidence contained herein is intended to supplement the legal argument made in the motion to reargue.

ARGUMENT

23. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on prior motion." CPLR Rule 2221(e). The basis of this motion to renew consists of material evidence that was not previously available to support Mr. Yarbough's claims for relief based on (1) ineffective assistance of counsel at trial, (2) newly discovered evidence and (3) actual innocence. The new evidence includes an affidavit from Mr. Yarbough's trial counsel explaining why and how she failed to provide competent representation at trial; an affidavit from the defendant's grandmother describing additional exculpatory evidence that the trial lawyer never used; an affidavit from an intern in my office demonstrating that we diligently proceeded on the underlying motion in this case and that the evidence we submitted previously was not available to the appeals lawyer; and a transcript of the parole hearing in 2009 in which the only witness against Mr. Yarbough recants his testimony under oath. We describe this new evidence – and, where applicable, the reasons it was not submitted previously – in turn.

A. Irene Elliot's Affidavit

24. Irene Elliot was Mr. Yarbough's trial attorney. In her affidavit, she states, "I had no strategic reasons for the decisions that Mr. Margulis-Ohnuma pointed out. It is very painful and difficult for me to say this, but in hindsight it is clear to me that I failed Tony in my representation of him." Ex. A, ¶ 8.

25. In the affidavit, Ms. Elliot states that she had never handled a homicide before taking Mr. Yarbough's case. Although Ms. Elliot was a member of the 18-b panel for felonies, she was not a member of the panel for homicides. Upon being assigned Mr. Yarbough's case, Ms. Elliot contacted the 18-b administrator, but was instructed to stay on the case. Ex. A, ¶ 9.

26. According to Ms. Elliot, the trial judge pressured the attorneys to hurry the trial because he had vacation plans. Ms. Elliot explains, "As a result of this pressure, the difficulty of the case, and the Judge's overall demeanor and attitude towards me, I was in an emotional state during the trial. In fact, when I reviewed my mistakes with Mr. Margulis-Ohnuma and Mr. Smallman, it seemed apparent that as a general matter I missed a number of important points because of the emotional state I was in." Ex. A, ¶ 11.

27. Ms. Elliot explained that she did not have strategic reasons for her failure to argue time of death. She did not even realize that she could have hired a medical expert at public expense. She explains, "In retrospect, I of course should have hired an expert to consult on this topic as soon as I learned that Tony had an alibi for

earlier that day, let alone when I found out that the bodies were in full *rigor mortis* when they were found." Ex. A, ¶¶ 10-11.

28. As to her failure to cross-examine Sharrif Wilson about his "emphatic" denial of the crime to a probation officer between the two trials, Ms. Elliot states that she did not remember that Sharrif Wilson denied committing the crime to his probation officer or that Judge Kreindler read portions of the report into the record. She states, "I should have vigorously cross-examined Sharrif about that statement, which was made *after* he had already testified against Tony at one trial. I was surprised to see that I did not cross-examine Sharrif at all about that statement. I can only conclude that I was not listening or not paying attention when the judge read the statement into the record. There is simply no reason in the world that I would not have cross-examined Sharrif about that statement if I had been paying attention at that time." Ex. A, ¶¶ 14-15.

29. As to her failure to object to the admission of an un-noticed prior custodial statement of her client, Ms. Elliot states that she "simply overlooked the fact that [she] did not have prior CPL § 710.30 notice" of Mr. Yarbough's statement. Ex. A, ¶ 16.

30. With respect to her failure to prepare defense witness Charnett Loyal, Ms. Elliot states that to her recollection she did not meet with or prepare Charnette Loyal prior to the trial, and that she did not remember the notes of the police interview of Charnette Loyal and did not make a "conscious decision…not to use the notes." *Id.* at ¶ 17. She states that she does remember that Ms. Loyal appeared to be under the influence of drugs when testifying, and that she should have asked for a brief adjournment to allow

her to sober up, but was afraid of angering the judge who wished the trial to move quickly. *Id.* ¶18.

31. As to her failure to object to improper questioning by the assistant district attorney, Ms. Elliot agrees that she "should have objected to questions where the prosecutor effectively testified [during the cross-examination of Sandra Vivas] that Tony beat his mother. The only reason I did not object to this testimony is that I was intimidated by the judge." Ex. A, ¶ 19.

32. Further, Ms. Elliot admits that she failed to make a number of crucial arguments in summation for no strategic reason. "I had no reason, strategic or otherwise, for failing to make these arguments except that I was overwhelmed by the trial and intimidated by the judge. By the time of the closings I was in an emotional state because of the back-and-forth with Judge Kreindler, stress over the snowstorm, the lack of alternate jurors, and the stress of trying my first murder case without any assistance." *Id.* at ¶ 20.

33. This affidavit is crucial evidence of ineffective assistance of counsel that is not in the trial record. Since the ineffective assistance of counsel claim in the original 440.10 motion was dismissed on procedural grounds, not the merits, this affidavit "would change the prior determination." The affidavit is off-the-record evidence that persuasively supports each individual claim of ineffective assistance of counsel brought in the 440.10 motion. *See People v. Gil*, 285 A.D.2d 7, (3d Dep't 2002) ("ordinarily a complete record adduced through a motion to vacate a judgment of conviction pursuant to CPL 440.10, which includes an affidavit from trial counsel

explaining his or her trial tactics, is necessary in order to properly evaluate a claim of ineffective assistance of counsel.").

34. Furthermore, the affidavit in and of itself is sufficient outside-the-record proof of ineffective assistance of counsel. Ms. Elliot explains her lack of experience and the tense circumstances that rendered her unable to adequately advocate for Mr. Yarbough. She lists her failings and her lack of trial strategy. She acknowledges that her emotional state compromised her professional judgment. Indeed, the affidavit alone demonstrates that Ms. Elliot's performance "viewed in totality" did not amount to "meaningful representation" as required by the Constitution. *People v. Baldi*, 54 N.Y. 2d 137, 147 (N.Y. 1981).

35. Not only does this affidavit warrant "chang[ing] the prior determination," but there was a "reasonable justification" for the delay in obtaining the affidavit. This affidavit is extensive and detailed. Additionally, as Ms. Elliot says, she is "admitting to a substantial professional failure by swearing to th[e] affirmation." Ex. A, ¶ 21. The delays were caused, in part, by the time needed to schedule and hold meetings with Ms. Elliot, which required developing a relationship with her so that she would be willing to work fully with Mr. Yarbough's new lawyers on this affidavit. Also, as she states, her recollection of the trial was not clear, and time was needed to refresh her recollection of the trial and the circumstances around it as fully as possible. Ex. A, ¶7. We had intended to submit this affidavit to the Court along with other evidence in our Reply papers.

B. Sylvia Viva's Affidavit

36. The second area of off-the-record evidence of trial counsel's ineffectiveness is the affidavit of Sylvia Vivas, who is Anthony Yarbough's grandmother. In her affidavit, Ms. Vivas recounts taking Irene Elliot to Tony's apartment building shortly after the murders to assist Ms. Elliot in speaking to potential exculpatory witnesses. Ms. Vivas recounts talking to the witnesses with Ms. Elliot. Ms. Elliot first spoke with a "Ms. Mary" who lived on the first floor of Tony's apartment building. Ms. Mary could hear whenever someone entered or exited his apartment. According to Ms. Vivas, "Ms. Mary told Ms. Elliot that on the morning of June 18, 1992, Anthony and his friend were sitting outside the apartment building. Then, Anthony went into his family's apartment by himself. Anthony quickly came out the apartment screaming, 'They're all dead!'" Ex. B ¶ 8-11.

37. Ms. Vivas was also present when Ms. Elliot interviewed a witness on the fourth floor of the apartment building. "The woman told us that on the morning of June 18, 1992, she was getting dressed to go to work. From her window, she saw Anthony hanging out in front of the apartment building. She then saw Anthony enter the building and quickly come out running. She could see that Anthony was screaming something, but could not make out what he was saying. Next thing she knew the cops had came and taken Anthony away. She said she didn't have time to talk to other people about what she saw because she had to go to work." Ex. B, p. 1-2, ¶ 8-13.

38. Both of these witnesses are materially exculpatory witnesses whom Ms. Elliot failed to call at trial for no strategic reason. Ms. Vivas' affidavit presents

substantial evidence of ineffective assistance of counsel outside of the record. *See People v. Nau*, 21 A.D.3d 568, 569 (2d Dep't 2005) ("the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel"). These witnesses make clear that Mr. Yarbough did not have time to kill all three victims, let alone tie them up in the elaborate manner in which they were found, and that Sharrif Wilson was not present when Mr. Yarbough entered the apartment. These witnesses had exculpatory information, their testimony was mutually reinforcing and there was no strategic reason for Ms. Elliot's failure to call them at trial. The magnitude of this failure to present two witnesses whose recollections were identical and exculpatory alone constitutes ineffective assistance of counsel, and in combination with trial counsel's multiple other failures would lead to a different decision on the § 440.10 motion regarding ineffective assistance of counsel.

39. Mr. Salpeter found Ms. Vivas, interviewed her, and then conducted an additional interview that was filmed in order to document her testimony. As discussed above, since Mr. Yarbough is indigent and his family was unable to help him financially, I raised money for Mr. Salpeter's fee from my own family and friends. It was time consuming both to raise the necessary funds and for Mr. Salpeter to investigate this case. This necessary time was a "reasonable justification" for not bringing this evidence before the court previously.

C. Martha Lineburger's Affidavit

40. Martha Lineberger was a law student intern at my law office from May of 2009 until May of 2010. Ex. C, p. 1 ¶1. In her affidavit, Ms. Lineberger details

her attempts to get the full autopsy reports necessary for an expert witness to form an opinion as to the time of death of the victims. She called the New York City Office of the Chief Medical Examiner multiple times, but was told the consent of the People was required. She contacted the People who informed her that a formal court order was needed (although not stated in the Affidavit, Ms. Lineberger reported to me in an email dated April 8, 2010 that the official she spoke to was John Besunder of the homicide bureau of the Kings County District Attorney's Office.

41. We did request a court order, both in the motion and in our follow-up letter, Ex. E, but that request was never acted upon.

42. Ms. Lineberger also explains that Mr. Yarbough's case file at the Legal Aid Society only had tapes made by the medical examiner that contained an incomplete autopsy report that the recorder planned to fill in and contained no conclusions about time of death. Without the full autopsy, an expert medical examiner cannot form an opinion about the time of death needed to fully develop the ineffective assistance of counsel and actual innocence claims. I had planned to submit this affidavit in the response motion to make it clear that the autopsy records were needed and that the People had refused to turn them over. Until the People responded, it was not clear that this affidavit was needed, which is why it was not previously submitted.

D. Minutes of Sharrif Wilson's Parole Hearing on October 7, 2009

43. The fourth piece of evidence in support of Mr. Yarbough's grounds for relief is Sharrif Wilson's Parole Hearing records from October 7, 2009. In

this hearing, Mr. Wilson denies that he committed the crime. He also says he was coerced into giving a confession. Ex. B at 6. His denial necessarily exonerates Mr. Yarbough.

44. Though in 2011 Mr. Wilson again claimed to have committed the murders, in the setting of a parole board hearing in which remorse and rehabilitation are the key components of succeeding in the hearing, Wilson's denial of committing the murders in 2009 are against his interests and thus far more believable than his generally vague and non-committal confessions to the crime at the hearings. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 Iowa L. Rev. 491, 497 (2008) (arguing "innocent inmates currently face a true 'prisoner's dilemma' when encountering parole boards. Choice A consists of proclaiming innocence and consequently hindering the possibility of parole; Choice B involves taking responsibility for a crime the prospective parolee did not commit and bolstering the chance for release"). In the parole hearing Mr. Wilson even explained why he had previously claimed to be guilty: "I said yes so hopefully I could be released, to show remorse. That's what I was told, if you show remorse, then eventually the board will let you go". Ex. B at 6. This record of the parole hearings constitutes new evidence and furthers Mr. Yarbough's claim of actual innocence by revealing that the sole witness against him lied at trial.

45. These records were not previously furnished to the Court because until the People sent their reply, I was not aware that Mr. Wilson had testified before the parole board. Once the People raised the issue of parole minutes, I promptly made a FOIL request for the hearings the People had omitted in their reply. When they were sent

to us, I discovered that Mr. Wilson had denied his guilt in his 2009 hearing. I had intended to submit these transcripts in my reply papers mentioned in the letter to the Court dated December 13, 2010.

CONCLUSION

46. The four pieces of evidence presented in this motion all provide "new facts not offered on the prior motion that would change the prior determination," and there is "reasonable justification for the failure to present such facts on prior motion." CPLR Rule 2221(e).

WHEREFORE, I respectfully request that the relief specified herein and in the accompanying Notice of Motion be granted.

Dated: New York, New York
March 15, 2012

Respectfully Submitted,

Law Office of Zachary Margulis-Ohnuma

By: _____
Zachary Margulis-Ohnuma