COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

GIL SHEARER,

Ind. No.: 2003-0708

Defendant.

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ZUCKERMAN, J.

The following papers numbered 1-2 were read in connection with this application by Defendant, pursuant to CPL §440.20, to set aside his sentence as illegal:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION/EXHIBIT	1
OPPOSING PAPERS[1]	2

FACTS

On or about March 22, 2003, Defendant was charged with, *inter alia*, Murder in the Second Degree, regarding a homicide which had occurred in Mount Vernon earlier that day. Defendant was subsequently indicted for Murder in the Second Degree (on a Depraved Indifference theory) and other charges. Following pre-trial proceedings, on January 22, 2004, a non-jury trial was commenced (Walker, J.). After hearing several witnesses, the matter was adjourned to January 26, 2004 for the trial to continue. On that date, Defendant entered a plea of guilty to Murder in the Second Degree. After a complete allocution at which, *inter alia*,

[1]In addition, on July 3, 2019, the court held a telephone conference with both counsel.

a sentence promise of 15 years to life incarceration (concurrent with the sentence yet to be imposed in connection with his prior plea on another matter, Ind. #2002-1566) was placed on the record, the court accepted Defendant's guilty plea and adjourned the matter to March 10, 2004 for sentence.

On January 29, 2004, Defendant was present before the court (Adler, J.) on his prior matter, Ind. #2002-1566. A Pre-sentence report, ordered on the day the plea was taken, was present in court that day. The court advised Defendant that it would not adhere to its prior promise, since Defendant had been arrested on the instant matter while awaiting sentence on Ind. #2002-1566, and imposed a sentence of seven and one-half to fifteen years incarceration as a second felony offender. On March 10, 2004, Defendant was before the court (Walker, J.) for sentencing on the instant matter. The court specifically inquired of counsel for Defendant whether he had an opportunity to review the Pre-sentence Report (i.e., the Report prepared for Defendant's sentencing on Ind. #2002-1566 on January 29, 2004, just 5 weeks earlier). Counsel stated that he had not, whereupon the court provided counsel time to review the Report. Following that time, counsel for Defendant acknowledged that he had reviewed the Report and waived any adjournment for sentencing. Defendant was then sentenced, as promised, to fifteen years to life incarceration, concurrent with the prior sentence on Ind. # 2002-1566 (seven and one-half to fifteen years incarceration as a second felony offender).

Subsequently, Defendant filed a direct appeal, asserting that his actions did not constitute Depraved Indifference Murder and that his plea allocution had been deficient. The Second Department affirmed his conviction (*People v Shearer*, 29 AD3 608 (2008). Thereafter, Defendant filed his first CPL §440.10 motion, seeking to vacate his conviction on the ground that he had a viable justification defense which should have been raised by the trial court or his counsel. In a Decision and Order dated July 12, 2006, this court (Cacace, J.) denied the motion. No appeal of that Decision and Order followed. In June, 2007, Defendant filed his second CPL §440.10 motion, seeking vacatur of his conviction on the ground that his attorney was ineffective for misinforming him regarding the elements of depraved indifference murder and for failing to preserve his potential challenge to the plea allocution. In a Decision and Order dated September 10, 2007, this court (DiBella, J.) denied the motion and, in January, 2008, the Appellate Division, Second Department, denied leave to appeal that Decision and Order. Three months later Defendant filed a *coram nobis* petition with the Second Department, which was denied in June, 2008. In November, 2008, Defendant filed a petition for writ of *Habeas Corpus* in the United States District Court, Southern District of New York, again attacking, *inter alia*, the sufficiency of th depraved indifference count and his plea allocution. In October, 2013, the writ was denied and leave to appeal to the

Second Circuit was denied in April, 2017.

Defendant now seeks, pursuant to CPL §440.20 motion, to vacate his sentence on the ground that it is illegal as entered without a pre-sentence report.

DISCUSSION

Defendant alleges that his sentence on Ind. #2003-708 is illegal because the court neither ordered nor received a Pre-sentence Report in connection with Defendant's guilty plea to Murder in the Second Degree. See CPL §390.20. CPL §390.20 provides

> **§ 390.20 Requirement of pre-sentence report**
>
> 1. Requirement for felonies. In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation.
>
> 2. Requirement for misdemeanors. Where a person is convicted of a misdemeanor a pre-sentence report is not required, but the court may not pronounce any of the following sentences unless it has ordered a pre-sentence investigation of the defendant and has received a written report thereof:
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> (a) A sentence of probation except where the provisions of subparagraph (ii) of paragraph (a) of subdivision four

of this section apply;

(b) A sentence of imprisonment for a term in excess of one hundred eighty days;

(c) Consecutive sentences of imprisonment with terms aggregating more than ninety days.

3. Permissible in any case. For purposes of sentence, the court may, in its discretion, order a pre-sentence investigation and report in any case, irrespective of whether such investigation and report is required by subdivision one or two.

4. Waiver. (a) Notwithstanding the provisions of subdivision one or two of this section, a pre-sentence investigation of the defendant and a written report thereon may be waived by the mutual consent of the parties and with consent of the judge, stated on the record or in writing, whenever:

(i) A sentence of imprisonment has been agreed upon by the parties and will be satisfied by the time served, or

(ii) A sentence of probation or conditional discharge has been agreed upon by the parties and will be imposed, or

(iii) A report has been prepared in the preceding twelve months, or

(iv) A sentence of probation is revoked.

[Eff. until Sept. 1, 2020, pursuant to L.1995, c. 3, § 74, par. d. See, also, closing par. below.] Provided, however, a pre-sentence investigation of the defendant and a written report thereon shall not be waived if an indeterminate or determinate sentence of imprisonment is to be imposed.

As the People properly point out, the sentencing minutes belie Defendant's assertion. They clearly indicate that a Pre-sentence Report was present on March 10, 2004, the date that the court (Walker, J.) sentenced Defendant on the instant matter. The court specifically asked counsel for Defendant, whether counsel had had an opportunity to review the Pre-sentence Report; defense counsel ultimately acknowledged that he had done so and that Defendant waived any adjournment for sentencing. Defendant was then sentenced, as promised, to fifteen years to life incarceration, concurrent with his prior sentence on Ind. #2002-1566.

The parties appear to concede that the Report that was present at the time of Defendant's sentencing was prepared in connection with his conviction under Ind. #2002-1566. Defendant argues that use of that Report without an affirmative waiver violates CPL §390.20. The court respectfully disagrees.

As the People properly argue, the case at bar is substantially the same as *People v Kryminski*, 154 AD2d 549 (2nd Dept 1989). There, the Second Department found that any violation of CPL

§390.20 was waived when counsel, on the record, elected to proceed with Pre-sentence Reports from two out-of-county matters. The court went on to explain that, as here, "[t]he sentence was the result of a negotiated plea and the defense counsel specifically agreed, on the defendant's behalf, to proceed to sentence on the basis of the [out-of-county] presentence reports which were prepared shortly before the instant sentence was imposed." *Id.* The proceedings in the instant sentencing hearing militate even more against *vacatur* of the sentence. While Defendant similarly received the benefit of his negotiated disposition and the Pre-sentence Report was prepared shortly before sentence was imposed, the instant sentencing court had significantly more information than the *Kryminski* sentencing court because it had heard testimony from several witnesses upon the commencement of the bench trial in this matter. In addition, the Pre-sentence Report used here was prepared by the probation department from the county where sentence was imposed. Lastly, of note is the fact that Defendant was incarcerated from the time of the sentence on Ind #2002-1566 to the date of sentence on the instant matter; essentially the need for an update. *People v Kuey*, 186 AD2d 684 (2nd Dept 1992), *aff'd* 83 NY2d 278 (1994); see also *People v Hendircks*, 178 AD2d 1027 (4th Dept 1991), *People v White*, 115 AD2d 313 (4th Dept 1985). Thus, the instant sentencing court would have been more amply apprised regarding the facts and circumstances relevant to sentencing than

that in *Kryminski*.

This is not a case like *People v Stewart*, 185 AD2d 381 (3rd Dept 1992), where 15 months separating a prior Pre-sentence Report and that defendant's re-sentencing was found improper. Here, to the contrary, barely a month passed between the report being generated for Ind #2002-1566 and Defendant's sentence on the instant matter. In contrast, in *People v Fuentes*, 140 AD3d 278 (4th Dept 2016); *lv den* 28 NY3d 1072 (2016), the sentencing court's reliance, after that defendant's refusal to cooperate, on an older Pre-sentence Report from a different case was upheld. Notably, that older report was two years old at the time of sentence. *See also People v Sears*, 209 AD2d 885 (3rd Dept 1994)(use of an over four year old report upheld where the court updated the report on the record before sentencing).

Here, in light of *Kryminski* and the other above-cited cases, where the Pre-sentence Report used was barely weeks old, the sentencing court had heard trial testimony regarding the instant matter, involving a negotiated plea with an agreed-upon sentence, and Defendant was incarcerated for the time period between preparation of the Pre-sentence Report and the date sentence was imposed, it was not improper for Defendant to have been sentenced with the Pre-sentence Report from IND #2002-1566.

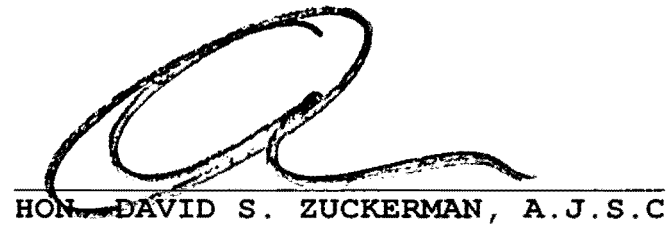
Based on the foregoing, it is hereby

ORDERED, that Defendant's motion, pursuant to CPL § 440.20, to

vacate his sentence is denied.

This Decision shall constitute the Decision and Order of this court.

Dated: White Plains, New York
July 11, 2019



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