

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

NAME: Nelson Cruz

PLACE OF CONFINEMENT: Woodbourne Correctional Facility	PRISONER NUMBER: 99A1866	
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Instructions—Read Carefully

- (1) This motion must be legibly handwritten or typewritten and signed by the movant under penalty of perjury. All documents must be on 8½ x 11 inch paper; the Court will not accept other paper sizes. Any false statements of a material fact may serve as the basis for prosecution and conviction for perjury.
- (2) All questions must be answered concisely in the proper space on the form.
- (3) Movant seeking leave to file a second or successive petition is required to use this form. In capital cases only, the use of this form is optional.
- (4) Movant may use additional pages only to explain additional grounds for relief and set forth additional facts and documents supporting any alleged grounds. Separate petitions, motions, briefs, arguments, etc. should not be submitted.
- (5) In capital cases only, the use of this form is optional, and separate petitions, motions, briefs, arguments, may be submitted.

- (6) Movant must show in the motion to the Court of Appeals that the claim to be presented in a second or successive habeas corpus application was not presented in a prior application and that
- (1) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (2) (a) the facts underlying the claim could not have been discovered previously through the exercise of due diligence; and
(b) those facts, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.
28 U.S.C. § 2244 (b)
- (7) Send the completed motion, the original and two copies, to:

**Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Court House
40 Foley Square
New York, New York 10007**

MOTION

1. (a) Name and location of court which entered the judgment of conviction under attack
Kings County Supreme Court State of New York

(b) Case number Ind. No. 3669/1998

2. Date of judgment of conviction March 12, 1999

3. Length of sentence 25-Life Sentencing Judge Kreindler

4. Nature of offense or offenses for which you were convicted: Murder in the Second Degree

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

Yes No

If "yes", how many times? 1 (if more than one, complete 6 and 7 below as necessary)

(a) Name of court Eastern District of New York

(b) Case number 1:05-cv-04750

(c) Nature of proceeding 18 USC § 2254

(d) Grounds raised (list all grounds; use extra pages if necessary) 1. Insufficiency of Evidence; 2. Excessive sentence

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

Yes No

(f) Result Denied

(g) Date of result June 6, 2007

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

(a) Name of court

(b) Case number

(c) Nature of proceeding _____

(d) Grounds raised (list all grounds; use extra pages if necessary) _____

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

Yes No

(f) Result _____

(g) Date of result _____

7. As to any third federal petition, application, or motion, give the same information:

(a) Name of court _____

(b) Case number _____

(c) Nature of proceeding _____

(d) Grounds raised (list all grounds; use extra pages if necessary) _____

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

Yes No

(f) Result _____

(g) Date of result _____

8. Did you appeal the result of any action taken on your federal petition, application, or motion? (Use extra pages to reflect additional petitions if necessary)

(1) First petition, etc. No Yes Appeal No. _____

(2) Second petition, etc. No Yes Appeal No. _____

(3) Third petition, etc. No Yes Appeal No. _____

9. If you did not appeal from the adverse action on any petition, application, or motion, explain briefly why you did not: The certificate of appealability was denied.

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

A. Ground one: DUE PROCESS WAS VIOLATED DURING PETITIONER'S CPL § 440.10 HEARING WHEN THE JUDGE PRESIDING OVER THE HEARING WAS SUFFERING FROM DEMENTIA AND FAILED TO RENDER A WRITTEN DECISION. U.S.C.A. 6TH AND 14TH AMENDMENT. THIS COURT SHOULD REMAND THIS MATTER TO THE DISTRICT COURT TO HEAR MR. CRUZ

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

Please see attached POINT I of the petition, pages 13-15.

Was this claim raised in a prior federal petition, application, or motion?

Yes No

Does this claim rely on a "new rule of constitutional law?" Yes No

If "yes," state the new rule of constitutional law (give case name and citation):

Does this claim rely on "newly discovered evidence?" Yes No

If "yes," briefly describe the newly discovered evidence, attach a copy (if available), state when you obtained it, and why it was not previously available to you.

Evidence of judge's dementia, which did not become available until August of 2020.

B. Ground two: POINT II & III PETITIONER HAS PRESENTED Newly Discovered Evidence and CLEAR AND CONVINCING EVIDENCE OF HIS INNOCENCE THAT WARRANTS THE DISTRICT COURT TO HEAR HIS HABEAS PETITION. 28 U.S.C. § 2244(b)(2)(B)(ii)

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

Please see attached POINT II and POINT III of the petition, pages 15-28.

Was this claim raised in a prior federal petition, application, or motion?

Yes No

Does this claim rely on a "new rule of constitutional law?" Yes No

If "yes," state the new rule of constitutional law (give case name and citation):

Does this claim rely on "newly discovered evidence?" Yes No

If "yes," briefly describe the newly discovered evidence, attach a copy (if available), state when you obtained it, and why it was not previously available to you

This was a part of an investigation for over 20 years. Pages 15-24 specifically addresses the evidence of actual innocenc. Pages 24-28 addresses the newly discovered evidence argument with regard to the prior misconduct of Louis Scarcella and Stephen Chmil. The actions of these officers did not become recognized by a court as newly discovered evidence until 2018. Mr. Cruz's motion was not litigated until 2019.

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

11. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes No

If yes, Name of court _____ Case number _____

Wherefore, movant prays that the United States Court of Appeals for the Second Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254.

Attorney for Petitioner

Justin Bonus

Dated: October 28, 2021

Movant's Signature

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

Executed on _____
[date]

Movant's Signature

PROOF OF SERVICE

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

I certify that on _____, I mailed a copy of this motion*
[date]

and all attachments to _____ at the following address:

Movant's Signature

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

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

SUCCESSIVE PETITION

NELSON CRUZ,

Petitioner,

-against-

Dock. No. 21-2235

SUPERINTENDENT OF SULLIVAN
CORRECTIONAL FACILITY,

Respondent.

PRELIMINARY STATEMENT

Nelson Cruz (herein “Petitioner”), an innocent man who has spent the last 22.5 years out of a 25-to-life sentence in prison, has had the entire justice system fail him. In the 6 years, that I have been practicing criminal law and the over-one-hundred clients I have represented in post-conviction proceedings, I have never seen a clearer case of actual innocence. A uniformed police officer, William Piatti, watched the real killer, Eduardo Rodriguez, murder Trevor Vieira on March 28, 1998. Piatti’s observations were corroborated by ballistics, eyewitness testimony, and Rodriguez himself. This case is a disgrace to the justice system: Cruz has been abandoned in the state courts – failed at all levels.

After serving 21.5 years in prison, Petitioner was finally granted an evidentiary hearing to prove his innocence in 2019. Unfortunately for Cruz, and unbeknownst to the entire criminal justice system, the judge who heard his case suffered from dementia. See https://features.propublica.org/judge_alzheimers/brooklyn-federal-judge-mental-illness/; <https://www.nytimes.com/2020/08/11/nyregion/shawndya-simpson-judge-alzheimers->

resign.html.¹ After the hearing, which ended in May of 2019, the judge failed to issue a written decision.² Petitioner has yet to receive the due process of law he is entitled: a written decision on his motion to vacate the judgment that provided findings of fact and conclusions of law required by statute.

Here, during the hearing in the Supreme Court, Kings County, Petitioner submitted clear and convincing evidence that he did not kill Trevor Vieira on March 28, 1998. At the very least, 14 witnesses came before State Court in the post-conviction proceedings to swear that Nelson Cruz was innocent and framed by Detectives. See 28 U.S.C. § 2244(b)(2)(B)(ii). During the hearing in 2019, retired police officer, William Piatti, testified that he exited his vehicle, watched a man with a ponytail fire the murder weapon in the direction of the deceased, and arrested Eduardo Rodriguez³ with the murder weapon at around 11:15PM. William Johnson, who was also arrested at the scene, testified that police arrived at the scene as the shooting occurred and that he knew Nelson Cruz, and Cruz was not the man that fired the shots that killed Trevor Vieira. Two alibi witnesses, Ralph Johnson and Luis Polanco, testified that Petitioner was down the block with them when the shooting occurred. Both men witnessed the police arrive on the scene and arrest the ponytailed man. William Harden testified that he witnessed his friend, Trevor Vieira shot to death by a man with a ponytail. Harden also testified that the police pulled up at the scene simultaneously as shots were fired. Jermaine Frazier testified that Andre Bellinger lied during his trial testimony when Bellinger testified that Frazier pointed a gun at Cruz not long before the shooting. Christopher Cooper and Bonnie Cooper testified that Andre

¹ Mr. Cruz attempted to vacate Judge Simpson's oral decision in August of 2020 to no avail. Even with evidence from Judge Shawndya Simpson's husband that she was suffering dementia at the time of the hearing and decision in 2019, the Supreme Court, Kings County, *refused* to allow Mr. Cruz to even present evidence of her incapacity, let alone hold another hearing before a competent judge.

² In fact, the judge actually granted leave to reargue, which was also not properly addressed by the state court. The entire debacle was recorded by CBS and is on YouTube: Part 1 - <https://youtu.be/cbZ4hcTy60Y>; Part 2 - <https://youtu.be/RNBIVkcyIGo>. See also Exhibit A – Transcript of the August 29, 2019 oral decision.

³ Notably, Rodriguez had a ponytail at that time.

Bellinger did not see the shooting; his trial testimony was a lie. Bellinger, himself, testified at the hearing that the police told him Nelson Cruz was the shooter, they told him the type of gun used, and that Eduardo Rodriguez was unreliable. Moreover, the police failed to tell him that an officer arrived at the scene at the time of the shooting and that there was a ponytailed man at the scene firing a weapon. Private Investigator Jay Salpeter confirmed in his testimony that Bellinger was the only person who did not see Eduardo Rodriguez or the police at the scene of the shooting.

But Cruz's overwhelming case of innocence did not stop with just witness testimony. The investigation was tainted by none other than infamous Detectives Louis Scarcella and Stephen Chmil. Both Scarcella and Chmil were involved in every facet of the investigation in the case at bar. And according to Detective Mark Brooks, both detectives known to taint identification procedures, were left alone with the sole alleged eyewitness right before he made the erroneous identification of Nelson Cruz. The Appellate Division, Second Department, in the landmark case People v. Hargrove, 162 A.D.3d 25 (N.Y.App.Div. 2d Dep't 2018), held that the pattern of past misconduct by Scarcella and Chmil constitutes newly discovered evidence in cases where Scarcella and Chmil were involved with the investigation. See also People v. DeLeon, 190 A.D.3d 764 (N.Y. App. Div. 2d Dep't 2021). The evidence of Scarcella's and Chmil's misconduct could not be presented by Cruz until the Second Department's decision in Hargrove, supra. See 28 U.S.C. § 2244(b)(2)(B)(ii). In conjunction with Andre Bellinger's testimony that he was told by the police who committed the murder, Scarcella and Chmil's involvement in this case, wherein they were involved in the identification procedure by both Bellinger and Rodriguez and interviewed several key witnesses, warrants, minimally, a new trial.

Here, Nelson Cruz is an innocent man sitting in prison because the state failed him at every level. The state court failed to reach the merits of the factual dispute before it, failed to consider the vast amount of newly discovered evidence before it and, plainly, issued a bench decision that was not supported by the record. Nelson Cruz submits, newly discovered evidence since the 2019 hearing

proves the judge had dementia during the entire 2019 hearing and bench decision, by her own husband's account, and Cruz never received a full and fair hearing on the claim that the Judge's dementia had an adverse effect on the decision making process. We beg for the federal courts to step in to right this wrong. The Supreme Court has held "that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Townsend v. Sain, 372 U.S. 293, 313 (1963).

PROCEDURAL HISTORY

1. The judgment of conviction was rendered in the Supreme Court of New York, County of Kings, located at 320 Jay Street, Brooklyn, NY 11201.
2. The indictment number is 3669/98.
3. The sentence imposed was 25 to Life on March 12, 1999.
4. Nelson Cruz ("Petitioner") was convicted of the following charges: Murder in the Second Degree.
5. The Petitioner pled not guilty.
6. The Petitioner had a trial by judge.
7. The Petitioner did testify during the pretrial hearings but not the trial.
8. The Petitioner filed a timely notice of appeal from the judgment of conviction to the New York State Appellate Division Second Judicial Department located at 45 Monroe Place, Brooklyn, New York 11201.

9. Petitioner's conviction was affirmed on April 30, 2001. People v. Cruz, 724 N.Y.S.2d 341 (2d Dep't 2001).
10. The following grounds were raised:
 - i. The evidence of recklessness was legally insufficient to sustain Petitioner's conviction of depraved indifference murder where he approached Vieira, shot him from a few feet away as his back was turned, and continued to shoot at him after he collapsed. US Const. Amend. XIV, NY Const. Art. I § 6.
 - ii. Petitioner, who was sixteen at the time of the incident and had no prior convictions, received an excessive sentence.
 - iii. Did the trial court err in denying the defense the right to have a missing witness charge given to the jury on account of the prosecutions failure to call two witnesses.⁴
11. Petitioner sought further review and sought leave to appeal from the New York State Court of Appeals. The leave application was denied. People v. Cruz, 96 N.Y.2d 917 (2001).
12. Petitioner did not petition the United States Supreme Court.
13. On October 16, 2002, Petitioner filed a motion to vacate, pursuant to NY CPL § 440.10(1)(g) & (h), in the New York State Supreme Court Kings County. The motion was denied on March 5, 2003 without a hearing. A certificate to appeal application to the New York State Supreme Court Appellate Division Second

⁴ Namely, these witnesses were William Johnson and Eduardo Rodriguez. Johnson testified for Nelson Cruz and Rodriguez testified for the state. Notably, Rodriguez testified that police officers told him that he was not needed for the trial.

Department was granted on March 5, 2003. Ultimately the appeal was denied both in the Appellate Division and the Court of Appeals. Petitioner raised the following grounds:

- (a) Petitioner's fundamental constitutional rights were violated when he was: (a) wrongfully convicted upon the discovery of new evidence which exonerates him from the charges he was convicted; and
- (b) He was deprived of his fundamental right to effective assistance of trial counsel during the cross-examination of officer William Piatti.⁵

14. On October 7, 2005, Petitioner timely filed a petition to this Court, under docket 1:05-cv-0475-ARR. The petition was denied on June 6, 2007. (A. Ross, USDJ) The following grounds were raised:

- (a) The evidence of recklessness was legally insufficient to sustain Petitioner's conviction of depraved indifference murder where he approached Vieira, shot him from a few feet away as his back was turned, and continued to shoot at him after he collapsed. U.S. Const. Amend. XIV; N.Y. Const. Art. 1 § 6.
- (b) Petitioner, who was sixteen at the time of the incident and had no prior convictions, received an excessive sentence.
- (c) Petitioner argued that the conviction was against the weight of the evidence.
- (d) That he was actually innocent based upon the affidavits of William Wilson and Bonnie Cooper.
- (e) That his trial attorney was ineffective based upon the following:
 - i. Counsel's inadequate cross-examination of police officer William Piatti.

⁵ This Court should note that PO William Piatti, the eyewitness who saw the murder, stated definitively that Nelson Cruz *was not the man he saw fire the murder weapon on March 28, 1998*. Piatti testified to this in 1999 *and* at a hearing to exonerate Petitioner in April of 2019.

- ii. Counsel's untimely motion for a missing witness charge.
 - iii. Counsel's failure to object to the submission to the jury of depraved indifference charged in light of the evidence of intentional conduct.
15. On April 11, 2013, Petitioner filed a motion pursuant to NY CPL § 440.20, challenging the sentence he received as excessive. This motion was denied.

THE CLAIMS BEFORE THIS COURT ON 2244

16. On August 29, 2016, Petitioner filed a motion to vacate, pursuant to CPL § 440.10, arguing that he was actually innocent and newly discovered evidence and ineffective of counsel would have probably changed the result of his trial.
17. On June 7, 2018, the Supreme Court Kings County (Simpson, J) denied the motion for a hearing on the CPL 440.10 motion above. The absurd record reads as follows:

MR. BONUS: So the Court's finding is that Louis Scarcella was not involved in the identification process at all?

THE COURT: He really wasn't involved in the --- I think who was a big part of the identification process was Rodriguez, and that was the main person that observed and saw a lot of things. I believe at one point Scarcella or Chmil, one or the other, another officer, did go to --

MR. BONUS: Excuse me, your Honor. I just couldn't, I couldn't hear you.

THE COURT: Sorry. I said I know on one occasion, I believe it was, either, Scarcella or Chmil went to, I want to say, Rodriguez's home and got a photograph of him.

MR. BONUS: If I may, your Honor?

THE COURT: Yes.

MR. BONUS: First of all, Scarcella was, he has multiple DD5s in this case. He is far more involved than he was even in the Hargrove case. He made the arrest in this case. Nelson Cruz turned himself in to Scarcella and Chmil, but that's a besides the point.

THE COURT: No. I'm listening to you.

MR. BONUS: As far as the identification process – And I did have other things I wanted to say, but if we're going to talk about the ID process, then –

THE COURT: Listen, you put a lot of time and effort into this case, I'm going to listen.

MR. BONUS: Absolutely.

THE COURT: And I think you know I'm patient. And I will correct myself if I'm wrong. That's why we're here. I'm here to listen. And I know how passionate you are, so go for it.

MR. BONUS: Absolutely. You're wrong. And I'll tell you why. All right. So two cops, you already know this, see the gun fired, arrest Rodriguez at the scene. They arrest William Johnson at the scene, okay, see muzzles flash. A cop actually testifies at trial, Piatti. He testifies at trial that he did not see Nelson Cruz at the scene. Okay. The People speculate that Palmieri chased Nelson Cruz. There is no evidence that Palmieri chased Nelson Cruz from the scene. Okay. No evidence of that. All right. What we do know is that Piatti do end up testifying, and he testifies that he does not see Nelson Cruz at the scene. Scarcella interviewed, I can't remember which one because I don't have the DD5s in front of me, but Scarcella and Chmil interview both of these cops. Okay. So these cops. Thinking they have –

THE COURT: When you say these ---

MR. BONUS: The arresting officers. I appreciate that. The arresting officers, think that they they're turning Rodriguez – they've arrested him for possession of a weapon at this

point, bottom line, they think they're tuning him over to the closer. All right. There is what Hargrove is about. This is what Hamilton is about. This is what all these cases are about. All right. Scarcella, he probably was consulting Barry Kamins when they wrote that Wrongful Conviction Task Force. All right this is what – the whole case turns with Rodrigues, right to Nelson Cruz's house – And I think we got to step back because –

THE COURT: I'm loving the passion.

MR. BONUS: Because this is where we're talking about people like Nathan Torres, we're talking about Teresa Gomez. There is some type of relationship here, because Rodriguez walks out the back door.

THE COURT: I know, you're preaching to the choir.

18. After hearing argument above amongst other things recorded therein, On July 11, 2018, the Supreme Court, Kings County (S. Simpson, J.) granted a hearing on Nelson Cruz's motion to vacate the judgment. At that hearing, the following witnesses were presented by Petitioner and testified to the following:⁶

- (a) PO William Piatti: testified that he was at the scene and saw the muzzle from the murder weapon flare as Eduardo Rodriguez fired it. Piatti emphatically testified that he did not see Nelson Cruz before, during or after the shooting.
- (b) William Johnson: Johnson was arrested at the scene with Eduardo Rodriguez. Johnson, who knew Cruz, definitively stated that Cruz was not the shooter.

⁶ The Respondent called Rogelio Torres, Lauren Miller, Luis Parillo and Eduardo Rodriguez. Notably, Rodriguez, who entirely contradicted the testimony of the lone witness that testified at trial, Andre Bellinger, testified for the first time ever and stated that Petitioner was defending himself as the victim shot at Petitioner first. Petitioner's position is and has always been that Rodriguez *is the murderer and a pathological liar*.

- (c) Ralph Johnson: was an alibi witness and testified that Petitioner was with him at the other end of the block as the shooting occurred.⁷
- (d) Luis Polanco: was an alibi witness and testified that Petitioner was with him at the other end of the block as the shooting occurred.
- (e) William Harden a.k.a. William Wilson: testified that he saw a man with a ponytail kill his friend Trevor Vieira. Harden stated that Petitioner was *not* the shooter and that Andre Bellinger, the People's lone eyewitness that testified at trial, was not at the scene when the shooting happened.
- (f) Jermaine "Shack" Frazier: testified that Andre Bellinger's testimony at trial was false in that he never had an altercation with Petitioner on March 28, 1998.
- (g) Det. Barrios: testified that he could not remember anything.
- (h) Det. Mark Brooks: testified that he was the assigned detective on this case. Det. Stephen Chmil and Det. Louis Scarcella were alone with Andre Bellinger, the lone witness who testified against Cruz, *right before Bellinger viewed the line-up*. Brooks admitted that at the time of Eduardo Rodriguez's arrest, he did not know that the gun Rodriguez was arrested with was the murder weapon.
- (i) Andre Bellinger: Attempted to disavow his trial testimony, but, ultimately admitted the following: the police told him what type of gun was used to kill Trevor Vieira, that Nelson Cruz committed the murder, that Eduardo Rodriguez was unreliable, and that he was told that Nelson Cruz was in the precinct on the day of the line-up. Notably, at trial in 1998, Mr. Bellinger testified that he could not remember who mentioned that Nelson Cruz was the shooter, he or the police. During the 2019 hearing, Mr. Bellinger was able to somehow miraculously remember that he gave the

⁷ The Court should note that Petitioner lived around the corner from where the shooting occurred.

police Nelson Cruz's name first, repeatedly stating during his testimony that the police could not give him information.

- (j) Louis Scarcella: Testified that he arrived at the scene with Stephen Chmil at 11:55PM. He interviewed one of the responding officers and remained at the precinct the entire night and early morning of March 28/29, 1998. At 6AM on March 29, 1998, Scarcella took Eduardo Rodriguez out of the precinct to Petitioner's home and showed him a picture of Nelson Cruz. Scarcella was also the officer that effectuated Cruz's surrender.
 - (k) Stephen Chmil: Testified that even though Petitioner turned himself in with an attorney, Chmil made a judgment call to take Petitioner into the interview room. Chmil testified that he was assisting Det. Brooks as a member of the Brooklyn North Homicide Squad. Chmil's partner was Louis Scarcella. Chmil testified that he took the statement from William Piatti. Chmil stated that it was Scarcella's decision to take Eduardo Rodriguez out of the precinct to Cruz's house at 6AM on March 29, 1998.
 - (l) Jay Salpeter: Testified that Andre Bellinger told him that the police never told Bellinger that the man with the ponytail and the police were at the scene, which is why Bellinger did not testify to seeing these people.
 - (m) Chris Cooper: Testified that he was with Bellinger on March 28, 1998. When Cooper and Bellinger arrived at the vicinity of the scene, the shooting had already happened.
 - (n) Bonnie Cooper: Testified that she was dating Bellinger at the time of the murder of Trevor Vieira. Ms. Cooper testified that Bellinger told her that he did not see the shooting.
19. In the middle of the hearing, the hearing court (S. Simpson, J.) made the following determinations: (a) Louis Scarcella and Stephen Chmil were deeply involved with the

investigation of this case and were with the only eyewitness that testified at trial right before the line-up, (b) Andre Bellinger was unreliable, (c) Chris Cooper and Bonnie Cooper, who both stated that Bellinger did not see the shooting, were reliable witnesses. See Exhibit B – Excerpt from Hearing minutes dated April 12, 2019.⁸

20. On August 29, 2019, the Court gave a bench decision that denied the post-conviction motion in its entirety. The trial court made contradictory statements regarding the witnesses at the hearing and then stated: “I’m going to review some of the minutes and I think then we’re going to issue a written decision. I just came back from vacation, so I have to catch up on a few things myself. But we’ll get it out sooner or later.” See Exhibit A – Hearing minutes dated August 29, 2019. A written decision was never rendered by the hearing judge (Simpson, J).
21. A letter was written to the administrative judge on February 14, 2020, on behalf of Petitioner. See Exhibit C – Letter to the Honorable Lawrence Marks and the Honorable Matthew D’Emic. The Petitioner requested that a written decision be rendered stating “conclusions of law and findings of fact in regard to the credibility analysis of each witness presented.” The Court did not respond.
22. On July 31, 2020, Judge Simpson agreed to retire because she was suffering from advanced stages of Alzheimer’s. By letter dated July 31, 2020, Judge Simpson admitted that she was on medical leave as early as August of 2019, during the time she made the bench decision in Cruz case. See Exhibit D – Agreement between Judge Simpson and the New York State Commission on Judicial Conduct; Exhibit E – Letter from Judge Simpson dated July 31, 2020.

⁸ Trial testimony will be labeled “TT”. Hearing testimony will be labeled “HT”.

23. On March 17, 2021, petitioner filed a writ of mandamus seeking to compel a decision from the Supreme Court Kings County for a hearing to reargue as promised by the Court; and a written decision from Judge Simpson based upon her August 29, 2019 bench decision. On May 21, 2021, after being compelled to issue the written decision by the Appellate Division Second Judicial Department, the Supreme Court, Kings County, issued a one page decision adopting Judge Simpson's oral decision. See Exhibit F – May 20, 2021 Decision and Order from the Second Department; Exhibit G – May 21, 2021 Decision and Order from the Supreme Court. The reargument as promised by Judge Simpson never occurred due to her leave of absence from the bench due to dementia.

POINT I

DUE PROCESS WAS VIOLATED DURING PETITIONER'S CPL § 440.10 HEARING WHEN THE JUDGE PRESIDING OVER THE HEARING WAS SUFFERING FROM DEMENTIA AND FAILED TO RENDER A WRITTEN DECISION. U.S.C.A. 6TH AND 14TH AMENDMENT. THIS COURT SHOULD REMAND THIS MATTER TO THE DISCTRICK COURT TO HEAR MR. CRUZ'S HABEAS PETITION ON ACTUAL INNOCENCE GROUNDS.

24. There is no constitutional right to an appeal or post-conviction hearing. Abney v. United States, 431 U.S. 651, 656, 97 S.Ct 2034, 2038 (1977). Having made the right to post-conviction proceedings available, however, the state is obligated by the United States Constitution to avoid impeding effective access to the post-conviction process. Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct 1497, (1966); Douglas v. California, 372 U.S. 353, 83 S.Ct 814 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct 585, (1956). (quoting from Harris v. Kuhlman, 601 F.Supp.987,) (1985).

25. A delay in adjudicating an appeal or a hearing and decision based upon statutory requirements may constitute a denial of due process and equal protection. United States ex rel. Hankins v. Wicker, 582 F. Supp. 180, 183-85 (W.D.Pa 1984). The

Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct 2182 (1972) sets forth the criteria to be utilized where delay is the basis of the claim for relief. Although Barker is a speedy trial case, the analysis is applicable to post-conviction proceedings.

Doescher v. Estelle, 454 F.Supp 943 (1978).

26. In the case at bar, a month-and-a-half long hearing was held wherein 18 witnesses were called, 14 by Petitioner, and both parties fully briefed the hearing.
27. The Appellate Division rules of New York State require that a presiding judge of a NY CPL § 440.10 hearing issue a written decision addressing the credibility of all the evidence, including the witnesses that testified before the court.
28. Here, not only did the lower court fail to address the witnesses, the hearing court completely failed to issue a written decision that detailed the facts and conclusions of law relied upon to deny the motion in August 2019.
29. Now we know the reason the hearing court failed to give its findings of fact and conclusions of law: Judge Simpson was suffering from Alzheimer's, apparently, when she issued her decision, which is why at the bench decision on August 29, 2019, she misstated facts. *She could not remember what she heard during the hearing.*
30. Nelson Cruz, after presenting overwhelming evidence that he is innocent and the entire case was manufactured by corrupt police and the real killer, was entitled to the due process decision making mechanism enunciated in New York Criminal Procedure Law mandating a written opinion that detailed the facts and conclusions of law the Court relied upon.
31. The Supreme Court failed to do so. And, frankly, this was an absurd outcome for someone who presented the evidence addressed in paragraph 18 above. Cruz is *demonstrably* innocent. Moreover, Louis Scarcella and Stephen Chmil, detectives

whose investigative tactics have led to 15 convictions being vacated, were entirely involved in a majority of this investigation and were with, alone, the only witnesses who named Petitioner, Andre Bellinger and, the murderer, Eduardo Rodriguez. See People v. Hargrove, 75 N.Y.S.3d 551 (2d Dep't 2018). For Petitioner to have to relitigate this case is an overwhelming burden that *de facto* violates his right to due process.⁹ He presented more than enough evidence for, at the very least, his conviction to be vacated and a new trial to be ordered.

POINT II

PETITIONER HAS PRESENTED CLEAR AND CONVINCING EVIDENCE OF HIS INNOCENCE THAT WARRANTS THE DISTRICT COURT TO HEAR HIS HABEAS PETITION. 28 U.S.C. § 2244(b)(2)(B)(ii)

Andre Bellinger's Hearing Testimony Confirmed that He was Fed Information about the Shooting and Attempted to Disavow his Trial Testimony Because It Was Clear that the Police Told Bellinger to Implicate Nelson Cruz Prior to Bellinger Ever Mentioning Cruz's Name.

32. It is Bellinger's trial testimony and hearing testimony that *confirms that an officer fed him specifics of the crime and told him that Nelson Cruz was the killer. See* TT: 98-101, 131-133; HT: 657-665. Judge Simpson, herself, concluded on April 12, 2019, that Bellinger's trial testimony was unreliable and Bonnie Cooper and Christopher Cooper's testimony was reliable. See Exhibit B; HT: 213-214, 369-371, 416, 633-634 (both Bonnie Cooper and Christopher Cooper testified that Andre Bellinger did not see the Vieira murder; Christopher Cooper provided detailed testimony that Andre Bellinger was with him and only arrived in the area *after* police had arrived and taped

⁹ The immense task of coordinating 14 witnesses is a Mount Everest like task for a man who has been in prison for over 22 years. To relitigate this hearing would be an abuse of process.

off the scene).¹⁰ There is only one conclusion that one can come to after making that determination: Andre Bellinger did not witness the Vieira murder.

33. But it was not just Bellinger's trial testimony that left much to be desired. In Bellinger's hearing testimony, Bellinger, a man who showed up with his trial testimony in hand and Kings County Detective Investigators, tried to disavow his trial testimony and then stated, for the first time, that *he* told the police *first* that "Nelson" was the shooter. This is a direct contradiction to his trial testimony when he specifically stated that the police told him first and then replied to a pointed question from defense counsel: "[b]efore or after you told them it was Nelson Cruz who did the shooting?" Bellinger answered: "I don't remember". TT: 133. Bellinger's hearing testimony on the salient points were as follows:

MR. BONUS: I don't know. What is the witness looking at? It looks like he has a copy of the transcript as well.

THE WITNESS: I do.

Q. You do. All right. This would be page number 132, line 12 through 19. Were you asked this question: Your story to the police was that you saw no one with a ponytail. Did you not see the people Eduardo Rodriguez or William Johnson who had been arrested there at all? Do you remember that question?

A. Yes I do.

Q. Okay. And then you answered: That was my story and they already told me before I had told them who he was, They said the individual with the ponytail had already told them who he was, but he was giving conflicting stories. Do you remember giving that answer?

A. At this moment I don't remember giving it, but it's here in black and white so I must have said it.

Q. You were under oath at that point, right?

A. Yes.

Q. So whatever you said was the truth, correct?

A. Yes.

Q. Do you also remember being asked – this would be page 133, line four through line eight:

Question: Said that Nelson Cruz did the shooting, right?

Answer: That's what they told me. I wasn't there when they said –

Question: The police told you that?

Answer: Yes. Yeah.

¹⁰ Not to mention, William Harden also testified that Andre Bellinger showed up at the scene *after* the shooting happened. HT: 71-73.

Q. Do you remember being asked those questions and giving those answers? (Objection by the People) (Court indicated the question should be rephrased). (HT-657-659).

Bellinger continued on the path of defending the conflicting stories as follows:

MR. BONUS: We can go – it would be page 132, line 12 through 19 again, which I actually went over this.

Q. Do you recall specifically providing this answer after this question. Specifically the question is and, again, it's a repeat question, but there's a subsequent answer after that. It's line 12 on page 132. The question is:

Your story to the police was that you saw no one with a ponytail. Did you not see the people Eduardo Rodriguez or William Johnson who had been arrested there at all?

You answered: That was my story and they already told me that before I told him who he was. They said the individual with the ponytail had already told them who he was, but he was giving conflicting stories. And then on line 20 you were asked – excuse me.

And then you answered, line 21: They said the individual with the ponytail had already told them who did the shooting and said he had just picked up a gun or something like that, that he didn't shoot no one.

Did you receive those questions – were you asked those questions and did you give those answers?

A. At the trial you mean?

Q. Yes. That would be page 132.

A. I got it.

Q. 12 through 24, lines.

A. To my recollection I don't remember those questions at this moment but, yeah I must have said them because they're here on the page. But those questions were posed to me after I gave my statement.

Q. Okay. Do you also recall – and go to page I believe this is 74 and 75. You also recall being asked these questions and giving these answers beginning on line 16. Mr. Bellinger, when you went to view the line-up you knew that you were going to see Nelson Cruz, correct?

Your Answer: Correct.

Question: The police had just told you we have Nelson Cruz here correct?

Answer: They said he will be there.

Question: Nelson Cruz?

Answer: No. They just said Nelson. They didn't say his last name.

(HT- 660-661).

34. Contrary to his hearing testimony, at trial, Bellinger admitted that the police informed him “first” that Nelson Cruz was identified by Rodriguez as the shooter. TT: 131-133. Also, that Nelson would be at the precinct prior to him viewing the line-up. TT: 74-75. That they needed him, Bellinger, to identify Nelson because Rodriguez was not credible. All these things in Bellinger's trial testimony proved that Bellinger was told by investigators

before he ever informed the police Cruz shot and killed Viera. The question-and-answer session attempting to refresh Bellinger's memory continued at page 662 of the 440 hearing with defense counsel asking Bellinger did he remember testifying to these facts at the trial:

Question: You never told Assistant District Attorney Vande Stouwe that you observed Thompson with a nine-millimeter in his hand?

Answer: I don't remember that.

Because you never would have said a nine-millimeter in his hand?

Answer: If I would have said it, I would have said it from previously talking to the cops, but I don't remember if I said it to them or not.

Question: So you spoke to the district attorney after you spoke to the cops?

Answer: Yes, I did.

Question: After the cops told you Vieira had been shot with a nine-milimeter?

Answer: Yes.

Question: And then you told the district attorney that you saw Nelson Cruz with a nine-millimeter in his hand?

Answer: yeah. They asked me at that time do I have an idea what type of gun it was. I said – what was told to me, it was a nine-millimeter.

Were you asked those questions and did you provide those answers?

A. I was asked those questions but I don't remember the answers that I provided. I was asked did I know what kind of gun it was and I said, yeah, a nine-millimeter.

Q. But the police told you it was a nine-millimeter, correct?

A. They told me after I done told them it was a nine-millimeter. I know guns.

Q. You know guns?

A. Yes. I know an automatic from a revolver.

Q. But they told you that first and then you told them?

A. No, I told them that first.

Q. But that's not what you just testified to right there, correct?

A. I'm going over it now?

(HT- 662-663).

When further confronted with previous testimony on the subject matter of the weapon used, the following is revealed: (HT: 663-664)

MR. BONUS: Then I'll bring him back actually a little further in his testimony. Page 98.

Q. You can actually begin at line two, page 98. But with respect to the gun you saw Nelson Cruz – Again, this is line two page 98, beginning here. These are questions that you were asked and answered that you provided:

But with respect to the gun you saw Nelson Cruz have, you were able to identify from 35 feet away, correct?

Your answer: I was able to identify the gun. I never said what type or make or model it was.

Question: Never told the police he had a nine-millimeter?

Answer: No. They told me it was a nine-millimeter.

Question: The police told you it was a nine-millimeter?

Answer: When I asked them what it was, they told me he was shot with a nine-millimeter.

35. Bellinger's hearing testimony confirmed his trial testimony, even with Bellinger attempting to disavow his trial testimony. Bellinger was fed the information by police. He never saw the Vieira homicide.

Officer William Piatti's Testimony Was Clear that Nelson Cruz Was Not the Man Who Shot Trevor Vieira – the Ponytailed Man, Eduardo Rodriguez Was the Shooter.

36. In the Bench Decision, Judge Simpson never even assessed Piatti's explosive testimony. Officer William Piatti confirmed during his hearing testimony that the statement that he provided on March 29, 1998 at 1:30AM was indeed his, read his statement, which was taken by Stephen Chmil and admitted into evidence, into the record (HT: 560-561):¹¹

"In substance, the witness stated 'I was the recorder.' John (PO Palmieri) was driving. It was about 2315 hours. We were driving slowly up Pitkin Avenue. There was a lot of people out. Before the shooting, I saw a crowd on the sidewalk on Pitkin Avenue. I was inside the car when I heard the gunshots coming from the left of our patrol car. I exited the car and I saw a number of muzzle blasts coming in front of me (Bradford Avenue) and to the left side of Pitkin Avenue sidewalk. People started running in every direction. My attention was drawn to a male Hispanic (ponytail) pointing a black gun towards Bradford Avenue. I saw a muzzle flash near his gun. At some point this male pointed his gun down. I saw him lower the gun. I yelled at him a number of times to put the gun down. There was another male (BLK) near the guy with the gun. He yelled at me -- he yelled at me 'you saw me. You saw me,' and was just taking cover. Then the man with the gun (ponytail) dropped to his knees next to a dumpster. At this point I called over my radio a 10-13, 10-13 Pitkin Avenue and Bradford, shots fired. The male (ponytail) then yelled to me 'I'm dropping it. I'm dropping it,' meaning the gun. He then -- he then dropped the gun onto the sidewalk. A second later -- a second later, John (partner) came back. John had chased two other guys during the incident. He (John) cuffed the guy who had the gun. I kicked the gun away from his hand, then other police arrived on the scene."

Officer Piatti continued to testify (HT: 572-573):

Q. So you remember shots being fired, correct?

A. yes.

Q. You remember -- do you remember the location?

A. Sure. It was Pitkin Avenue, I think, between Bradford and Miller.

¹¹ Officer Piatti's testimony at trial was substantially similar to his hearing testimony. Piatti further testified that the only 9MM gun found at the scene was in the possession of Eduardo Rodriguez. TT: 298-300, 303, 304-305.

Q. Bradford and Miller.

A. Yeah. I think so.

Q. Would it be Bradford and Pitkin?

A. Pitkin Avenue –

Q. You said –

A. we were on Pitkin Avenue.

Q. I got it.

A. The cross streets, I think, were Bradford and Miller.

Q. I got it.

A. The cross streets, I think were Bradford and Miller.

Q. Got you. And when you were arriving, shots were being fired?

A. Yes.

Q. Did you see muzzle flashes?

A. Yes.

Q. Did you see a man with a ponytail?

A. yes.

Q. And you jumped out your car, right?

A. Yeah. I don't know in what particular order, but those facts – those are facts.

Q. So when you were outside of the car, you saw muzzles flare, right?

A. I saw the muzzle flashes, yeah when I got out of the vehicle.

Q. And you saw a man with a ponytail pointing a gun?

A. Again, it's been 20 years. You know, I definitely seen a man with a ponytail. I remember – I'm not sure if he pointed the gun or I saw him just holding the gun. I remember him having the gun in a crouched position. I remember pointing a gun at him, my gun at him. I'm not so exactly sure why he was pointing the gun. Those details I don't remember.

Officer Piatti went on to say (HT: 574-575):

Q. Did you tell the man with the Ponytail to drop the gun?

A. Yes.

Q. And this was all simultaneously when you were outside the car, correct?

A. Yeah.

Q. Did you see Nelson Cruz out there at all that day?

A. No.

Q. Did you see him before the crime?

A. No.

Q. Did you see him during the crime?

A. No.

Q. And you were out there when those shots were being fired correct?

A. Yeah. But again, there was 25, 30 people running all over the place. It was a very frantic scene. I – I wouldn't know – I wouldn't be able to remember anybody at this point.

Q. Did you process the arrest of Eduardo Rodriguez?

A. I did.

Q. Was that for – what did you process the arrest for, do you remember?

A. I remembered because I looked back over my notes. It was for Criminal Possession of a weapon.

37. The weapon that Officer Piatti arrested Eduardo Rodriguez with turned out to be the murder weapon. In fact, ballisticsian Joseph Tamburri testified at Cruz's trial that all 5 shell casings that were found and vouchered into evidence from the crime scene were *fired* from the gun that Eduardo Rodriguez was caught holding. TT: 183-187, 191, 194-196. These were the bullets that killed Trevor Vieira.

The Testimony of Cruz's Fact Witnesses Corroborate William Piatti's Testimony and Prove That Both Nelson Cruz is Innocent and that Andre Bellinger Lied at Trial

38. William Johnson, the first witness called by the defense, was an eyewitness to the Trevor Vieira murder. Johnson testified under oath for the first time ever in 21 years. Johnson admitted that Nelson Cruz was not the person he saw kill Trevor Vieira¹² (HT-36-39).
39. William Harding testified under oath for the first time in a court of law as to what he recalled the night his friend, Trevor Vieira aka "Forever", was shot and killed. Harding stated he saw a guy with a ponytail shoot and kill his friend, while police were a few feet away. (HT-70). Harding watched as the shooter was arrested at the scene by the police who yelled for the guy to drop the gun and freeze. (HT-71).
40. Harding admitted to seeing Andre Bellinger the night Vieira was killed. Bellinger drove Harding to the hospital to check on Vieira; as they were driving, Harden spoke about the crime to Bellinger. Sharing the details as he saw while standing there watching the murder unfold, Harden emphasizes that "DRE", Andre Bellinger, did not witness the crime. Bellinger learned all he knew about the crime from Harden as they drove to the hospital to check on Harden's friend Vieira. (HT-73).

¹² The prosecution argued Johnson is incredible because Johnson forgot what year his grandmother died. Such argument fails to recognize that Johnson also swore that the incident happened in the daytime, when everyone knows it happened at night. All the people have proven is that, like many other human beings, Johnson suffers from memory lapses. But one thing he knew for certain was that Nelson Cruz did not commit the shooting.

41. The People did not present any evidence to disprove Harding's account of the murder. In fact, Harding and Officer William Piatti saw the same exact thing: Rodriguez with the gun in hand firing at Vieira.
42. Ralph Johnson¹³ testified that on March 28, 1998 at approximately 11:00 p.m. he was at 361 Miller Ave., Brooklyn, New York with Nelson Cruz. He knew Nelson all his life and identified him in the courtroom. Johnson was outside of a Chinese restaurant with Nelson not far from where the police arrested the Spanish guy with a Ponytail. No one ever reached out to him to testify at Nelson's trial. (HT-145-146).
43. Bonnie Cooper testified that on March 28, 1998, Andre Bellinger and herself were boyfriend and girlfriend. They broke up because he was a liar. Bellinger informed her that he saw Nelson kill Vieira. She later learned that Bellinger was at the community center playing basketball and someone else informed him about the crime. (HT-212-214).
44. Jermaine Frazier came forth to dispel the prosecution's theory that Trevor Vieira was murdered due to a fight he had with Nelson Cruz. Frazier testified, under oath, that he never had a beef with Cruz and destroyed the portion of Andre Bellinger's testimony that Cruz accused Vieira of giving Frazier a gun to use against Cruz. (HT-347-349).
45. Chris Cooper testified that he knew Nelson Cruz for over 15 years. He also knew the deceased, Forever. The day that Forever was killed, Andre Bellinger and Chris were together, when they arrived at Pitkin Avenue and learned about the Trevor Vieira murder (HT-369-371). Cooper, as noted by Judge Simpson, credibly testified that Andre Bellinger could not have witnessed the Vieira murder.
46. Luis Polanco was another person testifying for the first time before a court. Polanco is 38, employed by a clothing company, has 3 children, and resides in Queens. In 1998, he lived

¹³ Ralph Johnson and William Johnson are not related.

in Brooklyn, New York at 283 Vermont. Nelson Cruz is a childhood friend who Polanco identified sitting at the defense table in court. On March 28, 1998, he was present at a restaurant on Pitkin Avenue with Nelson Cruz and Ralph Johnson aka “Snick”. Polanco heard shots and started running towards Pitkin and Miller then stopped because there were no more shots fired. When he looked back, the police officers were pointing a gun at a guy with a ponytail. After the incident, Cruz, Johnson, and Polanco went to a liquor store then to Nelson Cruz’s home (HT-587-589). Polanco never saw Nelson Cruz with a gun the night Vieira was killed.

47. Jay Salpeter, a private investigator for 25 years and a former New York City Police Department Detective, was called at the hearing for Nelson Cruz. Mr. Salpeter recalled an interview he had with Andre Bellinger in the fall of 2014 at a car dealership in Queens. Mr. Salpeter, confronted Bellinger with the facts, that is, Bellinger never saw what other witnesses saw: Eduardo Rodriguez, William Johnson, and the police at the crime scene when the shooting occurred. Bellinger responded that the police never told him that they were there. (HT-703-704). Salpeter indicated that Bellinger was upset that he came to his workplace, so he got Bellinger’s phone number and indicated he would call him later. When Salpeter called Bellinger, he received a phone call back from Detective Lincoln of the 75th squad, who Salpeter worked with for many years in the 69th squad anti-crime unit. Lincoln advised Salpeter that Bellinger was in the 75th Precinct making a complaint. (HT-704).
48. The evidence before the hearing court was clear and convincing: Nelson Cruz did not kill Trevor Vieira. We ask this Court to remand this matter back to the District Court to hear Mr. Cruz’s habeas petition.

POINT III

THE EVIDENCE OF LOUIS SCARCELLA AND STEPHEN CHMIL'S PAST MISCONDUCT COULD NOT HAVE BEEN DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE. 28 U.S.C. § 2244(b)(2)(B)(ii)

49. Until 2018, the New York State courts did not recognize the past misconduct conduct of Louis Scarcella and Stephen Chmil as newly discovered evidence. People v. Hargrove, 162 A.D.3d 25 (N.Y.App.Div. 2d Dep't 2018); see also People v. DeLeon, 190 A.D.3d 764 (N.Y. App. Div. 2d Dep't 2021). As such, the evidence presented by Cruz of Scarcella and Chmil's role in the investigation was newly discovered in his 2019 hearing. Judge Simpson completely failed to address the fact that both Scarcella and Chmil were involved with every facet of this case, including the identification procedures with both Andre Bellinger and Eduardo Rodriguez. In fact, Scarcella and Chmil were alone with Bellinger, the lone witness that testified against Nelson Cruz, right before Bellinger identified Cruz in a line-up. Significantly, *this fact only came out in Mark Brooks' testimony*, not Scarcella's or Chmil's, which is typical regarding the amnesia that both men feign when they testify. See generally People v. Deleon, 190 A.D.3d 764; see also People v. Hargrove, *supra*.
50. The involvement of Louis Scarcella and Stephen Chmil was documented by Scarcella and Chmil's hearing testimony and Det. Mark Brooks hearing testimony. The following evidence was procured during the hearing about Chmil and Scarcella's actions and misconduct, specifically in the case at bar:

Scarcella:¹⁴

¹⁴ Notably, if the Court had been aware that Scarcella and Chmil were with Bellinger alone, it is the defense's position that the Court would have allowed extensive questioning regarding past cases. But, Brooks, the witness that put Scarcella and Chmil alone with Bellinger, testified after Scarcella.

- a) Scarcella could remember many things from 30 or even 40 years ago, yet, when questions began regarding this investigation, he stated that he “didn’t do very much” (HT: 301) and could not remember details. Scarcella was evasive, to say the least. See generally March 29, 2019 hearing testimony.
- b) Scarcella readily admitted that he did not play by the “rules” in homicide investigations. HT: 272.
- c) Stephen Chmil and he arrived at the scene of the crime shortly after the murder happened. HT: 274, 282.
- d) At approximately 1:45AM in the 75th Precinct, Scarcella interviewed John Palmieri, an officer who arrived as the shooting took place. HT: 284-285.
- e) Scarcella was responsible for taking the murderer, Eduardo Rodriguez, out of the precinct on the morning of March 29, 1998. HT: 287-293, 458.
- f) Scarcella left Rodriguez, a murder suspect, in the car by himself when Scarcella, Barrios and Chmil went into the Cruz residence. HT: 294, 458
- g) Scarcella organized the surrender of Nelson Cruz. HT: 295.
- h) When questioned about the case *People v. James Jenkins*, Scarcella lied when he testified that he never told the witnesses to come to the precinct to identify Jenkins and brought the witnesses together to view Jenkins as Jenkins was sitting alone in the interview room. HT: 337-338.¹⁵

Chmil:

- a) Chmil interviewed eyewitness, former police officer, William Piatti at 1:30AM at the 75th Precinct. Piatti specifically named the pony-tailed man as the shooter. HT 493; see Defense Hearing Exhibit I.
- b) Chmil interviewed eyewitness William Johnson at 3:30AM at the 75th Precinct. HT 502-504.
- c) Along with an assistant district attorney, Chmil conducted interviews of William Johnson, Eduardo Rodriguez, and Andre Bellinger from 5AM until roughly 7AM in the 75th Precinct. HT: 506-509.
- d) Chmil testified that it was not his decision to remove Eduardo Rodriguez from the precinct. HT: 514. He also stated that he did not remember who stayed in the car with Rodriguez when he, Scarcella and Barrios went into Cruz’s home. HT 515-516.
- e) Chmil was present with Scarcella when Cruz surrendered with his attorney. HT: 517.
- f) Chmil stated that it was a judgment call when he took Nelson Cruz out of his cell to speak with him in the interrogation room in violation of Cruz’s rights under Miranda. HT: 542-543. Det. Scarcella was present with Chmil when Cruz allegedly made his statement. HT: 540.

¹⁵ This was among several denials that Scarcella made that have been proven to be untrue. In fact, in the Jenkins case, all the identifications made by witnesses were suppressed because of Scarcella’s misconduct. A copy of the Supreme Court, Kings County’s decision and order can be provided to the Court upon request.

51. But it was Det. Brook's testimony that eviscerated Scarcella and Chmil and showed the Court that Scarcella and Chmil were the officers that fed Bellinger with the details of the case and directed him to pick Cruz out in a lineup.¹⁶ Brooks testified as follows:

Q. Were you with Andre Bellinger the whole time he was in the precinct that day –

A. No.

Q -- On April 3rd?

A. No.

Q. What other Detectives were with him that day?

A. Scarcella and Chmil.

Q. And what time did he arrive at the precinct, if you remember?

THE COURT: Who is he

MR. BONUS: Andre Bellinger.

Q. What time did Andre Bellinger arrive at the precinct?

A. About 6:00 P.M.

Q. Did Detective Scarcella participate in the lineup?

A. What do you mean by "participate"?

Q. You said – earlier, though you testified that Detective Scarcella and Chmil were with Bellinger. When were they with Bellinger, was it prior to the line-up?

A. Before the lineup, yes.

(HT: 443).

On cross-examination Detective Brooks maintained both Scarcella and Chmil were with Andre Bellinger right before the line-up:

Q. Okay. And so Andre Bellinger was in the RIP room and there was an officer on the door. I believe you said on direct that at some point Detectives Scarcella and Chmil were with the witness Andre Bellinger; is that correct?

A. Yes.

Q. Okay. At what point did that happen?

A. I believe before the lineup.

(HT: 461)

52. The evidence produced by Nelson Cruz is overwhelming that Cruz did not commit the Vieira murder. In fact, it was so overwhelming that Judge Simpson found that Andre

¹⁶ Significantly, Scarcella was the first officer that had a photograph of Nelson Cruz.

Bellinger was incredible, Scarcella and Chmil were involved in every facet of the case and Christopher Cooper and Bonnie Cooper were reliable.

Midway Through the Hearing, Judge Simpson Agreed that Nelson Cruz Had Established that Louis Scarcella and Stephen Chmil Played a Significant Role in the Investigation and that Andre Bellinger Was Unreliable.

53. First, when one looks at Judge Simpson's "bench decision" on August 29, 2019, her conclusions contradict findings that she already held earlier in the year during the hearing. During a portion of the hearing on April 12, 2019, after hearing testimony from all the defense witnesses other than Andre Bellinger and Jay Salpeter, Judge Simpson agreed with the defense on the following points:

THE COURT: No. Well, let me say this: Scarcella and Chmil did testify and there were times when he, the defendant, was alone in a room with these -- with these -- and we know their track record; so you have to focus not only on the defendant, but you have to focus on the witness. And you know there is a whole bunch of research we could do on Chmil and Scarcella for some of the things that they've done to a lot of, I will say, wrongfully convicted, innocent people, and that's it.

And even, I believe, Scarcella said at one time he was in the room with Nelson or someone else, there was no attorney in there. There's so many things that, you know, people are avoiding that should have been done and it wasn't.

MR. STEWART: Well, Judge, hold on a second.

THE COURT: Oh, no, hold on. I'm talking.

Go ahead.

MR. STEWART: Okay.

MR. BONUS: First of all, Brooks puts Scarcella and Chmil alone with Andre Bellinger before a lineup. What we also know is that Scarcella is the one that takes Eduardo Rodriguez out of the precinct. Brooks says I had nothing to do -- the lead detective, I have nothing to do with it. Chmil, the lead detective from Brooklyn North, I have nothing do with it.

THE COURT: I'm agreeing with you.

MR. BONUS: This guy is in the precinct for eight hours. What's he doing, playing tiddlywinks? I mean, this is what we know, he doesn't do that. We know he is always involved. He is the closer, Mariano Rivera, that's what he is.

Okay. All right. Again, how many witnesses? We know -- if you really want to go into how unreliable Andre Bellinger is, we can.

THE COURT: Well, I already know that.

MR. BONUS: Well, okay.

THE COURT: You don't have to go there.

MR. BONUS: Well, I mean, Shaq told you there was no fight. Okay. And we can -- he can say whatever he wants about William Harden, but now we heard William Harden on the witness stand, credible.

Okay. Five witnesses. And then we have four witnesses all that corroborate each other that say either Andre Bellinger -- Shaq says Andre Bellinger is lying. Bonnie Cooper, Chris Cooper, very credible witnesses, both say Andre Bellinger wasn't there. And William Harden says he wasn't there.

THE COURT: Well, the Coopers definitely were reliable witnesses, I will say that.

See Exhibit B (emphasis added); HT: 632-634.

- (a) For Judge Simpson to find Christopher Cooper and Bonnie Cooper reliable, Judge Simpson would necessarily have to find Andre Bellinger's testimony that he saw the Vieira murder unreliable, as the Coopers specifically testified that Bellinger *did not see the crime*. See HT: 213-14, 369-371, 416. As this Court now knows, there is a reason why Judge Simpson's findings were so sporadic and contradictory: she was suffering from dementia throughout the entirety of the hearing and at the time of her decision.¹⁷

54. There is no other litigation in state or federal court in this matter.

55. Petitioner has no other future sentence to serve after the completion of the sentence he is now serving.

Wherefore, based on the facts and the law, Petitioner's right to due process was violated when the Kings County Court failed to: (a) release an innocent man from prison despite the overwhelming evidence that he is innocent or at the very least wrongfully convicted; (b) grant the right to be heard on reargument as promised by Judge Simpson, to show how her bench decision denying the post-conviction motion was outright wrong and failed to assess credible evidence; (c) for the failure to provide conclusions of law and findings of facts in a written decision as promised by the court and mandated by statute; (d) the right to present evidence at a hearing to demonstrate that Judge Simpson suffered from dementia during the post-conviction proceedings. This Court should allow Petitioner

¹⁷ See https://features.propublica.org/judge_alzheimers/brooklyn-federal-judge-mental-illness/.

to file a successive petition and remand this matter to the District Court to adjudicate the evidence that demonstrates Mr. Cruz's newly discovered evidence and actual innocence.

DATED: OCTOBER 28, 2021
FOREST HILLS, NY

Respectfully Yours,

/s/ Justin Bonus
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1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF KINGS - CRIMINAL TERM - PART 24
3 -----X
4 PEOPLE OF THE STATE OF NEW YORK,

INDICTMENT NO.
3669/1998

-against-

5 NELSON CRUZ,
6 Defendant.

7 -----X
8 Kings County Supreme Court
9 320 Jay Street
10 Brooklyn, New York 11201
11 August 29, 2019

B E F O R E:

12 THE HONORABLE SHAWN DYA L. SIMPSON,
13 J U S T I C E

14 A P P E A R A N C E S:

15 ERIC GONZALEZ, ESQ.
16 KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
17 350 Jay Street
18 Brooklyn, New York 11201
19 BY: CAMILLE GILLESPIE, ESQ.
20 LEONARD JOBLÖVE, ESQ.
21 For the People

22 ELEFTERAKIS, ELEFTERAKIS & PANEK
23 Attorneys for the Defendant
24 80 Pine Street
25 New York, New York 10005
BY: JUSTIN BONUS, ESQ.
KEYONTE SUTHERLAND, ESQ.

NAOMI SCHWARTZ, RPR
Senior Court Reporter

1 THE COURT CLERK: Calling number one on the Part 24
2 calendar, indictment 3669 of 1998, Nelson Cruz.

3 Defendant's incarcerated, produced before the
4 Court.

5 Appearances?

6 MR. BONUS: Good afternoon, Your Honor, Justin
7 Bonus on behalf of Nelson Cruz.

8 THE COURT: Good morning.

9 MS. SUTHERLAND: Good morning, Your Honor, Keyonte
10 Sutherland also on behalf of Nelson Cruz.

11 THE COURT: Good morning.

12 MS. GILLESPIE: Good afternoon, Your Honor.
13 Camille Gillespie.

14 ADA Stewart cannot be here this morning.

15 THE COURT: I knew somebody was missing.

16 MS. GILLESPIE: He had a hearing in front of Judge
17 Konviser.

18 MR. JOBLove: Also for the Office of the District
19 Attorney, Leonard Joblove.

20 THE COURT: How you doing, Mr. Joblove?

21 MR. JOBLove: Well. Thank you.

22 THE COURT: Anything you want to say beforehand?

23 MR. BONUS: Excuse me, your Honor?

24 THE COURT: Anything you want to say beforehand?

25 MR. BONUS: No.

1 THE COURT: All right. The defendant brought his
2 motion to reargue this Court's prior denial of the motion to
3 vacate the instant conviction of murder in the second degree
4 that was brought pursuant to CPL Section 440.10 on the basis
5 that he was wrongfully convicted.

6 The defendant has brought prior appeal 440.10
7 motions before this Court that were denied.

8 In his motion to reargue, the defendant was granted
9 a hearing given the revelations of compromised police
10 practices.

11 Defendant asserts that he's innocent of the
12 charges. That the evidence is insufficient to convict and
13 was compromised, that there's new evidence that demonstrates
14 that he was wrongfully convicted and that he received
15 ineffective assistance of counsel.

16 The defense also argues that new evidence
17 demonstrates that defendant was acting in self-defense.
18 Defense is seeking new trial or dismissal.

19 It was a difficult case. Substantial testimony was
20 taken in this hearing, 18 witnesses were called.
21 Significant issues were raised in the course of the
22 testimony taken. However, some of the testimony was
23 inconsistent and appeared unreliable from both parties.

24 Although the involvement of Detectives Chmil and
25 Scarcella was a great concern as to the reliability of the

1 investigation in this case, the defense failed to
2 effectively undermine the evidence upon which the defendant
3 was convicted.

4 The testimony of one of the main witnesses Andre
5 Bellinger was not effectively impeached to give cause to
6 vacate the conviction herein.

7 There was additional evidence presented at trial
8 that corroborated the evidence upon which the defendant was
9 convicted.

10 The defense has not proved that defendant is
11 innocent by a preponderance of the evidence.

12 For example, the defense claims that the defendant
13 is innocent while claiming there's new evidence that tends
14 to show he was acting in self-defense is inconsistent and
15 undermines the effort to vacate the judgment.

16 The defense has also not established that the
17 defendant's representation was ineffective giving that
18 meaningful representation was provided.

19 It may have also been a course of strategy taken by
20 counsel in not calling certain witnesses that did not appear
21 credible or reliable.

22 The defendant's motion to vacate is denied and that
23 constitutes the order of the Court.

24 MR. BONUS: We intend to reargue that decision.

25 THE COURT: That's fine.

1 MR. BONUS: Obviously file leave, strenuously
2 disagree with the Court's decision, but respectfully --

3 THE COURT: I know this.

4 I'm listening. Go ahead.

5 MR. BONUS: Andre Bellinger came in here and
6 admitted that police told him who did it. All right.

7 THE COURT: I'm not denying that.

8 MR. BONUS: The jury, the jury didn't hear from at
9 least what, five or six witnesses that were at the scene.

10 The alleged man that this whole thing started with
11 respect to Nelson and Trevor Vieira's altercation came in,
12 Frazier -- Jermaine Frazier and told you that was false.

13 There's nothing about Andre Bellinger's testimony
14 that's reliable. Nothing.

15 And then we hear from a witness, the witness that
16 is the first person who points to Nelson Cruz.

17 THE COURT: Who's that witness?

18 MR. BONUS: Eduardo Rodriguez.

19 THE COURT: Okay. Go ahead.

20 MR. BONUS: Has a motive to lie and then 15 years
21 later says it's self-defense. And let me tell you, Your
22 Honor, we don't take his position, but that alone right
23 there is newly discovered evidence. That's evidence that
24 they put before the Court.

25 And we heard from the police officer that witnessed

1 this guy Rodriguez with the gun, and what's very interesting
2 about this case is from a forensic standpoint. Which is a
3 big problem in New York because forensics is often
4 overlooked, but from a ballistic standpoint in this case,
5 nobody tested that weapon. Nobody tested the ballistics
6 with regard to that weapon. They didn't know it was the
7 murder weapon until about a year afterwards. Okay? But
8 that was the murder weapon that Eduardo Rodriguez had. That
9 William Payotti (phonetic) came in and reaffirmed, swore
10 under oath before, during and after Nelson Cruz wasn't
11 there. But we tossed his testimony away.

12 Juries get it wrong. I know you know that. You
13 vacated convictions before.

14 Young kids, Johnson, Luis Polanco, these were kids.
15 We're going to believe that on the day of his birthday he
16 killed somebody. Let's think about that for a second. He's
17 16, with his friends. I was at a soccer field. I'm the
18 same age as Nelson. Thinking about college. Jury never
19 heard any of that.

20 Jury never -- and you know what, as wild as William
21 Johnson was, jury never heard William Johnson. Jury never
22 heard Eduardo Rodriguez tell the story he told which was
23 totally unreliable.

24 THE COURT: Well, he did -- he testified. He was a
25 witness on the 16th, Eduardo Rodriguez.

1 MR. BONUS: The jury doesn't hear that. And you
2 know what's interesting about Bellinger when we look at
3 Bellinger, and, again, you know, we plan to reargue this, is
4 that Andre Bellinger, he never mentions the police, he never
5 mentions a man with a ponytail. He never mentions seeing an
6 altercation. He never mentions seeing people fall down and
7 bumping into each other. And what's very interesting is
8 Rodriguez, when I play his own audio recording from 1998,
9 talks about Nelson bumping into him and falling in front of
10 a police car. Rodriguez confirms that the police are there.
11 So I just -- that's not even getting to Scarcella and Chmil.

12 Just think about this for a second. Andre
13 Bellinger says the police told me who did it. He says that
14 the police told me he did it -- who did it. The police said
15 that Eduardo Rodriguez was unreliable. The police tell him
16 what type of gun was used at the crime. The police call him
17 up and tell him to come in for the lineup, that Nelson Cruz
18 is on his way with his lawyer.

19 Unfortunately, in cases like this the law doesn't
20 really protect a 17-year-old. And who do we know was by
21 themselves with Andre Bellinger before the lineup, Scarcella
22 and Chmil. Who do we know was in that precinct, at the
23 scene and then in the precinct -- until after the
24 investigation was completed because we know Scarcella was
25 the one who takes Rodriguez out of the precinct to the Cruz

1 residence. Scarcella, Chmil, they're the ones with
2 Rodriguez. They're the ones with Bellinger before the
3 lineup. To say that they're not a part of this case when
4 Andre Bellinger, the only witness, the only witness that
5 testifies against Nelson Cruz says that police told him
6 things, that Cruz did it. I don't know. I mean, hey, where
7 there's smoke there's fire. When there's flames. This is
8 flames. But then -- that's not the -- Scarcella isn't the
9 only evidence. There's just -- you know, Brooks tells you
10 Scarcella is with them. It isn't even Scarcella and Chmil.
11 Brooks tells you Scarcella is with them. Chmil tells you
12 that it was Scarcella's idea to remove Rodriguez from the
13 precinct. I don't know how much more you need Scarcella and
14 Chmil to be involved with the case, and a witness said --
15 the only witness against Nelson Cruz, single witness, the
16 only witness against Nelson Cruz says that police told him
17 that Nelson Cruz did it and they needed him.

18 So, I mean, yeah, we'll reargue, we'll submit a
19 reargument. I will litigate this. This is wrong. And I
20 mean that as respectfully as I could say that.

21 THE COURT: Give me a second.

22 (Whereupon the Judge stepped off the bench.)

23 THE COURT CLERK: Second call.

24 (Short break in the proceedings.)

25 THE COURT CLERK: Re-calling number one, indictment

1 3669 of '98, Nelson Cruz.

2 Appearances are the same.

3 THE COURT: Mr. Bonus?

4 MR. BONUS: Yeah.

5 THE COURT: You're looking --

6 MR. BONUS: I was waiting for your -- should we put
7 our appearances on the record?

8 THE COURT: Sure.

9 MR. BONUS: Justin Bonus on behalf of Nelson Cruz.
10 Good afternoon, your Honor.

11 THE COURT: Good afternoon.

12 MS. SUTHERLAND: Good afternoon, Your Honor,
13 Keyonte Sutherland, also on behalf of Nelson Cruz.

14 MS. GILLESPIE: Camille Gillespie for the District
15 Attorney's Office.

16 Good afternoon, your Honor.

17 THE COURT: Good afternoon.

18 MR. JOBLove: Office of the District Attorney by
19 Leonard Joblove.

20 Good afternoon, again, your Honor.

21 THE COURT: Good afternoon.

22 The crux of the hearing and this decision falls on
23 the following: Defense failed to prove reliably that it was
24 not a confirmatory identification process, that Bellinger
25 did not know the defendant, Cruz.

1 The defense also failed to prove that Bellinger was
2 not at the scene through reliable evidence.

3 The defense claims that the defendant was innocent
4 while claiming there's new evidence that tends to show he
5 was acting in self-defense.

6 Rodriguez testified at his hearing that the victim
7 fired the first shot at Cruz and that Cruz shot back in
8 self-defense.

9 The new evidence claim by the defense is the
10 testimony of Rodriguez who was known to everyone at the time
11 of trial.

12 Mr. Rodriguez's testimony at the hearing does not
13 constitute new evidence for purposes of the instant motion.
14 Further, the defense claims both that Rodriguez is
15 unreliable, and at the same time, ask that the Court find
16 his testimony supports a claim of self-defense and that this
17 constitutes new evidence. For this reason, the motion must
18 be denied.

19 You want to say something?

20 MR. BONUS: Never claimed that Rodriguez was newly
21 discovered evidence. Claimed that Rodriguez was unreliable
22 from day one. He's a liar.

23 THE COURT: I'm not disagreeing with you.

24 MR. BONUS: All right, so they put him on, that's
25 their evidence. Their evidence -- they put evidence on that

1 contradicted the only evidence that was at trial, which is
2 Andre Bellinger, right, okay, and what do we know about
3 Andre Bellinger. Again, you know, we got to look at
4 Hargrove (phonetic). Hargrove talks about --

5 THE COURT: We know, we know Hargrove.

6 MR. BONUS: You know Hargrove, but Hargrove talks
7 about how do you evaluate reasonable probability. You
8 evaluate reasonable probability by looking at what the
9 People put in at the trial.

10 So what the People put in at the trial was Andre
11 Bellinger who, again, whether he even knew Cruz or he didn't
12 know Cruz, he said that the police told him that Nelson Cruz
13 was the killer. We have to go back to what Andre Bellinger
14 said, then, what we put forward, and again, the police told
15 him that Nelson Cruz was the killer and they needed Andre
16 Bellinger, page 131 to 133 of the trial testimony. It's
17 engrained in my head like forever. Okay. And they needed
18 Andre Bellinger because Eduardo Rodriguez was unreliable.
19 Okay.

20 So we have to look at the evidence that they put in
21 at trial and juxtapose it with the evidence that we put in.
22 One witness who says the police told him who did it, who
23 says the police told him what weapon was used, who even
24 testifies that the police told him that Cruz was in the
25 lineup. How reliable is that witness? How many witnesses,

1 I mean, what three alibis, and you could look at the
2 Hamilton case, you could look at all these cases that talk
3 about -- People V Stokes, that talk about, it's not about
4 the witnesses that are newly discovered, right, it's about
5 the evidence that they bring forth. That's what makes it
6 newly discovered.

7 The jury never heard this evidence. Okay? And a
8 jury is the one in newly discovered evidence claims that
9 determines credibility. The way you determine whether the
10 jury should, you know, there's a new trial, comes down to
11 was there a reasonable probability that the jury might have
12 rendered a different decision, had they heard from Luis
13 Polanco, Ralph Johnson, William Harden, William Johnson, as
14 crazy as he might have been during the hearing, but William
15 Johnson who said he knew Nelson Cruz, he was there, he was
16 arrested and Nelson Cruz was not the shooter, did not see
17 Nelson Cruz. William Payotti, Jermaine Frazier who goes
18 directly to the credibility of Andre Bellinger. And I could
19 go -- I think there's more, there's a tremendous amount of
20 -- five, six, seven witnesses who say he's innocent. And
21 we'll submit reargument and, I mean, I -- you know, we'll
22 reargue, we'll file leave, but Bellinger was not a credible
23 witness and he admitted it. He admitted his testimony at
24 trial was truthful, and his testimony at trial was that they
25 told him Nelson Cruz did it, and compare that with the

1 evidence that was put in through trial, and then not to
2 mention that he actually -- when he spoke to our
3 investigator --

4 THE COURT: Talking about Bellinger?

5 MR. BONUS: Jay Salpeter, Andre Bellinger spoke to
6 our investigator and our investigator said like everyone
7 else in this case, including Rodriguez, right, 'cause
8 Rodriguez actually says the police were there, why didn't
9 you mention the guy with the ponytail to the police. That's
10 what Jay Salpeter asked Andre Bellinger. That's what Jay
11 Salpeter testified to at the hearing and Andre Bellinger
12 said the police never told me that they were there. That
13 goes -- that's the only piece of evidence that convicted
14 this man 21 years ago.

15 You know, and, again, the Court is going to make
16 its ruling. We have to respect the ruling. I'll respect
17 the ruling. We will absolutely reargue and absolutely file
18 leave to appeal. I appreciate you for listening to me.

19 THE COURT: And you should. You guys put a lot of
20 work, a lot of time in it and I respect what you've done
21 thus far.

22 MR. BONUS: Excuse me, your Honor?

23 THE COURT: I said I respect what you've done thus
24 far. You've put a lot of work into this case.

25 People, do you have anything to say?

1 MS. GILLESPIE: No, your Honor. We'll rely on the
2 arguments that were made and our papers to the Court and the
3 Court has made its ruling.

4 THE COURT: You guys could approach.

5 (Off-the-record discussion held at the bench.)

6 MR. BONUS: So I guess 30 days from today, Your
7 Honor, which would be --

8 THE COURT: If you need more time, you need more
9 time.

10 MR. BONUS: Then I guess we'll do it, could we have
11 the first of October? I know that's a little bit out. And
12 I guess that would be for them then and they would obviously
13 get a chance to respond and reply.

14 I mean, do you want to actually pick another date
15 -- I mean, I would in this case request oral argument with
16 regard to the reargument, so if you want to pick a date --

17 THE COURT: What works for you?

18 MR. BONUS: I guess we could reply --

19 THE COURT: You said 10/1, right? October 1st?

20 MR. BONUS: Excuse me?

21 MS. SUTHERLAND: Yes, your Honor.

22 MR. BONUS: Yes. 10/1 for our papers.

23 THE COURT: Right.

24 People?

25 MR. JOBLove: Your Honor, can we ask for four weeks

1 after that date for our reply. October 29th?

2 THE COURT: That's my birthday, but I'm going to
3 let you get away with it.

4 MS. GILLESPIE: Your Honor, I'm sorry. I'm going
5 to be away at that time. So can we ask for the following
6 week?

7 THE COURT: What date?

8 MS. GILLESPIE: 11/8, yes.

9 THE COURT: 11/8.

10 MR. BONUS: And we can have two, three weeks for a
11 reply.

12 THE COURT: Not a problem. So, 11/8.

13 We're good. So 11/8 it is.

14 MR. BONUS: You want to be back here I guess
15 mid-December? Unless you want to schedule it once we submit
16 our papers -- do you want to just schedule it once we submit
17 --

18 THE COURT: I think you should do that.

19 MR. BONUS: Once we submit all of our papers, I
20 would ask -- maybe we can set a date via e-mail, an oral
21 argument date.

22 THE COURT: Do you have a date in mind yet or think
23 about it?

24 MR. BONUS: What's that?

25 THE COURT: I said do you have a date in mind?

1 MR. BONUS: Off the top of my head --

2 Can we do 12/16? That's a Monday.

3 THE COURT: 12/16 at 11:00.

4 MR. JOBLOVE: Your Honor, is the Court planning to
5 issue a written decision regarding today's decision?

6 THE COURT: I'm going to review some of the minutes
7 and I think then we're going to issue a decision. I just
8 came back from vacation, so I have to catch up on a few
9 things myself. But we'll get it out sooner or later.

10 MR. BONUS: So we'll see you on 12/16.

11 THE COURT: 12/16.

12 Oh, someone has to do an order to produce on that
13 date.

14 MR. BONUS: Thank you, your Honor.

15 *****

16 C E R T I F I C A T I O N

17 I hereby certify that the foregoing is a true and accurate
18 copy of the stenographic proceedings of the hearing held in the
above matter.

19 

20 NAOMI SCHWARTZ, RPR
21 Senior Court Reporter

22
23
24
25

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1 A Yes.

2 Q Okay. And what was that controlled substance? What
3 was that controlled substance?

4 A Cocaine.

5 MR. STEWART: All right. Nothing further, Judge.

6 MR. BONUS: Nothing further, your Honor.

7 THE COURT: All right. Thank you. You can step
8 down.

9 THE WITNESS: Okay.

10 (Whereupon, the Witness was excused.)

11 THE COURT: Are there any other witnesses?

12 MR. BONUS: No more witnesses, but I have an
13 application to make.

14 THE COURT: Okay.

15 MR. BONUS: Let me know when you're ready, your
16 Honor.

17 THE COURT: I'm ready now.

18 MR. BONUS: You're ready?

19 THE COURT: Yes.

20 MR. BONUS: So at this point, we have one more
21 day of witnesses Monday. I think we -- it's Andre
22 Bellinger and Jay Salpeter, who is an investigator.

23 Seems to be a bit of a formality. Nelson Cruz is
24 innocent and we're asking you to release him on bail. And
25 you have the authority to do so under Judiciary Law 2-b.

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1 Judiciary Law 2-b gives the discretion, and the interest of
2 justice so requires, to form procedures and processes so
3 that people like Nelson Cruz don't remain in prison.

4 And I want to really just give you a quote from
5 Hamilton, Derrick, all right, from the Appellate Division,
6 not from Derrick himself, even though he's here in spirit.

7 THE COURT: He is the first, yes.

8 MR. BONUS: Okay. Believe me.

9 THE COURT: Definitely sets the tone.

10 MR. BONUS: Just give me a second.

11 "The Due Process Clause in the New York State
12 Constitution provides 'greater protection than its federal
13 counterparts as construed by the Supreme Court.'" And
14 that's -- again, this is all Second Department, *People v*
15 *Hamilton*, *People v LaValle*, *People v Harris*, these are the
16 citations within that quote.

17 "Since a person who has not committed any crime
18 has a liberty interest in remaining free from punishment,
19 the conviction or incarceration of a guiltless person,
20 which derives that person of freedom of movement and
21 freedom of punishment -- freedom from punishment and
22 violates elementary fairness, runs afoul of the Due Process
23 Clause of the New York Constitution.

24 "Moreover, because punishing an actually innocent
25 person is inherently disproportionate to the acts committed

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1 by that person, such punishment also violates the provision
2 of the New York State Constitution which prohibits cruel
3 and unusual punishments." So does the United States
4 Constitution; any constitution prohibits that.

5 And, again, you find your power to do this in
6 Judiciary Law 2-b, but you wouldn't be the first judge that
7 does this. Judge Feldman in 1997 in *People v Acevedo* did
8 the same thing in the middle of hearing, same procedural
9 situation. She saw that the evidence would require
10 Mr. Acevedo's release and she released Mr. Acevedo on his
11 own recognizance, on his own recognizance.

12 If there are certain conditions, we ask that you
13 release -- ankle bracelet, whatever. Let me tell you
14 something right now, Nelson Cruz in 1998 on April 3rd, he
15 turned himself in. He's been willing to answer this. He's
16 litigated this. This is -- there's multiple 440 motions,
17 appeal. These witnesses have been around since day one.
18 He's -- he's innocent. The man is innocent.

19 And, you know, especially when you look at the
20 circumstances that he's incarcerated in right now. He is
21 in Ulster. He is not able to eat the same way that he eats
22 when he is in Woodbourne. And I can tell you other stories
23 from Woodbourne of when corrections officers have told him
24 that he is not innocent right now; he might have been
25 innocent 21 years ago, but he is not innocent right now.

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1 And every day that he's not out, I'm concerned because he
2 is innocent.

3 I will never forget when you issued your decision
4 back in June two years ago. And I sat on the 18th floor
5 and I looked out the window and I asked who could be
6 released when they have all this evidence. You've heard
7 the evidence. And if you want me to go into the evidence,
8 I can. But I ask you to release this man now. He will be
9 back on Monday. You can put an ankle bracelet on him,
10 whatever needs to be done.

11 And I'll tell you right now, we can go into the
12 evidence. I can tell you, but you heard it already.
13 You've heard 12 witnesses. You've heard five witnesses
14 that said this man wasn't there; they're all credible.
15 They corroborate each other.

16 Police officer -- if you want me to go into the
17 argument, I will. I can give you the factual elements.

18 I can go into with bail pending appeal because
19 that's analogous here, what are the merits? That's what
20 bail pending appeal is about. Okay. The man has done 21
21 years out of 25. If you want me to go into the facts, the
22 argument, I can.

23 THE COURT: Well, you know I know the facts and
24 the arguments, but if you want to add something.

25 MR. BONUS: You know the facts at this point.

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1 THE COURT: Of course.

2 MR. BONUS: I ask you to release him, please.

3 THE COURT: Okay. People, do you have anything
4 to say?

5 MR. STEWART: Judge, I -- I just simply disagree
6 that bail would be appropriate or even permissible at this
7 time. He is a convicted felon. He stands convicted. He
8 is in the custody of New York State Bureau of Prisons; so
9 he -- and there is no authority to grant bail under those
10 circumstances.

11 We briefed this for your Honor when Mr. Bonus
12 initially made this request back before the hearing
13 started. And it is clear that, with the instances where
14 bail is permitted to be granted at the Supreme Court level,
15 is not true for a 440 hearing. A lot of changes in the 440
16 rules over the years, but granting bail to a convicted
17 felon is not one of them. So there is no procedural or
18 authority for granting bail to the defendant in this case.

19 THE COURT: Well, let me ask you this: It has
20 been done before.

21 MR. STEWART: Well, I'm not familiar with that
22 case; so I would have to look at it, but just because --

23 THE COURT: I will -- get this, I guess you have
24 to look at it and you come to me and make your arguments --

25 MR. STEWART: So --

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1 THE COURT: -- but it definitely has been done.

2 MR. STEWART: Okay.

3 THE COURT: And I'm willing to hear whatever case
4 law that you wish to bring me before the Court.

5 MR. STEWART: Well, the granting of bail is
6 statutory. Under the statute, it's not permitted under
7 these circumstances.

8 THE COURT: Well, the good thing is that I'm
9 sitting here and I have the discretion to make my decision.

10 MR. STEWART: No, it's -- but, your Honor --

11 THE COURT: I already heard you. Move on.

12 MR. STEWART: Right. Well, we would like an
13 opportunity to research and brief it and check --

14 THE COURT: That's fine. That's how we live and
15 learn. I don't mind being challenged. I don't mind
16 hearing new law. That's what it's about. And it's all
17 about justice and fairness; so I'm here to listen.

18 MR. BONUS: If I had the indictment number on
19 Julio Acevedo, I would give it to you, but I don't have it.
20 But I know that for a fact that during -- it was actually
21 during the hearing before she -- before she granted the
22 motion to vacate, Julio Acevedo --

23 THE COURT: You're talking about Feldman?

24 MR. BONUS: Excuse me?

25 THE COURT: Who is the "she"?

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1 MR. BONUS: Judge Feldman is the she, right.

2 Yes, Judge Feldman, '97.

3 THE COURT: Yeah. She retired a long time ago.

4 MR. STEWART: Yeah. If we could have the
5 decision or the transcript. Is this a published decision?
6 Is it a published decision?

7 THE COURT: Well, if you have it, I think it will
8 be fine if you want to turn over a copy to the People to
9 review. Is it something that you're interested in?

10 MR. STEWART: Sure. I mean, we'll take a look at
11 it, but it sounds as though the hearing had been concluded.

12 MR. BONUS: No.

13 THE COURT: That's what I don't know. I think
14 you guys should work it out among yourselves.

15 MR. BONUS: Again, Judiciary Law 2-b gives you
16 this power. You have the discretion when -- when the
17 interests of justice require it, you have the -- it gives
18 you the ability to step around, you know, statutory
19 mandates when justice so requires. You have that power.

20 MR. STEWART: So then I take it that Mr. Bonus is
21 conceding that the statutory --

22 MR. BONUS: No, I don't concede that. I don't
23 concede that.

24 THE COURT: Okay. One at a time.

25 MR. STEWART: I'm sorry.

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1 THE COURT: People.

2 MR. STEWART: -- that the statutory mandates
3 don't permit this and he is asking you to rely on
4 discretionary power, to ignore the statutory mandates.

5 MR. BONUS: That's not what I said.

6 MR. STEWART: Well, you said you could step
7 around them.

8 MR. BONUS: That's not what I said.

9 THE COURT: Okay. One has to speak at a time.
10 Let him finish, you go next.

11 Go ahead.

12 MR. STEWART: Right. So he is talking about
13 sidestepping the statutory structure. I mean, that's --
14 well, we can have it read back. I believe the words he
15 used was step around and he made this motion (indicating);
16 so clearly he sees the statutory structure as an impediment
17 and he is arguing for you to act with some discretionary
18 authority. Again --

19 THE COURT: So I think at this point -- and I'm
20 not saying -- I'm not ruling in one favor or the other, but
21 if you could submit some case law that would support how
22 you feel and what you think, that would be helpful to the
23 Court. It doesn't have to be five, ten cases; whatever you
24 think is important.

25 MR. BONUS: You think -- how about after lunch?

Proceedings

1 THE COURT: That's fine.

2 MR. BONUS: I mean, you know, because I would
3 like to have the man out with his child and his wife, you
4 know, if we could do it today and not have him sit back in
5 Ulster.

6 MR. STEWART: Judge --

7 MR. BONUS: I will -- do you think --

8 THE COURT: I'm sorry, People, what did you want
9 to say?

10 MR. STEWART: No. I'm just saying that if
11 Mr. Bonus wanted to make this argument today, he certainly
12 could have let us know last week that he was planning on
13 making a bail application. It's not like there's anything
14 today that's revelatory or new. Luis Polanco's testimony
15 which was -- more or less follows his affidavit and
16 everything else.

17 So he wanted to make this application; so I would
18 like a briefing schedule on it. I would like to be able to
19 brief it. As I get -- I believe it would be an
20 extraordinary measure.

21 Additionally, you know, there are two claims
22 being brought here. There's an actual innocence claim and
23 then there's also a request for a new trial. If there were
24 a new trial, we would be requesting remand, as we do with
25 homicide cases. So, you know, and the standards of proof

Proceedings

1 are different. And we are far from conceding on this case.

2 And the evidence which Mr. Bonus has talked about
3 and these witnesses who, time and again, disavow their
4 prior sworn statements either to the District Attorney's
5 office or actually submitted to this Court. William Harden
6 said he didn't -- he disavowed his affidavit from 2002
7 claiming that he didn't really read it. Okay. This was
8 the affidavit which helped to get this hearing.

9 So the basis for your Honor considering and
10 granting the hearing to begin with was disavowed by the
11 very man who signed it; so this -- this is far from a clear
12 case.

13 And, moreover, one of the reasons that your Honor
14 granted this hearing relating to Detective Scarcella, the
15 allegation's made have not been -- there has been no
16 testimony with respect to Detective Scarcella slapping or
17 anything like that. That has not been made part of the
18 record. The defendant has not taken the stand.

19 THE COURT: No. Well, let me say this:
20 Scarcella and Chmil did testify and there were times when
21 he, the defendant, was alone in a room with these -- with
22 these -- and we know their track record; so you have to
23 focus not only on the defendant, but you have to focus on
24 the witness. And you know there is a whole bunch of
25 research we could do on Chmil and Scarcella for some of the

Proceedings

1 things that they've done to a lot of, I will say,
2 wrongfully convicted, innocent people, and that's it.

3 And even, I believe, Scarcella said at one time
4 he was in the room with Nelson or someone else, there was
5 no attorney in there. There's so many things that, you
6 know, people are avoiding that should have been done and it
7 wasn't.

8 MR. STEWART: Well, Judge, hold on a second.

9 THE COURT: Oh, no, hold on. I'm talking.

10 Go ahead.

11 MR. STEWART: Okay.

12 MR. BONUS: First of all, Brooks puts Scarcella
13 and Chmil alone with Andre Bellinger before a lineup. What
14 we also know is that Scarcella is the one that takes
15 Eduardo Rodriguez out of the precinct. Brooks says I had
16 nothing to do -- the lead detective, I have nothing to do
17 with it. Chmil, the lead detective from Brooklyn North, I
18 have nothing do with it.

19 THE COURT: I'm agreeing with you.

20 MR. BONUS: This guy is in the precinct for eight
21 hours. What's he doing, playing tiddlywinks? I mean, this
22 is what we know, he doesn't do that. We know he is always
23 involved. He is the closer, Mariano Rivera, that's what he
24 is.

25 Okay. All right. Again, how many witnesses? We

Proceedings

1 know -- if you really want to go into how unreliable Andre
2 Bellinger is, we can.

3 THE COURT: Well, I already know that.

4 MR. BONUS: Well, okay.

5 THE COURT: You don't have to go there.

6 MR. BONUS: Well, I mean, Shaq told you there was
7 no fight. Okay. And we can -- he can say whatever he
8 wants about William Harden, but now we heard William Harden
9 on the witness stand, credible.

10 Okay. Five witnesses. And then we have four
11 witnesses all that corroborate each other that say either
12 Andre Bellinger -- Shaq says Andre Bellinger is lying.
13 Bonnie Cooper, Chris Cooper, very credible witnesses, both
14 say Andre Bellinger wasn't there. And William Harden says
15 he wasn't there.

16 THE COURT: Well, the Coopers definitely were
17 reliable witnesses, I will say that.

18 MR. BONUS: Okay. So, you know, you have the
19 discretion -- let's go back to what it is. You have the
20 discretion. The merits of this claim are extraordinarily
21 strong.

22 And they -- they just made a comment about what
23 Judge Gerstein very recently --

24 THE COURT: Who?

25 MR. BONUS: -- two years ago, maybe less, Judge

Proceedings

1 Gerstein, Tasker Spruill -- *People v Tasker Spruill*.

2 Listen, you want to start talking about it, I got the
3 cases. Okay. He released Tasker Spruill or I think it was
4 an ankle bracelet maybe, but I can't remember exactly what
5 it was, but he releases Spruill.

6 Okay. Now, what does Spruill do? He gets a
7 call, Second Department reverses him. What does Spruill
8 do? He comes back. This is what happens.

9 Nelson Cruz, we got to go back to Nelson Cruz.
10 Nelson Cruz wants to litigate this case.

11 THE COURT: And he should.

12 MR. BONUS: Okay. So I say Judge Feldman has
13 done it before in the same procedural posture. She knew
14 which way the wind was blowing. This is a meritorious case
15 just like Julio Acevedo's case; she did it. It was -- it's
16 a '97 indictment number, I think it was -- it might have
17 been a '96 indictment number and it was vacated in '98 or
18 whatever, but it was done by Judge Feldman in Julio
19 Acevedo's case.

20 And I don't think -- you know, again, Judiciary
21 2-b gives you this power, you know, and I ask you to
22 release him. Why keep an innocent man in jail another day?
23 It's -- you know, he'll be back on Monday when Andre
24 Bellinger comes up on the stand.

25 MR. STEWART: Judge, I'm sorry, did Mr. Bonus

JUSTIN C. BONUS, ESQ.

A T T O R N E Y A T L A W

JUSTIN BONUS, ESQ.
JUSTIN.BONUS@GMAIL.COM

118-35 QUEENS BLVD. SUITE 400
FOREST HILLS, NY 11375

TEL. (347) 920-0160
FAX (888)237-8686

February 14, 2020

The Honorable Lawrence K. Marks
Chief Administrative Judge
Office of Court Administration
25 Beaver Street
New York, NY 10004

The Honorable Matthew D'Emic
Administrative Judge
Supreme Court, Kings County, Criminal
320 Jay Street
Brooklyn, NY 11201

Subj: Due Process Violation

Re: People v. Nelson Cruz, Ind. Nos. 3669/1998

Via: *1st Class Mail*

Your Honors:

This office represents Nelson Cruz in the above-captioned matter. Mr. Cruz's case has been litigating in a post-conviction posture for almost three-and-a-half years. His motion to vacate was filed in September of 2016. The Court denied Mr. Cruz's motion to vacate in June of 2017. Mr. Cruz, immediately, reargued the motion, based upon the Court's misstating the facts and failure to consider other certain facts. The Court granted a hearing based upon the reargument in July of 2018. Mr. Cruz then had to wait 8 months before the Court conducted a hearing. Over the course of the end of March through the beginning of May, a hearing was held. 18 witnesses were called. The hearing was fully briefed by the end of June. The Court was supposed to render a decision in July. The matter was adjourned until August 29, 2019.

In court on August 29th, the Court issued an oral decision, heard arguments from defense counsel and adjourned the case until after lunch. After lunch, the Court again issued an oral decision and heard oral arguments from defense counsel. The Court never issued a written decision but indicated that one would be forth coming. The Court also put the matter over to December 16, 2019 for reargument.¹

The defense waited for a decision; one was never issued. Instead, on December 16, 2019, the Court administratively adjourned the matter and advised the parties that the Court would be away until February 20, 2020. The Defense submitted its reargument motion, without a decision, on January 3, 2020. On January 27, 2020, the People asked for a 60 day extension to file its response to

¹ Incredulously, the Court indicated that it needed to read some of the transcripts of the hearing before it issued its written decision.

Page 2

Client – Letter Description

2/14/2020

Mr. Cruz's reargument. Mr. Cruz objected to that request. The Court, apparently, is away until *May 18, 2020*.

Mr. Cruz, an innocent man who did not even remotely receive a fair trial, has been rotting in prison for, now, almost 22 years. He turned himself in on April 3, 1998, when he *just* turned 17. We merely request the due process that the New York Criminal Procedure Law and the Constitution requires: a written decision with conclusions of law and findings of fact in regard to the credibility analysis of each witness presented.

Thank you for your consideration. If you should have any questions, do not hesitate to contact me.

Sincerely,

/s/ Justin Bonus

Justin Bonus, Esq.

cc;

Camille Gillespie

Matthew Stewart

Kings County District Attorney's Office

350 Jay Street

Brooklyn, NY

(via email)

The Honorable Shawndya L. Simpson

Kings County Supreme Court

320 Jay Street

Brooklyn, NY 11201

(via email)

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

SHAWNDYA L. SIMPSON,

STIPULATION

a Justice of the Supreme Court,
2nd Judicial District, Kings County.

THE FOLLOWING IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct, and the Honorable ShawnDya L. Simpson (“Respondent”), and her attorneys Michael S. Ross and Deborah A. Scalise.

1. Respondent has been a Justice of the Supreme Court, 2nd Judicial District, Kings County, since 2017. She previously served as a Judge of the New York City Civil Court, Kings County, from 2004 through 2016. Her current term expires on December 31, 2030. Most recently, she had been assigned to serve in Bronx County.

2. On October 16, 2019, and on dates thereafter, the Commission apprised Respondent in writing that it was investigating complaints against her, *inter alia*, alleging that her demeanor toward litigants, lawyers, and others had become erratic and at times intemperate, and that she was frequently absent from court, arriving very late and/or leaving very early, or not arriving at all, notwithstanding that litigants and lawyers were waiting for the commencement of proceedings over which she was scheduled to preside. The Commission’s investigation, which had commenced months earlier, involved

interviews with numerous witnesses and the examination of voluminous court records and other documents.

3. In the course of its investigation, the Commission learned that Respondent has been on medical leave for an undisclosed condition since August 2019.

4. On December 6, 2019, the Commission apprised Respondent in writing that it was also investigating a complaint alleging that she was suffering from a physical or mental disability that prevented her from properly performing her judicial duties.

5. On February 27, 2020, after extensive communication between Commission counsel and Respondent's attorneys, her attorneys provided the Commission with medical records revealing that Respondent, who is in her mid-fifties, is suffering from Alzheimer's Disease, which had progressed to an advanced level uncommon to a person of her age. The medical records indicate that her condition had been undiagnosed at the time of the alleged misconduct for which she was originally being investigated.

6. Respondent was served with a Formal Written Complaint dated March 27, 2020, containing one charge: that Respondent should be retired from judicial office, pursuant to Article 6, Section 22, subdivision (a) of the Constitution and Section 44, subdivision 1 of the Judiciary Law, in that Respondent has a mental or physical disability that prevents the proper performance of her judicial duties.

7. Alzheimer's Disease attacks the memory and thinking centers of the brain. There is no known cure. Its effects are irreversible, and its progression is unstoppable. Its characteristics include memory loss, volatile mood swings, difficulty with language, loss of focus and/or comprehension, apathy, and confusion.

8. Respondent alternates at various times of day between apparent cognition and unawareness of her circumstances.

9. In view of the catastrophic and cognitively debilitating nature of Alzheimer's Disease, and in furtherance of the public interest in a judiciary that is both independent and fit to serve, Respondent, her family, her attorneys, and the Commission's Administrator agree that her resignation or early retirement from judicial office, based on disability, is more appropriate than further proceedings. As such, Respondent has notified the Chief Administrative Judge that she is vacating judicial office as of October 31, 2020, and she has filed her retirement papers accordingly. A copy of her letter to the Chief Administrative Judge, dated July 31, 2020, is appended.

10. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from a judge's resignation to complete proceedings and, if it so determines, render and file a determination that the judge should be removed from office.

11. Respondent affirms that, after vacating her judicial office, she will neither seek nor accept judicial office at any time in the future.

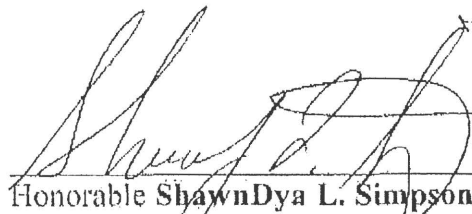
12. Respondent understands that, should she abrogate the terms of this Stipulation and hold any judicial position at any time in the future, the Commission's investigations of the complaints would be revived, she would be served with a Formal Written Complaint on authorization of the Commission, and the matter would proceed to a hearing before a referee.

13. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded by the terms of this Stipulation, without further proceedings.

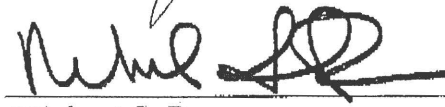
14. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

15. Both the Administrator and the attorneys for Respondent appreciate the enormous emotional impact a diagnosis of Alzheimer's Disease can have on an individual, a family, and a community of personal friends and professional colleagues, especially where, as here, the disease has already reached an advanced stage in the life of a relatively young and highly accomplished individual. The signatories hope that Respondent and her family will share years of enjoyment in her retirement, that further progression of the disease will be slowed by application of the best available science, and that her legacy will be burnished by her fortitude in revealing her condition and the degree to which this action might de-stigmatize Alzheimer's Disease and inspire others to learn more about how to recognize and cope with it.

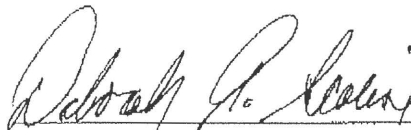
Dated: 7/31/20


Honorable Shawn Dya L. Simpson

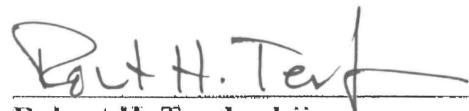
Dated: 7/31/20


Michael S. Ross
Attorney for Respondent

Dated: 7/31/20


Deborah A. Scalise
Attorney for Respondent

Dated: July 31, 2020


Robert H. Tembeckjian
Administrator and Counsel to the Commission
(Mark Levine and Daniel Davis, Of Counsel)

THE HONORABLE SHAWN DYA LUISA SIMPSON

July 31, 2020

PERSONAL AND CONFIDENTIAL

Hon. Lawrence K. Marks
Chief Administrative Judge
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Retirement

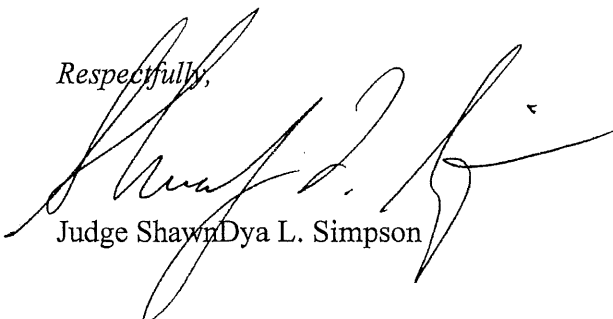
Dear Judge Marks,

As you know, I have been a Justice of the Supreme Court for the Second Judicial District, in Kings County, having been elected in 2017, and, I previously served as a Judge of the New York City Civil Court, Kings County, from 2004 through 2016. My current term expires on December 31, 2030. I am assigned to serve in Bronx County. As you may know, I have been on medical leave since August 2019. Unfortunately, my medical diagnosis is such that I will not be able to fulfill my term. Accordingly, this is to advise that I will be vacating my judicial office and retiring, effective October 31, 2020.

It was my life-long ambition to wear a robe and to serve the judicial system faithfully, as well as with objectivity and integrity. Having achieved this goal, with the will and guidance of God, I must continue to walk in accordance with his plan for me. I have thoroughly enjoyed serving as a Judge for the past sixteen years; your leadership is just but one reason why my career has been so satisfying. Thank you.

In closing, my heart and soul were brought to Chambers and to my Court Part each and every day. I hope the Office of Court Administration, my colleagues and the public will view my career in the spirit that it was intended, in that I served the People of the State of New York with the passion and honor they deserved.

Respectfully,



Judge Shawn Dya L. Simpson

THE HONORABLE SHAWN DYA LUISA SIMPSON

July 31, 2020

PERSONAL AND CONFIDENTIAL

Hon. Lawrence K. Marks
Chief Administrative Judge
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Retirement

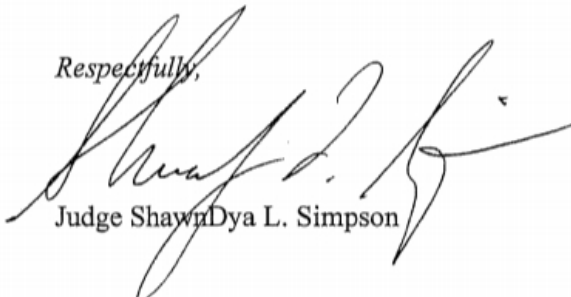
Dear Judge Marks,

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Respectfully,



Judge Shawn Dya L. Simpson

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

D66514
Ejr/

_____AD3d_____

MARK C. DILLON, J.P.
LEONARD B. AUSTIN
BETSY BARROS
ANGELA G. IANNACCI, JJ.

2021-01995

DECISION, ORDER & JUDGMENT

In the Matter of Nelson Cruz, petitioner,
v Matthew D’Emic, etc., et al., respondents.

Justin C. Bonus, Forest Hills, NY, for petitioner.

Eric Gonzalez, District Attorney, Brooklyn, NY (Camille O’Hara Gillespie and Leonard Joblove of counsel), nonparty pro se.

Proceeding pursuant to CPLR article 78, inter alia, in the nature of mandamus to compel the respondents Matthew D’Emic, a Justice of the Supreme Court, Kings County, and Raymond L. Rodriguez, an Acting Justice of the Supreme Court, Kings County, to issue a written order determining the petitioner’s motion for leave to reargue his prior motion pursuant to CPL 440.10, filed by the petitioner in an action entitled *People v Cruz*, commenced in that court under Indictment No. 3669/1998, and to conduct a hearing on a January 3, 2020 motion to reargue a “bench decision” which occurred on August 29, 2019, or to compel the respondents to issue a written order determining that motion, in that same action. Application by the petitioner, inter alia, to strike the affirmation in opposition filed by the nonparty pro se.

ORDERED that the application is denied; and it is further,

ADJUDGED that the petition is granted, on the law, without costs or disbursements, to the extent that the matter is remitted to the Supreme Court, Kings County, for a written order determining the petitioner’s motion for leave to reargue his prior motion pursuant to CPL 440.10, filed by the petitioner in the action entitled *People v Cruz*, commenced in that court under Indictment No. 3669/1998, and an order determining the petitioner’s motion to reargue a “bench decision” which occurred on August 29, 2019; the orders shall be issued within 45 days after service upon the respondents of a copy of this decision, order and judgment; and the petition is otherwise denied.

Under the circumstances of this case, the petitioner demonstrated a clear legal right

May 19, 2021

MATTER OF CRUZ v D’EMIC

Page 1.

to a written order determining his motion for leave to reargue his prior motion pursuant to CPL 440.10, in the action entitled *People v Cruz*, commenced in that court under Indictment No. 3669/1998, and mandamus properly lies to compel the respondents to issue that written order, as well as an order determining the petitioner's motion to reargue the "bench decision" which occurred on August 29, 2019 (see *Matter of Weinstein v Haft*, 60 NY2d 625, 627; *Klostermann v Cuomo*, 61 NY2d 525, 540; *Matter of Law Offs. of Russell I. Marnell, P.C. v Blydenburgh*, 26 AD3d 495).

The petitioner's remaining contentions are without merit.

DILLON, J.P., AUSTIN, BARROS and IANNACCI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 12

.....X
PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.:3669/1998

NELSON CRUZ

Decision and Order

.....X

Pursuant to the Appellate Division, Second Judicial Department, Decision, Order and Judgment in *In the Matter of Nelson Cruz v Matthew D'Emic, etc., et al.*, dated May 19, 2021, attached hereto, the Court issues the following Decisions and Orders.

The Court denies defendant Cruz's January 3, 2020 motion seeking to reargue Justice Simpson's August 29, 2019 bench decision denying his CPL 440 motion to vacate his guilty verdict. The Court has reviewed the submissions and CPL 440 hearing record and finds no basis for granting reargument since Justice Simpson neither overlooked newly discovered evidence, misapprehended the law, nor misrepresented the facts.

The Court also denies defendant Cruz's January 27, 2021 motion seeking to reargue his prior motion pursuant to CPL 440.10. The Court has reviewed the submissions and CPL 440 hearing record and finds no basis for granting reargument. The Court finds that *People v. Deleon* is inapplicable as the Detectives Chmil and Scarcella did not have significant involvement in this case.

WHEREFORE, it is Ordered, the defendant's motion seeking to reargue the August 29, 2019 bench decision, and motion to reargue his prior CPL 440.10 motion are denied.

Dated: May 20, 2021
Brooklyn, New York



HON. RAYMOND L. RODRIGUEZ
ACTING J.S.C.

