

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

THE PEOPLE OF THE STATE OF NEW YORK

Respondents,

-against-

NELSON CRUZ,

Defendant.

AFFIDAVIT IN SUPPORT
OF MOTION TO REARGUE AND
RENEW

IND. NOS. 3669/1998

Justin Bonus, an attorney at law admitted to practice law in the State of New York, hereby affirms, upon information and belief, under the penalties of perjury the foregoing is true and exact:

1. I represent Nelson Cruz in this Criminal Procedure Law 440.10 motion to vacate the judgment of conviction. I contend the August 29, 2010 bench decision (Simpson, J), denied Mr. Cruz fundamental due process, misapprehended and overlooked the facts and law, that deprived Nelson Cruz of a fair and meaningful mechanism to decide his claims of innocence and/or wrongful conviction.

2. In his original moving papers Nelson Cruz contends the conviction relied upon the single false eye-witness testimony manufactured by Detectives Louis Scarcella and Stephen Chmil. That is, Louis Scarcella and Stephen Chmil told Andre Bellinger prior to his line-up identification of Nelson Cruz, that Nelson Cruz committed the crime and that Rodriguez had already identified Cruz as the killer. However, Rodriguez was not a credible witness, therefore, Bellinger was needed in order for the People to convict Cruz. See TT 131-133; HT 657-665.¹

3. From the onset Nelson Cruz became the target once Rodriguez, with the murder weapon in hand, blamed the murder on Cruz. Tunnel vision took over and Cruz would be arrested at all costs. Detective Louis Scarcella and his partner Detective Chmil armed with tunnel vision set out

¹ Trial testimony will be delineated by the letters "TT". Hearing testimony by "HT".

to get evidence to arrest Nelson Cruz; then Detectives found Andre Bellinger who was more than willing to help the police frame an innocent man.

4. Your Honor, in her bench decision on August 29, 2019, stated the following:

“defendant asserts that he’s innocent of the charges. That the evidence is insufficient to convict and was compromised, that there’s new evidence that demonstrates that he was wrongfully convicted and that he received ineffective assistance of counsel.”

5. The court went on to state:

“the defense also argues that new evidence demonstrates that defendant was acting in self-defense. Defense is seeking a new trial or dismissal.”

6. First and foremost, the only claims raised by Nelson Cruz was that he is:

- Actually innocent and his entire conviction is based on evidence manufactured by Eduardo Rodriguez, along with Detectives Scarcella and Chmil in conjunction with Andre Bellinger;
- The evidence newly discovered: by presentation of sworn testimony for the first time proved that Nelson Cruz was not the person who shot and killed Viera;²
- Cruz’s trial attorney was ineffective failing to call alibi witnesses; and
- Fraud upon the court was committed when Bellinger, a non-witness, was able to testify he saw a murder that he did not see.

7. Cruz never argued that the evidence was insufficient or, for that matter, he was acting in self-defense. The Court’s finding to the contrary demonstrates that Your Honor has not read the record and has substituted Cruz’s claims for those of her own, therefore, subjecting Cruz to impermissible burdens that he does not possess.

POINT I

THE COURT’S BENCH DECISION DENYING THE MOTION TO VACATE JUDGMENT MISAPPREHENDED AND OVERLOOKED MATERIAL FACTS AND LAW THAT A REASONABLE JURIST HAVE FOUND SUFFICIENT TO VACATE THE JUDGMENT IN OTHER CASES WHERE DETECTIVES LOUIS

² Cruz called the following witnesses that *did not testify at trial*: Luis Polanco, William Harden, William Johnson, Ralph Johnson, Jay Salpeter, Christopher Cooper, Bonnie Cooper and Jermaine Frazier. In one way or another these people provided credible evidence of Cruz’s innocence that went *unrefuted* by the People.

SCARCELLA AND STEPHEN CHMIL ILLEGAL POLICE PRACTICES COME INTO PLAY.

8. To date, 15 cases have been overturned that Brooklyn Homicide Detectives Louis Scarcella and Stephen Chmil have investigated. In several of these cases, that is the cases of David Ranta, Alveena Jenette, Darryl Austin, Robert Hill, Derrick Hamilton, Robert Logan, Vanessa Gathers, unreliable witnesses were used to convict. In the cases of Shabaka Shakur, Sundhe Moses and Jabbar Washington, false confessions were used to obtain those convictions. In Roseann Hargrove, John Bunn and Eliseo Deleon the newly discovered evidence of illegal police practices, in and of itself, were cited as grounds for vacating the convictions.

9. In the latest Scarcella and Chmil related case, the Honorable Dena E. Douglas on November 19, 2019, (Kings County), granted Eliseo Deleon's motion to vacate the judgment after a hearing and held (amongst other things):

“ A motion to vacate a judgment of conviction upon the ground of newly-discovered evidence rests within the discretion of the hearing court” (People v. Malik, 81 A.D.3d 981, [2d Dept. 2011], citing People v. Tankleff, 49 AD3d 160 [2d Dept. 2007]; People v. Bellamy, 84 AD3d 1260, 1261 [2d Dept. 2011]). Accordingly the hearing court must assess “the probable effect of the newly-discovered evidence on the verdict.”; that is, the hearing court must determine whether the newly discovered evidence, when viewed in conjunction with the trial record, would have probably resulted in a more favorable verdict for the defendant (Malik, 81 A.D. 3d at 982).

10. The Deleon court went on to state:

“Based upon its review of the trial and hearing record, the Court is persuaded that there is a reasonable probability that had the evidence about the investigatory practices of Detective Scarcella and Detective Chmil been known to the jury the result would have been more favorable to defendant (see CPL 440.10 [1] [g]).”

11. The lower court's bench decision denying Nelson Cruz's motion makes no sense for the following reason: in People v. Hargrove, the same Judge who denied Cruz, granted Hargrove on the same evidence or facts. In Hargrove this Court found, as it did in Cruz, that Scarcella and Chmil were present during the line-up of the sole identifying witness at the trial and was “in part responsible

for the outcome” of the identification procedures “as the assigned Detective investigating and processing the case.” Id.

12. The court also determined in Hargrove that “[t]he revelation of Detective Scarcella’s malfeasance in fabricating false identification evidence gravely undermines the evidence that convicted the defendant’s in this case.” “The sole basis for the defendant’s conviction [was] the identification by one witness”.

13. The Hargrove court further held: the issue here was “not whether the defendant is innocent, but whether the newly discovered evidence should require a new trial.” The Court determined that “[t]he pattern and practice of Scarcella’s conduct which manifest a disregard for rules, law and truth undermines our judicial system and gives cause for a new review of the evidence.”

14. The Court finalized that the issue here was “not whether the defendant is innocent, but whether the newly discovered evidence should require a new trial.”

15. The Hargrove court detailed the facts, that is, how Detective Chmil and Scarcella from the outset were involved in the case. (See Appendix A – Hargrove decision dated April 14, 2015).

16. In Nelson Cruz’s case, the Court overlooked and misapprehended the fact that Detectives Scarcella and Chmil were involved with both Andre Bellinger and Eduardo Rodriguez from the onset. These Detectives helped shape the narrative, focused in Cruz and manufactured the rest of the case. Andre Bellinger never saw the crime, and Your Honor failure to compare the facts in other Scarcella cases that mirrors the frame up here has deprived Cruz due process. As in Hamilton Jewel Smith was forced to lie identifying Hamilton in a murder she never witnessed. .Smith knew Hamilton from the neighborhood and was forced to “lie” at the trial to facts made up by Detective Scarcella. (Appendix-).

16. The Appellate Division Second Department ruled in Hargrove that the courts should only construe the core elements of the statute as strict legal requirements. see CPL § 440.10 [1][g];

accord People v. Jones, 24 NY3d at 637 [Abdus-Salaam, J., concurring]). In other words, a motion for a new trial based on newly discovered evidence should only be granted if the court finds, as a factual matter, that the movant has demonstrated that “(1) (n)ew evidence has been discovered since the entry of a judgment...(2) which could have not have been produced by the defendant at the trial even with due diligence on his part and (3) which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant” (CPL 440.10 (1) (g)).

17. The Appellate Division went on to state: “[t]he remaining three criteria should be used to evaluate the ultimate issue of whether the new evidence would “create a probability” of a more favorable verdict (CPL 440.10 (1) (g). In assessing the probable impact of the new evidence, the court should consider whether and to what extent the new evidence is (1) material to the pertinent issues in the case, (2) cumulative to evidence that was already presented to the jury, and (3) merely impeaching or contradicting the evidence presented at trial (accord People v. Rensing, 14 NY2d at 214, People v. Salemi, 309 NY at 215-216; People v. Shilitano, 218 NY at 170).” People v. Hargrove, 162 A.D.3d 25 (2d Dept. 2018).

18. Here, in Cruz, the Court failed to assess any of the evidence proving that Scarella and Chmil were proven by various courts of record to do the same acts complained of herein by Bellinger. That is, telling witnesses who to identify during line-ups. These Detectives negotiated the surrender of Cruz. Solicited a false confession stating that Cruz was acting in self-defense which was suppressed. Advised Andre Bellinger that Cruz had already been identified by Rodriguez as the killer, however, Rodriguez wasn’t credible therefore, they needed Bellinger to come forth and identify Cruz as the killer. They told Bellinger that Cruz would be at the precinct in the line-up. They also told Bellinger what type of gun to say Cruz had, and so on. See TT 131-133; HT 657-665.

19. From the onset, Detectives Louis Scarcella and Stephen Chmil refused to listen to Officer Piatti, an on-duty Police Officer who observed Eduardo Rodriguez firing the murder weapon right before his very eyes (Appendix- B: a copy of Officer Piatti's statement to Detective Chmil at 1:30AM on March 29, 1998). Officer Piatti's testimony at the hearing to vacate the judgment is that his previous trial testimony was true, that is he didn't lie when he testified Rodriguez was the person firing the weapon. Officer Piatti goes on to state:

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.

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. (Ht. 572-573).

20. Officer Piatti goes on to say:

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.
(HT-574-575).

21. Normally, when a Police officer identifies a person who committed the crime and arrests that person at the crime scene with physical evidence connecting him to the crime that evidence is undisputed proof of guilt. Here, the exact opposite happened. Eduardo Rodriguez was seen by Officer Piatti firing *the* weapon that caused the death of Trevor Viera.³ Yet, somehow after his arrest for firing the firearm that killed Trevor Viera, he was able to convince Homicide Detectives Louis Scarcella, Stephen Chmil, Mark Brooks and Barrios that the 17 year-old Nelson Cruz committed the murder.

22. Rodriguez convinced these detectives, who only cared about an arrest, that Nelson Cruz was the murderer. Armed with tunnel vision Detective Louis Scarcella and Chmil, fresh with Nelson Cruz's name in their heads, confronted Andre Bellinger and told him that Rodriguez had identified Nelson Cruz as the killer and, they needed him Bellinger to do the same.

23. These Detectives informed Bellinger the type of gun Viera was shot with and many details about the crime. Bellinger in turn told the prosecutor everything he learned from the Detectives.

24. At the 440 hearing when confronted with the above factual matters Andre Bellinger testified amongst other things 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.

³ Ballistics determined that the weapon that Rodriguez was arrested with was the murder weapon.

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. 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).

25. 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).

26. Bellinger, above, admitted to testifying contrary to his hearing testimony at the trial, that the police informed him “first” that Nelson Cruz was identified by Rodriguez as the shooter. Also, that Nelson would be at the precinct prior to him viewing the line-up. That they needed him, Bellinger, to identify Nelson because Rodriguez was not credible. All these things Bellinger's trial testimony demonstrated happened before Bellinger ever informed the police Cruz shot and killed Viera.

27. The question and answer session attempting to refresh Bellinger memory continued at page 662 of the 440 hearing with Justin Bonus 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).

28. When further confronted with previous testimony on the subject matter the following is revealed:

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 then what it was, they told me he was shot with a nine-millimeter.
(HT-664).

29. As shown above, Andre Bellinger “lies” at the 440 hearing 20 years later: he testified that he told the police about the gun. At the trial in 1999, he swore the police told him about the gun, then 20 years later he changed his story to: “he told the police about the gun”. Bellinger’s attempt to cover for the police should be evidence that he has an unusual relationship with the Police Department. Why would he make up a story about who mentioned the gun first 20 years later unless someone informed him it was in their interest for the story to be told that way.

30. The truth of the matter is Bellinger should not be believed. He did not see the contemporaneous events as they unfolded at the crime scene. No police, no Johnson or no Rodriguez, was ever mentioned in Bellinger’s crime scene observations is proof that he could not have seen when Trevor Vieria was shot and killed.

31. A reasonable jurist would find in this case the evidence that Detective Scarcella and Chmil were alone with Bellinger prior to his line-up. Where Bellinger admits he was told by Detectives that Cruz committed the murder and was previously identified by Rodriguez as the murderer. That Cruz would be present at the precinct during the line-up and the Detectives needed Bellinger to identify Cruz because Rodriguez was not credible. These facts so undermined the process as to deprive Cruz a fair trial. Brooks' C.P.L. § 440.10 testimony on the subject shed light as follows:

DETECTIVE BROOKS

Q. Were you with Andre Bellinger the entire time he was in the precinct that Day.

A. No.

Q. On April 3

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 the "he" you're referring to?

A. About 6:00 p.m.

Q. Did Detective Scarcella participate in the lineup

A. What do you mean by "participate"?

Q. You said – you said earlier, though, you just testified that Detective Scarcella and Chmil were with Bellinger. When they were with Bellinger, was it prior to the lineup, do you remember?

A. Before the lineup, yes (HT-442-443).

32. On November 19, 2019, the Honorable Dena E. Douglas (Kings County), in People v. Eliseo Deleon Indictment Number 8153/1995 vacated the conviction and ordered a new trial on the grounds that had the evidence of the illegal police practices of Detective Scarcella and Detective

Chmil been known to the jury the result would have been more favorable to defendant (C.P.L 440.10). (Appendix C).

33. Here, in the Nelson Cruz case before the Court on motion to reargue, this Court failed to credit the testimony of Detective Brooks, who testified that Scarcella and Chmil were present with Andre Bellinger prior to the lineup when Bellinger admits some Detective told him it was Cruz who committed the crime. Applying Judge Douglas' analysis here would warrant nothing less than a new trial.

34. For one, Cruz like Deleon had a false confession attributed to him by Detective Chmil and/or Scarcella. In both cases, Scarcella made it appear that defendants were acting in self-defense, or the gun went off by accident during a struggle.

35. Had the jury heard the lead Detectives in this case were known for fabricating evidence and procuring false identifications, false confessions and suborning perjury through witness testimony, as proven in 15 cases overturned by the judiciary, the result of the proceedings would have been different.

36. For Your Honor to disregard the truth, that is, all the evidence that Detective Chmil and Scarcella, who were known to procure false evidence and resort to illegal police practices to get an arrest/conviction, were with Andre Bellinger and told him Cruz committed the murder, what type of gun was used, as well as many particulars in order to get him to corroborate their belief that Cruz killed Viera. Judge Douglas found this evidence to be enough to tip the scales in favor of granting the motion to vacate the judgment in Deleon. Respectfully I submit the same result should be granted to Nelson Cruz.

POINT II

CRIMINAL PROCEDURE LAW 440.30 (7) IMPOSES A STATUTORY DUTY UPON YOUR HONOR TO SET FORTH ON THE RECORD ITS FINDINGS OF FACTS, ITS CONCLUSIONS OF LAW AND REASONS FOR ITS DETERMINATION. YOUR HONOR HAS FAILED TO FOLLOW THIS

MANDATE AND HAS VIOLATED CRUZ'S RIGHT TO A FAIR AND IMPARTIAL DECISION IN THE PROCESS.

37. The Appellate Division Second Department has held that a court ruling on a Criminal Procedure Law 440.10 motion must set forth the required findings of fact, conclusions of law and reasons for its determination. See CPL 440.30 [7]; People v. Castro, 147 A.D.2d 410; People v. Brown, 66 A.D.2d 785).

38. First it should be noted, C.P.L. § 440.10 requires the defendant to make the motion in writing and would seem to imply that a court should answer the motion in writing as well. Here, to date, no written decision and order detailing the facts, conclusions of law or reasons for its determination has been provided to Mr. Cruz.

39. The Court's bench decision in sum and substance states the following:

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

Although the involvement of Detectives Chmil and Scarcella was a great concern as to the reliability of the investigation in this case, the defense failed to effectively undermine the evidence upon which the defendant was convicted.

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

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

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

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

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

It may have also been a course of strategy taken by counsel in not calling certain witnesses that did not appear credible or reliable.”
(HT-August 29, 2019 pages 3-4).

39. The court denied the motion in its entirety (HT- August 29, 2019, pages 3-4).

40. Immediately after the court's decision above, the attorney noted the following:

MR. BONUS: The jury, the jury didn't hear from at least what, five or six witnesses that were at the scene. The alleged man that this whole thing started with respect to Nelson and Trevor Vieira's altercation came in, Frazier – Jermaine Frazier and told you that was false. There's nothing about Andre Bellinger's testimony that's reliable. Nothing.

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

THE COURT: Who's that witness?

MR. BONUS: Eduardo Rodriguez.

THR COURT: Okay. Go ahead.

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

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

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

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

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

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

MR. BONUS: The jury doesn't hear that. And you know what's interesting about Bellinger when we look at Bellinger, and, again, you know, we plan to reargue this, is that Andre Bellinger, he never mentions the police, he never mentions a man with a ponytail. He never mentions seeing an altercation. He never mentions seeing people fall down and bumping into

each other. And what's very interesting is Rodriguez, when I play his own audio recording from 1998, talks about Nelson bumping into him and falling in front of a police car. Rodriguez confirms that the police are there. So I just – that's not even getting to Scarcella and Chmil.

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

Unfortunately, in cases like this the law doesn't really protect a 17 year old. And who we know was by themselves with Andre Bellinger before the lineup, Scarcella and Chmil. Who do we know was in the precinct, at the scene and then in the precinct – until after the investigation was completed because we know Scarcella was the one who takes Rodriguez out of the precinct to the Cruz residence. Scarcella, Chmil, they're the ones with Bellinger before the lineup. To say that they're not a part of this case when Andre Bellinger, the only witness, the only witness that testifies against Nelson Cruz says that police told him things, that Cruz did it. I don't know. I mean hey, where there's smoke there's fire. When there's flames. This is flames. But then – that's not the – Scarcella isn't the only evidence. There's just – you know – you know, Brooks tell you Scarcella is with them. Chmil tells you that it was Scarcella's idea to remove Rodriguez from the precinct. I don't know how much more you need Scarcella and Chmil to be involved with the case, and a witness said – the only witness against Nelson Cruz, single witness, the only witness against Nelson Cruz says that police told him that Nelson Cruz did it and they needed him.

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

41. The court left the bench after the above colloquy and recalled the case during the afternoon session. The record amongst other things stated:

THE COURT: Good afternoon. The crux of the hearing and this decision falls on the following: Defense failed to prove reliably that it was not a confirmatory identification process, that Bellinger did not know the defendant Cruz. The defense also failed to prove that Bellinger was not at the scene through reliable evidence. The defense claims that the defendant was innocent while claiming there's new evidence that tends to show he was acting in self-defense. The new evidence claim by the defense is the testimony of Rodriguez who was known to everyone at the time of the trial. Mr. Rodriguez's testimony at the hearing does not constitute new evidence for purposes of the instant motion. Further, the defense claims both that Rodriguez is unreliable, and at the same time, ask that the Court find his testimony supports the claim of self-defense and that this constitutes new evidence. For this reason, the motion must be denied.

42. Immediately thereafter the defense counsel stated the following:

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

THE COURT: I'm not disagreeing with you.

43. The Court's decision from the bench above violated fundamental due process of law, because it failed to decide questions of law and fact, that is, whether the evidence presented at the hearing raised a reasonable probability that the result of the proceedings would have been different.

EVIDENCE UTILIZED TO CONVICT

44. The sole evidence that sent Nelson Cruz to prison was the testimony of Andre Bellinger. Nothing else. It was Andre Bellinger that provided a motive for the crime. It was Andre Bellinger that said Cruz pulled up in a car jumped out and committed the crime. It was Bellinger that described a totally different crime scene than any other person present when the crime happened. It was Bellinger who also indicated that Detectives told him it was Cruz, what type of gun Cruz had, and Cruz would be in the lineup to be identified at the precinct.

DISCUSSION

45. The United States Constitution protects causes of action from arbitrary interference by government officials. Barrett v. United States, 798 F2d 565, 575 (1986). Here, it is before the court that this Court, during the CPL 440.10 decision and order, failed to provide a written decision that detailed the facts, or made conclusions of law. Ultimately, denying Nelson Cruz the right to file a certificate to appeal. Without a written decision the Appellate Division Second Department does not accept applications for certificate to appeal. This Court should not permit Cruz's right to due process be stripped away. This amounts to "conduct intended to injure in some way unjustifiable by any government interest" and would undoubtedly shock the conscience.

46. Due Process of law requires a written decision from the Kings County Supreme Court as part of the process due before he can file an application to the higher court seeking relief. Nor can Cruz be expected to intelligently reargue what's in the Court's thoughts or mind. The reasoning of the court in denying the motion to vacate judgment totally overlooked and misapprehended the proper

burden of proof to determine whether a reasonable probability existed that the results would have been different had the jury knew that Detectives Scarcella and Chmil were falsely arresting blacks and Hispanics by using false evidence and witnesses to obtain convictions.

47. Applying these facts to the case at bar. Andre Bellinger appeared as a witness and readily admitted that:

- He did not see the contemporaneous events as everyone else saw them the day when Trevor Viera was killed.
- No police, Johnson or Rodriguez was present when the shooting happened.
- The Detectives told Bellinger that Nelson was the person who committed the crime. That another person had already identified Nelson. However, that person had credibility issues therefore they needed him (Bellinger) to identify Nelson. That Nelson would be coming to the precinct to be in a lineup that Bellinger would view. Also the Detectives told Bellinger what kind of gun was used by Nelson was a 9-millimeter.

48. The decision by Your Honor at bar stated that because Bellinger knew Cruz there could be no misidentification and any suggestive procedures therein were off-set by the confirmatory identification. This court should not forget in the case People v. Hamilton, 115 A.D.3d 112 (2d Dep't 2014), the sole identifying witness, Jewel Smith, knew Derrick Hamilton, and testified that she was forced by Detective Scarcella to say she witnessed the Cash murder. Ms. Smith articulated in several court proceedings under oath how she was threatened and coerced into making the false identification. Bellinger, in his trial and hearing testimony detailed the same coaching by police as Smith did in the Hamilton case.

49. The hearing Court's deliberate indifference to the undisputed facts, that is, Officer Piatti and his partner along with Rodriguez, and Johnson were all on Pitkin Avenue when Trevor Viera was killed. Bellinger never saw any of these people. Judicial Notice requires this Court to find Bellinger's testimony unreliable, because he does not see the contemporaneously events while they are unfolding, as evident by his failure to see any of the people that were present when the shooting

occurred. The United States Supreme Court has emphasized time and time again: “[t]he touchstone of due process is protection of the individual against arbitrary action of government. Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

50. Here to ignore the evidence, that is several members of the East New York community have come forth and testified that Andre Bellinger lied at the trial of Nelson Cruz and was somewhere else when the murder occurred.⁴ These witnesses were corroborated by the fact that Bellinger never saw material witnesses (PO Piatti or William Johnson) at the crime scene or Rodriguez with a gun in his hand as he fired the shots that killed Viera.

51. Wherefore, based on all the facts and the evidence presented it is respectfully submitted that the motion to reargue and renew the motion to vacate the judgment should be granted. Detective Scarcella and Chmil convinced Andre Bellinger to say he saw Cruz shoot and kill Viera. Circumstantial evidence is present to prove Bellinger was left alone with Scarcella and Chmil before the lineup. In of itself, this is enough to conclude that they were the detectives who informed Bellinger that Cruz was the person who shot Viera with a 9mm. Take that evidence along with Officer William Piatti, trained eye-witness observations at the crime scene, Ralph Johnson’s and Luis Polanco’s alibi testimony that Cruz was with them when the shots rang out on Pitkin avenue; William Harden’s and William Johnson’s eye-witness account of the murder; Bonnie’s and Christopher Cooper’s, sworn testimony that Bellinger did not witness the crime. This evidence weighed cumulatively undermines the evidence that convicted Cruz. This Court should weigh the evidence on its own and decide on its merits that the conviction should be vacated and a new trial ordered. Or whatever other relief the court deem just and proper.

CONCLUSION

NELSON CRUZ IS ENTITLED TO A NEW TRIAL. UNDISPUTED EVIDENCE IS BEFORE THE COURT TO PROVE BY A PRPEPONDERANCE OF THE

⁴ Bonnie Cooper, Christopher Cooper and William Harden all testified to such.

EVIDENCE THAT THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT AT THE TRIAL HAD THE JURY HEARD THE TRUTH. THAT IS DETECTIVES LOUIS SCARCELLA AND STEPHEN CHMIL FRAMED AT LEAST 15 PEOPLE FOR MURDERS THEY DID NOT COMMIT. CASES WHERE AS HERE, FALSE CONFESSIONS WERE MADE AND FALSE WITNESSES PROCURED TO CONVICT INNOCENT MEN AND WOMEN. CHMIL AND SCARCELLA ARE THE SAME DETECTIVES WHO WERE PRESENT IN THE PRECINCT WITH ANDRE BELLINGER, THE SOLE WITNESS AT THE TRIAL, WHEN HE WAS TOLD THAT NELSON CRUZ COMMITTED THE CRIME AND WAS PREVIOUSLY IDENTIFIED BY EDUARDO RODRIGUEZ THE MAN CAUGHT FIRING THE MURDER WEAPON RIGHT BEFORE THE POLICE EYES WAS NOT CREDIBLE. THEREFORE, THEY NEEDED HIM (BELLINGER) TO COME FORTH AND IDENTIFY CRUZ AS THE KILLER. OVERWHELMING EVIDENCE HAS BEEN PRESENTED TO ESTABLISH THAT BELLINGER'S TRIAL TESTIMONY IS FALSE AND PERJURED TO WIT: OFFICER WILLIAM PIATTI, BONNIE AND CHRIS COOPER, LOUIS POLANCO, RALPH JOHNSON, WILLIAM JOHNSON, AND EDUARDO RODRIGUEZ, ALL WHO AGREE ANDRE BELLINGER'S TRIAL TESTIMONY IS FALSE: THAT HE WAS NOT PRESENT WHEN VIERIA WAS SHOT AND KILLED. WITHOUT A WRITTEN DECISION THAT DETAIL THE FACTS AND CONCLUSIONS OF LAW IT IS TOTALLY IMPOSSIBLE FOR THIS WRITER TO BE ABLE TO ASCERTAIN WHO THE COURT CREDITED AND/OR DISCREDITED. UNDER A PROPER ANALYSIS, THE COURT WOULD FIND DETECTIVE SCARCELLA AND CHMIL WERE PRESENT WITH ANDRE BELLINGER WHEN HE WAS TOLD THAT NELSON CRUZ WOULD BE IN A LINE-UP, THAT HE SHOT THE DECEASE WITH A 9 MM. THAT CRUZ WAS PREVIOUSLY IDENTIFIED AS THE KILLER AND BELLINGER WAS NEEDED TO IDENTIFY CRUZ AT THE TRIAL ALL BEFORE BELLINGER MADE ANY IDENTIFICATION IN THE CASE. THIS COURT WOULD ALSO CONCLUDE HAD THE JURY HEARD THE NEW EVIDENCE THAT THESE DETECTIVES ALSO FRAMED DERRICK HAMILTON, ELISEO DELEON, SHABAKA SHAKUR, SUNDHE MOSES, VANESSA GATHERS, DAVID RANTA, JABBAR WASHINGTON, ALVEENA JENETTE, ROBERT HILL, DARRYL AUSTIN, JOHN BUNN, ROSHAWN HARGROVE, AND OTHERS. THAT CRUZ CLAIM THAT HE WAS FRAMED IS CORROBORATED BY UNDISPUTED FACTS THAT THESE DETECTIVES DO INDEED FRAME PEOPLE. THERE IS NO PROCEDURAL BAR TO THESE CLAIMS OF INNOCENCE AND/OR NEWLY DISCOVERED EVIDENCE NOR SHOULD PROCEDURAL NUISANCES TRUMP CRUZ'S RIGHT TO A FULL AND FAIR PROCEDURAL MECHANISM TO VACATE THE JUDGMENT.

Dated: December 17, 2019
Forest Hills, NY

Respectfully Yours,

JUSTIN C. BONUS, ATTORNEY AT LAW

/s/ Justin Bonus

JUSTIN C. BONUS, ESQ.
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Docket/Indictment # 3669/1998

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 24

THE PEOPLE OF THE STATE OF NEW YORK,

-against -

NELSON CRUZ,

Defendant.

NOTICE OF MOTION, AFFIRMATION

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Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: _____ Signature: _____

Service of a copy of the within: _____ is hereby admitted.

Dated: _____ Signature: _____
