

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

.....X

Defendant's motion is to vacate Justice ShawnDya Simpson's August 29, 2019 decision based upon a subsequent Alzheimer's diagnosis which the Defendant states rendered her incompetent to preside over the evidentiary hearing as well as render a decision.¹ Alternatively, the Defendant requests an evidentiary hearing regarding her competency at the time of the hearing and the rendering of the decision. For the reasons set forth below, the Court denies the Defendant's application in its entirety.

Justice Simpson critically analyzed the evidence presented at the hearing and was able to apply the facts to the law and appropriately determined that the Defendant did not meet his burden as to actual innocence and newly discovered evidence. The record clearly demonstrates Justice Simpson was competent to preside over the hearing as well as render a decision. In fact,

¹ Black's Law Dictionary defines these terms as:

Incompetent - Lack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation.

Competent - Duly qualified; answering all requirements; having sufficient capacity, ability, or authority; possessing the requisite physical, mental, natural or legal qualifications; able; adequate; suitable; sufficient; capable; legally fit.

Capacity - Legal qualification, competency, power of fitness. Mental ability to understand the nature and effect of one's acts.

she recognized that the Defendant argued incompatible legal theories.² In addition, she identified that the Defendant wanted the Court to assess the evidence inconsistently.³

Procedural History

On February 25, 1999, the Defendant was convicted of Second-Degree Murder after a jury trial. On March 12, 1999, the Defendant was sentenced to twenty-five years to life imprisonment.⁴ The instant motion arises from the Defendant's 2013 motion pursuant to Criminal Procedure Law ("CPL") § 440.20 where he argued, among other things, that his sentence was cruel and unusual under the Eighth Amendment of the United States Constitution. On August 27, 2013, Justice Simpson, without ordering a hearing, denied the motion.

In 2016, the Defendant filed a motion to "renew and supplement" his 2013 decision, including new arguments under CPL 440.10 of actual innocence, newly discovered evidence, and ineffective assistance of counsel. Specifically, the Defendant provided affidavits of several alibi witnesses stating that the Defendant and the identifying witness, Andre Bellinger, were not at the scene at the time of the murder. The Defendant sought dismissal of the indictment, or in the alternative, a hearing on the issue of actual innocence. On May 22, 2017, Justice Simpson denied the motion, without ordering a hearing, on procedural grounds and on the merits.

On July 12, 2017, the Defendant sought leave to reargue the decision on grounds that the Court misapprehended and overlooked facts. Specifically, the Defendant argued the Court overlooked the involvement of detectives Louis Scarcella ("Scarcella") and Stephen Chmil

² The Defendant argued a newly discovered evidence theory that showed he was acting in self-defense and justified, while also arguing an actual innocence theory that he was not at the scene at the time of the crime and, therefore, not the murderer.

³ For instance, the Defendant wanted the Court to determine certain witnesses credible regarding one theory and incredible regarding the other.

⁴ Between 2000 and 2003 the defendant filed several post-conviction motions in state and federal courts which are of no consequence to the instant motion.

(“Chmil”) on the case.⁵ On December 21, 2017, Justice Simpson granted the Defendant’s application to reargue and on June 7, 2018 arguments were heard. On July 11, 2018, Justice Simpson granted the Defendant’s application and ordered a hearing. The hearing was conducted between March 26, 2019 and May 10, 2019.⁶ On August 29, 2019, the court issued a decision from the bench denying the Defendant’s application.⁷

On February 27, 2020, the Commission on Judicial Conduct was provided with Justice Simpson’s medical records indicating that she was suffering from Alzheimer’s Disease which had progressed to an advanced level uncommon to a person of her age. Additionally, the medical records indicated that her condition was previously undiagnosed, and that Justice Simpson alternated at various times of day between apparent cognition and at times unawareness of her circumstances. On July 31, 2020, Justice Simpson informed the Chief Administrative Judge that she had been on medical leave since August 2019 and due to a medical diagnosis would be retiring effective October 31, 2020.

⁵ Notably, while the defendant’s August 29, 2016 motion mentions Detectives Scarcella and Chmil’s notorious past, their involvement was not argued as newly discovered evidence or actual innocence but included, belatedly, during his oral reargument on June 7, 2018.

⁶ At the conclusion of the hearing the defendant filed a post hearing memorandum of law on May 24, 2019, and the People filed a response on June 14, 2019.

⁷ Upon issuing the Decision, Justice Simpson granted the defendant’s application for *leave* to reargue. A motion schedule was set for defendant’s papers to be submitted by October 1, 2019; the People were to respond by November 8, 2019. Defendant was also granted a three week reply period and a return date of December 16, 2019 was set. Thereafter, the People served on defense counsel on September 26, 2019, a notice of entry coupled with a transcript of the August 29, 2019 decision. The defendant neither submitted motion papers by October 1, 2019, nor requested an extension from the Court. On December 5, 2019, having still not received motion papers from the defendant, the People contacted the Court via e-mail requesting the matter be removed from the December 16, 2019 calendar. Defense counsel responded to the email that day asserting he would file his motion to reargue prior to December 16, 2019. By e-mail response dated December 9, 2019, the Court, through her law secretary Ms. Isaac, informed the parties that the matter was removed from the December 16, 2019 calendar and that there were no further motions or matters pending before the Court. On January 3, 2020, the defendant filed a motion to reargue the Decision, citing misapplication of law, the People responded on April 16, 2020. On January 18, 2021, this Court denied that motion.

On August 17, 2020, the Defendant filed the present motion to vacate Justice Simpson's decision and requesting the Defendant be released on bail.⁸ The Defendant seeks vacatur pursuant to Civil Practice Laws and Rules ("CPLR") § 5015 (a) (1), (2) and (3) and Judiciary Law § 2-b (3) on the grounds that Justice Simpson did not issue a written decision or findings of facts and determinations of law.⁹ Additionally, that his substantive and procedural Due Process rights were violated as Justice Simpson presided over the proceedings and issued a decision while suffering from dementia.¹⁰ Alternatively, the Defendant seeks a hearing to determine Justice Simpson's competency at the time of the hearing and issuing her decision.¹¹ The People responded to the Defendant's motion on September 28, 2020 and the Defendant filed a reply on October 13, 2020.

Factual Background

On March 28, 1998, at approximately 11:00 p.m. on Pitkin Avenue between Miller Avenue and Bradford Street, in Brooklyn, the Defendant confronted Trevor Vieira outside of a convenience store and, after an argument, shot Vieira twice, inflicting two gunshot wounds. Vieira fired his own gun, which he dropped as he collapsed. Simultaneously, New York City Police Department ("NYPD") Police Officers John Palmieri and William Piatti were driving down Pitkin Avenue in a patrol vehicle without lights or sirens when they heard gunfire and saw muzzle flashes, neither officer witnessed Vieira being shot. Upon hearing the gunfire, Officer Palmieri exited the vehicle and chased the suspect. Running toward Miller Avenue, the suspect

⁸ On August 24, 2020, Justice Laura Johnson denied the defendant's bail application and ordered the People to respond to the defendant's argument as to vacatur of the decision.

⁹ This claim is denied, the Defendant must seek leave to appeal to the Appellate Division. (*See generally People v Martinez*, 335 NYS2d 708 [1st Dept 1972]; *People v Isaacs*, 71 AD3d 1162 [2nd Dept 2010])

¹⁰ The Court takes notice that Alzheimer's Disease is a form of dementia.

¹¹ The Court will note the defendant argues in his motion that relitigating the hearing would be a "de facto" violation of his due process rights and "abuse of process" while simultaneously arguing it is "the only potential remedy". (Defense August 17, 2020 Motion – Paragraph 35)

outran Officer Palmieri and escaped from view after dropping his gun on Pitkin Avenue. Officer Palmieri returned to the initial location to assist Officer Piatti who had also exited the vehicle and observed a male with a ponytail, later determined to be Eduardo Rodriguez, holding a gun. Officer Piatti commanded Rodriguez to drop the gun. Crouched next to Rodriguez was William Johnson. Vieira was taken to the hospital, where he died of his wounds. Police arrested Johnson and Rodriguez near the gun that the suspect dropped as he fled. Both guns and ballistics evidence were recovered.

In the early morning hours of March 29, 1998, at the 75th precinct, Johnson and Rodriguez were interviewed by Detective Mark Brooks, and Bellinger was interviewed by Detective Richard Barrios, separately. Johnson told Detective Brooks that he saw the shooter drop the gun and that the man with the ponytail was just ducking down near the dumpster where the shooter dropped the gun. Rodriguez told Detective Brooks that he saw the shooting, the shooter's name was Nelson, and that Nelson lived at 361 Miller Avenue. Further, that Nelson fired a gun at the victim and then dropped the gun. Bellinger told Detective Barrios that the shooter argued with the victim and then fired a gun at the victim and that the shooter was named Nelson. Thereafter, Detective Barrios ran a computer check using the name Nelson and the address 361 Miller Avenue, which disclosed a Nelson Cruz with an address of 361 Miller Avenue.

At approximately 5:00 AM on March 29, 1998, Detectives went to 361 Miller Avenue, the Defendant was not there but Detectives were able to speak with his mother. Detective Scarcella received permission to take a photograph of the Defendant with two other individuals, which was shown to Rodriguez, who identified the Defendant. Later that morning, Johnson, Rodriguez, and Bellinger made sworn statements concerning the incident in audiotaped

interviews with an assistant district attorney. Johnson was released without charge and Rodriguez was charged with third degree criminal possession of a weapon.¹²

On April 3, 1998, the Defendant accompanied by his attorney, Carol Moore, surrendered to police. On that date, Detective Brooks conducted a lineup, attended by Defendant's attorney, where Bellinger identified the Defendant as the man who shot Vieira. At the precinct after the lineup, the Defendant stated to Detective Chmil that he wanted to come in on the night it happened but was scared and that the victim and Defendant each had a gun. He stated that the victim fired at him and clipped his left leg, and that he fired his gun and then ran. As a result of these events, the Defendant was charged, by Kings County Indictment Number 3669/98, with Murder in the Second Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree. Prior to trial, Robert J. Collini, Esq., now deceased, was assigned to represent the Defendant.

Pre-Trial Hearing Summary

On February 16, 1999, a combined Wade/Huntley hearing was conducted before Justice Robert Kreindler. The People presented three witnesses, Detective Scarcella, Detective Brooks and Detective Chmil. The Defendant testified on his own behalf. At its conclusion, Justice Kreindler found the lineup procedure conducted by Detective Brooks with Bellinger was properly conducted and was not suggestive. With regards to the identification conducted by Detective Scarcella with Rodriguez, the Court held it was not suggestive under the circumstances and was confirmatory. The Court reasoned that the photograph was voluntarily given to the police and that Rodriguez, prior to viewing the photograph, indicated he knew the Defendant by

¹² The charges against Rodriguez were presented to a grand jury, however, the grand jury did not return an indictment.

name and where he lived, further, that Rodriguez picked out the Defendant even though there were two other individuals in the photo, one of which resembled the Defendant.

With respect to the Defendant's statement, the Court held it was involuntary as it was made while the Defendant was in custody and was questioned by detectives in violation of his Miranda rights, therefore, it was suppressed. However, the Court stated it believed the Defendant made the statements and he could be cross examined on the statement if he testified during the trial. At the hearing, the Defendant did not mention being physically assaulted by detectives or coerced into making a statement.¹³

Trial Summary

On February 18, 1999 a jury trial began before Justice Kreindler, the People presented nine witnesses, the Defendant did not present a case.

CPL 440 Hearing Summary

From March 26, 2019 to May 10, 2019, a CPL 440 hearing was conducted before Justice Simpson. The Defendant presented 18 witnesses and put forth dual arguments. First, the Defendant claimed actual innocence arguing Rodriguez was the shooter. The Defendant presented several alibi witnesses who testified that neither the Defendant nor Bellinger were at the scene at the time of the murder.

¹³ The Court notes defendant made statements in 2013 to the New York Times claiming he met Detective Chmil in the interrogation room after he was arrested, and the detective had a confession ready. The report states, "Chmil said, 'Sign it and you go home', Mr. Cruz said in a telephone interview from Green Haven Correctional Facility. Mr. Cruz refused. The detective crumpled the paper and threw it in the suspect's face". (Frances Robles, *Louis Scarcella's Ex-Partner Is Coming Under Scrutiny in Brooklyn Cases*, The New York Times (December 27, 2013), <https://www.nbcnewyork.com/news/local/conviction-review-unit-nelson-cruz-brooklyn-louis-scarcella/1098280/>) Conversely, in a 2015 television interview the defendant stated that Detective Scarcella "tried to get a confession out of me at the precinct, and when I refused to sign it, he became frustrated, crumpled the paper and slap me in my face with it. He was telling me, 'Listen you just sign the paper and you will go home', I said 'I'm not signing anything'". (Sarah Wallace, *I-Team: Brooklyn DA Looking Into Another Murder Case Connected to Embattled Detective*, NBC NEW YORK (September 30, 2015, 8:57 AM), <https://www.nbcnewyork.com/news/local/conviction-review-unit-nelson-cruz-brooklyn-louis-scarcella/1098280/>)

Second, the Defendant argued newly discovered evidence not available at the time of the trial would have raised a probability of a different outcome for the Defendant. Specifically, the Defendant cited the involvement of Detectives Chmil and Scarcella in the investigation and with Bellinger. The Defendant alleged Bellinger did not witness the shooting and that Detectives Chmil and Scarcella told Bellinger that Cruz was the shooter. Further, that this was the only evidence to convict the Defendant at trial. Additionally, the Defendant alleged Rodriguez's testimony that the Defendant acted in self-defense and was justified, was also newly discovered evidence.

The People presented four witnesses and argued Bellinger was reliable and that his trial and hearing testimony were consistent. Further, that his identification of the Defendant was not procured by Detectives Chmil and Scarcella.

Question Presented

The question before this Court is whether Justice Simpson was incompetent when she presided over the hearing and rendered a decision due to a subsequent Alzheimer's diagnosis.

Defendant's CPLR 5015 and Judiciary Law § 2-b (3) arguments

The Defendant seeks vacatur of Justice Simpson's decision pursuant to CPLR 5015 (a) (1), (2) and (3). CPLR 5015 (a) (1), (2) and (3) state that on motion, the court which rendered a judgment or order may relieve a party from it upon such terms that may be just... upon the grounds of: (1) excusable default, (2) newly-discovered evidence which, if introduced at the trial, would probably have produced a different result or (3) fraud, misrepresentation or other misconduct of an adverse party.

The Defendant's application of CPLR 5015 (a) (1), (2) and (3) is misplaced. Subdivision (1) is inapplicable as Justice Simpson's decision was not a default judgment. Subdivision (2)

pertains to newly discovered evidence, which if introduced at the *trial*, would have produced a different result, therefore, it is inapplicable in this context since this was not a trial but a post-conviction hearing. Furthermore, this is the CPLR equivalent to CPL 440.10 (g), which is also inapplicable here as the Defendant is seeking to vacate the Court's decision and not the underlying conviction. Lastly, subdivision (3) is inapplicable as the Defendant does not allege any misrepresentation, fraud, or other misconduct by an adverse party.

The Defendant also seeks vacatur of Justice Simpson's decision pursuant to Judiciary Law § 2-b (3). Judiciary Law § 2-b (3) states that a court of record has power to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it. This Court possesses jurisdiction in the interest of justice to grant the relief the Defendant seeks, as such, Judiciary Law § 2-b (3) is inapplicable.

Therefore, because the Defendant's CPLR and Judiciary Law arguments are inapplicable, relief may not be granted on these grounds.

Presumption of Regularity in Judicial Proceedings

A presumption of regularity applies to all judicial proceedings and a defendant must come forward with substantial evidence to rebut this presumption.¹⁴ Additionally, instances of lapsed memory by a judge would not rebut the presumption of regularity.¹⁵

Alzheimer's Disease attacks the memory and thinking centers of the brain. The disease is progressive, and its effects are irreversible, there is no known cure. These effects include memory loss, volatile mood swings, difficulty with language, loss of focus, loss of comprehension, apathy, and confusion. Those diagnosed with Alzheimer's Disease may alternate at various times of day between apparent cognition and unawareness of their circumstances.

¹⁴ *People v Andrew*, 1 NY3d 546, 547 [2003]; *People v Bogan*, 78 AD3d 855, 856 [2d Dept 2010].

¹⁵ See *People v Decondea*, 3 AD3d 148, 164 [1st Dept 2003].

In support of his motion, the Defendant provided the affidavit of Jacob Walthour, Justice Simpson's husband, dated September 30, 2020. Mr. Walthour states he noticed his wife's mental health decline in late 2018 and early 2019. Further, that she had numerous tests before she was diagnosed with Alzheimer's. Additionally, that her diagnosis was overlooked for years and she was continually misdiagnosed by doctors due to how rare the disease was at her age. The Defendant also provided the Court with a Pro Publica article, a stipulation between the Commission of Judicial Conduct and Justice Simpson regarding her diagnosis and retirement and a letter from Justice Simpson announcing her retirement.¹⁶

While the affidavit, stipulation and letter establish that, as of February 2020, Justice Simpson was suffering from advanced Alzheimer's Disease for an individual her age, it does not establish that Justice Simpson was incompetent at the time of the hearing and decision. The submissions are general and lack specificity. More specifically, Mr. Walthour's affidavit merely states that he noticed Justice Simpson's mental health decline in late 2018. However, Alzheimer's is a progressive disease with various effects. Though some impact an individual's cognitive ability, others can involve mood swings. Mr. Walthour's affidavit fails to specify which observations led him to believe that Justice Simpson's mental health was in decline.

Mr. Walthour further states that her diagnosis went overlooked and undiagnosed for a period but fails to identify when that period was. In other words, when did Justice Simpson begin seeking medical attention for any changes in her behavior? Further, what were the changes in her behavior? Additionally, the oversight of her diagnosis leads to the possibility that any effects were not conspicuous, precluding medical professionals from diagnosing her until the disease

¹⁶ (Joe Sexton, *He'd Waited Decades to Argue His Innocence. She Was a Judge Who Believed in Second Chances. Nobody Knew She Suffered from Alzheimer's*, Propublica (October 12, 2020), https://features.propublica.org/judge_alzheimers/brooklyn-federal-judge-mental-illness/) The Court notes throughout the Pro Publica article the author cites portions of the trial testimony without providing full context.

advanced, although, it is unclear when that was. The failure of the affidavit in providing specificity as to what Mr. Walthour observed would require this Court to speculate about Justice Simpson's mental capacity while presiding over the hearing and issuing her decision.

Similarly, the stipulation between Justice Simpson and the Commission of Judicial Conduct and Justice Simpson's retirement letter fail to provide the Court with specificity as to her competency at the time of the hearing and decision. The stipulation and letter stated Justice Simpson was presently suffering from Alzheimer's and that Justice Simpson was on medical leave as of August 2019. However, neither indicate whether the medical leave was related to the Alzheimer's diagnosis or whether she was diagnosed prior to February 2020. Therefore, the Defendant's submissions fail to establish that Justice Simpson was incompetent at the time of the hearing and decision.

Alternatively, the Defendant requests that this Court conduct an evidentiary hearing to determine Justice Simpson's competency at the time of the hearing and decision. However, this Court finds it unnecessary, as it has the benefit of the entire record of the proceedings to analyze and make a determination as to whether Justice Simpson's conduct and decision-making during the hearing was logical and reasoned, whether she understood the proceedings and, ultimately, whether her competency was compromised.

Therefore, this Court denies the Defendant's application for vacatur of Justice Simpson's decision and his application for an evidentiary hearing to determine her competency at the time of the hearing as the Defendant failed to put forward substantial evidence to rebut the presumption of regularity that applies to all judicial proceedings.

However, where allegations are made regarding the competency of a judge who presided over a proceeding, the interest of justice and public policy demands a review of the record.

Consequently, a review of the record clearly establishes Justice Simpson was aware and cognizant throughout the hearing.¹⁷ Furthermore, Justice Simpson's rulings and application of the law were logical and supported by the evidence. While the Defendant makes multiple claims as to Justice Simpson's competency¹⁸, he only cites the record once to support his claims.¹⁹ Thus, the Defendant's characterizations of Justice Simpson's competency without specificity reduces his claims to mere ad hominem attacks on Justice Simpson.

Most indicative of her competency during the proceedings was Justice Simpson's ability to decipher the Defendant's inconsistent and incompatible legal and factual arguments, as well as her ability to see through defense counsel's misrepresentations and fabrications.

The CPL 440 Hearing

To prevail on a claim of actual innocence, a defendant must establish his or her innocence by clear and convincing evidence.²⁰ Further, to prevail on a claim of newly discovered evidence, a defendant must establish by a preponderance of the evidence that had the evidence been presented at the trial it would have raised the probability of a more favorable outcome for the defendant.²¹ Actual innocence claims must be based upon credible and reliable evidence.²²

The Defendant presented alibi witnesses alleging that the Defendant was not at the scene at the time of the murder and was not the shooter. Additionally, the Defendant alleged that

¹⁷ The Court notes Justice Simpson was aware of the context and procedural history of the case and that she acknowledged she had handled several of these types of cases with the same parties and similar issues back-to-back. (Justice Simpson's June 7, 2018 Decision Minutes – pg.38)

¹⁸ The defendant states throughout his various submission that the Decision was "wildly inaccurate", contained "certain contradictory statements regarding the witnesses", "misstated facts" and that Justice Simpson was "incompetent", "could not remember what she heard during the hearing", "got all the facts wrong", and "indeed showed many different signs of instability".

¹⁹ Defendant states Justice Simpson issued a written decision on June 7, 2016 and subsequently took it back. See footnote 5 as to the context in which this occurred.

²⁰ *People v Hamilton*, 115 AD3d 12, 17 [2d Dept 2014].

²¹ CPL 440.30(6); see *People v Thibodeau*, 31 NY3d 1155, 1158 [2018]; *People v Hamilton*, 115 AD3d 12, 17 [2d Dept 2014].

²² *Hamilton*, at 23.

Bellinger's identification was the only evidence that convicted him at trial and was a result of Detectives Scarcella and Chmil informing Bellinger that Cruz was the shooter. Further, that Rodriguez's testimony stated that the Defendant acted in self-defense and was justified and was newly discovered evidence.

August 29, 2019 Decision

In holding that the Defendant failed to meet his burden, Justice Simpson's decision was logical, methodical, and reasoned. She began by correctly citing the procedural history of the case, noting that a previous application was denied and an application to reargue had been granted. She outlined the Defendant's grounds for relief and generally summarized the Defendant's arguments. She acknowledged it was a difficult case where substantial testimony was taken, correctly stating 18 witnesses testified. Further, Justice Simpson noted some of the testimony from both parties was inconsistent and appeared unreliable. Finally, she acknowledged the involvement of Detectives Chmil and Scarcella in the investigation was a great concern.

In support of her decision, Justice Simpson noted the Defendant's failure to effectively undermine the evidence upon which he was convicted, noting there was corroborative evidence at the trial, in addition to Bellinger's identification, on which to convict the Defendant. Further, that the Defendant did not prove his innocence in that the Defendant did not effectively impeach Bellinger's testimony.²³ She noted the Defendant's claims of innocence and that the Defendant had acted in self-defense were inconsistent. As to the Defendant's claim of ineffective assistance of counsel, Justice Simpson found that meaningful representation was provided, reasoning that it may have been a course of strategy taken by trial counsel in not calling certain witnesses that were not credible or reliable.

²³ The Court notes the standard for an actual innocence claim is clear and convincing evidence though Justice Simpson stated it was a preponderance of the evidence.

Justice Simpson took a recess and returned to the bench in the afternoon and added to her decision. First, she stated that the Defendant did not prove reliably that the photo identification procedure conducted with Rodriguez was not confirmatory. Second, that the Defendant did not prove that Bellinger did not know the Defendant. Lastly, that the Defendant did not prove through reliable evidence that Bellinger was not at the scene. The Court also held that Rodriguez's testimony was not newly discovered evidence as it was known at the time of the trial.²⁴ Justice Simpson noted the Defendant's request that the Court find Rodriguez unreliable as to the actual innocence claim and simultaneously find his testimony supports a claim of self-defense, incompatible.²⁵

I. Inconsistent Testimony

Justice Simpson held that the Defendant did not meet his burden as to newly discovered evidence since he failed to present credible and reliable evidence to support his claims. Specifically, Justice Simpson found the evidence presented, from both parties, was inconsistent. In support of his newly discovered evidence claim, the Defendant presented various alibi witnesses and witnesses who testified that Bellinger did not witness the murder.

Ralph Johnson and Luis Polanco, lifelong acquaintances of the Defendant, testified that the Defendant was with them at the time of the shooting at a Chinese restaurant on Pitkin Avenue. Additionally, Bellinger's girlfriend at the time of the shooting, Bonnie Cooper, and her son, Chris Cooper, testified that Bellinger had not witnessed the shooting but arrived on the scene after it occurred. William Harden, an acquaintance of Bellinger and Viera, testified that he

²⁴ The Court's finding that Rodriguez's testimony was not newly discovered is also highlighted by defense counsel himself referring to Rodriguez's recorded statement from 1998.

²⁵ The Court notes that Mr. Bonus states on the record at the time of the decision that he never claimed that Rodriguez was newly discovered evidence however, he explicitly states this in his post hearing memorandum. (Defense May 24, 2019 Motion – Page 23)

witnessed the murder, saw Bellinger after the shooting and told him what happened while Bellinger drove him to the hospital to see Vieira.

Johnson and Polanco testified that at approximately 11:00 pm on the night of the murder they were with Cruz and two others in Cruz's building.²⁶ They were later walking to get Chinese food on Pitkin Avenue when they heard gunshots. They then went to a liquor store and returned to Cruz's building. Johnson later went home, and Cruz and Polanco left together to Polanco's house. Johnson and Polanco's testimony were consistent with regards to the timeline, however, there were several notable inconsistencies.

First, Polanco testified while at Cruz's apartment prior to the shooting they were *inside* Cruz's apartment and that he saw Cruz's mother while he was there.²⁷ However, Johnson testified that prior to the shooting they were *in the lobby* of Cruz's building and that he never saw any of Cruz's family members that evening. Second, testimony as to where Polanco and Johnson were when they heard the gunshots varied with their own testimony and each other's. Johnson testified that he never made it to the Chinese food restaurant and that he heard the gunshots when he was on Pitkin Avenue, then turned around and walked to the liquor store. However, he also testified that when he heard the shots, someone from the group was ordering food inside the Chinese restaurant. Finally, he testified that he was "in the vicinity"²⁸ of the shooting at the time he heard the shots. Conversely, Polanco testified they were *at* the Chinese food restaurant when they heard the shots, but never went inside.

Additionally, Johnson's testimony was inconsistent with his own previously recorded statements. Specifically, he told the Kings County District Attorney's office in 2015 that he was

²⁶ The two others were Tina and Beatrice.

²⁷ The Court notes this is inconsistent with Detective Brook's testimony that when he spoke to Cruz's mother the morning after the murder, she stated she had not seen Cruz since 8:00 pm the night before. (HT: Page 458 – Line 11)

²⁸ HT: Page 184 – Line 5.

turning the corner on Pitkin Avenue when he heard the shots, then went to get food and then to Cruz's building.

Lastly, with regards to witness availability at the time of the trial, while the Defendant contends his trial counsel did not contact witnesses, Polanco and Johnson's testimony indicated they were in contact with Cruz and his family during the time of the trial. Polanco testified that he made his phone number available so that he could testify at trial, but never received a call and that he mentioned this to Cruz's mother during the trial.²⁹ Additionally, he testified that Cruz had his contact information and address, which had not changed prior to the trial, and that he had also visited Cruz on Riker's Island prior to the trial.

Johnson testified that Cruz's mother informed him that someone would call him regarding the case, however, he never spoke with anyone. Additionally, he could not initially recall if he spoke with Cruz prior to trial but recalled visiting Cruz after the trial. He then testified that he likely visited and spoke to Cruz before the trial.³⁰

Chris Cooper and Bonnie Cooper testified regarding a conversation between Bonnie Cooper and Bellinger in the hours after the shooting. Chris Cooper testified that he was at home when Bellinger and Bonnie Cooper were talking and that he told Bonnie Cooper, in Bellinger's presence, that Bellinger was with him and that Bellinger was not at the scene at the time of the shooting. Bonnie Cooper testified that Chris Cooper was present when Bellinger came home on the night of the murder and Bellinger told her that he "*witnessed* a kid get shot".³¹ Subsequently, Bonnie Cooper testified that Bellinger told her he "*was told* a kid got shot".³² Lastly, Chris

²⁹ Polanco did not identify who he provided his number to.

³⁰ During the testimony, Justice Simpson corrects the witness to respond verbally. (HT: Page 597 – Line 9)

³¹ The Court notes Justice Simpson's ability to recall who the defendant's previous counsel was. (HT: Page 415 – Line 21)

³² HT: Page 214 – Line 8-22.

Cooper testified that Cruz's father had a car, which contradicted Johnson and Polanco's testimony that they did not know Cruz or his family to possess a car.

Harden's testimony also contained inconsistencies. Harden testified he was on Pitkin Avenue before, during, and after the shooting, talking with an acquaintance and did not see Bellinger or Cruz at the scene. He stated that after the shooting he met Larry and Ronnie, who were acquaintances, and while trying to hail a cab, saw Bellinger arrive in his car with Chris Cooper. They all got in the vehicle and went to the hospital. Notably, Chris Cooper testified that he saw Harden when he arrived at the scene as well but acknowledged in his 2014 affidavit that he did not mention seeing Harden, nor could he recall if his 2015 interview with the Kings County District Attorney mentioned seeing Harden.

Additionally, Harden testified that prior to the shooting he heard a confrontation, a statement that was inconsistent with Johnson's testimony that stated he did not hear any fighting or commotion before the shots. Lastly, while Harden testified that he did not see Bellinger or Cruz on the scene at the time, he also testified that he did not know who was at the scene at the time of the shooting. Further, he could not testify whether Ronnie or Larry were there when the shooting occurred because he was talking with his friend. Therefore, Harden's testimony is inconsistent in that Harden testifies that he is sure that Bellinger and Cruz are not at the scene, while simultaneously admitting he could not say who was at the scene at the time of the shooting.

Most noteworthy, was Harden's testimony that on the way to the hospital he told Bellinger that the shooter "looked like Nelson" but that it was not Nelson; it was a guy with a

ponytail.³³ This is notable as it undermines the Defendant's contention that it was Detectives Scarcella and Chmil who told Bellinger that Cruz was the shooter.

Recognizing the inconsistencies with the witness's testimony demonstrated Justice Simpson's ability to follow, compare and analyze the evidence and appropriately conclude that the evidence was neither reliable nor credible.

II. Evidence corroborating Bellinger's Trial testimony

Contrary to the Defendant's assertion, Justice Simpson found there was other evidence to convict the Defendant at trial in addition to Bellinger's testimony. A review of the trial record supports this finding, specifically, that Bellinger's testimony was corroborated with additional evidence at the trial.

Bellinger testified at trial that he was across the street on Pitkin Avenue with friends when he observed Cruz shoot Vieira. He testified that prior to the shooting Cruz had an argument with an individual named Shack, during which Shack pulled out a gun and threaten to shoot Cruz. Cruz walked away, got into a black car, and left the location.

Bellinger further testified that Cruz later returned to the scene, again in a black car, and had a dispute with Vieira. During the dispute, Cruz pulled out a gun and shot Vieira once. Bellinger testified that after he was shot, Vieira held his stomach, staggered a few feet, and fell to one knee. He then pulled out a gun and fired back at Cruz before collapsing. After the shooting, Bellinger ran to Miller Avenue. Within a couple of seconds, he was on Miller Avenue and looked back and saw that police were already on scene.

Bellinger's testimony was corroborated with other testimony at the trial. First, a photo of the crime scene immediately after the shooting was in evidence showing a black car parked in

³³ HT: Page 72-73.

front of the location Vieira was shot. Further, Bellinger identified the black car in the photo as the car he saw Cruz arrive in prior to the shooting. Additionally, there was evidence presented that the vehicle in the photo was registered to Luis Parilla at 361 Miller Avenue, Cruz's address.

Second, Bellinger's testimony as to Vieira holding his stomach and falling to one knee after being shot was corroborated by the trial testimony of Dr. Pierre Charles, who conducted Vieira's autopsy. Dr. Charles testified that Vieira sustained blunt impacts, abrasions or scraping, on his right elbow and left knees possibly consistent with falling to the ground.³⁴ Additionally, Dr. Charles testified that Vieira sustained two gunshot wounds, the second going into Vieira's stomach and stopping on the left side of his body.³⁵

Lastly, Bellinger's testimony that officers were on scene within a couple of seconds after the shooting was corroborated by Officer Piatti's trial testimony that he and Officer Palmieri arrived *immediately* after the shooting in a patrol car.³⁶

The Court will also note that testimony of several witnesses at the hearing corroborated other parts of Bellinger's trial testimony. Specifically, Bellinger testified Cruz appeared angry and was yelling and cursing right before shooting Vieira. This testimony was corroborated by Harden who testified that he heard a commotion prior to the shooting. Additionally, Luis Parilla, an acquaintance of the Defendant's father, Miguel, testified at the hearing that he insured a black Buick, on behalf of the Defendant, in March of 1998.

Justice Simpson's finding that there was additional evidence at trial to convict Cruz is accurate. Her ability to recognize this reflects her familiarity with the trial record and her ability

³⁴ TT: Page 309.

³⁵ TT: Page 315.

³⁶ TT: Page 298.

to evaluate the evidence, an indication that she was competent at the time of the hearing and decision.

III. Failure to impeach Andre Bellinger

Justice Simpson found that the Defendant failed to properly impeach Bellinger's testimony and establish through credible evidence that Bellinger was not at the scene at the time of the murder and did not know Cruz. The Defendant alleged Bellinger never witnessed the murder but instead identified Cruz as the shooter only after Detectives Chmil and Scarcella told him it was Cruz. The Defendant wanted the Court to credit Bellinger's testimony that Detectives Chmil and Scarcella told him Cruz was the shooter while simultaneously stating, "There's nothing about Andre Bellinger's testimony that's reliable. Nothing".³⁷

Bellinger's hearing testimony was unorganized and at times, confusing due to defense counsel's examination of the witness. It is unclear which information defense counsel sought to elicit from the witness or if he was attempting to impeach the witness.³⁸ Ultimately, Bellinger confirmed his trial testimony, specifically that he knew Cruz and that he was told by officers that Cruz was the shooter as well as the type of weapon he used.³⁹ Additionally, he testified he was told Cruz was the shooter *after* he gave police his statement naming Cruz as the shooter. Justice Simpson recognized the Defendant's failure to impeach Bellinger's trial testimony, thereby supporting her conclusion that the Defendant failed to establish his actual innocence claim.⁴⁰

³⁷ HT: Page 5 – Line 13-14.

³⁸ The Court will note that defense counsel himself stated at a side bar during the examination of Bellinger that he was not attempting to impeach the witness. (HT: Page 651 – Line 14)

³⁹ Defense counsel never asked Bellinger whether, or how, he knew Cruz. This information was elicited by Mr. Stewart on cross-examination.

⁴⁰ It should be noted here defense counsel taking Bellinger's trial testimony out of context, which was noted by Mr. Stewart. (HT: Page 663 - 664)

Finally, of note during Bellinger's examination were various sidebars conversations between the Court and the parties due to defense counsel's inability to ask proper questions of the witness. During one sidebar, Justice Simpson demonstrated her ability to discern and recall specific details from Bellinger's trial testimony not elicited during the hearing, which is another example of her competency.⁴¹

IV. Inconsistent Dual Arguments

In putting forth dual theories of newly discovered evidence and actual innocence, the Defendant sought for the Court to determine that certain witnesses were reliable and credible as to one theory but were unreliable and incredible as to the other. In not choosing one theory over the other, the Defendant undermined both, which Justice Simpson recognized in her decision.

The Defendant argued a theory of actual innocence and presented witnesses who testified that Cruz was not at the scene at the time of the murder. Additionally, the Defendant argued a theory of newly discovered evidence and presented evidence that Cruz was acting in self-defense and was justified. Specifically, when arguing actual innocence, the Defendant wanted the Court to find Rodriguez was unreliable and incredible in that he stated he witnessed Cruz commit the murder. Moreover, when arguing newly discovered evidence, the Defendant wanted the Court to determine that Rodriguez was credible and reliable in that he stated Cruz acted in self-defense.⁴²

The Defendant does this further with Bellinger's testimony. When arguing actual innocence, the Defendant wanted the Court to determine Bellinger's testimony reliable and credible in that he stated he was told by Detectives Scarcella and Chmil that Cruz was the

⁴¹ HT: Page 666 – Line 8 – 20.

⁴² Defense counsel stated he did not take the position of self-defense on August 29, however, in his Post Hearing Motion, defense counsel states, "...the newly discovered evidence by the People's witness, Eduardo Rodriguez, that Cruz was justified in shooting Viera in of itself is enough to vacate the judgment". (Defense May 24, 2019 Motion – Page 23)

shooter.⁴³ Then, when arguing newly discovered evidence, the Defendant wanted the Court to determine Bellinger's testimony was unreliable and incredible in that he stated he witnessed Cruz commit the murder. These examples highlight how the Defendant, through his arguments, undermined both of his claims, which Justice Simpson recognized and articulated in her decision.

Defense Counsel's Misrepresentations

Licensed attorneys in New York State are officers of the Court and as such must conduct themselves with candor and truthfulness before the Court. A review of the record in this case exposed various misleading statements, misrepresentations, and fabrications of the record by Defendant's counsel, Mr. Bonus. The Court recognizes that matters with a record and submissions as voluminous and prolonged as in this case will undoubtedly possess a degree of human error. However, this Court finds several of Mr. Bonus's arguments and affirmations before the Court extend beyond human error and were instead fabrications and intentional misrepresentations.

Specifically, the Court finds most troubling Mr. Bonus's flagrant fabrication of Officer Piatti's testimony regarding his observations of the shooting. In his submissions, where he affirms under penalty of perjury, Mr. Bonus gives several versions of Officer Piatti's testimony regarding his observations, all of which are falsehoods.

In his submission on January 19, 2017, Mr. Bonus states that Officer Piatti testified that he "witnessed the shooting".⁴⁴ In his submission on May 24, 2019, Mr. Bonus states that Officer

⁴³ The Court again notes that Harden testified that he mentioned to Bellinger that Cruz was the shooter immediately after the shooting.

⁴⁴ Defendant's Affirmation in Support of Order to Show Cause – Page 3, Paragraph 12, Sub a.

Additionally, Mr. Bonus appended to this motion the defendant's August 28, 2016 submission by counsel for the defendant, Ilya Novofastovsky, which states that Officer Piatti testified that he and Officer Palmieri "saw a man with a ponytail holding a gun and saw a muzzle flash from his gun, a 9 mm." (Defendant's Attorney's Affirmation in

Piatti testified that he “identified Eduardo Rodriguez was the person he saw shooting the gun that killed Viera”.⁴⁵ In his submission on January 3, 2020, Mr. Bonus states that Rodriguez was “the man caught firing the murder weapon right before the polices’ eyes”.⁴⁶ In his submission on August 17, 2020, Mr. Bonus states under the facts section that Officer Piatti testified that he “saw the muzzle from the murder weapon flare as Eduardo Rodriguez fired it”.⁴⁷ In his submission on October 13, 2020, Mr. Bonus states that it is “undisputed” that Officer Piatti testified that he “saw Rodriguez discharge the gun several times *right before his very eyes*” (emphasis added by the Defendant).⁴⁸ Finally, in his letter to the Court on January 18, 2021, Mr. Bonus states that Officer Piatti testified that he “witnessed Eduardo Rodriguez fire the murder weapon in the direction of Trevor Viera” and cites pages 298-300 of the trial testimony and pages 572-576 of the hearing testimony.⁴⁹

With regards to his observations when he arrived at the scene, Officer Piatti testified at trial that he heard multiple shots from the corner of Bradford and Pitkin and as he heard the shots he got out of the vehicle.⁵⁰ Further, that he saw a Hispanic male crouched down flimsily holding a firearm in his hand pointed toward the ground and it did not look like he was about to fire the gun. Further, that he did not see him fire the gun.⁵¹

At the hearing, Officer Piatti testified that when he arrived on scene, simultaneously, shots were fired, and he saw muzzle flashes. Additionally, that he jumped out of the car almost

Support of his Motion to renew and Supplement under *Hamilton* the Motion to Vacate Judgment Per C.P.L. 440.10 – Page 10, bullet 23)

⁴⁵ Defendant’s Brief on Hearing on Motion to Vacate – Pg. 3.

⁴⁶ Defendant’s Affirmation in Support of Motion to Reargue and Renew – Pg. 20.

⁴⁷ Defendant’s Affirmation in Support of Motion Requesting Reargument. - Pg.2, paragraph 6, sub. a.

⁴⁸ Defendant’s Affirmation in Reply – Pg.1.

⁴⁹ Defendant’s letter to the Court dated January 21, 2021 – Pg.2.

⁵⁰ TT: Page 283 – Line 2-8.

⁵¹ TT: Page 286 – Line 2-19.

immediately upon hearing the shots.⁵² Furthermore, that he was inside the vehicle when he heard the gunshots coming from his left. He exited the car and saw several muzzle blasts in front of him and to the left. He testified his attention was drawn to a male Hispanic with a ponytail pointing a black gun towards Bradford Avenue and saw a muzzle flash *near* his gun and that at some point the male lowered his gun.⁵³

Mr. Bonus does not argue that his versions of Officer Piatti's testimony are reasonable inferences to be drawn from the record, but rather affirms that it *is* the record. Counsel's willingness to contour the record when the facts did not support his position call into question counsel's integrity. This contouring of the record is not advocacy but rather fabrication.

Conclusion

This Court does not find that Justice Simpson's decision was "wildly wrong" as the Defendant asserts. The witness's inconsistent testimony coupled with the Defendant's inconsistent legal theories of actual innocence and newly discovered evidence were incompatible with his assertions regarding the significance of the evidence presented. Furthermore, counsel's assertions and arguments were littered with intentional misrepresentations of the evidence as well as blatant fabrications of the record.

Justice Simpson correctly identified and analyzed these flawed arguments and inconsistencies in ultimately concluding that the Defendant did not meet his burden as required by the law. Any disability she might have suffered did not impede her ability and fitness to preside over this hearing and render a competent decision.

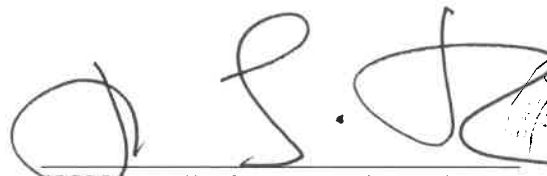
⁵² HT: Page 298 – Line 16-24.

⁵³ HT: Page 560 – Line 3-10.

WHEREFORE, this Court denies the Defendant's motion to vacate Justice Simpson's decision, as well as, denies the Defendant's motion for an evidentiary hearing as to her competency at the time of the hearing.

This constitutes the Opinion, Decision and Order of this Court.

Dated: February 26, 2021
Brooklyn, New York


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

