**JUDGES COPY**

**Case C 2018**

**The People of the State of New York, Appellants**
**v.**

**Deidre Rubenstrunk, Respondent**

**Supreme Court Appellate Division,**
**Fourth Department New York**

*Facts of the Case:*

In March of 2017, Deidre Greeley and Brian Rubenstrunk moved into a three bedroom fixer-upper in Mastic, Long Island in preparation for their marriage in July 2017. Brian was a handy guy who could fix almost anything, so the two began gutting the house to the joists and rafters in an effort to create their "dream home." Things began to deteriorate when they started working on the kitchen just days before the wedding. Next door neighbors Aaron Taggert and Jane Henderson could hear their verbal arguments and both clearly remember Deidre threatening Brian that "If the Kitchen was not finished before their honeymoon, he was a dead man."

Brian and Deidre returned from Bora Bora with the kitchen still in disrepair. They hosted a dinner party for their good friends Jane, Aaron, Kelsey Willford and Logan Bowman. The party was a disaster because a kitchen cabinet fell on Murphy's head, splitting his skull and then hit Deidre in the back of the head as she tried to help Logan. Deidre was further incensed that all of the women guest—including her—were wearing the exact same outfits (a Michael Kors steel grey dress), which is common in Long Island. All of the guests remember Deidre giving Brian her patented "death look" and quietly saying, "You're finished." The next morning, Deidre dialed 9-1-1 and reported Brian had been shot in the kitchen. The murder weapon was found on the floor next to Brian's body. No sign of forced entry or fingerprints were found except for those of the dinner guests. The police also found a nanny cam (Deidre denied knowing one existed) that clearly showed a woman of Deidre's height and wearing a steel grey dress shooting Brian in the kitchen and dropping the gun to the floor. The video was black and white, shot from behind so the viewer cannot see the shooters face, and only lasted about four seconds. Deidre told police she had been hit in the back of the head by someone around midnight and then work up the next morning. The police found the gun still in place on the floor, but the lab messed up all of the potential forensic tests, including a finger print and DNA test of the weapon as well as a gunshot residue test of Deidre's dress.

Based on the testimony of the witnesses from the party and video from the nanny cam, Deidre was charged and tried for second degree murder. The main witness for the People was Logan Murphy, who gave riveting testimony that Deidre was in a mood to kill that night after her pasta was ruined by the accident. Logan was subjected to extensive cross examination concerning the extent of his injuries from cabinet falling on his head. The second most important

witness was Jane Henderson who corroborated Logan's story and added information about the early fights she could hear next door. Both Jane and Kelsey were cross examined thoroughly on the fact that they could have been the woman in the video and that each had a potential motive to kill Brian. Kelsey was cross-examined about a possible affair she was having with Brian and the defense produced a picture of Brian with his arm around her at a barbeque. Jane was also cross-examined about a potential affair she was having with Brian, but the Judge did not give the defense much leeway because there was no corresponding photo. Kelsey and Aaron were less helpful to the prosecution and only testified that things were tense, but they could not tell if Deidre was joking when she said he was finished. Aaron could not remember the earlier arguments. Deidre was convicted and sentenced to twenty-five years to life in prison.

Deidre filed a CPL Section 440.10 Motion for a New Trial based on newly discovered evidence approximately two months after the original trial, based on several factors. She included a sworn affidavit that Logan Murphy had been being treated for memory loss from the time of the accident and was actually committed to Stonybrook University labs for dementia approximately two days after testifying. She also included a sworn affidavit from Kelsey Willaford that stated a week after the murder Jane Henderson told her that she had killed Brian because he was obnoxious, despite the fact that she loved him. Additionally, Deidre provided a sworn affidavit from Aaron that stated that about a month after the trial he had gone to a bar where Jane was drinking. Jane had had too much to drink and Aaron overheard her say aloud that she was sorry that she killed him, but he was obnoxious after all. Defense counsel attempted to obtain a sworn affidavit from Henderson, but she refused.

The trial judge considered all of the Salemi factors and found that Deidre did not meet the six-factor test from *Salemi*, but failed to state why. Then the judge granted the motion for a new trial anyway, stating that "Where there is that much smoke something is probably burning."

The People of the State of New York now appeal this decision stating it was not in the judge's discretion to grant the motion if the Salemi test is not met. Deidre Rubenstrunk also appeals the ruling because she believes she did meet the six-factor test based on the evidence she has submitted.

Note: you must use your team numbers on all submissions to the Court.

Team _____ represents People of the State of New York.
Team _____ represents Deidre Rubenstrunk.

The following cases are the only cases you may use in your brief. If other cases are cited in the supplied cases you may cite them but only for the paragraphs from the original cases.

People v. Salemi, 309 N.Y. 208 (1955).
People v. Balan, 484 N.Y.S.2d 648 (N.Y. App. Div. 2d Dep't 1985).
People v. Macon, 924 N.Y.S.2d 311 (N.Y. Sup. Ct. 2011).
People v. Powell, 424 N.Y.S.2d 626 (N.Y. County Ct. 1980).

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent**

***v.***

**LEONARDO SALEMI, Appellant.**

**Court of Appeals of New York**

**Cite as: People v. Salemi, 309 N.Y. 208 (1955)**

**Argued June 9, 1955.**
**July 8, 1955, decided**

**OPINION**

[*209] On March 12, 1954, we affirmed by a divided court this defendant's appeal from a judgment convicting defendant of the crime of murder in the first degree and from an order [*210] of said court made June 17, 1953, following a hearing, denying defendant's motion for a new trial on newly discovered evidence.

Briefly, the record shows that at about 8:40 P.M., February 26, 1952, Walter Forlenza was shot and fatally wounded as he sat alone at a table in the dining room of the Belvedere Bar and Grill located at 2056 Second Avenue between 105th and 106th Streets, Borough of Manhattan, New York City; two bullets from a .32 calibre pistol were fired at close range. He died about 9:00 P.M. the following evening, February 27, 1952, while undergoing an emergency operation for the removal of one of the bullets that had lodged near and partially severed the spinal cord.

In the confusion following the shooting, the assailant, with a pistol in his right hand, ran out and disappeared. The defendant was suspected and widely sought. Some ten weeks later and on May 14th, accompanied by his counsel, he voluntarily surrendered himself to the District Attorney. Thereafter and on June 19, 1952, the Grand Jury of the County of New York returned an indictment accusing the defendant of the crime of common-law murder.

The trial was held and a special jury commencing November 12, 1952. At the trial the People did not prove motivation but did show that the defendant and his victim for a long period of time had been friends and acquaintances and that there had been "argument" from which the jury could properly infer that defendant had a grievance against decedent. Identification was furnished by two witnesses present at the time and both of whom knew the defendant, one Paul R. (Whitey) Janson, a patron sitting at the bar, positively identified the defendant as the man whom he had seen standing over the deceased with a gun in his hand immediately after the shooting—the other, Andrew Bertorelli, a part owner of the [*211] tavern, placed the defendant in the bar a few minutes earlier. In addition, the People offered a conversation had between James Forlenza and the deceased a few hours before he died in which the deceased named the defendant as his assailant. Other witnesses were called to show flight or concealment to account for defendant's disappearance for upwards of ten weeks.

The defendant did not take the stand in his own behalf. He relied on his plea of not guilty and his defense of an alibi furnished by witnesses who placed him near a restaurant in

Queens at about the time of the shooting. Defense counsel attempted to discredit, on cross-examination, the reliability of the People's witnesses. In an effort to contradict and impeach as a falsity the dying declaration, the defense called Evelyn Forlenza to testify that he had told her he did not know who shot him.

On November 20, 1952, the jury rendered a verdict of guilty as charged in the indictment. Prior to sentence which had been set down for December 12, 1952, counsel for the defendant was advised by the court, as had already appeared on the trial, that while the witness Janson was being held in prison as a material witness and two days before he testified at the trial he had rammed his head into the bars of his cell inflicting a severe gash in his scalp requiring eight stitches to close. Thereafter he was lodged in a hotel under guard; that on the evening following the coming in of the verdict Janson had been sent to Bellevue for observation as to his mental condition which was then described as "psychotic". On December 4, 1952, he was committed to the Pilgrim State Hospital for treatment. The court postponed sentence apparently for the purpose of allowing counsel for the defendant to look into the matter and at the same time advised counsel that the hospital records would be made available to him for use in preparing a formal motion. On March 12th, nearly four months after the verdict, the defendant formally moved to set aside the verdict and for a new trial based on two grounds, first that Janson was mentally incompetent at the time he testified and secondly that new evidence had been discovered supporting defendant's claim of innocence.

The court permitted the case to be reopened for the purpose of receiving evidence bearing on the defendant's contentions. Hearings were held beginning May 19, 1952, at which time the [*212] defendant called a psychiatrist to testify that in his opinion Janson was mentally incompetent at the time he testified. The expert concededly had never personally examined the witness Janson. He based his opinion upon Janson's trial testimony, statements made by him to examiners at the mental hospital as contained in the hospital records, and Janson's self-inflicted injury. The People's expert, Dr. Lichtenstein, who had examined Janson prior to his being called to testify at the new trial, gave as his opinion that Janson was sane at the time of testifying.

At the main trial Janson, who knew both defendant and the deceased and had been present in the Belvedere on the night in question at the time of the shooting, identified the defendant as the assailant. The matter developed by the defense at the new trial hearing to show that Janson at the time he testified was moody and depressed both before and after the suicide attempt, was not new matter at all, but had been before the court and jury on the main trial. The suicide attempt was there brought out and fully explored, at least to the extent that Janson had blown "his top" and had deliberately butted his head against the iron cell bars causing a deep scalp wound requiring several stitches to close. During the course of his cross-examination the suicide episode was adverted to several different times and he was asked whether he had been in a mental hospital or had psychiatric treatment. He even was asked to exhibit his scalp to the jury. In summation, the defense counsel commented on the episode at length and called Janson "the man that purposely banged his head against the bars". At the motion hearing Janson was recalled. He had been released from the hospital in custody of his wife sometime previously. He testified that on July 2, 1952, after a witness, the bartender at the Belvedere had been found strangled to death in First Avenue—he had been locked up as a material witness, for which he was "only too glad". As

the trial date approached, owing to his knowledge of the bartender's fate—he became obsessed by fear and terror as to what might happen if he testified; he said that on November 11, 1952, he "blew his top" and tried to commit suicide by deliberately running his head into the bars. He repeated without material inconsistency, identification testimony given on the main trial. His testimony at the hearing was not shaken by cross-examination. We unanimously agreed that [*213] the trial judge was right when he ruled that "on both occasions he [Janson] was competent to testify". The judge denied the motion for a new trial.

Upon the main appeal we reviewed the judgment of conviction rendered on the verdict of guilt and also the order denying defendant's motion for a new trial made at the reopened hearing. At that time the defendant argued that his conviction was not supported by the evidence—the trial issues had turned largely on identity, lack of motive and an alibi—certain trial rulings were urged as erroneous. The adequacy of the jury charge was also questioned.

As to all these points we unanimously agreed that the judgment of conviction was amply sustained beyond any reasonable doubt; that on the record then before us, including both the minutes of the trial and the minutes on the motion for a new trial, the conduct of the trial was free from reversible error in all respects excepting that the dissenting Judges were of the view that "the court's charge did not marshal the evidence as required by *People v. O'Dell (230 N.Y. 481)*". On that issue, the court was under no necessity of writing a formal statement of their view to the contrary as the law on that subject is governed by section 420 of the Code of Criminal Procedure which provides: "In charging a jury, the court must state to them, all matters of law which it thinks necessary for their information in giving their verdict; and must, if requested, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact".

While this statute emphasizes that the court shall charge the jury on all matters of law, it does not follow that the charge on the law shall be given with only slight reference to the facts. The better practice for the court in a capital case, as we long ago pointed out, even when uninvited by the defendant to do so, is to present to the jury the case on trial in all its phases in which the jury ought to consider it ( *People v. Fanning, 131 N.Y. 659*). Here, as in the *O'Dell* case (*230 N.Y. 481*), we must examine the charge in the setting of the case to determine whether the omission to detail all items of the evidence renders the charge so incomplete as to require a reversal and a new trial. In this case the court charged: "It is the prosecution's contention in [*214] this case that the defendant and the deceased Walter Forlenza knew each other, and that on Tuesday evening, February 26th, 1952 at about 8:30 P.M. in the Belvedere Bar and Grill at 2056 2nd Avenue the deceased Walter Forlenza was sitting at a table in the dining section, and the defendant was allegedly at the bar, and it is claimed that the defendant walked to the table at which the deceased was seated and fired two shots at the deceased at close range. That the defendant immediately fled, and Walter Forlenza was removed to Beth David Hospital where he died the following day from the effects of the bullet wounds."

The court adverted to the defendant's flight and his alibi by saying:

"The prosecution claims that the defendant fled and was not seen or heard from until May 14th, 1952 when in the custody of his lawyer he surrendered himself at the District Attorney's office. It is the defendant's contention that on the night of the shooting he was not in the

Belvedere Bar and Grill. It is claimed that he was in a restaurant in Queens County.

"If you find as a fact that the defendant was not in the Belvedere Bar and Grill when the shooting occurred, then you should acquit him.

"If you find as a fact that the defendant was in the Belvedere Bar and Grill when the shooting occurred, but that he did not shoot the deceased, then you should acquit him."

The defendant, we must remember, relied on his plea of "not guilty" and his alibi witnesses. Under the proof the court said about all that could be said, for - as we know and as they had been instructed - the statute says: "The jury * * * are the exclusive judges of all questions of fact". The issue was murder in the first degree. The shooting was quickly done. The lone assailant had fled and disappeared and the victim died of the wounds inflicted. What more was necessary to be said? The jury had heard all of the witnesses. We may assume that they had paid attention to the witnesses as they testified and were intelligent enough to remember the various incidental and collateral details without repetition by the court. On the main appeal we regarded the charge in the setting of this case as full and fair. Our view has not changed by our later reconsideration and we adhere to our former decision that no error was committed on this aspect of the case.

[*215] On that motion the defense also stressed as error the admission of testimony of James Forlenza concerning a dying declaration, for lack of proper foundation and veracity, inadequacy of the charge, etc., all of which Judge GOLDSTEIN carefully reconsidered and adhered to his former rulings. On the main appeal we considered all phases of the controversy concerning the admissibility and credibility of the dying declaration. We unanimously agreed that no error was assignable to that aspect of the case.

We now turn to the within order denying defendant's motion for a new trial based on alleged newly discovered evidence showing that the dying declaration naming the defendant-appellant as the killer was not made at the time claimed and could not have been made at any time because the victim's physical condition was such that he could not talk, a new claim made for the first time on this motion.

The power to grant an order for a new trial on the ground of newly discovered evidence is purely statutory. Such power may be exercised only when the requirements of the statute have been satisfied, the determination of which rests within the sound discretion of the court. So far as pertinent the statute provides, viz. (Code Crim. Pro., § 465):

"§ 465. *In what cases granted.* The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases. * * *

"7. Where it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination [***18] and cross-examination, under oath, upon the contents of the affidavits which they subscribed."

The test thus enunciated was long ago approved in this court, and since followed - viz.: that "Newly-discovered evidence in order to be sufficient must fulfill all the following [*216] requirements: 1. It must be such as will probably change the result if a new trial is

granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence." ( *People v. Priori, 164 N.Y. 459, 472*; *People v. Eng Hing, 212 N.Y. 373, 392*.) On this record these criteria are not satisfied.

At the trial James Forlenza, a brother of the victim was called by the People to testify to a conversation had with the victim shortly before his death, in which he named the defendant as the person who had shot him. This conversation was admitted over objection as a dying declaration. According to the witness' best recollection at the trial, the conversation had taken place between 5:00 and 5:30 P.M. February 27, 1952.[1]

Although it appeared and was readily admitted that, in a prior written statement to the District Attorney, James had fixed the time at 1:00 P.M. and that when he testified before the Grand Jury he had fixed the time at between 4:00 and 4:30 P.M., the defense made no effort to clear up this inconsistency. The cross-examination of this witness was devoted almost entirely to discrediting the statement as a dying declaration on the ground that the declarant was not expecting to die. James was cross-examined to the point of exhaustion on slight inconsistencies [*217] in language used on the three different occasions. Everyone, including the defense, proceeded on the theory that such a conversation had, in fact, taken place, the attack being centered at all times on its competency and materiality as a dying declaration, as to which more will be said later.

Returning to the issue as to the time the declaration was made, the defense called *Detective Mengrone*, who visited the hospital four times between 1:00 A.M. and 4:30 P.M. on February 27th, to testify that he saw other relatives of decedent but at no time did he see James either at the hospital or at the bedside.

Notwithstanding the existence of a time discrepancy, defense counsel barely mentioned it in his summation but devoted the greater part of his comment to an attempt to persuade the jury that the defendant was innocent and that the dying declaration was a false, perjurious fabrication.

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[1] "Q. Will you keep your voice up now, Mr. Forlenza, and tell us exactly what happened as you approached the bedside of your brother? A. When I approached the bedside of my brother I lifted up the flap of the oxygen tent and stuck my head in, bent over him and asked him: 'How do you feel?' He said: 'No good, very bad,' he says: 'I am not going to make it, I am going to die.'

"Q. Did you say anything to him at that time, or did he say anything to you? A. He said to me: 'That is why I sent for you.' So I asked him, he said: 'That is why I sent for you tell you about what you asked me last night.' And I said: 'Who shot you?' He said: 'Nardi.' I said: 'Nardi who?' He said: 'Nardi Salemi, the fellow that I introduced you to.' [Objections by defense overruled.]

"Q. And when your brother said that did you say anything to him? A. No, he kept on talking.

"Q. What else did he say? A. He said: 'I have five thousand dollars out in the street, see that it is collected.'" [Objections by defense that no proper foundation for admission as dying declaration overruled.]

Counsel for the People, in the course of his summation, pointed out that, in the testimony by James as to the time, the statement was made according to his best recollection; that the inconsistency was explainable by the attendant anxiety incident to the stress and strain of the tragic news plus the utter lack of motive to testify falsely. The question, then, was fully presented to the jury and we must assume that they considered the inconsistency as unsubstantial. Notwithstanding this state of the record on the main appeal, counsel for the defense now argues that the inconsistency in time raises an issue of fact which should be resubmitted to the jury. At the hearing so-called newly discovered evidence calculated to throw new light on this point was presented. After a careful study of this testimony, we are constrained to conclude that it adds nothing to what was previously before the trial jury. For example:

*Nurse Cancro* said she was there between 4:30 and 5:15 P.M. when the patient was taken to the operating room and during that time had not seen James. However, on her cross-examination she conceded that, when she returned from her lunch hour sometime between 12:30 and 1:00 P.M., she saw two men whom she did not know at the patient's bedside, one of whom had his head inside the oxygen tent. Now it is true that this witness did not testify at the trial. Her name was in the records of the hospital. She married in December, 1952, long after her attendance on the deceased. No one sought to locate her until [*218] 1955 - nearly three years after the trial and her marriage - when her married name was not easily discoverable. The point is that the defense did not attempt to locate her at the time of the trial and does not claim to have done so, since it was not then the theory of the defense that the deceased could not talk.

*Dr. Strully*, who between 4:30 and 5:15 P.M. aided in preparing the patient for the operation, testified that no outsiders were present during that time. His name appeared on the hospital chart and was available.

*Patsy Yannotti* was at the bedside for a short while when preparations for the operation were commenced about 4:30 P.M. He left the ward and joined Evelyn and a friend named Donato in the adjacent hallway. During that time he did not see James Forlenza whom he knew.

The moving affidavit alleges that the identity of Yannotti did not become known until sometime in July, 1954. To the extent that the identity of *Cancro* and *Yannotti* were unknown by defense counsel at the time of the trial, I suppose it can be said with some plausibility that the testimony they gave at the hearing was newly discovered in the sense that these witnesses had not been interviewed by the defense counsel prior to the trial. Even if we assume this is so, it does not follow that "the failure to produce [their testimony] on the trial was not owing to want of diligence" (§ 465) for, surely, the names of each one of these witnesses were either mentioned in the hospital records or could have been easily learned by the simplest sort of inquiry. Furthermore, even though we assume that such testimony would have been material to the issues upon which the trial was conducted, it cannot reasonably be said that "if before received" such evidence "would probably have changed the verdict" (§ 465). When these basic ingredients are lacking - and by any standard they are lacking here - the so-called newly discovered evidence does not qualify as the basis for granting a new trial (§ 465).

In reaching this conclusion, we have not limited our consideration of the testimony in accordance with the bare language of the statute but have examined it in the light of the evidence as to this point contained in the record on the main appeal. The issue as to the exact

time of the making of the dying declaration as testified to by James Forlenza, as we have seen, was fully [*219] explored at the trial, was adverted to by counsel in summation and its credibility passed upon by the jury. When this alleged newly discovered evidence is viewed against the main record in light of the best inference rule, the most that can be said concerning it is that - at best, it is cumulative or designed merely to impeach or contradict the former evidence. It throws no new light on the issue ( *People v. Priori, 164 N.Y. 459, supra*). The statute requires that to justify granting a new trial it must be shown that the evidence "is not cumulative". This the appellant is unable to do. It should be mentioned that at the hearing the People met the so-called new evidence by calling several persons who had not testified at the trial.

*Patrolman Snyder*, who testified that, while on duty between 4:00 P.M. and 9:00 P.M., the 27th, he saw two women at the bedside but did not recall seeing any men.

*Patrolman Perrino*, on duty between 8:00 A.M. and 4:00 P.M., who testified that he saw two men at the bedside about 1:30 P.M.

*Jeanne Forlenza*, a sister, who saw James at the hospital at about 4:30 P.M., the 27th.

*Anne Forlenza*, a sister, who saw James at the hospital at about 4:00-4:15 P.M., the 27th.

*Anthony Donato*, a friend of the Forlenza family for many years, that he reached the hospital with Yannotti about 3:00 P.M.; that they looked at Walter, said nothing and remained outside in the corridor until about 3:30 P.M., when they left. They returned about 4:00 P.M. During these times the witness did not see James.

*Maud Forlenza*, wife of James, who testified at the trial, was recalled to testify that her husband, James, was at the bedside about 4:30 P.M., the 27th; that she left him and returned to her place of business where she was joined by James not later than 5:15 P.M.

As to this aspect of the attack on the dying declaration, the trial judge determined that the time the declarant had made the statement to James was fully explored at the trial and that its credibility was passed upon by the trial jury. He accordingly rejected this aspect of the defendant's motion as a ground for granting a new trial. We cannot now say that, in so ruling, the trial judge abused his discretion as a matter of law. It seems clear that on this phase of the record nothing was shown [*220] requiring the court to exercise his statutory power any differently than he did.

The defendant's contention that the dying declaration was never made because the decedent could not talk was not raised at the trial for the very good reason that the defense had proceeded on the theory that the testimony of James Forlenza was false and unworthy of belief because, in conversations had with others, the decedent had refused to name his assailant, and that the alleged statement did not qualify as a dying declaration because the declarant had not expected to die, the purpose being - of course - to throw doubt on the credibility of James and the declarant. For this purpose the defense had called *Evelyn* to testify affirmatively that she talked with her husband between 4:00 and 5:30 P.M. on the 27th.[2]

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[2] Q. Did you talk to your husband? A. Yes.

"Q. And between four and 5:30 did you talk to him? A. Well, he couldn't - Yes, I was talking to him but he was under oxygen and I couldn't talk to him much.

"Q. You couldn't talk too much? A. No, because I would take all the oxygen out of the tent.

It seems clear beyond dispute that at the trial the defense assumed throughout that Walter could and did talk. At no time was the dying declaration assailed because it was not made due to declarant's inability to talk, but solely on the ground that he had said something else and this at a time when they had the hospital records and autopsy report in court, when the names of Nurses Blanchard and Cancro and Doctors Strully and Breidenbach were known to the defense and whom the defense did not call, although available.

At the motion hearing these persons who had not been trial [*221] witnesses all testified on the issue of decedent's ability to talk:

*Nurse Blanchard* in charge of the floor and *Nurse Cancro*, special nurse, both testified to the fact that they had no recollection of having heard the decedent say anything at all.

*Dr. Strully* was of the opinion that the patient could not have carried on a conversation as testified to by James. He based this opinion on the circumstance that the decedent had made no reply to his routine inquiries; that based on the hospital report, he believed some teeth were missing but had not verified this by an independent examination as the patient's face, mouth and neck were swollen and that, in his opinion, the patient could not have carried on a conversation as testified to by James.

*Dr. Breidenbach*, that when he saw the patient he found some teeth missing; that the patient's mouth, tongue and neck were badly swollen due to injury from the bullets and that he suspected the jaw had been fractured; that the patient was in a semistupor and very weak and that, in his opinion, he was in no condition to have talked, as claimed.

All of this testimony was completely opposed to the theory adopted at the trial and, as such, served only to impeach and contradict former evidence which we have said is not new evidence of the sort warranting the granting of a new trial (*People v. Eng Hing, 212 N.Y. 373, supra*).

Furthermore, such testimony was all available at the time of the trial but, for reasons best known to the defense, the alleged inability of the decedent to talk was never mentioned.

When the People offered the dying declaration, the defense claimed no surprise which he might have done if he actually believed that decedent could not talk, as now claimed, but he could not do so at that time as the trial strategy was based on the theory that the decedent could have and did talk. To now claim surprise is proposing an afterthought based on a desperate effort to find new grounds for the granting of another trial. Furthermore, defense counsel having failed to convince the jury on the theory that decedent was lying when he named defendant as his assailant, it seems rather late for a new counsel to ask that the case be reopened in order to introduce an entirely new and contradictory theory respecting the validity of the dying declaration. The trial strategy, we must assume, was carefully and deliberately planned. Having failed in its

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> "Q. Did you see James Forlenza there between the hours of 4 and 5:30? A. No.
>
> "Q. Did you ask Walter Forlenza who shot him? A. Yes.
>
> "Q. What did he tell you? A. He says he didn't know. He says 'All I was doing was sitting down eating.'
>
> "Q. Did he at any time ever tell you that Salemi shot him? A. No.
>
> "Q. Did you ask him that question constantly? A. I kept asking him to tell me who done it.

"Q. And he always said to you what? A. 'I don't know.' Mr. Fruchtman; That is all. Your witness."

purpose, [*222] we know of no reason for permitting the case to be reopened in order to try out a different and opposing theory.

We must bear in mind that this case has been exhaustively litigated. More than six months intervened between the verdict of guilt and the sentence in order to permit defense to explore the Janson episode and renew many of the contentions made at trial and rejected by both court and jury. Following our affirmance, many other motions were made [3] including two to the [*223] Supreme Court of the United States, none of which raised any issue as to declarant's ability to speak. There is overwhelming evidence that decedent did speak - and to various persons at various times - for instance:

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| Motions for reargument of appeal and | |
| for an order of recall and amended | |
| remittitur denied | April 15, 1954 (306 N.Y. 946) |
| Motion for stay of execution pending | |
| determination of petition for writ | |
| of certiorari in United States | |
| SupremeCourt denied | April 23, 1954 (306 N.Y. 978) |
| Execution stayed by Mr. Justice | |
| STAN-LEY REED, Associate Justice | |
| of the United States | |
| Supreme Court | April 24, 1954 (not reported) |
| Certiorari denied | Oct. 14, 1954 (348 U.S. 845) |
| Rehearing denied | Nov. 22, 1954 (348 U.S. 890) |
| Petition for writ of error | |
| coram nobis dismissed | December, 1954 (not reported) |
| Certificate granted by DESMOND, | |
| J.,permitting appeal from dismissal | |
| of writ of error coram nobis | February 4, 1955 (not reported) |
| Order dismissing petition for writ | |
| of error coram nobis affirmed, | |
| DESMONDand VAN VOORHIS, JJ., dissenting | March 11, 1955 (308 N.Y. 863) |
| Motion granted pursuant to section | |
| 503of the Code of Criminal Procedure, | |
| set-week beginning April 18, 1955, | |
| for date of the death sentence | March 11, 1955 (308 N.Y. 883) |
| Motions for vacating judgment of | |
| death and for a new trial upon | |
| ground of newly discovered | April 27, 1955N.Y.L.J., |
| evidence denied | April 28, 1955, p. 8, col. 4 |
| Motion for reopening proceeding | |
| and for reargument of motion for | |
| new trail granted | May 5, 1955 (not reported) |

| | |
|---|---|
| Motion for reargument of application | |
| for new trial denied | May 10, 1955 (not reported) |

*Maud Forlenza*, wife of James, and the two sisters, Anne and Jeanne, testified that there was almost a continuous flow of conversation.

*Mary Karasik*, director of nurses, to the effect that Nurse Blanchard had overheard the patient asking his wife how their child was.

*Evelyn Forlenza*, who testified at the main trial for the defense and at the hearing for the People, in each instance to a conversation had with decedent, but which was contradictory, she having testified at the trial that decedent did not state who shot him - while at the hearing she testified that she lied at the trial and that, in fact, the decedent had told her about 11:00 A.M. on February 27th that the defendant had shot him. She said that the deceased had her swear that she would not disclose the information except to his brother, James, and then only in case that he should die.

*Evelyn* explained her recantation on the ground that on the main trial she was literally "scared to death". Well she might have been. She had just borne a baby out of wedlock, fathered by the victim, Walter. She was familiar with the fact that Walter "had money in the street" which, if collected, would go towards the support of the infant; that decedent had made the statement under a solemn promise that she tell no one but James and then only if he should die; that to be careful of herself and the baby "as something might happen" to them and not to move back to Harlem; that the bartender, Pauitta, who had witnessed the shooting from his unobstructed vantage point behind the bar, met violent death by strangulation shortly after he had testified before the Grand Jury. She knew that, following this tragic coincidence, other witnesses, Bertorelli and Janson were taken into custody as material witnesses and that James had been given a police bodyguard. She knew the ramifications of the narcotic trade and the peril attending a "squealer". The trial was sensational and it is little wonder that Evelyn chose the easy way out. After all, she was a mother protecting her own in face of stark realities of life as she knew and understood [*224] them. Her recantation as to the contents of the conversation, which at one time even the defense counsel conceded she had with the decedent, was thus fully explained.

Nothing of significance flows from the failure of the People to recall James Forlenza on the hearing. His testimony on the trial had been subjected to a most thorough and exhaustive cross-examination. Nothing remained for him to say.

Perhaps a word should be mentioned concerning another witness named Anthony Donata (or Tony Iodine), a trafficker in narcotics with a long criminal record. He knew both the decedent and the defendant. On the 26th he visited the victim's bedside and, in Italian, asked decedent who had shot him; decedent did not answer but "rolled his eyes toward the officer standing behind the bed"; the following day he returned at about 10:30 A.M.; when Evelyn and Lizzie (Louis Farlradi) stepped out for a moment, he put his head under the tent and again asked the victim who had shot him and was told in a painful way "Nardi" and to tell Albert "to watch out"; that he had no feeling in his legs and that he believed he "could not make it". Donato left when ordered out by a nurse.

The trial judge had presided at the trial. He was thoroughly familiar with every aspect of this case. When Doctors Strully and

Breidenbach testified with respect to the decedent's physical condition contrary to the autopsy report, factual issues were raised presenting a serious question of weight and credibility. It could only be solved by a re-examination of the decedent's body. It is now contended that this re-examination prejudiced defendant by depriving him of his right to due process, although he consented to the exhumation. This contention is based on the circumstance that the examination was not for the purpose of determining the cause of death, which was already known, but to resolve a collateral matter, condition of the teeth, and whether the wounds were such as to have prevented speech prior to death.

As we view this aspect of the proof, we see no new issue of fact requiring submission to a new jury on the ground of newly discovered evidence. The opinion of Doctors Strully and Breidenbach that the victim was incapable of speech was based on a superficial examination of the outward effects of the injury - since, concededly, they made no otherwise independent examination at the time - relying on statements contained in the hospital [*225] records, the generally weakened condition of the patient and the fact that he said nothing to them. The autopsy report subsequently made showed the true nature of the victim's condition. The missing teeth which had played so prominent a part in their diagnosis were, in fact, not the result of wounds but of a long prior extraction in normal course. While all can say that these witnesses were eminent physicians and honorably disposed, with no reason to testify falsely, they - nonetheless - were mistaken as to the actual damage caused by the bullets and had given their opinions in reliance on facts that were plainly and definitely inaccurate. The re-examination of the body demonstrated this inaccuracy and confirmed the original defense theory that the victim had, in fact, talked to various persons, as testified to on the trial. The medical examiners agreed that the wounds were not of such a nature as to prevent talking prior to death.

It is also contended that the trial judge conducted the examination and interrogated witnesses not in the presence of counsel for the defendant. To state these objections is to demonstrate their absurdity. The record shows that the examination was attended by a physician of defendant's own choosing, Dr. Birnkrant; that counsel for defendant - and People as well - preferred to stand in the hallway and look through the door rather than be close spectators to the re-examination. A careful stenographic record was made of the proceedings and no one contends that such record was incomplete or inaccurate. It demonstrates that defendant's rights were fully protected. It cannot reasonably be said that the trial judge in any way prejudiced defendant's rights by asking Dr. Birnkrant from time to time if he saw, understood and agreed with what the operating pathologist, Chief Medical Examiner, Milton Helpern, M.D., was doing and the results found. True, the trial judge swore the undertaker who had exhumed the body but only for the purpose of identification of the body, a most necessary and essential step in the proceeding. Had the Presiding Judge not done these things - and he was not to be blamed if counsel preferred to remain out of hearing - he would, no doubt, have been charged with another kind of dereliction. In our view, the trial judge acted with judicial propriety.

[*226] When this record is measured with the requirements of the statute, it cannot reasonably be said that the evidence adduced satisfies statute and case law as having been newly discovered, for it is not such as could not have been discovered before the trial by the exercise of due diligence and, even if we assume that it is material to the issue, it nonetheless is cumulative and any purpose it might serve is to impeach or contradict the

former evidence; in fact, it cannot reasonably be said that it is of such a nature and quality as would probably change the result of a new trial if granted. As a matter of fact, the evidence adduced at the hearing - far from "probably changing the [jury's] verdict" would have made it easier for the jury to conclude that the defendant was guilty.

Furthermore, the statute contemplates diligence. Here trial counsel acknowledges that he made no investigation concerning the dying declaration until after the Supreme Court denied rehearing on November 22, 1954. The point now raised is clearly an afterthought and is not supported by evidence warranting the granting of a new trial as newly discovered within the meaning of section 465. This is not the situation where the court is depriving the jury of its right to determine an issue of fact, but rather whether the facts are sufficient to warrant setting aside the jury verdict and granting a new trial. We agree with the Court of General Sessions that the alleged newly discovered evidence is insufficient to warrant the granting of a new trial. We are also satisfied that this defendant has been accorded due process in accordance with applicable State law.

The judgment of conviction should be affirmed.

**DISSENT BY:** FULD and DESMOND

**DISSENT**

*FULD, J. (dissenting).* I was one of the bare majority of four who voted to affirm the judgment of conviction when this case was first before us (*306 N.Y. 863*). Although the record evidence was far from strong, I concluded that there was sufficient to justify a verdict of guilt. The new matter which has been developed and adduced upon the motions for a new trial, as well as upon the application for an order in the nature of a writ of error *coram nobis*, has radically changed the picture, and I cannot now, consistent with the dictates of conscience or the demands of due process, adhere to my original vote of affirmance. A refusal to direct a new trial will not only work [*227] an injustice upon Salemi but, even more important, will do a disservice to the administration of the criminal law.

The conviction against the defendant depended primarily upon the testimony of two witnesses, Paul Janson, who identified defendant as the killer, and James Forlenza, the deceased's brother, who testified that the victim had made a dying declaration to him, naming defendant as his assailant.

As to Janson, proof not before the jury demonstrates that he was probably insane at the time he testified against the defendant, and, as to Forlenza, the newly discovered evidence creates a real doubt as to whether he ever received a dying declaration from his brother. No more need be said about the evidence relating to Janson, for it is indisputable that he was committed as an insane person on the very day after the jury returned its verdict of guilt against defendant.[3] And very little more need be said about the testimony bearing upon the authenticity and existence of the alleged dying declaration. It is enough to observe that, had the new matter been before the jurors at the trial, they would have heard - from witnesses of the highest character, whose honesty and sincerity are beyond all suspicion - not only that Forlenza was not at his brother's bedside in the

[3] This material was before the court, in connection with an appeal from an order denying a motion for a new trial, when we originally affirmed the judgment of conviction. However, it did not then have the same impact as it does today when considered with the other evidence brought to our attention by the more recent applications.

hospital during the period he said he spoke to the latter and received the declaration, but that, in point of fact, the victim was in no condition, physically or mentally, to have uttered any statement. There was, it is true, conflicting testimony, but the vital thing is that the jury never heard the evidence which, if credited, would have gone far toward destroying the prosecution's case.

In arriving at my decision that there should be a reversal and a new trial, I would not be understood as saying that the defendant is not guilty - I do not know whether he is or not - or that the jury, with the new evidence before it, would have returned a verdict of acquittal. My view is simply that the original jury, or another, could reasonably and conscientiously have reached a verdict contrary to the one that was reported, [*228] on the basis of the matter recently uncovered and not adducible by the defense at the time of the original trial.

The judgment of conviction should, upon this reargument, be reversed and a new trial granted.

*DESMOND, J. (dissenting).* When defendant was tried, convicted and sentenced to death, all the important proof against him consisted of eyewitness identification testimony by witness Janson, and testimony by James Forlenza of an alleged dying declaration in which the victim is supposed to have named defendant as his slayer. On the trial record as it then stood, and despite the mystery as to motive or background, we held that the jury's guilty verdict was not against the weight of evidence. But, since our affirmance, quantities of new evidence have come to light, the existence and weight of which we must recognize. To my mind, the new proofs insistently demand a new trial for this defendant. In voting for such a new trial this court would not be passing on defendant's guilt nor would we be reviewing again the weight of evidence as to that question. We would be seeing to it that this man does not go to the electric chair until a jury has heard this strange new series of conflicting and confusing narratives, many of them highly favorable to defendant. We would be upholding defendant's fundamental right to a full trial by jury.

Let us assume that the new information, not known at the trial, as to witness Janson's mental condition, does not meet the requirements that new evidence to call for a new trial must be more than merely cumulative or contradicting or impeaching, that it must be such as could not by due diligence have been discovered before the trial and that it must be such as would, if produced at a new trial, probably change the result (Code Crim. Pro., § 465, subd. 7; *People v. Priori, 164 N.Y. 459*). Let us go further and assume that the highest court of New York is so tightly bound by that rule that we must close our eyes to everything but the rule. On those two assumptions, even, I still think that a new jury should decide whether or not it is safe to accept the testimony of a witness who went straight from the courtroom to a mental institution, and the seriousness of whose mental illness was certainly not disclosed during the trial to defense counsel. It is unreasonable to charge defense counsel with lack of diligence in discovering the facts as to Janson, facts which [*229] were diligently kept from him by those whose duty it was to disclose all pertinent information about a witness, especially in a first degree murder case. It cannot be stressed too much that Janson was the only witness who identified defendant as the killer.

If the jury had been permitted to learn that Janson was at least temporarily insane during the trial, the jury might have had to rely, for a finding of guilt, on Forlenza's testimony as to a dying declaration. That testimony obviously came as a complete surprise to defense counsel at the trial. To say now that the latter should have stopped the trial and made a prompt and

thorough investigation, as to the probability or possibility of that declaration ever having been made at all, is to demand the impossible. Even if a long delay in the trial, for such an investigation, could have been had, how could any lawyer in such a situation have guessed at the existence of testimony which it has since taken months or years to uncover? How could defense counsel have imagined that elaborate investigations later made would turn up two physicians, two nurses, two police officers and several other persons, each prepared to give testimony of greater or less definiteness, completeness and weight, to the effect that the dying declaration could not have been made by decedent or heard by Forlenza? Such testimony is "cumulative" in the broadest sense only of that term since there was no real opportunity or effort to try out the precise question at the trial. For the same reason, it cannot be said to be merely "contradictory". It is brand new evidence to show that an alleged fact surprisingly testified to (not the fact of guilt but the alleged fact of a dying declaration) simply could not be true. To say that all this new material (or any of it) could with due diligence have been produced at the trial by the defense is to ignore reality. How could defense counsel, having no reason to expect dying declaration testimony, have been expected to prepare himself with medical proof that the victim was in fact unable to speak? There simply was no such issue in the case until James Forlenza took the stand. The charge against defense counsel of lack of due diligence is particularly unfounded as to the victim's special nurse Cancro, now a most important witness for defendant, whose very name could not be learned till long after the trial.

[*230] The important dispute of fact on a new trial would be as to whether the victim could or did talk. Since at the last trial defense counsel could not have anticipated that any such dispute would arise, diligence in preparing for it is simply not in the picture at all.

This court, since it cannot directly review an order not in the original judgment roll, denying a motion for a new trial on newly discovered evidence, reaches the same result by ordering a reargument (*People v. Regan, 292 N.Y. 109*) as we did here. But such a reargument brings up not only the newly discovered evidence, but the whole record, old and new. We cannot, or at least should not, treat the alleged newly found evidence as something separate and off by itself. We should picture the trial record as it would look with the new testimony added. After thus re-examining the total record, our duty is to say whether or not a new jury, hearing all of it, might well come to a different conclusion.

And our power to order a new trial is not limited by the rules as to newly discovered evidence. Having heard a reargument of the entire proceedings, we have now the same powers of disposition and decision as in any other appeal in a capital case. Among those is the power to order a new trial if justice so requires (Code Crim. Pro., § 528). I strongly feel that the interests of justice demand a full trial of this cause before a jury which can hear all the witnesses.

The judgment should be reversed and a new trial ordered.

**The People of the State of New York, Appellant**

**v.**

**Aurelian Balan, Respondent**

**Supreme Court of New York, Appellate Division, Second Department**

***Cite As:*** People v. Balan, 484 N.Y.S.2d 648 (N.Y. App. Div. 2d Dep't 1985)

**January 28, 1985, Decided**

**OPINION**

[**648] Appeal by the People from an order of the Supreme Court, Queens County (Di Tucci, J.), dated February 3, 1984, which granted defendant's motion pursuant to *CPL 440.10* to vacate his judgment of conviction on the grounds of newly discovered evidence and in the interest of justice, and ordered a new trial.

Order reversed, on the law and the facts, and judgment reinstated.

After a jury trial, defendant Aurelian Balan was convicted of criminal possession [**649] of a weapon in the second degree, assault in the first degree, and reckless endangerment in the first degree, all of the counts arising from an incident which occurred in a private Roumanian club on Seneca Avenue in Queens, in the early morning hours of November 12, 1982.

At trial, the People presented two principal witnesses, Anatoli Rusanovskhi, the owner of the club, and George Puja, a patron, both of whom testified through a Roumanian interpreter, although they could understand some English.

Both of these witnesses had known defendant Balan for seven to eight years. Defendant apparently owned a jukebox located on the premises of the club, and defendant and Puja had been involved in a dispute involving Puja's car shortly before the incident in question.

According to the testimony adduced at trial, Puja was at the social club on the evening in question from about 11:30 p.m. on; there were only one or two other people there, including Rusanovskhi and the barmaid, Sylvia Stan. At some point, defendant, who is Hispanic, arrived with two Hispanic friends; he pointed at Puja and told his friends that "[this] is the man". The four men then became involved in an argument during which one of the men with defendant pulled out a gun and the other pulled out a knife; neither Puja nor Rusanovskhi saw defendant with a gun, but defendant kept his hand under his jacket and threatened to shoot Puja.

Rusanovskhi attempted to break things up, and began pushing defendant towards the door, which had a window in the center. Rusanovskhi got the three men outside and shut the door when shots were fired through the door, two of which struck Rusanovskhi. Puja could not see what was happening outside, but Rusanovskhi testified that he could see defendant and one of the other Hispanic men firing. The police found bullet holes of differing sizes in the door. Shortly after the

incident, Rusanovskhi commenced a civil suit against defendant seeking $ 1,000,000 damages.

Defendant testified at the criminal trial that the Hispanic men whom he did not know were already in the club when he arrived in response to a call from Rusanovskhi, apparently concerning the jukebox. Puja began an argument with him, and when defendant knocked over a bread plate and made a loud noise, the Hispanic men jumped up, and one of the men pulled a gun and told everybody not to move. Defendant was pushed out the door while Rusanovskhi argued with one of the Hispanic men about money. Two other defense witnesses testified to seeing defendant outside the club at about the time in question, but that there was no shooting.

Following his conviction but prior to sentencing, defendant moved to set aside the verdict under *CPL 330.30*. The motion was based solely upon his attorney's affirmation, which recited that he, the attorney, had accompanied defendant's brother to the Roumanian club where the brother and Rusanovskhi had a conversation in an unidentified language which the attorney did not understand, after which defendant's brother told the attorney that Rusanovskhi was changing his testimony. Rusanovskhi now agreed, essentially, with defendant's version, and further, Rusanovskhi also said that he saw defendant drive away before the shooting occurred. Rusanovskhi stated that he had implicated Balan because, before they left, the two Hispanic men had warned him not to tell anyone. There was no explanation for Rusanovskhi's civil suit, however, or for the presence of the two Hispanic men in the Roumanian club in the first instance. There was no affidavit from Rusanovskhi, or from defendant's brother. That motion was denied.

Defendant was sentenced on December 22, 1982. Thereafter, in January, 1984, defendant moved pursuant to *CPL 440.10* to vacate the judgment on the ground of newly discovered evidence, i.e., Rusanovskhi's recantation. As with the earlier motion, no sworn statements were submitted, but for defendant's new attorney's affirmation. Also attached was an unsworn statement signed by Rusanovskhi, which was taken from him by a private investigator [**650] and a recognized court interpreter of Roumanian, although there were no affidavits from these persons. This second statement differed from the first Rusanovskhi statement. According to this unsworn statement, defendant had been in the club twice on the evening in question which contradicted defendant's testimony at trial that he had only been there once. Shortly after defendant's second arrival, two Hispanic men "forced" their way into the club. This contradicted not only defendant's testimony at trial, but Rusanovskhi's first recantation, which placed the men in the club prior to defendant's arrival. The second statement also said that after Puja and defendant began to argue, one of the Hispanic men pulled a gun and told everyone to freeze; Puja and defendant began to argue again, however, so the two Hispanic men took defendant outside and shots were fired. Absent from this statement was any allegation that Rusanovskhi saw defendant drive away before the shooting; rather, it was in accord with Rusanovskhi's trial testimony to the extent that it placed all three outside the door just before the shots were fired.

Additionally, the attorney's affirmation asserted that the barmaid, Sylvia Stan, had been ill at the time of trial and had been intimidated by Puja. An unsworn statement taken from Stan was also attached, which supported in part and contradicted in part Rusanovskhi's statement. However, Stan said that she did not see the actual shooters.

A hearing was held at which time Rusanovskhi invoked the Fifth Amendment upon the advice of counsel and the failure of the People to offer him immunity. The private investigator testified that Rusanovskhi told him that defendant was not guilty of the shooting; curiously, however, no such direct remark appears in Rusanovskhi's unsworn statement. Sylvia Stan also testified, but contrary to the attorney's affirmation, did not say that she was ill during the trial. In fact, it appears that she had been asked by defense counsel to be a witness, and had appeared in the courtroom during trial, yet was not called. Stan also did not support the attorney's allegations that she had been intimidated. The only facts adduced in defendant's favor at this hearing did not come from the testimony; rather, it appears that Rusanovskhi at one point had told the department of probation that defendant was not guilty, and defendant had successfully completed a court-ordered lie detector test.

Although the hearing court determined that defendant had failed to comply with the statute and had "failed to sustain any issue which would permit the setting aside of the jury verdict", the court nevertheless vacated that conviction and ordered a new trial "in order to avoid the very grave, no matter how slight, possibility that an innocent man may remain incarcerated because of false testimony and/or a legal technicality". Given the facts of this case, such a ruling was error.

To be considered "newly-discovered" so as to support a motion to vacate a judgment of conviction pursuant to *CPL 440.10* (subd 1, par [g]), the evidence in question must meet the six criteria set out in *People v Salemi (309 NY 208, 216*, citing *People v Priori, 164 NY 459, 472)*, specifically: "1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting the former evidence".

Additionally, *CPL 440.30* (subds 1, 6) require that such motions be based upon sworn allegations, and that the defendant prove "every fact essential to support the motion" by a preponderance of the evidence. It has been held that "[the] power to grant an order for a new trial, based upon newly-discovered evidence, is purely statutory and such power may be exercised by the court only when the requirements of the statute have been satisfied, [**651] the determination of which rests in the sound discretion of the court" (*People v Powell, 102 Misc 2d 775, 779*, affd *83 AD2d 719)*. Here, the hearing court specifically found that defendant had not met the criteria and had failed to carry his burden of proof, yet granted the motion in the interest of justice. Assuming that the court has the inherent discretion to grant a motion which is not in compliance with the statute (cf. *People v Carter, 63 NY2d 530*), the interest of justice does not require that such relief be granted here, given [***9] the wholly untrustworthy nature of defendant's papers, and the circumstances surrounding the alleged recantation.

**The People of the State of New York,**

**against**

**Darnell Macon, Defendant.**

**SUPREME COURT OF NEW YORK, BRONX COUNTY**

***Cite As:*** People v. Macon, 924 N.Y.S.2d 311 (N.Y. Sup. Ct. 2011)

**March 3, 2011, Decided**

**OPINION**

Pursuant to *CPL §§ 440.10(1)(g)*, Defendant Darnell Macon moves to vacate the judgment of conviction finding him guilty of assault under a depraved indifference theory (see, *Penal Law § 120.10 [3]*). The judgment was entered on June 12, 2002, and Defendant is presently serving a term of eighteen years as a result of that conviction.

**Defendant's Motion**

Macon's motion is based upon grounds of "newly discovered evidence," that is, his counsel discovered a witness whose testimony could not have been produced at trial and which is of such character as to create a probability that its admission into evidence would have resulted in a verdict more favorable to Defendant. The new evidence consists of unsworn taped testimony of one Amil Scott, a friend of Defendant, who says that he was the gunman -- not Defendant -- who was depicted in two photographic stills (Defendant Exhibits D and E) taken from a surveillance video of a shootout and introduced into evidence at Macon's trial.

**District Attorney's Response**

In opposition, the District Attorney argues that the motion is meritless and should be denied because: (1) there are no sworn allegations of fact (see, *CPL § 440.30[4][b]*); (2) Defendant failed to show the evidence could not have been produced at trial, and (3) Defendant failed to show that a more favorable verdict would have resulted if the evidence had been presented at trial. In summary, the prosecutor maintains the motion should be denied because it was not made with due diligence after discovery of new evidence (see, *CPL §§ 440.10 [1][g]*).

**Defendant's Reply**

In reply, Defendant demands, *inter alia*, that the Court should not reject Scott's statement upon the grounds that it is unsworn. Special circumstances exist that justify both the delay in submitting the new evidence and the fact that it is unsworn. If the Court requires Scott to be sworn, Defendant suggests a hearing wherein Scott would be sworn before testifing.

**Background**

Darnell Macon is presently incarcerated at Coxsackie Correction Facility in Greene County. Defendant, who was found to have injured two bystanders while engaging in a gunfight at a crowded theater in 2000, was convicted of assault under a depraved indifference theory (see, *Penal Law § 120.10 [3]*). Defendant says he was also convicted at trial of reckless endangerment as a lesser included offense and acquitted of two counts of assault and four counts of criminal possession

of a weapon. The Court (Strauss, J.) sentenced Macon to a maximum term of 18 years imprisonment.[4] Subsequently, the reckless endangerment count was dismissed by the First Department which otherwise affirmed the conviction (see, *People v. Macon, 14 AD3d 413, 788 N.Y.S.2d 103 [1st Dept. 2005]).*

According to Defendant, a crucial part of the trial evidence was a surveillance videotape and photographic stills that the District Attorney alleged showed Defendant at the scene of the crime. Macon claims that the prosecutor used the video and photographs as the sole evidence that Defendant was at the crime scene with a gun in his hand. Throughout the trial, Defendant says, he denied he was the person pictured in the tape and photos.

Seven years after conviction, Defendant's counsel says he uncovered the identity of the person "depicted" in the surveillance tape. According to him, the person located is the real perpetrator who was wrongly identified at trial as Macon. That person is Defendant's friend Scott, who spoke to counsel in 2009, but refused to sign a sworn statement or to be video taped at that time, ostensibly because of fear of possible prosecution.

Defendant attempts to justify his attorney's inability to obtain a sworn statement from Scott by the unusual circumstances under which counsel located Scott. In February 2009, Defendant's fiancee brought Scott to Defendant's attorney's office where Scott explained what happened the night of the shootout. However, as stated, Scott would not sign a sworn statement to that effect.

Subsequently, counsel obtained a copy of the videotape that was introduced into evidence at trial, but could not find Scott until "early" 2010. At that time, Scott admitted on tape that he was the person in the video who was identified as Macon at trial. The unsworn interview was placed on a DVD and submitted with Movant's moving papers (see, Exhibit H). Scott provided specific details concerning the incident's location, his actions, and the identity of others there during his taped interview.

**Legal Discussion**

*Article 440 of the Criminal Procedure Law* sets forth the procedure for post judgment motions. In this article, our legislature provides a framework for the Court to follow in cases where a defendant claims that his/her conviction should be reviewed because of newly discovered evidence. Statutory sections relevant to the instant case:

*CPL § 440.10(1)(g)* (motion to vacate judgment) - provides, in relevant part, that

"(a)t any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

. . . .

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of [*3] guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and 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; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; . . ."

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[4] The Department of Correctional Services' on line records list Macon as being convicted of Assault in the 1st Degree (B) and Criminal Possession of a Weapon in the 2nd Degree ( C ).

*CPL § 440.30(1)* (motion to vacate judgment and to set aside sentence; procedure) - provides, in relevant part, that:

"A motion to vacate a judgment pursuant to *section 440.10* . . . must be made in writing and upon reasonable notice to the people. . . . If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. . . . After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact"; and

*CPL § 440.30(4)* - provides, in relevant part, that:

"4. Upon considering the merits of the motion, the court may deny it without conducting a hearing if: . . . .

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one."

For evidence to be considered "newly-discovered" so as to support a motion to vacate a conviction under *CPL § 440.10 (1)(g)*, the evidence in question must meet six criteria: (1) such as will probably change the result if a new trial is granted; (2) discovered since trial; (3) not discoverable before trial by the exercise of due diligence; (4) material to the issue; (5) not cumulative to the former issue; and (6) not merely impeaching or contradicting the former evidence (see, *People v. Balan, 107 AD2d 811, 484 N.Y.S.2d 648 [2nd Dept. 1985])* (citing *People v. Salemi, 309 NY 208, 128 N.E.2d 377 [1955]* and *People v. Priori, 164 NY 459, 58 N.E. 668, 15 N.Y. Cr. 194 [1900])*

Additionally, the legislature in enacting *CPL § 440.30* requires newly discovered evidence motions to be based upon "sworn allegations" (see, *CPL § 440.30 [1]*) and requires that Defendant prove "essential facts" (see, *CPL § 440.30 [4][b]*) to support a motion by a "preponderance of the evidence" in the event a hearing is held (see, *CPL § 440.30 [6]*).

The Court finds that Defendant fails to meet the criteria set forth in *People v. Balan, supra.*, for newly discovered evidence motions. Defendant failed to carry his burden of proof because he failed to obtain a sworn statement from either Defendant, or more significantly, from the missing witness (Scott). Likewise, because of the lapse of a year from discovery of the new witness, the Court can only conclude that Defendant failed to utilize sufficient due diligence in bringing the instant motion.

On this record, no basis exists for granting relief given the apparent unreliability of Scott's unsworn statement. Even though Defendant's counsel memorialized his interview with Scott on a DVD, he fails to convince the Court that Scott's "admissions" were against Scott's penal interests (see generally, *People v. Johnson, 66 NY2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 [1985]* [admission against penal interest serves the function of an oath]). Further, Defendant fails to adequately explain why he waited more than a year after discovering Scott's identity before moving to vacate the judgment of conviction.

Applying the factors in *People v. Balan, supra.*, the Court finds Defendant fails to persuade that the judgment of conviction

should be overturned. Because the instant motion relies upon the existence of facts and the moving papers do not contain sworn allegations tending to substantiate the alleged facts, the motion must be denied.

As the Court sees it, Defendant's motion to vacate his conviction, pursuant to *CPL 440.10(1)(g)*, is based upon a statement from Defendant's friend who seems to inculpate himself for some actions for which the District Attorney blamed Defendant during the trial. Not only was the statement unsworn (*see CPL 440.30[4][b]*), but it was prepared more than eight years after Defendant's conviction and a decade after the incident. Moreover, the witness' account of the incident in question is less than credible, particularly in light of his disappearance after initially speaking to counsel and only reappearing after the elapse of a year; and he continues to refuse to sign a sworn statement!

Accordingly, the evidence presented is not of such character as to create a probability that had it been received at the trial the verdict would have been more favorable to Defendant (see generally, *People v. Medina, 79 AD3d 909, 912 NYS2d 415 [2nd Dept. 2010]).* Therefore, the Court, exercising its discretion, denies the motion (see generally, *People v. Mendez, 71 A.D.3d 696, 894 N.Y.S.2d 901 [2nd Dept. 2008]).*

**Hearing**

In light of the present record, the Court finds Defendant fails to show sufficient facts exist to entitle him to a hearing upon his motion (see generally, *CPL § 440.30[4][b]*). The Court rejects Defendant's suggestion for a hearing where Scott would be sworn before testifying to satisfy any concern about the reliability of his testimony.

*CPL § 440.30(4) (b)* empowers a Court, upon considering the merits of a motion, to deny it without a hearing where the motion is based upon existence of facts (newly discovered evidence) and the moving papers do not contain sworn allegations tending to substantiate all the essential facts required by *CPL §§ 440.30(1)* and *(4).* Because Scott disappeared for nearly a year, without explanation, after Defendant's counsel first interviewed him, and his statement yet remains unsworn, the Court is unconvinced that Scott's statement contained in the DVD is reliable. Based upon the foregoing and in the exercise of its discretion, the Court determines that a hearing is not justified at this time.

**Conclusion**

Upon this record,[5] the Court finds that Defendant fails to set forth grounds upon which to set aside his conviction. Likewise, Defendant is not entitled to a hearing upon his motion, Accordingly, Defendant's motion in its entirety is denied.

The foregoing constitutes the Decision and Order of this Court.

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[5] In deciding the instant motion, the Court read (1)Defendant's Motion to Vacate Judgment pursuant to *CPL § 440.10(1)(g)* with exhibits; (2) the affirmation in opposition of Allen Saperstein, Esq,, with exhibits, and (3) Reply Affirmation in Support of Motion to Vacate Judgment.

**The People of the State of New York, Plaintiff**

**v.**

**Bernadette Powell, Defendant**

**County Court of New York, Tompkins County**

***Cite As:*** People v. Powell, 424 N.Y.S.2d 626 (N.Y. County Ct. 1980)

**January 15, 1980, Decided**

**OPINION OF THE COURT**

[**627] On August 8, 1978, a Tompkins County Grand Jury returned an indictment against defendant, Bernadette Powell, charging her with the crime of murder in the second degree, in alleged violation of subdivision 1 of *section 125.25 of the Penal Law*. The specification alleged that on or about July 9, 1978, at about 8:00 a.m., at Room 253 of the Holiday Inn in the Village of Lansing, Tompkins County, New York, defendant, Bernadette Powell, with the intent to cause the death of Herman D. Smith, Jr., did cause the death of Herman D. Smith, Jr., by firing one shot into his heart with a .22 caliber revolver. The defendant, under this indictment, came on for trial before the undersigned on March 6, 1979, and on March 22, 1979, at 10 a.m., the jury returned a guilty verdict against defendant of murder in the second degree, as charged in the indictment, an A-1 felony. On June 29, 1979, defendant was sentenced to an indeterminate term of imprisonment of not less than 15 years and not more than her natural life.

Defendant moved to set aside the verdict on the ground of newly discovered evidence based on a theory of "learned helplessness" and to vacate the judgment of conviction on the ground of prosecutorial misconduct.

[**628] A summary of the testimony on the issue of defendant as a "battered wife", the issue of "learned helplessness", and the death of Herman Smith, Jr., would appear to be as follows: Since their divorce about July, 1977, defendant and Herman Smith, Jr., had been getting along fairly well and defendant had not been physically abused since the divorce decree. That, although Herman Smith was a brutal violent person, defendant had no reason to kill him because of his recent behavior. Several Broome County police officers, defendant's Family Court attorney, and other witnesses, testified with respect to incidents which occurred during 1974 through 1977 -- trussing up defendant, breaking into their various homes, and destruction of property, statements of Herman Smith that "he would get" defendant, physical abuse such as grabbing defendant by the collar, kicking and dragging her down a stairway, blows to the head, and other alleged physical abuse, repeated violations of orders of protection of Family Court, Broome County. That defendant was frightened and in shock, had had a rough marriage, with her life threatened by decedent.

Defendant testified to her marriage in 1970 to decedent at age 18, with Trozell, their son, born in 1972. That Herman Smith was uncontrollable when drinking. Defendant referred to threats and assaults as outlined in

the testimony of the witnesses previously noted -- that Herman Smith had "beat her up" on the average of twice a week and she had been confined in several hospitals as a result; that she had divorced Herman Smith as she could not take any more beatings.

Defendant denied ever knowing one Al Smith, who had testified that he had sold her the pistol which caused the death of Herman Smith. She also denied making any statements as testified to by Diane Nelson, and others, to the effect that she wanted to kill Herman Smith and that she had wanted to get some acid to injure him.

With respect to the incidents at the time of death of Herman Smith: On the night in question, defendant had gone to Binghamton, New York, to get her son, Trozell, who had been with Herman Smith, his father. Defendant was living at Owego, New York, at the time, with employment at the IBM Corporation. When defendant got to Binghamton, Herman Smith was playing cards at a residence on Yeager Street, with some apparent drinking. All three then went to the apartment of Herman Smith -- decedent and son, Trozell, in his van, and defendant in her truck. They had talked at the apartment for a while about some police reports. Decedent wanted to return to Ithaca, New York, with defendant and their son, and said he would return to Binghamton by bus. Defendant had stated to Herman Smith that she no longer lived in Ithaca. They all left in defendant's truck with Herman Smith driving. On reaching New York Route 96, he had pulled out a revolver. That they had driven around for a while, stopping at several places in search of a room, which included several stops in Elmira, New York. At one stop in Elmira, at a taxi stand, defendant was crying and decedent had warned her "not to run". From Elmira, they had then proceeded to Ithaca, where they first stopped at defendant's old apartment where decedent made defendant get out, still holding the gun, while he checked the apartment to ascertain if defendant still lived there. They had then proceeded to the Holiday Inn at Lansing, New York, where decedent obtained a room. Herman Smith had carried their son into the motel and had ordered defendant to walk ahead of him to their second floor room in the motel.

The gun had been apparent at all times and on arriving at the Holiday Inn, decedent had said, "Don't try anything -- you can't run from a bullet". On entering the room defendant was ordered to sit in a corner chair. Their son went to sleep in one of the beds in the room. After a while, decedent kicked off his shoes, got on the other bed in the room, and told defendant to lay on the bed with him.

When decedent began to snore, defendant testified that she waited a few minutes, lying on her right side with her back to [**629] decedent; she testified that she had then leaned back, had turned toward Herman Smith, had seen the revolver and was scared. That she had then laid on her back and had reached for the gun. She says that decedent then jumped up and the revolver went off. She then tried to phone for help, banged on some doors, and finally went to the motel office where she had stated that a man was shot. After an ambulance was called, she had returned to the room with a man from the motel. Defendant and son then went to another room where she remained until contacted by State Police Investigator Eisenberg.

On cross-examination, defendant testified that the revolver just went off, that she had never had a gun in her hand before; that Herman Smith's head and shoulders were off the pillow just before the shot and his waist was down on the bed; that she had taken the revolver from his belt; that on the trip to Ithaca, Herman Smith had the gun in his right hand and drove with his left hand.

There was some evidence in the People's case relating to the proximity of the revolver to the body of Herman Smith at the time of its discharge.

Defendant alleges, on her motion pursuant to *CPL 440.10* (subd 1, pars [f], [g]) that a full evidentiary hearing is required on the grounds, *inter alia*: Under paragraph (f) of subdivision 1: "Improper and prejudicial conduct not appearing in the record occurred during trial" alleging that the District Attorney in this case engaged in prosecutorial misconduct in asking questions of defendant with respect to matters upon which he had no good faith basis, that the personal life of the District Attorney placed him in a conflict of interest situation requiring him to recuse himself from prosecution of this indictment.

Under paragraph (g) of subdivision 1: "New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial".

Defendant here asserts the existence of newly discovered evidence consisting of testimony of Dr. Lenore Walker and Dr. Clara Mayo, as contained in affidavit form: The expert opinion of Dr. Walker on the theory of "learned helplessness", as applied to the "battered woman", e.g., the battered woman syndrome; and expert opinion of Dr. Mayo on the prevalence of inaccurate and dangerous myths and stereotypes, as allegedly utilized by the District Attorney in his cross-examination of defendant and in his summation to the jury. In support of these contentions, as newly discovered evidence, defendant submits the affidavit of Dirk Galbraith, Esq., defendant's trial counsel, that he had no knowledge of the defense of learned helplessness and no knowledge of the conflict of interest of the District Attorney.

The pivotal issue before this court concerns whether the alleged evidence, submitted by the defendant as part of her motion under *CPL 440.10* (subd 1, par [g]), is newly discovered evidence as that term is defined by the New York courts in interpreting the statutory authorization of article 440. The power to grant an order for a new trial, based upon newly discovered evidence, is purely statutory and such power may be exercised by the court only when the requirements of the statute have been satisfied, the determination of which rests in the sound discretion of the court. *(People v Wagner, 51 AD2d 186*.)

In *People v Salemi (309 NY 208, 215)*, the Court of Appeals sets forth the criteria which must be satisfied to meet the newly discovered evidence standard of the statute. The decision of the Court of Appeals was rendered under section 465 of the Code of Criminal Procedure, which is substantially identical with *CPL 440.10* (subd 1, par [g]). *(People v Maynard, supra, p 283*.) In *Salemi*, the court stated (pp 215-216): [**630] "The test thus enunciated was long ago approved in this court, and since followed -- viz: that 'Newly-discovered evidence in order to be sufficient must fulfill all the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting the former evidence.' *(People v. Priori, 164 N. Y. 459, 472*) On this record these criteria are not satisfied."

The question then becomes whether the expert testimony, relating to defendant's alleged status as a battered woman, and the claim of defendant of the prosecutor's exploitation of unfounded myths and stereotypes concerning battered woman, are sufficient to constitute newly discovered evidence under the six criteria noted above. It is to be noted that there

is no newly discovered evidence relating to any psychiatric report.

The motion to vacate the judgment of conviction of murder in the second degree is predicated upon a psychiatric theory of defense. As aforestated, under paragraph 9 of his affidavit of September 5, 1979, Attorney Martin Stolar refers to the attached resume of Dr. Lenore E. Walker, which is identified as new evidence to be offered by defendant covering the battered wife syndrome of "learned helplessness". "Learned helplessness" is identified by defendant as a recently documented theory which explains the psychological paralysis that maintains the victim status of the battered wife, and that it refutes the major theory of the prosecution's case that defendant is guilty of murder because she did not attempt to escape from Herman Smith, her gun-carrying former husband, the night of the homicide. Attorney Stolar contends that this theory is new evidence and goes directly to the question of guilt or innocence of defendant on the charge of intentional murder, and that it offers a substantial likelihood that the verdict of the jury on retrial would be to a lesser degree of criminal homicide.

In her eight-page affidavit in support of defendant's motion, Dr. Lenore Walker states that she has reviewed a partial transcript of the trial and a summary of the testimony of the trial as a whole. Dr. Walker refers to the theory of learned helplessness and the cycle theory of violence as providing a scientifically based explanation for understanding why defendant did not try to escape; that the said behavior of defendant is classically symptomatic of the behavior of battered women in similar circumstances. Dr. Walker indicated that the statements and implications that defendant voluntarily remained and enjoyed the violence of Herman Smith irrevocably damaged the credibility and theory of defense of defendant. Dr. Walker also states: "When someone becomes prey to the psychological condition of learned helplessness, it distorts their feelings, beliefs and behavior so that they react as though they do not have the ability to control what happens to them"; that a battered woman does not like the beatings but likes the loving behavior which occurs after the beating and she becomes submissive and passive. The basic theory of Dr. Walker's testimony, submitted as "newly discovered evidence", seems to be self-defense. In paragraph 7 of her affidavit, Dr. Walker states as follows: "Bernadette Powell's testimony indicates her behavior was similar to other battered women who have killed their batterers in *self-defense* and the battered women's reaction to disbelieve the seriousness of the man's injury *when they strike back in self-defense*". As will appear *infra*, this court does not consider the theory of self-defense, under the battered woman syndrome, as newly discovered evidence. Dr. Walker asserts that the theory of "learned helplessness" and its social/scientific basis is a relatively recent development which did not become generally available until the publication [**631] of her book, "The Battered Woman", published in January, 1979.

While the notion of a "battered woman syndrome" or "learned helplessness" may constitute a unique or novel idea within the scope of a "newly discovered theory of defense", it is difficult for this court to consider a new theory of defense as ground for reversing a properly conducted and judicially determined verdict. Here the issue of Bernadette Powell, as a battered wife, was in evidence and was an issue before the jury for consideration under the charge of the court which included, *inter alia*, the defense of justification under *article 35 of the Penal Law*.

It is the opinion of this court that the defenses available to a battered woman, when charged with a criminal homicide, are already provided for under New York law. The

prospective newly discovered evidence testimony of Dr. Walker would appear to be the defense of justification. It may be that she is asserting the battered woman syndrome under the need for more lenient laws of self-defense where battered women are concerned, such as a jury charge of woman's perspective of her perception of danger.

The court has reviewed the battered woman syndrome theories of Dr. Walker as they may relate to other issues which arise in the framework of criminal homicides such as the defenses of mental disease or defect (*Penal Law, § 30.05*); and the affirmative defense of "extreme emotional disturbance", an affirmative defense to murder, second degree. (*Penal Law, § 125.25*.)

It would seem to this court that "battered woman syndrome" and "learned helplessness" as a defense to assaultive or homicidal behavior, if not within the justification defense of *article 35 of the Penal Law*, are within the purpose and pattern of the affirmative defense of extreme emotional disturbance, as explained by the Court of Appeals in *People v Patterson (39 NY2d 288, 297-302)*.

In the instant case, this affirmative defense of extreme emotional disturbance, and self-defense under justification, were charged by the court and explained to the jury. The court also charged lesser included homicide counts of manslaughter, first degree, and criminally negligent homicide (*Penal Law, §§ 125.10, 125.15, 125.20*). The emotional trauma affecting the conduct of the defendant was before the jury. As to the psychological defense of "battered woman" and "learned helplessness", it is this court's opinion that the affirmative defense of extreme emotional disturbance represents the psychological boundary available to battered women under New York law. The Court of Appeals in *Patterson* (at p 303) explained extreme emotional disturbance as representative of the tremendous advances made in psychology and a willingness on the part of the public and the courts and the legislators to reduce the level of criminal responsibility of a defendant upon proof of mitigating circumstances which render his conduct less blameworthy. *(People v Lyttle, 95 Misc 2d 879, 884*.)

The court finds that the expert testimony sought to be elicited would not change the result if a new trial were granted. The court finds that the proposed testimony of Dr. Walker does not add anything to defendant's defense in that defendant has already given the jury her history as a battered woman in the context of self-defense and accident. The court finds that the argument of defendant that the use of the alleged female myths by the prosecutor did not destroy defendant's credibility before the jury, in that the jury rejected any claim of self-defense on the facts. The defendant's credibility may have been rejected by the jury on her denial of familiarity with the murder weapon when considered against the conflicts with the testimony of the numerous witnesses concerning the gun.

The general rule is that evidence which would merely tend to impeach or discredit the prior testimony of a witness is not such new evidence as to set aside the judgment of conviction. *( People v Salemi,* [**632] *309 NY 208, supra*.) Significantly, the expert opinion of Dr. Lenore Walker, in its relationship to establishing the credibility by expert opinion and not on any factual basis, would in effect constitute impeachment or discredit of the direct testimony of numerous witnesses, for example, concerning knowledge of defendant of the alleged murder weapon.

The defendant has cited *Ibn-Tamas v United States* (DC, C A, 1979) and provided the court with the entire opinion of the appeals court. This case was remanded for further

proceeding on the basis of possible error of the trial court in excluding testimony of Dr. Lenore Walker as a defense expert on battered women. The defense offered her testimony to describe the "phenomena of wife battery" and to help the jury appraise the credibility of the wife on her contention that she perceived herself in such imminent danger that she shot her husband in self-defense. There the reversal related to possible error in not receiving the testimony of Dr. Walker at the trial. The admissibility of evidence at trial and newly discovered evidence to set aside the verdict of a jury, under the six criteria established in *People v Salemi (supra)* present entirely different issues. Defense counsel in *Ibn-Tamas* explained Dr. Walker's testimony as "providing background data that the trier of fact can use in making the ultimate determination".

As concerns the alleged prosecutorial misconduct, sought to be addressed under *CPL 440.10* (subd 1, par [f]), this court is of the opinion that the District Attorney's personal life did not affect his performance as an officer of this court and any cross-examination concerning female myths (such as defendant's potential enjoyment in being beaten by deceased), considered with all the evidence in the case, constituted harmless error. Also, any alleged misconduct on the part of the District Attorney is within the scope of *CPL 440.10* (subd 2, par [b]) for the judgment of conviction is still appealable and the trial record can provide adequate review on this issue. The court finds that the opinion of Dr. Clara Mayo, as a social psychologist, with respect to the alleged myths set forth at length in her affidavit, are irrelevant and inadmissible in evidence as not competent to interpret the evidence. Further, it can be argued that the District Attorney had a duty to inquire into defendant's attitudes toward the beatings to apprise the jury on defendant's status as a battered woman and to elicit whether defendant provoked the aggressions of Herman Smith.

The motion of defendant to set aside the verdict of guilty is basically a motion based upon expert opinion evidence. The court has examined the supporting affidavits of Dr. Lenore Walker and Dr. Clara Mayo, and finds that the motion is determinable without a hearing in that a hearing is not necessary to resolve any questions of fact. Accordingly, the court in its discretion denies a hearing pursuant to *CPL 440.30* (subds 2, 4). *(People v Crimmins, 38 NY2d 407, 416*.)

The rule of newly discovered evidence sets the strict criteria that new evidence must be of such character as to create the probability it would have resulted in a more favorable verdict. *(People v Maynard, 80 Misc 2d 279, 284, supra.)*

It must have been discovered since the trial. As previously discussed, the court finds that material contained in the affidavits of Dr. Walker and Dr. Mayo does not meet the requirements of newly discovered evidence. It would not result in a more favorable verdict. As to its discovery, it is the opinion and finding of the court that the defendant, as a battered woman, was known and considered by the jury in reaching its verdict. It would be cumulative to the issue previously considered. (*CPL 440.30, subd 7*.)

The motion for a new trial, pursuant to *CPL 440.10* (subd 1, [**633] par [f]) and *CPL 440.10* (subd 1, par [g]) is denied in all respects. *( People v Salemi, 309 NY 208, supra*; *CPL 440.30, subd 4*.)