

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

THE PEOPLE OF THE STATE OF NEW YORK

-against-

WAYNE GARDINE

Defendant.

PEOPLE'S AFFIRMATION
AND RESPONSE TO
DEFENDANT'S MOTION
TO VACATE JUDGMENT

Indictment No. 9946/94

Jenna Dunton, Esq., an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in the New York County District Attorney's Office ("DANY") and am familiar with the facts and circumstances of the above-captioned matter.
2. The People join defense counsel in the motion to vacate Wayne Gardine's conviction under Indictment No. 9946/94 pursuant to C.P.L. § 440.10(1)(g), and in requesting that the underlying indictment be dismissed pursuant to C.P.L. §§ 210.20 and 210.40.¹
3. Defense counsel's affirmation sets forth the underlying facts of the crime, which are not in dispute. As the defense describes, this was a single-witness identification case where the witness ("N.S.") viewed the crime on a dark street. The witness provided several different accounts of the distance from which he observed the crime. Some of those distances would have made viewing the perpetrator all but impossible.
4. Given the single witness's account, the new witness, N.V.'s, statements are critical. N.V., who according to contemporaneous police reports and N.S.'s trial testimony, was next to N.S at the time of the shooting, now says that neither could have seen the crime and that both accused Mr. Gardine,

¹ The People write separately to make clear that while we join in the motion for relief, we do not necessarily endorse every fact as alleged in defense counsel's affirmation. *See People v. Gruden*, 42 N.Y.2d 214, 215 (1977).

despite not seeing him. N.V.'s statement that he and N.S. were not close enough to see the shooter's face or otherwise identify the shooter, given to the Legal Aid Society and in his two interviews with DANY, constitutes newly discovered evidence and creates a reasonable probability of a more favorable outcome.

5. The People agree with the Legal Aid Society's representation of N.S.'s varying statements in this case about his opportunity to observe. The People also acknowledge that the lead detective assigned to this investigation stated that he no longer stands by his work in this case.

6. "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 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 Salemi, 309 NY 208, 215–16 (1955).

7. Here, the People agree that N.V.'s statements satisfy the *Salemi* factors:

(1) *N.V.'s statements create a reasonable probability of a more favorable outcome.* N.V.'s statements undermine the testimony of N.S., which was the only evidence implicating Wayne Gardine as the shooter at his trial.

(2) *N.V.'s statements were discovered since trial.* N.V. refused to give a sworn statement to defense counsel or speak to the People about this case until October 2022.

(3) *N.V.'s statements could not have been discovered at the time of trial.* N.V., a minor at the time, refused to talk to the trial ADA or testify at trial. Trial defense counsel requested he be made available, and the People were unable to produce him. Nor could these statements have been uncovered earlier, even with due diligence. As the defense explains in its affirmation, N.V. avoided multiple diligent attempts from both sides to give information in this case.

(4) *N.V.'s statements are material.* N.S.'s identification of Wayne Gardine was the only evidence establishing Mr. Gardine as the shooter at trial, rendering any evidence undermining his testimony material.

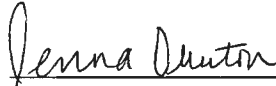
(5) *N.V.'s statements are not cumulative.* N.V.'s statements directly challenge the testimony of the only witness against Mr. Gardine at trial.

(6) *N.V.'s statements are not merely impeaching.* In addition to completely undermining N.S.'s testimony, N.V. provides a motivation for N.S. to testify falsely at trial.

8. The People also request that the underlying indictment be dismissed pursuant to C.P.L. §§ 210.20 and 210.40, in the interest of justice and because the People cannot now prove the case beyond a reasonable doubt. Mr. Gardine has served his entire sentence, and any re-trial would not only be nearly-impossible to prove but also unjust.

WHEREFORE, the People respectfully request that this Court grant the joint motion to vacate Wayne Gardine's convictions and sentence as to Indictment No. 9946/1994 pursuant to C.P.L. § 440.10 (1)(g) and enter an order vacating his convictions and sentence imposed under that indictment. And upon vacatur of the conviction, the People further ask the Court to dismiss Indictment No. 9946/1994.

Dated: New York, New York
November 14, 2023



Jenna Dunton
Assistant District Attorney
212-335-3804