

The National Registry of EXONERATIONS

A JOINT PROJECT OF MICHIGAN LAW & NORTHWESTERN LAW

CURRENTLY 1,246 EXONERATIONS


[BROWSE CASES](#) ▾ [ABOUT US](#) ▾ [CONTACT US](#) [LEARN MORE](#) [RESOURCES](#)

Follow NLE



Derrick Deacon

On April 1, 1989, 16-year-old Anthony Wynn was fatally shot in the hallway of an apartment building in the Flatbush neighborhood of Brooklyn, New York.

A resident of the building who saw the gunman flee described him as about 19 years old and 5 feet, 7 inches tall. After a few days, police had no leads, so they distributed flyers in the neighborhood asking that anyone with information call Crime Stoppers and leave a message. On April 6, Abdullah Pickering, another resident of the building where the shooting occurred, called the tip line and implicated Derrick Deacon, a Jamaican immigrant with a crack cocaine addiction who was known by residents of the building because he did odd jobs for them and for the building superintendent.

At 34 years of age and standing 6 feet tall, Deacon did not fit the physical description of the perpetrator. Nonetheless, he was arrested on April 7, 1989 and charged with second degree murder, first degree robbery and criminal possession of a weapon.

Deacon went on trial in December 1989 in Kings County Supreme Court. Pickering testified that he saw Deacon argue with Wynn and yank a chain from Wynn's neck. Pickering then heard gunfire.

The woman who provided the initial physical description was called as a defense witness and was expected to testify that Deacon was not the gunman, but on the witness stand, she hedged and said she wasn't sure whether Deacon shot Wynn.

Deacon testified on his own behalf and denied involvement in the crime. He said that he was in another building at the time of the shooting.

In December 1989, a jury convicted Deacon and he was sentenced to 25 years to life in prison. Pickering later collected a \$1,000 Crime Stoppers reward.

In 2001, federal authorities were investigating a violent Jamaican gang known as the Patio Crew, which controlled the section of Flatbush where the murder occurred. A man named Trevor Brown became a cooperating witness in the investigation and told federal prosecutors that Deacon was not Wynn's killer. Brown, in an interview with a federal prosecutor, two federal agents and a New York City police detective, said Wynn had been murdered by a member of the Patio Crew known as Pablo who was later deported to Jamaica.

None of the law enforcement officials at that meeting notified Deacon of Brown's statement. Instead, three years later, another member of the Patio Crew, Emile Dixon, who had been convicted of federal charges, found a copy of Brown's statement in his file. Dixon sent the statement to a relative and asked that the statement be sent to Deacon.

State:	New York
County:	Kings
Most Serious Crime:	Murder
Additional Convictions:	Robbery, Gun Possession or Sale
Reported Crime Date:	1989
Convicted:	1989
Exonerated:	2013
Sentence:	25 to life
Race:	Black
Sex:	Male
Age:	34
Contributing Factors:	Perjury or False Accusation, Official Misconduct
Did DNA evidence contribute to the exoneration?:	No

In 2007, Glenn Garber and Rebecca Freedman, attorneys at the Exoneration Initiative, a New York innocence project, took on Deacon's case and began a six-year battle to prove Deacon's innocence. In 2008, they filed a motion for a new trial. Brooklyn prosecutors opposed the motion, arguing in part that Deacon's motion was filed too late and that the evidence of Deacon's guilt was overwhelming.

In 2009, a hearing was held on the motion for a new trial, during which Brown testified that Pablo admitted killing Wynn. Brown said, "Pablo told me that when he pulled the gun on Wynn, Wynn did not back down. Pablo said that he then shot Wynn."

The woman who gave the initial physical description also testified and said that she had been pressured by law enforcement to give "vague" testimony at Deacon's trial, even though she knew Deacon looked nothing like the man she saw on the night of the crime. In an affidavit, the woman said, "I was fearful of the real perpetrator and others who may have been associated with him. Being noncommittal about (Deacon) seemed to be the safest and easiest approach at the time." The woman said she was threatened with loss of her children if she did not cooperate.

Deacon's motion was denied. But in June 2012, the Appellate Division of the New York State Supreme Court reversed and vacated Deacon's conviction. The court held that "the likely cumulative effect of the newly discovered evidence and the recantation testimony established a reasonable probability that the result of a new trial would be a verdict more favorable to the defendant."

Deacon went on trial a second time in November 2013. Pickering again testified to seeing Deacon grab a chain from Wynn and hearing gunshots. He admitted had collected a \$1,000 reward for his testimony.

The woman who had given the initial description told the jury that Deacon was not the gunman and that she falsely hedged at Deacon's first trial on whether he was the gunman.

Brown testified that Pablo and two other Patio Crew members knew that Wynn was going to a particular apartment to purchase narcotics and they intended to rob him of his cash before the drug purchase. When Wynn resisted, Pablo shot him, Brown testified.

On November 18, 2013, the jury deliberated nine minutes before acquitting Deacon.

- Maurice Possley

[Report an error or add more information about this case.](#)

CONTACT US

We welcome new information from any source about the exonerations that are already on our list and about new cases that might be exonerations. And we will be happy to respond to

ABOUT THE REGISTRY

The National Registry of Exonerations is a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at

inquiries about the Registry.

- + [Tell us about an exoneration that we may have missed](#)
- + [Correct an error or add information about an exoneration on our list](#)
- + [Other information about the Registry](#)



Northwestern University School of Law.

Follow Us:

Copyright 2012. All rights reserved.



HOME NEWS BUSINESS SPORT LIFESTYLE ALL WOMAN REGIONAL ENTERTAINMENT VIDEO PHOTOS CLASSIFIEDS

Editorial | Columns | Career | Food | Teenage | Letters | Auto | Clovis Toons | Page2 | E-Paper | Supplements | One Stop Drive | Search

ELECTRICITY THEFT: IS IT WORTH IT?
658 persons arrested for electricity theft so far this year

Report Theft: 292-7483 or
stoptheft@jpsco.com



LATEST NEWS: St Elizabeth man pleads guilty to lottery scamming charges 6:44 PM

UPDATE: Over 50 students collapse after mosquito fogging at Ocho Rios High School 6:19 PM

Haiti/Jamaica relations expected to strengthen -- Govt 6:12 PM

[More stories...](#)

LATEST NEWS

Jury acquits Jamaican man of murder 24 years after imprisonment

Tuesday, November 19, 2013 | 11:26 AM



NEW YORK (CMC) - A jury has acquitted a Jamaican man who has been imprisoned in the United States for 24 years on a charge of murder.

The jury took only nine minutes to finally clear Derrick Deacon, 58, who was convicted in 1989 in the shooting death of Anthony Wynn during a robbery in a Flatbush, Brooklyn apartment complex.



1/1



Deacon, who had always denied the charge, was granted a new trial in 2012 after someone cooperating with the Federal Bureau of Investigation identified a different man as the gunman.

Another witness also recanted her testimony.

"There was no case," said the jury after reading the new verdict. "There was

OTHER STORIES

Row in House over accrediting tax beneficiaries

Arthur Williams injunction application to be heard today

[1 comment](#)

Fenton Ferguson calls for more action against crime in St Thomas

[5 Comments](#)

No morning classes at Ocho Rios High School

Exporters urged to seek new opportunities

Probe ordered into alleged police killing of 17-y-o boy

Trinidad beat Jamaica again

[3 Comments](#)

And now there are 8: Tessanne still safe

[2 Comments](#)

Venezuela congress gives decree powers to President Maduro

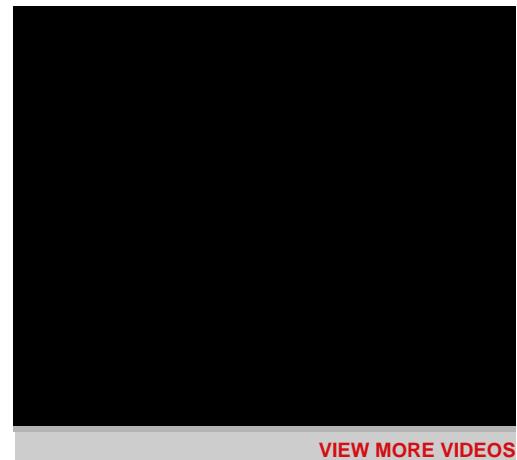
[1 comment](#)

Ronaldo's hat trick

▼ advertisement



Video



[VIEW MORE VIDEOS](#)

▼ advertisement

never a shred of evidence against Derrick Deacon. Why did they try him a second time if he's been in jail for 24 years?"

Deacon, who had always insisted he was not near the scene of the crime, cried when the jury found him not guilty of the April 1989 slaying and robbery of Wynn.

Deacon was first convicted based on testimony from a single eyewitness who received US\$1,000 from a Crime Stoppers hotline.

But in 2001, an FBI informant spilled on an unrelated Jamaican drug gang, the Patio Crew, and mentioned that someone named "Pablo" confessed to him minutes after Wynn was shot dead, saying he killed the potential cocaine buyer in a botched robbery, according to the New York Daily News.

It took years until that information was sent to Deacon, the paper said.

In 2009, a judge heard from the drug dealer and from a defence witness who said that she saw someone other than Deacon fleeing the scene but had given a vague testimony in the first trial after getting threatened by law enforcement.

The Daily News reported that investigators confirmed her account in a lie detector test but told her to hedge on the stand or her children would be taken away.

Justice Albert Tomei still denied a request to set the verdict aside, but an Appeals Court panel reversed that decision in June 2012 and jurors heard from all three witnesses during the retrial.

"I think they firmly believed in our client's innocence," said Glenn Garber, director of the Exoneration Initiative, a legal team that had taken up Deacon's case.

"For 25 years, this man has suffered under a cloud of lies," he told jurors in closing arguments, adding "finally, please, set the record straight".

Deacon is being held by immigration authorities, but his lawyer said he expected him to be released on bail within a week.

Like our Facebook page <https://www.facebook.com/jamaicaobserver>

Follow us on Twitter <https://twitter.com/JamaicaObserver>

Navy Veteran Search

[VetFriends.com](#)

Instant Online Veteran Search. A
Veteran Site w +1.5 million members



sends Portugal to World Cup

22-y-o US man fatally shoots 19-month-old daughter, self

[5 Comments](#)

98-y-o Thomas Bennett of St Mary missing

St Elizabeth man pleads guilty to lottery scamming charges

[1 comment](#)

UPDATE: Over 50 students collapse after mosquito fogging at Ocho Rios High School

[4 Comments](#)

Haiti/Jamaica relations expected to strengthen -- Govt

Supreme Ventures to extend sales time by an hour

Arthur Williams files injunction against Holness

[6 Comments](#)

Road works to affect Mount Rosser traffic starting Sunday

Forex: J\$105.76 to one US dollar

[1 comment](#)

VIDEO: Samuda takes aim at Mark Wignall

[4 Comments](#)

Outsource Your Tax, Payroll and Human Resources Functions to Us & SAVE MONEY \$\$\$

Today's Cartoon



[View Previous Cartoons](#)

▼ advertisement

We are **IUC** International University of the Caribbean



POST A COMMENT

HOUSE RULES

1. We welcome reader comments on the top stories of the day. Some comments may be republished on the website or in the newspaper – email addresses will not be published.
2. Please understand that comments are moderated and it is not always possible to publish all that have been submitted. We will, however, try to publish comments that are representative of all received.
3. We ask that comments are civil and free of libellous or hateful material. Also please stick to the topic under discussion.
4. Please do not write in block capitals since this makes your comment hard to read.
5. Please don't use the comments to advertise. However, our advertising department can be more than accommodating if emailed: advertising@jamaicaobserver.com.
6. If readers wish to report offensive comments, suggest a correction or share a story then please email: community@jamaicaobserver.com.
7. Lastly, read our [Terms and Conditions](#) and [Privacy Policy](#)

comments powered by [Disqus](#)

LEARN HUNDREDS OF THINGS ABOUT YOUR HEALTH

Get your DNA kit for \$99



HOME
NEWS
BUSINESS
SPORTS
LIFESTYLE
TEENAGE
REGIONAL
ENTERTAINMENT
ENVIRONMENT
AUTO
ADVERTISING

Editorial
Columns
Career
Food
All Woman
Letters
E-Paper
Weather

A-Z
 RSS Feeds
Contact Us
Feedback
Privacy Policy
Site Map
Terms and
Conditions
Mobile Observer



Copyright© 2000-2001 Jamaica Observer. All Rights Reserved.
Terms under which this service is provided to you.

New Trial in Non-DNA Case in New York on Grounds of Possible Innocence...

Posted on [June 21, 2012](#) by [Mark Godsey](#) | [Leave a comment](#)

The Exoneration Initiative reported yesterday that the Appellate Division in New York granted a new trial to Derrick Deacon based on post-conviction newly discovered evidence. Derrick has now served 23 years for a homicide he did not commit.

In reversing the hearing court's denial of relief, the Appellate Division found the recantation of a key trial witness to be "credible and compelling," despite the hearing court's opinion to the contrary. It also considered a declaration against penal interest by the true killer. The decision, attached [here](#), is significant for non-DNA litigants because it stresses the cumulative impact of multiple pieces of evidence of innocence.

An article about the case from last week is available [here](#)....

Share this:

[Facebook 2](#)

[Email](#)

[Twitter](#)

This entry was posted in [Recantations](#). Bookmark the [permalink](#).

Theme: Customized Coraline by Automattic. [Blog at WordPress.com.](#)

The New York Times

MIA
WASIKOWSKA

June 21, 2012

Imprisoned Over 20 Years, Brooklyn Man Gets Retrial

By MOSI SECRET

After spending more than two decades in prison saying he was not guilty of murder, a Brooklyn man won a new trial this week after an appellate court vacated his conviction based on evidence that another man might have committed the crime and that a key trial witness had recanted her testimony.

The ruling followed four years of legal wrangling by the man, Derrick Deacon, 57, who was convicted in 1989 of robbing and shooting to death Anthony Wynn in the hallway of an apartment building in the Flatbush section of Brooklyn.

Glenn A. Garber, director of the Exoneration Initiative, a nonprofit group that represents people convicted of crimes who say they are innocent and has handled Mr. Deacon's case, celebrated the decision. "We're thrilled. Deacon has suffered a long time," he said. "We're hoping that the state is not going to retry him and if they do, we think he is going to get acquitted."

A spokesman from the Brooklyn district attorney's office said the office was reviewing the case.

Though Mr. Deacon argued he was elsewhere at the time of the murder, he was convicted based largely on the testimony of a superintendent in the building who said that he had seen Mr. Deacon arguing with the victim moments before the attack. But in 2001, a man named Trevor Brown became a cooperating witness in an unrelated federal investigation of the Patio Crew, a violent Jamaican gang that controlled the neighborhood where the murder happened. In the course of the investigation, Mr. Brown told members of the Federal Bureau of Investigation that another member of the Patio Crew, a man known as Pablo, actually killed Mr. Wynn.

Mr. Deacon, serving time in prison in central New York, did not learn about Mr. Brown's statements until years later when Emile Dixon, the leader of the Patio Crew who was

convicted as a result of the federal investigation, noticed a record of Mr. Brown's statements in his own court file. He sent the document to Mr. Deacon.

"After the murder, people who later became known as the Patio Crew and other people who lived in the area openly acknowledged Fire's mistaken arrest for the Wynn murder," Mr.

Brown later wrote in an affidavit, referring to Mr. Deacon, who was known as Fire.

"However, nobody dared inform the authorities for fear that Pablo's implication would cause Pablo and people associated with him to take revenge."

Mr. Deacon filed a motion for his release based on the new evidence, which was rejected by a state supreme court judge after a special hearing.

Among those to testify at that hearing, in June 2009, was Colleen Campbell, a witness at the original trial whom defense lawyers had expected to say that the man she had seen flee the scene of the murder with a gun was not Mr. Deacon but who hedged on the stand and said she could not be sure. At the new hearing, she said she had been pressured by the police or prosecutors to provide "vague" testimony at trial and that the man she saw looked nothing like Mr. Deacon. "I was fearful of the real perpetrator and others who may have been associated with him," she said in an affidavit filed as part of the motion. "Being noncommittal about Fire seemed to be the safest and easiest approach at the time."

On Wednesday, the state court of appeals rejected the previous ruling and ordered that Mr. Deacon receive a new trial. "We find that the likely cumulative effect of the newly discovered evidence and the recantation testimony established a reasonable probability that the result of a new trial would be a verdict more favorable to the defendant," the court wrote in its ruling.

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

D35298
W/kmb

____AD3d____

Argued - January 13, 2012

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2009-11331

DECISION & ORDER

The People, etc., respondent,
v Derrick Deacon, appellant.

(Ind. No. 4919/89)

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, N.Y. (Roberto Finzi, Ilana D. Waxman, Andree Goldsmith, and Jane B. O'Brien of counsel), and Stillman, Friedman & Shechtman, P.C., New York, N.Y. (Sarah K. Jackel of counsel), for appellant (one brief filed).

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Lori Glachman of counsel), for respondent.

Glenn A. Garber and Rebecca E. Freedman, New York, N.Y., for amicus curiae Exoneration Initiative (one brief filed).

Appeal by the defendant, by permission, from an order of the Supreme Court, Kings County (Tomei, J.), dated November 9, 2009, which, after a hearing, denied his motion pursuant to CPL 440.10 to vacate a judgment of the same court rendered January 12, 1990, convicting him of murder in the second degree (two counts), robbery in the first degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence, and for a new trial, on the ground of newly discovered evidence or, in the alternative, to vacate the judgment and dismiss the indictment on the ground of actual innocence.

ORDERED that the order is modified, on the law, on the facts, and in the exercise of discretion, by deleting the provision thereof denying that branch of the defendant's motion which was pursuant to CPL 440.10(1)(g) to vacate the judgment of conviction on the ground of newly discovered evidence and for a new trial, and substituting therefor a provision granting that branch

June 20, 2012

Page 1.

PEOPLE v DEACON, DERRICK

of the motion; as so modified, the order is affirmed, the judgment is vacated, and a new trial is ordered.

On April 1, 1989, Anthony Wynn was robbed and shot dead in the hallway of a Flatbush apartment building. In connection therewith, the defendant was charged with two counts of murder in the second degree, as well as robbery in the first degree, criminal possession of a weapon in the second degree, and criminal possession of a concealed weapon in the third degree. The defendant was tried before a jury in December 1989. At trial, Colleen Campbell, a witness who had seen the fleeing assailant, testified pursuant to a subpoena served by the defense. During the police investigation, Campbell had described the assailant as approximately 19 years old and approximately 5' 7" tall. The defendant is six feet tall, and, at the time of this incident, was 34 years old. At trial, Campbell testified that while she knew the defendant for “[a]bout three years or more,” she could not tell whether the defendant was the person she saw fleeing. Campbell testified that she had “barely glimpsed the person, [and] didn’t look” because “she was scared.” The defendant was convicted of two counts of murder in the second degree, robbery in the first degree, and criminal possession of a weapon in the second degree. The defendant remains incarcerated.

In 2008, the defendant moved to vacate the judgment pursuant to CPL 440.10, seeking a new trial pursuant to CPL 440.10(1)(g), or to vacate the judgment based on actual innocence. In support of the motion, the defendant submitted affidavits from Trevor Brown and Colleen Campbell.

According to his affidavit, in 2001, Brown became a “key cooperating witness” in a federal investigation of the activities of the “Patio Crew,” a “violent Jamaican gang that controlled” the Flatbush neighborhood where the homicide occurred, and had testified against Emile Dixon, the “leader” of the Patio Crew. Defense counsel asserted that, in the course of an investigation of Dixon and other Patio Crew members by the Federal Bureau of Investigation, “Brown [had] told federal authorities during a June 2001 proffer session that another member of the Patio Crew, Paul Gary Watson, a.k.a. ‘Pablo,’ committed the murder of Anthony Wynn for which the defendant was wrongfully convicted.” According to the defendant’s counsel, Brown “state[d] that he was present when Watson planned to rob Wynn and that Watson returned to Brown’s apartment immediately after the murder where Watson confessed to Brown that he killed Wynn . . . in the course of the planned robbery.” The defendant’s counsel argued that “Watson, unlike [the defendant], matches the description provided to the police on the day of the murder by Colleen Campbell . . . who saw the assailant run past her moments after the occurrence.”

Campbell stated in her affidavit that the defendant was not the fleeing assailant whom she had seen. Campbell also stated that she had been afraid to testify as an eyewitness at the trial, due to her fear of the “real” perpetrator.

The Supreme Court conducted a full evidentiary hearing on the motion for a new trial based upon the aforementioned newly discovered evidence. At the hearing, Brown testified to the alleged facts of Watson’s confession, as set forth in Brown’s affidavit. Campbell testified that the defendant was not the fleeing assailant involved in this incident, but that she had been afraid to exonerate the defendant at trial due to her fear of neighborhood gang members, namely, those

affiliated with the Patio Crew. Campbell also testified that she had initially told the police that the perpetrator was not the defendant, but that she had been pressured by police or prosecutors to provide “vague” testimony at trial. Campbell testified that the police and/or prosecutors had threatened to “take away” her children if she did not cooperate with them.

During the hearing, the defendant moved to amend his motion to include the affidavit or testimony of Dexter Bailey. Bailey submitted an affidavit in which he stated that J.T. Dixon had confessed to having taken part in the robbery and murder of Wynn along with Watson. Bailey, another gang member who had also cooperated with the federal investigation of the Patio Crew, had not previously divulged this information to the prosecution. The Supreme Court denied the defendant’s motion to include Bailey’s testimony.

Following the evidentiary hearing, the Supreme Court denied the defendant’s motion pursuant to CPL 440.10. The Supreme Court found, *inter alia*, that Brown’s testimony with respect to Watson’s alleged confession would not qualify as a statement against penal interest, as it was not established that Watson was unavailable, and there were insufficient indicia that Brown’s testimony was reliable. The Supreme Court also found the testimony of Colleen Campbell to be inconsistent and not credible. Thus, the Supreme Court concluded that the evidence adduced at the hearing did not warrant a new trial. We disagree.

A motion to vacate a judgment of conviction upon the ground of newly discovered evidence rests within the discretion of the hearing court (*see People v Salemi*, 309 NY 208, 215, *cert denied* 350 US 950; *People v Tankleff*, 49 AD3d 160, 178). The “court must make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial” (*People v Bellamy*, 84 AD3d 1260, 1261; *see CPL 440.10[1][g]*). In order to justify such vacatur, the evidence 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 at 216, quoting *People v Priori*, 164 NY 459, 472; *see CPL 440.10[1][g]*; *see also People v Malik*, 81 AD3d 981).

The Supreme Court erred in concluding that the proffered testimony of Brown as to Watson’s alleged confession could not be considered in support of the defendant’s motion for a new trial under CPL 440.10(1)(g) (*see People v Ortiz*, 81 AD3d 513, 514; *People v Toussaint*, 74 AD3d 846, 846; *People v Washington*, 31 AD3d 795). “[B]efore statements of a nontestifying third party are admissible as a declaration against penal interest, the proponent must satisfy the court that four prerequisites are met: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction, or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability” (*People v Brensic*, 70 NY2d 9, 15). Third-party statements used against the accused may be admitted only when competent independent evidence is presented to establish that the declaration was spoken under circumstances which renders it highly probable that it is truthful (*id.* at 14-15). However,

declarations which exculpate a defendant, such as those presented here, are subject to a more lenient standard, and will be found “sufficient if [they] establish[] a reasonable possibility that the statement might be true” (*People v Settles*, 46 NY2d 154, 169-170; *see People v Fonfrias*, 204 AD2d 736, 738). “Depriving a defendant of the opportunity to offer into evidence another person's admission to the crime with which he or she has been charged, even though that admission may only be offered as a hearsay statement, may deny a defendant his or her fundamental right to present a defense” (*People v Gibian*, 76 AD3d 583, 585, citing *Chambers v Mississippi*, 410 US 284, 302).

The statement offered by Brown satisfied the four prerequisites. The defense established that Watson, despite the Supreme Court’s finding to the contrary, was unavailable to testify because he had been deported to Jamaica (*see People v Luckey*, 73 AD3d 568, 569; *see also People v Coleman*, 69 AD3d 430, 431). Watson’s declaration was clearly and unambiguously against his penal interest. Watson admitted his own participation in the attack, and there is a reasonable possibility that the declaration may be true. Watson’s declaration was clearly exculpatory of the defendant. Further, we find that there were sufficient indicia that Brown’s testimony was reliable. In this regard, we note that this Court “is not bound by the hearing court’s factual determinations and may make its own credibility determinations” (*People v Tankleff*, 49 AD3d at 179).

We also find the recantation testimony of Campbell credible and compelling, and disagree with the Supreme Court’s finding that Campbell’s testimony would not be likely to change the result upon a new trial, especially when viewed in conjunction with Brown’s testimony. While recantation evidence is considered to be the most unreliable form of evidence (*see People v Shilitano*, 218 NY 161, 170), its credibility may be established if certain factors are present, including its inherent believability, the demeanor of the recanting witness, the existence of corroborating evidence, the reasons offered for the recantation of the previous testimony, the relationship between the recanting witness and the defendant, and “the importance of facts established at trial as reaffirmed in the recantation” (*People v Wong*, 11 AD3d 724, 726, citing *People v Shilitano*, 218 NY at 170-172; *see People v Jenkins*, 84 AD3d 1403, 1407).

Here, Campbell testified at trial that she had “barely glimpsed” the fleeing perpetrator. Campbell offered an equivocal answer when asked if she could identify that person as the defendant, stating, “if I say I saw this man, I would be telling a lie. I just barely glimpsed the person and the same way I told the police, I cannot tell if it was Dick, Tom or Harry.” At the hearing, Campbell testified that she had seen the perpetrator, and that he was not the defendant. Campbell provided a credible reason as to why she originally testified that she could not exculpate the defendant, namely, that she feared repercussions from the gang members whose activities permeated her neighborhood and who were the focus of the aforementioned federal investigation. Indeed, the recantation further acquires “an aura of believability” because of the testimony of the other witnesses at the hearing and its consistency within the context of other matters contained in this record (*People v Wong*, 11 AD3d at 726), including, but not limited to, the fact that Campbell’s initial pretrial description of the perpetrator as approximately 19 years old and 5’ 7" tall matches a description of Watson, but not that of the defendant, who, at the time of the incident, was 34 years old and six feet tall. Moreover, there appears to be no relationship between Campbell and the defendant of a nature that would motivate Campbell to inappropriately come to the defendant’s aid.

Further, we find that the likely cumulative effect of the newly discovered evidence and the recantation testimony established a reasonable probability that the result of a new trial would be a verdict more favorable to the defendant (*see CPL 440.10[1][g]; People v Bellamy*, 84 AD3d 1260). Accordingly, the Supreme Court erred in denying that branch of the defendant's motion which was for a new trial based on newly discovered evidence (*see People v Tankleff*, 49 AD3d 160; *People v Wong*, 11 AD3d at 726).

Nonetheless, the Supreme Court properly denied that branch of the defendant's motion which was pursuant to CPL 440.10(1)(h) to vacate the judgment of conviction and dismiss the indictment on the ground of actual innocence. The defendant did not establish entitlement to this relief. In making our determination, we do not decide whether, as the defendant contends, New York recognizes a free-standing claim of actual innocence that is cognizable by, or which may be addressed within the parameters of, CPL 440.10(1)(h) (*see People v Tankleff*, 49 AD3d at 182).

ANGIOLILLO, J.P., DICKERSON, AUSTIN and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court