

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 85

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DAVID LEMUS and OLMADO HIDALGO,

Defendants.
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: Indictment Nos.
674/91 and 12833/91

: Motion: CPL 440.10

Robert Morgenthau, District Attorney, New York County (Daniel L. Bibb and Joel J. Seidemann of counsel), for the People.

Gordon Mehler, for defendant Lemus.

Carter Ledyard & Milburn LLP (Daniel J. Horowitz and Kenneth Levine of counsel), for defendant Hidalgo.

Honorable Roger S. Hayes:

INTRODUCTION

Defendants jointly move to vacate their convictions for Murder in the Second Degree and Attempted Murder in the Second Degree. These convictions arose from the death of Marcus Peterson and the wounding of Jeffrey Craig, bouncers at the Palladium nightclub, on November 23, 1990. Pursuant to CPL 440.10, defendants claim their convictions should be vacated because of newly discovered evidence and *Brady* violations.¹

Defendants were convicted after a jury trial. On January 6, 1993, Justice Jay Gold² sentenced each defendant to an indeterminate prison term of from twenty-five years to life for the

¹ On July 22, 2005, the People consented to vacate the judgment of conviction for Hidalgo on newly discovered evidence grounds pursuant to CPL 440.10 (1) (g). On August 19, 2005, the People consented to dismissing all charges against Hidalgo. For the sake of completeness and to present a clear rendition of the events and claims, this decision contains summaries of evidence relating to Hidalgo as well as Lemus.

² Justice Gold is now retired.

murder count and lesser concurrent terms for the attempted murder count. Lemus remains incarcerated based on this conviction and sentence.

On their direct appeal, the Appellate Division unanimously affirmed the judgments of conviction (240 AD2d 170 [1st Dept1997]). On October 14, 1997, the Court of Appeals denied leave to further appeal (90 NY2d 1012 [1997]).

THE TRIAL

The jury trial before Justice Gold commenced on November 12, 1992, and testimony ended on November 24, 1992.

Evidence established that on Thanksgiving night, November 22, 1990, a party of seven or eight people arrived at the Palladium nightclub on 14th Street in Manhattan. A heavy-set man gave a tip to one of the bouncers enabling the party to enter without waiting in line. Defendants were identified in court as members of this group. Later in the early morning hours of November 23rd, one member of the party had a verbal and then physical confrontation with a bouncer, Fritz Vincent, when the man sought permission to leave the club and reenter without paying. Vincent, who struck the man and caused him to fall to the ground, was unable in court to identify the person he struck, but other bouncers present during the fight identified Lemus as the man who fought with Vincent. Lemus soon left the nightclub, followed shortly thereafter by a number of his associates.³

Within minutes, a number of men including either two or three who were armed returned to the front of the nightclub. Several witnesses identified defendants as the armed men,

³ Vincent was the sole witness to testify Lemus left accompanied by his associates.

although their accounts differed as to the clothing⁴ they wore and particular actions they took. Lemus again fought with one or two of the bouncers and was wrestled to the ground. Hidalgo pulled out a black automatic handgun and fired at the bouncers who dispersed. Lemus got up and pointed a handgun at Marcus Peterson's head. Jeffrey Craig, another bouncer, grabbed Lemus from behind. Hidalgo pointed a gun directly at Craig's head and pulled the trigger, but the gun did not fire. Another witness testified that it was Lemus's gun which jammed while pointed at Craig's head. As Craig released Lemus and ran into the club, Craig was shot in the thigh. Peterson was shot and killed as he attempted to run through the club's front entrance. The gunmen fled.

Evidence against Hidalgo consisted exclusively of four in-court and four lineup identifications. As to Lemus, four in-court and three lineup identifications were bolstered by the testimony of Dolores Spencer, a former girlfriend, who described admissions he made to her by telephone. In the first call made within days of Thanksgiving 1990, he told her that he "got into a fight at the Palladium [and] shot one of the bouncers because someone had pinched his girlfriend's butt and he got angry." Spencer refused Lemus's request to keep his gun at her apartment. Spencer's relationship with Lemus ended upon his arrest in January 1991. However, in June 1991, he began calling her repeatedly. Spencer contacted the police who recorded several of their conversations. In audio tapes played for the jury, Lemus could be heard asking Spencer if she was "scared of him." When Spencer asked why he thought she might be frightened of him, Lemus answered "[b]ecause you know that I know that you know" and then made the sound of three gunshots.

⁴ Some witnesses testified that Lemus was wearing different clothes from those he wore when he entered initially.

Neither defendant testified or called any witnesses. Lemus introduced a stipulation setting forth the initial description given by Vincent of the man with whom he fought to show that Lemus did not match that description.

Deliberations began on December 1, 1992. The jury convicted Lemus and Hidalgo on December 2, 1992 of Murder in the Second Degree and Attempted Murder in the Second Degree.

THE FIRST CPL 440 MOTION

In 1996, defendants moved to vacate the judgments of their convictions pursuant to CPL 440.10 (1) (g). They argued that newly discovered evidence, primarily consisting of Joseph Pillot's confession that he and Thomas Morales⁵ – not defendants – committed the crimes at the Palladium, required the granting of a new trial. The People opposed the motions, but consented to a hearing which was held before Justice Gold from April through June, 1996.

At the hearing, Pillot testified that he had been a member of a violent drug gang and was serving federal and state prison sentences of from fifteen years to life imprisonment for various crimes, including murder. On Thanksgiving night 1990, he went to the Palladium nightclub with his girlfriend and three other couples. Morales was part of this group. Later in the evening, Morales and his girlfriend argued and left. The girlfriend returned and reported that a bouncer had punched Morales. Pillot went outside and found Morales on the ground surrounded by two bouncers. The group left the club and went to their cars in a nearby parking lot. Morales retrieved a .38 caliber revolver and Pillot a .9 mm Glock, and returned to the Palladium while the others departed.

⁵ Thomas Morales is also known as James Rodriguez, James Guerrido, and "Spanky." He is not the same person as Jose Figueroa, also known as "Spanky," who was mistakenly identified as being at the Palladium, but who was in jail the night of the shooting.

Pillot and Morales approached the front of the club with their guns in their hands. Morales reached the bouncers first; a black bouncer grabbed him from behind in a bear hug. Pillot pointed his gun at the bouncer and ordered him to release Morales. Pillot cocked his gun, but it jammed. The bouncer released Morales and ran to the entrance with the second bouncer. Morales fired five or six shots as Pillot ejected the jammed cartridge. Pillot and Morales ran back to their cars and fled.

In October 1993, Pillot was arrested on murder charges. In 1994, knowing he was about to be indicted on federal charges, Pillot began to cooperate with federal prosecutors, ultimately disclosing his involvement in the Palladium shooting. Other witnesses at the hearing included his wife, the federal prosecutor, and a number of members of Pillot's gang.

On October 29, 1996, Justice Gold denied the motions to vacate the judgments. He found the "veracity of both Pillot and his wife much worse than merely doubtful, their testimony entirely unworthy of belief." Further, he found that "Pillot, believing he had immunity from prosecution, falsely claimed responsibility for the Palladium murder." Accordingly, Justice Gold concluded the newly discovered evidence did not create a probability of a more favorable verdict if received at trial.

THE INSTANT CPL 440 MOTION

On July 16, 2004, defendants jointly filed the instant motion to vacate the judgments of conviction based on newly discovered evidence and alleged *Brady* violations.⁶ On October 29,

⁶ The defense also claimed *Rosario* violations entitled them to the requested relief. This ground was referred to in a footnote, but not cited as a ground for relief in the Notice of Motion or argued in the memorandum of law. Because the Court will resolve the motion based on the newly discovered evidence claim as discussed below, the Court will not reach any of the other claims. Accordingly, the evidence and findings of fact will focus on matters relevant to the newly discovered evidence claim.

2004, the motion was assigned to this Court. In their response, dated November 8, 2004, the People opposed defendants' motion to vacate the judgments, but consented to a hearing to resolve only the newly discovered evidence claim. The defense filed their reply papers on January 19, 2005, urging the Court to grant their motion solely on *Brady* grounds without conducting a hearing.

On February 18, 2005, this Court granted a hearing, pursuant to CPL 440.30, to resolve both the *Brady* and newly discovered evidence claims. This Court conducted the hearing during the weeks of April 18, May 9, and May 23, 2005. Defendants presented fifteen witnesses. The People offered no witnesses during this portion of the hearing. After the hearing was closed and the defense had submitted their memorandum, the People made an *ex parte* application to reopen the hearing. The application was granted, and the Court heard additional testimony on July 6 through July 8, 2005. The People presented two new witnesses at the reopened hearing and recalled two former witnesses for additional examination.

Evidence at the Hearing

The Defense Case

James Callahan

Callahan, an iron worker, worked intermittently as a bouncer at the Palladium from 1988 until a few months after the shooting. During the early morning hours of November 23, 1990, Callahan was positioned outside the main entrance area of the nightclub with four other bouncers. A person⁷ walked up to Callahan. They were "face to face, almost chest to chest." Callahan told Morales that Morales needed to be searched, but Morales physically refused by pushing Callahan's

⁷ When shown a photograph of Thomas Morales, Callahan identified Morales as the man who approached him.

hands away. After this happened repeatedly, Callahan punched Morales, who fell to the ground on his back, revealing the silhouette of a revolver under his shirt near his waistband.

As Morales reached for his waistline, Callahan heard someone yell from behind him. About five feet away, a heavy-set man pointed a gun directly at Callahan. Callahan immediately ran around the corner and heard shots. He remained there, while everyone else scattered, until the gunfire stopped. When he emerged, the gunmen were gone.

Callahan said he observed Morales for about forty-five seconds, under good lighting conditions. Callahan's practice as a bouncer was to study the face of a patron with whom he had an altercation in case the patron returned to retaliate. He explained, "you always just watch in case anybody comes back, you know . . . you just have to remember what they look like."

Later that night, the police interviewed Callahan and the other bouncers at the precinct. Callahan gave the police an address and phone number, but after the night of the shooting, he was not contacted by any law enforcement agent for fourteen years. In July 2004, Callahan met Daniel Bibb, a prosecutor, who showed him fifteen to twenty photographs which included the defendants. Callahan "went right past" the photographs of the defendants and identified a photograph of Morales as the man who refused to be searched and whom he punched. Callahan also picked out a photograph of Jose Figueroa⁸ as the heavy-set man who pointed a gun at him.

Two days after this meeting with the prosecutor, Callahan and his girlfriend watched a television broadcast of NBC News and observed images of Lemus, Hidalgo, and Morales. When Callahan saw images of Lemus and Hidalgo, he said to his girlfriend, "that's not the guy, that's not

⁸ Both sides agree that Figueroa was incarcerated on the night of the Palladium shooting. Further, while a person then believed to be Figueroa was mentioned by several witnesses at the trial, no one claimed he possessed a gun that night.

the guy.” When Morales’s image – the same mug shot that he picked days before – appeared on the television screen, Callahan said, “that’s the freaking guy.”

At the hearing, Callahan stated consistently and with certainty that neither Lemus nor Hidalgo was the man whom he punched or who pointed the gun at him.

Callahan further testified with certainty that he did not see either Lemus or Hidalgo on the night of the shooting. Callahan believed that there were only two gunmen and explained, “where I was standing, I was in line with the hot dog cart, that is the only reason, I don’t think that there was a third shooter because I thought I would have gotten shot right from that direction after blocking his body, you know.” He also confirmed that in March 2005, the People called him as a witness in a Grand Jury proceeding, which resulted in an indictment against Morales⁹ in connection with the crimes at the Palladium.

Callahan - Findings of Fact

The Court finds Callahan to be a credible, candid witness. The People do not question his credibility. They do challenge his reliability regarding his identification of Morales as the person he punched. However, the People did call him as a witness in the Grand Jury which indicted Morales. The Court believes he had a good opportunity to observe the events he described and ample reason to note and remember them. He has no motive whatsoever to falsely or carelessly exculpate the defendants, since he was a friend of the victims. Further, the earnest manner in which he testified and the reasons he gave for remembering the person with whom he fought added to his credibility and reliability. In addition, his status as a People’s witness in the Grand Jury that indicted

⁹ New York County Indictment Number 1721/05 charges Morales with Murder in the Second Degree for killing Marcus Peterson at the Palladium on November 23, 1990. Morales was arrested on April 15, 2005, and the case is currently pending.

Morales also supports his reliability and recollection of the events. Based on his credited testimony, the Court finds that Callahan was an honest witness who genuinely believes that Morales, not Lemus, was the man who attempted to reenter the Palladium on November 23, 1990 and whom he struck, and that neither Lemus nor Hidalgo was among the armed men he observed.

Fritz Vincent

Fritz Vincent is currently a high school dean. Between August 1990 and March 1991, he worked as a bouncer at the Palladium nightclub. On November 23, 1990, Vincent was stationed near the entrance in the vestibule of the club. Also working near the entrance area were Callahan and the other bouncers. Around 1:00 a.m., a man¹⁰ approached Vincent and told him he had to get something from his car. They were face-to-face, less than a foot away from each other when Vincent advised Morales that club rules required Morales to pay a new admission fee. Morales became agitated and upset, walking back and forth, and began to curse at Vincent. Morales pushed Vincent, who punched him knocking Morales to the ground. This encounter lasted about five minutes.

Morales's group of friends came out of the club and took Morales outside. A heavy-set male from that group had a conversation with Craig, the chief of security. After Morales and his group left, Craig told Vincent to go inside, and Vincent went inside and upstairs to a party room. The shooting occurred while Vincent was inside the club, and he did not witness it.

In January 1991, Vincent viewed a lineup containing Lemus. Vincent was uncertain about the identity of the person with whom he fought and did not positively identify Lemus. At trial,

¹⁰ When shown a photograph of Thomas Morales, Vincent identified Morales as the person who approached him.

Vincent testified about the events he was involved with, but did not positively identify Lemus as the person with whom he fought.

In March 2004, Bibb the prosecutor showed Vincent fifteen to twenty photographs from which he picked out a photograph of Lemus “[a]s someone who looked familiar.” During this viewing, for the first time, he was shown a photograph of Morales and identified him saying, “he looked familiar and might have been there.”

After the meeting with the prosecutor, a representative of the NBC Dateline television show telephoned Vincent and requested an interview for an upcoming report about the Palladium shooting. Vincent declined to be interviewed, but did watch the program when it aired. He testified that “[i]t was at that point that I was a hundred percent certain it was Morales” with whom he had the confrontation.

Vincent testified he was certain Morales was the man he had punched. He explained that after observing Morales’s facial expressions, body movement, and speech on the NBC Dateline television show, he was certain of the identification. Vincent also stated with equal conviction that defendant Lemus was not the man with whom he had fought.

Vincent also testified that in March 2005, the People called him to testify in the Grand Jury proceeding against Morales in relation to the Palladium crimes.

Vincent - Findings of Fact

Vincent is currently a high school dean who was recently called as a Grand Jury witness by the People in connection with the indictment of Morales for the crimes committed at the Palladium on November 23, 1990. The People agree with the defense that Vincent was candid and forthright. Like Callahan, he was a co-worker of the victims and has no reason to falsely or carelessly exculpate defendants. He, too, had a good opportunity to observe the events about which

he testified. After a careful examination, the Court is satisfied he testified truthfully and that he sincerely believes in the accuracy of his account. This conclusion is bolstered by his open, thoughtful demeanor while testifying and the reasons he gave for his testimony. After saying he was one hundred percent certain Morales was the man with whom he had the confrontation, he set forth the reasons for his belief.

Based on this credited testimony, the Court finds that Vincent is a credible witness who believes with complete certainty that Morales, not Lemus, was the man with whom he fought on November 23, 1990.

Joseph Pillot

Pillot testified with transactional immunity for events relating to the Palladium shootings. Pillot acknowledged that he understood he could be prosecuted only in the event that he testified falsely under oath at the hearing.

Pillot is currently serving a life sentence for crimes, including murder, he committed as a member of the C&C gang. He has known Morales since he was child; it was Morales who introduced him to the C&C gang.

On Thanksgiving night 1990, Pillot went to Latin Night at the Palladium nightclub together with his fiancée Josephine, Morales, Morales's girlfriend Millie, Peachy, Richie, and their girlfriends. Pillot drove his BMW, Morales his blue Cutlass, and Peachy a rental car. Pillot was wearing a custom-made green leather suit. Peachy and Richie spoke to the bouncers, and the group was allowed inside without waiting in line. They were having drinks when Morales and Millie argued and left the club. Millie shortly returned to their group and reported that Morales had a problem with the bouncers and that a bouncer hit him. The group left the club and Richie, who was

heavy-set, asked a bouncer what happened. Then, their group went to the parking lot. Morales got his gun, a .38 revolver, out of his car; Pillot got his gun, a .9 mm Glock. They directed Josephine and Millie to leave with Peachy and Richie and their girlfriends. Only Pillot and Morales returned to the Palladium.

Morales hurried and approached the Palladium first. By the time Pillot reached the front of the club, Morales was already struggling with two bouncers. With his gun in his hand, Pillot ordered the bouncers to release Morales. Pillot cocked his gun, ejecting an already chambered round, and the gun jammed. The bouncers released Morales and started running inside the nightclub. Morales fired several shots at the bouncers; then he and Pillot ran back to their car and drove away.

Pillot may have told fellow gang member Trumont Williams about the Palladium shooting.

Pillot denied knowing either Lemus or Hidalgo. When the hearing was reopened, however, Pillot acknowledged there was a “connection” between himself and Lemus through two people – his cousin Ernesto Mesorana and his friend Luis Mesorana.

Pillot testified that Ernesto and Luis are cousins. While not related to Luis, Pillot has known him since they were children. Pillot knew Luis was in the drug business, but did not conduct business or socialize with him. Pillot socialized with Ernesto, but never exposed his criminal activities to him.

At some unknown date – either before or after October 1993 when Pillot went to jail – Ernesto or Luis told Pillot that Luis and Lemus were friends and that Lemus was in jail for the Palladium murder.

Pillot testified that he may have told Ernesto about the Palladium incident, but “[Ernesto] never asked me to do anything for anybody.”

Pillot acknowledged that he knew Luis and Lemus were friends, but he maintained, “I don’t know [Lemus and Hidalgo] at all.”

Pillot - Findings of Fact

The factual conclusions stemming from Pillot’s testimony, as well as an assessment of his credibility, are set forth more fully in the discussion below of the impact the new evidence would likely have in producing a more favorable verdict. Basically, Pillot is a person without integrity – a convicted murderer who lies or withholds evidence when it suits him. Therefore, the Court will credit his testimony only where it is supported by independent credible evidence. Substantial credible evidence¹¹ exists with regard to the likelihood that Morales and Pillot participated in the shooting at the Palladium; further, the People have been unable to demonstrate that Pillot’s version of the events is false. Accordingly, the Court cannot conclude that Pillot’s claim that he and Morales are solely responsible for the crimes at the Palladium is “entirely unworthy of belief” as found by Justice Gold at the first CPL 440 hearing. Further, the Court finds Pillot knew that Luis was close to Lemus and that Luis wanted the persons responsible for the Palladium crimes to admit to them, so Lemus could be freed. The Court further finds Pillot intentionally withheld information about this connection to Lemus.

Danila Sanchez

Danila Sanchez is currently a supervisory border patrol agent for the United States Department of Homeland Security – Customs and Border Protection. From the latter part of 1990

¹¹ Including, but not limited to, the testimony of both Callahan and Vincent.

through the beginning of 1992, she lived in New York City with her ex-husband Heriberto Troche. Troche had three sisters, Arlene, Wanda, and Lorraine, and a half-brother, Thomas Morales. Sanchez met Morales on several occasions and knew that he had spent time in jail for drug related crimes.

In 1991, Sanchez argued with Troche about Morales and Lorraine. During that argument, Troche revealed that Morales had shot somebody at the Palladium. About a week after Troche left for Operation Desert Storm on February 23, 1991, Morales was alone with Sanchez inside her apartment when he ordered her to take off her clothes. Sanchez called the police. When the police arrived, Morales was gone. Sanchez reported what happened with Morales and also told them about his involvement in the Palladium shooting.

Subsequently, a female detective telephoned Sanchez. Sanchez told her what Troche had disclosed about Morales and the Palladium shooting. She told the detective specifically that she was told Morales shot someone at the Palladium. She also explained that she was returning to Texas and provided the detective with a telephone number where she could be reached in Texas. The detective did not request a telephone number for Troche or any other information to contact him. After Sanchez moved, law enforcement did not contact her again until twelve years later.

In June 2003, Bibb, the prosecutor, contacted Sanchez in Arizona and later showed her numerous photographs. She recognized Morales in one. Bibb also showed her some old handwritten notes made by the detective on the Palladium case. Sanchez confirmed that the notes contained her contact information in Texas as well as the information she had provided to the female detective on the telephone back in 1991.

