

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

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DAVID LEMUS and OLMADO HIDALGO,

Defendants.  
-----X

: 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.<sup>1</sup>

Defendants were convicted after a jury trial. On January 6, 1993, Justice Jay Gold<sup>2</sup> sentenced each defendant to an indeterminate prison term of from twenty-five years to life for the

---

<sup>1</sup> 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.

<sup>2</sup> 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 [1<sup>st</sup> 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 14<sup>th</sup> 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.<sup>3</sup>

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,

---

<sup>3</sup> Vincent was the sole witness to testify Lemus left accompanied by his associates.

although their accounts differed as to the clothing<sup>4</sup> 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.

---

<sup>4</sup> 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 Morales<sup>5</sup> – 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.

---

<sup>5</sup> 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.<sup>6</sup> On October 29,

---

<sup>6</sup> 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 person<sup>7</sup> 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

---

<sup>7</sup> 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 Figueroa<sup>8</sup> 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

---

<sup>8</sup> 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 Morales<sup>9</sup> 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

---

<sup>9</sup> 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 man<sup>10</sup> 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,

---

<sup>10</sup> 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 evidence<sup>11</sup> 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

---

<sup>11</sup> 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.

### **Sanchez - Findings of Fact**

Sanchez is currently a supervisory border patrol agent for the United States Department of Homeland Security. She was a credible witness whose testimony is not disputed by the People. Her credibility is enhanced by the uncontested fact that she reported information about her knowledge of Morales and the Palladium to the police in February 1991. Based on her credited testimony, the Court finds that in early 1991 Troche told Sanchez that Morales had admitted his involvement in the crimes at the Palladium, and that Sanchez reported this information to the police soon after, but was not contacted again by law enforcement until 2003, when she was visited in Arizona by the prosecutor and a detective.

### **Darryl Gray**

Darryl Gray and Morales were members of the C&C gang, a group of people who extorted drug dealers near Brook Avenue in the Bronx. Other gang members included Pillot, Tree, Tyson, Pito, Dopy, Cuba, Caldron, and Casone. In late 1990, Gray met Morales who was head of security for C&C. Around December 1990, at the C&C headquarters, in the presence of other gang members, Pillot told Gray that he and Morales “had a beef down at the Palladium,” that a bouncer pushed Morales, and that Morales shot the bouncer. Sometime after this conversation, Gray was alone with Morales when Morales told him that he shot a Palladium bouncer who pushed him.

Gray testified that he had never seen Lemus and Hidalgo face-to-face before, that he had never heard their names during his association with C&C, and that he did not know them at all.

Gray has been convicted in state and federal court for serious violent crimes. He received a reduced sentence for his cooperation with the government. At the time of the hearing, he was on parole and working in construction.

### **Gray - Findings of Fact**

The Court finds Gray a credible witness regarding admissions by Pillot and Morales about their responsibility for the crimes at the Palladium and his assertion that he does not know defendants. The People do not dispute that Pillot and Morales both made admissions to him. Gray is on parole and has no motive to help the defendants by falsely inculcating his former associates, Pillot and Morales. Indeed, to do so would expose him to new criminal charges and a revocation of his parole. Further, he has a good recollection of what he was told, by whom, and under what circumstances. His testimony is also supported by the testimony of other witnesses that Pillot or Morales or both made similar admissions to them. In addition, Gray did not hesitate to identify others who were members of C&C. Based on his credited testimony, the Court finds that Gray was a member of C&C as were Morales, Pillot, Trumont Williams, and others; at different times, Morales and Pillot admitted to Gray that they were involved in the crimes at the Palladium – specifically that Pillot and Morales had a “beef” at the Palladium and Morales shot the bouncer. Morales told him the bouncer pushed him and he shot the bouncer. Defendants were not members of C&C; Gray had never seen either defendant in person prior to the hearing.

### **Michael Colomer**

In 1990, Michael Colomer worked for the Moyas, a group that supplied heroin to the C&C gang on 139<sup>th</sup> Street and St. Ann’s in the Bronx. While distributing heroin and collecting money, Colomer dealt with Morales, Pillot, and other C&C gang members. Toward the end of 1990, Colomer had a conversation with Morales, who asked if he had heard about the Palladium. Morales said that Pillot had an altercation with the bouncers and was ejected, and that they came back and shot the bouncers. Months later, Morales was arrested on drug charges. When he was released,

Morales, in Pillot's presence, joked that he thought he had been picked up for the Palladium shooting. Colomer also testified he did not recognize either defendant.

### **Colomer - Findings of Fact**

The People agree Colomer's testimony should be credited regarding the admissions made to him by Morales, but claim Morales's statements are not reliable. Based on Colomer's credited testimony, the Court finds that Colomer was familiar with Pillot, Morales and other C&C members, but does not know defendants and does not believe they were members of C&C; that at the end of 1990, Morales told Colomer that Pillot had a dispute with a bouncer at the Palladium, was beaten up and thrown out, and that Morales and Pillot returned and shot at security.

### **Trumont Williams**

Trumont Williams is currently serving lengthy prison terms for his convictions relating to crimes, including murder, he committed as a member of the C&C gang. As a former member of C&C's security force, Williams was familiar with Morales and Pillot, as well as other associates of the gang. The day after Thanksgiving 1990, Morales and Pillot "beeped" Williams into their headquarters at 139<sup>th</sup> Street and St. Ann's and told him what happened the night before. They said they shot a bouncer at the Palladium after Morales left the club, but could not get back in, and scuffled with a bouncer. They said they got guns from their car and went back, and Morales shot the bouncer. Pillot said he tried to shoot, but his gun jammed. According to Williams, Morales was wearing dark glasses and had an abrasion or cut over his eye. Morales usually carried a .38 revolver and Pillot a .9 mm automatic handgun. Williams did not know either defendant and did not know them to be associated with C&C.

### **Williams - Findings of Fact**

Williams is currently serving a lengthy prison sentence for various crimes, including six murders in which he was the shooter, he committed as a member of C&C's security force. Therefore, the Court approaches his testimony with great caution, not only in view of his criminality, but also because of his admission that he initially had not been fully candid with law enforcement about his criminal activities. However, the Court finds, despite his criminal background and other credibility problems, he was credible regarding the admissions made to him the day after the crimes by both Pillot and Morales at C&C's headquarters. First, the People credit his testimony that Morales and Pillot made admissions to him. As a member of C&C security, he was in a position to speak to Pillot and Morales. Also, he had a clear memory for the details of the conversation – details likely to be remembered, such as the page to the clubhouse when he was told of the events by Pillot and Morales. He also remembered that Morales was wearing dark glasses and had an abrasion or cut over his eye.

Moreover, Williams's demeanor while testifying enhanced his credibility. He appeared intelligent, candid, and cooperative with both sides. He did not attempt to minimize his crimes. He has also testified on behalf of federal prosecutors against twenty people. Further, details of his testimony are corroborated by other witnesses at the hearing. He does not have any motive to falsely help defendants, since he said he did not know them personally or as fellow members of C&C.

The Court accepts the testimony of Williams as truthful and accurate. The Court finds that Williams was a member of C&C security force; Morales, in charge of C&C security, and Pillot were like "cousins"; it was not unusual for C&C members to discuss murders they committed; the day after the crimes at the Palladium, Morales and Pillot admitted to Williams they were

responsible for the crimes at the Palladium, specifically that they had been at the Palladium with their girlfriends the previous night; Morales had left the club and was roughed up by a bouncer when he tried to come back inside; Morales and Pillot went to their cars, got guns, returned, and shot the bouncer; and Pillot's gun jammed. The Court also finds Morales had a cut or scrape over his eye and was wearing sunglasses and that defendants were not known to Williams and were not members of C&C.

### **John Doe 1 and John Doe 2**

John Doe 1 (JD1) and John Doe 2 (JD2) testified in a closed courtroom, and their testimony was sealed pursuant to a joint motion by the parties, based on safety concerns for both witnesses. In order to avoid revealing the identities of JD1 and JD2, their testimony is not summarized in detail. Generally, the testimony of JD1 and JD2 corroborated Pillot's account of the Palladium shooting and was consistent with other witnesses to whom Morales also admitted shooting the bouncer. JD1 confirmed that Morales went to the Palladium on Thanksgiving night 1990, described the clothes he wore, and that Morales admitted he and "his boys" shot the bouncer. In addition, JD2 corroborated that Morales admitted he was involved in the Palladium shooting, that Morales had no relationship or connection with the defendants and did not know them, and that defendants were not involved in the shooting. There is no evidence or contention by any party that JD1 and JD2 are known to each other or connected in any way.

### **JD1 - Findings of Fact**

JD1 is a credible witness, whose testimony was logical, consistent, and reliable. Based on his credited testimony, the Court finds that Morales admitted his participation in the shooting at the Palladium to JD1 at a time close to the events; Morales told him the shooting was

the result of an argument with a bouncer who refused to readmit him or his friend after they left the club; and he described Morales's clothing on the night in question – a description which generally fits what bouncers Craig, Cortes, and Fowler said Lemus was wearing.

### **JD2 - Findings of Fact**

JD2's testimony must be carefully scrutinized. However, there exists no discernible reason for him to testify falsely to help the defense and undermine the People's position. The Court, therefore, credits his testimony and finds that Morales made the statements attributed to him by JD2, specifically that Morales was the shooter at the Palladium; Morales did not have any relationship or connection with defendants; and defendants did not participate in the shooting.

### **Patrick Natale and Richard Early**

Patrick Natale is a twenty-year veteran of the New York City Police Department. While a member of the 40<sup>th</sup> Precinct, Natale became familiar with C&C gang and its violent criminal activities. He confirmed that Morales and Pillot were known members of C&C.

Richard Early was employed with the New York City Police Department from 1973 through 1993. He became a detective in 1985 and was assigned to the Crimestoppers Tips Unit from 1989 through 1991. On November 28, 1990, Early received an anonymous telephone tip about the Palladium shooting. The anonymous caller reported:

“[I] overheard two individuals talking about being thrown out of the Palladium, then coming back to retaliate, they bragged about shooting the two bouncers. One of these individuals drives a blue olds [sic], the caller will attempt to get the plate and call back.”

The caller described and identified these males as follows:

“Spankey [sic] - M/H/28 yrs./5'8"/Light skin/blk. hair/earring in ear/ he may live or hang-out around 139 St. between St. Anns and Brook.

“Joey - M/H/20-23 yrs./5'6"/Med/Beard&Mustache/earring in ear/tattoo on arm/also lives or hangs-out 139 St. St. Anns and Brook.”

Early completed a DD5 report with the information from the tip and also relayed the information to Detective Victoria Garcia over the telephone.

### **Natale and Early - Findings of Fact**

The Court accepts their undisputed accounts as related above.

### **Detective Victoria Garcia**

Detective Victoria Garcia is currently assigned to the 106<sup>th</sup> Detective Squad. She became a detective in 1989 and was assigned to the 9<sup>th</sup> Precinct Detective Squad. On November 23, 1990, Garcia was assigned as the lead detective in the investigation of the Palladium homicide.

On November 29, 1990, Garcia had a telephone conversation with Early who relayed an anonymous tip that “Spanky” and “Joey” were involved in the Palladium shooting. She generated a DD5 report and attached her notes of her conversation with Early. Subsequently, she received a copy of Early’s DD5 of the Crimestoppers tip. Garcia matched the nickname “Spanky” to Frankie Figueroa<sup>12</sup> and obtained his photograph. She showed Figueroa’s photograph to Probationary Police Officer Ernesto Morales, who was a bystander; Craig; Vincent; and two other Palladium employees, Julie Brunner and Robert Blake. All five witnesses identified Figueroa either as the person or “looking like” the person who attempted to mediate during the incident between the bouncers and the angry patron.

---

<sup>12</sup> Frankie Figueroa is also known as Jose Figueroa.

Before the trial began, Garcia learned that Figueroa was in jail on the night of the Palladium murder and she informed the prosecutor of this. During the investigation, Garcia attempted to speak to Figueroa in jail, but he refused.

On November 29, 1990, Garcia also took Efren Cortes and one or two other witnesses to the police sketch unit. Based on the witnesses' descriptions and a "look-alike" photograph, a sketch of one of the gunmen was generated.

On February 24, 1991, Garcia spoke on the telephone with Detective Ruiz who told her about Danila Sanchez, the woman with information about the Palladium case. She took notes of her conversation with Detective Ruiz. Garcia subsequently spoke on the telephone to a woman, possibly Sanchez or Lorraine Troche, who provided information about two perpetrators, one named Joey, and the other named Thomas Morales, also known by the nickname "Spanky." She also took notes of this conversation. Although her notes included the name Heriberto Troche and she knew he supposedly had information about the Palladium shooting, she never attempted to contact him.

Garcia conducted a background check of Morales and learned that he was on parole. Garcia obtained a photograph of Morales and put it in a photo array, which she showed to four bouncers separately, but no one identified Morales.

Although Garcia considered Morales a suspect in the Palladium murder, she never generated a wanted card for him. Garcia explained at the hearing, "It's not in the best interest of the NYPD to put a wanted card on a possible perp[etrator]." She elaborated, "when you indicate a possible perp [and] it's not a positive I.D., so it doesn't make a good case."

She also did not generate a DD5 about the Morales photo array, explaining:

"From the best of my recollection there was no identification on the photo array, that's what I remember. If there is they usually sign the back of the photo array. When there was no ID, you know, I was a little concerned because Morales was always an issue in the case. I

always believed there was a third suspect. I couldn't actually prove it, but he was out there. So, you know, it's a matter of who makes the final decision on who is going to keep pursuing the third suspect.

"I know from experience that once you do that, if he was the right guy, and I agree that that is what the case is here, you would have lost the case, right there, it would have been over."

At the hearing, the People stipulated that as of March 2003, no document in Garcia's case file reflected that an array including a photograph of Morales was ever shown to witnesses. The People also stipulated that Garcia's handwritten notes contained the contact number for Sanchez in Texas and, further, that no DD5 was generated to document that conversation.

During the investigation, Garcia attempted to locate James Callahan a number of times, but was unable to do so despite her "best efforts." Garcia also did not find any connection between the defendants or any link of either to the C&C gang.

#### **Garcia - Findings of Fact**

The Court concludes Garcia's testimony was so inconsistent with other witnesses, logic, and documentary evidence, it can not be accepted as completely accurate. However, the Court does not believe it was intentionally false or completely unreliable. Rather, the Court finds she was attempting to testify truthfully concerning remote events about which, in many instances, she had only limited memory. Garcia's demeanor, as well as her acknowledgment of questionable police practices, admissions she did not have to make, persuade the Court she was attempting to testify truthfully. Where her testimony conflicts with other more reliable witnesses or documentary evidence, the Court credits the latter and not Garcia. Regarding her testimony that no one identified Morales's photograph, she is wrong. As discussed below, the contemporaneous notes recorded by a paralegal in the district attorney's office show she is incorrect, and that a number of witnesses identified a photograph of Morales before trial as a participant in the shooting. Further, the People

concede that a number of witnesses made identifications of Morales's photograph before trial. The People also concede that before trial, a detective in the 24<sup>th</sup> Precinct told Garcia that his informant, Hector Colon, had information that Morales had admitted responsibility for the Palladium shooting. Garcia never spoke to Colon because he was in Puerto Rico.

The Court credits her testimony that she tried, but failed to locate Callahan. She testified to this during the trial when her memory was fresher. She reiterated this during the hearing when reminded of her earlier testimony. Also, this is consistent with the testimony of Lemus's trial attorney, *infra*, that he believed Callahan was unavailable, as well as Hidalgo's trial attorney, *infra*, that his investigator could not locate Callahan. Further, the Court credits her testimony she did not find any connection between the defendants or with either defendant and the C&C gang.

The Court finds that on November 29, 1990, Garcia spoke by telephone with Detective Early regarding an anonymous report about those responsible for the Palladium crimes; the report said "Spanky" and "Joey" were involved; Garcia subsequently received a copy of Early's DD5; Garcia matched the nickname "Spanky" from the Crimestoppers report to Frankie Figueroa; she showed his photograph to PPO Morales, Brunner, Craig, Vincent and Blake, all of whom identified him as the mediator, or looking like the mediator, during the Palladium incident; Garcia took Craig, Cortes, and possibly another witness to the police sketch unit and a sketch was prepared; on February 24, 1991, she spoke to Detective Ruiz who told her Sanchez had information about the Palladium case and that she took notes of this conversation; Garcia subsequently spoke by telephone with a woman, possibly Sanchez or Lorraine Troche, who provided information about two perpetrators Joey and Morales, and Garcia took notes of this conversation; Garcia had notes about Heriberto Troche and knew he had information about the case, but made no effort to contact him;

Garcia attempted, but failed to locate Callahan a number of times; and Garcia was unable to find any connection between defendants or with either defendant to the C&C gang.

### **Maureen Kelly**

Maureen Kelly, an attorney, worked as a trial preparation assistant in the Manhattan District Attorney's Office from 1990 to 1993. In 1991 and 1992, she assisted the trial prosecutor on the Palladium murder case. Kelly spoke with Detective Garcia in person and over the telephone. Garcia gave her Palladium case file to Kelly. One document reflects an interview of Callahan on the night of the shooting, but no information for the witness's address or telephone number.<sup>13</sup>

Kelly recognized the handwritten notes she took regarding the Palladium case. One note reflected Kelly's conversation with someone in the police department about a confidential informant in the 24<sup>th</sup> Precinct who had information about "Spanky" and the Palladium case. Other notes reflected that Garcia told Kelly about a photographic array containing Morales that was shown to four bouncers: Craig, Cortes, Fowler, and Lespinasse. These notes evidenced that from the array, Cortes identified Morales as the gunman whose gun misfired; Lespinasse identified Morales as one of the participants, but was unsure which one; and Craig picked Morales and another photograph. The notes indicated that Fowler made an identification from the array, but failed to specify whom he identified. The notes did not reveal when these identifications were made, but the People stipulated that Kelly's handwritten notes were created between February and October of 1991.

---

<sup>13</sup> The People assert that Callahan gave the police his address and telephone number and that information was attached to this report which was a part of a defense exhibit. The People objected, however, and the exhibit was not admitted into evidence. Further, Callahan in an affidavit dated February 22, 2004, swears the phone number contained in that document was incorrect by one digit.

### **Kelly - Findings of Fact**

All parties urge the Court to accept Kelly's testimony as credible, and the Court finds her to be credible and fully credits her testimony as summarized above. In particular, the Court finds that Kelly's handwritten notes indicate that Cortes identified Morales as the man whose gun misfired; that Lespinasse, Craig, and possibly Fowler<sup>14</sup> picked a photograph of Morales from an array shown them by Garcia and described him as one of the participants in the incident; and further that the police had information that Morales made admissions about the Palladium crimes to an informant in the 24<sup>th</sup> Precinct.

### **Eric Sears**

Eric Sears, represented Lemus as assigned counsel at the trial and the first CPL 440 proceeding. Subsequently, Hidalgo's family retained Sears to represent Hidalgo during a federal habeas corpus proceeding.

Sears testified that, among other items, he did not receive Garcia's handwritten notes of February 24, 1991, referring to Sanchez and Troche. Nor did he receive Kelly's handwritten notes referring to Sanchez, the photographic array identifications of Morales by four bouncers, and information about a confidential informant from the 24<sup>th</sup> Precinct. He also said he did not receive Detective Early's November 28, 1990, DD5 from the Crimestoppers Unit.

At the hearing, Sears testified that he learned certain potential witnesses to the shooting, including Callahan, were unavailable. Further, Sears explained that he made a decision not to deploy his resources to try to locate Callahan since "I had no reason to think that [Callahan] would help [in the defense]."

---

<sup>14</sup> The People agreed that Fowler also identified Morales as one of the participants in the incident.

### Sears - Findings of Fact

Sears is an experienced criminal litigator, a former assistant district attorney in the Queens County District Attorney's Office, a member of the 18-B homicide panel, and an active trial lawyer. At the time of the trial, he was a solo practitioner. The most contentious issues of the hearing revolve around what Sears knew, when he knew it, and from what source he acquired the information. During his testimony, Sears acknowledged that portions of his January 18, 2005, affirmation were incorrect in that he had alleged the People did not provide Morales's name, date of birth, and NYSID number prior to trial; he had further alleged the information was only disclosed in connection with the first CPL 440 motion. Sears conceded the possibility he had received this information before the trial. Sears's disavowal of his claim that the People had not disclosed information about Morales's involvement in the shooting before trial was further supported by various documents. Accordingly, at the hearing Lemus's 440 counsel moved to withdraw that portion of the *Brady* claim based on a purported failure by the People to disclose, prior to trial, that Morales was identified as a possible third shooter, who may have been dressed in red clothes.

Clearly, Sears would not have submitted the erroneous affirmation if he had exercised greater care in reviewing his files. However, after observing his demeanor and evaluating his testimony in light of other evidence in this case, the Court concludes he testified truthfully, to his best recollection.

Based on the credited testimony of Sears, the Court finds that Sears, as trial counsel for Lemus, received a large volume of *Rosario* material immediately before or during jury selection; Sears was not aware that four bouncers had selected Morales's photograph from an array, and that some attributed roles to Morales inconsistent with the People's evidence and theory at trial; either just before or during trial, Sears learned that certain witnesses, including Callahan, were unavailable;

Sears concluded there was no reason to believe Callahan would be helpful to him and, in view of his limited resources and time constraints, did not embark on an investigation to find him or other witnesses unlikely to be helpful.

### **Andres Aranda**

Andres Aranda was retained to represent Hidalgo at trial. He said that at no time before or during trial was he ever informed by the People or anyone else that Morales had been identified in a photographic array as one of the gunmen. Beyond civil greetings, Aranda did not converse with Sears, and they did not share information.

Aranda testified he received most of the *Rosario* material on the eve of trial, including some material related to Callahan, who according to Aranda's notes could not be found. Aranda's investigator and paralegal attempted to locate Callahan without success.

### **Aranda - Findings of Fact**

Aranda, a graduate of Columbia Law School and an experienced criminal defense attorney in both federal and state courts, did not maintain his trial files and was, therefore, unable to produce notes he alleged would have reinforced his testimony. Despite this, the Court finds he was a truthful, credible witness.

Based on Aranda's credited testimony, the Court finds that Aranda and Sears did not routinely share strategy or information during the trial; and Aranda had an investigator and a paralegal who attempted but failed to locate Callahan.

### **Detective Carlos Rodriguez - Stipulation**

At the hearing, the defense and the People agreed upon the following stipulation:

“[I]f Detective Carlos Rodriguez were called to testify, he would testify that on February 18, 2004, Jeffrey Craig viewed photos of members and associates of C&C plus [defendants] and identified Joseph Pillot as someone who looked familiar and believes that he was one of the members of the group who was with Morales [and defendants] on the night of November 22<sup>nd</sup> and 23<sup>rd</sup>, 1990.”

### The People’s Case

On May 24, 2005, the People rested without presenting any witnesses. On June 17, 2005, the People moved *ex parte* for an adjournment of their written submission in order to give them an opportunity to fully develop new evidence which warranted reopening the hearing. On July 6, 2005, the Court granted the People’s motion to reopen the hearing. Thereafter, the People recalled Sears and Pillot for additional cross-examination and also called two witnesses.

### Luis Mesorana

Luis Mesorana, a truck driver, grew up in the Bronx. He used to sell cocaine. In 1993, he was convicted of Criminal Sale of a Controlled Substance in the Third Degree and was sentenced to a state prison term.

Luis met Lemus in 1988, and they became friends. They socialized together, going to various clubs, including the Palladium once or twice. While Luis sold drugs to Lemus, Lemus was not known as a drug dealer.

Luis and Ernesto Mesorana are cousins. Ernesto and Pillot are also cousins. Luis and Pillot are not related, but they saw each other at family functions. Luis knew of Pillot’s gang affiliation and was once introduced to Morales on the street. Luis testified that when Ernesto visited him in prison they discussed Lemus:

“I told him I read in the paper about Joseph Pillot and that his organization got incarcerated. And that I read that they were snitching on each other. And I said that if someone in the

organization is responsible for [the shooting at the Palladium] they should step up to it. And that was all that was said.”

Luis testified that he never asked Ernesto to approach Pillot to take responsibility for the Palladium crimes to help Lemus.

### **Luis Mesorana - Findings of Fact**

Luis was not a wholly credible witness. He was clearly uncomfortable as a witness called by the prosecution to give testimony potentially damaging to his friend Lemus. However, there is insufficient evidence to conclude he made any specific, direct request to Ernesto to ask Pillot to help Lemus. This conclusion is bolstered by Ernesto’s testimony that Luis never made any such request. However, it is clear from the separate accounts of Luis, Ernesto, and Pillot that Luis told Ernesto that “if someone in the organization is responsible for it they should step up to it” and that Ernesto subsequently discussed the Palladium shooting with Pillot.

### **Ernesto Mesorana**

Ernesto Mesorana is an enforcement agent with the United States Department of Homeland Security – Immigration and Customs Enforcement, assigned to Florida. He grew up in the Bronx. Ernesto and Luis are cousins because their fathers are brothers. Ernesto and Pillot are cousins because their mothers are sisters. Ernesto was close to both Luis and Pillot.

Both Luis and Pillot were incarcerated in 1993. On an unknown date while visiting Luis in prison, Ernesto learned from Luis that Luis’s friend, Lemus, was charged with a homicide in lower Manhattan. Luis told Ernesto that Lemus was not responsible for the crime.

Also, on an unknown date, after visiting Luis, Ernesto visited Pillot who was in prison. When Pillot asked Ernesto how Luis was, Ernesto mentioned Luis’s friend, Lemus, who was

charged with homicide. Pillot admitted he knew about the case and had read about it in the newspapers. At the hearing, Ernesto recalled Pillot's response that he was at the Palladium at the time of the shooting, but that defendants were not. Ernesto testified that in response to Pillot's admission, he said to Pillot:

“Well, I told Joe, you know, if you feeling, you know, you said you made peace with God, you want to get things off your chest or whatever, you want to per se [*sic*] make peace with man, whatever. I told him contact whoever you need, whatever you going to do because you got yourself here, you need to deal with it. So, you know, whether it's your lawyer, your attorney or whoever, just do what you got to do.”

Ernesto also testified that when he was a young boy, Morales lived in his aunt's neighborhood and hung out with his other older cousins. Ernesto did not know either defendant.

#### **Ernesto - Findings of Fact**

Ernesto is a federal law enforcement agent. While his demeanor showed he was not happy to be involved in this proceeding, there is no reason to doubt he testified as he remembers his discussion with Pillot. The Court credits his testimony as to how he came to raise the subject of the Palladium shooting with his cousin Pillot and the conversation he had with Pillot, specifically that Pillot admitted being present at the Palladium the night of the crimes, and that neither defendant was present.

#### **CONCLUSIONS OF LAW**

##### **Newly Discovered Evidence**

Pursuant to CPL 440.10 (1) (g), a court may vacate a judgment of conviction on the ground that “[n]ew evidence has been discovered since entry of a judgment based upon a verdict of 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.”

The defendant must establish each of the following six requirements to be entitled to a new trial: 1) the evidence must have been discovered after the trial; 2) it must have been undiscoverable before or during the trial by the exercise of due diligence; 3) it must be material to the issue; 4) it must not be cumulative; 5) it must not merely impeach or contradict the trial evidence; and 6) it must be of such nature to probably change the result if a new trial were granted (*People v Salemi*, 309 NY 208, 216 [1955], *cert denied* 350 US 950 [1956]; *People v Reyes*, 255 AD2d 261 [1st Dept 1998]; *People v Taylor*, 246 AD2d 410, 411 [1st Dept 1998]). The determination of whether these requirements have been satisfied and to vacate a judgment and grant a new trial based on newly discovered evidence rests within the sound discretion of the trial court (*see People v Bryce*, 88 NY2d 124, 128 [1996]; *People v Crimmins*, 38 NY2d 407, 415-417 [1975]; *People v Santos*, 306 AD2d 197, 198 [1st Dept], *affd* 1 NY3d 548 [2003]).

At a CPL 440 hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion to vacate (CPL 440.30 [6]). In addition, the newly discovered evidence must be evidence admissible at a trial (*see People v Fields*, 66 NY2d 876 [1985]; *People v Boyette*, 201 AD2d 490 [2d Dept 1994]).

Here, in their post-hearing memorandum of law, defendants present as newly discovered evidence the testimony of Fritz Vincent, James Callahan, Danila Sanchez, Darryl Gray, Trumont Williams, Michael Colomer, Joseph Pillot, JD1, and JD2.

After review of the trial record, the first CPL 440 hearing record, the current hearing testimony, and documentary proof, this Court concludes, as discussed below, that the proffered

evidence satisfies the requisite statutory criteria for newly discovered evidence and that both defendants<sup>15</sup> are entitled to a new trial on that basis.

While each of the six requirements will be discussed below, perhaps the most compelling reason to grant Lemus a new trial may be found in the People's acknowledgment that the identical evidence compels the vacating of Hidalgo's conviction. The People's initial argument that a procedural bar should prevent the Court from considering some of the defense claims is entirely unpersuasive – any such argument would apply with equal force and effect to Hidalgo who was, of course, a party of the first CPL 440 hearing and was in Lemus's exact position in terms of using due diligence to investigate and discover new evidence. The People next assert the case against Hidalgo was intrinsically weaker than that against Lemus because Hidalgo was apprehended ten months later and his lineup occurred almost a year after the crime. This is a novel claim supported by no controlling New York legal authority. No appellate court in New York has held that a lineup identification a year after a crime is inherently of lesser reliability than one two months after the crime (*see People v Whalen*, 59 NY2d 273 [1983]; *People v Daniels*, 88 AD2d 392 [2d Dept 1982]). The Criminal Jury Instructions do not include the length of time between the crime and an identification among the factors to be considered in evaluating the accuracy of the identification evidence (*see* CJI2d [NY] Identification). Next, while the arrest and identifications of Hidalgo occurred later than Lemus's, the investigation and development of evidence, including eyewitness statements and photographic identifications, were based on the same witnesses who were providing information and making photographic identifications of both defendants. The trial witnesses did not have less confidence in the accuracy of Hidalgo's identification nor is there

---

<sup>15</sup> As reflected in footnote 1 on page 1, the People consented to Hidalgo's motion to vacate the judgment of conviction based on newly discovered evidence and later consented to the dismissal of all charges against him. Accordingly, the conclusions set forth below are limited to Lemus.

anything about the nature of the events or the length of interactions witnesses had with Lemus as contrasted with Hidalgo which should have made one set of identifications intrinsically more reliable than the other. Finally, this is the first time the People are taking the position the case against Hidalgo was weak, a change from their position at both trial and the first CPL 440 hearing. In fact, the only real distinction in the evidence against Lemus consisted of his statements to Spencer.

The People argue that the newly discovered evidence would not have affected the verdict for Lemus in light of the admissions he made to Spencer. They contend that Lemus's statements to Spencer, including the recorded conversations, are sufficient to support the verdict. Without doubt, Lemus's statements played a part in the jury's verdict. His statements were used to reinforce the witnesses' identifications of him and are clearly inculpatory.

However, upon examination, they did not independently constitute evidence of his guilt sufficient to defeat the impact of the newly discovered evidence. Indeed, Lemus's statements to Spencer were actually inconsistent with the events as described by the eyewitnesses. His statements to Spencer made days after the shooting claiming the trouble began when someone pinched his girlfriend inside the club were not confirmed by any other evidence. Contrary to Lemus's statements, none of the multiple accounts of the beginning of the incident involved an insult to a woman. Further, Spencer testified Lemus said he himself shot one of the bouncers, but contrary to his statement to Spencer, only one of the four eyewitnesses, Lespinasse, claimed Lemus's gun was discharged. The trial testimony of Fowler, Craig, and Cortes established they never saw Lemus fire a shot.<sup>16</sup>

---

<sup>16</sup> Lespinasse's testimony contradicted other eyewitnesses regarding many subjects. For example, he claimed Lemus was wearing green and Hidalgo a rust reddish shirt.

Lemus does not deny making such statements, but his counsel argues that they were false boastings to impress a girlfriend. When viewed in such context, his statements do not amount to overwhelming evidence of his guilt (*cf. People v Lavarick*, 146 AD2d 648 [2d Dept 1989]; *People v Miller*, 144 AD2d 867 [3d Dept 1988] [new evidence contradicting prosecution's theory outweighed by defendant's signed confession and other overwhelming evidence of guilt]). While Lemus's statements if unexplained may have seemed powerful confirmation of his guilt in the context of the trial evidence back in 1992, given the strong and credible new evidence gathered over the last thirteen years, the import and reliability of those statements have been significantly weakened (*see People v Wise*, 194 Misc 2d 481, 496 [Sup Ct, New York County 2002]). Even without his counsel's explanation, the reliability of the statements is greatly impaired by the new evidence. Accordingly, the Court concludes that the newly discovered evidence coming from so many sources is so powerful that such statements ought not preclude the granting of a new trial for Lemus.

(1) Discovered Since the Trial

Indisputably, all the proffered evidence was discovered after the trial. Before the trial, neither Vincent nor Callahan was ever shown a photograph of Morales. Not until 2004 – twelve years after the trial – did either of them see an array which included a photograph of Morales. Callahan immediately identified Morales as the man with whom he had fought. Vincent said Morales “looked familiar and might have been there.” Thereafter, Callahan also saw a photograph of Morales on NBC News and again recognized Morales as the person with whom he had fought. In 2005, Vincent viewed the NBC Dateline television program which contained audio and video coverage of Morales. He immediately recognized Morales as the person with whom he had fought.

They each were one-hundred-percent certain Morales and not Lemus was the man with whom they each had fought. Thus, there is no dispute their identifications of Morales did not exist until after trial.

Likewise, the testimony of Pillot, Gray, Colomer, Williams, Sanchez, JD1 and JD2 was discovered after the trial. It is uncontested Pillot did not confess to law enforcement until after defendants were convicted. JD2 did not learn his information until well after the trial. The People agree Gray, Colomer, and JD1 were discovered by the defense since the trial. The defense were unaware of these witnesses at trial. Therefore, the testimony of these witnesses was discovered subsequent to the trial.

(2) Undiscoverable with Due Diligence

While the proffered new evidence was discovered after the trial, it must also have been undiscoverable with due diligence before or during trial (CPL 440.10 [1] [g]; *People v Friedgood*, 58 NY2d 467, 471 [1983]). The due diligence requirement may be satisfied when there is nothing in the record to indicate that a defendant's failure to acquire the evidence before or during trial was unreasonable (*People v Hildenbrandt*, 125 AD2d 819 [3d Dept 1986]). The due diligence requirement is thus measured against a defendant's available resources and the practicalities of the particular situation (*id.* at 821; *see also People v Maynard*, 183 AD2d 1099 [3d Dept 1992]).

The substance of JD2's testimony and Pillot's confession did not exist until after trial and thus was clearly undiscoverable even with the utmost diligence. The defense learned of the existence of JD1, Sanchez, Williams, Colomer, and Gray as potential witnesses during the post-trial investigations of this case and through paperwork recently disclosed by the People. While information about Sanchez and JD1 was known to the police prior to trial and therefore legally

considered in the possession of the People, the People concede that Garcia's handwritten notes and the "specifics of the information" about Sanchez and JDI were not turned over to defendants before trial. Even if the defense had known at trial about the C&C gang members, it is improbable that such witnesses would have cooperated and revealed Morales's admissions at a time when they were active gang members. It is uncontested their cooperation with law enforcement did not commence until after the trial. Thus, even with due diligence, the currently proffered evidence was not discoverable before or during trial (*see People v Collins*, 250 AD2d 379 [1st Dept 1998] [defendant learned only after trial for the first time about complainant's history of mental illness]; *People v Wise*, 194 Misc 2d at 486 [confession by serial rapist and DNA confirmation could not have been produced at trial with due diligence]).

Likewise, Vincent's current testimony certainly could not have been discovered with due diligence before or at trial. Although Vincent testified at trial, he could not identify the man with whom he had fought and thus did not identify either defendant. It was only after he viewed the 2005 Dateline program devoted to this case, which contained video footage of Morales walking and talking, that Vincent recognized Morales as the man with whom he had fought. Even if Vincent had been shown a photograph of Morales before trial by Sears, there is no evidence he would have been able to identify him. Indeed, he was shown a photograph of Morales by a prosecutor in 2004 and said only that he looked familiar and might have been there. In his words, it was hearing Morales speak and watching him move on the video which "sealed the deal." Thereafter, he was absolutely certain it was Morales and not either defendant with whom he had fought. Even with the People's diligent efforts to ascertain accurate identifications in preparation for trial, Vincent's identification of Morales simply did not occur until after trial. Thus, Vincent's identification is newly discovered evidence which could not have been discovered with due diligence before or during trial.

Although the defense knew before trial that Callahan was one of the bouncers who witnessed the shooting, his testimony was undiscoverable with due diligence. The primary burden of investigating a crime is on the People through their agency, the police department (*see People v Maynard*, 80 Misc 2d 279, 287 [Sup Ct, New York County 1974] [prosecution has great advantage over defendant in fact-gathering process due to superior manpower and access to other law enforcement facilities]). The defense certainly has an obligation to investigate the facts also, but this requirement must be measured against the limited resources generally available to the defense and the practicalities of the particular situation (*see People v Hildenbrandt*, 125 AD2d at 821). Here, Lemus was incarcerated before trial and could not freely assist in his defense. He was represented by assigned counsel Sears, whose responsibilities extended to other clients as well and who had limited investigatory resources. Both defense counsel received the majority of the *Rosario* material, which included the police paperwork containing witness interviews, immediately before or during jury selection. While actually on trial, counsel were required to scrutinize those materials, investigate any leads derived from those materials, and prepare for the next day of trial. Counsel utilized their limited resources in what they considered the most productive way under their time and economic constraints and, as a practical matter, did not investigate leads that did not appear helpful. Both defense counsel utilized their available resources to prepare for trial, but relied essentially on the police investigative paperwork provided by the People. Since the police never showed a photograph of Morales to Callahan, their paperwork did not provide any basis to believe that Callahan would testify contrary to the other bouncers. Also, Hidalgo's attorney, Aranda, actually attempted to locate Callahan, but was unsuccessful. Sears testified he thought Callahan was unavailable. In any event, Sears had no reason to use his limited resources to try and locate a witness who, at a minimum, was never reinterviewed by the police. Although the defense was not

successful in locating Callahan before trial, their efforts were reasonable and not lacking under these circumstances.

Moreover, and most importantly, the police department, which generally has the means, resources, personnel, and power to locate witnesses, was also unable to locate Callahan. Garcia admitted at trial and at this hearing that the prosecutor asked her to find Callahan and she “looked for James Callahan a number of times and despite [her] best efforts as a detective, [she] or [her] colleagues were unable to locate him.” As a result, the People did not present at trial one of the two eyewitnesses who had a face-to-face confrontation with one of the perpetrators. Thus, even if Sears had attempted to locate Callahan, there is no reason to conclude that his limited resources could accomplish what the lead case detective was unable to do. The People argue that Sears could have located Callahan by speaking to another bouncer, Blake, who was a friend of Callahan. They claim Blake was in court and Sears could have spoken to him. This is not necessarily true, since there is no evidence Sears ever knew who Blake was or that he was actually in court on any given day. The evidence at trial, when there was no motive to fabricate on this issue, as well as the credible evidence at this hearing, is that none of the parties – Sears, Aranda, or the People – found Callahan, and that the People and Aranda looked for him without success. Based on this record, the failure to locate Callahan was not unreasonable, and defendant may not be charged with a lack of due diligence in finding him (*see People v Hildenbrandt*, 125 AD2d at 821-822; *People v Ramos*, 132 Misc 2d 609, 612 [Sup Ct, Kings County 1985]).

(3) Material to the Issue

The new evidence is unquestionably material to the issues at trial which revolved around identification. Defendant’s conviction was based primarily on the identification testimony

of four eyewitnesses – Craig, Fowler, Cortes, and Lespinasse. A reading of the trial transcript as a whole reveals that the identification of the gunmen and members of their group and the roles or actions of these individuals became significant – if not the determinative – issues at trial. Indeed, misidentification was the front line of defendants’ defense, although Hidalgo also raised an alternative defense of “friendly fire.” Accordingly, evidence that a witness identified another person as the perpetrator in the role of either defendant or that witnesses misidentified a participant or that other individuals admitted to the crimes would certainly be material at the trial (*see People v Santos*, 306 AD2d at 198; *People v Wise*, 194 Misc 2d at 494-495; *People v Maynard*, 80 Misc 2d at 288).

(4) Not Cumulative and (5) Not Merely Impeaching or Contradictory

The new evidence cannot be considered merely impeaching, contradictory, or cumulative of the trial evidence. The testimony at trial varied on significant factors such as the number of perpetrators, how they were dressed, and who did a particular act. At trial, Craig, Cortes, and Fowler identified Hidalgo as the man in green, while Lespinasse ultimately identified Lemus as the man in green and Hidalgo as the man wearing a rust, reddish colored shirt. The trial evidence also showed that Cortes had identified Hidalgo as the man in red during a pretrial identification procedure. Craig, Cortes, and Fowler said Lemus was dressed in black clothing, but Lespinasse initially said Lemus was wearing a rust, reddish colored shirt before he changed his testimony and said Lemus was wearing green clothes and Hidalgo a rust, reddish colored shirt. PPO Morales testified about a man in yellow and black, a man dressed in red and black, and a man in green. In addition, while Fowler and Craig described three men with guns, Lespinasse testified that there were only two gunmen. Now, the new evidence strongly suggests that Pillot and Morales were the gunmen. Since this evidence was never introduced at trial, it is not cumulative. While the new

evidence accounts for only two gunmen, it is not cumulative because it allows a theory of the case that wholly excludes defendants as the gunmen. Furthermore, the new evidence does more than merely impeach or contradict the various descriptions of the perpetrators given at trial. It provides a viable alternative theory of the case, exculpating Lemus and Hidalgo and placing Morales in a role different from the People's case at trial (*see People v Ramos*, 132 Misc 2d at 613 [new evidence more than impeachment material as it might well have altered entire "texture and focus" of case]).

The trial witnesses differed significantly on the sequence of events and the actions or roles of the people involved. At trial, Vincent could not identify the man with whom he had fought, but Cortes and Fowler testified Vincent fought with Lemus. Now, Vincent swears he fought with Morales and not Lemus. Such evidence is not merely impeaching, contradictory or cumulative since Vincent never identified Lemus at trial. Further, Lespinasse said Lemus complained about Vincent, while the other bouncers said it was the heavy-set man who complained to them. Craig said the heavy-set man looked like a photograph of Figueroa, but he appeared fatter in the photograph. The new evidence does not merely impeach or contradict Figueroa's participation, but conclusively establishes that he was not present. Indeed, Garcia testified that she learned Figueroa was incarcerated on the night of the shooting, and the People have conceded that he was incarcerated. The other bouncers also said that Lemus left alone after being kicked out, but Vincent said that the man with whom he fought left as part of a group. Some bouncers testified that the man in red returned to the club with two heavy-set men with Hidalgo trailing behind, while Lespinasse testified that only Hidalgo and Lemus returned together. Craig and Lespinasse said Callahan alone knocked Lemus to the ground, but Fowler said he, Callahan, and Cortes together restrained Lemus. Cortes said Callahan and Fowler were involved with Lemus, but he, Cortes, was not. Lespinasse testified Callahan struck Lemus and then only Craig struggled with Lemus. Now, Callahan, who

never testified at trial, swears that he knocked Morales, and not Lemus, to the ground and that he alone struggled with Morales. At trial, Craig testified that Hidalgo placed a gun to Craig's head, pulled the trigger, but the gun jammed. Lespinasse, however, testified that it was Lemus whose gun jammed when it was pointed at Craig's head. Thus, considering the varying versions of the events presented by the trial evidence, the new evidence cannot be deemed merely impeaching, contradictory or cumulative (*see People v Maynard*, 183 AD2d at 1102-1103; *People v Wise*, 194 Misc 2d at 491-492).

(6) Probability of More Favorable Verdict

This Court must also determine whether the new evidence is of such character that it would have resulted in a more favorable verdict (CPL 440.10 [1] [g]). Given the facts either conceded by the People or established at the hearing, it is now apparent that newly discovered evidence, specifically the testimony of Vincent and Callahan and the confession by Pillot, corroborated by the testimony of the other gang members, Sanchez, JD1, and JD2, as well as Morales's admissions, would, without doubt, create the probability that had such evidence been received at trial, the verdict would have been more favorable to defendants.

Had Vincent and Callahan testified at trial as they did at this hearing, their testimony alone would have significantly undermined the People's case and assured a more favorable verdict for defendants. At trial and throughout all post-trial proceedings, the People have asserted that Lemus was the gunman who argued with Vincent about reentering the club and who later tried to sneak back into the club and was knocked down by Callahan. Indeed, Fowler and Cortes testified that they observed Vincent fight with Lemus. Lespinasse and Cortes testified that later they saw Callahan strike or push Lemus. Lespinasse added that when Lemus reached for a gun, Craig

“tussled” with Lemus. Fowler said he, Callahan, and Cortes fought with Lemus, while Cortes said he did not fight with or restrain Lemus. On the other hand, Vincent was actually face-to-face with the gunman, spoke to him, and ultimately punched him to the ground during an encounter, which he described at the hearing as lasting about five minutes, although he agreed he was not watching the person continuously. Even if Vincent’s trial testimony that his direct confrontation with the gunman lasted only seventeen seconds were more accurate, he was still face-to-face with this person, and he now states unequivocally that the gunman was Morales and not either defendant. Callahan also had a face-to-face encounter with the gunman for approximately forty-five seconds. Callahan studied his face as a security measure. Callahan spoke to the gunman, attempted to search him, and eventually punched him to the ground. Callahan, like Lespinasse, believed there were only two gunmen. Now, Vincent and Callahan, the two bouncers who were in the best position to identify the gunman, testified, contrary to the trial witnesses, that it was Morales with whom they had fought. Vincent was “a hundred percent” certain he fought with Morales and not Lemus. Callahan was absolutely certain he punched Morales and that he saw neither Lemus nor Hidalgo that night. Such explicit unwavering testimony from two eyewitnesses that Lemus was not the person involved and that Morales was actually the gunman identified as Lemus would have certainly damaged the People’s case at trial and very likely led to a more favorable verdict for defendants. In light of the nature of the People’s evidence and the defenses at trial, evidence of misidentification or evidence that seriously questioned the trial witnesses’ identifications would have been especially compelling for the defense (*see People v Wise*, 194 Misc 2d at 490). The People argue that their theory encompassed joint action by multiple participants and that it was therefore inconsequential as to what a particular participant did. However, the testimony of Vincent and Callahan eviscerates the scenario presented by the People at trial.

Thus, the testimony of Vincent and Callahan alone would have assured a more favorable verdict for defendants. At the hearing, Vincent and Callahan each gave a dramatic and convincing account of his face-to-face encounter with Morales. They were both candid and forthright, and their testimony proved unassailable under cross-examination. Neither had any interest in this proceeding nor any reason to testify contrary to their former bouncer colleagues. They explained logically and persuasively the reasons for their absolute certainty that Morales was the gunman with whom they had fought. Callahan was positive that Morales was “the freaking guy” with whom he had fought and “one hundred percent” certain it was not either defendant. Vincent was also “a hundred percent” certain he had fought with Morales and not Lemus. After observing Morales on the NBC Dateline program, Vincent explained at the hearing, that “having a person move and talk and be animated in front of you, pretty much seals the deal on anything” and “there was no doubt in my mind at that point that it was Mr. Morales who I had the confrontation with.” Overall, their testimony provided wholly credible evidence that Morales was the gunman who had the confrontation with both Vincent and then Callahan and that defendants were not involved. The reliability of their testimony is supported by the fact that the People recently presented both Vincent and Callahan as witnesses in the Grand Jury proceeding against Morales. In addition, their testimony is corroborated, as discussed more fully below, by other witnesses to whom Morales and Pillot admitted their role in the Palladium shooting. Moreover, their testimony is consistent with and corroborates the testimony of Pillot that he and Morales were the gunmen and not the defendants. Callahan and Vincent may in fact be correct about their identifications, or they may be incorrect. However, it is inconceivable that their testimony would not have a profound effect on the People’s case and would alone assure a more favorable verdict for defendants.

There is a great deal of other new evidence which cumulatively assures a more favorable outcome for defendants. Pillot was an inherently unreliable witness. He is a convicted murderer whose admitted life of violent crime reflects a person without regard for an oath or telling the truth. If a lie would help him, he would lie. To call him a scoundrel is to inflate his character. Mindful of such credibility issues, however, this Court believes a jury would credit his testimony where it is corroborated by credible evidence, including the circumstances under which and to whom he made admissions. Indeed, his account of the Palladium shooting is now corroborated by numerous reliable sources and consistent with many incontrovertible aspects of the evidence. Pillot's denial that Figueroa was present bolsters his credibility since it is now conceded Figueroa could not have been present at the Palladium since he was in jail. Nor is this the sole or even most important factor in reassessing Pillot's credibility. Given persuasive additional new evidence, Pillot's testimony must be viewed in a wholly different light than when presented during the first CPL 440 hearing before Justice Gold. The core of his testimony that he and Morales, and not defendants, are responsible for the crimes at the Palladium has now proved credible based on the accumulated new evidence showing he and Morales were at the Palladium that evening and may well have been the gunmen. Further, Pillot's credibility is enhanced by the indictment of Morales. Thus, while Justice Gold found Pillot incredible in 1996 based on the evidence before him which included the People's allegation of Figueroa's participation, which Pillot refused to confirm and which is now acknowledged by all parties as erroneous, the Court cannot conclude that his testimony is incredible or entirely unworthy of belief. Indeed, the record at the first CPL 440 hearing before Justice Gold was vastly different from the record before this Court, which includes the testimony of Vincent, Callahan, Sanchez, JD1, JD2, Colomer, Gray, and Williams; the People's concession

that Pillot was correct when he denied the presence of Figueroa; and the stipulation that Craig believed Pillot was a member of the group with Morales at the Palladium the night of the shootings.

Pillot's testimony at the first hearing and at the current hearing was actually consistent with many details elicited at trial. Pillot's group consisted of eight – four men and four women – who were allowed into the club without waiting in line, similar to the testimony at trial. His group had parked their cars in the same nearby parking lot where the perpetrators were observed. Pillot's recollection of the cars they drove was a viable match to the description of the gunmen's cars offered by the witnesses. Pillot testified that Morales's dispute with the bouncer involved his attempt to reenter the club. Similarly, at trial, Vincent testified that the altercation resulted from a patron wanting to leave and reenter the club. The bouncers testified that the patron was knocked down to the ground by Vincent during the altercation; Pillot said he found Morales lying on the ground. Pillot recalled that Richie, one of his companions, complained to the bouncers as their group left the club; the bouncers testified that a heavy-set man spoke to them. While the People's presentation at trial that the heavy-set man was Figueroa was erroneous, the People now agree that Richard Feliciano, who is also known as Richie and who is heavy-set, is an exact look alike for Figueroa and, further, that Richie has admitted being present during the shooting. Also, Pillot specified a street cart vendor at the scene, just like the testimony of the trial witnesses. Pillot's description of the guns used – a .38 caliber revolver and .9 mm automatic – matched the trial evidence. Also consistent with the trial evidence was that a gunman ejected a live cartridge after his gun jammed. Indeed, Pillot explained that his gun had jammed causing him to eject a cartridge, and a live .9 mm cartridge was found at the scene. Pillot also testified that only he and Morales had guns just as Lespinasse, and now also Callahan, testified there were only two gunmen. Given such similarities and consistencies, the central aspects of Pillot's version of the events that Morales and

he, and not defendants, were the people involved can be reconciled with the trial evidence and appears credible.

In addition, Pillot's testimony is now corroborated by various numerous other witnesses. Former C&C gang members or associates Gray, Colomer, and Williams all testified that either Pillot or Morales or both, shortly after the event and before the trial, on more than one occasion, admitted responsibility for the Palladium shooting. The details previously admitted by Morales and Pillot to these witnesses further substantiate Pillot's hearing testimony. Gray confirmed that both Pillot and Morales specified a Palladium bouncer pushed Morales and that Morales shot him. Colomer was also told specifically that an altercation occurred with the bouncers and that Pillot and Morales returned with guns and shot them. Williams said Pillot and Morales specified that the dispute resulted when Morales left the club and was not allowed to return, that they got the guns from their cars and returned to the club, that Morales shot the bouncer, and that Pillot's gun had jammed. In addition, Williams confirmed that the day after the shooting, Morales had an abrasion or cut over his eye, consistent with Pillot's testimony that a bouncer punched Morales. Despite his criminal record, Williams was a very credible witness who appeared to be telling the truth as best as he could recall it. It is significant he remembered this injury to Morales's eye in light of the testimony of both Vincent and Callahan that they struck the person they now identify as Morales. Also consistent with Pillot's testimony about the guns used during the shooting, Williams confirmed that Pillot carried a .9 mm and Morales a .38 caliber. Indeed, the People do not dispute that these three witnesses testified candidly. Their testimony that Pillot and Morales made these admissions close in time to the crimes at the Palladium to people they would reasonably tell about their criminal activity adds to the importance of these admissions. No persuasive reason has been given as to why Pillot and Morales would have falsely inculpated themselves in 1990 when talking

to their fellow gang members. While it is always possible the statements are not true, their existence would be powerful evidence at trial.

The hearing testimony of non-gang related witnesses Sanchez, JD1 and JD2 also established that Morales made admissions that corroborate Pillot's version of the shooting. Sanchez confirmed that Morales confessed the Palladium shooting to his half-brother. Consistent with Pillot's testimony, JD1 confirmed that Morales said he or his friend had a dispute with a bouncer when attempting to reenter the club and that he and his friend returned to shoot the bouncer. Further, JD1's description of the clothing Morales wore to the Palladium on the night of the shooting was similar to descriptions provided by trial witnesses. JD2 also confirmed that Morales admitted his participation in the Palladium shooting and that defendants were not involved. Thus, Pillot's testimony, corroborated by various independent sources, is credible regarding his involvement, Morales's role, and the noninvolvement of defendants (*see People v Fields*, 66 NY2d at 877 [third party's statement implicating himself and exonerating defendant was newly discovered evidence warranting new trial]; *People v Wise*, 194 Misc 2d at 489).

The newly discovered evidence would have allowed defendants to present to the jury a persuasive alternative theory of the case to consider. Indeed, Pillot's version of the events, as well as the other new evidence, corresponds with the trial evidence more rationally than the People's theory. At trial and at every subsequent hearing, the People have consistently argued that there were at least three gunmen – Lemus, Hidalgo, and Morales – cohorts who knew each other, conspired together, and acted in concert to commit the shooting. Yet, the only evidence of a relationship among these three was the trial testimony of witnesses who said they acted in a coordinated manner on the night of the shooting and that they were members of the group who had tickets purchased for them by Cortes. No other evidence was offered at trial that linked Lemus and Hidalgo to each other

or to Morales or to the C&C gang. Moreover, despite several investigations spanning a decade, investigators from both the police department and the District Attorney's Office have been unable to find conclusive evidence that Morales knew or was associated with defendants or even that defendants had any link to each other.

At the current hearing, the People at first conceded the lack of any connections among the three alleged gunmen. Then, at the reopened hearing, the People attempted to show a link between Pillot and Lemus. The People assert that Luis Mesorana was a close friend of Lemus and was also Pillot's cousin. The People mislabel Luis as Pillot's cousin when both Luis and Pillot explicitly testified that they are not related. Pillot is actually a cousin of Ernesto Mesorana who is a cousin of Luis. The People claim they have now exposed Luis as the link between Lemus and Pillot. However, the People acknowledge that in August 1995 during the People's reinvestigation of this case, Lemus was interviewed and told the People he knew Luis and they may have gone to the Palladium together once. The People claim Lemus hid from them the connection between Luis and Ernesto, and Ernesto and Pillot. They assert correctly that Pillot withheld detailed information about his connection to Luis and thus to Lemus. The People argue that Luis spoke to Ernesto, who in turn spoke to Pillot, whom he asked to take responsibility for the Palladium murder, but there is no evidence that Luis and Ernesto made such specific requests. Indeed, Luis testified that he never requested Ernesto to ask Pillot to help Lemus, and Ernesto testified that he never asked Pillot to do anything for anybody. Assuming Luis's testimony was shaded in favor of his friend Lemus and Ernesto was minimizing his role, Ernesto's description of his conversation with Pillot nevertheless does not support the People's claim that Pillot was urged to help Lemus. Indeed, the testimony of Luis and Ernesto did not support the People's assertion of "a real and significant connection" from Lemus to Morales, Pillot, and the C&C gang. Overall, the inferential link offered by the People –

Pillot has a cousin who has a cousin who knew Lemus – is tenuous and unpersuasive, especially when every member or associate of C&C who testified stated that defendants were unknown to the gang.

By contrast, the connection between Morales and Pillot was indisputable – members of the C&C gang, friends who referred to each other as “cousins” with friends in common. As the security force for the gang, they both carried guns – the same types as described at trial. Morales and Pillot were the “Joey” and “Spanky” who were mentioned in the anonymous tip to police only a few days after the shooting. Even assuming for the sake of argument only that Ernesto told Pillot Luis wanted him to take responsibility to help Lemus, there is no evidence Pillot would do so if it meant falsely inculcating Morales. Morales was his close friend, whom he called a cousin. They were fellow gang members and criminal cohorts. It is simply not believable that the connection of Lemus to Luis to Ernesto to Pillot would cause Pillot to testify falsely on this issue. In fact, in Pillot’s first and second versions to the federal prosecutor, and again in his first statement to the trial prosecutor, he tried to avoid referring to Morales or to minimize Morales’s role. Had the new evidence been available at trial, it would have been wholly reasonable and appropriate to assert that Morales had an altercation with a bouncer and that he and a fellow gang member retaliated violently by shooting the bouncers. Thus, the new evidence would have presented a viable, convincing alternative theory of the case that C&C gang members and not defendants committed the Palladium shootings (*see People v Wise*, 194 Misc 2d at 490-491).

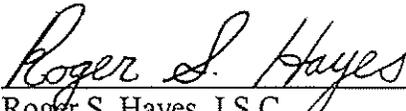
Further, there has been no credible explanation of why Morales would lie, even in conversations with JD2, to protect the defendants. No connection whatsoever has been shown between Morales and the defendants. Moreover, in all the statements Pillot and Morales made in the days and years since these crimes, they never mentioned the participation of either defendant –

powerful circumstantial evidence the defendants were not involved, but more important for this motion, compelling evidence before a jury that Pillot and the other witnesses are correct in their assertions that the defendants were not involved.

### CONCLUSION

In reaching this conclusion, the Court's analysis is rooted in the belief that the essence of a fair trial requires a jury to consider all material facts. It is possible Lemus is guilty of this crime. Still, the issue does not involve "a procedural nicety, but beyond that the issue touches the very essence of a trial's truth finding goal: namely, to accord an accused a full and fair opportunity to present highly relevant evidence in his or her defense" (*People v Santos*, 306 AD2d at 198-199). Even with a fair consideration of Lemus's statements, this Court is convinced the newly discovered evidence, which meets the requirements of CPL 440.10 (1) (g) and *People v Salemi* (309 NY 208 [1955]), would make a more favorable outcome more probable. Accordingly, defendant's motion to vacate the judgment of conviction is granted. The indictment is reinstated and a new trial is ordered as to Lemus. This constitutes the decision and order of the Court.

New York, New York  
October 19, 2005

  
\_\_\_\_\_  
Roger S. Hayes, J.S.C.