

On September 25, 2006, a trial jury found William McCaffrey guilty of rape in the first degree (three counts), kidnaping in the second degree, assault in the second degree, unlawful imprisonment in the first degree, and criminal possession of a weapon in the third degree. On October 20, 2006, this Court sentenced him to serve determinate terms of imprisonment of twenty years on each rape charge to be followed by five years under post-release supervision; eighteen years on the kidnaping charge to be followed by five years under post-release supervision; and seven years on the assault charge to be followed by three years under post-release supervision. The Court also sentenced him to serve indeterminate terms of imprisonment of from one and one-third to four years on the unlawful imprisonment charge and from two and one-third to seven years on the weapon charge. The Court ordered that the sentences run concurrently.

Mr. McCaffrey is now represented by Glenn Garber, principal counsel to the Exoneration Initiative. Mr. Garber was not trial counsel. Mr. Garber has filed a motion, pursuant to CPL §440.10(1)(g), for an order vacating the conviction on the ground that there is newly discovered evidence which, if known at the time of the trial, would have resulted in verdicts favorable to the defendant. He further moves, pursuant to CPL §440.10(1)(h), for an order dismissing the indictment on the ground that Mr. McCaffrey is actually innocent of the charges, and that the judgment was obtained in violation of his rights under the Constitutions of the State of New York and the United States. Mr. Garber's motion is based upon the fact that the complainant has recanted her testimony, and has acknowledged that Mr. McCaffrey did not rape her or commit any other crime against her.

Assistant District Evan Krutoy, who did not try the case, has filed a response on behalf of the People. Mr. Krutoy reports that a thorough investigation conducted by his office confirms that the complainant's recantation is genuine. The Court finds the motion should be granted on each of the grounds urged by the defense.

#### I. Pertinent Trial Evidence

The primary evidence supporting the jury's guilty verdicts was the testimony of Biurny Peguero, the purported victim. At trial, Peguero testified that she had spent the evening of September 17, 2005 drinking with a group of woman friends. She acknowledged that she was intoxicated. According to her sworn account at trial, at about 5:00 a.m. on September 18, she and one of her friends, Aurora Pujols, became separated from the rest of their group outside a restaurant, and were accosted by McCaffrey and his companions. Peguero and Pujols did not know any of the men. Pujols walked away, and entered the restaurant to join the other women. Peguero testified that McCaffrey drove her to a secluded street, where he and two others purportedly raped her at knife point. She claimed that McCaffrey bit her on the shoulder and injured her leg during his assault. When the men were done with her, she said, they left her in a parking garage where she was eventually reunited with her friends. She testified that she was hysterical when she saw her friends again, but that during the drive home she was able to tell them about the rape. She testified that her friends took her to a hospital, where she told medical personnel that she was the victim of a sexual attack, an allegation that she repeated to the police.

During the trial, Peguero's friends testified about her disheveled and hysterical condition when they saw her after the purported rape, and verified that she told them about the attack. Additional trial evidence confirmed that Peguero complained about the purported rape to physicians at the hospital. A sexual assault nurse examiner noted that there were bite marks on her shoulder and bruises on her thigh. There was also testimony about the preparation of a sexual assault kit. The jury was informed that analysis of its contents showed that semen was not found in any of the materials taken from

her body. However, this was consistent Peguero's statement that she did not believe that the assailants had ejaculated after penetrating her. DNA samples were recovered from the bite marks, but were insufficient in cell quantity to permit testing under the regimen then in use. A surveillance video of the parking garage eventually led to McCaffrey's identification and arrest.

McCaffrey testified at trial. He acknowledged meeting Peguero in the early morning hours of September 18, 2005 in front of a restaurant. He had never seen her before, but nonetheless struck up a conversation. She seemed to be drunk. McCaffrey stated that she accepted his invitation to go with him and his friends to a party. A friend of McCaffrey, Ramon Uribe, testified that he was present when McCaffrey invited her to go with him. Uribe said that Peguero went voluntarily in the car to go to the party. Uribe testified that he was one of the men in the car with McCaffrey, but was dropped off at his home within a short time. He said that nothing unusual had occurred.

McCaffrey testified that during the drive to the party, Peguero became visibly upset by a telephone call from her friends. She demanded to be driven to them. McCaffrey testified that he and his companions immediately drove her to a garage where she said she was to meet her friends. McCaffrey left her at the garage, after alerting the garage attendant of her intoxicated condition. The garage attendant testified that Peguero's friends arrived shortly after McCaffrey left. He said that the women began to shout at one another, and became embroiled in a physical fight.

#### II. The DNA Analysis and Peguero's Recantation

As noted, Mr. Garber became Mr. McCaffrey's attorney well after sentence had been imposed. After conducting a preliminary investigation of the case, Mr. Garber moved that the Court order DNA testing of the biological material that had been retrieved from the bite marks on Ms. Peguero's body. Scientific procedures developed after the trial indicated that DNA testing on such small amounts of residue might be possible. Mr. Garber recommended that testing be done at a private laboratory. Although the District Attorney consented to the testing of the substance, he opposed the employment of the private laboratory. Both parties eventually agreed that the Office of the Chief Medical Examiner test the samples. The result of the testing was that the DNA could only have come from a female. Thus, Mr. McCaffrey and his companions were excluded as the sources of the DNA recovered from Ms. Peguero's wounds.

While issues pertaining to DNA testing were being resolved, Ms. Peguero apparently was undergoing anguish attributable to a guilty conscience. Simply put, the rape that she described in her testimony never occurred. Ms. Peguero confessed to Father Zeljko Gurberovic, a priest of the Roman Catholic Church, that she had testified falsely at the trial. At Father Gurberovic's suggestion, Ms. Peguero saw an attorney, Paul Callan, Esq., to begin the process of correcting what she had done. Through him, she contacted the District Attorney's Office to declare that Mr. McCaffrey had not committed any crime against her. During subsequent interviews with Mr. Krutoy and other prosecutors, Ms. Peguero remained firm in her statement that she had not been raped, and that her testimony inculpating Mr. McCaffrey was false. She acknowledged that an apparently brutal physical fight erupted between her and her friends after the men had dropped her off at the garage. In all probability, given the results of the DNA testing, that struggle resulted in the injuries that she sustained that night.

Following an initial inquiry, the District Attorney's office informed Mr. Garber of the recantation. At about this time, Mr. Krutoy was assigned to the case, and commenced a more thorough investigation concerning Ms. Peguero and her recantation. Mr. Garber retained a private detective, and conducted his own investigation of Ms. Peguero's conduct. Each attorney separately interviewed witnesses and examined relevant physical evidence. The details of their efforts are contained in their submissions to the Court in connection with the motion and will not be recounted here.

#### III. Discussion

CPL §440.10(1)(g) provides that a court may vacate a judgment of conviction upon the ground that there is newly discovered evidence. The evidence must be of a kind that "will

probably change the result if a new trial is granted." *People v. Priori*, 164 N.Y. 459, 472 (1900). See, *People v. Salemi*, 309 N.Y. 208, 216 (1955). The evidence must have been discovered since the trial, and must not have been discoverable before trial. *Priori*, 164 N.Y. at 472. Furthermore, the evidence must be material and not cumulative. Finally, the evidence "must not be merely impeaching or contradicting the former evidence." *Id.* Concerning this last requirement, the Court of Appeals recognized, in *People v. Shilitano*, 218 N.Y. 161 (1916), that a witness's recantation may warrant vacatur of conviction where the recantation goes beyond merely impeaching or discrediting trial evidence, and actually "destroy[s] the basis upon which the judgment of conviction rests \* \* \*" *Id.* at 170.

Although recantation may qualify as newly discovered evidence and thus afford relief to the person convicted, the Court of Appeals cautioned circumspection in crediting a witness's renunciation of prior sworn testimony. After all, "witnesses to crimes of violence \* \* \* after they have given their testimony \* \* \* are sometimes influenced by bribery and other improper considerations" or by intimidation. *Shilitano*, 218 N.Y. at 169. However, the Court is convinced, on the basis of the submissions of both parties, that Ms. Peguero's sole motive in recanting was to undo the harm that she caused in falsely accusing an innocent man of having committed a horrendous crime. The Court cannot provide a better summary for the reasons for this conclusion than the following statement contained in Mr. Krutoy's response to the motion:

The fact that the recantation originated within the confines of a church confessional is compelling, and goes far toward allaying concerns about possible third party influence. These concerns are further allayed by the fact that it was the priest to whom she confessed, and not Peguero herself, who insisted that she contact an attorney to begin the process of freeing the defendant. In fact, Ms. Peguero has stated that had she known she was pregnant at the time she confessed, she might well have either delayed revealing that she had perjured herself or not done so at all. Although incarcerated criminals can wield influence beyond the walls of state correctional facilities, the reluctant journey of this recantation from the confines of a confessional in a Union City Church to the New York County District Attorney's Office is one which is, by any reasonable assessment, devoid of any untoward influence by the defendant or an individual acting on his behalf.

As to the allegation of forcible rape, Peguero's recantation gains further credibility from the conversations she had with friends, her attorney, and her former husband following the revelation that she perjured herself. Ms. Peguero was repeatedly confronted with the possible consequences of her actions: incarceration, deportation, a possible civil law suit. Nonetheless, she has maintained that she was not raped.

Krutoy Affirmation of November 23, 2009 at 68.

The only reasonable conclusion to draw from Peguero's recantation, the DNA results, and the statements of witnesses made after the recantation is that Mr. McCaffrey did not commit the crimes of which he was convicted. A wrongful conviction is not simply an injustice. It is also a catastrophe both for the injured party and for the criminal justice system. See, *Ramos v. City of New York*, 285 A.D.2d 284 (1st Dept. 2001). Mr. McCaffrey has served four years of imprisonment for a crime that never occurred. The Court cannot restore lost time. However, the Court will do what it is capable of doing to ameliorate the injustice by vacating the judgment and dismissing the indictment. In doing so, the Court wishes to express its gratitude to Mr. Garber and Mr. Krutoy for the high degree of professionalism that they demonstrated throughout this proceeding.

#### IV. Conclusion

The motion to vacate the judgment of conviction and to dismiss the indictment is granted on each of the grounds urged by the defense.

The forgoing constitutes the decision and order of the Court. The clerk is directed to provide copies hereof to counsel for each of the parties.