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WITNESS RECANTATION—HOW DOES IT AFFECT A JUDGMENT OF CONVICTION?*

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I. INTRODUCTION

The audience in the courtroom is hushed. The defense counsel has just gotten a key prosecution witness to admit that his testimony at a previous criminal trial, identifying the defendant as the perpetrator of a heinous crime, was a complete fabrication. As the prosecutor groans, defense counsel triumphantly moves to dismiss all charges against the defendant. The judge raps his gavel and declares: "Motion granted, case dismissed." Although this scenario is not uncommon in books, movies, or television programs depicting courtroom dramas, in real life recantation evidence rarely achieves its intended result of reversing a conviction.

This Article examines how trial witness recantation affects a judgment of conviction in New York, specifically, the law governing postconviction trial witness recantation[1] as newly discovered evidence.[2] This Article

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1. Recantation may occur before a verdict is rendered. On recantation before trial, see, e.g., People v. Williams, 73 N.Y.2d 84, 535 N.E.2d 275, 538 N.Y.S.2d 222 (1989) (before trial, witness recanted sworn deposition filed with police); People v. West, 72 N.Y.2d 941, 529 N.E.2d 418, 533 N.Y.S.2d 50 (1988) (before trial, witness recanted statements made to police); People v. Fein, 18 N.Y.2d 162, 219 N.E.2d 274, 272 N.Y.S.2d 753 (1966) (before trial, witness recanted statement made to police); People v. Gasper, 132 A.D.2d 990, 518 N.Y.S.2d 519 (1987), *appeal dismissed*, 71 N.Y.2d 887, 522 N.E.2d 1063, 527 N.Y.S.2d 765 (1988) (before trial, police informant recanted statements to police used in the indictment); People v. Quartararo, 113 A.D.2d 845, 493 N.Y.S.2d 511 (1985) (defendant recanted confession prior to trial); People v. Vargos, 54 A.D.2d 884, 388 N.Y.S.2d 612 (1976) (before trial, codefendant recanted statement exculpating codefendant); People v. Bottom, 76 Misc. 2d 525, 351 N.Y.S.2d 328 (1974) (before trial, informant recanted statements made to police); People v. Williams, 140 Misc. 35, 249 N.Y.S. 425 (1931) (grand jury witness recanted testimony prior to trial).

Recantation may also occur during the trial. *See, e.g.*, People v. De Tore, 34 N.Y.2d 199, 313 N.E.2d 61, 356 N.Y.S.2d 598, *cert. denied*, 419 U.S. 1025 (1974) (while testifying at trial, witness recanted earlier trial testimony); People v. Jones, 156 A.D.2d 934, 548 N.Y.S.2d 824 (1989) (while testifying, witness recanted pretrial statement made to police); People v. Osuna, 103 A.D.2d 719, 478 N.Y.S.2d 291 (1984), *aff'd*, 65 N.Y.2d 822, 482 N.E.2d 915, 493 N.Y.S.2d 119 (1985) (witness recanted during trial, but before verdict); People v. Steffens, 12 A.D.2d 962, 211 N.Y.S.2d 949 (1961) (trial witness

initially discusses three tests of recantation evidence as newly discovered evidence and reviews technical motion practice requirements and hearing procedures. Application of the three tests is analyzed, with emphasis on three successful efforts to set aside convictions based upon recantation evidence. Finally, the appropriate standard of appellate review is discussed.

II. RECANTATION EVIDENCE: STATUTORY, *SALEMI*, AND *SHILITANO* TESTS

To recant generally is defined as "to withdraw or repudiate formally and publicly."[3] Postconviction trial witness recantation which is sought to set aside a conviction must meet at least one of three different tests applied by courts. All three tests have developed under the rubric of newly discovered evidence, but each has different requirements. The test annunciated in *People v. Salemi*[4] and the statutory test of the Criminal Procedure Code[5] were fashioned to address all forms of newly discovered evidence (including recantation), while the test applied by the New York Court of Appeals in *People v. Shilitano*[6] emphasizes requirements specific to recantation evidence.

A. *Newly Discovered Evidence: Statutory and* Salemi *Tests*

In broad terms, newly discovered evidence is evidence which becomes available and is discovered after trial, and which may potentially alter the verdict in favor of the defendant.[7] This type of evidence may take many forms, for example, discovery of a new eyewitness,[8] discrediting the

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recanted during trial prior to verdict); People v. Gonzalez, 106 Misc. 2d 801, 435 N.Y.S.2d 532 (1981) (defendant recanted first confession prior to confessing).

This article will not explore recantation as a defense to the crime of perjury. For a discussion of the doctrine of recantation as applied to perjury, see generally People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957).

2. N.Y. CRIM. PROC. LAW §§ 330.40, 440.30 (McKinney 1983).

3. BLACK'S LAW DICTIONARY 1267 (6th ed. 1990).

4. 309 N.Y. 208, 128 N.E.2d 377 (1955), *cert. denied*, 350 U.S. 950 (1956).

5. N.Y. CRIM. PROC. LAW §§ 330.30, 440.30.

6. 218 N.Y. 161, 112 N.E. 733 (1916).

7. N.Y. CRIM. PROC. LAW §§ 330.40, 440.30 (a verdict is a prerequisite to a motion based upon newly discovered evidence). For cases stating the proposition that motions must be preceded by a verdict, not a guilty plea, see, e.g., People v. Sherman, 83 Misc. 2d 563, 564, 372 N.Y.S.2d 546, 548 (1975); People v. Allen, 187 Misc. 547, 548, 64 N.Y.S.2d 723, 723-24 (1946); People v. Frangipane, 171 Misc. 610, 610-11, 13 N.Y.S.2d 429, 430 (1939).

8. *See, e.g.*, People v. Barrero, 137 A.D.2d 759, 759, 524 N.Y.S.2d 834, 835 (1988)

psychiatric history of a prosecution witness,[9] and, in some cases, recantation by a trial witness.[10]

At common law, courts in England inherently lacked jurisdiction to entertain claims based on newly discovered evidence.[11] Consequently, a felony verdict against a defendant was impervious to attack on the ground of newly discovered evidence. Recourse was available, however, in an application to the Crown for a pardon which the court could recommend.[12] Consonant with this common law limitation on judicial authority, New York courts have often held that, absent a statutory grant of jurisdiction, courts lacked authority to rule on requests for new trials based on newly discovered evidence.[13]

(discovery of new witness must meet requirements of newly discovered evidence); People v. Hughes, 136 A.D.2d 916, 916-17, 525 N.Y.S.2d 88, 89 (1988) (trial court properly denied defendant's motion to set aside verdict based on newly discovered evidence, because defendant's counsel was aware of the existence of a potential eyewitness to the crime but failed to secure his attendance at trial, or to exercise due diligence in ascertaining witness' address before trial); People v. Rivera, 119 A.D.2d 517, 519, 501 N.Y.S.2d 38, 40 (1986) (trial court abused its discretion by failing to hold an evidentiary hearing where the prosecution, with the trial court's permission, refused to disclose to defendant's counsel prior to trial the name of a principal witness).

9. *See, e.g.*, People v. Rensing, 14 N.Y.2d 210, 214, 199 N.E.2d 489, 491, 250 N.Y.S.2d 401, 404-05 (1964) (postconviction discovery that prosecution witness was mentally ill warranted setting aside verdict and ordering a new trial); *cf.* People v. Salemi, 309 N.Y. 208, 226, 128 N.E.2d 377, 388 (1955), *cert. denied*, 350 U.S. 950 (1956) (postconviction discovery regarding a dying declaration was insufficient to warrant a new trial where neither the statutory criteria of § 465 of the Code of Criminal Procedure nor the requirement of due diligence were satisfied).

10. *See infra* notes 89-154 and accompanying text.

11. For an analysis of the common law grounds for granting a new trial and the proper forum, see J. BISHOP, CRIMINAL PROCEDURE OR COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES § 1268 (3d ed. 1880); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 495-98 (1947); Riddell, *New Trial at the Common Law*, 26 YALE L.J. 49, 57 (1916). *See also* Appo v. People, 20 N.Y. 531, 551 (1860) (noting that under English common law, not even the highest courts had authority to grant a new trial due to recantation by a witness).

12. *See* sources *supra* note 11. *See also* People v. Fletcher, 35 Misc. 779, 783, 72 N.Y.S. 386, 388 (1901) (postconviction discovery of the identity of a violin, accompanied by its production, warranted new trial where, in case of receiving stolen goods, this new evidence proved the violin was found under circumstances precluding the possibility defendant possessed it at time of his arrest).

13. For cases stating the general proposition that the power to grant a new trial in criminal cases is statutory in origin, see, e.g., People v. Rao, 271 N.Y. 98, 100-01, 2 N.E.2d 275, 275 (1936); People v. Schmidt, 216 N.Y. 324, 328, 110 N.E. 945, 946 (1915); People v. Eng Hing, 212 N.Y. 373, 386, 106 N.E. 96, 100 (1914); Appo v. People, 20 N.Y. 531, 552-53 (1860); People v. Knapper, 230 A.D. 487, 493, 245 N.Y.S.

In the late nineteenth century, the legislature attempted to mitigate the harshness of this common law rule, as applied to New York criminal practice. In 1859[14] and 1876,[15] jurisdiction to hear newly discovered evidence claims was conferred on specific courts. However, neither grant of jurisdiction defined what constituted newly discovered evidence. As a result, the courts applied civil law requirements[16] which required that the new evidence must not have been available to the defendant during trial through the exercise of due diligence,[17] and that it must not have been cumulative of evidence established at trial.[18]

While the judiciary developed a definition of newly discovered evidence applicable to criminal cases, the legislature ended its piecemeal approach to conferring jurisdiction by enacting the 1881 Code of Criminal Procedure,[19] which authorized numerous courts to hear claims based upon newly discovered evidence.[20] More importantly, this legislation

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245, 252 (1930); People v. Seidenshner, 152 N.Y.S. 595, 598 (1914); People v. Sorrell, 39 Misc. 2d 559, 561, 241 N.Y.S.2d 584, 585 (1963); People v. Klein, 6 Misc. 2d 289, 290, 166 N.Y.S.2d 240, 242 (1957); People v. Smith, 6 Misc. 2d 601, 603, 165 N.Y.S.2d 355, 356 (1957); People v. Shepard, 142 N.Y.S.2d 882, 884 (1955); People v. Skeete, 205 Misc. 1118, 1119, 132 N.Y.S.2d 368, 370 (1954); People v. Frangipane, 171 Misc. 610, 611, 13 N.Y.S.2d 429, 430-31 (1939); People v. Lamboray, 152 Misc. 206, 207, 273 N.Y.S. 69, 70 (1934).

14. Act of April 14, 1859, ch. 339, 1859 N.Y. Laws 794, 795 (granted the courts of sessions "power to grant new trials upon the merits, or for irregularity, or on the ground of newly discovered evidence, in all cases tried before them").

15. Act of May 15, 1876, ch. 295, 1876 N.Y. Laws 290 (granted jurisdiction to order new trials on the grounds of newly discovered evidence to courts of oyer and terminer). *See* People v. Case, 6 Abb. N. Cas. 169 (1879) (acknowledged the court's statutory authority to set aside a verdict based upon newly discovered evidence).

16. The tendency to apply civil law was not without support in the language of the Act of May 15, 1876, ch. 295, 1876 N.Y. Laws 290, which instructed criminal courts to consider civil law procedure for determining newly discovered evidence motions. *See, e.g.*, People v. Case, 6 Abb. N. Cas. 169 (1879) (acknowledged the court's statutory power to set aside a verdict based upon newly discovered evidence similar to that in civil cases).

17. People v. Mack, 3 Park. Cr. Cas. 673, 675 (1854) (applying to criminal cases the civil rule of not granting a new trial based on newly discovered evidence if it could have been discovered by exercise of due diligence or it was in the defendant's power to have been furnished with it).

18. Williams v. People, 45 Barb. Ch. 201 (1865).

19. Act of June 1, 1881, ch. 442, 1881 N.Y. Laws 601.

20. *Id.* § 22(7) (granted jurisdiction to courts of oyer and terminer to grant new trials). The courts of oyer and terminer were abolished in 1894, and their jurisdiction was placed in the supreme court. *See* N.Y. CONST. of 1894, art. VI, § 6; Act of June 1, 1881, ch. 442, § 39(14), 1881 N.Y. Laws 601 (granted same jurisdiction to county courts). *Id.* § 51(2) (granted court of general sessions of County of New York the same jurisdiction as

contained the first statutory definition of newly discovered evidence in criminal cases. Section 465 of the Code provided:

> The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:
> . . . .
>
> 7. When it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as if before received would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence.[21]

Despite this legislative effort, the New York Court of Appeals set forth a more restrictive definition of newly discovered evidence (without reference to section 465(7) of the 1881 Code of Criminal Procedure) in *People v. Priori*.[22] In comparison to the 1881 Code of Criminal Procedure definition, the criteria of *Priori* additionally requires that the new evidence be material and not merely impeach or contradict former evidence.

> Newly-discovered evidence in order to be sufficient must fulfill all of the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due

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county courts in other counties). The court of general sessions was abolished in 1962. The judges were transferred to the New York Supreme Court along with jurisdiction over most crimes prosecuted by indictment. *See* N.Y. CONST. art. VI, §§ 1, 35; *cf.* People v. Rao, 271 N.Y. 98, 101-02, 2 N.E.2d 275, 276 (1936) (the supreme court, county court, and court of general session have the right and power to grant motions for a new trial); People v. Schover, 27 N.Y. Crim. 167, 167, 140 N.Y.S. 427, 428 (1912) (section 463 of the New York Code of Criminal Procedure authorized the children's court to grant a new trial based on newly discovered evidence). The King's County Children's Court was abolished in 1962 and its jurisdiction was transferred to the newly created family court. *See* N.Y. CONST. art VI, § 35. *But see* People v. Lamboray, 152 Misc. 206, 207, 273 N.Y.S. 69, 70 (1934) (city magistrate of City of New York did not have jurisdiction to consider newly discovered evidence); People v. Sparrow, 93 Misc. 468, 469, 157 N.Y.S. 265, 266 (1916) (city court of City of Geneva did not have jurisdiction to consider newly discovered evidence).

21. N.Y. CODE CRIM. PROC. ch. 442, § 465(7), 1881 N.Y. Laws 113, 114.

22. 164 N.Y. 459, 58 N.E. 668 (1900).

> diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting the former evidence.[23]

The differences between *Priori* and the 1881 Code were highlighted in *People v. Salemi*,[24] wherein the New York Court of Appeals noted the elements of section 465(7), but ultimately followed the *Priori* test as one "long ago approved in this court,"[25] and applied *Priori's* additional requirement barring evidence which "merely impeach[ed] or contradict[ed] the former evidence."[26]

In 1961 the New York State Legislature established the Bartlett Commission[27] to study and recommend changes in the 1881 Code of Criminal Procedure. Acting upon the commission's recommendation,[28] the legislature revised the definition of newly discovered evidence under section 465(7). The single provision was split into two: section 330.30(3) of the Criminal Procedure Law,[29] enacted in 1971, covers motions to set aside a verdict prior to entry of judgment or sentence; section

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23. *Id.* at 472, 58 N.E. at 672. The court, without noting the origin of the rule, observed that this test was "correctly stated in the appellant's brief." *Id.*, 58 N.E. at 672. One commentator has noted that Berry v. State, 10 Ga. 511 (1851), served as a guide to courts adopting a criteria for defining newly discovered evidence. *See* Repka, *Rethinking the Standard for New Trial Motions Based upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1439 (1986). A comparison between the *Priori* and *Berry* six-point tests supports this observation.

24. 309 N.Y. 208, 128 N.E.2d 377 (1955), *cert. denied*, 350 U.S. 950 (1956).

25. *Id.* at 215, 128 N.E.2d at 381.

26. *Id.* at 216, 128 N.E.2d at 381.

27. Act of July 1, 1961, ch. 346, § 2, 1961 N.Y. Laws 1275, *amended by* Act of April 18, 1962, ch. 548, § 1, 1962 N.Y. Laws 2513 (adding the corrections law and other related statutes). The Act creating the temporary State Commission on Revision of the Penal Law and Criminal Code stated:

> The commission shall make a study of existing provisions of the penal law and the code of criminal procedure and shall prepare, for submission to the legislature, a revised, simplified body of substantive laws relating to crimes and offenses in the state, as well as a revised, simplified code of rules and procedures relating to criminal and quasi-criminal actions and proceedings in or connected with the courts, departments and institutions of the state, affecting the rights and remedies of the people . . . .

Id. § 2.

28. *See* STATE OF N.Y. TEMPORARY COMM'N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, LEGISLATIVE REPORT TO THE LEGISLATURE OF 1969, at XIII, XIX (1969).

29. N.Y. CRIM. PROC. LAW § 330.30(3) (McKinney 1983).

440.10(1)(g)[30] covers motions to vacate a judgment or set aside a sentence after the entry of judgment or sentence. Except for a timeliness obligation under section 440.1(1)(g),[31] the two definitions are identical: newly discovered evidence is that which "could not have been produced by the defendant at the trial even with due diligence on his part 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 . . . ."[32]

This most recent statutory standard lacks three requirements which are present in the *Salemi* test: the evidence must be material, it must not merely impeach or contradict the former evidence, and it must not be cumulative.[33] The six-point judicial criteria originally adopted in *Priori*, and later restated in *Salemi*, remains favored by the courts.

B. *Recantation Evidence as Newly Discovered Evidence: The* Shilitano *Test*

While the six-point *Salemi* and statutory tests lay out the general requirements of newly discovered evidence, *Shilitano*[34] is the New York Court of Appeals' most comprehensive discussion on the issue of postconviction witness recantation. In acknowledging recantation evidence as newly discovered evidence, the court eschewed a formalistic application of either the *Salemi* or the statutory tests as they existed at the time.

At the outset, the *Shilitano* court rejected the argument that trial witness recantation, in and of itself, necessarily justifies granting a new trial.[35] To delegate to each trial witness the power to defeat the jury's verdict by recanting would undermine the integrity of the trial process by inviting witness subterfuge.[36] Instead, an act of recantation only triggers an examination of the recanter's statements, conduct, and motives.[37]

Accordingly, the *Shilitano* court stressed the judiciary's duty to safeguard against recantation prompted by "corrupt or unworthy

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30. *Id.* § 440.10(1)(g).

31. *Id. See infra* notes 63-66 and accompanying text for a discussion of the timeliness requirement for such motions.

32. N.Y. CRIM. PROC. LAW §§ 330.30(3), 440.10(1)(g).

33. People v. Salemi, 309 N.Y. 208, 215-16, 128 N.E.2d 377, 381 (1955), *cert. denied*, 350 U.S. 950 (1956).

34. People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916).

35. *Id.* at 170, 112 N.E. at 736.

36. *Id.* at 169, 112 N.E. at 735.

37. *Id.* at 170, 112 N.E. at 736.

motives,"[38] such as threats and bribes, engendered on behalf of the convicted. It is the likelihood that such motives prompted the recantation that led to the often quoted observation: "There is no form of proof so unreliable as recanting testimony."[39]

Hence, the "character and weight"[40] of the recantation evidence must be evaluated to determine whether it justifies setting aside a verdict. In analyzing the truthfulness of recantations made by six trial witnesses, the *Shilitano* court considered these six factors: 1) the inherent believability of the substance of the recantation;[41] 2) the demeanor of the witness at both the trial and recantation;[42] 3) the existence of trial evidence corroborating the original trial testimony;[43] 4) the reasons offered for the trial testimony and recantation;[44] 5) the extent and importance of facts established at trial as reaffirmed in the recantation;[45] and 6) the relationship between the defendant and the witness as it relates to motive.[46]

The statutory, *Salemi*, and *Shilitano* tests differ primarily in the scope of their requirements. The six-point *Salemi* test, adopting the *Priori* definition of newly discovered evidence, is more stringent than the statutory test which has three fewer requirements. The *Shilitano* test is the most stringent of the three. It applies the requirements of the *Salemi* test, and additionally requires the court to consider particular avenues of inquiry specific to recantation evidence.

III. TECHNICAL MOTION PRACTICE REQUIREMENTS: RECANTATION EVIDENCE

Although now governed primarily by statute,[47] the New York Court of Appeals' first of two opinions in *Shilitano*[48] established basic motion practice guidelines for recantation evidence. In this decision, Judge Cardozo observed that the trial witnesses' notarized statements to a newspaper recanting their trial testimony were defective. He characterized

38. *Id.*, 112 N.E. at 736.
39. *Id.*, 112 N.E. at 736.
40. *Id.* at 171, 112 N.E. at 736.
41. *Id.* at 171-72, 112 N.E. at 736.
42. *Id.* at 172, 112 N.E. at 736.
43. *Id.*, 112 N.E. at 736.
44. *Id.* at 174, 112 N.E. at 737.
45. *Id.* at 177, 112 N.E. at 738.
46. *Id.*, 112 N.E. at 738.
47. N.Y. CRIM. PROC. LAW §§ 330.30, 440.10 (McKinney 1983).
48. People v. Shilitano, 215 N.Y. 715, 109 N.E. 500 (1915).

the form of this recantation as a "styled affidavit,"[49] lacking the requisite indication of venue,[50] a proper caption,[51] and, most importantly, the truthfulness of the recantation was not sworn to by the recanter in a form that could provide a basis for prosecution for perjury if false.[52] To ensure veracity, the court required compliance with the formal requirements of an affidavit. In the event that such compliance was not possible, an excuse or explanation was necessary.[53] Failure to provide either was found to be a ground for denial of the motion to set aside the verdict.[54]

In a similar vein, courts recently have rejected both an unsigned, unsworn letter purportedly authorized by a prosecution witness who was allegedly recanting trial testimony,[55] as well as a signed, unsworn recantation.[56] Judge Cardozo's criteria notwithstanding, the Bartlett Commission, noting that the 1881 Code of Criminal Procedure was "virtually silent on procedural rules,"[57] recommended enacting rules of motion practice for newly discovered evidence. The legislature promulgated the procedural motion rules in 1971.[58]

A motion to set aside a verdict or judgment based on newly discovered evidence, pursuant to section 330.40(2)(a) of the Criminal Procedure Law, must be written and contain "sworn allegations . . . of the occurrence or existence of all facts essential to support the motion."[59] These allegations must be based upon personal knowledge or information and belief, and state sources of information and grounds for belief.[60] After receipt of service the state must be allowed a reasonable opportunity to respond,[61] which in recantation cases has included a sworn repudiation

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49. *Id.* at 715, 109 N.E. at 500.

50. *Id.*, 109 N.E. at 500. *See also* People v. Farini, 125 Misc. 300, 302, 209 N.Y.S. 532, 536 (1925) ("[t]here is no venue and it is not entitled in any action").

51. *Shilitano*, 215 N.Y. at 715, 190 N.E. at 500.

52. *Id.* at 716, 190 N.E. at 500.

53. *Id.*, 190 N.E. at 500.

54. *Id.*, 190 N.E. at 500.

55. People v. Bova, 122 A.D.2d 798, 799, 505 N.Y.S.2d 885, 887 (1986) (witness' letter was not a recantation but an apology which reaffirmed the testimony given by the witness at trial).

56. People v. Balan, 107 A.D.2d 811, 814, 484 N.Y.S.2d 648, 650 (1985).

57. STATE OF N.Y. TEMPORARY COMM'N ON REVISION OF THE PENAL LAW & CODE OF CRIMINAL PROCEDURE, LEGISLATIVE REPORT TO THE LEGISLATURE OF 1967, at 240 (1967) (staff comments on proposed N.Y. CRIM. PROC. LAW § 170.40).

58. *See supra* notes 27-32 and accompanying text.

59. N.Y. CRIM. PROC. LAW § 330.40(2)(a) (McKinney 1983). *See also id.* § 440.30(10) (applies to motions for a new trial after entry of judgment or sentence).

60. *Id.* §§ 330.40(2)(a), 440.30(1).

61. *Id. See, e.g.*, People v. Luciano, 164 Misc. 167, 169, 299 N.Y.S. 132, 135

of the recantation asserted in support of the motion.[62]

Although technically not a procedural issue, timeliness is no longer crucial for initiating a newly discovered evidence motion. Under the 1881 Code of Criminal Procedure, a motion had to be filed within one year after the date of judgment, except in capital cases where no limit existed.[63] At present, a postverdict motion must be made before entry of sentence,[64] and a postjudgment motion must be made "with due diligence after the discovery"[65] of the new evidence. A postjudgment motion based on recantation has been found to be timely eighteen years after entry of judgment.[66]

Once the presiding judge[67] is satisfied that the technical requirements are met, the motion must establish "a ground constituting a legal basis"[68]

(hearing denied because prosecution's response "met and answered" every assertion in defendant's recantation motion), *aff'd*, 251 A.D. 887, 298 N.Y.S. 629, *appeal dismissed*, 275 N.Y. 547, 11 N.E.2d 747 (1937).

62. *See, e.g.*, People v. Grattop, 192 Misc. 667, 668-69, 84 N.Y.S.2d 137, 138-39 (1948) (on return day of motion, complainant presented affidavit recanting her previous recantations; hearing required to determine truth); *see also* People v. Becker, 215 N.Y. 126, 159, 109 N.E. 127, 137 (prosecution witness' signed and verified statement, which he later repudiated, was inconsistent with his trial testimony but insufficient to grant a new trial under the newly discovered evidence rule), *reh'g denied*, 215 N.Y. 721, 109 N.E. 1086 (1915).

63. N.Y. CODE CRIM. PROC. ch. 442, § 466, 1881 N.Y. LAWS 114. *See, e.g.*, People v. Bonifacio, 119 A.D. 719, 722, 104 N.Y.S. 181, 184 (applying a flexible approach to the one-year rule), *aff'd*, 190 N.Y. 150, 82 N.E. 1098 (1907).

64. N.Y. CRIM. PROC. LAW § 330.30(3). *See also id.* § 1.20(14) (defining "sentence").

65. *Id.* § 440(1)(g).

66. *See, e.g.*, People v. Lavrick, 146 A.D.2d 648, 648-49, 536 N.Y.S.2d 548, 548-49 (plaintiff's motion for new trial denied, but eighteen-year delay not considered to be an issue), *appeal denied*, 73 N.Y.2d 979, 538 N.E.2d 365, 540 N.Y.S.2d 1013 (1989), *cert. denied*, 110 S. Ct. 741 (1990).

67. N.Y. CRIM. PROC. LAW § 330.30 directs defendant to bring a motion to set aside a verdict before the "court" wherein the verdict was rendered. Similarly, § 440.10(1) provides: "[a]t any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment . . . ." Nevertheless, there is a demonstrated preference for the judge who presided over the original trial and heard the recanting witness' trial testimony to consider the motion based upon recantation evidence. *See, e.g.*, People v. Rodriguez, 88 A.D.2d 890, 891, 453 N.Y.S.2d 4, 6 (1982) (consideration of new testimony all the more pointed as judge who tried case was no longer available to say how change in testimony would have affected his verdict). If the trial judge dies, another judge of that court may hear the motion. People v. Rao, 271 N.Y. 98, 102-03, 2 N.E.2d 275, 276 (1936).

68. N.Y. CRIM. PROC. LAW §§ 330.40(2)(d)(i), 440.30(3)(a). *See, e.g.*, People v. Gomezgil, 135 A.D.2d 561, 562, 521 N.Y.S.2d 781, 783 (1987) (stating that "defendant

by satisfying whichever test of newly discovered evidence is applicable. Whether this "legal basis" is established and supported by essential facts is within the sound discretion of the trial judge.[69] If the judge finds the motion to be sufficient, and the state concedes to the truthfulness of the facts asserted, the statute directs the court to grant a new trial.[70] The motion, however, may be denied if either the legal basis asserted is faulty or the facts sworn to are insufficient.[71]

Generally, the newly discovered evidence must be admissible evidence,[72] because granting a new trial based on inadmissible new evidence defeats the purpose of holding a new trial. The rule, however, is difficult to apply to recantation evidence because, by its very nature, a recantation is a withdrawal of evidence adduced at an earlier trial. If a new trial is granted, no "new" evidence is contemplated; rather, the recanted testimony is omitted. However, the admissibility of recantation evidence has been questioned in determining whether a motion meets the requisite "legal basis" grounded upon adequate facts. Where the evidence is an affidavit of a third party to whom a trial witness has recanted, this type of affidavit has been held to constitute hearsay and to be insufficient to support the motion.[73] However, some courts have exhibited a more flexible approach and granted evidentiary hearings to determine whether a new trial should be granted on the ground of newly discovered evidence.[74] Obtaining an evidentiary hearing is a necessary first step to

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must show by fair preponderance of the evidence that newly discovered evidence would probably have resulted in a contrary verdict").

69. *See, e.g.*, People v. Welcome, 37 N.Y.2d 811, 338 N.E.2d 328, 375 N.Y.S.2d 573 (1975); People v. Balan, 107 A.D.2d 811, 484 N.Y.S.2d 648 (1985).

70. N.Y. CRIM. PROC. LAW §§ 330.40(2)(e)(i), 440.30(3).

71. *Id.* §§ 330.40(2)(e), 440.30(4).

72. *See, e.g.*, People v. Giordano, 144 Misc. 108, 112, 259 N.Y.S. 178, 182 (1932) (stating that "newly discovered evidence, like all evidence, must be relevant, competent, and material").

73. *See, e.g.*, People v. Farini, 125 Misc. 300, 303, 209 N.Y.S. 532, 537 (1925) (witness' testimony would have been hearsay), *aff'd*, 39 N.Y. 411, 146 N.E. 645 (1925); People v. Devine, 97 Misc. 205, 207, 162 N.Y.S. 852, 853 (1916) (affiant's testimony would not be competent evidence at defendant's trial).

74. *See, e.g.*, People v. Arata, 254 N.Y. 565, 565, 173 N.E. 868, 868-69 (1930) (affidavits themselves were not sufficient to grant a new trial, but were important enough to require production of witnesses and cross-examination); People v. Bonifacio, 119 A.D. 719, 721-23, 104 N.Y.S. 181, 183-84 (affiant was orally examined upon motion for new trial that was based on a witness who admitted that his testimony was untrue), *aff'd*, 190 N.Y. 150, 82 N.E. 1098 (1907); People v. Gordon, 142 Misc. 25, 26, 254 N.Y.S. 424, 425 (1932) (rejecting motion for a new trial after examination and cross-examination of the affiants at an open hearing); People v. Macedonio, N.Y.L.J., Oct. 1, 1979, at 16, col. 3 (Suffolk County Ct. Sept. 24, 1979) (granting an evidentiary hearing based on the affidavits

success, because there is only one New York precedent where a judgment was set aside without first holding a hearing.[75]

A. *Hearing Procedure*

Unlike the discretionary wording of the 1881 Code of Criminal Procedure,[76] the present statute directs the court to "conduct a hearing and make findings of fact"[77] essential to support its ruling if the motion is not granted outright or denied based on technical, factual, or legal grounds. Notwithstanding this language, the New York Court of Appeals has held that the decision to hold a hearing is "discretionary."[78]

Once an evidentiary hearing is granted, a defendant has the burden of proving "every fact essential to support the motion" by a preponderance of the evidence.[79] As applied to recantation evidence, defendants have been required to prove that a recanter's original trial testimony is false,[80] or similarly, to establish the falsity of the trial evidence.[81] One court has

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of six individuals who asserted a knowledge of trial witnesses' intentions to testify falsely).

75. For a discussion of People v. Cohen, 117 Misc. 158, 191 N.Y.S. 831 (1921), see *infra* notes 134-44 and accompanying text.

76. Act of April 6, 1894, ch. 270, § 1, 1894 N.Y. Laws 494, 495 (amending Act of June 1, 1881, ch. 442, § 465, 1881 N.Y. Laws 601) ("the court in which a trial has been had upon an issue of fact has power to grant a new trial . . . [w]hen . . . the defendant can produce evidence such as if before received would probably have changed the verdict").

77. N.Y. CRIM. PROC. LAW §§ 330.40(2)(f), 440.30(5) (McKinney 1983).

78. *See, e.g.*, People v. Crimmins, 38 N.Y.2d 407, 416, 343 N.E.2d 719, 726, 381 N.Y.S.2d 1, 8 (1975) (decision to grant defendant's motion for a hearing rests solely in the discretion of the lower courts); People v. Welcome, 37 N.Y.2d 811, 812-13, 338 N.E.2d 328, 329, 375 N.Y.S.2d 573, 573 (1975) (decision to hold a hearing on motion to vacate is discretionary with the court to which the motion is addressed); People v. Bohn, 155 A.D.2d 679, 680, 548 N.Y.S.2d 57, 58 (1989) (findings of a hearing are to be accorded great deference and should not be set aside absent an improvident exercise of discretion). For a more in-depth review, see *infra* notes 157-65 and accompanying text.

79. N.Y. CRIM. PROC. LAW §§ 330.40(3)(g), 440.30(6).

80. *See, e.g.*, People v. Gordon, 142 Misc. 25, 26, 254 N.Y.S. 424, 425 (1931) (compelling the personal appearance of affiants for the purpose of examination and cross-examination regarding the contents of their affidavits, which represented that recanted statements were false); People v. Giordano, 106 Misc. 235, 244, 175 N.Y.S. 715, 720 (1919) (holding that the sum of the testimony of the recanter, the record of the trial, and affidavits submitted all failed to prove testimony at trial to be false).

81. *See, e.g.*, People v. Kelly, 38 A.D.2d 1006, 1006, 329 N.Y.S.2d 968, 969 (1972) (defendant "failed to establish the falsity of evidence preserved at trial"); *see also Gordon*, 142 Misc. at 26, 254 N.Y.S. at 425 (defendant's affidavit "failed to establish any presumption that any additional evidence now available to the defendant, if produced at another trial, would change the verdict").

required a "reasonable probability that the recantation is true."[82] All require the appearance of the recanting witness at the hearing.

The requirement of calling the recanter to testify at the hearing is also applicable to a recantation hearing based upon a hearsay affidavit of a third person in whom the recanter has confided.[83] Although this type of hearsay affidavit may succeed in obtaining a hearing,[84] at this stage the defendant must produce the recanter to testify.[85] As with any witness, an appearance does not guarantee testimony. A recanter may refuse to give evidence by invoking the constitutional privilege against self-incrimination,[86] by repudiating the recantation,[87] or by affirming the original trial testimony.[88]

IV. THE TESTS APPLIED

A. *Probability of a More Favorable Outcome*

Each of the three tests for measuring recantation evidence as newly

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82. *Giordano*, 106 Misc. at 238, 175 N.Y.S. at 717 (trial judge must deny the motion unless convinced that recantation testimony is true or at least that there is a reasonable probability of it being true).

83. *E.g.*, People v. Farini, 125 Misc. 300, 209 N.Y.S. 532 (1924), *aff'd*, 239 N.Y. 411, 146 N.E. 645 (1925).

84. *See supra* notes 76-82 and accompanying text.

85. *E.g.*, People v. Arata, 254 N.Y. 565, 173 N.E. 818 (1930); *Farini*, 125 Misc. 300, 209 N.Y.S. 532.

86. *See* U.S. CONST. amend. V; N.Y. CONST. art. I, § 6; *see also* People v. Behlin, 133 A.D.2d 835, 520 N.Y.S.2d 405 (1987) (prosecution's witness, who allegedly recanted, asserted the privilege against self-incrimination at the hearing); People v. Balan, 107 A.D.2d 811, 814, 484 N.Y.S.2d 648, 650 (1985) (prosecution's witness invoked the privilege against self-incrimination upon his counsel's advice and the prosecution's refusal to grant him immunity); People v. Osorio, 108 Misc. 2d 100, 436 N.Y.S.2d 958 (judgment vacated when prosecution's refusal to grant immunity to its witness who, in recanting his testimony after trial, violated the defendant's due process rights), *rev'd on other grounds*, 86 A.D.2d 233, 449 N.Y.S.2d 968 (1982).

For an example of the plight of the recanter, see People v. Colgan, 50 A.D.2d 932, 377 N.Y.S.2d 602 (1975) (after testifying before the grand jury, prosecution's witness received death threats and recanted his grand jury testimony at trial; he was convicted of perjury; however, his conviction was later set aside and a new trial ordered, permitting defendant-recanter to raise an affirmative defense of duress).

87. *See, e.g.*, People v. Rossi, 155 A.D.2d 951, 548 N.Y.S.2d 124 (1989) (at the evidentiary hearing, the witness denied making a sworn statement recanting his testimony), *appeal denied*, 75 N.Y.2d 817, 551 N.E.2d 1245, 552 N.Y.S.2d 567 (1990); People v. Fishgold, 189 Misc. 602, 71 N.Y.S.2d 830 (1947) (same).

88. People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916).

discovered evidence recites some requirement that the trial judge be persuaded by a preponderance of the evidence that the new evidence, if admitted at a new trial, will result in a verdict more favorable to the defendant. The statutory test demands that the new evidence "create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant."[89] *Salemi* states that the evidence "must be such as will probably change the result."[90] The *Shilitano* test asserts that the "character and weight" of the recantation must warrant a new trial.[91] Each test presents the trial judge with an unusual task: he must weigh the credibility and content of the recantation and predict what effect, if any, the new evidence would have had on the jury if it was included in, deleted from, or substituted for the original trial testimony. Because neither the statutory test nor the *Salemi* test identifies what should be considered in determining whether a more favorable verdict is probable, courts rely on the factors applied in *Shilitano*.

Accomplice and defendant recantations do not fare well. In *People v. Devine*,[92] the court, applying the 1881 Code of Criminal Procedure section 465(7), viewed an accomplice's recantation as an admission to committing two acts of perjury, thus not warranting "any reliance."[93] Similarly, in *People v. Mayhew*,[94] the court rejected the accomplice's recantation, applying an approach which later appeared in *Shilitano*, where the accomplice's trial testimony was corroborated by circumstantial evidence established at trial.[95] In both cases no change in the verdict was foreseen, and the motions for new trials were denied.

More recently, in *People v. Allison*,[96] the court quoted *Shilitano* on recantation[97] in summarily characterizing an accomplice recantation as

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89. N.Y. CRIM. PROC. LAW §§ 330.30, 440.10 (McKinney 1983). *See, e.g.*, People v. Rice, N.Y.L.J., Sept. 11, 1972, at 19, col. 5 (N.Y. Sup. Ct. July 31, 1972) (holding that recantation would produce a more favorable result when prior recantation by recanting witness regarding the same issue was introduced into evidence at earlier trial; however, defendant was reconvicted).

90. People v. Salemi, 309 N.Y. 208, 216, 128 N.E.2d 377, 381 (1955), *cert. denied*, 350 U.S. 950 (1956).

91. People v. Shilitano, 218 N.Y. 161, 171, 112 N.E. 733, 736 (1916).

92. 97 Misc. 205, 162 N.Y.S. 852 (1916).

93. *Id.* at 207, 162 N.Y.S. at 853. *See also* People v. Kelly, 38 A.D.2d 1006, 1006, 329 N.Y.S.2d 968, 969 (1972) (motion for new trial was denied although recanting accomplice admitted to committing perjury at trial).

94. 19 Misc. 313, 44 N.Y.S. 206 (1897).

95. *Id.* at 314, 44 N.Y.S. at 206.

96. 119 A.D.2d 1005, 500 N.Y.S.2d 888 (1986).

97. *Id.* at 1005, 500 N.Y.S.2d at 888 ("There is no form of proof so unreliable as recanting testimony.").

falling within the import of this observation.[98] This approach also was taken in dismissing the recantation of a prosecution witness, who was a defendant in an unrelated prosecution, and who was motivated to recant in retaliation for having received a higher sentence than anticipated.[99] In another instance of a defendant as a trial witness, the court in *People v. Johnson*[100] rejected the defendant's recantation of his identification testimony because it was motivated by fear of jailhouse reprisals, and because the reasons for testifying falsely were "extremely weak and incredible."[101]

When a witness who is not an accomplice or a defendant in a separate prosecution recants identification testimony, courts generally place less emphasis on motive. Instead, courts tend to look to the trial evidence for guidance. Without reference to any definition of newly discovered evidence, the court in *People v. Dinan*[102] rejected the recantation of a witness' voice identification of the defendant because the identification was "corroborated by other evidence."[103] In *People v. White*,[104] in applying *Shilitano*, the court held that despite the recantation made by one of three identification witnesses who testified at trial, an evidentiary hearing was not necessary.[105] Additionally, the recanting identification witness' demeanor at trial may undercut the courts' willingness to accept the recantation. Hence, a positive identification at trial, "the verbiage of which completely negates the believability of the wording of the alleged recantation,"[106] may stand. When a trial witness who was unable to

98. *Id.*, 500 N.Y.S.2d at 888. *See also* People v. Kelly, 38 A.D.2d 1006, 1006, 329 N.Y.S.2d 968, 969 (1972) (accomplice recantation held "less than credible").

99. People v. Donald, 107 A.D.2d 818, 819, 484 N.Y.S.2d 651, 652 (1985) (recantation affidavit executed by witness found to be unreliable and lacking credibility).

100. 113 A.D.2d 781, 520 N.Y.S.2d 66 (1987).

101. *Id.* at 782, 520 N.Y.S.2d at 67.

102. 15 A.D.2d 786, 224 N.Y.S.2d 624, *aff'd*, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962).

103. *Id.* at 786, 224 N.Y.S.2d at 627.

104. 44 A.D.2d 749, 354 N.Y.S.2d 735, *aff'd*, 40 N.Y.2d 876, 357 N.E.2d 1016, 389 N.Y.S.2d 361 (1974).

105. *Id.* at 750, 354 N.Y.S.2d at 736. *See also* People v. Legette, 153 A.D.2d 760, 761, 545 N.Y.S.2d 296, 296 (1989) (recantation by a civilian informant who had identified defendant at trial was rejected as merely impeaching or contradicting former evidence); People v. Gordon, 142 Misc. 25, 26, 254 N.Y.S. 424, 425-26 (1931) (minor recantation by one of five identification witnesses will not change result of trial).

106. People v. Freeland, 45 A.D.2d 814, 815, 356 N.Y.S.2d 912, 915 (1974). The principal witness allegedly recanted her identification testimony and the trial court denied the defendants a hearing on the matter. *Id.*, 356 N.Y.S.2d at 915. The appellate court affirmed the decision, citing to the trial record where the witness had testified repeatedly

identify the defendant, recants by stating positively that the defendant is not the perpetrator, the degree of assuredness of a nonrecanting witness' identification becomes crucial and may offset the recantation.[107] Finally, identification recantation is also susceptible to the inherent unreliability of recanted testimony,[108] as pointed out in *Shilitano*.[109]

A prosecution witness' recantation requires the court to consider a greater variety of factors than in other instances of recantation because of the greater likelihood that the witness was improperly induced to recant. In *People v. Font*,[110] the court applied the statutory test to recantation evidence in reversing the trial court's decision to vacate a guilty verdict for assault in the first degree. In determining whether the recantation created "a probability"[111] of a more favorable verdict, the court applied several *Shilitano* factors. At trial, only one witness testified that the defendant handed a club to the codefendant, who then struck the victim.[112] In recanting, this witness testified that he was paid $150 for his false testimony.[113] Noting violent instances of witness intimidation during the trial, and the fact that one of the two alleged bribe payers had killed the other before the start of the trial, the court branded this explanation as "simply not credible."[114] The court then explored a possible motive for the recantation. At the time of recantation, the witness

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as to the identity of defendants, as evidence of the truthfulness of the trial testimony. *Id.*, 356 N.Y.S.2d at 915. *See also* People v. Steele, 65 N.Y.S.2d 214, 218 (1946) (where the trial testimony of a witness was recanted for the insubstantial reason that the witness lied on the stand to oblige an acquaintance, the court harbored the belief that the witness' trial version was indeed the truth).

107. *See, e.g.*, People v. Gomezgil, 135 A.D.2d 561, 521 N.Y.S.2d 781 (1987). The nonrecanting witness was the defendant's fiance. The court held that the "defendant must show, by a fair preponderance of the evidence, that the newly discovered evidence would have resulted in a contrary verdict. Here, [the nonrecanting witness'] eyewitness testimony provided strong evidence that the defendant was the perpetrator." *Id.* at 562, 521 N.Y.S.2d at 783.

108. *See, e.g.*, People v. Dukes, 106 A.D.2d 906, 907, 483 N.Y.S.2d 137, 137 (1984) (affirming trial court's order that prosecution witness' recantation of identification was not credible); *cf.* People v. Lavrick, 146 A.D.2d 648, 648, 536 N.Y.S.2d 548, 548 (holding that victim's partial recantation of identification testimony merely impeached prior testimony), *appeal denied*, 73 N.Y.2d 979, 538 N.E.2d 365, 540 N.Y.S.2d 1013 (1989), *cert. denied*, 110 S. Ct. 741 (1990).

109. *See* People v. Shilitano, 218 N.Y. 161, 170, 112 N.E. 733, 736 (1916).

110. 160 A.D.2d 299, 553 N.Y.S.2d 393 (1990).

111. *Id.* at 299, 553 N.Y.S.2d at 394.

112. *Id.*, 553 N.Y.S.2d at 394.

113. *Id.*, 553 N.Y.S.2d at 394-95.

114. *Id.*, 553 N.Y.S.2d at 395.

was living with the defendant's wife and had received encouragement to recant from the defendant's friends. This cast further doubt on the recantation, while other evidence supported the witness' trial testimony: the witness' signed statement to the police made within twenty-four hours of the incident was consistent with his trial testimony, and in pleading guilty, the codefendant claimed that the defendant had given him the club.[115]

In examining the motives of recanting eyewitness testimony, courts have rejected explanations of inducement by law enforcement coercion.[116] Other motivations underlying recantations that have been rejected are those motivated by fear of physical harm,[117] financial pressure,[118] drug dependency,[119] or pressure from relatives.[120] Even when no sinister motive is apparent, unassailed victim recantation may prove inadequate if the recanter contradicts other aspects of the trial testimony which renders the recantation incredible.[121] Likewise, a recanter's untenable explanation for false trial testimony may defeat the effort.[122]

In summary, regardless of the test applied, courts often focus on a mix of the *Shilitano* factors to determine whether a more favorable outcome is probable. Assuming a hearing is held, it is the trial judge who, having observed the witness' demeanor while testifying at the trial, is qualified to evaluate the credibility of the witness' recantation. The recantation may consist of a renunciation of trial testimony with an explanation for the original trial testimony or a presentation of a different

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115. *Id.* at 300, 553 N.Y.S.2d at 394.

116. *See, e.g.*, People v. Chalos, 111 A.D.2d 827, 828, 491 N.Y.S.2d 8, 9 (1985) (noting that the alleged coercion had been brought out upon cross-examination and was thus merely cumulative as post-trial evidence); People v. Kelly, 38 A.D.2d 1006, 1006, 329 N.Y.S.2d 968, 969 (1972) (recanting accomplice's trial testimony purportedly induced by pressure from district attorney's office); People v. Steele, 65 N.Y.S.2d 214, 219 (1946) (recanting witness' trial testimony purportedly induced by pressure from district attorney's office); People v. Lee, N.Y.L.J., June 24, 1985, at 13, col. 3 (N.Y. Sup. Ct. May 23, 1985) (although the court expressed doubts as to the veracity of the law enforcement officers' testimony, it concluded that the witnesses' recantations were likely based on community pressure and the original testimony had been more truthful).

117. People v. Luciano, 164 Misc. 167, 169, 299 N.Y.S. 132, 135, *aff'd*, 251 A.D. 887, 298 N.Y.S. 629, *appeal dismissed*, 275 N.Y. 547, 11 N.E.2d 747 (1937).

118. *Id.*, 299 N.Y.S. at 135.

119. *Id.*, 299 N.Y.S. at 135.

120. People v. Lee, N.Y.L.J., June 24, 1985, at 13, col. 3 (N.Y. Sup. Ct. May 23, 1985).

121. People v. Steele, 65 N.Y.S.2d 214, 217 (1946).

122. *Id.* at 219.

version of the facts disputed at trial. The truthfulness of the recanted testimony is assessed by examining its internal consistency and logic, and the degree to which each version affirms or contradicts accredited trial evidence. A more direct line of inquiry considers the relationship, or lack thereof, between the defendant and the recanting witness, which may indicate a motive for recanting. Finally, the extent to which the witness' trial testimony is corroborated by accredited trial evidence, taking the recantation into account, and the strength of the remaining trial evidence supporting the verdict are also frequently dispositive.

B. *Contradictory and Cumulative Evidence*

Two elements of the *Salemi* test direct courts to compare the newly discovered evidence to the trial evidence and to determine whether the new evidence is "merely impeaching or contradicting" or cumulative of the evidence established at trial.[123] These inquiries share a common purpose: to weed out inconsequential attacks on, or repetitious additions to, the trial evidence.

In *Shilitano*,[124] the New York Court of Appeals sought to distinguish between evidence of recantation which "tends to impeach or discredit a witness" and that which is "much more fundamental" in character and may "in certain cases destroy the basis upon which the judgment of conviction rests."[125] Trial courts must determine whether the substance of a particular recantation manifests a fundamental contradiction of trial evidence, since a partial recantation is viewed as merely impeaching.[126]

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123. People v. Salemi, 309 N.Y. 208, 216, 128 N.E.2d 377, 381 (1955), *cert. denied*, 350 U.S. 950 (1956).

124. People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916).

125. *Id.* at 170, 112 N.E. at 736. *See also* People v. Legette, 153 A.D.2d 760, 761, 545 N.Y.S.2d 296, 296-97 (1989) (affirming trial court's determination that witness recantation was insufficient to warrant a new trial); People v. Johnson, 133 A.D.2d 781, 782, 520 N.Y.S.2d 66, 67 (1987) (witness recanting his identification of defendant was insufficient to satisfy the six-point *Salemi* test).

126. *See, e.g.*, People v. Becker, 215 N.Y. 126, 159-60, 109 N.E. 127, 137-38, *reh'g denied*, 215 N.Y. 126, 109 N.E. 1080 (1915) (assimilating partial recantation to newly discovered evidence that is to be used only to impeach or discredit witness' previous sworn statements); People v. Bohn, 155 A.D.2d 679, 680, 548 N.Y.S.2d 57, 58 (1989) (court properly denied motion for a new trial because recantation evidence was "contrary and disjointed in contrast" to trial testimony which was consistent); People v. Robinson, 116 A.D.2d 748, 748, 498 N.Y.S.2d 42, 43 (1986) ("[e]vidence which merely impeaches or contradicts former evidence does not justify ordering a new trial"); People v. Lavrick, 146 A.D.2d 648, 648-49, 536 N.Y.S.2d 548, 548-49 (victim's partial recantation, which merely impeached his prior testimony, was insufficient to set aside verdict), *appeal denied*, 73 N.Y.2d 979, 538 N.E.2d 365, 540 N.Y.S.2d 1013 (1989), *cert. denied*, 110 S. Ct. 741

Similarly, recantation cannot be cumulative to evidence adduced at trial.[127] In other words, the evidence must be a renunciation or withdrawal of trial evidence, not merely an addition or repetition of that already testified to by the recanter or by any other trial witness. If the purported recantation "disclose[s] no significant difference" to that produced at trial, the recantation may be deemed ineffective and rejected.[128] In addition, recanted evidence elicited during cross-examination has been deemed cumulative of other evidence established at trial.[129]

C. *Discovery: The Due Diligence Requirement*

All three tests require that newly discovered evidence must have been discovered since trial and could not have been discovered before or during trial by exercise of due diligence. In *Shilitano*, the prosecution argued that the existence of the witness who testified at trial, and then recanted, was known to the defendant, thus his recantation should have been barred.[130] The court responded by observing: "It is not that the witness has been newly discovered, but the fact that he has recanted his testimony since the trial which makes that evidence newly discovered."[131] Hence, if the court determines that due diligence has been exercised, no time bar is imposed.

While timeliness is no longer a requirement, it will operate to bar a defendant who conceals exculpatory information within his knowledge, but who chooses to hide this information by testifying falsely. Accordingly, when a defendant testifies at trial, and subsequently recants his trial testimony and asserts new evidence intended to be exculpatory, neither the facts recanted nor the new evidence is timely; this recantation evidence was known by, and available to, the defendant during trial, and obviously could have been discovered by the exercise of due diligence.[132]

(1990).

127. *E.g.*, People v. Shea, 16 Misc. 111, 121-24, 38 N.Y.S. 821, 828-30 (1896).

128. People v. Egan, 103 A.D.2d 940, 941, 479 N.Y.S.2d 774, 776 (1984).

129. People v. Chalos, 111 A.D.2d 827, 828, 491 N.Y.S.2d 8, 9 (1985).

130. People v. Shilitano, 218 N.Y. 161, 170-71, 112 N.E. 733, 736 (1916).

131. *Id.* at 171, 112 N.E. at 736. *See also* People v. Militano, 80 N.Y.S.2d 755, 756 (1948) (holding evidence of insanity insufficient to satisfy the requirements of the Code of Criminal Procedure for granting a new trial because the defendant knew his mental state at the time of the first trial).

132. *See, e.g.*, People v. Poole, 127 A.D. 122, 125, 111 N.Y.S. 258, 260 (1908), *aff'd*, 199 N.Y. 542 (1910) (defendant recants his own testimony); *see also Militano*, 80 N.Y.S.2d 755, 757 (defendant's willful suppression of facts relating to his sanity was not newly discovered evidence because it was known at the time of trial).

V. RECANTATION RESULTING IN SETTING ASIDE THE VERDICT

In New York, there are three reported cases where recantation evidence as newly discovered evidence resulted in the granting of a motion to set aside a verdict or judgment.[133] Interestingly, the prosecution consented in all three cases.

A. *People v. Cohen*[134]

This 1921 trial court decision, which set aside a judgment against the defendant Cohen, is unusual in that the recantation was made by a codefendant, Sorro, who testified against Cohen at the trial. Cohen was convicted of murder and Sorro was acquitted.[135] Later, Sorro recanted his trial testimony and was tried and convicted of perjury for his testimony at Cohen's trial. At his perjury trial, however, Sorro repudiated his recantation. Initially, the court cited the *Shilitano* position, and held that the mere fact that a portion of his testimony was adjudged perjurious did not, of itself, establish grounds for setting aside Cohen's conviction.[136] The court found that perjurious testimony must have been of the requisite "character and weight"[137] to support the setting aside of the judgment. Upon examination, the court determined that Sorro's perjurious testimony against Cohen was the only evidence corroborating another witness' testimony which had linked the defendant to the crime.[138] As a matter of law, this evidence was essential to Cohen's prosecution.[139]

In recanting, Sorro was extraordinarily cooperative. A year and a half after Cohen's conviction, Sorro approached the district attorney and recanted his trial testimony in a seventy-five-page deposition, which was admitted into evidence at his perjury trial. Two weeks later, Sorro repeated his recantation to a representative of the attorney general's office, recorded in a 100-page transcript.[140] One week later, Sorro attempted to repudiate his recantation, attributing it to threats and bribes by associates of Cohen. The court characterized these offers as "too shadowy and flimsy

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133. People v. Caruso, 172 Misc. 191, 14 N.Y.S.2d 349 (1939); People v. Cohen, 117 Misc. 158, 191 N.Y.S. 831 (1921); People v. Allen, N.Y.L.J. Sept. 21, 1989, at 23, col. 4 (N.Y. Sup. Ct. Sept. 6, 1989).

134. 117 Misc. 158, 191 N.Y.S. 831 (1921).

135. *Id.* at 159, 191 N.Y.S. at 832.

136. *Id.* at 161, 191 N.Y.S. at 832-33.

137. *Id.*, 191 N.Y.S. at 832-33.

138. *Id.* at 163-65, 191 N.Y.S. at 833-35.

139. *Id.* at 165, 171-72, 191 N.Y.S. at 835, 838-39.

140. *Id.* at 174, 191 N.Y.S. at 840.

for belief."[141]

Fortunately for Cohen, the detailed and sworn recantation garnered by the district attorney and attorney general provided the trial judge with a basis by which to evaluate the credibility of Sorro's various accounts of Cohen's conduct in comparison to the trial evidence.[142] The court also observed that, despite his efforts to the contrary, Sorro's testimony at his perjury trial, wherein he further repudiated his recantation, served to "strengthen rather than to weaken the recantation."[143] Ultimately, the judge held that Sorro's recantation "adhered more closely to the truth"[144] than either his testimony at Cohen's trial or his own trial for perjury.

B. *People v. Caruso*[145]

This 1939 robbery case illustrates effective victim recantation of identification testimony. The victim was seated in his parked car when three "bandits"[146] entered it, one from each front door of the car (thus sandwiching the victim between them), while the other entered the back seat. Brandishing a gun, the bandits robbed the victim, who only saw the face of the robber seated to his immediate right.

Five months later, the victim identified Caruso in a police station lineup; the next day he repeated his identification. In the felony complaint, the victim stated: "I remember his face, I made sure that I would get a good look at his face."[147] This identification was repeated unequivocally at trial.

One year after the incident, and five months after Caruso's trial, two suspects in police custody on another matter confessed to committing the robbery.[148] The victim of the earlier Caruso robbery then identified one of them as the robber who sat to his right during the incident. In explaining his earlier mistake, the victim noted that the robber had a mole or birthmark on the right side of his upper lip identical to the one on this new suspect. It seems that when identifying Caruso, he too had a "sore spot or pimple"[149] on the right side of his upper lip.

In applying *Shilitano*, the trial judge viewed the victim's recantation

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141. *Id.* at 175, 191 N.Y.S. at 841.

142. *Id.* at 176-77, 191 N.Y.S. at 841.

143. *Id.* at 176, 191 N.Y.S. at 841.

144. *Id.*, 191 N.Y.S. at 841.

145. 172 Misc. 191, 14 N.Y.S.2d 349 (1939).

146. *Id.* at 192, 14 N.Y.S.2d at 350.

147. *Id.* at 193, 14 N.Y.S.2d at 350.

148. *Id.* at 194, 14 N.Y.S.2d at 351.

149. *Id.*, 14 N.Y.S.2d at 351.

testimony as credible and uninfluenced by any improper motive to exculpate Caruso. Corroborating this finding, the court examined various police department records containing postincident interviews with the victim. These records clearly established the victim's description of the robber as having a "birthmark on his upper right lip."[150] This fact, the court emphasized, eliminated the possibility that the facial markings rationale for the misidentification was recently concocted. Moreover, the suspects pled guilty to the crime and testified to the truthfulness of their confession, thereby exonerating Caruso.[151] The cumulative effect of these events, along with the district attorney's lack of opposition, compelled the court to grant the motion to set aside the judgment. Furthermore, the court dismissed the indictment, finding that a new trial would have been "an idle gesture."[152]

C. *People v. Allen*[153]

After *Caruso*, a half century elapsed before the most recent example of recantation succeeded in setting aside a verdict. In 1989, *People v. Allen*, like *Caruso*, turned on the recantation of the victim's testimonial identification of the defendant. Here, the victim, a proprietor of a stationery store, was alone in the store when the defendant entered, demanded money, and threatened to "blow her . . . head off."[154] She complied with the demand. Two months later she identified the defendant at a lineup. At trial, the victim, who was the prosecution's sole witness, identified the defendant who had not testified. The defendant was convicted of robbery. Approximately ten days later, the victim received a telephone call from the incarcerated defendant. Afterward, the victim realized that the defendant's voice was markedly different from that of the perpetrator.

In response to a motion to set aside the verdict, the trial court convened a hearing. After the court directed a voice demonstration by the defendant, the victim testified that the defendant's voice was substantially different in "tone, diction, choice of street language and vocabulary"[155] from the person who robbed her. Moreover, the victim noted that the defendant bore a scar on the left side of his face below the ear and she was certain that the perpetrator had no such scar.

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150. *Id.* at 196, 14 N.Y.S.2d at 352-53.

151. *Id.* at 195, 14 N.Y.S.2d at 352.

152. *Id.* at 197, 14 N.Y.S.2d at 354.

153. N.Y.L.J., Sept. 21, 1989, at 23, col. 4 (N.Y. Sup. Ct. Sept. 6, 1989).

154. *Id.*

155. *Id.*

In examining the victim's recantation, the court observed that the prosecution's case against the defendant was entirely comprised of the recanted testimony; no other evidence, direct or circumstantial, tied the defendant to the crime. It was, however, the degree of assuredness of the victim's recantation, as exhibited at the hearing, and an absence of any indicia of corrupt or improper motive on the part of the recanting victim that supported the court's granting of the defendant's motion to set aside the verdict, with which the prosecution concurred. In light of the victim's fundamental repudiation of her trial testimony, and the necessity of such testimony to prosecute this defendant, the court dismissed the indictment, citing *Caruso*.[156]

As demonstrated by these three cases, the need for an uncontrovertible basis to bear out the truthfulness of the recantation is a prerequisite for a defendant's success in overturning a judgment of conviction. In *Cohen*, the conviction of the witness for perjury was helpful, though not adequate by itself. The perjurious testimony coincided with the evidence statutorily required to convict the defendant. The other two cases relied on unalterable physical characteristics of the defendant (a mark above the lip in *Caruso* and the facial scarring and voice in *Allen*) to precipitate victim recantation of their identifications.

VI. STANDARD OF APPELLATE REVIEW

Because of the peculiar nature of recantation evidence and the special vantage point of the trial judge for assessing this evidence, appellate courts are reluctant to overturn a trial court's decisions. The reported cases where the appellate court deferred to the sound discretion of the trial court on whether to hold a hearing on the motion are legion.[157]

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156. *Id.*

157. *See, e.g.*, People v. Lavrick, 146 A.D.2d 648, 648, 536 N.Y.S.2d 548, 548 (trial court properly denied motion to vacate the judgment because the victim's partial recantation would not change the result if a new trial were granted), *appeal denied*, 73 N.Y.2d 979, 538 N.E.2d 365, 540 N.Y.S.2d 1013 (1989), *cert. denied*, 110 S. Ct. 741 (1990); People v. Allison, 119 A.D.2d 1005, 1005, 500 N.Y.S.2d 888, 888 (1986) (accomplice's affidavit seeking to recant his trial testimony was properly denied without a hearing); People v. Chalos, 111 A.D.2d 827, 828, 491 N.Y.S.2d 8, 9 (1985) (motion for a new trial based on witness' post-trial recantation was properly denied because the proposed new evidence was merely cumulative); People v. Donald, 107 A.D.2d 818, 819, 484 N.Y.S.2d 651, 652 (1985) (trial court properly exercised its discretion in finding that the recantation affidavit of inmate was implausible without conducting an evidentiary hearing); People v. Dukes, 106 A.D.2d 906, 907, 483 N.Y.S.2d 137, 137 (1984) (proper exercise of trial court's discretion to deny motion without a hearing where prosecution witness' recantation was not credible); People v. Egan, 103 A.D.2d 940, 941, 479 N.Y.S.2d 774, 776 (1984) (trial court properly denied hearing where victim's post-trial

In one exception to this practice, *People v. Rodriguez*,[158] the appellate division unanimously reversed the trial court's denial of a recantation hearing sought by motion. In *Rodriguez*, after a nonjury trial, the defendants were convicted of kidnapping and weapons possession. The gravamen of the charges alleged that the defendants forced two teenage girls at gunpoint to drive to New Jersey where they raped them. After the verdict, one of the two complainants admitted to a third person, in contradiction of her trial testimony, that she had gone with the defendants voluntarily. This recantation evidence served as the basis for the first motion to set aside the verdict, which was denied. Some years later the defendants submitted a second motion containing an affidavit sworn to by one of the two complainants, which recanted her testimony about the gunpoint abduction and explained that the fabrication was motivated out of fear of her parents' disapproval of her having accompanied the defendants voluntarily. Since the trial judge was no longer available, another judge denied the motion without an evidentiary hearing.

Without passing on the trustworthiness of the recantation, the appellate court held that "fundamental fairness"[159] required an evidentiary hearing

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statements purportedly recanting certain aspects of her testimony were not significantly different from trial testimony); People v. White, 44 A.D.2d 749, 750, 354 N.Y.S.2d 735, 736 (1974) (upholding trial court's refusal to hold hearing when one of four prosecution witnesses recanted the identification testimony of defendant by post-trial statement that he was no longer sure that the defendant was the perpetrator), *aff'd*, 40 N.Y.2d 876, 357 N.E.2d 1016, 389 N.Y.S.2d 361 (1976); People v. Freeland, 45 A.D.2d 814, 815, 356 N.Y.S.2d 912, 915 (1974) (upholding trial court's refusal to hold a hearing); People v. Dinan, 15 A.D.2d 786, 786, 224 N.Y.S.2d 624, 626 (1962) (motion for new trial was properly denied without a hearing based on the post-trial recantation statement of witness); People v. Maki, 253 A.D. 782, 783, 1 N.Y.S.2d 17, 19 (1937) (motion for a new trial based on recantation of a friendly witness was properly denied because there was no reason to believe the proposed new evidence would alter the judgment).

Trial court decisions to grant a hearing, but deny the motion for a new trial are usually upheld. *See, e.g.*, People v. Bohn, 155 A.D.2d 679, 680, 548 N.Y.S.2d 57, 58 (1989) (finding it was within trial court's discretion to deny a motion for a new trial based on contradictory and disjointed recantation testimony in contrast to consistent trial testimony); People v. Rossi, 155 A.D.2d 951, 952, 548 N.Y.S.2d 124, 124 (1989) (trial court properly exercised its discretion in denying motion for a new trial where the defendant failed to prove that the recanting witness "would testify in a different fashion at a new trial"); People v. Legette, 153 A.D.2d 760, 760-61, 545 N.Y.S.2d 296, 296 (1989) (trial court properly denied motion to vacate the judgment after conducting a full evidentiary hearing); People v. Johnson, 133 A.D.2d 781, 782, 520 N.Y.S.2d 66, 67 (1987) (upheld trial court's determination that witness' recantation at hearing was unreliable); People v. Kelly, 38 A.D.2d 1006, 1006, 329 N.Y.S.2d 968, 968 (1972) (trial judge's decision on the "efficacy" of witness' recantation is "entitled to great weight" based on his opportunity to judge the credibility of the witness).

158. 88 A.D.2d 890, 453 N.Y.S.2d 4 (1982).

159. *Id.* at 890, 453 N.Y.S.2d at 5.

on the motion. The recantation evidence was "obviously a very significant"[160] part of the case against the defendants. This reversal, however, was grounded, in part, on the unavailability of the trial judge:

> This consideration [whether to hold a hearing] is all the more pointed as the judge who tried the case originally is no longer available to say how his verdict would have been affected by such a change in testimony, and by the fact, if it be a fact, that the complainants lied before him.[161]

It is unclear, however, whether a hearing would have been similarly ordered had the original trial judge been available.

There does not appear to be any instance where an appellate court has reversed a trial court which held a hearing and rejected a post-trial recantation. In *People v. Johnson*,[162] the court went so far as to require a defendant to muster "some reason" to overturn a trial court's findings that a recantation was unreliable.[163] Moreover, the court in *People v. Balan*[164] reversed the posthearing decision to grant a new trial based on recantation when the *Salemi* requirements were not met, even though the trial court granted the relief "in the interest of justice."[165]

VII. CONCLUSION

Thus, with relatively few exceptions, it can be seen that recantation by a trial witness, although dramatic, is basically untrustworthy in nature and will be viewed by trial judges and appellate courts with great skepticism. Given the sanctity of jury verdicts, trial and appellate courts are extremely reluctant to alter these determinations. As a result, the likelihood that a convicted defendant will obtain a more favorable outcome based on a witness' recantation is remote, at best, and should not be counted on as an avenue leading toward a defendant's ultimate vindication.

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160. *Id.* at 891, 453 N.Y.S.2d at 6.

161. *Id.*, 453 N.Y.S.2d at 6.

162. 133 A.D.2d 781, 782, 520 N.Y.S.2d 66, 67 (1987) (recantation evidence is inherently unreliable and is insufficient alone to require setting aside a conviction).

163. *Id.* at 782, 520 N.Y.S.2d at 67; *see also* People v. Brown, 126 A.D.2d 898, 900, 510 N.Y.S.2d 932, 934 (1987) (codefendant's recantation of his confession implicating the defendant was insufficient to vacate defendant's guilty plea); People v. Allison, 119 A.D.2d 1005, 1005, 500 N.Y.S.2d 888, 888 (1986) (accomplice's recantation of his trial testimony was insufficient to vacate defendant's conviction).

164. 107 A.D.2d 811, 484 N.Y.S.2d 648 (1985).

165. *Id.* at 815, 484 N.Y.S.2d at 651 (conviction should not have been vacated "given the wholly untrustworthy nature" of defendant's recanted testimony).