

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CASE NO. ST-06-CR-157
	)	
vs.	)	
	)	
DENZIL IVAN STEVENS,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

MEMORANDUM OPINION

Pending before the Court is Defendant Denzil Ivan Stevens' Motion for New Trial and Motion to Request Remand filed on January 28, 2011. Defendant's Motion for a New Trial and Motion to Request Remand will be denied. Upon reconsideration of Defendant's Motion for a *Larrison* Hearing, the Court also affirms its earlier March 29, 2012, Order denying Defendant a *Larrison* hearing.

FACTS AND PROCEDURAL HISTORY

On May 3, 2006, Defendant was charged with attempted first degree murder and other related offenses in connection with the April 7, 2006, shooting of Jahlil Ward. During a jury trial conducted in September 2007, Ward testified that while he was standing outside a nightclub on St. John, a van pulled up close to him and the van door opened, revealing Defendant holding a shotgun.¹ Defendant asked Ward a question, but Ward turned his back to Defendant and began walking away while talking on his phone.²

¹ Ward Trial Testimony, at ¶ 42.

² *Id.* at ¶¶ 42, 44.

Moments later, Ward heard gunfire and discovered he had been shot in his lower back.³ When Ward was hit, his phone flew out of his hand, at which point Ward turned around and looked at the Defendant.⁴ Ward then fell to the ground, Defendant closed the door to the van, and the van drove off.⁵ When Ward was asked whether he had any doubt Defendant shot him, Ward replied: "I know . . . [b]ecause I saw him, and when I turn around I see him putting back in the gun, and he close the door."⁶ On September 20, 2007, the jury found Defendant guilty on the charges of attempted murder and related offenses.⁷

On January 28, 2011, Defendant filed a Motion for a New Trial and Motion to Request Remand based on a January 19, 2011, affidavit from Ward that states: "I did not know at that time who shot my (sic) . . . [m]y back was turned so I really didn't see who the person was who shot me . . . I would recant on the testimonies and statements that I gave during trial accusing . . . Stevens of shooting me."⁸ Defendant supplemented the Motion for New Trial and Motion to Request Remand on April 6, 2011, with a Motion for a *Larrison* Hearing, which was predicated on the same January 19, 2011, affidavit from Ward.⁹ The Motion for a *Larrison* Hearing was denied on March 29, 2012, and

³ *Id.* at ¶¶ 43, 44.

⁴ *Id.* at ¶ 43.

⁵ *Id.*

⁶ *Id.* at ¶45.

⁷ The jury found the Defendant guilty of the offenses charged in Counts I, II, III, IV, and IX of the Information. In response to a September 15, 2009, Supreme Court Opinion, the Court issued an Amended Judgment and Commitment on October 22, 2009, vacating the sentence imposed on the Count IV charging unauthorized possession of ammunition, and dismissed that charge with prejudice.

⁸ Ward Affidavit, at ¶¶ 1, 2. The Government opposed Defendant's Motion on January 23, 2011, noting that Defendant did not meet the *Larrison* test. Government's Opposition to Defendant's Motion to Vacate Verdict, January 23, 2011.

⁹ Defendant renewed the motion for a *Larrison* hearing on November 4, 2011, arguing that the "Ward affidavit did meet the *Larrison* criteria warranting a new trial herein." The Government did not respond to the renewed motion.

Defendant appealed. The Supreme Court remanded for the Court to consider Defendant's Motion for a New Trial and Motion to Request Remand prior to hearing Defendant's appeal.¹⁰

STANDARD OF REVIEW

I. Newly Discovered Evidence Standard Under Super. Ct. R. 135

Under Super. Ct. R. 135, the court may grant a new trial "if required in the interest of justice."¹¹ Specifically, the Supreme Court of the Virgin Islands has held that the Court, at its discretion, may grant a new trial because of "newly discovered evidence" when the following five requirements are met:

- (a) the evidence must be in fact, newly discovered, *i.e.*, discovered since the trial;
- (b) facts must be alleged from which the court may infer diligence on the part of the movant;
- (c) the evidence relied on, must not be merely cumulative or impeaching;
- (d) it must be material to the issues involved; and
- (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.¹²

¹⁰ Subsequently, Defendant filed a Motion for Entry of Final Order on July 17, 2012, requesting the court to grant Defendant's Motion for a New Trial, and in the alternative enter a final appealable order with respect to the motion.

¹¹ SUPER. CT. R. 135 (a motion for new trial on the basis of newly discovered evidence must be brought within two years after final judgment). Super. Ct. R. 135 mirrors the standards set forth in Fed. R. Crim. P. 33. See FED. R. CRIM. P. 33(a) ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. . ."); see also *Phillips v. People of the Virgin Islands*, 51 V.I. 258, 280 (V.I. 2009) (noting the standard of review is abuse of discretion unless the denial of the motion is based on review of the erroneous application of a legal standard); *Harris v. Gov't of Virgin Islands*, 2011 WL 4357336, *16 ("At bottom, Rule 33 calls upon the trial court to examine the fairness and result of the proceedings in an effort to ensure that convictions are just, reliable and trustworthy and do not offend the court's commitment to justice.").

¹² *Phillips*, 51 V.I. at 280 (citing *U.S. v. Cimera*, 459 F.3d 452, 458 (3d Cir. 2006)). See *Gov't of Virgin Islands v. Lima*, 774 F.2d 1245 (3d Cir. 1985) (adopting the five requirements from *U.S. v. Iannelli*, 528 F.2d 1290 (3d Cir. 1976)); *Gov't of the Virgin Islands v. Sampson*, 42 V.I. 247. 265-6 (D.V.I. 2000) (noting that a motion for new trial will not be granted when the movant fails to prove one of the requirements, since all five requirements must be met).

While the decision whether to grant the motion for new trial is ultimately within the Court's discretion, "the movant has a heavy burden of proving each of these requirements."¹³

When considering witness "recantations" of their trial testimony, "the question of whether the recanted testimony 'would probably produce an acquittal' rests on the credibility of the recantation."¹⁴ However, courts are often very cautious when evaluating the veracity of the recantation and "must weigh the testimony against all of the other evidence in the record."¹⁵ As such, courts "generally do not grant new trials" simply on witness recantation.¹⁶

II. *Larrison* Test

While the Court usually follows the Super. Ct. R. 135 "newly discovered evidence" standard, both parties argue under *Larrison v. U.S.*¹⁷ The *Larrison*¹⁸ test, which is only applicable in a motion for a new trial based on newly discovered evidence of perjury committed by a material witness, requires proof of the following:

- (1) The court is reasonably well satisfied that the testimony given by a material witness is false;
- (2) That without it a jury might have reached a different conclusion;
- and,

¹³ *Id.* (internal citations omitted).

¹⁴ *Edwards v. Gov't of Virgin Islands*, 48 V.I. 468, 473 (V.I. 2006).

¹⁵ *U.S. v. Kelly*, 539 F.3d 172, 189 (3d Cir. 2008). *See U.S. v. Jackson*, 427 Fed.Appx 109, 2011 WL 1807440, at **4 (3d Cir 2011) (holding that the court, "[h]aving presided over the trial and being intimately familiar with the record, . . . did not abuse its discretion in declining to conduct an evidentiary hearing" on the motion for new trial).

¹⁶ *Phillips*, 51 V.I. at 280; *See, e.g., Edwards*, 48 V.I. at 474 (finding, in a case involving child abuse, that the victim's apology to the defendant was not a recantation, nor did it indicate that the victim's testimony was false); *but see Harris*, 2011 WL 4357336, *18 (finding that in the totality of the circumstances of a case, new evidence impeaching a witness may be sufficient to grant a motion for a new trial).

¹⁷ *Jackson*, 2011 WL 1807440, at **3 (noting that while the Third Circuit has not adopted *Larrison*, where the district court utilized *Larrison* in its analysis, the appellate court will still review the district court's decision under the abuse of discretion standard because "the parties had agreed upon *Larrison* as the appropriate analytical framework" in the motion for new trial).

¹⁸ *Larrison v. U.S.*, 24 F.2d 82, 87-88 (7th Cir. 1928).

- (3) That the party seeking the new trial was taken by surprise when the false testimony was given as was unable to meet it or did not know if its falsity until after the trial.¹⁹

The *Larrison* test and “newly discovered evidence standard” share overlapping considerations. For instance, the Court must first consider whether the recantation is credible under both tests. However, the *Larrison* test is less stringent than Rule 135 because “rather than having to demonstrate newly discovered evidence would ‘probably produce acquittal,’ a defendant whose motion is being governed by *Larrison* need only show that, without the benefit of materially false testimony, the jury ‘might have reached a different conclusion (emphasis added).’”²⁰ Thus, a motion for a new trial which does not pass the *Larrison* test will surely not pass the higher “newly discovered evidence” standard under Super. Ct. R. 135.

DISCUSSION

I. Defendant’s Motion for a New Trial and Motion to Request Remand Do Not Meet the Requirements Under Super. Ct. R. 135’s “Newly Discovered Evidence” Standard.

Ward’s affidavit, the basis of Defendant’s Motions for a New Trial, to Request Remand, and to Request a *Larrison* hearing, does not constitute “newly discovered evidence” under Super. Ct. R. 135. Specifically, as this Court already found in its March 29, 2012, Memorandum Opinion, Ward’s affidavit is not significantly different from his trial testimony. At trial, Ward never said he actually witnessed Defendant shoot him in the back. Instead, he testified that before being shot he saw Defendant holding a gun that was pointed at him and asked him a question.”²¹ Ward then turned his back to the van and

¹⁹ *U.S. v. Harris*, 2000 WL 336843, at *5 (E.D. Pa. 2000).

²⁰ *Jackson*, 2011 WL 1807440, at **3.

²¹ Ward Trial Testimony, at ¶¶ 42, 44.

began walking away, at which point he was shot.²² After being shot, Ward turned around and saw Stevens putting away the gun and closing the van door.²³ From these facts, Ward deduced that Defendant shot him, and Ward testified to that effect at trial. Even though Ward now asserts in his affidavit that he does not actually know who shot him, his affidavit does not establish that his trial testimony concerning his belief who shot him, or any other testimony he gave at trial, was false.

Further, Ward's general recantation at the end of the affidavit where he states, "I would recant on the testimonies and statements that I gave during trial accusing . . . Stevens of shooting me"²⁴ is too general to suggest that Ward's testimony was false. To the contrary, Ward's affidavit actually corroborates some of Ward's testimony at trial: that "his back was turned" when he was shot.²⁵ Thus, Ward's affidavit does not constitute "newly discovered evidence."

Additionally, Defendant's Motion for a New Trial and Motion to Request Remand also fail the last requirement of the Super. Ct. R. 135 standard because there is no evidence in Ward's affidavit that would cause a jury to "probably produce an acquittal." As previously noted, Ward's affidavit is not inconsistent with his testimony. *At most*, Ward's affidavit recants his belief or inference that Defendant shot him, but it does not recant the circumstantial evidence on which Ward based his belief. As it is the role of the jury to weigh the credibility of the evidence, including assessing the veracity of witness testimony, the jury already had an opportunity to evaluate Ward's testimony at

²² *Id.* at ¶ 43.

²³ *Id.* at ¶ 45.

²⁴ Ward Affidavit, at ¶¶ 1, 2.

²⁵ *Id.* at ¶¶ 1; Ward Trial Testimony, at ¶ 42.

trial.²⁶ Thus, in light of all the evidence on the record, the Court finds it unlikely a jury would return a verdict of acquittal on the basis of Ward's affidavit.

Because Defendant has not meet his burden under the first and last requirements of Super. Ct. R. 135's "newly discovered evidence" standard, the Court does not find it necessary to address the other requirements. Accordingly, Defendant's Motion for a New Trial and Motion to Request Remand will be denied. Further, as Defendant's supplemental Motion for a *Larrison* hearing seeking a new trial is also based on the same grounds, Defendant's Motion for a *Larrison* hearing is also denied under Super. Ct. R. 135's "newly discovered evidence" standard.

II. Defendant's Motion for a *Larrison* Hearing Fails to Pass the *Larrison* Test.

Upon subsequent consideration, the Court is compelled to make a correction on a matter of law concerning the use of the *Larrison* test in this jurisdiction. While Defendant's original Motion for New Trial and Motion to Request Remand did not make any arguments under *Larrison*, the Defendant supplemented with a Motion for a *Larrison* Hearing after the Government responded to Defendant's Motion for New Trial and Motion to Request Remand on the grounds of *Larrison* test.²⁷ Since both parties argued under *Larrison*, the Court denied Defendant's Motion for a *Larrison* Hearing based on the *Larrison* test. However, upon subsequent research, the Court has found that *Larrison*

²⁶ *U.S. v. Boria*, 592 F.3d 476, 480 (3d. Cir. 2010) (highlighting that in a motion for acquittal, "[a] reviewing court 'must be ever vigilant ... not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [the court's] judgment for that of the jury.'"); *People v. Morton*, 2012 WL 3204668, at *1 (V.I. 2012).

²⁷ The Government's Opposition to Defendant's Motion to Vacate Verdict, January 23, 2011. The Court notes that both parties' briefs are stunningly insufficient under Loc. R. Civ. P. 11.1 where "the applicable law in this jurisdiction [must be] . . . presented before law from another jurisdiction is cited." LOC. R. CIV. P. 11.1(b). The Court strongly cautions counsel to be diligent in their legal arguments before this Court.

has not been clearly adopted in this jurisdiction,²⁸ but has merely been considered as persuasive authority where the newly discovered evidence suggests perjury by a material witness.²⁹

Assuming *arguendo* that *Larrison* applies, the Court affirms its March 29, 2012, Memorandum Opinion denying Defendant's Motion for a *Larrison* Hearing, and does not feel the need to reiterate its rationale in this Memorandum Opinion. Moreover, as the Court concludes that Defendant's motions should also be denied under the stricter Super. Ct. R. 135 "newly discovered evidence" standard, this Court offers no opinion on whether this jurisdiction should adopt the *Larrison* test.

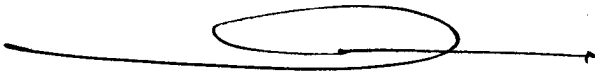
²⁸ *Lima*, 774 F.2d 1245, 1251 Footnote 4; *Jackson*, 2011 WL 1807440, at **3.

²⁹ *Harris*, 2000 WL 336843, at *5, Footnote 11 (discussing the circuit split over *Larrison*); *See, e.g., State v. Jones*, 2008 WL 4173816, at *16, Footnote 102 (Del. Super. Ct. 2008) (noting that while Delaware still uses the *Larrison* test only in cases of recanted witness testimony, the 7th Circuit has abandoned the test in favor of the "reasonable probability" test.)

CONCLUSION

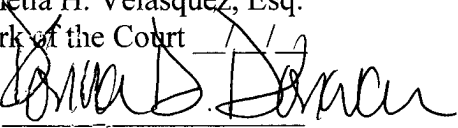
For the foregoing reasons, the Court will deny Stevens' Motion for New Trial, Motion to Request Remand, and Motion for a *Larrison* hearing. The Court also affirms its March 29, 2012, Order denying Stevens' Motion for a *Larrison* hearing. An appropriate Order is issued simultaneously herewith.

Dated: August 17, 2012


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest:

Venetia H. Velasquez, Esq.
Clerk of the Court

by: 

Lori Boynes-Tyson
Court Clerk Supervisor 8/20/12

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

VS.

DENZIL IVAN STEVENS,

Defendant.

CASE NO. ST-06-CR-157

ORDER

The Court having issued a Memorandum Opinion on this date, it is

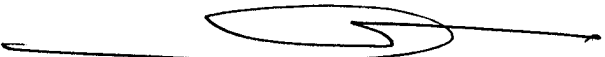
ORDERED that the Motion of Defendant Denzil Ivan Stevens for a New Trial is DENIED; and it is

ORDERED that the Motion of Defendant Denzil Ivan Stevens to Request Remand is DENIED; and it is

ORDERED that the Motion of Defendant Denzil Ivan Stevens for a *Larrison* Hearing is DENIED; and it is

ORDERED that a copy of this Order and the accompanying Memorandum
Opinion shall be directed to counsel of record.

Dated: August 17, 2012

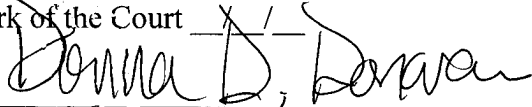


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest:

Venetia H. Velasquez, Esq.

Clerk of the Court X / 1

by: 

Lori Boynes-Tyson

Court Clerk Supervisor 8 20 12