Newly Discovered Evidence Claims Based on Witness Recantation

By: Mark M. Baker*

It has become a near certainty in post-verdict New York criminal practice that a motion to set aside a verdict[1] or vacate a judgment[2] will be summarily rejected where newly discovered evidence is alleged, premised on the recantation of a witness's trial testimony. A trial judge to whom such a motion is addressed, and the reviewing court to which any consequent appeal is taken, will normally rule that the recantation either amounts to legally insufficient impeachment material or that it is "inherently unreliable." Usually cited in support will be the Court of Appeals' ninety year old decision in People v. Shilitano[3] ("Shilitano II"), or one of its myriad Appellate Division progeny.

In reality, however, no opinion has been more misunderstood and universally misapplied than Shilitano II. Indeed, even a cursory reading demonstrates that the opposite is true: the availability of a crucial witness's recantation is something to which a motion court should give careful consideration, even if the information is essentially of an impeachment nature. Thus, rather than ordering summary denials, the holding of evidentiary hearings, as the best means for determining the credibility of the recantation, should be the norm.[4]

The Prevailing View of *Shilitano II*

In People v. Turner,[5] the Second Department made the following statement:

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> It is well settled that "[t]here is no form of proof so unreliable as recanting testimony" People v. Shilitano, 218 N.Y. 161, 170, 112 N.E. 733 [1916] [Shilitano II]).*** The witness's recantation, which merely impeaches his prior testimony, probably would not change the result if a new trial were granted...[citations omitted], and therefore the court properly denied the defendant's motion without a hearing.

There has been much cross-referencing among the Departments on what they regard as these "well settled" concepts of inherently "unreliable" and legally insufficient recantation proof which is "merely impeaching." Illustratively, in People v. Legette,[6] the Second Department, relying on holdings of the Third and Fourth Departments in People v. Brown[7] and People v. Allison,[8] had earlier observed that "[r]ecantion evidence is inherently unreliable and is insufficient alone to require setting aside a conviction [internal quotes omitted]." This characterization had been also embraced by the Fourth Department in People v. Dukes[9] and the Second Department in its own earlier ruling in People v. Donald.[10] More recent decisions of the Second Department in People v. Fields,[11] People v. Lawrence,[12] and People v. Serrata,[13] as well as the First Department in People v. Cintron,[14] have followed suit.

***Shilitano II* Properly Understood**

As a fair reading of Shilitano II demonstrates, however, the Court of Appeals has actually called for a fact-based analysis in most, if not all, recantation situations. In Shilitano II, all the witnesses for the People, except one, later sought to recant their earlier trial testimony, but the supporting proof submitted to the motion court was initially found to be wanting. Yet, when the matter first came before it, the Court of Appeals, rather than simply upholding the conviction, remanded the case for the very sort of hearing that the four

Appellate Division Departments so readily eschew. As Judge Cardozo explained in People v. Shilitano[15] ("Shilitano I"):

> After it has been ascertained whether the witnesses are willing to retract their testimony, not by letters or informal statements, but by affidavits, and after the test of cross-examination has been applied to the retraction, we shall be better able to determine where the truth lies.

Following the hearing ordered under Shilitano I, the matter returned to the Court of Appeals. Although there was then found to have been legally sufficient evidence supporting that conviction, the Shilitano II Court stated that "[t]he case upon this appeal is very much complicated by the fact that the defendant moved for a new trial upon the ground of alleged newly discovered evidence."[16] Obviously, if recantation evidence were indeed inherently unreliable, the issue could not have been so "complicated."

The Court next noted that "[a]t the outset of our task in considering this alleged newly discovered evidence it is necessary to determine whether recantation by witnesses called on behalf of the people *necessarily* entitled the defendant to a new trial." [17] To be sure, the Court rejected any *per se* rule, cautioning that "otherwise the power to grant a convicted defendant a new trial rests not with the court but with the witnesses who testified against him upon the trial."[18]

On the other hand, the Court did ascribe potential significance to such claims. Thus, quoting People v. Tallmadge,[19] the Court immediately embraced the proposition "that a case might arise where an important witness had afterward testified to having committed perjury, in which this court would hold, looking at the whole case, that a new trial ought to

have been granted."[20]

The Shilitano II Court did indeed utter the oft-repeated words that "[t]here is no form of proof so unreliable as recanting testimony."[21] Remarkably, however, while ascribing talismanic quality to this isolated sentence, the plethora of Appellate Division decisions later citing Shilitano II utterly failed to acknowledge any aspect of Judge Seabury's full discussion which had immediately preceded:

> I do not wish to be understood as urging that the fact of recantation is not to be considered by the court in weighing the testimony upon which the defendant was convicted, but I wish to make clear the fact that recantation in and of itself does not necessarily require the court to order a new trial. Such being the case, whether or not a new trial should be granted must depend upon all the circumstances of the case, *including the testimony in which these witnesses recant the testimony which they gave upon the trial*. In determining the weight to be given to the statements of these witnesses affirming the guilt of the defendant and recanting their testimony, we must endeavor to discern the motives which actuated them. If *upon examination* it should appear that their testimony upon the trial was given without any motive to falsify and that their statements recanting their testimony were prompted by corrupt or unworthy motives, but little weight should be given to the recanting statements.[22]

Moreover, immediately following this articulated need for "examination," the Shilitano II Court specifically debunked the precise notion that, as impeachment evidence, recantation testimony is legally insufficient to warrant such relief:

> It is suggested by the learned assistant district attorney that evidence of recantation upon the part of a witness is not newly discovered evidence, but merely evidence tending to impeach or discredit a witness, and therefore not of the character which would justify granting a new trial...[citations omitted].[23]

In response to this argument, the Court of Appeals admonished:

> In this contention the learned counsel for the people is in error. Evidence of recantation upon the part of a witness *is not merely evidence which tends to impeach or discredit a witness*. Its character is much more fundamental. If the recantation be true it may in certain cases destroy the basis upon which the judgment of conviction rests and under the ample power vested in this court in reviewing a judgment of conviction in a capital case *might be sufficient of itself to justify the granting of a new trial*. Nor can it properly be said that because the witness who now recants his testimony gave evidence upon the trial, the fact that he now repudiates his former testimony precludes proof of this fact from being regarded as newly discovered evidence. 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.[24]

So understood, contrary to all Appellate Division authority, the Court of Appeals *never* stated that a recantation is untrustworthy as a matter of law simply because it might amount to no more than impeachment evidence.[25] Rather, as emphasized by the concurring Judge Cardozo, with which the Shilitano II majority expressly agreed:

> Three witnesses for the prosecution have stated under oath to the trial judge that their testimony upon the trial was false. *It became his duty* to say whether they were conscience-stricken penitents, or criminal conspirators to defeat the ends of justice.[26]

Conclusion

In most recantation situations, a motion court has a "duty" to conduct an evidentiary hearing. Only then can a considered determination be made that relief may not be required. As the Court of Appeals itself later acknowledged, "in the Shilitano case this court indicated that the power to grant new trials upon this ground should seldom be exercised, but that the circumstances might be such as to warrant retrials for newly discovered evidence in the case of recantation of witnesses."[27]

At least one Department has recently embraced this premise of open-mindedness, marking a positive departure from the rote past.[28] Hopefully, the Court of Appeals will soon explicate further upon its ninety year old Shilitano I and II precedents, and put to rest such a large body of ill-considered case law which ignores these realities.

1. CPL §330.30(3).

2. CPL §440.10(1)(g).

3. 218 N.Y. 161, 112 N.E. 733 (1916).

4. This discussion solely addresses the New York rule under Shilitano II. It should be noted, however, that even though the Second Circuit has essentially formulated a three part test for determining recantation issues in federal court, *see* United States v. DiPaolo, 835 F.2d 46, 49 (2d Cir. 1987), and has indicated that such motions can be denied without a hearing, *id.* at 51, it has also stated -- seemingly inconsistently -- that "a determination that [a witness's] recantation was not credible is insufficient to establish that [such witness's] trial testimony was not perjured." Ortega v. Duncan, 333 F.3d 102, 107 (2d Cir. 2003). "Rather," according to the Second Circuit, "the court must weigh all the evidence of perjury before it, including but not limited to the recantation, before reaching this conclusion." *Id.* Obviously, such a "weighing," as suggested by the New York Court of Appeals in Shilitano II, is best done following an evidentiary hearing.

5. 215 A.D.2d 703, 628 N.Y.S.2d 122 (2nd Dept. 1995), *lv denied*, 86 N.Y.2d 742, 631 N.Y.S.2d 623 (1995).

6. 153 A.D. 2d 760, 545 N.Y.S.2d 296 (2nd Dept. 1989), *lv. denied*, 74 N.Y.2d 949, 550 N.Y.S.2d 284 (1989).

7. 126 A.D.2d 898, 510 N.Y.S.2d 932 (3rd Dept. 1987), *lv. denied*, 70 N.Y.2d 703, 519 N.Y.S.2d 1037 (1987).

8. 119 A.D.2d 1005, 500 N.Y.S.2d 888 (4th Dept. 1986), *lv. denied,*68 N.Y.2d 665, 505 N.Y.S.2d 1030 (1986).

9. 106 A.D.2d 906, 483 N.Y.S.2d 137 (4th Dept. 1984).

10. 107 A.D.2d 818, 484 N.Y.S.2d 651 (2nd Dept. 1985).

11. 287 A.D.2d 577, 731 N.Y.S.2d 492 (2nd Dept. 2001), *lv. denied*, 97 N.Y.2d 681, 738 N.Y.S.2d 296 (2001).

12. 247 A.D.2d 635,669 N.Y.S.2d 242 (2nd Dept. 1998), *lv. denied*, 91 N.Y.2d 1009, 676 N.Y.S.2d 137 (1998).

13. 261 A.D.2d 490, 690 N.Y.S.2d 273 (2nd Dept. 1999), *lv. denied*, 93 N.Y.2d 1045, 697 N.Y.S.2d 877 (1999).

14. 306 A.D.2d 151, 763 N.Y.S.2d 11 (1st Dept. 2003), *lv. denied*, 100 N.Y.2d 641, 769 N.Y.S.2d 207 (2003).

15. 215 N.Y.715, 716, 109 N.E. 500 (1915) (Cardozo, J.).

16. 218 N.Y. at 168-69

17. 218 N.Y. at 169 (emphasis added).

18.*Id.*

19.114 Cal. 427, 46 P. 282 (1896).

20. 218 N.Y. at 169.

21. 218 N.Y. at 170

22.218 N.Y. at 169-70 (emphasis added).

23. 218 N.Y. 170.

24.218 N.Y. at 170-71; emphasis added.

25.The First Department recently embraced this view. *See* People v. Jackson, 29 A.D.3d 328, 329, 816 N.Y.S.2d 22 (1st Dept. 2006) (judgment vacated, despite newly discovered evidence amounting to no more than impeachment material).

26.Shilitano II, 218 N.Y. at 180 (Cardozo, J., concurring) (emphasis added).

27. Evans v. Monaghan, 306 N.Y. 312, 325-26, 118 N.E.2d 452 (1955).

28. In People v. Wong, 11 A.D.3d 724, 784 N.Y.S.2d 158 (3rd Dept. 2004), the court reversed the denial of a motion to vacate judgment based on newly discovered recantation evidence. Considering the "character" of the proposed recantation testimony, and while noting that the hearing court's evaluation of credibility is normally entitled to great weight, it made a *contrary* finding. Thus, relying on Shilitano correctly, the Wong Court found that the verdict would have been more favorable had such proof been available. In doing so, it enumerated the following

dispositive factors in furtherance of determining such applications:

> (1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie (People v. Shilitano, *supra*, 218 N.Y. 170-172).

11 A.D.3d at 725-26, 784 N.Y.S.2d at 160-61.