

## COA Opinion: Codefendant's post-trial statements that exculpate defendant were not newly discovered evidence warranting new trial, even though codefendant had invoked Fifth Amendment right to not testify at trial

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Defendant Tion Terrell was convicted of assault with intent to murder and related crimes after a non-lethal shooting incident. After his conviction, the defendant moved for a new trial and offered the testimony of his codefendant. The codefendant, who had invoked his Fifth Amendment privilege against self-incrimination and was acquitted at trial, testified post-trial that the victim had been armed and that someone other than the defendant shot the victim. The trial court granted a new trial based on newly discovered evidence. In *People v. Terrell*, No. 286834 (published Aug. 26, 2010), the Court of Appeals reversed the order for new trial, holding that the testimony of the codefendant was not newly discovered evidence, and therefore a new trial was not warranted. In this issue of first impression, Judge Borrello, joined by Judge Meter, adopted the approach of the majority of federal circuit courts: a codefendant's post-trial exculpatory testimony constitutes newly available evidence, but it is not newly discovered if the defendant knew or should have known of the evidence before or during trial. The Court of Appeals stressed that the codefendant's testimony was not new to the defendant, and the defendant did not seek available remedies to overcome the potential prejudice caused by his codefendant's refusal to testify, such as severance of trial and limited immunity. Judge Borrello's opinion can be found [here](#). Judge Shapiro concurred in the result, but believed that the Court of Appeals should have applied the test articulated by the Court of Appeals for the First Circuit, which assesses such testimony on a case-by-case basis, rather than applying a bright-line rule. You can find Judge Shapiro's concurring opinion [here](#).