IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

No. _____

Santos F. Bonilla,

Petitioner,

VS.

Hon. Mary Ellen Abrecht,

Respondent.

On Petition for Writ of Mandamus & Prohibition from the Superior Court of the District of Columbia F 2332-98

PETITION FOR WRIT OF MANDAMUS & PROHIBITION

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Filed: June 18, 2002

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IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

SANTOS F. BONILLA, **PETITIONER,** vs. **HON. MARY ELLEN ABRECHT,** **RESPONDENT.**	No. _____ (F 2332-98)

Comes not the Petitioner, Santos F. Bonilla, through undersigned counsel, and moves this Court to:

1. Assume jurisdiction in this matter pursuant to the All Writs Act, 28 U.S.C. § 1651, and to issue a Writ of Mandamus and Prohibition to the Respondent Judge, the Hon. Mary Ellen Abrecht, directing her to enter the appropriate orders specifically requested herein; and
2. Issue a stay of the proceedings below pending resolution by this Court of this Petition.

CONCISE STATEMENT OF REASONS FOR GRANTING THIS PETITION

Currently pending before Respondent is a Motion pursuant to D.C. Crim. R. 33 asserting that the Assistant U.S. Attorney who prosecuted Mr. Bonilla and his four codefendants engaged in prosecutorial misconduct pretrial and during the trial to obtain a conviction. App. A.[1] It states that the prosecutor used Grand Jury subpoenas to compel several individuals to appear repeatedly in his office to be interrogated; that he coerced witnesses to provide inculpatory information about the defendants, and in at least one case, knowingly used coerced, false Grand Jury testimony in the trial to obtain Mr. Bonilla's conviction; and that he withheld exculpatory information provided by several of the subpoenaed individuals from defense counsel in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). But for the prosecutor's actions, which violated

[1] Designation of exhibits in the Appendix to this Petition will be in the form "App." Followed by the letter designating the relevant document, and where appropriate the relevant page number, i.e. App. A, 4.

Petitioner's Fifth and Sixth Amendment rights, there is a reasonable probability that the outcome of the trial would have been different.

In support of the Motion for New Trial, Mr. Bonilla submitted several exhibits, including an Affidavit of Hugo Aleman stating that the prosecutor repeatedly summoned him to the U.S. Attorney's office, and each time he was interrogated he told the prosecutor and Metropolitan Police investigators that he had been drinking heavily on the night of the homicide, that he was unaware of the fatal assault when he left the area in a taxi to go home. According to Mr. Aleman, the prosecutor told him he had been implicated in the fatal assault and if he did not cooperate he would be charged in connection with the crime. He further felt pressured to cooperate because, as a non-citizen, he might be deported if he did not comply.

The motion cited trial testimony of Mayra Rivera indicating that she had been coerced in a similar manner, but had refused to lie about events March 15, 1998, and had not been called before the Grand Jury. She told the prosecutor that a key government eyewitness had been drinking heavily that night, and had left the area with Ms. Rivera and several other individuals before the homicide occurred. *See*, App. E (Affidavit of Mayra Rivera).

If Mr. Bonilla can demonstrate that, but for the prosecutor's illegal actions, there is a reasonable probability that the outcome of his trial would have been different, he is entitled to a new trial. Because evidence of the prosecutor's usurpation of the Grand Jury's power, payment of illegal witness fees for office interviews, coercion of witnesses, and of the *Brady* violations are outside the record of the trial, Mr. Bonilla is entitled to a hearing on those issues.

In an Order issued March 7, 2002, Respondent stated:

> This matter is before the Court upon the Defendant's Motion for a New Trial and the Government's Opposition. To support his motion for a new trial based on newly discovered evidence of witness perjury coerced by the government, Defendant Bonilla submits an affidavit of witness Hugo Aleman who claims he lied to the grand jury when he testified that he saw who assaulted the decedent. In opposition, the government submits an affidavit of the prosecutor Anthony Asuncion denying coercion and denying knowledge of any perjury. In order to be able to make credibility findings regarding the credibility of these affiants, this Court will hold a hearing at which they may be questioned on direct and cross-examination.

Order for Hearing, 1. App. G, 1. The Judge invited counsel for Mr. Bonilla's four codefendants to participate in the hearing, but limited the hearing to the "issue of Mr. Aleman's recantation." *Id.* at 2.

By limiting the hearing Respondent appears to have denied *sub silencio* those portions of Mr. Bonilla's new trial motion asserting that the prosecutor coerced many civilian witnesses and engaged in numerous *Brady* violations which seriously hampered presentation of a defense, depriving Petitioner of due process. Her Order includes no findings of fact or conclusions of law on any of the issues raised in the new trial motion, and therefore Mr. Bonilla must at this point be presumed to have a right to a hearing on them..

Alternatively, Respondent appears to intend to make Mr. Bonilla run the gauntlet: having demonstrated that he is entitled to a hearing, he must now demonstrate that Mr. Aleman "recanted" his Grand Jury testimony.[2] If Mr. Bonilla can satisfy Respondent that Mr. Aleman "recanted," perhaps she will permit him a hearing on the *Brady* issue.

A Writ of Mandamus and Prohibition should issue in this case because an appeal from a final order of the Superior Court on Mr. Bonilla's new trial motion does not provide an adequate remedy. Unless this Court acts Mr. Bonilla, who has been incarcerated since March 1998, will remain imprisoned a the U.S. Penitentiary in Atlanta, Georgia. He will be unable to assist counsel, and will continue to be deprived of relationships with his family in the Washington metropolitan area.

Four years after the homicide underlying this case, counsel has had considerable difficulty locating witnesses who were in the vicinity before and during the crime, and could testify on Mr. Bonilla's behalf. Some have moved out of Washington, one is incarcerated for an unrelated misdemeanor, and another has been deported. If Respondent denies the new trial motion on the basis of the inadequate record of this one hearing and Mr. Bonilla appeals, at the conclusion of his direct appeal this Court will have to remand with instructions for the Judge to hold another

[2] Petitioner believes Respondent's characterization is erroneous. Before he testified in the Grand Jury, Mr. Aleman repeatedly denied having witnessed the fatal assault and knowing who was involved. At trial he asserted again that he did not witness the assault, that he had been too drunk to remember and that he left the area before it happened. If there was a "recantation" in this situation it was the testimony in the Grand Jury.

hearing. The resulting lengthy delay will increase the difficulty of locating defense witnesses and severely erode their ability to recall the events of March 15, 1998. Meanwhile, the government's case against Mr. Bonilla, which was not strong absent Mr. Aleman's perjured Grand Jury testimony, is preserved in the record of the first trial, and the transcripts can be used to refresh government witnesses' recollections.

STATEMENT OF THE CASE

Defendant Santos F. Bonilla was arrested March 27, 1998 on a warrant charging him with second-degree murder while armed in violation of D.C. Code §§ 22-2403 and 22-3202. Following a preliminary hearing April 2, 1998, Petitioner was detained without bond while awaiting trial. He was arraigned June 18, 1998 on an indictment charging assault in violation of D.C. Code § 22-504 and first-degree premeditated murder while armed in violation of D.C. Code §§ 22-2401 and 22-3202, and again July 17, 1998, on a superceding indictment charging in addition conspiracy to commit murder in violation of D.C. Code §§ 22-105a, 22-2401 and 22-3202..

Among the overt acts Mr. Bonilla was charged with committing was assaulting an unidentified homeless man outside the Diversite Club on 14th Street, N.W., and when Mr. Helm intervened to help the homeless man, redirecting his attack on Mr. Helm and his three companions. It accused Mr. Bonilla, Carlos Robles-Benevides, Douglas Ventura and Walter Velasquez of getting into a car and chasing Mr. Helm, discussing how they would attack him as they traveled up 14th Street.[3] Once they reached Mr. Helm, the indictment states, Mr. Bonilla participated in the assault that resulted in the victim's death. Finally, the indictment states that Mr. Bonilla transported Walter Velasquez away from the crime scene.

The trial began October 26, 1998, and at the conclusion of the government's case the Court dismissed the count charging Mr. Bonilla with assaulting the homeless person because the government had presented no evidence to support the charge. The jury returned a verdict of guilty on the conspiracy and first-degree murder charges November 6, 1998. The Court sentenced Mr.

[3] The government introduced no evidence admissible against Mr. Bonilla that he participated in or was present during such a discussion.

Bonilla January 26, 1999 to 30 years to life in prison for first-degree murder while armed and 20 to 60 months in prison for conspiracy. The two sentences are concurrent.

Mr. Bonilla filed a timely Notice of Appeal February 19, 1999.

In Orders issued February 16, 2001 the Trial Court appointed undersigned counsel to represent Mr. Bonilla in preparing a motion for new trial, but denied without prejudice Petitioner's motion for permission to obtain the services of an investigator and Spanish interpreter to assist in locating potential witnesses who could provide affidavits supporting his belief that the prosecutor had coerced witnesses to testify falsely.[4] App. Q & R.

Mr. Bonilla filed a Motion for New Trial pursuant to Rule 33 on November 5, 2001 and a Motion for Discovery November 14, 2001. App. A. In the latter Mr. Bonilla requested documents in the possession of the government related to the prosecutor's use of Grand Jury subpoenas to compel civilian witnesses to report to his office for questioning, and notes detailing the prosecutor's meetings with individuals who had been subpoenaed to his office.[5]

The Judge granted Mr. Bonilla's Renewed *ex Parte* Motion for Investigative and Interpreter Services November 14, 2001. App. S & T. In a January the Court ordered the government to respond to the new trial and discovery motions, and after the government filed its pleadings (App. B & I) Mr. Bonilla filed a Reply to the government's Opposition to his new trial motion. App. C. On March 7, 2002 the Trial Court ordered a limited hearing (App. G), and on March 11, 2002 it denied Mr. Bonilla's discovery motion (App. K), and recommended to the Attorney General that Mr. Bonilla be housed in the Washington area for the proceedings. But she refused to issue a writ to return Petition to Washington, even after she was informed that the U.S. Marshal Service would not honor the recommendation without a Writ of *Habeas Corpus ad Prosecuendum.* The Judge, on May 28, 2002 denied a second motion asking her to order Mr.

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[4] Undersigned counsel had been appointed by this Court to represent Mr. Bonilla for his appeal. In reading the trial transcripts, Grand Jury transcripts provided to defense counsel pursuant to the Jencks Act, 18 U.S.C. § 3500, and trial counsel's files, counsel determined that issues needed to be resolved on collateral attack before the appeal could proceed and began working on a new trial motion. *See, Shepard v. United States*, 533 A.2^{d} 1278 (D.C. 1987). Believing that Mr. Aleman's experience was but one example of the prosecutor's misconduct, counsel filed an *Ex Parte* Motion for Investigative and Interpreter Services.

[5] On November 14, 2001 counsel also filed a Motion for Recommendation To House Defendant in Washington Metropolitan Area.

Bonilla's return for the hearing, and on June 6 denied a motion seeking return to Washington of Wilmer Villatoro, a potential witness incarcerated at F.C.I. Petersburg. App. M & N.

Mr. Bonilla and his codefendants on June 11 filed a Joint Supplemental Reply To Government's Opposition to Defendant Bonilla's Motion for New Trial. App. D. It argued that the scope of the evidentiary hearing should be expanded, and supplied affidavits of two individuals who would testify that the prosecutor attempted to coerce them into testifying falsely in the Grand Jury about the events of March 15, 1998, three vouchers for payment of witness fees to individuals subpoenaed to the prosecutor's office, and trial counsel's discovery letter making specific *Brady* requests for information about witnesses inconsistent statements and impairment caused by use of drugs or alcohol. It argued that the hearing should be expanded to include testimony from additional civilian witnesses questioned by the prosecutor while the Grand Jury was investigating this case. A Notice of Filing, filed June 13, included affidavits of three more witnesses, and check stubs showing that one of them had been paid illegally for appearing in the prosecutor's office. App. E.

Counsel for Codefendant Carlos Robles-Benevides on June 11 filed a motion to convert the June 18 hearing to a status hearing so counsel and the Trial Court could resolve these issues and set a new date for a hearing on all of the issues raised in Mr. Bonilla's new trial motion. App. U. At the same time she filed a motion to unseal a government pleading in *United States v. Briscoe*, F 1478-94, raising similar *Brady* issues involving the same prosecutor, which is also pending before Respondent. App. O. The Judge denied both motions June 13. App. V & P.

STATEMENT OF FACTS

According to testimony at the trial, early in the morning March 15, 1998, after an altercation in the Diversite Club, 1526 14th Street, N.W., the club closed. As the club's Latino patrons left, some of them attacked an elderly, homeless black man outside. Four young black men driving north on 14th Street saw the attack and stopped to help the homeless man. As they approached on foot the assailants turned on them and they fled. Three of the young black men returned to the car, but the fourth, Warren Helm, ran north on 14th Street with several Latino men

in pursuit. Some of the people who had attacked the homeless man pelted the car with rocks and bottles and one of them used a screwdriver-like object to stab a passenger in the car in the hand. The car, with its three occupants drove off and did not return to the area for several minutes.

When the club closed Petitioner talked to a young woman outside for a short time. He had offered Codefendant José Salamanca, who had been drinking heavily for several hours, a ride to his home at 14th and W Streets, N.W., and Mr. Salamanca sat in the front passenger seat of his car. Before they drove away Codefendant Robles-Benevides, Walter Velasquez (Catinga) and Douglas Ventura asked for rides and got in the back seat.[6] Mr. Bonilla began driving north on 14th Street, and one of his back-seat passengers shouted to stop after about 2 ½ blocks. The three back-seat passengers exited the car leaving both rear doors open. Mr. Bonilla was stopped in traffic, and before he returned to the car after closing the back doors and began moving again, Mr. Velasquez, armed with a knife, returned to the car and ordered him to drive to La Triviada, a gambling hall.

The government called four witnesses who had been in the club and who claimed to have seen the assaults on the homeless man and the homicide victim: Rosa Garcia (China), José Perez (Chino or Chinito) , Hugo Aleman (Loco Hugo), and José Benitez (Chofer), who testified under a plea agreement. Three of the defendants testified, including Mr. Bonilla, and the defense called one other witness who had been in the club March 15, 1998.

A full recitation of the relevant evidence put on by the government and the defense is set out in Mr. Bonilla's new trial motion, which is included in the Appendix to this Petition. *See App. A.*

ARGUMENT

JURISDICTION TO PROVIDE REQUESTED RELIEF

This Court has jurisdiction, pursuant to the All Writs Act, 28 U.S.C. § 1651, to issue a Writ of Prohibition directing Respondent to adjourn the limited hearing currently in progress. Similarly, it has jurisdiction to issue a Writ of Mandamus directing her to permit Mr. Bonilla to

[6] Mr. Velasquez and Mr. Ventura were indicted along with Mr. Bonilla, but have never been apprehended.

conduct discovery to gather evidence needed to fully present his claims of error in the Superior Court, and to expand the scope of the hearing to address all issues raised by his new trial motion which cannot be resolved by reference to the motions, files and records in his case. *See, Yeager v. Greene*, 502 A.2^{d} 980 (D.C. 1985); *Morrow v. District of Columbia, ex rel. Alexander*, 417 F.2^{d} 728, 734-5 (D.C. Cir. 1969)(Supreme Court and all courts established by Congress may issue all writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

An appellate court "may issue a 'supervisory' writ of mandamus to review certain interlocutory rulings." *Yeager, supra*, at 984 (citing *La Buy v. Howse Leather Co.*, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2^{d} 290 (1957)). Similarly, the *Yeager* Court cited *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2^{d} 152 (1964), for the proposition that "mandamus is available, on a one-time basis, to provide guidance on the operation of a new rule of procedure ('advisory' mandamus")." *Yeager, supra*.

This case implicates both bases for intervention by this Court in the proceedings below.

THE COURT SHOULD ISSUE THE WRIT IN THIS CASE IN EXERCISE OF ITS SUPERVISORY AUTHORITY

The Trial Court has severely limited the scope of the hearing, barring Petitioner from calling witnesses who can provide relevant evidence in support of issues raised in his new trial motion. She has done so without making any findings of fact and conclusions of law that Mr. Bonilla is not entitled to relief if he can prove the allegations in the motion. Furthermore, Respondent has not found that, even if Mr. Bonilla is entitled to relief, the motions, files and records of the case provide sufficient evidence to resolve his claims, and therefore are ripe for appellate review.

Rule 33 requires "that an application for a new trial on the ground of newly discovered evidence be made to the trial court and not asserted for the first time on appeal." *Crosby v. United States*, 383 A2d. 351, 354 (D.C.), *cert. denied*, 439 U.S. 849 (1978). This is so because such a claim requires evaluation of extra-judicial facts and "the ordinary function of appellate courts is

to review the application of the law to facts found, not to find those facts in the first instance." *Johnson v. United States*, 385 A.2d 742, 743 (D.C. 1978).

In reviewing denials of hearings when criminal defendants raised similar claims pursuant to D.C. Code § 23-110, this Court has stated, "an evidentiary hearing is required on allegations which, if proven, would entitle the prisoner to relief, particularly in a case involving circumstances not adequately reflected in the record." *Gibson v. United States*, 388 A.2d 1214, 1215 (D.C. 1978). "The statute requires an evidentiary hearing unless the allegations of the motion itself are vague and conclusory, are wholly incredible, or, even if true, would merit no relief." *Id.* at 1216. Furthermore, because collateral attack on the verdict pursuant to § 23-110 and Rule 33 is "a remedy of virtually last resort, any question whether a hearing is appropriate should be resolved in the affirmative." *Id*.

The bases on which Mr. Bonilla seeks a new trial include the systematic abuse of the Grand Jury's subpoena power and repeated *Brady* violations, as well as errors related to Mr. Aleman's testimony. A hearing on the new trial motion limited to presentation of evidence about what Respondent has erroneously described as "recantation" of Mr. Aleman's Grand Jury Testimony would create an inadequate record for Respondent to rule on the new trial motion. By so limiting the hearing Respondent has reduced the inquiry to a credibility contest between Mr. Aleman and the prosecutor, depriving Mr. Bonilla of the ability to introduce any corroborative testimony by other individuals subjected to the same coercive practices.

In the event that the Court denies the motion, such a truncated hearing would provide an insufficient basis for the Court of Appeals to determine whether the defendant's constitutional rights were violated. This Court would be required to remand the case for a new hearing, further delaying justice and impairing Respondent's ability to defend himself in a new trial.

As this Court recognized very recently, when a defendant on collateral attack has demonstrated that, but for the errors in his trial, there is a reasonable probability that the outcome would have been different, failure to hold an adequate hearing deprives "the trial court … [of a] complete and reliable record on which to base [its] disposition of [defendant's] claims…." *Lopez*

v. United States, 98-CF-1619 & 01-CO-107, Slip Op. at 13 (D.C. June 6, 2002)(quoting *Lanton v. United States*, 779 A.2d 895, 904 (D.C. 2001).

Respondent appears to have decided *sub silencio* to deny those portions of Mr. Bonilla's new trial motion alleging prosecutorial misconduct beyond that related to coercion of Mr. Aleman, including the asserted *Brady* violations. Through interviews with several other individuals subjected to the prosecutor's abuse of Grand Jury subpoenas, Petitioner has identified other witnesses who would testify at a hearing that they provided exculpatory evidence to the prosecutor which he did not disclose to defense counsel. Counsel has provided Respondent and the government affidavits from these witnesses, but Respondent's hearing order bars presentation of this corroborative evidence as well.

The D.C. Court of Appeal has ruled that a collateral attack on the verdict, pursuant to Rule 33 or D.C. Code § 23-110, is the appropriate avenue for developing the record when defendants allege that the government violated its ongoing obligation under *Brady* to disclose exculpatory information. *Farley v. United States*, 694 A.2d 887, 889 (D.C. 1997).

> It has been held that " 'the duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies.' " Furthermore, even when the prosecution may not know about certain evidence, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

(citations omitted). The Panel remanded the case for a second hearing in the Superior Court stating:

> Unfortunately, the record was not sufficiently developed during the § 23-110 hearing to provide a sound basis for our evaluation of the government's obligation to disclose the [evidence] under *Brady*, the impact of the [evidence] on the lack of documentation on [the witness's] statements to the police, or the materiality of the undisclosed information in relation to other evidence adduced at trial.

Id.

THE COURT SHOULD ISSUE THE WRIT IN THIS CASE IN EXERCISE OF ITS ADVISORY AUTHORITY

This Court has stated that,

> the trial court may order post-conviction discovery in aid of a new trial motion by borrowing from familiar discovery procedures as appropriate, "*whether these are found in the civil or criminal rules or elsewhere in the 'usages and principles of law,' "* in order that the new trial motion receive fair and meaningful consideration.

Gibson v. United States, 566 A2^{d} 473, 478 (D.C. 1989)(emphasis added). In doing so it relied heavily on *Harris v. Nelson*, 394 U.S. 286, 300, 89 S. Ct. 1082, 22 L. Ed. 2^{d} 281 (1968), in which the U.S. Supreme Court stated:

> At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," … upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] … and agreeable to the usages and principles of law."
>
> … [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate …."

When *Gibson* was decided there were no rules governing post-conviction proceedings in the Superior Court. Rules of procedure for litigating D.C. Code § 23-110 motions became effective in April 2000, and Rule 6 provides for discovery under both the D.C. civil and criminal rules. The drafters of the rules for implementing § 23-110 stated in the notes accompanying Rule 1 that they were modeled on the federal Rules Governing § 2255 Proceedings, U.S.C. § 2255 Proc. Under the relevant federal discovery rule, Rule 6, "Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing."[7]

It is clear from the case law and, in the case of § 23-110 motions the rules, that Mr. Bonilla must obtain the Court's permission to conduct discovery. As permitted by the procedural rules governing § 23-110 proceedings and *Harris v. Nelson, supra*, Mr. Bonilla requested shortly

[7] In fact, this admonition is drawn from Notes of the Advisory Committee on Rules appended to Rule 6 of the Rules Governing § 2254 Cases. However the notes appended to U.S.C. § 2255 Proc. Rule 6 state, "See the advisory committee note to Rule 6 of the § 2254 rules. The discussion there is fully applicable to discovery under these rules for § 2255 motions."

after he filed his new trial motion that he be permitted to conduct discovery pursuant to the D.C. Rules of Civil Procedure. When it became apparent that Respondent was limiting the hearing to the one witness counsel, lacking investigative resources, was able to locate before he filed the Rule 33 motion, Mr. Bonilla renewed his discovery motion, ant Respondent has not ruled on that motion.

Respondent has implicitly found that if Mr. Bonilla can prove allegations in his Rule 33 motion by no more than a preponderance of the evidence he is entitled to a new trial. It rejected the government's claim that the motion was vague and conclusory, and even if true would entitle Defendant to no relief. Furthermore, Mr. Bonilla and his codefendants have filed a Supplemental Reply to the Government's Opposition to Defendant Bonilla's Motion for New Trial — including affidavits from some of the potential witnesses, which demonstrates the likelihood that the government possesses documents directly relevant to allegations made in the new trial motion.

Under Rule 6 of the D.C. rules implementing § 23-110 Mr. Bonilla is entitled to discovery. Under D.C. Civ. R. 26(b)(1), the scope of discovery encompasses

> any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party…. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Similarly, D.C. Crim. R. 16(a)(1)(C) states that

> Upon request of the defendant the prosecutor shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense….

In its opposition to Mr. Bonilla's discovery motion the government provided a preview of the argument it will make in opposition to the Rule 33 motion. It states,

> The record indicates that Aleman's [grand jury] testimony that the defendant participated in the attack was corroborated by other evidence the government already had, and therefore there is no way that the government should have known it was false. Before Mr. Aleman testified in the grand jury on April 1, 1998, at least three witnesses had already given the police and prosecutors the same information: that defendant Bonilla had both driven the stabbers to and from the scene of the murder and had participated himself in the attack on Mr. Helm.

Gov't Opp. at 8. It goes on to state that this information was included in the affidavit Det. Eric W. Gainey swore to March 25, 1998 in seeking a warrant to arrest Mr. Bonilla, and that at the conclusion of the preliminary hearing the Court found that "The occupants [of Mr. Bonilla's car], including defendant, got out and began to physically beat the decedent." *Id.* at 9.

Mr. Bonilla seeks discovery to demonstrate that the prosecutor knew or should have known that Mr. Aleman testified falsely in the Grand Jury, and by using that testimony to impeach him at trial was putting false testimony before the jury. The documents sought will show as well that Mr. Asuncion possessed exculpatory evidence discrediting the primary government witness against several of the defendants long before the trial, and he did not disclose that information to defense counsel.

The documents sought in Defendant's discovery motion will facilitate investigation, aid in preparing witnesses who will be called to testify at a hearing on Mr. Bonilla's Rule 33 motion, corroborate their potential testimony, and assist in impeaching the testimony of government witnesses.

Although the committee that drafted the Rules of Procedure Governing D.C. Code § 23-110 Proceedings suggested that judges look for guidance to federal appellate decisions interpreting the rules governing § 2255 proceedings, this Court has never issued an opinion interpreting the new rules or instructing trial judges on their implementation. This case provides an opportunity to issue such guidance.

APPEAL FROM DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL DOES NOT PROVIDE AN ADEQUATE REMEDY

If this Court does not issue the requested Writ of Mandamus directing Respondent in the first instance to hold a full hearing, and then to place on the record findings of fact and conclusions of law addressing all issues raised by Mr. Bonilla's new trial motion, resolution of Petitioner's claims will be delayed at least another year and likely much longer as his case wends its way through the appellate process. If, this Court waits until the consolidated appeals reach it, and it determines that the record is inadequate for appellate review, it will have to remand the case for further proceedings in the Trial Court. *See Lopez, supra*.

Especially in criminal cases like this one, "justice delayed is justice denied." "Plainly, 'the writ of *habeas corpus*, challenging detention, is reduced to a sham if the trial courts do not act within a reasonable time.' " (Footnote omitted). *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir.1978).

This Court has ruled that *mandamus* is an appropriate remedy for errors in a preliminary hearing, including a hearing commissioner's refusal to permit the defendant to call a witness. *Poteat v. King*, 487 A.2^{d} 215, 216 (D.C. 1984). Where a convicted defendant on collateral attack raises significant, detailed claims of prosecutorial misconduct supported by evidence, his right to place that evidence before the Trial Court is no less significant than the right of an individual recently charged with a crime to present testimony to negate a finding of probable cause. Where the Trial Court has determined that a Defendant is entitled to a hearing on his motion for a new trial, the Defendant "has a right to call any witness whose testimony [is] relevant to the issue[s]" on which he is entitled to relief. *Id.*

In issuing a Writ of Mandamus ordering a prompt hearing and resolution of Petitioner's *habeas corpus* motion that had been languishing in the District Court for 14 months, the Tenth Circuit stated:

> For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of respondent to do the action in question, and no other adequate remedy available. Petitioner must also show that his right to the writ is "clear and indisputable." Under the circumstances of this case, petitioner has established a clear and indisputable right to have his petition expeditiously heard and decided, and he has no alternative remedy.

Johnson v. Rogers, 917 F.2^{d} 1283 (10th Cir. 1990)(citations omitted).

The delay that will result if Mr. Bonilla must go through the appellate process and another hearing before Respondent surely will be much greater that the 14-month delay the Tenth Circuit held to be unacceptable and deserving of mandamus relief.

CONCLUSION

For the reasons stated above and any other reasons that may appear to the Court, Petition respectfully requests that the Court issue a Writ of Prohibition directing Respondent to adjourn

the proceeding in progress, and a Stay barring further proceedings in the Trial Court pending resolution of this matter. Petitioner further requests that this Court order full briefing and issue a Writ of Mandamus directing Respondent to expand the scope of the hearing to include all issues raised in his new trial motion on which he is entitled to relief and which cannot be decided on the motions, files and records in the case; and providing Respondent guidance on the proper application of the rules governing discovery in collateral attack proceedings, so that Petitioner can obtain evidence needed to make a complete record demonstrating that he is entitled to a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Santos F. Bonilla, certify that on June 18, 2002 I served a true copy of the attached Petition for Writ of Mandamus and Prohibition by hand on the persons listed below.

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