

No. 98-CF-1871

IN THE  
DISTRICT OF COLUMBIA COURT OF APPEALS

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Luis M. Palacio,

*Appellant,*

v.

United States,

*Appellee.*

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On Appeal from the  
Superior Court of the District of Columbia  
Criminal Division — Felony Branch  
F 2902-98

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**APPELLANT'S REPLY BRIEF**

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IN THE  
DISTRICT OF COLUMBIA COURT OF APPEALS

LUIS M. PALACIO,

*APPELLANT,*

VS.

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No. 98-CF-1871  
(F 2902-98)

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**APPELLANT'S REPLY BRIEF**

**ARGUMENT**

Appellant Luis M. Palacio files this Reply Brief to respond to the government's letter filed pursuant to D.C. App. R. 28(k) and dated August 25, 2004, calling the Court's attention to the opinion in *Anderson v. United States*, No. 01-CF-1432 *Slip Op.* (D.C. Aug. 19, 2004). The quantity and quality of evidence supporting Palacio's conviction for aggravated assault on David Rodriquez is substantially less than the evidence supporting the conviction in *Anderson*, and therefore this case is readily distinguished. This case is much more like *Nixon v. United States*, 730 A.2<sup>d</sup> 145 (D.C. 1999), as Appellant argued in his main brief.

**THE EVIDENCE**

At the outset it is important to note that in its brief in the case at bar the government attempted repeatedly to conflate the medical evidence while arguing generically that all three of the victims suffered serious bodily injury.

For example, according to the government, "Detective Hewick confirmed that the victims were in pain when he visited them at the hospital the day after the attacks...." Gov't Brief, 43 n. 29. At trial the prosecutor asked a general question, "What condition were they in when you met with them there," and Hewick responded, "They were still being hospitalized. I mean, obviously, they were in pain. They could talk to me though when they were under medication with some

tubes in them.” Tr. 7/22/98, 291. When asked how much time he spent interviewing each victim Hewick replied, “I didn’t spend that much time, because of the condition they were in.... You could see that they were still in pain.” *Id.* at 292.

Hewick never said specifically that Rodriguez was in pain or that he had tubes in him, and Rodriguez’s hospital records contradict the government’s claim that he was in pain. Progress notes written April 14, 1998 at 11:30 p.m. state that Rodriguez was “hungry, no abdominal pain, ... abdomen soft, nontender, [no] masses/distension. ... No evidence of intra-abdominal injury. ... Continue observation. OK to advance diet.” Supp. R., 21.<sup>1</sup> Progress notes written at 6 a.m. on April 15 state that Rodriguez was “doing well this AM. [No] Abd. pain. ... Comfortable.... Abd. soft, mild incision tenderness. [No] guarding. [No] rebound.... Pain controlled. Advance discharge.” *Id.* at 22.

Citing the stab wounds to Rodriguez’s arm and abdomen, and his testimony that someone hit him in the head with a bottle, the government argues that “a reasonable juror could [] conclude that Rodriguez suffered a substantial risk of death from his multiple wounds.” Gov’t Brief, 42. The evaluation performed April 14 at 10:30 p.m., preparatory to admitting Rodriguez for observation, states that based on abdominal tests “No life threatening or potentially disabling injuries identified,” and that he “Ambulates independently.” Supp. R., 29 – 30. The records say nothing about an injury to Rodriguez’s head.

“[M]edical records likewise contain entries revealing that Rodriguez was in extreme pain, and that he had to be medicated and sedated so that the ‘laproscopy’ could be performed while he was hospitalized.” Gov’t Brief, 42. In fact, the document cited states, “[patient’s] consent obtained to perform diagnostic laparoscopy...[Patient] medicated & sedated — Laparoscope [not] functioning so regular deep peritoneal lavage done.” Supp. R. 9. But later notes indicated that doctors were unable to perform a diagnostic peritoneal lavage. *Id.* at 20. Instead, they relied

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<sup>1</sup> References to Rodriguez’s medical records will be referred to as “Supp. R.” followed by the relevant page number, i.e. Supp. R., 21. Appellant filed the medical records February 13, 2004.

on an abdominal ultrasound examination conducted at 5:15 p.m. on April 14 to determine that Rodriguez suffered no internal injuries. *Id.* at 19.

#### **APPLICABLE CASE LAW**

The government's reliance on *Anderson, supra*, is misplaced. In that case the victim testified that when she was stabbed "It was burning. It was *very painful*." *Slip Op.*, 23 (emphasis in original). She testified as well that her attacker stomped on her face, then stabbed her, and "she could not recall what occurred after that until the ambulance arrived." *Id.* at 3. Arguably, jurors could have concluded that she lost consciousness during that period. The doctor who treated the victim testified about the extent of her injuries, their long-term effects, and the pain such injuries would cause. *Id.* at 24. On that record this Court concluded that jurors could find beyond a reasonable doubt that the stabbing and the assault with a shod foot caused the victim "extreme pain," and therefore the government had produced sufficient evidence to support a conviction for aggravated assault. *Id.* at 24 – 5.

In Appellant's case, Rodriguez never testified that he suffered pain. Asked by the prosecutor about his injuries, Rodriguez said "I got hit twice in my right arm, one in my right wrist and one in my biceps and another one in my abdomen. Those are the ones that needed ... stitches. The one in my abdomen needed surgery.... The other ones were like minor cuts."<sup>2</sup> Tr. 7/22/98, 232 – 3. Later the prosecutor asked,

Q. Could you feel what you were being attacked with? Can you identify what it felt like?"

A. The one in my abdomen must have been a large [] object.

Q. What did it feel like?

A. I don't know.

*Id.* at 233 – 4.

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<sup>2</sup> The only "surgery" performed on Rodriguez, if any was performed, was a small incision to perform a diagnostic peritoneal lavage.

Rodriguez testified that after Palacio stabbed him twice he grabbed Appellant's arm and prevented a third stab, and then Palacio ran away. He continued to fight with other individuals, and after the brawl Rodriguez walked to the nurse's office at Bell Multicultural High School. The government offered no medical testimony concerning his injuries, and the medical records clearly do not support the government's argument that he suffered "serious bodily injury." The only evidence the government provided is Hewick's generic statement that when he interviewed the three complaining witnesses they appeared to be in pain.<sup>3</sup>

The government provided no evidence that Rodriguez's injuries were life threatening, that they resulted in "extreme pain," "serious permanent disfigurement," or "protracted loss or impairment" of any bodily function, or that he lost consciousness. *Nixon, supra*, 730 A.2<sup>d</sup> at 150. Therefore, a reasonable jury could not have concluded beyond a reasonable doubt that Palacio committed aggravated assault on Rodriguez.

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<sup>3</sup> Appellant will not repeat the argument made in his main brief at 27 – 8 regarding the pain medications prescribed for Rodriguez when he was discharged from the hospital.

## CONCLUSION

For the reasons stated in Appellant's main brief and above, and any others that may appear to the Court following oral argument, Appellant Luis M. Palacio respectfully requests that the Court vacate his conviction and remanded his case to the Superior Court Family Division. Alternatively, Appellant requests that the Court vacate his conviction for aggravated assault while armed on Rodriguez and assault with a dangerous weapon on Gonzales, and remand his case to the Superior Court Criminal Division for resentencing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Robert S. Becker, counsel for Luis M. Palacio, certify that on September 20, 2004 I served a true copy of the attached Appellant's Reply Brief by first-class mail on counsel listed below.

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