UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANTOS F. BONILLA, **DCDC NO. 276-907** **D.C. JAIL** **1901 D STREET, S.E.** **WASHINGTON, D.C. 20003** VS. **SIMON WAINWRIGHT, WARDEN,** **D.C. CENTRAL DETENTION FACILITY.**	Civil Action No. _____

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Santos F. Bonilla, through undersigned counsel, respectfully requests, pursuant to 28 U.S.C. § 2241(c)(3), that the Court issue a Writ of Habeas Corpus and that it vacate his conviction and sentence imposed December 11, 2009 by the Superior Court of the District of Columbia for conspiracy to commit second-degree murder in violation of D.C. Code §§ 22-105a, 22-2403 and 22-3202, and second-degree murder while armed in violation of §§ 22-2403 and 22-3202.[1]

This Court has jurisdiction because Mr. Bonilla has twice attempted to vindicate his Fifth and Sixth Amendment rights through post-conviction proceedings in the Superior Court, a motion pursuant to D.C. Crim. R. 33 filed in November 2001, Exh. K, and a motion pursuant to D.C. Code § 23-110 filed June 1, 2005; Exh. U, and his direct appeal to the D.C. Court of Appeals. *Perez, et al. v. United States*, 968 A.2d 39 (D.C. 2009). Exh. G. His case falls within the so-called safety valve provision of § 23-110(g) because both the Superior Court and the D.C. Court of Appeals have denied him relief and no adequate or effective remedy is available to challenge his continued unconstitutional detention. *See Eastridge v. United States*, 372 F. Supp.

[1] Citations to the D.C. Code are to the 1981 codification in effect when the charged crime occurred. As recodified in 2000 the applicable statutes are D.C. Code §§ 22-1805a, 22-2103 and 22-4502.

2d 26, 44 – 5 (D.D.C. 2005).

STATEMENT OF THE CASE

Mr. Bonilla was arrested March 27, 1998 and charged with second-degree murder while armed in violation of §§ 22-2403 and 22-3202. He was arraigned June 18, 1998 on an indictment charging assault in violation of D.C. Code § 22-504 (Count B), and first-degree premeditated murder while armed in violation of D.C. Code §§ 22-2401 and 22-3202 (Count C).

Mr. Bonilla filed a motion June 26, 1998 to sever his case from those of his codefendants. The government filed its opposition June 30.

A superseding indictment filed July 14, 1998 added a charge of conspiracy to assault and to murder in violation of §§ 22-105a, 22-2401 and 22-3202 (Count E).

The trial of Mr. Bonilla and co-defendants Carlos Robles Benevides, José Salamanca, Luís Perez and Oscar Villatoro began October 26, 1998. The Trial Court directed a verdict of acquittal as to Mr. Bonilla on the assault count at the close of the government's case. On November 6, 1998 the jury convicted Mr. Bonilla on the conspiracy and first-degree murder charges. On January 26, 1999, the Trial Court sentenced him to concurrent prison terms of 30 years to life for first-degree murder while armed and 20 to 60 months for conspiracy.

Mr. Bonilla filed a motion for a new trial November 5, 2001 pursuant to D.C. Crim. R. 33, citing newly-discovered evidence that the trial prosecutor abused the grand jury's subpoena power to compel witnesses to appear in his office repeatedly for interviews in the weeks after the homicide. He said the government coerced one witnesses, Hugo Aleman, to testify falsely about Mr. Bonilla's involvement in the crime, and that the prosecutor withheld exculpatory evidence concerning Aleman's intoxication and prior contradictory statements about the crime.

In a two-day hearing on the motion Aleman and the trial prosecutor testified. On October 10, 2002 the Trial Court denied Mr. Bonilla's new trial motion.

In early February 2005, less than a week before oral argument in the D.C. Court of Appeals on Mr. Bonilla's direct appeal and denial of his Rule 33 motion, the government

disclosed exculpatory information regarding another key government trial witness, Rosa Garcia. With that Court's permission Mr. Bonilla filed a D.C. Code § 23-110 motion. It asked asking the Trial Court to vacate his conviction because the government failed to disclose pretrial that Garcia had provided a fake Social Security number and Salvadoran passport to the U.S. Attorney's office when she sought admittance to the witness protection program. He argued as well that the government failed to disclose that it had imparted a benefit to Garcia, choosing not to prosecute her for crimes arising from illegal use of the identity documents or to notify the Immigration and Naturalization Service that she was in the United States illegally.

After an evidentiary hearing, the Trial Court on September 1, 2006 denied Mr. Bonilla's new trial motion. He filed a timely Notice of Appeal September 7, 2005, and because it had not yet decided the direct appeal, the D.C. Court of Appeals consolidated his 2006 appeal with the direct appeal and ordered supplemental briefing. Exh. D, E and F.

In an opinion issued March 26, 2009 the Court held that the Trial Judge gave a constitutionally deficient instruction as to aiding and abetting first-degree murder, permitting jurors to convict despite an absence of evidence of premeditation and deliberation by Petitioner. But it ruled that there was sufficient evidence to convict Mr. Bonilla of second-degree murder while armed. It remanded the case to the Superior Court to enter a judgment of conviction for second-degree murder while armed and conspiracy, and to resentence Petitioner. It held that the prosecutor abused the grand jury's subpoena power and suppressed exculpatory evidence, but those errors did not prejudice Mr. Bonilla. Exh. G.

The Court of Appeals denied Mr. Bonilla's Petition for Rehearing and Suggestion of Rehearing *en Banc* May 15, 2009, Exh. H and I. and the U.S. Supreme Court denied his Petition for Writ of Certiorari October 20, 2009. Exh. J.

The Trial Court resentenced Mr. Bonilla December 11, 2009 to concurrent prison terms of 18 years to life for second-degree murder while armed and 20 to 60 months for conspiracy.

STATEMENT OF FACTS

OVERVIEW

According to testimony at trial, early in the morning March 15, 1998, after an altercation in the Diversité 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.

Unlike his codefendants who had been drinking and dancing at Diversité for several hours before it closed, Mr. Bonilla had taken his girlfriend out for dinner. He took her home to Virginia and en route to his home in Silver Spring stopped at the club at about 2:30 a.m., had a soda, and bought drinks for some friends. When the club closed Mr. Bonilla offered José Salamanca, who had been drinking heavily, a ride to his home at 14th and W Streets, N.W. Before they drove away Robles, Walter Velasquez (Catinga) and Douglas Ventura asked for rides and got in the back seat. 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 left the car to close the doors and when he returned to the driver's seat he was in a line of cars waiting for the traffic light at the next corner to turn green. Before he began moving again 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 Helm: Garcia (China), José Perez (Chino or Chinito) , 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 the club's security chief

and a witness who had been in the club with Garcia and several other friends.

THE GOVERNMENT'S CASE

ROSA GARCIA'S TESTIMONY

Garcia testified that she arrived at the club at about 11 p.m. March 14 and was with friends, Mayra Rivera, Sendy Leonzo, Blanca Buruca and José Guevera,[2] Blanca's boyfriend. Tr. 10/27/98, 341.[3] Exh. KK. She saw some of the men flashing signs of two gangs, MS and Mara R, but the only member of Mara R she saw flashing a sign was Oscar Villatoro (Gato). *Id.* at 342. A fight broke out in the club and it closed at about 3 a.m. *Id.* at 341, 382. Outside she saw Villatoro arguing with a homeless black man across 14th Street. *Id.* at 347. Garcia testified that she walked north on 14th Street with Rivera, Leonzo, Buruca and Guevera, and did not pay any further attention to the altercation involving the homeless man.

As they walked past a Laundromat near Swann Street, she said, "I heard some noise, a black male saying no, no, no. And that's when I looked back and I saw 'Catinga' stabbing the black male." *Id.* at 348, 385. She said Ventura was "hitting, punching and kicking the black male."[4] *Id.* at 350. Garcia identified Mr. Bonilla as "Manotas," and when asked what he was doing during the attack on the decedent the following discussion occurred:

> A. I cannot really remember. But that I know of, I think he was doing the same thing (kicking and punching).
>
> Q. Okay. But I only want you to tell the ladies and gentlemen of the jury what you remember seeing with your own eyes, okay?
>
> A. I remember seeing with my own eyes he was inside a car with four doors open waiting

[2] His nickname is Chino, but he should not be confused with José Perez, also called Chino.

[3] References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and the page number, i.e. Tr. 6/18/02, 3. References to grand jury transcripts will be designated "GJ Tr." followed by the date and page number.

[4] Garcia testified in the grand jury that Aleman was standing near the attackers and later said, "I didn't have a conversation with him, but everybody else did — everybody else in the pictures. They did, and they said that he was punching and kicking him too." Garcia claimed she was present during these conversations. GJ Tr. 3/17/98, 18. Exh. GG. She later testified that Aleman admitted involvement in the attack on Helm. *Id.* at 21.

for the men that stabbed the black male.

Id. at 356 – 7. She then listed the people who were involved in the assault, including Benitez, Villatoro, Ventura, Chupa Cabra[5] and others she could not provide names for, but not Mr. Bonilla. *Id.* at 357 – 8. Garcia admitted that she had trouble seeing what was going on because she was not wearing her glasses and she was squinting to try and see. *Id.* at 358 – 9.

Garcia denied that she drank any alcoholic beverages while at the Diversité Club. Tr. 10/27/98, 361.

JOSÉ PEREZ'S TESTIMONY

Perez testified that when he left the Diversité Club as it closed he saw a red car stopped on 14th Street and five black men got out of it. Tr. 10/28/98, 499 – 500. He said he saw one of the men being stabbed by Velasquez, Ventura and Abuelo. *Id.* at 502. At the time he was standing a half block or a block away. He said his brother Luis and Robles punched Helm and José Benitez was punching and kicking the man. *Id.* at 503. In all, he said about eight people were involved in the assault. *Id.* at 504. He did not identify Mr. Bonilla as being involved in the attack on the homeless man or the decedent.

HUGO ALEMAN'S TESTIMONY

Aleman testified that in March 1998 he was a busboy at La Trumpeta, a restaurant. Tr. 10/28/98, 546. Exh. LL. He went to the Diversité Club after work the night of the homicide, but he had been drinking before he got there. *Id.* at 547. When the club closed he stood outside. *Id.* at 548. He eventually saw some people "running as if they were looking for something toward 14th and U." *Id.*

Aleman did not recall seeing an assault on a homeless man, saying he had a lot to drink and did not recall where he was. The prosecutor then impeached him with his grand jury testimony, in which he said he saw Luis Perez hit the homeless man. *Id.* at 550.[6]

---

[5] Chupa Cabra is Wilmer Villatoro, Oscar's brother.

[6] The transcript of Aleman's grand jury testimony is Exh. II.

A black car arrived and a black man got out of it, and when "some youngsters" threw bottles at the car it left the man behind, he testified. *Id*. at 550 – 1. Aleman said he then saw some "youngsters," including Luis Perez, Wilmer and Oscar Villatoro, leave on foot and others, including Velasquez, Salamanca and Ventura, leave in a red car with Velasquez driving. *Id*. at 551. The prosecutor again impeached him with his grand jury testimony, in which he said Mr. Bonilla was in the car as well. *Id*. at 552. He testified at trial that when the two groups reached Helm, "I saw they were fighting. But I was far back. I was about a couple of blocks back." *Id*.

The prosecutor then asked what the witness saw each defendant do and when he asked about the first, Luis Perez, Aleman repeated "I don't know. They hit the black man. I was far back. I couldn't see. I had drunk. I don't know. They were all like huddled up in a pile. I don't know who hit and who injured." *Id.* at 553. The prosecutor again turned to the grand jury transcript, reading:

> " 'Chofer', he was hitting him. 'Cholo', him too, 'Chino'[7] went with them but I don't know if he hit him or not."
> …
> Q. I asked you, "let me quickly move onto 'Gato'. What do you remember seeing 'Gato' do to the man who was caught."
> And your response, "Well, he sort of … pulled him like this." And you indicated. "He pulled him. He hit him, too."
> …
> Q. " 'Manotas', what do you remember seeing him do?
> "He only hit him in the face but then he went in the car because he was driving."

Tr. 10/28/98, 554 – 6.

On cross-examination Aleman stated that he had been drinking Long Island ice teas[8] at the Diversité Club. *Id.* at 565. He stood outside the club smoking a cigarette for about five minutes as the club closed and everyone left. *Id.* He then walked south on 14th Street. *Id.* at 566. When he was standing near the Diversité Club he was two blocks away from where Helm was

[7] José Perez.

[8] A Long Island iced tea is made with 1 oz. vodka, 1.5 oz. gin, 1 oz. triple sec liqueur, 1 oz. rum and 12 oz. cola. Another recipe calls for 1 oz. vodka, 1 oz. tequila, 1 oz. rum, 1 oz. gin, 1 oz. triple sec, 1.5 oz. sour mix and a splash of cola.

attacked, he said. *Id.* at 559 – 60.

He admitted that he first told jurors Velasquez was driving the red car, but when the prosecutor read the grand jury transcript he said maybe Mr. Bonilla was driving. *Id.* at 560. He further admitted that in the grand jury he testified that Velasquez, Ventura, Robles, Abuelo and Oscar Villatoro attacked Helm. *Id.* at 562-3. But, he said, Mr. Bonilla was not involved. *Id.* at 564.

JOSÉ BENITEZ'S TESTIMONY

Benitez arrived at the Diversité Club at 10:30 p.m. March 14, 1998. Tr. 10/28/98, 570. After the club closed he saw Oscar Villatoro with a street person outside. *Id.* at 571. Then Luis Perez went over to them and Oscar Villatoro attacked the street person. *Id.* at 573. Benitez said he and José Salamanca then became involved in the fight, as did Jorgé Navarette (Mexico) and Abuelo.[9] *Id.* at 574. Benitez then saw a car arrive, which he described as being a red chocolate color, with four black men in it. *Id.* He did not see Mr. Bonilla at that time. *Id.*

The black men said they had guns and ordered the Latinos to stop attacking the street person. But the Latino men turned on the four. One of the black men threw a punch but missed Benitez and, seeing this, Navarette and Abuelo hit him. *Id.* at 575. The Latinos threw rocks and bottles at the car as the black men fled, and the one who had thrown the punch could not get back in the car. *Id.* The rock throwers included Navarette, Luis Perez, Oscar Villatoro, Salamanca and Abuelo. Benitez's group began following Helm toward Florida Avenue, but could not catch up. He said the man picked up an iron rod and called to them. *Id.* at 576.

Benitez then saw Mr. Bonilla drive by with Robles, Velasquez and Ventura. He said "the deceased thought it was help that was coming for him. He went over to the car and then the 'R' … gang people came out."[10] *Id.* at 576 – 7. He said he saw Robles, Velasquez and Ventura, but

[9] The government did not charge Salamanca with conspiracy to murder or first-degree murder.

[10] Barry Hallner, a government witness who attempted to rescue Helm, testified that he saw the victim run into the street and approach a car driven by a woman, but the woman would not let him in the car. Tr. 10/28/98, 453.

not Mr. Bonilla, get out of the car and attack Helm. *Id.* at 577. The men on foot then arrived and joined in the assault. *Id.* at 579. When asked what Mr. Bonilla did he said "I saw the door of the car open and I saw him outside but I don't know what he did." *Id.* at 577 – 8.

Benitez then testified about a conversation he had with Robles shortly after they were arrested in which Robles admitted having a knife. *Id.* at 587. Before the prosecutor elicited the testimony, Mr. Bonilla's trial counsel objected that it was hearsay inadmissible against Mr. Bonilla.[11] *Id.* at 584. He said "My client is the driver and they're proving a conspiracy basically trying to show that he was the driver, too, in the getaway car. … [D]oes the jury get an instruction that they're not to take it against the other people who are in the car." *Id.* at 584 – 5. After the testimony the Court instructed jurors that they could consider Robles's admission to Benitez only against Robles.[12] *Id.* at 588 – 9.

On cross-examination Benitez clearly stated that he did not see Mr. Bonilla assault the homeless man, throw bottles or rocks at the car, or take part in the assault on Helm. Tr. 10/29/98, 624. Benitez admitted kicking Helm along with Ventura and Robles after Velasquez left the scene in Mr. Bonilla's car. *Id.* at 642. He admitted further that he later told an inmate at the jail that he had been so drunk March 15, 1998 that he could not recall what he told police when he was arrested after the incident. *Id.* at 643. He acknowledged on redirect examination that he was having difficulty recalling what he said and did the night of the homicide. *Id.* at 644.

THE DEFENSE CASE

MAYRA RIVERA'S TESTIMONY

Rivera testified that she and Garcia arrived at the Diversité Club at about 1:20 a.m. March 15, 1998. Tr. 10/30/98, 776. They had been at another club earlier and Garcia had several alcoholic drinks there. *Id.* at 784. Garcia had several drinks at the Diversité Club. *Id.* at 785.

[11] Mr. Bonilla's lawyer moved pretrial to sever his, case in part because the government intended to use Robles's statements about fighting with Catinga over who would use the knife.

[12] The Court made it clear that the statement was not being admitted as a co-conspirator statement. *Id.* at 592 – 5.

Rivera said she left the club with Garcia, Buruca, Leonzo and Guevera after the fight broke out inside and they took a taxi home from 14th and Q Streets, N.W. *Id.* at 777 – 8. She and Garcia left first and she prevented Garcia from following the men who were running. *Id.* at 788. Then Leonzo, Buruca and Guevera met them at the alley on the north side of the Diversité Club "because that's when I told Rosa to go back because she was insulting the men." *Id.* Her group ran to find a taxi and she held Garcia's hand so "she would hurry up." *Id.* at 785. She saw people running outside the club, but did not see any fights. *Id.* at 779. The taxi dropped them off at Rivera's apartment and Garcia stayed there until about 6 a.m. *Id.* at 786.

According to Rivera, the prosecutor interviewed her and she told him the same things she told the jury. "Then they told me that I knew the truth and I should tell the truth. And then they began showing me some photographs," she said. But she maintained that she was telling the truth. *Id.* at 782. When questioned by the prosecutor the following colloquy occurred:

> Q. … [O]ne of the very first things I told you, Ms. Rivera, was that the only thing I ever wanted from you was to tell me the truth and the entire truth, isn't that correct, Ms. Rivera?
>
> A. Yes, but they screamed at me.
>
> …
>
> Q. And … Investigator Torres participated in various interviews of you; isn't that correct?
>
> A. In some.
>
> Q. And Detective Eric Gainey was also present in some of our conversations; isn't that correct?
>
> …
>
> THE WITNESS: Yes.
>
> Q. And all any one of them ever told you was that they wanted to hear the truth about what happened to the man who died, isn't that correct?
>
> A. Yes, but they told me I knew who had killed him and I didn't know that.

Id. at 792 – 3.

> Q. … [Y]ou remember me showing you a photo of the victim?
>
> A. Yes.

Q. And then you started to shake? Yes or no?

A. No.

Q. You started to cry?

A. Because you were pressuring me.

Q. You started to cry. Yes or no?

A. Yes, because you told me you would put me in jail.

Q. And then you screamed out, "They were animals." That's what you screamed out? "They were animals."

A. That's what you said.

Q. Did you — remember you're under oath, Ms. Rivera. Did you or did you not after seeing the picture of the victim scream out something like, "They were animals"?

A. I didn't say that.

Id. at 798 – 9. The prosecutor confirmed that he showed Rivera "a photograph of a man on 14th Street whose guts were on the street." *Id.* at 797. Rivera refused to concede that she provided any information about the assault, maintaining that under pressure she identified individuals whose pictures police showed her. *Id.* at 801 – 4.

JOSÉ SALAMANCA'S TESTIMONY

Salamanca said he started the evening March 14, 1998 at a pool hall at 14th and W Streets, N.W., with two friends and then went to a bar and drank beer for about two hours. *Id.* at 72 – 73. They arrived at the Diversité Club shortly after 11 p.m., where they waited in line because "people were coming in, paying and they would check your I.D. and everything." *Id.* at 74. Over the next several hours he drank eight Long Island iced teas and some beers. *Id.* at 75.

Mr. Bonilla arrived at the club at about 2:20 a.m. and had not been drinking, according to Salamanca, who asked for a ride home because "I was kind of drunk, pretty drunk about that time." *Id.* at 76. When the club closed Salamanca left with a woman named Claudia and then waited for Mr. Bonilla, who was talking to two other women. Mr. Bonilla told Salamanca to wait in the car, which was parked a short distance away. *Id.* at 77. Mr. Bonilla then went to the car

and let Salamanca into it and went away for a few minutes. When Mr. Bonilla returned Velasquez asked for a ride, as did Robles and Ventura. *Id.* at 78 – 79.

Salamanca said he went to sleep at that point and the next thing he remember is that "Catinga came, like opened the door really hard and told Manotas, give me a ride. You know, take me to the Triviada." *Id.* at 79. Mr. Bonilla took Salamanca home. *Id.* at 80. Salamanca said he did not learn about the attack on the homeless man or the homicide until the afternoon of March 15. *Id.* at 83.

Salamanca recalled the car stopping and he recalled that Robles, Ventura and Velasquez were in the back seat, but he could not recall where the car stopped and he did not know that one of the men in the back had a knife. *Id.* at 112 – 3. He denied hearing Robles and Velasquez fighting over a knife. *Id.* at 114-5. The next thing Salamanca recalled about the ride was "[w]hen Manotas opened the car, his left-side door, and I saw him getting out and closed the door. … Then he came back in. I blacked out again." *Id.* at 90, 115.

> Q. Isn't it true that you never saw Filipe Bonilla involved in the attack on Warren Helm?
>
> A. No. I never saw it.
>
> Q. And is it your testimony that, while stopped at a light at 14th and P (sic), Catinga just got into the car?
>
> A. Yes, he just got into the car.
>
> Q. Did he have permission to get in the car?
>
> A. No. He just opened the door, got in the car.
>
> Q. Okay, did Catinga ask or tell Bonilla to take him to the gambling house?
>
> A. The way he told, he just tell him, yes, take me to the Triviada.
> …
> A. Yea, he never asked, you know, could I have a ride? No. He was, take me to the Triviada.

Tr. 11/2/98, 91-92.

SANTOS BONILLA'S TESTIMONY

Mr. Bonilla took his girlfriend out to dinner March 14, 1998 at El Paraiso on 14th Street,

N.W. Tr. 11/2/98, 125 – 6. Exh. MM. After he took her home to Virginia, he returned to Washington and decided as he drove up 14th Street at about 2:20 to 2:30 a.m. to stop at the Diversité Club. *Id.* at 126. He saw Salamanca and ordered beers for friends at the bar and a soda for himself. *Id.* at 127. He left the club when it closed and talked to two friends outside for three to five minutes. Salamanca had asked for a ride while they were in the club. *Id.* While he was outside the club Velasquez, Ventura and Robles asked him to drive them home because they did not have money for a taxi and it was cold. *Id.* at 127 – 8. He had given all of them rides in the past and never had a problem. *Id*. Mr. Bonilla said he did not know the men were armed. *Id.* at 128. As he drove north on 14th Street Velasquez shouted from the back seat for him to stop. *Id.* at 129.

Q. When did you pull over?

A. When Catinga told me. After he asked me, stop, stop, I asked him why.
And then he repeated, stop, stop. There was traffic on the street. So I moved to one side.

Q. What happened then?

A. They got out. Douglas got out first, and then Carlos, and then Catinga.

Q. Had you seen Warren Helm running up 14th Street

A. No.

Q. Did you see anyone running up 14th Street?

A. No.

Q. What happened after they got out of the car?

A. I closed the doors and left.

Q. Did you see what happened?

A. Yes. Catinga was knifing — supposedly knifing the black man.

Q. And what did you do?

A. I only got out to close the doors because they had left them open.

Id. at 129 – 30.

Mr. Bonilla said he then pulled up to the traffic light a little over half a block from where the three men left the car and waited behind four cars for it to turn green. *Id.* at 131. While he waited Velasquez returned and ordered him to drive to the Triviada. Mr. Bonilla said he did not let Velasquez into the car, but the doors were unlocked. He was nervous because he had just seen Velasquez stab a person "and he told me to take him somewhere in sort of an aggressive way." *Id.* at 132. Velasquez had a weapon in his hand, and "All I could think — I didn't think of anything else but of taking him there." *Id.* at 132-3.

Mr. Bonilla testified that there had been no conversation in the car as he drove up 14th Street until Velasquez shouted for him to stop. *Id.* at 134.

During cross-examination he again denied knowing that the men in the back seat were armed and said he first saw a knife when they got out of his car. *Id.* at 142. When he left the Latino men who had been chasing Helm on foot had not reached him yet, but Velasquez and Ventura were fighting with him and Robles had been knocked to the ground. *Id.* at 144 – 5. Mr. Bonilla denied that he took part in the attack. *Id.* He continued to say that he did not know the men in the back seat were armed until he saw Velasquez stabbing Helm. *Id.* at 148.

Then the prosecutor asked:

> Q. And when they jumped out of your car, you waited for them, didn't you?
>
> A. No. When I saw what they were doing, I got out to close the doors. I couldn't leave with the doors open.
>
> Q. And when Catinga got back into your car with his knife, he didn't point that knife at you did he?
>
> A. No, but he had a knife in his hand when he told me to go to La Triviada and he didn't ask me politely.
>
> Q. Did he point it at your neck?
>
> A. No, but he had it in his hand and he told me, go take me to such and such a place.
>
> Q. Did he point it at your face?

A. No, but, you know, I was nervous. He had just knifed somebody.

Tr. 11/2/98, 148 – 9.

Next the prosecutor questioned Mr. Bonilla about his post-arrest statement to police in which he said "when the two black guys ran off, they went and got their knives. I think they had their knives when they got in my car."[13] *Id.* at 153. Mr. Bonilla explained, "I said that because presumably, in the discotheque, they couldn't have had their knives. And when they asked me for a ride, they must have gone to get their knives because they didn't have them in the discotheque." *Id.*

THE 2002 HEARING ON MR. BONILLA'S RULE 33 MOTION

HUGO ALEMAN'S TESTIMONY

Aleman said he worked March 15, 1998 until 3:30 p.m. and later learned from acquaintances "the ugly things that happened there that night." Tr. 6/18/02, 23 – 4. Exh. OO.

Police first came to talk to him about the homicide Sunday afternoon or Monday morning and told him "somebody had died and that they had been told that I have been involved in that," he said. *Id.* at 24. They asked questions, gave him a subpoena to the U.S. Attorney's office, and told him he could be arrested if he did not comply. *Id.* at 25. He stated that at the U.S. Attorney's office they asked similar questions, and he told them truthfully who had been at the club, that he had been drunk and, "I remember paying the taxi and going home." *Id.* at 25 – 6. He spent that day at the U.S. Attorney's office waiting, and was interviewed for 60 to 90 minutes. *Id.* at 27. Aleman said he was paid and given another subpoena to return the next day or two days later. He was paid $20 or $40 a day when he went to the U.S. Attorney's office. *Id.* at 55. He gave the same responses in the next interview, but "they told me that I was lying, that they had proof that I had been there and that maybe I knew who actually … had been the one." *Id.* at 27 – 8. He added, "[t]hey put a lot of pressure on me. I started feeling bad. I was afraid. They threatened me with jail, so in the end I started doing what they wanted me to do and there was nothing else I

[13] The transcript of Mr. Bonilla's videotaped statement is Exh. HH.

could say." *Id.* at 28. At times investigators told him they had a witness who said he was involved in the assault, he testified.

Aleman said Det. Norberto Torres, another detective and Asst. U.S. Attorney Anthony Asuncion were present during the interviews, and that they questioned him in English without an interpreter.[14] He could not recall how many times he was subpoenaed to the U.S. Attorney's office, but said he went more than three times and that he was subpoenaed after he testified in the grand jury April 1, 1998. In the course of the interviews investigators told him what they believed specific individuals did during the assault. *Id.* at 29.

In the grand jury he did not tell the truth, he said,

> because I was afraid. They put me in a position of having to say things that I didn't know. They had asked me to make a lot of statements and some I knew about, but many others I didn't know about. … I was afraid that they could do anything with me, that they could put me in jail without having done anything.

Id. at 30.

Reviewing his grand jury testimony Aleman identified statements that were false. He said he testified falsely in the grand jury when he said he saw Ventura, Catinga, Robles, Muella (Salamanca) and Petitioner in Mr. Bonilla's car. *Id.* at 38 – 9. His grand jury testimony about what Gato, Ventura, Catinga and Carlos did to the victim, and that he saw Mr. Bonilla attacking the victim was false, Aleman said. *Id.* at 43 – 5, 48. He did not see those things because he was waiting for a taxi in front of the Diversité Club, not at the scene of the fatal assault. *Id.* at 49 – 50.

Aleman explained that, "I was feeling that if I said something which isn't true, I was doing something wrong I know, but I was going there to them so often and I was feeling pressured and I just wanted to get out of this." *Id.* at 50. He believed that if he did what the prosecutor wanted he would not be subpoenaed again. *Id.* at 51.

[14] A Spanish interpreter translated for Mr. Bonilla and Aleman at the hearing and Aleman responded in Spanish.

> [T]hey were calling me to interview me many, many times. They would ask me questions … and then they were threatening to imprison me…. [T]hey said that … I was mixed up in that, that they had proof, but that's not true. I was not involved in anything. I was only a kid and I let myself by influenced by them, because they were really pressuring me ….

Id. at 56.

Under cross-examination by the prosecutor Aleman stated that he knew Torres and Asuncion before March 1998. *Id.* at 70 – 71. He met the former when he was a student at Bell Multicultural High School, and the latter because two of his friends had been shot and killed in 1997, and Asuncion was the prosecutor.

On redirect examination Aleman said that before he went before the grand jury, when he told Asuncion and Torres he had not seen the homicide, they offered to give him a polygraph exam, but never did so. *Id.* at 87 – 8.

Questioned by the Judge, Aleman said he told the grand jury things he learned from the prosecutor, police and other people about what happened during the assault and who did specific things. Tr. 7/3/02, 21. Exh. PP. The Judge and the witness had the following colloquy:

> Q. Did you learn from any of your acquaintances what particular people did that night?
>
> A. … [I]t wasn't until I got to the prosecutor's office that I knew when and where and who.
>
> Q. Did you learn the when and where and who from the police?
>
> A. Yes.
>
> Q. Did you learn the when and where and who from the prosecutor, Mr. Asuncion?
>
> A. Not directly from him.

Id. at 25.

ANTHONY ASUNCION'S TESTIMONY

Asuncion, who presented this case to the grand jury and prosecuted the defendants, adopted his affidavit, but said it was not complete. Tr. 7/3/02, 35. He said he met with Aleman March 24, 1998 and had some contact with him March 23, 1998, even though his calendar did not reflect those meetings. *Id.* at 36 – 7. He posited that he did not record those contacts in his

calendar because Aleman "just showed up in my office where at least at the first meeting I probably didn't expect" him, and said Torres may have asked Aleman to come in. *Id.* at 37 – 8. He said he did not know whether Aleman had been subpoenaed on March 23. *Id.* at 38.

Asuncion said he investigated a case in which Aleman had witnessed the murder of two close friends in the summer of 1997. *Id.* at 39. He said he interviewed Aleman and took him in the grand jury in that case. *Id.* When he investigated the Helm homicide he expected Aleman "to be cooperative. My impression after what I believed was a good starting relationship was that he respected me and perhaps more importantly he trusted me." *Id.* at 40. But the first time they met Aleman said he had been at the club but left before any of the events that culminated with Helm's killing. *Id.* at 45. Asuncion testified that he responded,

> Hugo … I understand why you're lying to us. It doesn't surprise me. I personally have no problem with it. I'm not offended by it. It's not as far as I'm concerned a crime. It's actually very natural…. [Y]ou've just seen an awful crime and if you'd actually come in here and within five minutes told me everything you saw, I would have looked at you funny, I would have thought maybe there was something wrong. … [Y]ou will be testifying before the grand jury. And the important distinction, the thing that you need to realize is that when you testify before the grand jury, you're going to be under oath. … I make a big show of it. I reach over, I pull out that big book. I don't want it coming from my officer certainly, and I don't [] want it coming from me. And I go through each and every one of the elements of perjury….

Id. at 46.

Asuncion said he had information from witnesses in the grand jury and statements from defendants who had been arrested that Aleman was "present watching this thing." *Id.* at 42. He added that witnesses said Aleman had not participated in the attack. *Id.*

Asuncion said when he met with Aleman, Torres and Det. Eric Gainey would be present, as well as an interpreter because he (Asuncion) does not speak Spanish. *Id.* at 33, 44. He denied threatening Aleman with prosecution as a participant in the homicide. The prosecutor said he did not take Aleman into the grand jury that day because he was lying, and the prosecutor probably subpoenaed him to return another day. *Id.* at 47. In addition to the contacts March 23 and 24, Asuncion said Aleman came to his office March 27, but he doubted that they talked that day. *Id.*

at 47 – 8. Aleman appeared on Asuncion's calendar for March 30, 1998, but the prosecutor testified that they had no contact that day. *Id.* at 48 – 9.

Asuncion stated that on "April 1st he told us the truth. And once he did, we raced down to the grand jury and put him in …" *Id.* at 49. Asuncion denied that Aleman ever told him that he testified to things he had learned from friends or police, or that he made up what he told the grand jury. *Id.* at 49 – 50.

Asuncion denied knowing whether Aleman was under subpoena the first time he came to the U.S. Attorney's office, but said it was "a possibility." *Id.* at 56. He said in preparation for the hearing he reviewed the case files but found no records regarding subpoenas issued to Aleman.[15] He later acknowledged that Torres had sometimes subpoenaed witnesses to appear at the U.S. Attorney's office without his knowledge, and that Torres may have met with witnesses, including Aleman, elsewhere. *Id.* at 133. Asuncion said it was likely that Aleman received a witness voucher after his interviews because "[t]hat was the standard practice of the U.S. attorney's office at the time." *Id.* at 113.

Reviewing a transcript of Aleman's grand jury testimony in which he stated that he was standing near 14th and Q Streets, N.W., when he witnessed the assault on Helm, Asuncion said he had no reason to believe Aleman was lying. *Id.* at 71. He agreed that the Diversité Club was in the 1500 block of 14th Street and the homicide occurred in the 1800 block of 14th Street, between S and Swann streets. *Id.* at 74. Confronted with the fact that five blocks separated the club from the homicide scene and Aleman testified that he was near the club, Asuncion testified,

> … [M]y recollection is that's roughly where the attack of the homeless person happened. So it … did not surprise me that he would have been in that area when he made certain observations…. [O]ur understanding was that he … had basically a front-row seat to what was happening. So, … whether he said in the grand jury he was at 14th and Q or not, I guess that would have been fader (sic) for someone's cross-examination at trial. But I can tell you my understanding of the sequence of events where he was positioned based on everything I know about the case because he was outside to view the attack on the

[15] Through discovery counsel obtained records from the Superior Court CJA Finance Office of payments to witnesses. Exh. N, 12 – 14, P, 6 & Q, 3 – 5.

> homeless person which happened at a bus stop right outside of Diversity (sic). The crime scene … traveled up the street, as did Mr. Aleman and the defendants.

Id. at 77. He added, Aleman "saw the murder, and the murder was north of there. So … either he saw it from 14th and Q or he traveled with the group, which is what we believed the case was." *Id.* at 78. Then the following colloquy occurred:

> Q. … [W]hen he said he was standing at 14th and Q, you didn't ask him any questions … about whether he … went anywhere else after that; did you?
>
> A. I don't know if I asked that specific type of question, but I'm sure I asked him about what he saw with respect to the murder.
>
> Q. … And when he described to you facts that he saw, you accepted those at face value without questioning how he was able to see them; isn't that correct?
>
> [THE PROSECUTOR]: Objection, relevance.
>
> THE COURT: Sustained.
> …
> Q. … [W]hen you had questions about the answers Mr. Aleman had given to grand jurors, you asked other questions to clarify those points; didn't you?
>
> A. Yes.
>
> Q. And when Mr. Aleman said that he was standing at 14th and Q when he saw all of these things, you didn't ask any questions to try and clarify that as to where he was standing; did you?
> …
> A. … [I]f it's not in the transcript, then I didn't ask it.[16]

Id. at 79 – 80. Later it became clear that Asuncion's only source regarding Aleman's proximity to the fatal assault was Rosa Garcia.

> Q. … You had said … you thought that he had traveled up the street and that he had traveled with the group which was what we thought the case was. That Mr. Aleman had trav-

[16] It appears that on March 20, 1998 another grand jury witness claimed to have seen the attack on Helm from the doorway of the Diversité Club, and identified several individuals as having punched and kicked him. *Id.* at 138 – 9. Asuncion read from a transcript of the witness's testimony but did not identify him because he was not called to testify at the trial. After the witness identified the attackers and described what they did, a juror asked, "For both attacks, he was [in] the doorway of the club? During both attacks he never went up the street?" The witness replied, "No, I stayed right there." The Trial Court refused to make the grand jury transcript part of the record and place it under seal for appellate review. *Id.* at 140.

eled up the street from the club to the scene of the homicide; do you recall that?

A. … [W]hat was clear to us is he saw what happened.

Q. You said twice before lunch that you thought he had traveled up the street to the scene?

A. I would call that, sir, a reasonable inference. If at one point he was at Diversité Club and at another point he's witnessing a murder that happens several blocks north, I think it's reasonable to infer that he traveled in some fashion to be able to see this.

Q. … Drawing your attention to the testimony of Rosa Garcia at the grand jury, that Loco Hugo was close to the person that got stabbed; answer: Like 5 inches away?

A. Like five inches, period. Yes.
…
THE WITNESS: Right. All I can say, … what I took from that is he was in a position to see what occurred.

Id. at 114 – 8. Asuncion indicated that he relied heavily on Garcia's written statement and grand jury testimony in concluding that Aleman "had a front-row seat" to Helm's homicide. *Id.* at 121 – 2. Asuncion admitted that Garcia was the only person who gave a written or oral statement or testified in the grand jury and placed Aleman at the homicide scene. *Id.* at 126 – 7. Another witness, whose identity was never disclosed, testified in the grand jury that Aleman did not participate in the attack. *Id.* at 127 (see fn. 16 above).

Asuncion testified that he did not threaten Aleman with prosecution as a participant in the homicide, but he conceded that Torres or Gainey might have done so when he was not present. *Id.* at 90 – 2.

Q You testified several times today that Hugo Aleman was never a suspect or potential codefendant; do you recall that testimony?

A. Yes.

Q. And that's in spite of the fact that you believe he traveled up to the scene of the crime and that he was within 5 inches of the decedent during the fight?
…
THE WITNESS: Rosa Garcia specifically told us in her very first statement to the police, before she even met me, she was I believe specifically asked what role if any Aleman played. I know I specifically asked her that probably in great detail in her grand jury testimony. So the answer is no. If he had been a stabber, a kicker, a puncher, if he had even said anything like kill the man or something like that, then we're in a much different

> scenario. That didn't happen. The man was there. He saw what happened. He was a witness in my mind and he was never anything but.
> …
> THE WITNESS: I did not — based on everything I knew at the time and know now, I never have considered him to be a target or in any way a participant in this attack.

Id. at 116 – 7. But Garcia testified in the grand jury that she did not recall whether Aleman punched or kicked Helm. GJ Tr. 3/17/98, 18. Exh. GG. She said that later on March 15 she was present during a conversation among several of the defendants in which Aleman admitted involvement and the others confirmed his participation. *Id.* at 18, 20.

Near the beginning of Aleman's grand jury testimony Asuncion asked a series of questions establishing that Aleman had given a different version of events in previous interviews and earlier April 1, 1998. The witness explained that he asked those questions,

> [b]ecause we wanted to disclose it so that the defense if they chose to do so would do whatever they saw fit with it. It was information where inconsistent statements which he provided, which is what I do in all of my grand jury work where I have a witness who initially lies, which is not uncommon, in the grand jury they will explain that they lied to us and why they lied to us typically.

Tr. 7/3/02, 94. Asuncion conceded that he did not disclose the inconsistencies in Aleman's statements and grand jury testimony until Aleman testified at trial. *Id.* at 98 – 9, 108.

ADDITIONAL AFFIDAVITS

Mr. Bonilla filed two affidavits submitted by Wimbush, the club's security chief, and Arnold Giesemann, an investigator Petitioner employed during post-trial proceedings.

Wimbush described his duties at the Diversité Club on March 14 – 15, 1998.. He said that in addition to using metal detecting wands to ensure that no one entered with a weapon "I patted down each patron for weapons as he or she entered the club, and in the course of the search I checked patrons' socks, as well as their clothing. If a patron left the club during the evening and later returned, I patted the person down again before permitting re-entry." He corroborated Mr. Bonilla's trial testimony that his backseat passengers could not have carried knives into the club and must have retrieved them after it closed.

Giesemann measured the distance from the club to the scene of the homicide and deter-

mined that it was 1,372 feet.

AFFIDAVITS OF WITNESSES NOT ALLOWED TO TESTIFY

Mr. Bonilla's new trial motion argued that the government coerced potential witnesses to testify falsely and induced at least Aleman to do so. It argued as well that the prosecutor's *Brady* violations deprived him of due process. Before and during the post-trial hearing Mr. Bonilla and his codefendants moved to expand its scope to include testimony by other witnesses Asuncion repeatedly subpoenaed to his office, paid witness fees, and never took before the grand jury. The Judge refused to hear their testimony, but counsel augmented the hearing record with affidavits provided by these witnesses. Exh. O, Petition for Writ of Mandamus; Exh. N, Notice of Filing.

Mayra Rivera stated that she is not a citizen, but is in the United States legally. Exh. N, 10 – 11. Over the course of a month Asuncion subpoenaed her to his office repeatedly and sometimes paid her witness fees, but never called her to testify in the grand jury. "Mr. Asuncion threatened and pressured me when I met with him, stating that he would have my child taken away from me…. Mr. Asuncion tried to get me to lie," she stated. *Id.* Rivera said from the outset she told Asuncion she, Rosa Garcia and other friends left in a taxi and did not see what happened [on] 14th Street, N.W.; and that Garcia was not wearing her prescription glasses that night. *Id.*

Sendy Leonzo stated that Asuncion subpoenaed her several times and paid her witness fees, but never called her to testify in the grand jury. Exh. P, 4 She said Asuncion "pressured me including, insisting that I was lying in what I told him." *Id.*

Erica Garcia said she, too, received several subpoenas to attend interviews, and each time she received witness fees but never appeared in the grand jury. Exh. P, 5. She said the prosecutor "pressured me including, insisting that I had seen things with respect to the events on Fourteenth Street, NW. on March 15, 1998, that I had not seen." *Id.*

Blanca Buruca provided an affidavit stating that she received several subpoenas, including one Asuncion personally served on her at her mother's house. Exh. P, 7. She, too received witness fees, but never appeared before the grand jury. She said Asuncion "threatened

me and pressured me including by making statements about taking my son from me." *Id.*

José Perez said Asuncion subpoenaed him twice to his office and "threatened me and pressured me including, one time when he grabbed my arm and told me that I was going to go to jail. Exh. N, 11. The prosecutor took him before the grand jury the second time.

THE 2006 HEARING ON MR. BONILLA'S D.C. CODE § 23-110 MOTION

Rosa Garcia's first contact with the government in relation to this case occurred shortly before 7:30 p.m. March 15, 1998, about 16 hours after the homicide. P.D. 119, Statement of Rosa E. Garcia, 1. Exh. FF. She went to see Det. Norberto Torres, whom she viewed as a father-figure. Tr. 10/28/98, 360. Exh. KK. In the hearing on Mr. Bonilla's § 23-110 motion Garcia insisted she told Torres about the homicide "[b]ecause I'm a mother and … if somebody would do something to my kids, I would want a person to come forward and say who did something to my child. I have four kids and I don't want nothing like that happening to any of them." Tr. 12/19/05, 75. Exh. QQ.

But Asuncion had a different interpretation of Garcia's motivation. After his first interview with her, Asuncion wrote: "It appears [Garcia] is [a] cooperative witness only because she believes that cooperation can help her boyfriend of two months, Jose Benitez."[17] *Id.* at 189.

This view is supported by Garcia's witness statement and grand jury testimony. Garcia gave a written statement to Det. Pamela Reed, in which she said,

> when I was coming out of my house around 5 or 6 in the morning. I was staying at 14th and W with my friend. I came out to see if Chofer (Benitez) was coming home. Abuelo, Mexico,[18] and Douglas [Ventura]. Douglas said "did you know that your boy got arrested today". I said "no, why". He said "because he got arrested for beating up the black man".

P.D. 119, *supra*, at 2 – 3.

Near the beginning of Garcia's appearance before the grand jury, when the prosecutor asked whether anyone forced her to testify, she responded, "I came here by myself, because this

[17] The government turned this document over to defense counsel in 2005.
[18] Jorgé Navarette.

is a crime that somebody that didn't do anything bad is in jail for no reason, for not doing anything he didn't do." GJ Tr. 3/17/98, 5. "[E]very night when I go to sleep, I can not go to sleep, because I seen my boyfriend in jail and I see Catinga stabbing the man," she testified. *Id.* at 28.

Garcia said she learned Benitez was in jail in an early morning encounter March 15 with Ventura.

> That happened … at W and 14th there's the little store that is right there, the 24-hour store. I was going to go there to buy food and see if Chofer was around there.
>
> When I was on my way there I saw [Douglas] coming out of this building where is achiviada[19] at. Then, that's when he stopped me — him, Muell[a],[20] Mexico, stopped me and said, "Oh, China,[21] did you know your boy's locked up?" And so I said, "No." …
>
> … Then, he told me because we were beating up the black man and you know, he told me everything about it. And I said, "But he didn't kill it, Catinga[22] did." And he said, "No. Catinga didn't do it, I did." That's when I know Douglas and Catinga both stabbed the man, but I didn't see Douglas stabbing the man.

Id. at 28 – 9.

She described a conversation sometime later March 15, 1998 near 14th Street and Florida Avenue, N.W.: "everyone went up there and they said, 'Oh, yeah. You know about the black man that died? They blaming Chofer and Carlos[23] and we going to say that we didn't saw anything and if we were there in the fight that we didn't know who killed him….' " *Id*. at 19, 21. She attributed these statements to Aleman, Trebi, and others.

Garcia claimed that after she gave her written statement Simba[24] and Muella "threatened me that if I ever came to Torres, or somebody else, and tried to take my boyfriend out that something was going to happen to me or my family." *Id*. at 24 – 5. According to Garcia, Simba

[19] Co-defendant Salamanca testified that, after the attack on Helm, Walter Velasquez ordered Mr. Bonilla to drive him to "La Triviada," a gambling hall. It is unclear whether Garcia was referring to the same place.

[20] José Salamanca.

[21] Rosa Garcia.

[22] Walter Velasquez.

[23] Carlos Robles Benevides.

[24] José Ventura.

"told me that he was going to do something to me if I ever said anything about me listening to the conversation they had said, that they wanted Chofer and Carlos to be in jail, that they were going to do something to me." *Id*. at 26 – 7.

But at trial Garcia testified that she went to talk to Torres because Muella and Simba threatened her at the bus stop between 2 p.m. and 3 p.m. March 15. Tr. 10/27/98, 359 – 60, 363. Although Garcia claimed to have been motivated by the threats to seek Torres's assistance, she did not tell him she had been threatened. *Id.* at 373.

Asuncion said he was "almost positive the very first day I met [Garcia] … I arranged for her to see the … witness security people." Tr. 12/19/05, 181. Their first meeting was March 17, 1998.

Laverne Forrest, a victim-witness specialist in the U.S. Attorney's office, interviewed Garcia March 26, 1998 in a meeting including Det. Cassandra Washington and U.S. Marshal Hilton.[25] Tr. 12/19/05, 22, 46. Forrest said she gathered identifying information about Garcia that day, including her name, address, date of birth, her children's names and ages, and whether she had a criminal record, and filled out an intake questionnaire for the witness protection program. *Id.* at 23 – 6. Forrest could not recall whether she asked Garcia for her Social Security number. *Id.* at 19, 26. In the first meeting Garcia refused to enter witness protection, according to Forrest. *Id.* at 22, 57.[26]

Forrest next met with Garcia May 1, 1998, after Garcia claimed she had received threats two or three days earlier. *Id.* at 31 – 2. Forrest's notes of that meeting stated that Torres and an

[25] She said the assistant U.S. attorney assigned to the case usually attended such meetings, but she could not recall whether Asuncion was present. *Id.* at 28 – 9.

[26] When she checked Garcia's file in preparation for the December 2005 hearing, Forrest said, the form on which she wrote the information was no longer there. *Id.* at 23 – 4. But Forrest provided the Court and counsel a copy of the intake form used in 1998, and it has a space to write the witness's Social Security number. *Id.* at 130. The Trial Court found that Garcia provided her fake Social Security number in that interview. Memorandum & Order Denying 2005 Motion for New Trial Pursuant to § 23-110 ("Order Denying § 23-110 Motion"), 8. Exh. EE.

interpreter attended the meeting. According to typed notes she prepared and signed May 4, 1998, "Ms. Garcia states that she has a green card but cannot locate it." Exh. V, 81. The notes state that Garcia provided a copy of her passport and would provide a birth certificate, and that the U.S. Attorney's office has obtained an NCIC report stating that Garcia was an alien. But Forrest did not recall receiving a copy of Garcia's birth certificate or seeing her Social Security card. Tr. 12/19/05, 44.

An entry in Forrest's notes dated May 4, 1998, states that "MPD Det. Washington contacted the INS Office, Special Agent [REDACTED] regarding the status of Rosa Emilia Garcia. SA [REDACTED] found no record of Ms. Garcia." Exh. V, 89. An entry dated May 5 states:

> MPD Det. Washington [] informed MPD Det. Torres that Ms. Garcia does not have a green card. Shortly thereafter, MPD Det. Washington telephoned Ms. Garcia at the safehouse location inquiring about her green card again. Ms. Garcia informed her that, in fact, she did not have a green card. Ms. Garcia stated that she was brought to this country illegally by her mother.

Also that day, Forrest's notes state, "AUSA Asuncion was informed by MPD Det. Washington to contact the INS Office. He should contact Supervisory Special Agent [REDACTED]."[27] Garcia apparently left the witness protection program voluntarily May 18, 1998, and subsequent entries indicate that the U.S. Marshal Service began procedures to terminate her participation.

Forrest could not recall whether she talked to Garcia after May 4, 1998 about the fact that she did not have a Green Card or about her Social Security number. Tr. 12/19/05, 18 – 9.

Regarding her interactions with the Victim-Witness Unit, Garcia said she met with Forrest in late March 1998 and showed her a Salvadoran passport. *Id.* at 70 – 1. She claimed that she did not become aware that there was a problem with her passport until she tried to renew it in October 2001, and was told that it was invalid "because somebody have written over it, … because my kids used to play with it, so I think one of them did it." *Id.* at 71 – 2.

[27] Asuncion stated that he contacted Supervisory Special Agent Mario Cavallo. Memorandum to Catherine K. Breeden dated May 5, 1998. Exh. 8 attached to Gov't Opposition. Exh. V, 91.

Garcia denied knowing whether she had a Social Security card but said she uses a Social Security number she got from her mother. *Id.* at 73 – 4. She did not know where her mother obtained the number. *Id.* at 96. Garcia said that is the number she gave Forrest, and denied that anyone has ever told her it is not valid. *Id.* at 73 – 4, 95 – 6. She did not remember whether Det. Washington told her the Social Security number was invalid. *Id.* at 96 – 7. Although she worked before 1998 as a waitress, sometimes earning $60 – $200 a day in tips, she never paid income taxes "because they always used to pay me in cash." *Id.* at 105 – 6, 138.

Garcia did not recall telling anyone at the U.S. Attorney's office she had a Green Card, but she said that shortly after May 1, 1998 she admitted to Det. Gainey that she did not have a Green Card and "he told me we were going to talk about it later and then we never did." *Id.* at 80.

Garcia claimed that at some point her mother filled out an application to obtain a Green Card for her. *Id.* at 104. She said when she testified at trial, "I knew I didn't have [a Green Card] in my hands, but I didn't know if my mother have it or not." *Id.* at 104 – 5. She later claimed that in 1998 she believed her mother had sold her Green Card. *Id.* at 207 – 9.[28]

Garcia said she was well aware in 1998 of the problems faced by undocumented aliens in her community, that she knew she was in the United States illegally, and that was always in her mind. *Id.* at 135 – 6. But Garcia denied that she wanted or sought assistance with her immigration problems when she approached Torres March 15, 1998 about this case, or when she testified in the grand jury two days later. *Id.* at 75. She said no one from the Metropolitan Police Department or the U.S. Attorney's office offered her assistance to obtain legal status. *Id.* at 75 –

[28] The Trial Court appeared to absolve Garcia of any responsibility for her many conflicting explanations of why she gave the government a fake Social Security number and passport and falsely claimed to have a Green Card. Order Denying § 23-110 Motion, 7. It should be noted that in March 1998 Garcia was 24 years old and had been involved in court proceedings concerning custody of her four children. *See below at 32 – 33.* She was well past the age of emancipation and the government offered no evidence that she was incapable of managing her own affairs. In short, this Court should dismiss Garcia's excuses as nothing more than an attempt to avoid responsibility for her own illegal actions.

6.

Garcia claimed that the first time it occurred to her was while she was testifying at trial, "when I was seeing some people that I was accusing that knew that I didn't have a green card and I wasn't legal in here." *Id.* at 81. That afternoon, as Gainey was driving her back to a hotel in Virginia, Garcia asked him "if this was going to affect me — …an investigation of me not being legal in here and that if it was, that I needed help with my green card, but then all he told me was that we were going to talk about it later and we never did." *Id.* at 85 – 6. But she later stated that she did not know why she asked Gainey about her immigration status. *Id.* at 167.

Although Garcia claimed she raised the immigration issue because the defendants knew she was illegal, she identified Salamanca as the only person who might have known her status, saying her cousin is married to Salamanca's cousin. *Id.* at 84 – 5. Garcia said she had known Mr. Mr. Bonilla only a few months and had no reason to believe he was aware of her immigration status. *Id.* at 93 – 5. She had known Torres since she was 14 years old and often confessed things to him. *Id.* at 115, 117. But she never told him she was here illegally and did not think he knew her immigration status when she first approached him about this case. *Id.*

Asuncion said that in May 1998 someone from the Witness Protection office told him to call the Immigration and Naturalization Service "to make sure [Garcia] wasn't about to be deported, in which case her placement in Witness Protection … would have raised a hurdle." Tr. 12/19/05, 180. Asuncion testified that he could not recall whether the Victim-Witness Unit told him Garcia did not have a Green Card, "I can only tell you that when I first heard in January of this year (2005) … I found myself personally surprised when I found out about the fact that apparently her mother had allowed her or taken her into our country illegally." *Id.*

He claimed ignorance of the fact that Garcia provided the Victim-Witness Unit a fake passport and Social Security number. "No one has told me explicitly, but … reading between the lines, I would imagine that whatever she provided was false…. I have actually never been

provided, for example, the bulk of the pleadings filed in this," he said. *Id.* at 202. Asuncion acknowledged that when the U.S. Attorney's office runs *Lewis*[29] checks on potential witnesses it generally uses the witness's date of birth and Social Security number, but he said someone else checked Garcia's criminal history. *Id.* at 191, 194 – 5.

Asuncion testified that he was unaware of a set policy in the U.S. Attorney's office in 1998 regarding handling of witnesses who were illegal aliens, but "my understanding was … we were not to be delving into the immigration history of any of our victims or our witnesses, and [] we weren't in the business of making reports to the INS of … witnesses or victims who we found out were illegal." *Id*. at 182 – 3.

Asked how the U.S. Attorney's office handled situations in which a witness seeking placement in witness protection provided a fake Social Security number, Asuncion said "if it had come up as a general matter, … we would want to identify who this person was, but in terms of … a set policy … I'm not so sure I know…." *Id.* at 184. If a witness used a fraudulent passport, "I would imagine a referral would be made to another part of our office and assessments would be made in terms of whether there was any merit to going forward and if there were, I suppose we would have to hash that out and I guess the question of immunity would probably come up," Asuncion said. *Id.* 185 – 6.

Asuncion denied that anyone from the Victim-Witness Unit or the Metropolitan Police Department discussed Garcia's immigration status with him after he called INS and determined that she was not on a list to be deported. *Id.* at 188. He said Garcia never asked him for assistance regarding her immigration status, nor did anyone in the U.S. Attorney's office. *Id.* at 177 – 8.

In 2003, Asst. U.S. Attorney Stephen J. Gripkey was assigned to prosecute Jorgé Navarette, a codefendant who apparently left the United States shortly after the homicide and was arrested when he attempted to re-enter the country. In preparation for trial Gripkey reviewed

[29] *Lewis v. United States*, 408 A.2[d] 303 (D.C. 1979).

case files from Petitioner's case. *Affidavit of Stephen J. Gripkey*, Gov't Opposition, Exh. 10. He interviewed Garcia, and because she expressed concern for her safety he referred her to the Victim-Witness Unit. Gripkey found in the file created in March 1998 the photocopy of Garcia's Salvadoran passport and Forrest's notes regarding Washington's inquiry to the INS and Garcia's admission that she did not have a Green Card.

Gripkey contacted the INS August 27, 2003, provided the Social Security number Garcia had given Forrest and the passport number, and learned from an unidentified agent that "the Social Security number did not belong to Ms. Garcia. Furthermore, [the INS agent] indicated that the passport number I was providing was three digits short, and sounded fake to him."[30]

Gripkey apparently discussed his findings with Garcia, who obtained legal counsel, "and the government considered applying for an 'S Visa' for her and providing her with letter immunity concerning her immigration issues." After Navarette pleaded guilty, Gripkey said, he continued to work with Garcia to obtain legal status.

While preparing for oral argument in Petitioner's appeal in early 2005, Asst. U.S. Attorney David Goodhand found Gripkey's notes and advised the Court and appellate counsel of the 2003 findings regarding Garcia's immigration status and her use of the fake passport and Social Security number.

At trial and in the 2005 hearing on Mr. Bonilla's § 23-110 motion Garcia denied that she drank any alcoholic beverages while at the Diversité Club. Tr. 10/27/98, 361, Tr. 12/19/05, 97 – 8. She admitted that she used crack cocaine and sold it to support her addiction over a four- to five-year period, but claimed that she did not start using drugs until late 1998, after the trial. Tr. 12/19/05, 88 – 90.

Asuncion testified that he interviewed Garcia before she testified in the grand jury, and he said "I'm sure I would have asked her whether she was under the influence of any drugs or

[30] This is far different from Garcia's claim that she was told in 2001 that her passport was invalid because one of her children wrote on it.

alcohol when she made the observations she reported to me," and "my recollection is that she was not under the influence of either a drug or alcohol." *Id.* at 177 – 8. He denied ever receiving information that Garcia had used or sold drugs. *Id.*

He admitted at the 2005 hearing that other witnesses told him shortly after the homicide that Garcia had been drinking heavily in the hours before the crime. *Id.* at 179. Although Mr. Bonilla's trial counsel filed a discovery letter specifically requesting such information, Asuncion did not disclose that he had evidence regarding Garcia's alcohol consumption.[31]

In an affidavit appended to Mr. Bonilla's first new-trial motion, Rivera said from the outset she told Asuncion that she, Garcia and other friends left in a taxi, that they did not see the fatal assault, and that Garcia was not wearing her prescription glasses that night. Leonzo, Buruca and Guevera provided affidavits, initially attached to Villatoro's supplemental new trial motion, stating that they, Garcia and Rivera got into a taxi at 14th and R Streets, N.W., after they left the club and went to 1444 W Street, N.W. Exh. O, 24, 26, 28.

Garcia admitted in 2005 that she lost custody of her four children in a neglect proceeding in D.C. Superior Court, but did not say when that occurred. Tr. 12/19/05, 156 – 7. The Trial Court found that this occurred before 1998. Order Denying § 23-110 Motion, 10. The Family Division awarded her mother custody. When asked whether she was motivated to help the government in the post-trial hearing by her desire to regain custody of the children, Garcia refused to answer. Instead, she said, "[t]he thing is we're not talking about my personal life up here. We're talking about a crime that have been committed. We're not talking about my kids or my personal life." *Id.* at 158.

[31] When defense counsel received Garcia's grand jury testimony as Jencks material shortly before she testified at trial they learned for the first time that she had been with Rivera, Leonzo, Buruca and Guevera. After locating some of her companions counsel learned that Garcia was intoxicated and that she left the area in a taxi with them before the homicide.

ARGUMENT

ADMISSION OF A NON-TESTIFYING CODEFENDANT'S HEARSAY STATEMENT IN A JOINT TRIAL VIOLATED PETITIONER'S CONFRONTATION RIGHT

The Trial Court's decision to admit testimony about Robles's jailhouse confession violated Mr. Bonilla's Sixth Amendment rights, not because Robles's admission identified Petitioner by name, but because of the nature of the charges against Mr. Bonilla and the events Robles described to the testifying codefendant. *See, e.g., United States v. Glass*, 128 F.3d 1398, 1405 (10th Cir. 1997)(because relationship between defendants was so obviously important to prosecution, introduction in violation of *Bruton* not harmless beyond reasonable doubt); *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)..

Bruton and its progeny addressed the severe consequences of admitting a non-testifying codefendant's out-of-court statement that directly or indirectly implicates the defendant in the charged crime

> where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

Id. at 135 – 6.

The D.C. Court of Appeals's reason for concluding that no Sixth Amendment violation resulted from admission of Robles's confession was that "there is nothing in Robles-Benevides's statement that incriminates Bonilla directly." *Id.* at 77.

Under that interpretation a *Bruton* violation would occur only if the confession somehow identified the defendant by name or description. The Supreme Court's opinions in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998), preclude such an interpretation of *Bruton*.

Mr. Bonilla was charged with conspiracy to commit murder and aiding and abetting first-

degree murder while armed. Essential elements of each offense were that he knew before Robles, Velasquez and Ventura exited his car that they were armed and what they intended to do. The government argued that because he knew their intentions jurors could infer another element of aiding and abetting, that his compliance with Velasquez's order to stop the car was evidence that he intended them to succeed.

Over objection[32] the Judge permitted Benitez to testify that,

> Carlos said to me that he had a blade with him. That when he was in [Bonilla's] car, that Carlos and "Catinga" were fighting over the knife.
> …
>
> Carlos said to me that "Catinga" was asking him for the knife. … Carlos said that "Catinga" kept on asking him for the knife because he wanted to stab the deceased.
>
> Carlos said to him that he was going to do it. And so they were fighting over the knife, the two of them.
>
> When they got close to where the deceased was, Carlos gave the knife to "Catinga" because "Catinga" had said that he had some problems with people of that race for some time.

Tr. 10/28/98, 589.

The Court of Appeals was correct that Robles did not tell Benitez Mr. Bonilla was involved in the assault. It erred when it held that nothing in the statement "implies that Bonilla overheard their argument." *Perez, supra*, at 77. *See, e.g., United States v. Lage*, 183 F.3d 374, 387 (5th Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000)(*Richardton* and *Gray* involved situations in which codefendant's statement did not refer to defendant by name, but jury would have inferred defendant was in fact present during events recounted in statement).

[32] Before trial, Mr. Bonilla moved to sever his case from those of Robles and Villatoro under D.C. Crim. R. 14 because the government intended to introduce at trial statements both codefendants made after arrest. Based on the prosecutor's agreement to redact Robles's statement the Trial Court denied the motion. Before the prosecutor questioned Benitez about his jailhouse conversation with Robles, defense counsel objected again. He argued unsuccessfully that the statement was hearsay as to Mr. Bonilla and that, despite an earlier ruling barring use of co-conspirator statements, the testimony would implicate Petitioner in the charged conspiracy. Despite the government's argument to the contrary, the D.C. Court of Appeals held that Mr. Bonilla preserved the issue for appellate review. *Perez, supra*, at 77 n. 42.

That analysis might be reasonable if jurors were not told the argument occurred in the confines of the car Mr. Bonilla was driving. Knowing the context, the inference was inescapable that Petitioner knew his passengers' intentions because he could not have avoided overhearing the argument Robles described.

The Judge immediately instructed jurors that Robles's statements were hearsay and

> the only part that you are to consider is the admission made by Carlos. And to … put it in context, you hear about what some other people said or other people being present or around, not consider that against those other people at all. Just put that out because there's no particular reliability to what Carlos said about anybody else.

Id. at 589.

But, the Supreme Court ruled in *Bruton, supra,* at 126. that:

> [B]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [a codefendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

It carved out an exception for codefendant confessions after "a proper limiting instruction when … the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson, supra,* at 211. It explained that where jurors must infer a connection between the defendant and the admission made by the codefendant, it is less likely that jurors will be unable to follow the instruction. *Id.* at 208.

As the Court said in *Gray, supra,* merely removing the defendant's name from the codefendant's statement, or replacing his name with a symbol or blank space, is not enough to bring the statement under the *Richardson* exception. If the jury can readily infer, despite the redactions, that the statement inculpates the defendant it may not be introduced in a joint trial. *Id.* at 196.

The *Richardson* exception is inapplicable in Mr. Bonilla's case for two reasons. First, because the argument occurred in the car jurors did not have to infer the connection. *Id.* at 205. Second, in his opening statement and final argument, and by questioning Mr. Bonilla about whether Robles and Velasquez argued in the car, the prosecutor unmistakably linked Petitioner

to the confession, which could not be used against him. *See below at 38 – 39.*

ROBLES'S ADMISSION WOULD NOT HAVE BEEN ADMISSIBLE IF MR. BONILLA HAD BEEN TRIED SEPARATELY

The Court of Appeals noted repeatedly that the Trial Judge told jurors they could consider Robles's hearsay confession as substantive evidence only against Robles, *Perez*, *supra*, at 73, 77. Therefore, it was startling when the Panel said because his "statement would have been admissible against Bonilla had he been tried separately, and did not prejudice him in this joint trial, the [trial] court did not abuse its discretion by denying the motion to sever Bonilla's trial." *Id.* at 78.

The Court of Appeals predicated its analysis on a finding that Robles's statement could have been introduced in Mr. Bonilla's separate trial as a statement against Robles's penal interest, *Id.* at 76. It said,

> The statement directly implicated Robles-Benevides and the circumstances surrounding the statement had indicia of reliability…. Robles-Benevides voluntarily made the statement to his erstwhile friend and co-accomplice Benitez a few days after the assaults (before Benitez pleaded guilty and agreed to testify against appellants), while they were both in jail together…. Moreover, Robles-Benevides certainly had personal knowledge of his tussle with Velasquez in the car and it is unlikely that his recollection was faulty given that he made the statement shortly after the events. Although it could be argued that Robles-Benevides's statement that he and Velasquez had argued over the murder weapon sought to shift blame for the stabbing to Velasquez.

Id. at 77 (citations omitted).[33]

The Supreme Court specifically rejected that rationale in *Lilly v. Virginia*, 527 U.S. 116, 128 (1999). It noted that despite differences of opinion over the adequacy of redaction or the

[33] Contrary to the Panel's analysis, the circumstances surrounding the alleged confession do not provide indicia of reliability. The fact that Benitez was not a government informant when, he claimed, Robles confessed does not negate Benitez's motive to fabricate to curry favor with the government at the time of trial. There are no corroborating circumstances clearly indicating the trustworthiness of the alleged confession. That Robles did not stab the decedent does not corroborate his purported claim that he gave the knife to Velasquez. If Robles made the statement, he had a motive to puff himself up in Benitez's eyes, as well as to shift blame for the stabbing to Velasquez.

judge's limiting instruction, "we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."

The Panel posited no other evidentiary basis on which Robles's statement would be admissible if Mr. Bonilla were tried separately. But it erroneously cited *Crawford v. Washington*, 541 U.S. 36, 61 (2004), for the proposition that because the confession was not testimonial the Confrontation Clause did not mandate exclusion. *Id.* at 77 n. 43.

Perhaps the most significant reason Robles's admission would have been inadmissible in a separate trial is that because it does not incriminate Mr. Bonilla directly it has no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.[34] In short, it would be inadmissible because it is irrelevant as well as being hearsay lacking indicia of reliability.

There is only one possible basis for admitting Robles's statement in a separate trial of Mr. Bonilla: to create the inference that because the argument occurred in the confines of the car Petitioner must have overheard it. From there jurors could further infer that Petitioner's acquiescence when Catinga ordered him to stop the car constituted agreement with the goal of the conspiracy, as well as aiding and abetting murder.

Having concluded erroneously that the content of Robles's confession did not inculpate Mr. Bonilla, that the statement would have been admissible in a separate trial of Petitioner as a declaration against Robles's penal interest, and that the Confrontation Clause did not bar admission because the statement was not testimonial, the Court of Appeals reviewed the error for abuse of discretion, the wrong standard of review.

---

[34] Although the District of Columbia has not adopted rules of evidence, it follows federal precedent interpreting many provisions in the Federal Rules of Evidence, including Rule 401. *See, e.g., Punch v. United States*, 377 A.2[d] 1353, 1358 (D.C. 1977), *cert. denied*, 435 U.S. 955 (1978).

It never cited or explained how its holding squared with the holding in *Bruton*, *supra*, at 88, that, in a joint trial, introduction of a codefendant's statements implicating another defendant is prejudicial *per se* as to the second defendant, unless the codefendant testifies in his own behalf and can be cross-examined by counsel for the defendant who has been implicated.

Although the Supreme Court said curative instructions can be effective to protect criminal defendants in many cases where jurors receive other forms of inadmissible hearsay, this is a "context[] in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. The Court noted that it would be impossible to determine whether the jury actually credited the inadmissible codefendant statement in reaching a guilty verdict, and a defendant is entitled to a new trial without having to demonstrate that he actually was prejudiced. *Id.* at 136 – 7.

MR. BONILLA SUFFERED SUBSTANTIAL PREJUDICE DUE TO ADMISSION OF THE CONFESSION THAT THE LIMITING INSTRUCTION DID NOT CURE

Defense counsel's inability to confront Robles was especially damaging in this case because Mr. Bonilla testified in his own defense. Then the prosecutor impeached him with his post-arrest statement to police, in which he said "when the two black guys ran off, they went and got their knives. I think they had their knives when they got in my car." Exh. HH, 21 – 2. At trial Mr. Bonilla explained, "I said that because presumably, in the discotheque, they couldn't have had their knives. And when they asked me for a ride, they must have gone to get their knives because they didn't have them in the discotheque."[35] Tr. 11/2/98, 153. The prosecutor argued that jurors should interpret the statement as an admission that Mr. Bonilla knew his passengers were armed.

By asking Mr. Bonilla, "[i]sn't it a fact while you were driving up 14th Street, you heard Carlos Robles fighting with Catinga to have the knife to stab the black man, right," the

[35] The club's security officer testified that club personnel searched everyone who entered to make sure they were not carrying weapons.

prosecutor exacerbated the Sixth Amendment violation and negated any benefit the limiting instruction might have provided. Tr. 11/3/98, 154. *See Vazquez v. Wilson*, 550 F.3d 270, 283 (3d Cir. 2008)(prosecutor made clear to jury what redaction was intended to obscure, court's repetition of limiting instruction could not salvage case); *United States v. Davis*, 534 F.3d 903, 919 (8th Cir. 2008), *cert. denied sub nom., Edwards v. United States*, 129 S. Ct. 2381 (2009)("limiting instructions are rendered ineffective when the statements, as used by the prosecutor, will lead the jury to 'easily' and 'logically' apply the codefendant's confession to the defendant, notwithstanding the … instruction").

Defense counsel objected and Petitioner denied that the argument occurred in the car. But the question clearly implied that Mr. Bonilla's earlier testimony that he did not know about the knife until he saw Velasquez stab the decedent was incredible and invited jurors to infer knowledge and voluntary participation from Robles's inadmissible hearsay statement.

The prosecutor's final argument demonstrates that Robles's confession was a critical piece of evidence. In describing Benitez's testimony, the prosecutor stated:

> Now Benitez was one of the men who chased Helm on foot. So he had no idea what happened inside of the car. But there was a conversation between Benitez and Robles and Robles is filling him in on what happened inside of his car.
>
> He admits how he participated in this crime. He will tell you first he was in the car. Second, he was the one who gave the knife to "Catinga". And it wasn't entirely voluntary because when he handed over the knife to "Catinga", you will hear he admitted to José Benitez, he wanted it back because Carlos Robles-Benevides wanted to stab Warren Helm.

Tr. 11/3/98, 305 – 6. Exh. NN.

As the Supreme Court recognized in *Bruton* and *Richardson*, Robles's statement to Benitez was extremely damaging to Mr. Bonilla's defense. Because the statement and the prosecutor's tactics eliminated any need for jurors to infer a connection between Petitioner and the argument over the knife, the Judge's admonition that jurors could use the statement only against Robles was presumptively ineffective to mitigate the prejudice.

Absent Robles's admission about the argument in the car over the knife, the

government's evidence against Mr. Bonilla was weak. Three witnesses testified that Petitioner drove the car from which the assailants emerged, and in which one of them later escaped. But to convict Petitioner of conspiracy and aiding and abetting, the government had to prove that he knew before the assault that his passengers were armed and what they intended to do. Petitioner's post-arrest statement is at most ambiguous about whether he knew they were armed, and did not indicate that he knew the men intended to attack the decedent.[36]

Therefore, admission of Robles's confession in the joint trial violated Mr. Bonilla's Sixth Amendment rights and he is entitled to a new trial.

The prejudicial impact of Robles's confession was not limited to the trial. After remand for resentencing, in its Memorandum in Aid of Sentencing and at the sentencing hearing the government argued that Mr. Bonilla committed perjury when he testified at trial. Gov't Sentencing Memo, 2, 9. It cited the verdict as evidence that Petitioner testified falsely that he was not aware his backseat passengers were armed or that they intended to use the knife to assault the decedent. The government advocated the maximum prison term for second-degree murder, 20 years to life, in part because Mr. Bonilla committed perjury at trial.

THE GOVERNMENT DEPRIVED PETITIONER OF HIS RIGHT TO DUE PROCESS BY WITHHOLDING EXCULPATORY EVIDENCE

The D.C. Court of Appeals agreed with Petitioner that the government violated its obligations under *Brady*, *supra*, by failing to disclose before trial that in the weeks after the homicide a key government witness, Aleman, gave conflicting accounts of events to police and the grand jury. "[T]he due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense." *Perez, supra*, at 66. It said

[36] Knowledge that one of them had a knife alone would not have been sufficient to convict. This is so because Mr. Bonilla's agreement to give the men a ride home, knowing one of them had a knife, and then taking them home, would not have been a crime. His knowledge was relevant only in light of their later actions.

failure to disclose Aleman's grand jury testimony until immediately before the witness took the stand was error because "disclosure in accordance with the Jencks Act [does not] satisf[y] the prosecutor's duty of seasonable disclosure under *Brady*…." *Id.* But it held that when defense counsel finally got the grand jury transcript they effectively cross-examined the witness, so the prosecutor's deliberate suppression of exculpatory information did not prejudice Petitioner . *Id.* at 66 – 7.

The Panel, like the Trial Court, took the position that Aleman testified truthfully in the grand jury and his post-trial "recantation" was "incredible." *Id.* at 33. Aleman told the grand jury Mr. Bonilla actively participated in the attack on the decedent. At trial, when he testified that he was drunk and did not witness the homicide, the prosecutor impeached him with the transcript.

The Panel reached the same conclusion regarding the prosecutor's failure to disclose that several eyewitnesses told investigators Garcia lied when she claimed to have witnessed the homicide and denied being drunk at the time. *Id.* at 67 – 9. After counsel received Garcia's grand jury transcript, on the third day of trial, they located one of the witnesses, and later called her as a defense witness. By then counsel were unable to investigate and develop evidence corroborating Rivera's testimony and to counter the prosecutor's impeachment of her.

Finally, the Court refused to decide whether the prosecutor violated his obligation under *Brady* by failing to disclose that Garcia used a fake Social Security number and Salvadoran passport, and lied when she told investigators she was in the United States legally and had a Green Card. The government disclosed that information nearly seven years after trial. The Court of Appeals said, "even assuming the government breached its obligation to disclose Garcia's illegal immigration status, there is no reasonable probability that disclosing such information would have so undermined her testimony as to have produced a different outcome at trial." *Id.* at 70.

The Panel's analysis of *Brady* violations arising from non-disclosure of Garcia's use of a fake passport and Social Security number ignores that Mr. Bonilla was entitled to inform the jury

that, in addition to lying about her immigration status, she engaged in criminal conduct bearing on truthfulness for which she was not charged.

The D.C. Court of Appeals, as have federal appellate courts, long ago recognized that a criminal defendant may introduce evidence of "prior bad acts not reduced to a conviction" to attack a government witness's veracity. *See, e.g. Newman v. United States*, 705 A.2d 246, 254 – 57 (D.C. 1997). To be admissible such evidence must "bear[] directly upon the veracity of the witness in respect to the issue involved in the trial." *Winfield v. United States*, 676 A.2d 1, 5 (D.C. 1996)(*en banc*)(quoting *Kitchen v. United States*, 221 F.2d 832, 834 (D.C. Cir. 1955), *cert denied*, 357 U.S. 928 (1958)).

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within" the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 154 (1972)(quoting *Napue v. Illinois*, 360 U.S. 264, 270 (1959). "[T]he duty encompasses impeachment evidence as well as exculpatory evidence." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

There is no question that Garcia committed the bad acts, violations of 18 U.S.C. § 1543 prohibiting false use of a passport, 18 U.S.C. § 1544 prohibiting misuse of a passport, and 18 U.S.C. § 1028 prohibiting fraudulent use of a Social Security card and passport. Because she did so during the early investigative stage of this case, the bad acts were not remote in time or substance from her involvement in Mr. Bonilla's prosecution. False statements regarding the transaction before the court are admissible to impeach a witness's credibility, even when they do not go directly to the substantive claim. *Dean v. Garland*, 779 A.2d 911, 917 (D.C. 2001), *cert. denied sub nom., Wright-Dean v. Garland*, 536 U.S. 924 (2002).

THE OPINION BELOW CANNOT BE RECONCILED WITH* BRADY *AND ITS PROGENY

"The right of an accused in a criminal trial to due process is … the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973).

> The right to offer the testimony of witnesses … is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Washington v. Texas, 388 U.S. 14, 19 (1967). This right is grounded in both the Fifth and Sixth Amendments.

The Court's directive in *Brady*, recognized by the Court of Appeals, is clear and simple:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
> …
> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice….

373 U.S. at 87 – 88.

In *United States v. Agurs*, 427 U.S. 97, 106 (1976), the Court stated:

> Although there is … no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In Mr. Bonilla's case, the prosecutor received a specific request in a letter from trial counsel dated May 20, 1998. It requested,

> 3. Any prior inconsistent, non-corroborative, or other witness statements which will not reflect the witness' trial testimony. *See United States v. Enright*, 579 F.2^{d} 980, 989 (5th Cir. 1978).
> …
> 5. All information that any government witness and/or informant was under the influence of alcohol, narcotics, or any other drug at the time of the observations about which the witness will testify, and/or the informant informed or that the witness/informant's faculties of observation were impaired in any way.

In a discovery letter dated June 17, 1998, which did not acknowledge defense counsel's letter a month earlier, the prosecutor wrote, "[t]he United States will assume that you have made

a general *Brady* request." The prosecutor's only *Brady* disclosure was a letter dated October 3, 1998 to Salamanca's counsel stating, "1) Hugo Aleman, 3668 Park Place, N.W., Washington, D.C., 202-272-1173, places your client at the crime scene, but does not remember seeing him participate in the commission of any crime; 2) Nelson Rivera … likewise places your client at the crime scene, but does not remember seeing your client 'fighting.' " There is nothing in the record indicating that Mr. Bonilla's lawyer received that letter or that Salamanca's lawyer shared the information with him.[37]

THE GOVERNMENT'S* BRADY *VIOLATIONS SEVERELY PREJUDICED PETITIONER

The prosecutor admitted that he knew nearly six months before trial that Aleman's conflicting statements and claims of intoxication were *Brady* material. That is why he elicited testimony in the grand jury from Aleman about the conflicting statements.

The appeals court agreed, recognizing the requirement of timely disclosure so defense counsel can investigate and develop a defense strategy. But it then concluded that Mr. Bonilla was not prejudiced by the prosecutor's intentional nondisclosure because, with 25 minutes to read the grand jury transcript, defense counsel was able to use the evidence to impeach Aleman's credibility and elicit exculpating testimony, at least with regard to Bonilla." *Perez, supra*, at 66.

Aleman was a key witness against Mr. Bonilla, the only one to say Petitioner assaulted the decedent. The appeals court did not ask whether, with time to investigate, defense counsel could have completely discredited Aleman. It did not take into consideration that post-conviction counsel readily discovered the prosecutor's pattern of misusing grand jury subpoenas to pressure witnesses, and that Aleman had repeatedly denied witnessing the homicide before giving damning testimony in the grand jury.

The appeals court ignored Aleman's grand jury testimony that he remained in front of the Diversité Club as the assailants chased the decedent up 14th Street, and the unrebutted evidence

[37] Unlike other discovery communications from the prosecutor, which were addressed to counsel generally, this letter was addressed to Salamanca's lawyer only and included the caption of his case. It did not indicate any "cc's."

in the post-trial hearing that it would have been impossible for him to see Mr. Bonilla punching the decedent from that location.

Because the prosecutor used Aleman's grand jury testimony to impeach him as to the facts, it became substantive evidence at trial.[38] Establishing Aleman's vantage point was critical in demonstrating its untruthfulness, not merely to impeaching his credibility. *See Kyles v. Whitley*, 514 U.S. 419, 442 – 3 (1995)(witness testified to being eyewitness to homicide, but undisclosed statement to police immediately after crime showed he was not eyewitness). "A jury would reasonably have been troubled by the adjustments to [the witness's] original story…. These developments would have fueled a withering cross-examination, destroying confidence in [his] story…." *Id.* at 443. That, too, appellate counsel discovered through investigation and interviewing the witness.

In short, this is not a case where the Court needs to speculate about whether the outcome of the trial would have been different if the prosecutor had disclosed Aleman's grand jury testimony before trial. Post-conviction counsel's investigation shows that trial counsel would have destroyed confidence in Aleman's story.

Garcia testified at trial that Mr. Bonilla sat in his car near the homicide scene as his passengers attacked the decedent, then drove away with one of the assailants. She, like Aleman, was a key witness against Petitioner. Her testimony did not shed light on whether Mr. Bonilla was a knowing and willing participant in the crime before it happened. But, if believed by the jury, her assertion that he waited for Velasquez to return to the car before driving away at least

---

[38] In final argument the prosecutor told jurors they could read Aleman's grand jury testimony during deliberations.

> … This is sworn testimony under oath. And you can consider it as substantive evidence.
>
> So when Aleman says that Cholo was hitting the man who died, you can believe that. And when he talks about Gato pulling the man down … you can credit that and you can use that in this case as evidence against these men. It's in evidence. Read it. And remember, Hugo Aleman identified all of them.

Tr. 11/3/98, 218 – 19. Based on that transcript, the prosecutor argued repeatedly that Mr. Bonilla participated in the assault on Helm, and did not merely transport the attackers.

made him an accessory. As the prosecutor argued, jurors could infer from his failure to drive away immediately that he agreed to and aided his passengers' actions.

In late March and early April 1998, Rivera and Leonzo, who were subpoenaed repeatedly to the U.S. Attorney's office for questioning, told Asuncion that Garcia drank heavily at two clubs that night and left with them before the fatal assault.

Because the prosecutor withheld that transcript, defense counsel did not learn of this until Garcia testified, and overnight located Rivera. Because counsel were able to improvise on the spur of the moment, the Court of Appeals did not consider whether the outcome of the trial would have been different if the prosecutor had made timely disclosure.[39]

The prosecutor's suppression of Garcia's uncharged criminal conduct presents a more clear-cut issue because the government withheld that information until years after trial. The Supreme Court recognized in *Giglio* and *Bagley* that such evidence can have a very significant impact on the jury's evaluation of a witness's testimony.

The Court of Appeals affirmed the Trial Court's finding that Garcia was a credible witness at trial and in the post trial hearing, and concluded that evidence that she lied to the government about her immigration status would not have altered the outcome of the trial. *Perez, supra*, at 70. But the Panel never analyzed how the jury would have treated evidence that Garcia used fake identification documents, crimes that directly implicate truthfulness. Such evidence clearly would have been admissible under Fed. R. Evid. 608.[40]

Taken together, evidence that Garcia was intoxicated and left the area before the homicide, and that she committed bad acts in connection with this case bearing on her character

[39] The Panel stated that lawyers for some defendants interviewed Leonzo and Buruca and elected not to call them as witnesses. *Perez, supra*, at 68. In post-trial proceedings regarding Mr. Bonilla the government never introduced evidence supporting that finding, and Petitioner never had an opportunity to respond to it. The first time it appeared in the record was in the Trial Court's order denying Mr. Bonilla's second new trial motion.

[40] The D.C. Court of Appeals looks to federal court interpretation of Rule 608 to determine whether specific bad acts are "probative of truthfulness or untruthfulness." *See Riddick v. United States*, 806 A.2^{d} 631, 637 (D.C. 2002).

for truthfulness, would have caused jurors to have grave doubts about her incriminating testimony.

The Court of Appeals, as did the Trial Court, asserted that Mr. Bonilla would have been convicted even without Garcia's testimony because "there were four other witnesses who also testified that Bonilla was driving the car," and Petitioner admitted doing so. *Perez, supra*, at 71. As noted above, the fact that Petitioner drove the car carrying the assailants was insufficient to prove essential elements of either conspiracy or murder.

Furthermore, Mr. Bonilla offered innocent explanations why he got out of the car after the assailants left and why he drove Velasquez away afterward.

The only evidence contradicting him came from Aleman and Garcia. That their testimony was critical to the government is evident from the prosecutor's final argument. He said Mr. Bonilla

> drives them there to the crime scene, he chases after Helm, delivers the stabbers, he waits around. And he does more than wait. We've heard testimony that he actually physically participated. And that makes sense, right?
>
> You're in this just like everyone else. You know all of these guys. You're pumped up just like everyone else. Not only are you the chauffeur, if you will — you're delivering these guys — but you jump out of that car and you smack him in the face. Premeditation and deliberation, ladies and gentlemen.

Tr. 11/3/98, 214. According to the prosecutor:

> … before the chase even started, the people around there knew that, okay, knives are now part of the mix. Knives are now part of the equation. We're not just going to catch a guy and beat him up, but we're going to stab him.
>
> And certainly for the people in the car, the evidence is even more compelling. Certainly, Carlos Robles hands over the murder weapon. The evidence is more compelling.
>
> Now, some of you may be thinking, well, what about Santos Bonilla, Manotas? And let's face it, he comes up, he takes the stand — he seems like a nice-enough guy on the stand, right? On March 15th, 1998, his car was as deadly as any knife. And do you know why? There's no question that both of those stabbers came from his car. If he didn't drive them there, if he didn't have that car, do you really think these guys would be here today? On March 15th, 1998, his car was as deadly as any knife.

Id. at 215 – 6.

Based on the record in this case the D.C. Court of Appeals could not have concluded that the outcome of Mr. Bonilla's trial would have been the same, even if the prosecutor had complied with the disclosure requirements enunciated in *Brady* and its progeny. To the contrary, the record demonstrates that Mr. Bonilla suffered very substantial prejudice due to the prosecutor's deliberate suppression of exculpatory evidence.

The prejudicial effects of the *Brady* violations in this case not only infected the trial, they infected the sentencing on remand. As noted above at 43, the government is required to disclose exculpatory evidence material to punishment, as well as evidence tending to negate guilt. *Id.* at 87 – 8.

The government argued in its Sentencing Memo, at 5 & 9, and at the sentencing hearing that Mr. Bonilla should receive the maximum allowable punishment because he actively participated in the fatal assault.

Citing the D.C. Court of Appeals holding regarding use of grand jury subpoenas to obtain witness interviews and suppression of exculpatory evidence until the middle of trial, Petitioner strenuously objected. He argued that he would be prejudiced if the Trial Court relied in sentencing on Aleman's grand jury testimony, the prosecutor's suppression of the witness's inconsistent statements and claims that he was drunk . Bonilla Sentencing Memo, 1 – 2, 7, 9 – 11.

But the Judge specifically cited Aleman's testimony that Mr. Bonilla punched the decedent and Garcia's grand jury testimony as justifying the sentence she imposed.

THIS COURT HAS JURISDICTION TO REVIEW MR. BONILLA'S CLAIM THAT HIS CONTINUED DETENTION IS UNCONSTITUTIONAL

As the Supreme Court explained in *Schlup v. Delo*, 513 U.S. 298, 315 (1995), Mr. Bonilla's claim of innocence does not, by itself, provide a basis for relief. Rather, it is a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on its merits." *Id.* (quoting *Herrera v. Collins*, 506 U.S. 390,404 (1993)).

The requirement that a *habeas* petitioner assert his actual innocence is intended to protect

society's interest in finality of judgments and the states' interest in comity; and to reduce the burden on federal courts. *Schlup, supra*, at 318. Recognizing that *habeas corpus* is an equitable remedy, the Court carved out an exception under which the petitioner's interest in protection against unconstitutional detention takes precedence over those institutional concerns. It said, "'in appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* at 320 (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986)(internal quotations omitted).

The standard the Supreme Court enunciated, drawn largely from *Carrier*, requires Mr. Bonilla

> to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." … To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice. At the same time, the showing of "more likely than not" imposes a lower burden of proof than the "clear and convincing" standard…

Schlup, supra, at 327. As a threshold matter, he must convince the Court that , "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 329.

Mr. Bonilla's initial burden is heavy, but not as heavy as the burden of showing that there was insufficient evidence to support his conviction. *Id.* at 330. This is so because the Court may "consider the probative force of relevant evidence that was either excluded or unavailable at trial," *Id.* at 327 – 8, and because it may consider the effect that evidence would have on the credibility of witnesses. *Id.* at 330. Contrasting the standard for reviewing a claim of evidentiary insufficiency under *Jackson v. Virginia*, 443 U.S. 307 (1979), with the *Carrier* standard, the Court explained,

> Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not. Under *Carrier*, in contrast, the habeas court must consider what reasonable triers of fact are likely to do…. Thus, though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of petitioner's claim, that is not true under *Carrier*.

Schlup, supra, at 330.

Throughout these proceedings Mr. Bonilla has asserted his actual innocence, that he did not know his backseat passengers were armed when he offered them a ride home, he did not learn after they got in his car that they were armed, and he did not know they intended to assault the decedent until after he stopped the car in response to Velasquez's shouts. He testified further that when he realized what his passengers were doing he tried to leave. But, when Velasquez returned to the car with the knife he had used to stab the decedent, Petitioner complied with the order to drive to the gambling hall out of fear for his own safety.

To convict him of murder, as either a principal or an aider and abettor, and of conspiracy, the government had to prove that Petitioner knew before the back seat passengers got out of his car that they were armed and that they intended to assault the decedent.

Based on Aleman's grand jury testimony, which became substantive evidence at trial, and Garcia's grand jury testimony, which did not, the government argued that Mr. Bonilla participated as a principal by punching the decedent. The Trial Court adopted that argument at sentencing.

There is ample evidence, developed in post-trial proceedings, that Aleman could not have seen what he described to the grand jury and that his testimony was coerced. Similarly, there is considerable evidence, only somewhat developed at trial, that Garcia could not have seen what she described to the jury, and was based almost entirely on hearsay gleaned from conversations overheard hours after the homicide. Furthermore, jurors were entitled to consider evidence of her bias and bad acts demonstrating untruthfulness, evidence that was withheld until years after the trial.

Although the government received evidence within weeks after the homicide that clearly was exculpatory, the trial prosecutor knowingly and deliberately did not disclose it to defense counsel, even after receiving a discovery letter specifically requesting the types of information at issue here. The prosecutor turned some of that evidence over to the defense as each witness took

the stand at trial, too late for counsel to fully comprehend its significance, to investigate further, or to interview the witnesses in preparation for cross-examination.

The D.C. Court of Appeals held that the prosecutor violated Mr. Bonilla's Fifth Amendment right to due process by refusing to disclose *Brady* evidence about both witnesses. It also held that the prosecutor abused the grand jury's subpoena power by issuing subpoenas to compel witnesses to submit to interviews and by paying witness fees to them.

Even if this case is assessed on whether the government could have won a conviction for aiding and abetting, it is more likely than not that no reasonable juror would have convicted Mr. Bonilla. If Aleman's testimony that Mr. Bonilla assaulted the decedent, and Garcia's testimony that he willingly helped Velasquez escape are discounted, the only admissible evidence bearing on Petitioner's knowledge and intent is his ambiguous post-arrest statement to police. Viewed in a light most favorable to the government it is an admission that he knew the backseat passengers had a knife, but not that they intended to attack the decedent. The inference that he knew what they intended to do depended almost entirely on Benitez's testimony that Robles confessed to arguing with Velasquez over the knife as they traveled up 14th Street.

There is no question that the purported confession was hearsay inadmissible against Mr. Bonilla. None of the theories of admissibility suggested by the D.C. Court of Appeals passes muster under *Bruton*, and several of them are precluded by *Richardson*, *Gray*, and *Lilly*. Under the circumstances of this case, admission of the alleged confession was prejudicial *per se*. But, even if this were a case in which the prejudicial effect of the confession could have been ameliorated by a limiting instruction, the prosecutor's cross-examination of Mr. Bonilla and his argument to the jury counteracted the instruction. Admission of the statement in a joint trial violated Mr. Bonilla's Sixth Amendment right to confront witnesses against him.

As a result the Court must conclude that in a trial free of these Fifth and Sixth Amendment violations there is no reasonable probability that jurors would have convicted Mr. Bonilla of conspiracy or second-degree murder.

Finally, in light of the D.C. Court of Appeals holding that the *Brady* violations did not

prejudice Mr. Bonilla and the Trial Court's subsequent prejudicial reliance on Aleman's and Garcia's testimony as a basis for sentencing; and the holding regarding Robles's confession, Mr. Bonilla has no adequate or effective remedy in the courts of the District of Columbia.

CONCLUSION

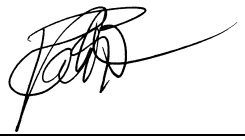
For the reasons stated above and any others that may appear to the Court after an evidentiary hearing, Petitioner Santos F. Bonilla respectfully requests that the Court issue a Writ of Habeas Corpus because no adequate or effective means are available to him to challenge his continued detention in violation of the Fifth and Sixth Amendments. He further requests that the Court vacate his conviction and sentence.

Respectfully submitted,

Robert S Becker, Esq.
D.C. Bar No. 370482
PMB #155
5505 Connecticut Avenue, N.W.
Washington, D.C. 20015
(202) 364-8013
Attorney for Santos F. Bonilla

CERTIFICATE OF SERVICE

I, Robert S Becker, counsel for Santos F. Bonilla, certify that on January 10, 2010 I served a true copy of the attached Petition for Writ of Habeas Corpus by first-class mail on the person(s) listed below.



Robert S Becker

Robert D. Okun
Office of the U.S. Attorney
555 Fourth Street, N.W.
Washington, D.C. 20001

Peter Nickles
Office of the Attorney General
441 4th Street, N.W.
Suite 1145S
Washington, D.C. 20001