

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION -- FELONY BRANCH**

UNITED STATES,

vs.

SANTOS F. BONILLA.

No. F 2332-98

Hon. Mary E. Abrecht

(Closed Case)

**REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION TO VACATE CONVICTION AND SET ASIDE SENTENCE
PURSUANT TO D.C. CODE § 23-110**

In its Opposition to Santos F. Bonilla's D.C. Code § 23-110 motion the government concedes that for over five months before trial it withheld from defense counsel information in its possession that Rosa Garcia was in the United States illegally, that she lied to investigators about her immigration status, and that she provided a false passport when the U.S. Attorney's office offered to place her in short-term witness protection. It now admits that Asst. U.S. Attorney Anthony Asuncion should have turned this information over to Mr. Bonilla's lawyer.

It concedes as well that from May 1, 1998, when she first lied about her immigration status, until at least August 2003, Ms. Garcia remained in this country illegally. In addition to using a fake passport, she at some point provided investigators a false Social Security number. *Affidavit of Stephen J. Gripkey*, 2. Gov't Opposition, Exh. 10.

By its own admission, the government knew that Ms. Garcia was committing several ongoing violations of federal law. From its account it appears that she violated 18 U.S.C. § 1543 prohibiting false use of a passport,¹ 18 U.S.C. § 1544 prohibiting misuse of a passport,² and at

¹ 18 U.S.C. § 1543 Forgery or false use of passport, states in relevant part:

Whoever willfully and knowingly uses, or attempts to use, ... any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport ... —

Shall be fined under this title, imprisoned not more than ... 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

² 18 U.S.C. § 1544 Misuse of Passport, states in relevant part:

Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or

Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or

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some point it knew she violated 18 U.S.C. § 1028 prohibiting fraudulent use of a Social Security card and passport.³ Ms. Garcia may have violated 18 U.S.C. § 1001 as well.⁴ In addition she was

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restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; ... --

Shall be fined under this title, imprisoned not more than ... 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

³ 18 U.S.C. § 1028 Fraud and related activity in connection with identification documents, authentication features, and information, states in pertinent part:

(a) Whoever, in a circumstance described in subsection (c) of this section--

...

(4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document or feature be used to defraud the United States;

...

(6) knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States which is stolen or produced without lawful authority knowing that such document or feature was stolen or produced without such authority;

(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law;

...

shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under subsection (a) of this section is--

(1) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 15 years, or both, if the offense is--

...

(D) an offense under paragraph (7) of such subsection that involves the transfer, possession, or use of 1 or more means of identification if, as a result of the offense, any individual committing the offense obtains anything of value aggregating \$ 1,000 or more during any 1-year period;

(2) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 5 years, or both, if the offense is--

(A) any other production, transfer, or use of a means of identification, an identification document, [,] authentication features, or a false identification document; or

(B) an offense under paragraph (3) or (7) of such subsection;

...

(d) In this section and section 1028A [18 USCS § 1028A]--

...

(3) the term "identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals;

(4) the term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that--

...

(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a foreign government, a political subdivision of a foreign government, or an international

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subject to deportation and could have been excluded from re-entry into the United States under 8 U.S.C. § 1182(6).

Although the government admits that it should have disclosed Ms. Garcia's uncharged criminal conduct, it denies that it violated its disclosure obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2^d 215 (1964); and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2^d 104 (1972). Gov't Opposition, 14. It argues that "Rosa Garcia's misrepresentations about her immigration status were clearly collateral and irrelevant to her testimony about the murder she witnessed," and "even if she had been impeached with her misrepresentation ..., such impeachment would not have significantly undermined the credibility of her compelling eyewitness testimony." Gov't Opposition, 2. It adds that "Ms. Garcia's testimony was just part of a broad mosaic of mutually corroborative evidence from other eyewitnesses and participants in the crime which conclusively prove that the defendant participated in the murder of Warren Helm." *Id.* Ultimately, relying on *Strickler v. Greene*, 527 U.S. 263, 281 (1999), it argues *post hoc* that it did not violate *Brady* because "there is [no] reasonable probability that the suppressed evidence would have produced a different verdict." Gov't Opposition, 11.

There are several errors in the government's analysis. First, a government witness's credibility and bias is never collateral or irrelevant. *See, e.g. United States v. Bagley*, 473 U.S.

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governmental or quasi-governmental organization;

...

(7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any--

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number; ...

⁴18 U.S.C. § 1001 Statements or entries generally, states in pertinent part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

...

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years

667, 676 (1985); *Napue v. Illinois*, 360 U.S. 264, 269 (1959)(“The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.”).

**THE GOVERNMENT MISCHARACTERIZES THE RECORD TO SUPPORT ITS
ARGUMENT**

No matter how compelling the government claims Ms. Garcia’s testimony was, Mayra Rivera’s trial testimony and affidavits she, Sendy Leonzo, Blanca Buruca and José Guevera provided after the trial raise serious questions about whether Ms. Garcia witnessed the homicide. The government now claims that “there is no credible evidence that Ms. Garcia lied about the central issues in the case.” Gov’t Opposition, 14. In the hearing on Mr. Bonilla’s second new trial motion the Court refused to permit the defense to put on testimony demonstrating that she lied about seeing the homicide. If Ms. Garcia testifies in an upcoming hearing, as the Court has suggested, counsel intends to call other witnesses who will testify that she lied to investigators, in the grand jury and at trial.

There is significant evidence that Ms. Garcia fabricated her account of the crime to exculpate her boyfriend, José Benitez. In the grand jury and at trial Ms. Garcia admitted that her purpose in providing information to police March 15, 1998 was to convey that they had wrongly arrested Benitez for crimes he did not commit. She sought to implicate others so Benitez, one of only two suspects arrested at the scene, would not be prosecuted. She told the grand jury “I came here by myself, because this is a crime that somebody that didn’t do anything bad is in jail for no reason, for not doing anything....” G.J. Tr. 3/17/98, 5. Gov’t Opposition, Exh. 4. “And every 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.” *Id.* at 28.

Regarding Mr. Bonilla there is no support in the record for the government’s assertion that Ms. Garcia should be believed because she “was testifying against people with whom she was very close. All of the significant players (defendants and witnesses) were either family or associates....” Gov’t Opposition, 16. In the grand jury the prosecutor showed her pictures of the

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defendants and other individuals, including Hugo Aleman and Trebi, and she testified that she had known many of the defendants for several years, and that some were her relatives and close friends. G.J. Tr. 3/17/98, 15 – 22. But when shown Mr. Bonilla’s picture she said, “I’ve just known him last year.” *Id.* at 23. At trial she testified that she only knew Mr. Bonilla for a few months before the homicide. Tr. 10/27/98, 350.

Contrary to the government’s argument, Mr. Bonilla has never asserted that Ms. Garcia was not a credible witness because she was an illegal alien, or that failure to disclose her immigration status was a *Brady* violation. Gov’t Opposition, 11 – 17. Certainly, if this case were to be retried, in cross-examination counsel could question Ms. Garcia about her immigration status. But the focus of impeachment would be on her use of a false passport and Social Security number, and her false claim that she had a Green Card, which dramatically demonstrate that she lies to get what she wants, whether it is to help her boyfriend or obtain special treatment from the government.

**DEFENSE COUNSEL WOULD CROSS-EXAMINE MS. GARCIA ABOUT HER
UNCHARGED CRIMINAL ACTS**

There is no merit to the government’s argument that Mr. Bonilla’s lawyer deliberately did not question Ms. Garcia about her immigration status or her entry into the witness protection program. Gov’t Opposition, 17 – 20. According to the government, counsel wanted “to avoid the inevitable line of inquiry from the government to Ms. Garcia on redirect about why she felt the need to be placed in a witness security program.” *Id.* at 19 (emphasis in original). In support of this assertion the government discloses for the first time in seven years of litigation a memorandum in which the trial prosecutor claimed that Mr. Bonilla told an unidentified third party, “tell China we are going to get her head off if she continues to talk.” Gov’t Opposition, 19 n. 21, Exh. 6.

Ms. Garcia apparently was the source of this information, which on its face is at least double hearsay. The government charged José Salamanca, but not Mr. Bonilla, in connection with threats to Ms. Garcia. More significantly, Mr. Bonilla testified in his own defense, and the trial prosecutor, who repeatedly demonstrated his skill in cross-examination, did not question

him about the alleged threat to Ms. Garcia, although he questioned José Salamanca about whether he threatened her. Regardless of what the prosecutor claimed in the memorandum intended to persuade others in the Department of Justice to put Ms. Garcia in witness protection, the Court should assume that he did not ask Mr. Bonilla about the alleged threats because he had no good-faith basis to do so. Without evidentiary support it would have been improper on redirect examination for the prosecutor to question Ms. Garcia about her allegation that Mr. Bonilla threatened her.

Equally without merit is the government's related argument that the record demonstrates that in a new trial counsel would not cross-examine Ms. Garcia about her use of a fraudulent passport and Social Security number to get into witness protection. Gov't Opposition, 17 – 18. By failing to highlight Ms. Garcia's receipt of protection and a small amount of money, which would have done little to discredit her testimony about the crime, Mr. Bonilla did not waive his right to cross-examine her in a future proceeding. The government cannot minimize the impact of a cross-examination in which Ms. Garcia would have to admit that in seeking assistance she violated several federal laws and lied to investigators and the prosecutor.

**ROSA GARCIA IS THE KEY GOVERNMENT WITNESS AGAINST MR. BONILLA AND
IF SHE IS DISCREDITED THE JURY WILL HAVE MORE THAN REASONABLE
DOUBT ABOUT HIS INVOLVEMENT IN THIS CRIME**

Without Ms. Garcia's testimony the government's case against Mr. Bonilla is very weak. In fact, the trial prosecutor and Inv. Norberto Torres⁵ acknowledged in a Memorandum dated May 1, 1998 to Catherine K. Breeden, chief of the Department of Justice Special Operations Unit. Gov't Opposition, Exh. 6, 2 and 4.

In support of its argument to the contrary, the government cites testimony by “neutral witnesses” Greg Alexander and Barry Hallner, Hugo Aleman, José Perez and Mr. Benitez, and Mr. Bonilla's videotaped statement to police. Gov't Opposition, 22 – 4. Mr. Alexander, the victim's friend, described the attack on the homeless man across the street from the Diversite

⁵ Ms. Garcia considered Inv. Torres to be a father figure and went to him on March 15, 1998 to report that she witnessed the homicide. He took her to the MPD Homicide Branch to be interviewed.

Club, and said the group involved, which did not include Mr. Bonilla, chased the victim up 14th Street, N.W., on foot. Mr. Alexander and the victim's two other friends then left the area by car and did not return until after Mr. Helm had been stabbed. His testimony did not implicate Mr. Bonilla.

The government conflates testimony of two witnesses to make it appear that “neutral” witness Hallner told jurors that Mr. Bonilla's car “seemed to cut off Helm as he tried to escape his assailants.” Gov't Opposition, 23. In fact, Mr. Hallner testified that the victim approached a red Geo Metro driven by a woman, “whoever it was — I don't think they knew him. They weren't about to let a stranger into their car.”⁶ Tr. 10/28/99, 453. Mr. Hallner neither implicated Mr. Bonilla directly nor identified him or his car as being present during the fatal attack.

Mr. Benitez said he saw Mr. Bonilla drive by with Carlos Robles Benevides, Walter Velasquez and Douglas 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.” *Id.* at 576 – 7. He said he saw Mr. Robles, Mr. Velasquez and Mr. Ventura, but not Mr. Bonilla, get out of the car and attack Mr. 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. Mr. Benitez's testimony was consistent with testimony of Mr. Bonilla and Mr. Salamanca that the three backseat passengers jumped out of the car, leaving both rear doors open, and Mr. Bonilla went around the car to close them before attempting to drive away.

The government asserts that “José Perez (who identified his own brother as a participant), ... described how the occupants of defendant's car got out and attacked Helm.” Gov't Opposition, 23 – 4. At trial, when the prosecutor asked for the names of Mr. Perez's friends who were at the Diversite Club that night, he identified Catinga (Mr. Velasquez), Douglas (Ventura), Abuelo, Raul, Gato (Oscar Villatoro), Carlos (Mr. Robles), Chofer (Mr. Benitez), and his brother Luis Perez, and said they were members of the gang Mara R. Tr. 10/28/98, 494 – 8. He did not

⁶ Mr. Bonilla's car was a dark-colored four-door sedan.

identify Mr. Bonilla as a friend or as a member of the gang. *Id.* José Perez said he witnessed the stabbing from a distance of half-a-block to a block away, and that the assailants included Catinga, Douglas, Abuelo, Carlos and Chofer. *Id.* at 502 – 3. In fact, José Perez never mentioned Mr. Bonilla in his videotaped statement to police March 15, 1998 or his trial testimony; and Defendant’s trial counsel did not cross-examine him. When he appeared before the grand jury on March 18, 1998 the only mention of Mr. Bonilla came when the prosecutor read off a list of names and asked how long Mr. Perez had known them. G.J. Tr. 3/18/98, 7. The witness responded, “five months give or take.” *Id.*

José Perez’s grand jury and trial testimony support Mr. Bonilla’s trial testimony in one respect that seriously undercuts the government’s argument. It has been the government’s position from the beginning that even if Mr. Bonilla did not actively participate in the fatal attack, he waited at the scene for the other assailants and willingly drove Catinga to a gambling hall. But José Perez admitted in the grand jury that he had omitted the names of several attackers when police questioned him “because since I am pretty much the way they are, I know that these are people of violence.” *Id.* at 20 – 1. The prosecutor explained to grand jurors that “the reason it’s important for him to explain why he ... felt threatened was simply to explain why he told something to the police that wasn’t true.” *Id.* at 21.

As Mr. Bonilla testified at trial, when Catinga ordered him to drive to the gambling hall he complied out of fear. It did not matter whether his back-seat passenger threatened him or brandished the bloody knife; Mr. Bonilla had just witnessed the assault on Mr. Helm and did not want to become Catinga’s next victim.

The government reiterates arguments made in response to Mr. Bonilla’s previous § 23-110 motion that Mr. Aleman’s testimony incriminates Mr. Bonilla. The record of that proceeding demonstrates that Mr. Aleman initially told investigators he had been drinking heavily before and while he was at the Diversite Club, and that he got in a taxi in front of the club to go home. After the prosecutor repeatedly subpoenaed him to the U.S. Attorney’s office to be interrogated Mr. Aleman appeared before the grand jury, where he testified that he stood in front of the club

and watched the fatal attack. From that vantage point over one-quarter mile from the scene of the crime, he identified Mr. Bonilla as one of the assailants. At trial, when Mr. Aleman reverted to his original account, the prosecutor impeached him with his grand jury testimony.

The trial prosecutor testified that he had information from witnesses in the grand jury and statements from defendants who had been arrested that Mr. Aleman was “present watching this thing.” Tr. 7/3/02, 42. He added that witnesses said Mr. Aleman had not participated in the attack. *Id.*

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 Mr. Helm, the prosecutor said he had no reason to believe Mr. Aleman was lying. *Id.* at 71. He agreed that the Diversite 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 Mr. Aleman testified that he was near the club, the prosecutor 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 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, Mr. 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?

...

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.⁷

Id. at 79 – 80. Later in the cross-examination it became clear that the prosecutor's only source regarding Mr. Aleman's proximity to the fatal assault was Ms. 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 traveled 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 Diversity 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.

Id. at 114 – 8. He indicated that he relied heavily on Ms. Garcia's written statement and grand jury testimony in concluding that Mr. Aleman "had a front-row seat" to Helm's homicide. *Id.* at 121 – 2. The prosecutor admitted that Ms. Garcia was the only person who gave a written or oral statement or testified in the grand jury and placed Mr. Aleman at the homicide scene. *Id.* at 126 – 7.

⁷ It appears that on March 20, 1998 another grand jury witness claimed to have seen the attack on Mr. Helm from the doorway of the Diversite Club, and identified several individuals as having punched and kicked him. *Id.* at 138 – 9. The prosecutor 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 Court refused to make the grand jury transcript part of the record and place it under seal for appellate review. *Id.* at 140.

If the government calls Mr. Aleman to testify in a new trial and again uses his grand jury testimony to impeach him, defense counsel will counter with his testimony that he remained in front of the Diversite Club until he left the area by taxi. Counsel will demonstrate that Mr. Aleman could not have seen the fatal assault, much less identified the attackers at night from a distance of over one-quarter mile. Thus, Mr. Aleman's testimony does not add to the "broad mosaic" of incriminating evidence the government claims to have against Mr. Bonilla.

As it did in earlier post-conviction proceedings, the government argues that in his videotaped statement to police Mr. Bonilla admitted knowing when Mr. Velasquez, Mr. Robles and Mr. Ventura got in the back seat that they were armed and intended to attack Mr. Helm. Gov't Opposition, 24. The videotaped statement is equivocal on that point at best, and under cross-examination Appellant refuted the government's interpretation. Mr. Bonilla testified, and Mr. Salamanca corroborated, that he got out of the car and closed the doors left open by the backseat passengers. Mr. Bonilla's uncontradicted testimony was that after he closed the doors he began to drive away but got caught in traffic at a red light. Before he could leave, Velasquez, armed with a bloody knife, jumped back into the rear seat and ordered Mr. Bonilla to take him to a gambling hall. The prosecutor could provide no evidence that Mr. Bonilla willingly transported Velasquez away from the scene.

THE COURT MUST EXAMINE ALL *BRADY* VIOLATIONS RELATED TO MS. GARCIA'S TESTIMONY

The government urges the Court to consider only Ms. Garcia's "misrepresentations" regarding her immigration status — her use of a false passport and assertion that she had a Green Card — in determining whether its *Brady* violations prejudiced Mr. Bonilla. It argues that this Court ruled in the previous Rule 33 proceeding that Mr. Bonilla and his codefendants litigated the *Brady* violation related to information provided by Ms. Rivera, Ms. Leonzo, Ms. Buruca and Mr. Guevera during trial and in the first round of new trial motions. Gov't Opposition, 4 n. 4. The Court said Ms. Rivera testified at trial, but "Rosa Garcia's testimony was ... credible, she was not an accomplice and was not shown to have any motive to lie." Memorandum & Order

Denying Motion for New Trial, 17 – 18.⁸

The D.C. Court of Appeals has held that where a *Brady* violation has occurred the defendant is entitled to a new trial if “there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Farley v. United States*, 767 A.2^d 225, 228 (D.C. 2001)(citing *Edelen v. United States*, 627 A. 2^d 968, 971 (D.C. 1993)). It noted that “when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial’ ” there is a reasonable probability of a different result. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2^d 490 (1995); *Bagley, supra*, 473 U.S. at 678)). “*Kyles* instructed that the materiality standard of *Brady* claims is met when ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’ ” *Banks v. Dretke*, 540 U.S. 668, 698 (2004).

It is important to note that Mr. Bonilla is entitled to a new trial if his lawyer, armed with evidence of Ms. Garcia’s uncharged crimes and bad acts, and testimony of witnesses who would contradict her version of events, can convince jurors that there is reasonable doubt about Defendant’s involvement in the charged crimes. This Court must consider all of the *Brady* violations related to Ms. Garcia, the totality of the circumstances, to resolve this issue.

THE GOVERNMENT’S *BRADY* VIOLATIONS PREJUDICED MR. BONILLA

The D.C. Circuit has said, “Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure.” *United States v. Pollack*, 534 F.2^d 964, 973 (D.C. Cir. 1976)(citations omitted). “[T]his court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor’s duty of

⁸ The Court found that counsel for two codefendants “decided for tactical reasons not to call” Ms. Leonzo. *Id.* at 18. Citing affidavits of Manuel Retureta and Bradford Barneys attached to the government’s August 15, 2002 Opposition to Mr. Salamanca’s new trial motion, the Court said all defense counsel interviewed the witnesses together, implying that Mr. Bonilla’s trial lawyer was a party to this tactical decision. The affidavits were not filed or served on counsel in Mr. Bonilla’s case and he was unaware of their existence until this Court issued its Order denying Mr. Bonilla’s new trial motion. Statements in the affidavits have not been subjected to cross-examination and should not be considered in these proceedings.

seasonable disclosure under *Brady*.” *Edelen, supra*, 627 A.2^d at 978 (citing *James v. United States*, 580 A.2^d 636, 643 – 4 (D.C. 1990)).

From the trial prosecutor’s testimony in the post-conviction proceedings it is evident that, contrary to those clear directives, he believed that he satisfied his obligation under *Brady* by disclosing Ms. Garcia’s grand jury transcript when she testified at trial. Discussing his failure to disclose inconsistencies in accounts Mr. Aleman gave investigators and the grand jury and Mr. Aleman’s statements that he was intoxicated, the prosecutor said he asked questions in the grand jury to “comply with our *Brady* obligations.” Tr. 7/3/02, 94. Later the Court asked, “do you recall whether or not you discussed ... Mr. Aleman’s inconsistent statements with any of the defense counsel before trial?” *Id.* at 98. The prosecutor responded that “[t]he vehicle that was communicated was through the grand jury transcript alone. So I didn’t have any conversations with any of the defense lawyers.” *Id.* Defense counsel received the transcript immediately before Mr. Aleman testified at trial.

The trial prosecutor’s decision to disclose as Jencks material the identities of witnesses who would have contradicted Ms. Garcia’s account deprived defense counsel of his ability to investigate and prepare for trial, to use the withheld information in his opening statement, to cross-examine Ms. Garcia effectively, and to call additional witnesses to counter her damaging testimony. Defense counsel could not have known that four witnesses contradicted Ms. Garcia’s claim that she watched the homicide and that she had not been drinking until after she finished testifying, when they located two of those witnesses. Mr. Bonilla’s counsel could not have know who those witnesses were until he received Ms. Garcia’s grand jury transcript. Because the Diversite Club had been filled to its 600-person capacity before the homicide it would have been impossible for defense counsel to have identified those witnesses through pretrial investigation. The jury, charged with assessing Ms. Garcia’s credibility, was entitled to see her reaction when confronted with evidence that she was drunk and had left the area before Mr. Helm was stabbed.

NO EVIDENTIARY HEARING IS NECESSARY FOR THIS COURT TO DETERMINE WHETHER, ABSENT THE GOVERNMENT'S *BRADY* VIOLATIONS, THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF MR. BONILLA'S TRIAL WOULD HAVE BEEN DIFFERENT

In the previous post-conviction proceedings the government conceded that Mr. Bonilla's lawyer made a specific *Brady* request, and the trial prosecutor testified that he withheld *Brady* evidence until he disclosed grand jury transcripts of Mr. Aleman as Jencks material during trial. It is well established that he withheld until he disclosed Ms. Garcia's grand jury transcript as Jencks material the identities of four witnesses who made statements to investigators contradicting Ms. Garcia's testimony. The government now admits that it withheld evidence that Ms. Garcia lied to investigators about her immigration status and gave them a fraudulent passport and Social Security number when she sought protective services.

Under the Supreme Court's holding in *Brady, supra*, 373 U.S. at 87 – 8, the government's failure to disclose that information violated Mr. Bonilla's constitutional rights regardless of the prosecutor's motive. Mr. Bonilla does not have to prove the trial prosecutor deliberately withheld exculpatory information, and the government cannot extricate itself by demonstrating the absence of bad faith.

It is clear from the record that the government knew approximately seven months before trial that statements made by Ms. Rivera, Ms. Leonzo, Ms. Buruca and Mr. Guevera conflicted with Ms. Garcia's account. It knew for five months that Ms. Garcia had lied about her immigration status and that she provided a fraudulent passport. There is some question about when it learned that the Social Security number was fraudulent as well.

For two reasons it does not matter what priority the Immigration and Naturalization Service would have given to instituting deportation proceedings against Ms. Garcia. First, the trial prosecutor knew that Ms. Garcia had violated federal law, and the decision about whether to charge her was the U.S. Attorney's, not that of the INS. Second, if the INS had acted while this case was pending, the U.S. Attorney's office would have taken steps to prevent deportation and probably would have assisted Ms. Garcia to obtain legal resident status, as it considered doing in 2003.

It would help Mr. Bonilla if investigators or the U.S. Attorney's office offered to assist Ms. Garcia to obtain legal resident status, told her they would not reporter her to the INS, or, based on the prosecutor's discussion with the INS, assured her deportation was unlikely. But the converse is not necessarily true. If Ms. Garcia understood from statements made by investigators and others that she would suffer no adverse consequences of her illegal acts she might well have been induced to curry favor from them, even if they did not intend to offer benefits to her in return for her cooperation. As the Court correctly recognized, if the government puts on witnesses to testify that they did not make promises in return for testimony, it should also have to call Ms. Garcia to testify about whether interpreted government statements as offers of assistance..

In its Opposition to Mr. Bonilla's new-trial motion the government enumerates 11 areas of inquiry it expects to pursue in a hearing. *Id.* at 5 – 10. Area 1 regarding Ms. Garcia's actions on March 15, 1998 is fully covered by her trial testimony and is irrelevant to this proceeding. Area 2, the trial prosecutor's actions regarding Ms. Garcia in the days following the homicide, is irrelevant, as is area 3 regarding Ms. Garcia's allegations that she was threatened and the process instituted to place her in witness protection. No testimony regarding area 4 is needed because the government has conceded that when investigators confronted Ms. Garcia she admitted lying about her immigration status and they subsequently determined that she had given them a fraudulent El Salvador Passport. For the reasons stated above, testimony regarding area 5, the trial prosecutor's discussions with the INS, are of no probative value. The trial prosecutor's pretrial disclosure that Ms. Garcia had been in witness protection for a short time does not cure or ameliorate the failure to disclose her lies and uncharged criminal acts, so area 7 is irrelevant. Areas 8 through 11 regarding the discovery in 2003 of earlier *Brady* violations are of no import because Mr. Bonilla's appeal was pending in 2003 and the government had an ongoing obligation to disclose *Brady* material to him. *Barnes v. United States*, 760 A.2d 556, 562 (D.C. 2000)(“government's obligation to disclose exculpatory evidence under *Brady* ... is continuous.

... And if the government had knowledge ... we would expect it to disclose the information to the defense — now as then.”).

The issue before the Court is a mixed question of law and fact, and all of the facts necessary to resolve it are contained in the motions, files and records of this case. If the Court believes that it needs to hear testimony from government witnesses, the scope of inquiry should be limited to discussions among Ms. Garcia and government agents regarding her uncharged criminal acts and immigration violations, and the extent to which the U.S. Attorney’s office would assist her in dealing with them. If Ms. Garcia testifies Mr. Bonilla would be entitled to fully cross-examine her and present witnesses who would contradict her testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Santos F. Bonilla, certify that on September 30, 2005 I served a true copy of the attached Reply to Government's Opposition to Defendant's Motion To Vacate Conviction and Set Aside Sentence Pursuant to D.C. Code § 23-110 by first-class mail on the person(s) listed below.

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