

**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)

MOTION FOR NEW TRIAL

Movant Santos F. Bonilla, through undersigned counsel, respectfully moves the Court to vacate his conviction and order a new trial pursuant to D.C. Crim. R. 33. The conviction should be vacated because new evidence has come to light indicating that a key government witness testified falsely because he was coerced with threats that he, too, would be prosecuted if he did not cooperate. Obtaining a conviction with false testimony is a violation of the Due Process Clause of the Fifth Amendment. *Mooney v. Holohan*, 294 U.S. 103 (1934). In addition, despite a pretrial request from defense counsel for information concerning government witnesses who provided exculpatory evidence or whose ability to observe was impaired, the prosecutor withheld information on at least one key government witness. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2^d 215 (1963).

STATEMENT OF THE CASE

Defendant Santos F. Bonilla was arrested March 27, 1998 on a warrant charging him with second-degree murder while armed in violation of D.C. Code §§ 22-2403 and 22-3202. He was arraigned the following day in D.C. Superior Court. The Court held a preliminary hearing April 2, 1998, in which it found probable cause and ordered that Mr. Bonilla be detained without bond while awaiting trial. He was arraigned June 18, 1998 on an indictment charging assault in violation of D.C. Code § 22-504 and first-degree premeditated murder while armed in violation of D.C. Code §§ 22-2401 and 22-3202.

The government filed a superceding indictment July 14, 1998 restating the assault (Count D) and first-degree murder while armed (Count F) charges, and adding against Mr. Bonilla

conspiracy to assault and to murder Warren Helm in violation of D.C. Code §§ 22-105a, 22-2401 and 22-3202 (Count E). Among the overt acts Mr. Bonilla was charged with committing was assaulting an unidentified homeless man outside the Diversite Club on 14th Street, N.W., and when Mr. Helm intervened to help the homeless man, redirecting his attack on Mr. Helm and his three companions. It accused Mr. Bonilla, Carlos Robles-Benevides, Douglas Ventura and Walter Velasquez of getting into a car and chasing Mr. Helm, discussing how they would attack him as they traveled up 14th Street.¹ Once they reached Mr. Helm, the indictment states, Mr. Bonilla participated in the assault that resulted in the victim's death. Finally, the indictment states that Mr. Bonilla transported Walter Velasquez away from the crime scene. Mr. Bonilla was arraigned on the superceding indictment July 17, 1998.

Jury selection for the trial of Mr. Bonilla and four co-defendants, Mr. Robles, José Salamanca, Luis Perez and Oscar Villatoro began October 26, 1998. At the conclusion of the government's case the Court dismissed Count D charging Mr. Bonilla with assaulting the homeless person because the government had presented no evidence to support the charge. The jury returned a verdict of guilty on the conspiracy and first-degree murder charges November 6, 1998. The Court sentenced Mr. Bonilla January 26, 1999 to 30 years to life in prison for first-degree murder while armed and 20 to 60 months in prison for conspiracy. The two sentences were concurrent.

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

STATEMENT OF FACTS

OVERVIEW

According to testimony at the trial, early in the morning March 15, 1998, after an altercation in the Diversite Club, 1526 14th Street, N.W., the club closed. As the club's Latino patrons left, some of them attacked an elderly, homeless black man outside. Four young black

¹ The government introduced no evidence admissible against Mr. Bonilla that he participated in or was present during such a discussion.

men driving north on 14th Street saw the attack and stopped to help the homeless man. As they approached on foot the assailants turned on them and they fled. Three of the young black men returned to the car, but the fourth, Warren Helm, ran north on 14th Street with several Latino men in pursuit. Some of the people who had attacked the homeless man pelted the car with rocks and bottles and one of them used a screwdriver-like object to stab a passenger in the car in the hand. The car, with its three occupants drove off and did not return to the area for several minutes.

When the club closed Movant talked to a young woman outside for a short time. He had offered José Salamanca, who had been drinking heavily for several hours, a ride to his home at 14th and W Streets, N.W., and Mr. Salamanca sat in the front passenger seat of his car. Before they drove away Mr. Robles, Mr. 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 was stopped in traffic, and before he began moving again Mr. Velasquez, armed with a knife, returned to the car and ordered him to drive to La Triviada, a gambling hall,

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

THE GOVERNMENT'S CASE

Rosa Garcia's Testimony

Ms. Garcia testified that she arrived at the club at about 11 p.m. March 14 and was with friends, Myra Rivera, Sandy Leonzo, Blanca Burca, and José Gueverra,² Blanca's boyfriend. Tr.

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

10/27/98, 341.³ 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. When she went outside she saw Mr. Villatoro arguing with a homeless black man across 14th Street. *Id.* at 347. Ms. Garcia testified that she walked north on 14th Street toward W Street with Ms. Rivera, Ms. Leonzo, Ms. Burca and Mr. Gueverra, and did not pay any further attention to the altercation involving the homeless man.

As they walked past a laundromat, 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. Ms. Garcia said on direct examination that she was not sure what street she was at and indicated it might have been R Street. But on cross-examination she testified that she was at Swann Street before she heard the black male voice. *Id.* at 386. She said Douglas Ventura was “hitting, punching and kicking the black male.”⁴ *Id.* at 350. Ms. Garcia identified Mr. Bonilla as “Manotas,” and when asked what he was doing during the attack on the homicide victim 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 for the men that stabbed the black male.

³ References to the transcripts of the trial will be designated “Tr.” followed by the date of the proceeding and relevant page number, i.e. Tr. 10/27/98, 341. References to transcripts of the Grand Jury will be designated “GJ Tr.” followed by the relevant date and page number.

⁴ Ms. Garcia testified in the Grand Jury that Mr. 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.” Ms. Garcia claimed she was present during these conversations. GJ Tr. 3/17/98, 18. She later testified that Mr. Aleman admitted involvement in the attack on Mr. Helm. *Id.* at 21.

Id. at 356-7. She then listed the people who were involved in the assault, including Mr. Benitez, Mr. Villatoro, Douglas Ventura, Chupa Cabra⁵ and others she could not provide names for, but not Mr. Bonilla. *Id.* at 357-8. Ms. 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.

On cross-examination Ms. Garcia denied that she drank any alcoholic beverages while at the Diversite Club. Tr. 10/27/98, 361.

She said that when she left the club with her four friends they immediately started walking north on 14th Street but she saw Oscar Villatoro arguing with the homeless man because they were immediately across the street. She could not identify anyone else as being involved in the altercation because “It was none of my ... business so I didn’t pay attention to it.” *Id.* at 362.

According to Ms. Garcia, she and her friends had walked past the 1800 block of 14th Street before she noticed anything happening, and then she noticed only because she heard “the black male voice saying no, no.” *Id.* at 385.

José Perez’s Testimony

Mr. Perez testified that he was in the Diversite Club until it closed March 15, 1998. When he left 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 Mr. Velasquez, Douglas Ventura and Abuelo. *Id.* at 502. At the time he was standing a half block or a block away. He said José Benitez was punching and kicking the man, and Luis Perez and Mr. Robles were punching him. *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 either attack.

Hugo Aleman’s Testimony

Mr. Aleman testified that in March 1998 he was a busboy at La Trumpeta, a restaurant. Tr. 10/28/98, 546. He went to the Diversite Club after work the night of the homicide, but he had been drinking before he got there and could not recall the names of everyone he saw at the club.

⁵ Chupa Cabra is Wilmer Villatoro, Oscar’s brother.

Id. at 547. He was drinking when a fight broke out inside the club and he left. While he was standing outside others came out as well. *Id.* at 548. He stayed outside and eventually saw some people “running as if they were looking for something toward 14th and U.” *Id.*

Mr. 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.

A black car arrived and a black man got out of it, and when “some youngsters” threw bottles at the car it left him behind. *Id.* at 550-1. Mr. Aleman testified that he then saw some “youngsters,” including Luis Perez, Wilmer and Oscar Villatoro, leave on foot and others, including Mr. Velasquez, Mr. Salamanca and Douglas Ventura, leave in a red car with Mr. 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 the trial that when the two groups reached Mr. 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, Mr. 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’⁶ 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?”

⁶ José Perez.

“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 Mr. Aleman stated that he had been drinking Long Island ice teas⁷ at the Diversite Club. *Id.* at 565. He stood outside the club smoking a cigarette for about five minutes as the club closed and everyone left, but he did not recall seeing the altercation with the homeless man. *Id.* When he left the club he walked south on 14th Street. *Id.* at 566. When he was standing near the Diversite Club he was two blocks away from where Mr. Helm was attacked. *Id.* at 559-60.

He admitted that he first told jurors that Mr. 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 Mr. Velasquez, Douglas Ventura, Mr. Robles, Abuelo and Mr. Villatoro attacked Mr. Helm. *Id.* at 562-3. But, he said, Mr. Bonilla was not involved. He added that his memory of events the morning of March 15, 1998 may be impaired because he had been drinking. *Id.* at 564.

José Benitez’s Testimony

Mr. Benitez arrived at the Diversite Club at 10:30 p.m. March 14, 1998. Tr. 10/28/98, 570. When the fight broke out inside the club and the security people told everyone to leave, 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. Mr. Benitez and José Salamanca then became involved in the fight, as did José Navarete and Abuelo. *Id.* at 574. Mr. 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 Latino men to stop attacking the street person. But the Latino men turned on the four. One of the black men threw a punch but missed

⁷ 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.

Mr. Benitez and, seeing this, Mr. Navarete and Abuelo hit him. *Id.* at 575. The Latino men began throwing 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 Mr. Navarete, Luis Perez, Oscar Villatoro, José Salamanca⁸ and Abuelo. Mr. Benitez's group began following Mr. Helm toward Florida Avenue, but could not catch up. But the man picked up an iron rod and called to them. *Id.* at 576.

Mr. Benitez then saw Mr. Bonilla drive by with Mr. Robles, Mr. 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 Douglas 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 then testified about a conversation he had with Mr. Robles shortly after they were arrested in which Mr. Robles admitted having a knife. *Id.* at 587.

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."

Id. at 587-8.

Before the prosecutor elicited the testimony Mr. Bonilla's trial counsel objected that it was hearsay inadmissible against Mr. Bonilla. *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

⁸ Other eyewitnesses said Mr. Salamanca was in Mr. Bonilla's car, not with the group on foot.

are in the car.” *Id.* at 584-5. After the testimony the Court instructed jurors that they could consider Mr. Robles’s admission to Mr. Benitez only against Mr. Robles.⁹ *Id.* at 588-9.

On cross-examination Mr. 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 Mr. Helm. Tr. 10/29/98, 624. Mr. Benitez admitted kicking Mr. Helm along with Douglas Ventura and Mr. Robles after Mr. 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

Myra Rivera’s Testimony

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

Ms. Rivera left the Diversite Club with Ms. Garcia, Ms. Burca, Ms. Leonzo and Mr. Gueverra 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 Ms. Garcia left first and she prevented Ms. Garcia from following the men who were running. *Id.* at 788. Then Ms. Leonzo, Ms. Burca and Mr. Gueverra met them at the alley on the north side of the Diversite 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 Ms. Garcia’s hand so “she would hurry up.” *Id.* at 785. She saw people running outside the club, but did not see any

⁹ The Court made it clear that the statement was not being admitted as a co-conspirator statement. *Id.* at 592-5.

fight. *Id.* at 779. The taxi dropped them off at Ms. Rivera's apartment and Ms. Garcia stayed there until about 6 a.m. *Id.* at 786.

According to Ms. 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 (emphasis added).

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 Ms. Rivera “a photograph of a man on 14th Street whose guts were on the street.” *Id.* at 797. Ms. 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.

Gilfredo Lopez’s Testimony

Mr. Lopez became acquainted with Mr. Benitez at the D.C. Jail. 11/2/98, 40. He testified that Mr. Benitez stated that he was cooperating with the government and “I’m going to tell them that ... I didn’t have nothing to do with it and get the other co-defendants involved with the incident they were being charged with.” *Id.* at 41. According to Mr. Lopez, Mr. Benitez said he, not Mr. Robles, gave the knife to Catinga. *Id.* at 42.

José Salamanca’s Testimony

Mr. Salamanca said he started the evening March 14, 1998 at the Lopez pool hall at 14th and W Streets, N.W., with two friends. 11/2/98, 72. At 8:30 or 9 p.m. they went next door to Judy’s bar and drank beer for about two hours. *Id.* at 72-73. Next they took a taxi and arrived at the Diversite 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 Mr. 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 Mr. Salamanca left with a woman named Claudia and then waited for Mr. Bonilla, who was talking to two other women. Mr. Bonilla told Mr. 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 Mr. Salamanca into it and went away for a few minutes. When Mr. Bonilla returned to the car Mr. Velasquez asked for a ride, as did Mr. Robles and Douglas Ventura after him. *Id.* at 78-79. Mr. 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,” a gambling hall. *Id.* at 79. Mr. Bonilla took Mr. Salamanca home. *Id.* at 80. Mr. Salamanca did not learn about the attack on the homeless man or the homicide until the afternoon of March 15. *Id.* at 83.

On cross-examination Mr. Salamanca said he remembered seeing Mr. Bonilla get out of the car and close the doors, and then drive up 14th Street. *Id.* at 90.

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 Mr. Bonilla to take him to the gambling house?

A. The way he told, he just tell him, yes, take me to the Triviada.

Q. Take me to the —

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.

Mr. Salamanca said during cross-examination that he saw Oscar Villatoro arguing with a homeless man near the bus stop across the street from the Diversite Club. *Id.* at 104. He did not see much of the argument because Mr. Bonilla came and put him in the car and he was drunk. *Id.* at 104-5. Mr. Bonilla “put the seat out and [I] laid back and go to sleep.” *Id.* at 110.

Mr. Salamanca recalled the car stopping and he recalled that Mr. Robles, Douglas Ventura and Mr. 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 did not recall seeing the three men in the back but knew who they were by their voices. *Id.* at 113-4. He denied hearing Mr. Robles and Mr. Velasquez fighting over a knife in the back seat. *Id.* at 114-5.

The next thing Mr. 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 115. When asked about the men in the back seat he said “I think they were out already.” *Id.* at 116. He next recalled when Mr. Velasquez returned to the car and ordered Mr. Bonilla to drive him to the Triviada. *Id.* at 118.

Santos Bonilla’s Testimony

Mr. Bonilla took his girlfriend out to dinner March 14, 1998 at El Paraiso in 14th Street. Tr. 11/2/98, 125-6. 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 Diversite Club. *Id.* at 126. He went to the bar and saw Mr. 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. Mr. Salamanca had asked for a ride while they were in the club. *Id.* While he was outside the club Mr. Velasquez, Douglas Ventura and then Mr. Robles asked him to drive them home as well because they did not have money for a taxi and it was cold outside. *Id.* at 127-8. He had given all of them rides in the past and never had a problem as a result. *Id.*

Mr. Bonilla said he did not know any of the men were armed and he did not know Mr. Velasquez or Douglas Ventura to carry weapons. *Id.* at 128.

As he drove north on 14th Street to take his passengers home Mr. 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 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 was waiting Mr. Velasquez returned to the car and ordered him to drive to the Triviada. Mr. Bonilla said he did not let Mr. Velasquez into the car, but the doors were unlocked. He was nervous because he had just seen Mr. Velasquez stab a person “and he told me to take him somewhere in sort of an aggressive way.” *Id.* at 132. Mr. 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 Mr. 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 scene the Latino men who had been chasing Mr. Helm on foot had not reached him yet, but Mr. Velasquez and Douglas Ventura were fighting with him and Mr. 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 Mr. Velasquez stabbing Mr. Helm. *Id.* at 148.

When 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 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." *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.*

ARGUMENT

The government's theory of its case against Mr. Bonilla was that he knew when he left the Diversite Club with Mr. Velasquez, Douglas Ventura and Mr. Robles in the back seat of his car that at least one of them was armed, and he set out to assist them in attacking the homicide victim. In his opening statement the prosecutor stated:

... Warren Helm now is all by himself facing up to ten men, including these men, and he runs for his life. He runs up 14th Street.

And then what happens? These men pursue him. They pursue him up 14th Street.

At one point the group breaks up and several men get into a car driven by Santos Bonilla, “Manotas”. It’s his car.

Tr. 10/27/98, 300. In describing Mr. Benitez’s testimony, the prosecutor stated:

Now Mr. Benitez was one of the men who chased Mr. Helm on foot. So he had no idea what happened inside of the car. But there was a conversation between Mr. Benitez and Mr. Robles and Mr. 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.

Id. at 305-6. Then the prosecutor explained how the five defendants could be convicted of murder even though none of them stabbed Mr. Helm. He said “ ‘Manotas’, as I mentioned earlier, Mr. Bonilla, he’s the one who brought the stabbers after Mr. Helm.” *Id.* at 307.

In his final argument the prosecutor argued that:

First of all, you’ve heard evidence that all of these men were involved in chasing Mr. Helm, that all of these men, when they caught up to him, were around him when he was being beaten, and that all of these men who are on trial for murder actually physically participated in that assault.

Tr. 11/3/98, 208. He went on to say: “[a]nd that’s what this case [] boils down to. It’s about mob violence. Maybe you look at someone like Oscar Villatoro or Santos Bonilla the other day and you think to yourself, goodness gracious, murderers?” *Id.* at 211. Then he said Mr. Bonilla

drives them there to the crime scene, he chases after Mr. 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.

Id. at 214. According to the prosecutor:

So 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. Then the prosecutor talked about Mr. Aleman's testimony:

Mr. Aleman identifies each and every one of the defendants on trial for murder as having participated in the murder. Now, some of you might be saying, well, Mr. Asuncion, Judge Abrecht earlier told us that [] we would be seeing no transcripts of this trial, and obviously she was right. You're not going to have transcripts of this trial. But there will be a transcript which comes into evidence. That's Government's Exhibit Number 62, and that's grand jury testimony of Hugo Aleman.

Now, some of you might be saying, well, that's good and fine, Mr. Asuncion, but what does it mean? How can I use it? Well, you know what? This is sworn testimony under oath. And you can consider it as substantive evidence.

So when Mr. Aleman says that Cholo was hitting the man who died, you can believe that. And when he talks about Gato pulling the man down — the man, after he was caught pulling him 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.

Id. at 218-9.

The prosecutor argued repeatedly that Mr. Bonilla participated in the assault on Mr. Helm, and did not merely transport the attackers. The basis for this argument was Hugo Aleman's Grand Jury testimony, which Mr. Aleman recanted on the witness stand at trial. In closing, the prosecutor urged jurors to treat the Grand Jury transcript as substantive evidence to convict Mr. Bonilla.

But the prosecutor and police obtained that testimony through systematic harassment and threats that Mr. Aleman, who was 17 years old at the time, would be prosecuted as a participant in the attacks if he did not cooperate. Ms. Garcia had testified in the Grand Jury that Mr. Aleman was involved in the attack on Mr. Helm. GJ Tr. 3/17/98, 14. She claimed to have been present later in the day March 15, 1998 when Mr. Aleman admitted participating in the assault. *Id.* at 18-19, 20-22. Despite that, the prosecutor did not inform Mr. Aleman at the beginning of his testimony that the government considered him to be a target of its investigation. It merely used the threat of prosecution to coerce him to provide helpful testimony. Implicit in the government's actions was the added threat that Mr. Aleman, a non-citizen, risked deportation if he was

convicted of either participation in the crime or of refusing to tell the Grand Jury what investigators claimed he knew about the homicide.

According to Mr. Aleman, during the two-and-a-half weeks between the homicide and his appearance before the grand jury, he was repeatedly summoned to the U.S. Attorney's office, where he was questioned by the prosecutor, Inv. Torres and another detective. *See Affidavit of Hugo Aleman*, Addendum A. Each time he went, after the interview he received a document directing him to report to the prosecutor's office on another date. One or two times, he received documents directing him to report to the Grand Jury. He repeatedly told the prosecutor and the detectives that he was drunk when he left the club, that he took a taxi home, and did not witness the fatal assault. Up until the morning of April 1, 1998 Mr. Aleman stuck to his story.¹⁰ In his

¹⁰ Near the beginning of his Grand Jury appearance the following occurred:

Q. Now before I get to what happened outside, let me first ask you whether the first time you and I met about this case, to talk about this case, whether you told me the truth about what you had seen.

A. No.

Q. In other words, the first time we talked about this case you lied to me; is that correct?

A. That is right.

Q. And you lied to Investigator Torres, and Detective Gainey, as well, did you not?

A. Yes.

...

Q. And then do you remember last week we were back at the office and you told Investigator Torres that, in fact, you had been outside of the club but you were too drunk to remember anything? Remember that?

A. Yes.

Q. And, as a matter of fact, that is what you told me earlier today when we saw each other today?

A. Yes.

Q. But that wasn't the truth either, was it?

A. Right.

Q. Now remember the first thing I told you when I saw you — regarding this case — was I only wanted the truth from you. Remember that?

A. Yes.

Continued on next page ...

trial testimony Mr. Aleman again asserted that he was too drunk to remember what happened and that he got in a taxi near the entrance to the Diversite Club, about three blocks from where the fatal assault took place, and went home, but the prosecutor impeached him with his Grand Jury testimony, which was placed in evidence.

The treatment of Mr. Aleman was not an isolated incident in this case. It is clear from Myra Rivera's trial testimony that she was harassed in the same way. The prosecutor acknowledged that he and police had several interviews with Ms. Rivera, and in some of them, in an effort to force her to do what he wanted, police showed her graphic pictures of the victim, who had been eviscerated by his attackers. But the prosecutor lacked sufficient leverage to compel Ms. Rivera to testify as he wished, despite repeated attempts. *See above at 11*. As a result the prosecutor refused to put her before the Grand Jury, where she would have testified that she and Rosa Garcia left the club in a taxi before the attack on Mr. Helm, and that Ms. Garcia had been drinking, which Ms. Garcia denied both in the Grand Jury and at trial. GJ Tr. 3/17/98, 30, Tr. 10/27/98, 361. Had he put Ms. Rivera before the Grand Jury and she testified there as she did at trial, the prosecutor would have been required to disclose the transcript pretrial under *Brady v. Maryland*, 373 U.S. 83 (1963), because it would have been exculpatory.

THE PROSECUTOR ABUSED HIS POWER BY SUMMONING MR. ALEMAN TO HIS OFFICE

The United States abused the judicial process of the Grand Jury in this case and coerced Mr. Aleman to testify falsely in the Grand Jury in violation of Mr. Bonilla's right to due process

... Continued from previous page.

Q. And that's all I want from you today. Do you understand that, Mr. Aleman?

A. I do.

Q. And, unlike then, when you were not under oath, at this very moment you are under oath; do you understand that?

A. Yes.

GJ Tr. 4/1/98, 7-8

of law. The prosecutor had no authority to use a grand jury subpoena to compel any individual to attend a witness conference in his office.

Subsequent to this case the U.S. Attorney for the District of Columbia has conceded that it is improper for prosecutors to do so. *See In Re Grand Jury Subpoenas to T.J.*, SP No. 2802-00, Government's Opposition to Motion To Quash and for Injunctive Relief at 5 (attached as Addendum B). *See, also*, "Prosecutors Nix Witness Strategy: Subpoena Bypassed Grand Jury, Routed Witness to U.S. Attorney," *Legal Times*, Dec. 15, 2000. (Addendum C). Such use of a grand jury subpoena has been condemned as unlawful in decisions binding on the U.S. Attorney for the District of Columbia. Almost fifty years ago, the U.S. Court of Appeals for the District of Columbia Circuit admonished the U.S. Attorney's Office to cease such practices. *Durbin v. United States*, 221 F.2^d 520 (D.C. Cir. 1954).

In *Durbin*, the appellant had been subpoenaed to appear before the grand jury on four different occasions in the course of one week. Each time, he was taken to the assigned prosecutor's office, where he was questioned by the prosecutor, F.B.I. agents, or both and was released without a grand jury appearance. At trial, the prosecutor stated that he did not take appellant before the Grand Jury because he was not satisfied with appellant's statement. *Id.* at 521. Condemning the practice, the D.C. Circuit wrote:

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure." They do not recognize the United States Attorney's office as a proper substitute for the grand jury room and they do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's office.

It was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition. Nor is such use excusable upon the mistaken notion that a member of the United States Attorney's staff has the duty to be satisfied with what the witness will tell the grand jury before he allows the witness to testify before it, and may therefore use the subpoena as an oppressive tool to achieve such satisfaction.

Id. at 522 (footnote with citation omitted). *See also United States v. DiGilio*, 538 F.2^d 972, 983-85 (3d Cir. 1976) ("Rule 17 does not, in our view, authorize the use of grand jury subpoenas as a

ploy for the facilitation of office interrogation”). *Cf. In re Melvin*, 546 F.2^d 1, 5 (1st Cir. 1977) (U.S. Attorney “may not use his subpoena powers under Rule 17 to gather evidence without the participation of the grand jury”).

The Department of Justice Manual, in its section on “Pre-Appearance Interviews” of witnesses, states:

Neither the U.S. Attorney or his/her Assistants are empowered to issue subpoenas directing witnesses to appear at the U.S. Attorney’s Office. *United States v. Thomas*, 320 F. Supp. 527 (D.C.D.C. 1970). The usual procedure is for the U.S. Attorney to request that the witness appear at the U.S. Attorney’s Office a few days prior to the witness’ scheduled appearance in court.

Department of Justice Manual, § 1-14.111 (1990-1 Supp.) (emphasis in original).

This procedure comports with the decisions of the many federal circuit courts that have held that it is improper for a government attorney to use a trial subpoena to compel attendance at a pretrial witness conference. *See, e.g., United States v. LaFuente*, 991 F.2^d 1406, 1411 (8th Cir. 1993) (“The government may not use trial subpoenas to compel prospective trial witnesses to attend pretrial interviews with government attorneys); *United States v. Keen*, 509 F.2^d 1273, 1274 (6th Cir. 1975) (“no question” that government’s use of subpoenas to compel witnesses to attend interview was “highly improper”); *United States v. Standard Oil Company*, 316 F.2^d 884, 897 (7th Cir. 1963) (government may not subpoena witnesses to the U.S. Attorney’s office for private interrogation by government counsel). There is no difference in the grand jury context. *See LaFuente, supra*, 991 F.2d at 1411 (equating grand jury proceedings, preliminary hearings, and trial, for these purposes). A prosecutor abuses process when he uses a grand jury subpoena to compel a witness’s attendance in his office, for the purpose of conducting a “pre-hearing” interview.

The defendant in *Thomas* sought to end the admitted practice of the U.S. Attorney’s Office of sending a judicial-looking “summons” to prospective witnesses, directing them to appear in the prosecutor’s office for witness preparation. The *Thomas* court held that it is improper for a prosecutor to send any document that could be construed by a layperson to compel attendance at a witness conference. The court noted that the precise practice at issue had

been labeled “unprofessional conduct” by the American Bar Association. It stated: “The ‘summons’ here in question is an offensive document under the A.B.A. Standards, *supra*; and although these standards are not technically binding on the Court, we are convinced that this ‘summons’ is a usurpation of the judicial power.” *Id.* at 529.¹¹ The Court ordered: “that the United States Attorney shall cease sending to prospective witnesses whom he wishes to interview before the trial date *any form which includes the word ‘Summons’ or any derivative thereof or which in its format and language resembles an official judicial subpoena or similar judicial process or which conveys the impression that non-appearance is subject to sanction.*” *Id.* (emphasis added).

As Justice Brandeis wrote:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

**THE PROSECUTOR COERCED MR. ALEMAN WITH THREATS OF PROSECUTION
TO TESTIFY FALSELY BEFORE THE GRAND JURY AND KNOWINGLY USED
THAT TESTIMONY TO CONVICT MR. BONILLA**

Presenting false testimony to procure a conviction is a violation of the Due Process Clause of the Fifth Amendment. As the U.S. Supreme Court found in *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1934), the due process

requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by the State to procure the conviction and

¹¹ The D.C. Bar subsequently issued an ethics opinion coming to the same conclusion. District of Columbia Bar, Ethics Opinion No. 32 (March 29, 1977).

imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

In *Pyle v. Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942), appellant, like Mooney, charged that his murder and robbery convictions resulted from the prosecutor's use of testimony known to be perjured and government efforts to suppress testimony favorable to him. Pyle asserted that "one Truman Reynolds was coerced and threatened by the State to testify falsely against the petitioner and [] said testimony did harm to the petitioner's defense." *Id.* at 214. He charged as well that "one Lacy Cunningham who had been previously committed to a mental institution was threatened with prosecution if he did not testify for the State." *Id.* The Court said:

"Petitioner's papers . . . set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction. . . . These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.

Id.

The Supreme Court went further in *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2^d 9 (1957). Appellant, convicted of murdering his wife with malice and sentenced to death, claimed he was guilty only of murder without malice, a non-capital crime, because he committed the homicide in the heat of passion upon discovering the victim kissing a man late at night in a parked car. 355 U.S. at 28 – 29. At trial the prosecutor called Castilleja, the only eyewitness to the crime, to testify that he had a friendly, non-romantic relationship with the victim. He claimed that on the night of the killing he had given the victim a ride home at 2 a.m. and was sitting in his car with the lights off in front her house because he had car trouble. *Id.* at 29. After Alcorta's conviction became final, Castilleja issued a sworn statement that he had been romantically involved with the victim and they had had sexual intercourse several times during the weeks before she was killed. At a hearing Castilleja testified that he had informed the prosecutor of this before trial and was instructed that "he should not volunteer any information about such intercourse but if specifically asked about it to answer truthfully." *Id.* at 30 – 31. The prosecutor admitted that Castilleja's post-trial admissions were accurate and that he had not informed the

defense of the affair, and excluded information about it from Castilleja's written statement, which had been disclosed to Alcorta. *Id.* at 31. The Supreme Court concluded that:

Under the general principles laid down by this Court in *Mooney*... and *Pyle* ... petitioner was not accorded due process of law. It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of "sudden passion" in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castilleja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to "murder without malice" precluding the death penalty now imposed upon him.

Id. at 31 – 32.

In *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2^d 1217 (1959), the government called as a witness at Appellant's trial a codefendant, Hamer, who had pled guilty and been sentenced to 199 years for murder. When asked by the prosecutor whether he had been promised anything in return for his testimony, Hamer replied that he had not. *Id.* 360 U.S. at 265. After Napue and a third codefendant were convicted, the prosecutor in all three cases filed a writ of error *coram nobis* asking that Hamer's sentence be reduced because he had assisted in the other prosecutions. *Id.* at 266. Napue sought review of his conviction, arguing that the prosecutor knew Hamer had lied and made no effort to correct the error. *Id.* at 267.

The Supreme Court reversed a state Supreme Court ruling denying Napue relief, stating:

The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. 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.

Id. at 269. The Court went on to say, "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he

knows to be false and elicit the truth.” *Id.* at 270 (quoting *People v. Savvides*, 1 N.Y. 2^d 554, 557, 136 N.E.2^d 853 (1956)).

Thus, the Supreme Court has made it abundantly clear that prosecutors may not coerce a witness to testify falsely at trial or knowingly elicit perjured testimony to obtain a conviction. If they do, the defendants’ Fifth Amendment Due Process rights have been violated. “A defendant is [] entitled to a new trial if there is any reasonable likelihood that false testimony could have affected the judgment of the jury.” *Felder v. United States*, 595 A.2^d 974, 977 (D.C. 1991). *See, also, Keys v. United States*, 767 A.2^d 255, 261 (D.C. 2001).

To succeed on his claim Mr. Bonilla bears the burden of establishing that: (1) the prosecution's case included false testimony; (2) the prosecution knew, or should have known, of the falsehood; and (3) that the false testimony could have affected the judgment of the jury.¹² *Card v. United States*, 776 A.2^d 581, 602 (D.C. 2001).

Mr. Aleman’s affidavit demonstrates that Mr. Bonilla has met the first and second criteria. The prosecutor used threats of prosecution to induce Mr. Aleman to testify in the Grand Jury that he saw the assault on Mr. Helm, even though he had repeatedly maintained that he was intoxicated when the Diversite Club closed March 15, 1998, and took a taxi home shortly thereafter. When Mr. Aleman again testified at trial that he was not present near the scene of the assault and that he had been drunk, the prosecutor impeached him with his coerced testimony.

In his affidavit Mr. Aleman clearly states that in the Grand Jury he testified that he was present during the attack and recalled who was involved only because he was repeatedly called into the prosecutor’s office and interrogated by the prosecutor and detectives. He says they threatened him with prosecution for being a participant in the crime, told him things about the attack, and insisted that he knew about it. He further states that he felt pressured and eventually

¹² This is a less stringent test than that applied in determining whether a *Brady* violation was material. *See below at 27.*

decided that he had no recourse other than to lie in the Grand Jury to avoid prosecution. *Affidavit of Hugo Aleman* at 2.

Mr. Aleman's false Grand Jury testimony clearly could have and likely did affect the jury's verdict against Mr. Bonilla. The prosecutor introduced no testimony admissible against Mr. Bonilla that he knew one of his back-seat passengers was armed when they got in the car. He testified that he did not know one of them carried a knife until they exited his vehicle to attack Mr. Helm. Mr. Bonilla stated that he had no reason to believe any of them was armed because patrons of the Diversite Club were checked for weapons before they entered. He did not see any of them with knives after the club closed and everyone left.

Mr. Bonilla testified, and Mr. Salamanca corroborated, that he got out of the car and closed the doors left open by the back-seat passengers. This testimony is rebutted only by Mr. Aleman's testimony that Mr. Bonilla was involved in the fight and punched the victim in the face.

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 the scene Mr. 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 Mr. Velasquez away from the scene. Therefore, he could not rely on proving beyond a reasonable doubt that Mr. Bonilla aided and abetted the attackers merely by transporting them. The jury could quite reasonably have concluded that Mr. Bonilla did not "participate in the crime as something he wished to bring about," and that he did not "intend[] by his actions to make it succeed." Instruction 4.02, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, 4th Ed., 1993, 96. Similarly, it could reasonably have concluded that he did not intend to join in any agreement that may have been reached by his back-seat passengers and, therefore, he was innocent of conspiracy. Instruction 4.93.

Because the prosecutor relied heavily in his opening statement and his final argument on Mr. Aleman's Grand Jury testimony, and urged the jury to use the Grand Jury transcript as

substantive evidence that Mr. Bonilla participated in the attack on Mr. Helm, Mr. Aleman's coerced, false Grand Jury testimony very likely contributed to Mr. Bonilla's conviction. Thus he has met the third criterion enunciated by the Court of Appeals in *Card, supra*.

THE PROSECUTOR VIOLATED THE RULE OF *BRADY V. MARYLAND* BY FAILING TO DISCLOSE TO DEFENSE COUNSEL BEFORE TRIAL EXCULPATORY INFORMATION CONCERNING MR. ALEMAN'S STATEMENTS OUTSIDE THE GRAND JURY AND THAT HE WAS INTOXICATED

In a discovery letter dated May 20, 1998, citing *United States v. Enright*, 579 F.2^d 960, 989 (6th Cir. 1978), trial counsel requested "Any prior inconsistent, non-corroborative, or other witness statements which will not reflect the witness' trial testimony." He further requested "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...."

At the time the prosecutor was well aware that Mr. Aleman was under the influence of alcohol early on March 15, 1998 and that his Grand Jury testimony represented a marked departure from the statements he had made to investigators up to the morning he testified. But the prosecutor did not disclose any of this information until he provided the Grand Jury transcript as Jencks material when Mr. Aleman took the stand at trial.

Information that Mr. Aleman had changed his story and that he was drunk was material to whether Mr. Bonilla was guilty of the crimes charged and the prosecutor's failure to disclose it pretrial upon request violated Defendant's due process rights. *Brady, supra*, 373 U.S. at 87. Evidence is material, and constitutional error flows from suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2^d 481 (1985). Such evidence went both to the truth of Mr. Aleman's Grand Jury testimony and to his credibility as a witness.

Even if it were considered impeachment evidence, the prosecutor had a duty to disclose such information. *See Giglio v. United States*, 405 U.S. 154, 92 S. Ct. 775, 31 L. Ed. 2^d 1 (1972);

Lewis v. United States, 408 A.2^d 303, 307 (1979). “[I]mpeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial.” *Pennsylvania v. Ritchie*, 490 U.S. 39, 65, 107 S. Ct. 989, 94 L. Ed. 2^d 40 (1987)(Blackmun, J., concurring in judgment).

**EVIDENCE THAT THE PROSECUTOR COERCED MR. ALEMAN TO TESTIFY
FALSELY IN THE GRAND JURY IS NEWLY DISCOVERED.**

In seeking a new trial based on newly-discovered evidence, defendants ordinarily must satisfy the five-part test enunciated in *Thompson v. United States*, 188 F.2^d 652 (1951) and *United States v. Heard*, 245 A.2^d 125 (D.C. 1698). He must show that:

(1) the evidence was newly discovered since the trial; (2) the defendant was diligent in attempting to procure the newly discovered evidence; (3) the evidence relied on is not merely cumulative or impeaching; (4) the evidence is material to the issues involved; and (5) the evidence is of such a nature that in a new trial it would probably produce an acquittal.

Smith v. United States, 466 A.2^d 429, 432 (D.C. 1983). But when the newly-discovered evidence shows that the prosecutor knowingly employed false or perjured testimony to obtain a conviction, or suppressed evidence in violation of *Brady*, a far less stringent test applies.

[T]he fact that such evidence was available to the prosecutor and was not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that the newly discovered evidence probably would have resulted in an acquittal.

United States v. Agurs, 427 U.S. 97, 111, 96 S. Ct. 2392; 49 L. Ed. 2d 342 (1976).

As noted above, because the prosecutor knowingly introduced false testimony to obtain Mr. Bonilla’s conviction, this Court must reverse his conviction “if there is any reasonable likelihood that the false testimony could have affected the jury’s verdict.” *Bagley, supra*, 473 U.S. at 679 n. 9. To the extent that the conviction resulted from the government’s failure to disclose exculpatory evidence, this Court must reverse if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* at 682.

MR. BONILLA LIKELY WOULD BE ACQUITTED AT A NEW TRIAL

As noted above at 27, the government introduced no direct evidence that Mr. Bonilla was aware when the back-seat passengers entered his car that one of them was armed, or that he willingly transported Mr. Velasquez away from the murder scene. If the prosecutor were prohibited from impeaching Mr. Aleman with his Grand Jury testimony Mr. Bonilla likely would be acquitted.

During trial the government impeached Mr. Bonilla with a videotaped statement he gave police shortly after his arrest. That statement can be read as including an admission that he knew before they left his car that Mr. Velasquez and Douglas Ventura were armed. Transcript of Videotaped Statement of Santos Felipe Bonilla, 3/27/98, 23 (Addendum D). But earlier in the interview he told investigators none of his back-seat passengers had been involved in attacking the homeless person. *Id.* at .18. He stated twice that he believed when he drove away from the Diversite Club that the altercation had ended. *Id.* at 14, 19. Furthermore, he stated that he did not see Mr. Helm running up 14th Street as he drove north and only became aware of him after he stopped in response to an order from his back-seat passengers. *Id.* at 25. When he saw his passengers stabbing Mr. Helm he got out of the car, shut the rear doors, and attempted to leave but Mr. Velasquez caught up with the car. *Id.* at 30 – 31.

Even if it credited the videotaped statement as to whether Mr. Bonilla knew his back-seat passengers were armed over his trial testimony that he did not know, a reasonable jury could conclude that Mr. Bonilla was not guilty of first-degree murder or conspiracy.

CONCLUSION

For the reasons stated above and any others that may appear to the Court after a hearing, Movant respectfully requests that the Court vacate his conviction and order a new trial because there is a reasonable possibility that the jury convicted him of first-degree murder and conspiracy on the basis of false testimony the prosecutor knowingly introduced at trial and suppressed exculpatory evidence in violation of Mr. Bonilla's Fifth Amendment right to due process of law.

Respectfully submitted,

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Attorney for Bonilla, Santos

ADDENDA

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- A. Affidavit of Hugo Aleman
- B. Excerpt — Government’s Opposition to Motion To Quash and for Injunctive Relief,
In re Grand Jury Subpoena of T.J., SP No. 2802-00
- C. “Prosecutors Nix Witness Strategy” Subpoena Bypassed Grand Jury, Routed Witness
to U.S. Attorney, *Legal Times*, Dec. 15, 2000
- D. Excerpt — Transcript of Videotaped Statement of Santos F. Bonilla, 3/27/98

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Santos F. Bonilla, certify that on November 5, 2001 I served a true copy of the attached Motion for New Trial by first-class mail on the person(s) listed below.

Robert S. Becker

John R. Fisher
Assistant U.S. Attorney
555 Fourth Street, N.W.
Washington, D.C. 20001