

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

UNITED STATES,
vs.
SANTOS F. BONILLA.

No. F 2332-98
Hon. Mary Ellen Abrecht
Hearing: December 19, 2005

MEMORANDUM OF LAW

In an Order filed October 28, 2005 the Court requested additional briefing on several issues related to the scheduled hearing on Defendant Santos F. Bonilla's motion pursuant to D.C. Code § 23-110. Specifically, the Court asked for legal authority supporting the admissibility of Rosa Garcia's uncharged criminal conduct by defense counsel to impeach her credibility. It asked, in effect, whether defense counsel had a good-faith basis, despite the government's failure to disclose Garcia's illegal status, to cross-examine her about her immigration status, and whether counsel made a tactical decision not to impeach her for bias arising from her desire to curry favor with the government. The Court asked the extent to which a witness's immigration status is a permissible area of bias cross-examination. Finally, the Court asked when Garcia's bias developed, and if it developed after she testified in the grand jury, whether that affects the admissibility of her uncharged criminal conduct and bad acts to demonstrate her bias.

ROSA GARCIA WAS BIASED FROM THE OUTSET

Mr. Bonilla disagrees with the chronology of events set out in the Court's Order for Additional Briefing. Order, 4 – 5. Although the Court addressed this issue last, it underlies resolution of several of the other issues, and Mr. Bonilla will address it first.

At about 7:30 p.m. on March 15, 1998 Garcia gave a written statement to Det. Pamela Reed, in which she stated,

when I was coming out of my house around 5 or 6 in the morning. I was staying at 14th and W with my friend. I came out to see if Chofer¹ was coming home. Abuelo, Mexico,²

¹ Chofer is José Benitez, Garcia's boyfriend.

² José Navarette.

and Douglas.³ Douglas said “did you know that your boy got arrested today”. I said “no, why”. He said “because he got arrested for beating up the black man”.

P.D. 119 – Statement of Rosa E. Garcia, 2 – 3.

Near the beginning of Garcia’s appearance before the grand jury, when the prosecutor asked whether anyone forced her to testify, she responded, “I came here by myself, because this is a crime that somebody that didn’t do anything bad is in jail for no reason, for not doing anything he didn’t do.” G.J. Tr. 3/17/98, 5. “[E]very night when I go to sleep, I can not go to sleep, because I seen my boyfriend in jail and I see Catinga stabbing the man,” she testified. *Id.* at 28.

About her early morning encounter with Douglas, Garcia said,

That happened ... at W and 14th there’s the little store that is right there, the 24-hour store. I was going to go there to buy food and see if Chofer was around there.

When I was on my way there I saw [Douglas] coming out of this building where is achiviada at. Then, that’s when he stopped me — him, Muell[a],⁴ Mexico, stopped me and said, “Oh, China,⁵ did you know your boy’s locked up?” And so I said, “No.” Then

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...

... Then, he told me because we were beating up the black man and you know, he told me everything about it. And I said, “But he didn’t kill it, Catinga⁶ did.” And he said, “No. Catinga didn’t do it, I did. That’s when I know Douglas and Catinga both stabbed the man, but I didn’t see Douglas stabbing the man.”

Id. at 28 – 9.

She described a conversation sometime later on March 15, 1998 near 14th Street and Florida Avenue, N.W.: “everyone went up there and they said, ‘Oh, yeah. You know about the black man that died? They blaming Chofer and Carlos⁷ and we going to say that we didn’t saw anything and if we were there in the fight that we didn’t know who killed him....’ ” *Id.* at 19, 21. She attributed these statements to Hugo Aleman,⁸ Trebi, and others.

³ Douglas Ventura.

⁴ José Salamanca.

⁵ Rosa Garcia.

⁶ Walter Velasquez.

⁷ Carlos Robles Benevides.

⁸ Loco Hugo.

Garcia claimed that after she gave her written statement Simba⁹ and Muella “threatened me that if I ever came to Torres,¹⁰ or somebody else, and tried to take my boyfriend out that something was going to happen to me or my family.” *Id.* at 24 – 5. According to Garcia, Simba “told me that he was going to do something to me if I ever said anything about me listening to the conversation they had said, that they wanted Chofer and Carlos to be in jail, that they were going to do something to me.” *Id.* at 26 – 7.

But at trial Garcia testified that she went to talk to Torres because Muella and Simba threatened her at the bus stop between 2 p.m. and 3 p.m. on March 15. *Tr.* 10/27/98, 359 – 60, 363. Despite the fact that Garcia claimed to have been motivated by the threats to seek Torres’s assistance, she did not tell him on March 15th that she had been threatened. *Id.* at 373. But by the time she appeared before the grand jury March 17th she asked to be put in witness protection. *Id.* at 375.

Garcia’s actions and testimony in the grand jury and at trial refute the government’s claim that her bias developed after she gave her written statement and testified before the grand jury. Garcia’s motive from the very beginning was to help Benitez by implicating others she considered to be more guilty than him, and to retaliate against individuals she perceived to have benefited from her boyfriend’s arrest. Concern for her safety motivated her to curry favor with the government from the day of the homicide forward.

The government has acknowledged that after Garcia testified in the grand jury she made false statements to investigators concerning her immigration status. She provided them a fake passport and Social Security number, but as the Court noted, the government did not state when Garcia did so, or when it discovered that the passport and social security number were fraudulent. *Id.* at 4. As a result, Mr. Bonilla cannot address the issue of when that criminal conduct became an additional basis for concluding that she was biased against him and his codefendants.

⁹ José Ventura.

¹⁰ Det. Norberto Torres.

**THE ADMISSIBILITY OF UNCHARGED CRIMINAL CONDUCT AND BAD ACTS TO
IMPEACH GARCIA’S CREDIBILITY**

Garcia’s criminal conduct regarding her request for admission into witness protection is relevant in at least two respects to Mr. Bonilla’s defense, and would be admissible to impeach her credibility. It was directly related to the charges set out in the indictment, and it demonstrates her lack of credibility in relation to this case.

Although Salamanca is the only codefendant charged with assault and obstruction of justice related to the alleged attack on Garcia, the government claimed in its Opposition that Mr. Bonilla threatened Garcia as well, Gov’t Opposition, 19 n. 21, Exh. 6. As Mr. Bonilla noted in response, Garcia must have been the source of that accusation. Reply, 5. Furthermore, from the outset the government’s theory of this case, expressed in argument to the jury and presentation of testimony, has been that the homicide and attempts to silence Garcia were a joint effort by all of the defendants, who were members of a gang.

“Defense counsel must have the opportunity on cross-examination to reveal ‘possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.’ ” *Sherer v. United States*, 470 A.2^d 732, 736 (D.C. 1983)(quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). The Court of Appeals held that “a witness may be cross-examined on a prior bad act that has not resulted in a criminal conviction [] where: (1) the examiner has a factual predicate for such question, and (2) the bad act bears directly upon the veracity of the witness in respect to the issues involved the trial.” *Id.* at 378 (citing *United States v. Akers*, 374 A.2^d 874 , 878 (D.C. 1977); *Kitchen v. United States*, 221 F.2^d 832, 834 (D.C. 1955))(internal quotations omitted).

The government conceded the factual predicate for cross-examining Garcia about her lies and use of a false passport and fake Social Security number. Because Garcia accused Mr. Bonilla of threatening her, and the government urged jurors to view the homicide and subsequent attack on one of its key witnesses as group action, defense counsel would have a right to cross-examine Garcia about her uncharged crimes.

In assessing violations of the duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose “impeachment evidence, we consider the importance of the witness to the government's case, the credibility of the witness, and the value of the withheld evidence in undermining the witness' credibility.” *Bennett v. United States*, 797 A.2^d 1251, 1257 (D.C. 2002). In this case Garcia was a key government witness against Mr. Bonilla; in the early days of the investigation the prosecutor amassed ample evidence calling her credibility into question; and the fact that she lied and committed criminal acts to obtain a benefit from the government is powerful evidence undermining her credibility. To be sure, this evidence does not directly call into question whether Garcia witnessed the crime, as the withheld evidence in *Bennett* did. But the prosecutor also withheld information from other witnesses that Garcia left the area in a taxi before the homicide, preventing defense counsel from cross-examining her about whether she fabricated her entire account of the crime.¹¹

As the Court of Appeals recognized in *Dean v. Garland*, 779 A.2^d 911, 917 (D.C. 2001), false statements regarding an aspect of the transaction before the court are admissible to impeach a witness's credibility, even when they do not go directly to the substantive claim. “The fact that the Deans would be willing to give false information in an affidavit and alter a financial statement in order to secure a loan bore directly on their credibility as witnesses.” *Id.*

It is important to keep in mind that in the case before this Court Garcia is the complaining witness regarding the threats and obstruction of justice counts, and that she claimed Mr. Bonilla, as well as Mr. Salamanca, threatened her. As in *Garland*, her lies to investigators and the prosecutor in seeking protection go to her credibility as a witness in the underlying criminal case.

Confronted with her lies, use of the false passport and Social Security number for which she could be held criminally liable, potential perjury charges, and the possibility of removal from

¹¹ The government's reliance on *Brooks v. United States*, 396 A.2^d 200, 205 (D.C. 1978), is inapposite because in that case the uncharged perjury occurred months before the charged crime and the Court of Appeals held that, “[a]t best, appellant could have shown that Mrs. McDonald lied in the past in order to gain the state's permission to marry Clarence McDonald. Given the plethora of factors that could have motivated her other than an irreverence for truth and veracity, we cannot say that the judge below was incorrect in finding that the jury's verdict would not have been affected by such a line of questioning designed to impeach Mrs. McDonald's testimony.”

witness protection, Garcia understood that she had to conform her trial testimony to her written statement and grand jury testimony.

**THE ADMISSIBILITY OF UNCHARGED CRIMINAL CONDUCT AND BAD ACTS TO
SHOW GARCIA’S BIAS**

Mr. Bonilla addressed this issue in his Reply at page 5 – 6. There is no evidence in the record that Mr. Bonilla or his trial counsel knew that Garcia was an illegal alien. Garcia testified in the grand jury and at trial that she had known Mr. Bonilla only a few months, and nothing suggests more than a casual acquaintance. Mr. Bonilla’s lawyer would not have had a good-faith basis to question her immigration status. *Clayborne v. United States*, 751 A.2^d 956, 963 (D.C. 2000)(“examiner must have a reasonable factual foundation, such as the credible report of another witness or one's client, or at least a ‘well-reasoned suspicion’ that the circumstances indicating bias might be true.”).

In addition, in his *Rosser* letter dated May 20, 1998, defense counsel asked for “[a]ll information in the possession of the government indicating that ... (d) any government witness now has or has had any other liberty interest which the witness could believe or could have believed might be favorably affected by government action.” *Id.* at 4. “[I]t was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation” in the prosecutor’s subsequent letter acknowledged the *Brady* request *Strickler v. Greene*, 527 U.S. 263, 284 (U.S. 1999). *See, also, Banks v. Dretke*, 540 U.S. 668, 695 (2004)(“Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecutor represents that all such material has been disclosed. ...”).

Claiming that it had security concerns, the government did not disclose that Garcia would be a prosecution witness, and withheld her grand jury transcript and written statement until shortly before she testified. There is evidence in the record of prior proceedings that the Diversite Club was filled on March 15, 1998 to its legal capacity of 600 persons. It would have been impossible for Mr. Bonilla’s counsel to deduce that Garcia would be a key government witness,

especially if she left in a taxi before the homicide occurred, as Mayra Rivera testified and other witnesses confirmed in affidavits.

The Court specifically asks for defense counsel's comments regarding *United States v. Wong*, 78 F.3^d 73 (2^d Cir. 1996) and *Rivera v. United States*, 1999 U.S. Dist. LEXIS 4863, No. No. 97-Civ.-2853 (S.D.N.Y. April 14, 1999).¹² In that case the defense cross-examined a paid informant about more than \$80,000 he had received from the government, and confronted him with the fact that he had previously claimed falsely that he paid taxes on that money. In a subsequent, unrelated case the same informant was cross-examined about his failure to file tax returns for several years, and he again perjured himself. The government disclosed the perjury to the defendants in *Wong*, who sought new trials. The Second Circuit held that the new evidence of perjury was cumulative because the

jury was aware that Teixeira's testimony regarding his taxes was untrue, because Teixeira recanted it later in the cross-examination. Thus, on the one hand Teixeira swore that he had always paid his taxes, and that he had turned in his 1988 income figures to the IRS at the time of trial; on the other hand Teixeira conceded under oath that, as of the time of trial in 1989, he had not yet filed his 1987 and 1988 tax returns.

Wong, supra, at 80. The District Court relied on this holding in denying Rivera's § 2255 motion. *Rivera, supra*, 15.

Finally, the Court asked whether defense counsel would have sought to cross-examine Garcia about her criminal acts and whether the Court would have been required to permit it "to explore possible bias in this area, to see whether her view of her circumstances was akin to being on probation?" Order, 4 (citing *Davis, supra*; *Scull v. United States*, 564 A.2^d 1161 (D.C. 1989)).

As the Court of Appeals held in *Bennett, supra* at 1257, evidence of Garcia's lies and use of a false passport and Social Security number is not cumulative of other impeachment, and goes directly to her credibility in this case. Recognizing that the "trial judge has broad discretion to 'impose reasonable limits' on cross-examination to prevent 'interrogation that is repetitive or

¹² In fact, both relate to the same case. *Wong* is the Second Circuit opinion affirming the District Court's denial of new trial motions filed pursuant to Fed. R. Crim. P. 33, and *Rivera* is the subsequent District Court's opinion in proceedings pursuant to 28 U.S.C. § 2255.

only marginally relevant,' ” it said that discretion “cannot justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.” *Id.* (citations omitted).

In *Scull, supra*, at 1165, the Court of Appeals stated that,

the practical likelihood of prosecution is a valid and necessary part of the Fifth Amendment inquiry concerning self-incrimination, it is irrelevant to the Sixth Amendment issue of witness bias. In evaluating the possibility of bias in adverse testimony, the objective likelihood of prosecution and the subjective intent of the government to prosecute are irrelevant; rather, the witness' subjective belief in the possibility of prosecution is central, since it is this belief that can produce bias.

If the government had disclosed Garcia's conduct under *Brady*, the Court would have been alerted to the potential Fifth Amendment problem and would have appointed counsel to represent her. It is likely that the government would have been forced to decide whether to grant Garcia immunity or forego her testimony. If it chose to grant her immunity the jury would have been put on notice through defense counsel's argument and the Court's final instructions that

such testimony may be colored in such a way as to further the witness' own interest, for a witness who realizes that she may obtain her own freedom by incriminating another has a motive to lie.... The testimony of a witness as to whom immunity has been granted should be received with caution and scrutinized with care.”

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction 2.23 (4th Ed. 1993, 1996).

THE COURT MUST CONSIDER ALL OF THE *BRADY* VIOLATIONS RELATED TO GARCIA'S TESTIMONY

All of the questions raised in the Court's Order requesting supplemental briefing focus on the government's failure to disclose Garcia's immigration status, her lies related to it, and her use of the false passport and Social Security number. But the Court must consider the prosecutor's failure to disclose that several witnesses provided information clearly contradicting Garcia's written statement and grand jury testimony as well.

Although Mr. Bonilla sought in the proceeding on his Rule 33 motion to present evidence regarding the prosecutor's suppression of information provided by Mayra Rivera, Sindy Leonzo and Blanca Buruca, the Court would not permit those witnesses to testify. Mr. Bonilla's first new

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trial motion called trial counsel's effectiveness into question, and did not raise the *Brady* issue. The Court denied the motion without a hearing.

Mr. Bonilla believes the government's failure to disclose Garcia's criminal acts provides ample grounds on which to vacate his conviction. Considered with the failure to disclose evidence contradicting Garcia's account of the crime, it is clear that the government's unconstitutional actions prejudiced Mr. Bonilla very significantly. It is highly likely that the outcome of his trial would have been different if the government had fulfilled its disclosure obligations, under *Brady*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Santos F. Bonilla, certify that on December 12, 2005 I served a true copy of the attached Memorandum of Law by first-class mail on the person(s) listed below.

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