

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CASE MANAGEMENT BRANCH

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION — FELONY BRANCH

2002 OCT 10 P 12:36

UNITED STATES

v.

SANTOS BONILLA,
Defendant.

Crim. Nos. F-2332-98

FILED

Judge Abrecht

MEMORANDUM & ORDER DENYING MOTION FOR NEW TRIAL

This matter is before the Court upon the Defendant's November 5, 2001 Motion for a New Trial based on newly discovered evidence and various constitutional violations.

The motion was timely filed, pursuant to Super. Ct. Crim. R. 33 "within three years after the verdict or finding of guilty" which was rendered on November 6, 1998. The government filed an Opposition on March 5, 2002. Because Defendant's new trial motion was based on eyewitness Hugo Aleman's recantation of his grand jury testimony, some of which had been admitted at trial against all defendants, the Court ordered an evidentiary hearing and invited codefendants to participate. Defendant and Codefendants filed a Joint Supplemental Reply on June 11, 2002. The parties filed affidavits and numerous other materials to expand the record. An evidentiary hearing was held on June 18 and July 3, 2002, for testimony of Hugo Aleman and Anthony Asuncion, who had filed conflicting affidavits. (All other affidavits were uncontested for purposes of these motions.)

On July 19, 2002, Defendant Bonilla filed a Supplemental Final Argument on his motion and the government filed a Post-Hearing Notice of Filing (concerning a letter given to Bonilla at arraignment and Bonilla's videotaped statement to police). Bonilla filed additional Notices of

Filings on August 9, 2002 (investigator's affidavit that distance from club to homicide scene was 1,372 feet) and on August 30, 2002 (security guard's affidavit of measures taken to prevent club patrons from entering with weapons).

Facts of Bonilla's Involvement

Santos Bonilla ("Manotas") was convicted of conspiracy and first-degree murder (of Warren Helm) while armed. Bonilla's motion and the government's opposition provide detailed witness by witness descriptions of the trial evidence, which the Court will not repeat here. In summary, the evidence against Bonilla established that he was an active participant in events leading to the death of Warren Helm.

The facts at trial revealed that Santos Bonilla ("Manotas") was in Diversite nightclub with acquaintances who, like him, were associated with the MaraR gang--Oscar Villatoro ("Gato"), Carlos Robles Benevides, Luis Perez ("Cholo"), Jose Salamanca ("Muella"), Jorge Navarette ("Mexico"), Abuelo, Douglas Ventura, Walter Velasquez ("Catinga"), Jose Benitez ("Chofer") and Hugo Aleman ("Loco Hugo")--on the morning of March 15 1998 (Tr. 341, 347, 547, 557, 565, 569-570, 635, 636) when a fight broke out. Villatoro flashed a gang sign for the MaraR gang at members of the rival MS gang (Tr. 570-572, 637-638). The manager kicked everyone out (Tr. 570). Salamanca asked Bonilla for a ride home (Tr. 76) and waited after the club closed while Bonilla talked to a girl outside the club (Tr. 77). Robles Benevides, Walter Velasquez, and Douglas Ventura also asked for rides home also but did not immediately get into the car (Tr. 78, Tr.I 128).

While in the vicinity of the club, Bonilla saw Villatoro hit a homeless man (Tr. I 139-140). Rosa Garcia saw Villatoro and others arguing with the homeless man across the street (Tr. 347). Codefendant Perez went toward them, making the gang sign and yelling "R", "R" loudly

(Tr. 571, 573, 640). The homeless person, in trying to run away, ran toward Defendant Salamanca ("Muella"), who became actively involved by hitting him and knocking him to the ground. Eyewitness Jose Benitez saw Salamanca knock the homeless man to the ground and joined in the attack himself (Tr.574, 618).

A red Oldsmobile stopped and four black men (Alexander, his two cousins, and Warren Helm) got out to see if the homeless man was all right (Tr. 574, 618). Benitez heard the black men yell for the Latino men to stop hurting the homeless man (Tr. 575). As the black men walked towards the homeless man, Villatoro and other Latino men walked towards the black men. After Helm threw a punch, Navarette and Abuelo moved toward him (Tr. 575). At this point the four men from the red car turned to run back to their red car (Tr. 575). Three of them made it to the car, but Warren Helm did not (Tr. 575). As the crowd attacked the red car, Alexander drove away, around the block, leaving Helm and the crowd (Tr. 427-428). They threw rocks and bottles at the red car and chased Mr. Helm. (Tr. 575-576.)

Meanwhile, Bonilla got into his car and picked up his passengers. Helm ran up 14th Street pursued on foot by Villatoro and others of the crowd (Tr.452-453, 478, 552). Bonilla joined the pursuit of Helm in his Honda car with Velasquez, Robles Benevides, Salamanca, and Ventura as passengers. Bonilla caught up with Mr. Helm and stopped the car. (Bonilla denied that he saw Helm running and testified that he stopped because Velasquez told him to. Tr. 129.) Mr. Helm ran towards the car as if asking for help.

Instead of helping, Velasquez, Ventura, and Robles Benevides got out of the car and began to hit the decedent. Benitez saw Benevides and Ventura get out of Bonilla's car and hit the decedent (Tr. 577-578). Jose Perez saw Velasquez, Ventura and Abuelo stabbing him and saw Benitez, Luis Perez and Robles Benevides hitting and kicking him (Tr. 502). Benitez saw

Velasquez make a stabbing motion (Tr. 577- 578). Rosa Garcia's attention was directed to the scene by the sound of a black man's voice saying, "No, no" (Tr. 348, 385). She saw Walter Velasquez ("Catinga") stabbing him and others hitting, punching and kicking (Tr.348, 350).

Bonilla also got out of his car and joined the assault for a brief time. Benitez said he did not know if Bonilla hit the defendant but he did see him outside the car during the stabbing (Tr. 624-625). Aleman initially testified at trial that Bonilla was not involved in the final attack (Tr. 562-564) but acknowledged his grand jury testimony that he saw Bonilla get out of his car and hit Helm (Tr. 10/28/98, 544-546). Rosa Garcia testified at trial that although she could not really remember, she thought Bonilla was also kicking and punching the decedent. When admonished to tell only what she remembered seeing, she said she was sure only that she saw Bonilla in his car with four doors open, waiting for the men who stabbed decedent. (Tr. 356-357.) The prosecutor did not attempt to refresh her recollection with her clearer March 17, 1998 grand jury testimony, in which she said, "I saw him [Bonilla] hitting the black man and kicking the black man. And before everything finished he ran into his car..." (G.J.Tr. 23).

Bonilla testified he got out of his car briefly only to close the doors of his car (Tr. 129-130) but admits he was in a position to see Velasquez stabbing Helm (Tr. 132). After Bonilla got back in his car he did not leave the scene until the stabbers Velasquez and Ventura returned with their bloody knives to make their escape. Bonilla stated that he was not waiting for them; he claimed he was merely waiting for the light to turn green (Tr. 131).

Salamanca, who explained that he fell asleep upon getting into the car and did not wake up until Velasquez got back into the car later (Tr. 79), testified that when Velasquez got into the car, he told Bonilla to take him to the Triviada (Tr. 11/2/98, 91-92). Benitez saw Bonilla drive Velasquez away (Tr. 642). Bonilla said that Velasquez got into the car with a knife and in a

threatening manner told Bonilla to take him to the Triviada (Tr. 132-133). Bonilla took Velasquez to the Triviada and then took Salamanca home.

Bonilla testified that he did not know that Valesquez and Ventura were armed until they got out of the car (Tr. 142). However, in a police interview, he seemed to admit seeing the knives when they first entered the car (Tr. I at 695-697). He explained that they had hidden them outside (because knives were not allowed in the club) and retrieved them before entering the car (G.J. Tr. 20-21). He argues that he made that statement based on hindsight. (The Court excluded on hearsay grounds a statement of Carlos Robles Benevides that the passengers argued in the car over who would carry the knives when they exited.)

Mayra Riviera testified for the defense that she and Rosa Garcia waited outside the club and got into a taxi without seeing or being in a position to see a fight or anything (Tr. 778-779, 782-783). From Mayra Riviera's testimony, the defense argued that Rosa Garcia's testimony was incredible.

ANALYSIS

Bonilla raises three issues:

1. Alleged false testimony of Hugo Aleman;
2. Alleged harm from mid-trial disclosure of inconsistent statements of Aleman and other witnesses; and
3. Allegation that prosecutor's investigatory tactics corrupted the trial.

Based on a thorough review of the record, including an evidentiary hearing and numerous exhibits added to the record since trial, the Court finds no merit to any of these allegations and consequently no basis for ordering a new trial. Although the result of the trial was harsh—

because young men who aided and abetting in a fatal assault were convicted while the principal stabbers remain at large—it was not unfair. The Court will address each allegation in turn.

1. Alleged false testimony of Hugo Aleman

Defendant Bonilla contends that he is entitled to a new trial both because he satisfies the *Thompson-Heard* standard¹ for newly discovered evidence but also because the government violated his constitutional rights by knowingly presenting false testimony. *Alcorta v. Texas*, 355 U.S. 28 (1957) (holding that prosecutor’s sponsoring of misleading testimony violated defendant’s constitutional right of due process); *Card v. United States*, 776 A.2d 581, 602 (D.C. 2001) (no violation where defendant fails to prove that testimony was false or misleading); *Felder v. United States*, 595 A.2d 974, 977 (D.C. 1991) (defendant entitled to new trial if there is reasonable possibility that false testimony affected verdict).

a. Aleman’s grand jury testimony was not false.

For both arguments, the defendants contend that Hugo Aleman’s grand jury testimony, which included an identification of Bonilla as one who hit the decedent, was false. This Court has evaluated Hugo Aleman’s credibility based on his affidavit, on his demeanor and detailed testimony at the hearing held on June 18 and July 3, 2002, on its memory and the transcript of his testimony at trial on October 28, 1998 (Ex. 1 to Opposition to Salamanca’s Motion), and on the transcript of his grand jury testimony (Def.Ex. 9 at hearing). The Court concludes that Hugo Aleman was telling the truth before the grand jury on April 1, 1998 and finds his current claim that he made up the details of his grand jury testimony to be incredible.

¹ See *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951) and *United States v. Heard*, 245 A.2d 125 (D.C. 1968) (concluding that defendant must show that the evidence newly discovered since trial, that he made diligent attempts to procure that evidence, that the new evidence is not merely cumulative or impeaching, that the new evidence is material and that the new evidence is likely to produce an acquittal).

That Mr. Aleman was a reluctant witness who was pressured to testify is undisputed, but the Court concludes that he was pressured to tell what he had seen, not to lie. In his affidavit, Mr. Aleman states that he felt he would be charged if he did not say what the government wanted before the grand jury. Although there is no support for a concern that he would be implicated in the murder, his concern that he could be charged with some crime is consistent with Mr. Asuncion's testimony that he warned Hugo Aleman that he could be charged with perjury if he lied to the grand jury under oath. Mr. Asuncion said that he wanted Hugo Aleman to tell the truth about what he saw. Mr. Asuncion was convinced by his conversations with Rosa Garcia that Mr. Aleman had been present to observe critical events (*see* Garcia's 3-17-98 G.J. Tr. at 21-22). By the time Mr. Aleman testified before the grand jury on April 1, the government also had the benefit of lengthy videotaped statements to the police by codefendants Robles Benevides (on 3-15-98), Villatoro (on 3-21-98), and Bonilla himself (on 3-27-98). Jose Perez had testified before the grand jury on March 18, 1998.

Hugo Aleman's current claim (in affidavit in 2001 and testimony in 2002) that he responded to that pressure from Mr. Asuncion by lying is incredible. He claimed that he made up details to please the prosecutor who intimidated him and that he learned from the prosecutor and the investigators what information they wanted. When challenged at the June 18 hearing to explain, he admitted, "Well, the truth is that a lot of time has passed by and I don't remember anything, sir, so many cases that I have had, they hit me on the head. I have lost my memory. I was in the hospital for a week." (Tr. 6-18-02 at 85.) The Court finds his detailed testimony given in secret before the grand jury within a month of the crime far more credible than his recantation given over three years later following a head injury that apparently effected his memory. Given

his admitted memory problems, his claim that he now remembers with certainty that on April 1, 1998, he did not know from personal knowledge the details he told the grand jury is incredible.

His testimony before the grand jury has all the indicia of an account by a truthful eyewitness. He admitted he had been drinking alcohol. He said he saw some things but not others. He did not know he was witnessing a murder because he left by taxicab before the attack on the decedent was finished. He learned two days later that the victim had died (Aleman G.J. Tr. 18, 28, 30-31). He inculpated some of his acquaintances; he exculpated others. The details he remembered did not always help the government and he did not provide all the details that could have strengthened the government's case. For example, he identified Luis Perez ("Cholo") for beating the homeless man. He answered, "No" when the prosecutor asked, "After Cholo began to attack the homeless person, did you see anyone else attack him also?" He did not mention Oscar Villatoro's involvement with the homeless man. Rosa Garcia (who by April 1, 1998 when Aleman testified had already been interviewed by the government) saw Villatoro ("Gato") arguing with the homeless man (Tr. at 348). Surely, if Aleman were trying to help the government, rather than tell only what *he* saw, he would have reported seeing Villatoro fight the homeless man. He did not.

Mr. Aleman gives no credible explanation for telling the grand jury that Bonilla hit the decedent other than that he saw it happen. At the June 18, 2002, hearing he explained that he made up his story about what he said he saw while listening to what the prosecutor and the police talk about what they already knew about the case. However, he explained that no one told him to single out Bonilla and no one told him to say that Bonilla participated in the fatal assault. Thus, his testimony that he saw Bonilla ("Manotas") briefly out of his car hitting the decedent has the ring of truth. Even if Aleman feared he himself would be jailed if he did not corroborate what

the police and prosecutor already knew about the crime, he had no reason to make up this detail that would hurt an acquaintance.

Defendant Bonilla argues that Aleman had to be lying when he described seeing anyone attacking the decedent because he was too far away to see. He supports this argument with affidavits about visibility and distance between the club and the homicide scene. Bonilla assumes that Aleman stayed in front of the Diversite nightclub at 1526 14th Street, more than two city blocks from the scene of the stabbing at 1809 14th Street, until he took a cab home.

While Defendant is correct that Aleman would not have been able to see faces from such a distance, the record does not support Bonilla's assumption the Aleman remained in front of the Diversite nightclub as the crowd moved north. Taken in context, Mr. Aleman testimony about being in front of Diversity seems to relate only to his location when observing Cholo attacking the homeless man. Even then, he admitted that he could not see very well the other man involved in that fight. He was never asked specifically where he was when he observed Bonilla hit the decedent in the face and then return to his car. Rosa Garcia had testified in the grand jury that Aleman was close to the action. Mr. Asuncion inferred as the jury undoubtedly did as well that Hugo Aleman moved close enough to the scene to see what he claims he saw.

Much of Hugo Aleman's recantation testimony on June 18 and July 3, 2002, was nonsensical. He insisted that *every* detail he told the grand jury about the incident was false because he had been too drunk to see and had left early. To most every question about whether a particular statement to the grand jury was true or false, he answered that it was false even when his testimony had been that he had *not* seen something. A juror asked, "Did you testify that Cholo was beating the homeless man by himself when the car—when the other men came out of the red car?" He answered, "No, he was with another person, who I did not see very well,

because I was in front of Diversity, smoking a cigarette. So I didn't see very well." (Aleman G.J. Tr. 25). On June 18, he testified that his statement that he did not see very well was not the truth (Tr. 6-18-02 at 62).

Aleman's testimony concerning Salamanca further illustrates how nonsensical his recantation testimony was. Before the grand jury, he testified, "Emuela, I didn't see him. I didn't see him. I mean, you know, he was there in the car but I didn't see him. I don't remember seeing him—I didn't see him participate." (Aleman G.J. Tr. 15, lines 12-14.) When asked about this statement on June 18, 2002, he said it was false. Uncomprehending, the Court asked, "Is everything that you said in that answer false or is some of it true and some of it false?" He answered, "It is all false." (Tr. 6-18-02 at 46.) Counsel tried to clarify by asking, "Well did you see him or didn't you see him?" Mr. Aleman answered, "I did not see him." Counsel continued, "Okay. So the beginning of that statement is true or false?" Aleman answered, "Is false." (Tr. 6-18-02 at 47.) Later, he explained that he falsely testified that Muella was in the car because he heard from detectives on the street that Muella was in the car.

b. Prosecutor did not present false testimony.

Because the Court concludes that Aleman's recantation is incredible and that his grand jury testimony was not false, the Court also finds that the government did not present false testimony when offering parts of that grand jury testimony as substantive evidence at trial. The Court credits Mr. Asuncion's testimony that he believed Mr. Aleman's grand jury testimony to be true. Mr. Asuncion had no reason to suspect that Mr. Aleman's account before the grand jury on April 1, 1998, was false. Much of his testimony was corroborated by Rosa Garcia, Jose Perez and the videotaped statements to the police by codefendants Robles Benevides (on 3-15-98), Villatoro (on 3-21-98), and Bonilla himself (on 3-27-98).

c. Rule 33 Motion for New Trial denied.

Defendant Bonilla is not entitled to a new trial to present Aleman's current recantation story because it is so incredible. *Gaither v. United States*, 759 A.2d 655, 664 (D.C. 2000) (only if recantation is credible need court determine effect of recantation on jury); *Herbin v. United States*, 683 A.2d 437, 441 (D.C. 1996); *Young v. United States*, 639 A.2d 92, 95 (D.C. 1994). Moreover, under the five-part *Thompson-Heard* standard the defendant must show that the evidence is not merely cumulative or impeaching. He fails. Aleman's current testimony that he left before the final attack and was too drunk to see what was going on is cumulative of his trial testimony. On cross-examination at trial, he testified that his memory of events was unclear or impaired because he had been drinking heavily (Tr. 559-560, 564). His current testimony that he left before the attack on the decedent is merely impeaching of his grand jury testimony in which he said he saw the attack and provided details of the attack.

Furthermore, the fact that Hugo Aleman has given another contradictory version is not likely to produce an acquittal. His recantation of the inculpatory evidence against Bonilla is incredible for the reasons discussed above. Even if a jury in a new trial regarded Aleman as an unreliable witness and disregarded his testimony, there was overwhelming evidence that Defendant Bonilla aided and abetted the murder of Warren Helm by driving his car in pursuit of Helm so that his passengers could attack him and by then letting the armed assailants back in his car to make their getaway. Moreover, contrary to Bonilla's claim, Hugo Aleman was not the only witness who reported that when Bonilla got out of his car at the scene of the fatal attack, he hit the decedent. Rosa Garcia testified before the grand jury testimony, "I saw him [Bonilla] hitting the black man and kicking the black man. And before everything finished he ran into his car..." (G.J.Tr. 23). At a new trial, with memories even further faded, the prosecutor would

undoubtedly use such grand jury testimony as substantive evidence. (At trial in 1998, she testified that although she could not really remember, she thought Bonilla was kicking and punching the decedent, but was admonished to tell only what she remembered seeing (Tr. 356-357))

At a new trial with all of Mr. Aleman's conflicting stories, the jury would be likely to, as the Court has, consider Aleman's secret grand jury testimony truthful and disregard his initial denials and his post-conviction recantation. At trial, in cross-examination and closing argument, defense counsel already exploited Aleman's drinking and inconsistent statements in a valiant attempt to discredit his testimony. The recantation is cumulative and incredible.

d. No other recantations alleged

Although Bonilla has no witness other than Aleman who has recanted, Defendant Bonilla claims that Mr. Aleman is "just one example" of a witness who was coerced into testifying falsely in the grand jury. He speculates that had he had investigative resources he might have found other witnesses willing to recant or provide exculpatory material. Without establishing that trial counsel's investigation had been inadequate, Bonilla sought public funding for counsel and an investigator to conduct a new investigation after conviction. He blames his lack of resources on the Court, which denied his February 2001 Motion for Appointment of Investigative Services. He fails to note that the Court granted his request for appointment of counsel in February 2001 and invited him to articulate a need for an investigator. In his request, not only did he not proffer any basis to believe that the investigation conducted by trial counsel before trial had been ineffective, but also, he did not proffer any newly discovered evidence. He merely wanted to re-investigate the case by re-contacting witnesses he thought *might* help his

cause. The Court denied the request to hire an investigator *without prejudice* to his making a new request based on articulated need.

Appointing an investigator post-trial is discretionary with the court. *Smith v. United States*, 686 A.2d 537, 551 (D.C. 1996). Appellate counsel must make a reasonable inquiry into the possibility of ineffective assistance of counsel at trial and is “eligible for reimbursement by the appellate court as part of ... appellate duties....” *Kyle v. United States*, 759 A.2d 192, 203 (D.C. 2000), *citing Doe v. United States*, 583 A.2d 670, 675 n. 5 (D.C. 1990). The trial Court should authorize expenditure of public funds for a new investigation only **if** the defendant appears to be able to satisfy the same criteria that would entitle him to a hearing on a § 23-110 motion. *Kyle*, 759 A.2d at 201; *Doe*, 583 A.2d at 672. Thus, defendant’s February 2001 request for investigative services was properly rejected because his proffer was vague and conclusory. Significantly, his subsequent request in November 2001 was approved and after ten months with the services of an investigator, defendant has not come up with any recanting witness other than Aleman.

2. Alleged harm from mid-trial disclosure of inconsistent statements (Brady claim).

a. Hugo Aleman.

Defendant Bonilla contends that he is entitled to a new trial because the prosecutor violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to turn over before trial on request the information that Hugo Aleman had made inconsistent statements and had claimed to have been under the influence of alcohol. Bonilla’s trial counsel, Joseph Molina, requested by letter in May 1998 any “prior inconsistent, non-corroborative, or other witness statements which will not reflect the witness’ trial testimony” and “information that any government witness...was

under the influence of alcohol...at the time of the observations about which the witness will testify....” (Ltr. filed as exhibit on 6-11-02).

During the prosecutor’s first full interview in this case with Hugo Aleman on March 24, 1998, Aleman denied knowing anything about the murder because he left before anything happened. He finally admitted late in the day that he saw “it” but claimed not to know who did it. Mr. Asuncion required Mr. Aleman to return on March 27 and 30 but did not interview him on those days. He interviewed him before having him testify before the grand jury on April 1, 1998. April 1 was the first time Aleman told Mr. Asuncion that he saw the fights leading to the murder and could identify the people involved.

In the grand jury, Hugo Aleman admitted that, when not under oath, he had lied in his initial meetings with Investigator Torres, Detective Gainey and Mr. Asuncion in telling them that he had left the area of Diversity Club before anything happened. He admitted that even after he revealed that he was outside during the incident, he lied when he said that he was too drunk to remember anything. (Aleman G.J. Tr. 7.) Before the grand jury, Mr. Asuncion reminded Mr. Aleman of his oath to tell the truth and asked Mr. Aleman to tell what he saw happen. Mr. Aleman gave a detailed account of what he saw (Aleman G.J. Tr. 8-31).

On Wednesday, October 28, 1998, the day Hugo Aleman testified in the afternoon, the transcript of his testimony was given to defense counsel immediately after lunch before² Aleman began to testify on direct examination (Tr. 504, 558, 560). All defense counsel had the transcript during Mr. Aleman’s direct examination. When Mr. Aleman completed his direct examination at 3:24 p.m., Mr. O’Connor, counsel for codefendant Robles-Benevides asked for a recess to further review the transcript. The Court granted the recess and convened again at 3:50 p.m. (Tr.

². Under the Jencks Act, 18 U.S.C. § 3500, prior statements of a witness must be produced after the witness testifies on direct examination.

557.) Thereafter, Defense counsel made good use of the impeaching information in the transcript during cross-examination without requesting any additional time for preparation or investigation. Trial continued and the case did not go to the jury until Wednesday, November 4, a week later. No defendant sought to recall Mr. Aleman as a defense witness.

Hugo Aleman may have been available to the defendant before trial because of Bonilla's acquaintance with Aleman and because his identity was revealed to codefendant Salamanca (by letter of October 3, 1998, as a witness who placed Salamanca on the crime scene but not participating). Defendant Bonilla makes no claim by affidavit or otherwise that trial counsel was surprised by the calling of Aleman as a witness or by the information contained in his *Jencks* material. Ordinarily, the government has no duty to disclose the names of its witnesses before trial. *Robinson v. United States*, 797 A.2d 698, 709-710 (D.C. 2002), citing *Davis v. United States*, 315 A.2d 157, 161 (D.C. 1974).

In any event, Bonilla's counsel had the impeachment information in ample time to use it effectively during cross-examination and closing argument. Defendant does not explain how he was prejudiced by late disclosure by the government. *Edelin v. United States*, 627 A.2d 968, 971 (D.C. 1993) (conviction sustained where defendant receives potentially exculpatory information in time to use it effectively at trial). Mr. Aleman's drinking and his inconsistent statements were thoroughly exposed at trial so that Bonilla's counsel was able to argue that Mr. Aleman did not know what was going on that night and that his testimony that Bonilla hit the decedent was incredible. There is no indication in the trial record that Bonilla's trial counsel felt hindered by the lateness of the disclosure; he did not request a recess or a mistrial with regard to late disclosure of Aleman's inconsistent statements.

New counsel argues that if trial counsel had knowledge of Aleman's statements before trial, he might have been able to find other witnesses to Mr. Aleman's presence or absence at particular locations. That argument fails for two reasons. First, trial counsel did not need to know about Aleman's testimony to have tried to find out as much as he possibly could about who was on the street that night and what and who they saw. As to the identity of the person with whom Hugo Aleman was speaking outside the Diversity nightclub, Mr. Aleman testified at the hearing on July 3, 2002, that he would not have been able to remember that person even if he had been asked within a month of the date.

He also argues that if defense counsel interviewed Mr. Aleman before trial, Mr. Aleman might have told defense counsel then as he did in 2001 that his grand jury testimony was full of lies. That argument is weak. If Mr. Aleman wanted to recant his grand jury testimony in 1998, he would have done so at trial. Aleman tried to avoid telling the trial jury in front of the defendants the details he had told the grand jury in secret, but he did not deny the truth of his grand jury testimony even when cross-examined by defense counsel. Moreover, nothing prevented counsel from interviewing Mr. Aleman after his testimony during the week before the close of trial and recalling him as a defense witness. The facts suggest that Mr. Aleman would not have told defense counsel at any time in 1998 that his testimony before the grand jury was false. His recantation came only after the passage of time, after loss of memory and after his acquaintances were sentenced to long prison terms.

Thus, this Court finds no merit to Bonilla's *Brady* argument with regard to Mr. Aleman.

b. Other witnesses.

Defendant Bonilla also alleges that the government violated his constitutional rights by failing to disclose before trial that Ms. Mayra Rivera, Ms. Sandy Leonza, Ms. Blanca Buruca and

Mr. Jose Guevera provided information that contradicted Rosa Garcia who was an important government witness. He claims that the government should have told him before trial about witnesses who claimed that Rosa Garcia had been drinking, was not wearing her prescription glasses and did not see what happened on Fourteenth Street. Bonilla litigated this issue as to Ms. Rivera and Ms. Leonza during trial (Tr. 717-721) and in his first motion for new trial filed in November 1998. Both women were available to the defense and Mayra Rivera was called as a defense witness.

Rosa Garcia did not give significant testimony against Bonilla at trial. In his Supplemental Final Argument, Bonilla claims that Ms. Garcia was significant as “the only witness who placed Mr. Aleman close enough to the scene of the homicide” to be able to identify attackers (p. 18). However, she did not testify at trial about Aleman’s location. She described his location before the grand jury only and that portion of her grand jury testimony was not used at trial.

In any event, the defendants were able to impeach Rosa Garcia’s testimony with evidence from Mayra Rivera who was present at trial and testified as a defense witness. All the information tending to impeach Rosa Garcia’s testimony was explored before the jury (Tr. 358-9). Rosa Garcia’s testimony was nonetheless credible; she was not an accomplice and was not shown to have any motive to lie. Bonilla himself corroborated her testimony about his driving the car. (At a new trial, the government could also use Rosa Garcia’s grand jury testimony that Bonilla hit the decedent and that Aleman stood with the crew at the scene of the homicide, in a position to see Bonilla as well.)

Bonilla does not explain what more he would have done if the government had told him about Ms. Mayra Rivera, Ms. Sandy Leonza, Ms. Blanca Buruca and Mr. Jose Guevera before

trial. They were certainly not peculiarly available to the prosecutor. Bonilla makes no claim that his trial counsel was unaware during trial that there were additional witnesses, besides Mayra Rivera who could impeach Rosa Garcia. Counsel for two codefendants who decided for tactical reasons not to call the other witness have stated that all counsel together interviewed other witnesses during trial (*see* Affidavits of Manuel Retureta and Bradford Barneys filed August 15, 2002 as Exhibits to Government's Opposition to Defendant's Motion in *United States v. Salamanca*, F-4375-98).

c. Cumulative effect.

In order to obtain a new trial based on the cumulative effect of the alleged *Brady* violations, Defendant must show a reasonable probability that had the information been disclosed before trial, the result of the proceeding would have been different. *United States v. Agurs*, 427 U.S. 97, 111 (1976). Bonilla does not. Given the fact that the information challenging the credibility of Aleman's grand jury testimony and the information challenging the credibility of Rosa Garcia's observations was thoroughly explored at trial, the lateness of the disclosure to the defense does not undermine confidence in the outcome of the trial. *Strickler v. Greene*, 527 U.S. 263, 281 (1995) (holding that despite *Brady* violation in withholding of impeaching information about witness, new trial was not warranted because defendant did not show a reasonable probability that result would have been different if witness testimony had been severely impeached or excluded entirely); *Card v. United States*, 776 A.2d at 597-598 (no prejudice from delayed disclosure).

3. Allegation that prosecutor's investigatory tactics corrupted the trial.

The defendants have made a record of the fact that the prosecutor held repeated conferences with reluctant witnesses he believed had information about the culprits in this case

and paid them witness fees even without placing them before the grand jury. The defendants have also made a record that some witnesses, in addition to Hugo Aleman discussed above, felt pressured to tell a story pleasing to the prosecutor. They vaguely suggest that they are entitled to some relief because of due process violations.

The record evidence concerning each witness is as follows:

The defendants filed June 2002 affidavits from **Blanca Buruca, Sandy Leonzo and Erica Garcia** indicating that the government repeatedly summoned them to the Office of the United States Attorney, threatened them and tried to pressure them. They were never placed before the grand jury. Erica Garcia, who did see the fights, swears that Mr. Asuncion insisted that she had seen things with respect to the events on Fourteenth Street, NW on March 15, 1998 that she has not seen. Sandy Loenzo, who allegedly saw nothing, swears that Mr. Asuncion insisted that she was lying in what she told him. In January 1999, Sandy Loenzo and Blanca Buruca (and Jose Guevera) signed identical affidavits stating that they walked on 14th Street from the Club with Rosa Garcia and Mayra Rivera without seeing any fights outside the Club or at 14th and S Streets on their way to R Street where they caught a cab to 1444 W Street, NW. Those 1999 affidavits of Ms. Loenzo and Ms. Buruca are Exhibits 6 and 7 to Government's August 2002 Opposition to Salamanca's Motion in F-4375-98 and were attached to Villatoro's December 2000 § 23-110 motion.

Mayra Rivera testified as a defense witness at trial, explaining that by repeated interviews and screaming, the prosecutor had pressured her into identifying individuals involved in the murder, which she had not in fact seen. She refused to testify before the grand jury. Mayra Rivera has also presented an affidavit (filed June 11, 2002, with Joint Supplemental Reply) stating that she was subpoenaed several times to meet with the prosecutor and testified before the

grand jury on only one of those occasions. She claims she was threatened and pressured by the prosecutor. She has not, however, recanted any of her trial testimony.

Jose Perez testified before the grand jury and at trial about what he saw. Although he admitted that he had initially lied to the police, he swore that his testimony was true and not the result of pressure by the prosecutor. Jose Perez has now presented an affidavit (filed June 11, 2002, with Joint Supplemental Reply) stating that he was subpoenaed twice to meet with the prosecutor and testified before the grand jury on only one of those occasions. He claims he was threatened and pressured by the prosecutor. Jose Perez has not, however, recanted any of his grand jury or trial testimony.

Defendants note that there were **other potential witnesses** identified during *voir dire* but not called to testify— Nelson Rivera, Jose Gueverra, William Gueverra, Luis Miranda, Gloria Salazar, Walter Te and Wilmer Villatoro. The defendant makes no specific claims of prosecutorial misconduct with regard to these witnesses but implies that, because they were not called by the government, they might have had undisclosed exculpatory information. The Court need not address such speculation.

Under the guise of a search for due process violations and a corruption of the trial, the codefendants invite the Court to conduct a wide-ranging evidentiary hearing into the prosecutor's compliance with Department of Justice and ethical standards for witness interviews. The Court declines³. Since the government submitted no affidavits contradicting the allegations of any witness other than Hugo Aleman, the Court accepts as true the witness affidavits about their contacts with the prosecutor. Of all the witnesses alleging that the prosecutor pressured witnesses to lie and that the prosecutor misused the subpoena power, no one except Hugo Aleman claims to have actually lied at trial. The only corruption of the trial specifically alleged

is subornation of Aleman's alleged perjury, which the defendants have utterly failed to prove. Thus, the defendants show no nexus between the intimidation and the evidence at trial.

The Court agrees with the government's argument that the fact of interviews whether isolated or repeated with potential witnesses (although improper if wrongfully compelled as grand jury appearances), does not mean that the interviewers coerced untruthful incriminating testimony or suppressed truthful exculpatory information. Bonilla does not claim that any witness other than Hugo Aleman actually gave false testimony. Defendant Bonilla does not claim that any witnesses who could exculpate him was prevented by the government from doing so.

Thus, Defendant Bonilla does not explain how the prosecutor's attempted coercion of witnesses, abuse of grand jury subpoenas or unlawful payment of witness fees, even if established at an evidentiary hearing, tainted his trial and would entitle him to any relief. Reluctant witnesses may have been pressured to testify, but their testimony was subject to thorough cross-examination and there is no evidence that they perjured themselves or that the prosecutor suborned any perjury.

CONCLUSION

Bonilla had a fair trial and none of his allegations form a basis for having a new trial. First, this Court fully explored at an evidentiary hearing and made credibility findings rejecting his claim that Hugo Aleman testified falsely before the grand jury and that the prosecutor had reason to know the testimony was false. Second, the Court found no prejudice from mid-trial disclosure of inconsistent statements of Aleman and other witnesses, since it found no reasonable probability that earlier disclosure would have changed the outcome. Finally, even assuming that

³ . "The prosecutor's credibility is not a *Brady* violation." *Card v. United States*, 776 A.2d at 598.

the prosecutor's investigatory tactics were improper, the Court finds no corruption of the trial and no evidence whatsoever of subornation of perjury.

WHEREFORE, it is this /th 0 day of October, 2002, hereby

ORDERED that Defendant's Motion for a New Trial be DENIED.



MARY ELLEN ABRECHT, JUDGE

Copy to:

Robert S. Becker
5505 Connecticut Avenue, NW, PMB #155
Washington, D.C. 20015
Attorney for Santos Bonilla

James Sweeney, AUSA
Special Proceedings Section
555 Fourth Street, NW, Room 11-848
Washington, DC 20001