No. 02-1570

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RAFAEL MORENO MORALES,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of Moreno Morales's petition under 28 U.S.C. 2255 by virtue of this Court's order of November 9, 1998, which allowed him to file it even though it was a successive petition.[1] *Moreno Morales* v. *United States*, No. 98-8025 (unpublished; see S.A. 78-79).[2]

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[1] The order is not dated, but this Court's docket sheet shows that the order and a judgment were entered on November 9, 1998 (S.A. 10-11).

[2] Citations in this brief to "S.A. __" refer to the Supplemental Appendix filed by the United States with the brief. Citations to "App. __" refer to the Appendix filed by Moreno Morales with his opening brief. Citations to "Br. __" refer to Appellant's Brief. Citations to "Trial Tr. __" refer to the transcript of the 1985

(continued...)

On August 12, 2002, the district court granted Moreno Morales's request for a Certificate of Appealability pursuant to 28 U.S.C. 2253. Accordingly, this Court has jurisdiction over this appeal. *Grant-Chase* v. *Commissioner*, 145 F.3d 431, 435 (1st Cir.) ("COA from a district judge as to an issue is itself sufficient to permit an appeal of the issue in 28 U.S.C. §§ 2254 and 2255 proceedings"), cert. denied, 525 U.S. 941 (1998).

The notice of appeal from the district court's March 28, 2002, Order and Judgment dismissing the Section 2255 petition was timely filed on April 15, 2002. Rule 11, Rules Governing Section 2255 Proceedings For the United States District Courts (following 28 U.S.C. 2255 in the Code). The appeal is from a final order and judgment disposing of all of Moreno Morales's claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court abused its discretion in dismissing the Section 2255 petition without an evidentiary hearing.

STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal from a district court Order and Judgment dismissing a petition, filed pursuant to 28 U.S.C. 2255, to vacate Moreno Morales's sentence or set aside his judgment of conviction. The district court's March 28, 2002, order approved and adopted the November 16, 2001, Magistrate Judge's Report and

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[2](...continued)
trial in this case.

Recommendation. *Moreno Morales* v. *United States*, Magistrate-Judge's Report and Recommendation, No. 98-2337 (CCC) (D.P.R., Nov. 21, 2001) (hereinafter Magistrate's Recommendation).

B. *Course of Proceedings*

Moreno Morales originally filed a Section 2255 petition *pro se* on August 19, 1997. Because it was a successive petition subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, § 105, 110 Stat. 1220 (AEDPA), the district court dismissed it without prejudice to refiling if allowed by this Court. Following that dismissal, Moreno Morales sought permission from this Court to file a second or successive petition under 28 U.S.C. 2255. This Court allowed the petition to be filed in the district court within two weeks of the date of its November 9, 1998, order. *Moreno Morales* v. *United States*, No. 98-8025 (unpublished; see S.A. 78-79).

On November 30, 1998, Moreno Morales refiled his petition in the district court.[3] Subsequently, counsel was appointed, and on January 14, 2000, Moreno

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[3] The petition is dated November 23, 1998, but it was not filed in the district court until November 30, 1998, more than two weeks following entry of this Court's order. The Federal Rules of Appellate Procedure provide that a notice of appeal filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Fed. R. App. P. 4(c). That Rule provides methods for demonstrating that the filing was timely made within the institution, and it is not clear that either of those methods was followed here. There does not appear to be a similar rule regarding the filing of post-conviction petitions in the district courts, although Rule 12 of the Rules

(continued...)

Morales filed "an amended and more comprehensive petition." Magistrate's Recommendation at 2; Amended Petition to Vacate or Set Aside Judgment (S.A. 37-51).

The petition alleged that the United States deprived Moreno Morales of his constitutional right to due process, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by not disclosing allegedly exculpatory evidence. The evidence alleged to have been withheld involved prior statements of a witness who recanted his trial testimony in 1996, more than ten years following the trial in which Moreno Morales, a former police officer, was convicted of violating 18 U.S.C. 371 and 18 U.S.C. 1621 and 1623.

C. *Disposition Below*

The magistrate recommended that Moreno Morales's Section 2255 motion be denied without an evidentiary hearing. Magistrate's Recommendation at 19.

In addition to procedural bars affecting Moreno Morales's claim that the

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[3](...continued)
Governing Section 2255 Cases in the United States District Courts states: "If no procedure is specifically prescribed by these rules, the district court may proceed by any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules." The United States did not raise any issue below concerning the timeliness of the petition, since the deadline stated in this Court's order does not appear to be jurisdictional.

government failed to disclose multiple polygraphs taken by Cartagena Flores,[4] the magistrate found that there was no evidence that the government failed to comply with its *Brady* obligation. Even if, as Moreno Morales alleged, there were more polygraphs than he was aware of at trial, the magistrate found that they would at best have had impeachment value and as such, would be cumulative and not material to guilt or innocence. *Id.* at 12. The magistrate made similar findings concerning handwritten notes taken in 1983 by Puerto Rico Senate investigator Hector Rivera Cruz during an interview of Cartagena Flores. *Id.* at 15-16. Moreover, the magistrate found no evidence that such notes were in the possession of the United States at the time of trial.

The magistrate also found that statements recently released by the Senate of

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[4] The magistrate found that Moreno Morales knew at the time of trial in 1985 that Cartagena Flores had taken polygraph examinations, and issues concerning disclosure of polygraph results were extensively litigated in the trial court in relation to *Brady* claims. Magistrate's Recommendation at 12. Because Moreno Morales did not raise any issue in his direct appeal concerning *Brady* violations in regard to polygraphs of Cartagena Flores, the magistrate concluded that he was barred from raising the issue under Section 2255. *Ibid.* citing *David* v. *United States*, 134 F.3d 470, 474 (1st Cir. 1998) (Section 2255 not a "surrogate for a direct appeal").

In addition, the magistrate found that the claim was barred by the statute of limitations in the AEDPA, which requires that a motion under Section 2255 be filed within one year of the date on which "the facts supporting the claim or claims presented could have been discovered by the exercise of due diligence." Magistrate's Recommendation at 12-13.

Puerto Rico of Jose Montanez to Rivera Cruz, in which Montanez claimed he had no knowledge of Moreno Morales having shot Soto Arrivi, were also impeachment evidence that was cumulative of other prior inconsistent statements known to defense counsel at the time of trial and thus did not meet the materiality requirement under *Brady*. *Id.* at 9-10; *Barrett* v. *United States*, 965 F.2d 1184, 1195 (1st Cir. 1992).

The magistrate concluded that the court should not consider any claim concerning the trial testimony of Antonio Mendez. Magistrate's Recommendation at 8. That claim was based upon Montanez's 1996 Senate testimony denying knowledge concerning the Cerro Maravilla shooting combined with Montanez's 1985 trial testimony that Mendez was with him when the victims were shot. Since Montanez testified at trial that he was not present when the killings occurred, any claim that Mendez lied at trial in implicating Moreno Morales in the shootings was equally available at the time of trial and so did not constitute newly discovered evidence. *Ibid.* The magistrate concluded that Moreno Morales's failure to raise that issue at trial or on appeal bars him from raising it under Section 2255. *Ibid.*

Finally, the magistrate ruled that it was clear that, despite Cartagena Flores's 1996 recantation, the United States did not knowingly present perjured testimony at trial. Magistrate's Recommendation at 17-18. The magistrate found that (1) the recantation was merely cumulative of other inconsistent statements and testimony by Cartagena Flores that were known at the time of trial (*id.* at 17), (2) despite "sufficient material with which to effectively attack the now ephemeral

credibility of Cartagena," defense counsel made a tactical decision not to cross-examine him (*ibid.*), and (3) in light of the considerable testimony of other witnesses concerning Moreno Morales's guilt, the recantation cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (*id.* at 18), citing *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995).[5]

STATEMENT OF FACTS

1. *Background*

The convictions in this case arose from a politically charged incident in Puerto Rico in July 1978. At that time, members of a radical pro-independence movement attempted to destroy a television tower at a mountain site known as Cerro Maravilla. The Puerto Rico police learned of the planned sabotage through an informant who had infiltrated the group. Based upon that information, several police officers ambushed the group and shot two of its members, Dario Rosado and Soto Arrivi, after they had surrendered. Petitioner Moreno Morales was among the police officers at the scene, and the evidence later showed that he was involved in the shooting.

The police concealed the activities by rearranging the scene of the shooting and conspiring to tell authorities that the two men were killed in a shoot-out while

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[5] Although the magistrate also discussed Cartagena Flores's 1996 recantation before the Senate of Puerto Rico in terms of lack of materiality under *Brady* (Magistrate's Recommendation at 13-15), the recantation itself does not implicate *Brady*, since the United States could not have had a duty to disclose information that was not available at the time of trial.

resisting arrest. The officers told the fabricated story to local district attorneys, a federal grand jury, and attorneys conducting depositions in a federal civil rights action brought by the victims's survivors against the Commonwealth of Puerto Rico. Because the Cerro Maravilla incident had political overtones, the case drew immediate and continuous attention. The media reported findings from the state and federal investigations as well as revelations made during hearings before the Senate of Puerto Rico throughout 1983 regarding the conspiracy to commit perjury.

On February 6, 1984, a federal grand jury sitting in the District of Puerto Rico returned a 44-count indictment against petitioner Moreno Morales and nine co-defendants. Count One charged Moreno Morales and others with a violation of 18 U.S.C. 371 for conspiring to obstruct justice, give false testimony, and suborn perjury. App. 744-747. Counts 14 through 18 charged Moreno Morales with making false declarations before the grand jury and in depositions taken in the related federal civil rights action, in violation of 18 U.S.C. 1621 and 1623. App. 749-756. Moreno Morales was not charged with any substantive offenses involving the shooting due to statute of limitations problems.

2. *The 1985 Trial*

Trial of Moreno Morales and his co-defendants began on February 28, 1985. Count One of the Indictment charged that Moreno Morales and other agents and officers of the Police of Puerto Rico conspired to cover up the fact that Dario Rosado and Soto Arrivi were unlawfully assaulted and killed by the Puerto Rico

police on July 25, 1978, at Cerro Maravilla. App. 744-745. As overt acts in furtherance of the conspiracy, Moreno Morales was alleged to have (1) agreed with other defendants to conceal the fact that Nelson Gonzalez Perez, Jose Montanez Ortiz, and Antonio Mendez Rivera were material witnesses to the events at Cerro Maravilla (*id.* at 744-746); and (2) testified falsely that there was only one volley of shots at Cerro Maravilla and that Soto Arrivi and Dario Rosado were killed during that volley (*id.* at 747). The gist of the false statements charged in Counts 14 through 18 of the Indictment was that Moreno Morales was only at Cerro Maravilla for less than a minute, that he left the scene after the first volley of shots to transport an injured person to Jayuya, that he saw no one kick or strike the victims and heard no second volley of shots, and that one of the victims was already injured (or dead) before the second volley of shots. App. 749-756. In support of its case, the government's proof at trial demonstrated that:

> (1) at the time Moreno Morales arrived at Cerro Maravilla, after the initial volley of shots, Soto Arrivi and Dario Rosado were both alive, were in police custody, and had not been shot;
>
> (2) Moreno Morales was present at Cerro Maravilla when Puerto Rico police officers assaulted Soto Arrivi and Dario Rosado before they were shot;
>
> (3) Moreno Morales was at Cerro Maravilla for a period substantially in excess of a minute;
>
> (4) Moreno Morales knew that Nelson Gonzalez Perez and Jose

Montanez Ortiz were present at Cerro Maravilla.[6]

Included in that proof was testimony from Puerto Rico police officer Miguel Cartagena Flores regarding his version of events on the day of the shootings. Cartagena Flores testified that he saw Moreno Morales making hand motions with a weapon toward the victims at the scene of the shooting.

As the magistrate recognized, two other witnesses "corroborated [Moreno Morales's] involvement in the killing and physical presence at the scene." Magistrate's Recommendation at 14. First, Antonio Mendez Rivera testified at trial that Moreno Morales was among those surrounding the victims at the time the shooting occurred. *Ibid.*, citing *United States* v. *Moreno Morales*, 815 F.2d at 748; Trial Tr. 1438. Mendez Rivera also testified that he observed Moreno Morales take a gun out of another officer's hand and shoot Soto Arrivi. Trial Tr. 1437. In addition, Jose Montanez Ortiz testified at trial that Moreno Morales admitted to him that he (Moreno Morales) had shot and killed Soto Arrivi. *Ibid.;* App. 774; see also App. 767-768.

Moreno Morales was convicted on March 28, 1985, on all counts with which he was charged. *Moreno Morales* v. *United States*, 976 F.2d 724 (1st Cir. 1992) (TABLE), 1992 WL 245718 (No. 92-1157). He was sentenced to five

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[6] See Magistrate's Recommendation at 8, citing *United States* v. *Moreno Morales*, 815 F.2d 725, 747-748 (1st Cir.), cert. denied, 484 U.S. 966 (1987); *United States* v. *Reveron Martinez*, 836 F.2d 684, 690 (1st Cir. 1988) (part of the coverup at trial was to conceal the presence of Montanez at the shootings).

years' imprisonment on each of the six counts, to be served consecutively.

3. *Prior Post-Conviction Proceedings*

Moreno Morales appealed his conviction on due process grounds, claiming his right to a fair trial was compromised by the extensive pre-trial publicity surrounding the Cerro Maravilla incident. He also challenged the severity of his sentence. He did not, however, challenge the sufficiency of the evidence for conviction as to either the conspiracy or the perjury counts. This court affirmed the conviction and sentence. *United States* v. *Moreno Morales*, 815 F.2d 725 (1987).

Following the affirmance of his conviction, Moreno Morales filed a *pro se* petition for post-conviction relief pursuant to 28 U.S.C. 2255. As grounds for relief he argued that (1) two of the perjury convictions involved multiplicitous counts and thereby constituted double jeopardy; (2) another of the perjury counts was invalid because Moreno Morales's testimony was literally true; and (3) Moreno Morales's attorney rendered ineffective assistance of counsel in the direct appeal. The district court denied the petition, and this Court affirmed. *Morales* v. *United States*, 976 F.2d 724 (1992).

In 1996, Moreno-Morales filed a habeas corpus petition in which he challenged the August 1995 decision of the United States Parole Commission to deny him parole. The district court denied that petition, and this Court again affirmed. *Moreno Morales* v. *United States Parole Comm'n*, 114 F.3d 1149 (1st Cir. 1998) (TABLE), 1998 WL 124718 (No. 96-2358).

4. *The Present Petition*

Moreno Morales filed this successive petition in the district court under 28 U.S.C. 2255 on August 19, 1997. The petition asserted that government trial witness Miguel Cartagena Flores testified in 1996 before the Senate of Puerto Rico that his trial testimony regarding the 1978 shooting at Cerro Maravilla was untrue.

The district court dismissed that petition on jurisdictional grounds, and in 1998, Moreno Morales filed a motion in this Court requesting authorization to refile his Section 2255 motion in the district court. In his motion in this Court, Moreno Morales stated that Cartagena Flores testified before the Puerto Rico Senate on December 2, 1996, that, contrary to his trial testimony, he (Cartagena Flores) was not present at the site of the shootings at Cerro Maravilla. Moreno Morales alleged that Cartagena Flores told the Senate that, although he had originally told government authorities he was not at the scene of the shootings, he changed his story before trial in response to pressure from the government. He alleged that the United States told him it would withdraw his immunity unless he testified that he was at the scene at the time of the shootings.[7]

Moreno Morales argued in his 1997 petition and his 1998 motion to this Court that the government deprived him of his constitutional right to due process,

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[7] Moreno Morales also testified before the Senate of Puerto Rico in 1996. He admitted that he shot Soto Arrivi in 1978 at Cerro Maravilla and that he was responsible for Soto Arrivi's death (App. 899-901).

in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by not disclosing exculpatory evidence consisting of results of numerous polygraph tests Cartagena Flores allegedly took, statements made by Cartagena Flores to the federal grand jury on October 13, 1983, under a grant of immunity, and statements made by Cartagena Flores to Senate investigator Hector Rivera Cruz, in all of which he allegedly denied being at the scene of the shootings (S.A. 107).

He also stated in the 1998 appellate motion, although not in the original Section 2255 petition in the district court, that the government failed to produce statements of witnesses Jose Montanez Ortiz and Miguel Martes Ruiz, as well as evidence concerning witness Hiram Santiago Figueroa, who embalmed the bodies of Soto Arrivi and Dario Rosado.[8] *Ibid.* Moreno Morales alleged that these unproduced statements of Montanez Ortiz and Martes Ruiz were different from the testimony those witnesses gave under a grant of immunity at trial.

After receiving permission from this Court to file his successive petition, Moreno Morales's initial filing on remand was a *pro se* motion under 28 U.S.C. 2255 that was similar to, although more detailed than, the petition he filed in 1997. On August 23, 1999, the district court granted his motion for appointment of counsel, and on January 14, 2000, Moreno Morales filed an Amended Petition to Vacate or Set Aside Judgment. The Amended Petition concentrated on claims concerning nondisclosure of statements of Cartagena Flores, specifically, (1)

[8] The claim concerning the evidence of the embalmer was never fleshed out in any of the subsequent petitions.

alleged additional polygraphs taken by Cartagena Flores; (2) sworn statements of Cartagena Flores taken by the investigator of the Senate of Puerto Rico, Hector Rivera Cruz, on October 3, 1983, November 7, 1983, and November 9, 1983; and (3) handwritten notes taken by Rivera Cruz of an interview of Cartagena Flores. The Amended Petition also relied upon the fact that Cartagena Flores recanted his trial testimony in 1996 when he testified before the Senate of Puerto Rico in connection with its investigation into alleged irregularities surrounding the previous investigation of events at Cerro Maravilla. The Amended Petition also briefly raised an issue concerning nondisclosure by the United States of handwritten notes taken by Rivera Cruz of a November 8, 1983, interview with Jose Montanez Ortiz.

Following extensive briefing, United States Magistrate Judge Justo Arenas issued a Report and Recommendation that the Amended Petition be denied without an evidentiary hearing. That Report and Recommendation is summarized at pp. 4-6, *supra*. After consideration of Moreno Morales's objections to the Report and Recommendation and the United States' response to those objections, the district court approved and adopted the Report and Recommendation on March 28, 2002. This appeal followed.

SUMMARY OF ARGUMENT

Moreno Morales presents only one issue for review: whether the district court erred in dismissing his petition under 28 U.S.C. 2255 without an evidentiary hearing. Such a hearing is only required when a defendant alleges facts which, if

taken as true, would entitle him to relief. *United States* v. *Gonzalez*, 202 F.3d 20, 29 (1st Cir. 2000). The Section 2255 petition raised essentially two claims for relief. First, it claimed that the government violated Moreno Morales's due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose, *inter alia*, the results of all of the polygraphs given to Miguel Cartagena Flores. Second, it claimed that Cartagena Flores's 1996 recantation demonstrated prosecutorial misconduct in that the government unfairly pressured Cartagena Flores to change his testimony and that the government therefore knew that Cartagena Flores testified falsely at trial.

The magistrate assumed the truth of the petition's factual averment that Cartagena Flores took and failed fifteen polygraphs, not all of which were disclosed to the defense, before arriving at the version of the incident to which he testified at trial. Magistrate's Recommendation at 12. The magistrate found that even if there were more polygraphs than Moreno Morales was aware of, at best they would have had impeachment value, would have been cumulative of other evidence bearing unfavorably upon Cartagena Flores's credibility, and would not, therefore, have been material. *Ibid.* In addition, there was no need for a hearing because even if the facts alleged were true, they would not have entitled Moreno Morales to prevail on his motion. *Gonzalez,* 202 F.3d at 29.

Neither did the claims concerning Cartagena Flores's 1996 recantation require a hearing. It is well-established that recantations must be viewed with "considerable skepticism." *United States* v. *Carbone*, 880 F.2d 1500, 1502 (1st

Cir. 1989), cert. denied, 493 U.S. 1078 (1990). Contrary to Moreno Morales's allegation that the recantation demonstrates that Cartagena Flores perjured himself at trial and that the government knew his trial testimony was false, the court found that it was "clear that the United States did not knowingly present perjured testimony at trial." Magistrate's Recommendation at 18. That finding is supported by the record, which demonstrates that the convictions are amply supported by both the portions of Cartagena Flores's testimony that he has not recanted and by a substantial amount of evidence aside from Cartagena Flores's testimony. *See United States* v. *Gonzalez-Gonzalez*, 258 F.3d 16, 23-24 (1st Cir. 2001). In addition, because Moreno Morales had "sufficient material [at trial] with which to effectively attack the now ephemeral credibility of Cartagena" Flores in light of the many "instances when he had testified falsely under oath" (Magistrate Recommendation at 15, 17), the court properly concluded that the "'new' evidence can not 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *id*. at 18, quoting *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995). Finally, Moreno Morales's 1996 confession before the Senate of Puerto Rico demonstrates that there is no reasonable likelihood that a new trial in this case that included evidence of Cartagena Flores's recantation would result in an acquittal. Accordingly, the district court did not err in dismissing the petition without a hearing.

STANDARD OF REVIEW

Because the usual presumption against evidentiary hearings on motions

applies where a defendant files a post-conviction motion under 28 U.S.C. 2255, "a party seeking an evidentiary hearing must carry a fairly heavy burden of demonstrating a need for special treatment." *United States* v. *McGill*, 11 F.3d 223, 225 (1993). A district court's determination that an evidentiary hearing is not required is reviewed for abuse of discretion. *Gonzalez*, 202 F.3d at 28-29.

A "district court's determination on the materiality of newly discovered evidence in prosecutorial nondisclosure cases is ordinarily accorded deference." *United States* v. *Sanchez*, 917 F.2d 607, 618 (1st Cir.1990) (citations omitted), cert. denied, 499 U.S. 977 (1991). A contention that the district court applied an incorrect legal standard is reviewed *de novo*. *United States* v. *Huddleston*, 194 F.3d 214, 218 (1st Cir. 1999). The trial court's application of a correct legal standard to the facts of the case, however, is reviewed for abuse of discretion. *Ibid.*

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE PETITION WITHOUT AN EVIDENTIARY HEARING

A. *Moreno Morales Did Not Carry The Heavy Burden Of Demonstrating His Right To An Evidentiary Hearing*

Under Section 2255, Moreno Morales had the burden of establishing by a preponderance of the evidence that he was entitled to relief. *Mack* v. *United States*, 635 F.2d 20, 26-27 (1st Cir. 1980); see also *David* v. *United States*, 134 F.3d 470, 474 (1st Cir. 1998). Moreno Morales failed to carry his heavy burden of

demonstrating the need for an evidentiary hearing on his motion. *United States* v. *McGill*, 11 F.3d 223, 225 (1993).

An evidentiary hearing is not necessary "where a §2255 motion, (1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case." *United States* v. *Carbone*, 880 F.2d 1500, 1502 (1st Cir. 1989), cert. denied, 493 U.S. 1078 (1990); *McGill*, 11 F.3d at 225. To the extent that an examination of the record is inconclusive, a hearing is only required when a defendant alleges facts which, if taken as true, would entitle him to relief. *United States* v. *Gonzalez*, 202 F.3d 20, 29 (1st Cir. 2000).

Moreno Morales asserts (Br. 15) that the following material facts alleged in his petition are in conflict: the number of polygraphs taken by Cartagena Flores; whether the defense was provided with the results of all of the polygraphs taken by Cartagena Flores, including those he failed; and whether the United States pressured Cartagena Flores to testify falsely, or otherwise engaged in prosecutorial misconduct. As demonstrated below, however, the facts alleged in the petition were either conclusively refuted by an examination of the record, or, even if taken as true, would not have entitled Moreno Morales to relief.

B. *The Facts Alleged In The Petition Concerning The Polygraphs Of Cartagena Flores, Even If True, Would Not Entitle Moreno Morales To Relief Under* Brady v. Maryland

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court established the principle that "suppression by the prosecution of evidence

favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." In order to prevail on his claim that the United States violated *Brady* because the defense was "never provided with the multiple polygraph tests which were taken [by Miguel] Cartagena Flores which he allegedly failed," (S.A. 38), Moreno Morales bore the burden of demonstrating that the allegedly withheld evidence was material.

This Court has held that evidence is material in the *Brady* sense only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. *United States* v. *Sanchez*, 917 F.2d 607, 618 (1st Cir. 1990). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ibid.* If the evidence is impeachment evidence that is merely cumulative of other evidence available to the defense, it cannot undermine confidence in the trial. *Ibid.*; *United States* v. *Dumas*, 207 F.3d 11, 15-16 (1st Cir. 2000); see also *Zeigler* v. *Callahan,* 659 F.2d 254, 266 (1st Cir. 1981) (where evidence tending to impeach credibility of government witness is merely cumulative, courts generally reject the contention that such evidence is material, even where the information, if disclosed, could have been used to impeach a "key" prosecution witness, so long as the defense had an adequate opportunity to impeach the witness by other means).

The evidence alleged to have been withheld here consists of the results of polygraph examinations of Cartagena Flores, who, some ten years after the trial in

this case, recanted his trial testimony.[9] The Amended Petition relied upon allegations in the 1996 testimony of Cartagena Flores before the Senate of Puerto Rico that he was given 15 or more polygraphs over the course of a month and a half during the federal investigation in this case. App. 904; see also *id*. 903-906. There is no documentary evidence, or indeed any evidence independent of Cartagena's recantation, that Cartagena was subjected to 15 or more polygraphs.

As the district court correctly found, Moreno Morales specifically sought information concerning polygraphs under *Brady* and successfully moved for disclosure of exculpatory material related to the polygraphs. Magistrate Report at 12. The court also found, however, that even if there were some polygraphs that were not disclosed, they would have been cumulative and therefore not material within the meaning of *Brady*. Accordingly, the court correctly found that no hearing was necessary because the facts alleged, even if true, would not entitle Moreno Morales to relief.

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[9] As part of his recantation, Cartagena Flores alleged that he took "about 15 or more than fifteen polygraphs" over the course of a month and a half during which he stated truthfully that he was not present when Soto Arrivi and Dario Rosado were killed and thus, was not in a position to see the individuals who were responsible for their deaths. App. 903-904. He alleged that he was told that he had failed all of these polygraph tests and that he was threatened by the prosecutors that if he did not testify truthfully, his immunity from federal prosecution would be withdrawn and his family might be in danger. App. 904. See also App. 909; S.A. 38. He further alleged that once he admitted being present at the scene and implicated some of the defendants, he suddenly passed the polygraph examination. S.A. 38; App. 905.

1. *The record demonstrates that the United States revealed all of the polygraphs of Cartagena Flores that existed.*

The record demonstrates that, on February 5, 1985, the trial court ordered the United States to reveal extensive information concerning polygraph examinations to the defendants.[10] The docket sheet reveals that on February 13, 1985, the United States filed an *in camera* response to that order (S.A. 16, R. 243). The district court also entered a second order on February 19, 1985. That order required the United States to provide to the defendants the information submitted in the initial *in camera* response and also to reveal, in a second *in camera* filing, the results of polygraphs of witnesses other than Cartagena Flores that the United States had contended were not exculpatory in any way (S.A. 17; R. 253A). The docket sheet reflects that the United States complied with both parts of the February 19 order (S.A. 17; R. 258, 267). On February 28, the court ordered the United States to deliver to defendants' counsel information in the Amended In Camera Proffer that pertained to polygraph examinations of three witnesses other than Cartagena Flores (S.A. 19; R. 277). The record does not reveal any further pleadings filed concerning these discovery orders.

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[10] The order required the United States to state the "names of the witnesses to whom the polygraph examinations were administered," the "exact dates on which the polygraph tests were administered," the "name, last known address and telephone number of the examiner," "the number and substance of control questions propounded to the witness by the examiner, "the number and substance of the target questions propounded to the witnesses, and "the results of the polygraph tests administered." App. 859.

During the time that the Amended Petition was pending below, copies of the responses to the district court's orders filed by the United States in 1985 could not be located either in the district court or in the files maintained by the United States.[11] The United States therefore filed affidavits of the lead trial attorneys in this case in which they swore that they had complied with all court-ordered discovery. App. 910-912 (Aff. of Stephen P. Clark); App. 917-918 (Aff. of Daniel Lopez Romo).[12] The district court held that the record, including the fact

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[11] The magistrate entered an order on February 27, 2001 (S.A. 5, R. 41), instructing the district court clerk to provide the United States a copy of the February 13, 1985, response and the Amended In Camera Proffer (R. 243, 258, and 267) (S.A. 16, 17,18). The clerk informed counsel for the United States that the documents could not be located.

[12] While Moreno Morales's motion for a certificate of appealability (COA) was pending in the district court, copies of the two responses were found in previously unexamined files of the United States. Unaware that the district court had already granted the certificate of appealability, the United States filed a response opposing the motion for a COA to which it attached copies of the two previously missing *in camera* responses (S.A. 20-36). The district court's docket sheet notes that the issue was mooted by the granting of the certificate of appealability on August 5, 2002 (S.A. 7; R. 63). Moreno Morales's brief makes no mention of the filing of these documents, leaving the impression that the government's 1985 responses are still missing.

The government's February 13, 1985, response, ordered by the court to be produced to the defendants, revealed the results of three polygraphs taken of Cartagena Flores, on October 6, 1983; October 7, 1983; and November 15, 1983. See App. 864-865 (report of 10/6/83 polygraph); App. 866-867 (report of 10/7/83 polygraph); App. 868-870 (report of 11/15/83 polygraph). The United States's *in camera* response to the district court's February 19, 1985, order revealed the results of polygraphs of Julio Andrades Cepeda (prospective defense witness);

(continued...)

that Moreno Morales "failed to seek compliance with the court order or to raise the issue on appeal" (Magistrate Judge's Recommendation at 12), "belies petitioner'[s] ignorance related to the existence of a number of polygraph examinations." *Id.* at 13.

The court found "the information available reflects that it was probable that the government complied fully with its *Brady* obligations, particularly after all of the attention given to the subject of polygraph results by the court." *Id.* at 11; see also *id.* at 12 ("petitioner had access to some and very probably all of the results of those examinations as a result of the trial court's order to produce").[13]

2. *Even if there were additional polygraphs that were not produced, there was no reasonable probability that their production would have produced a different result at trial.*

Nevertheless, accepting for purposes of argument the allegation that some fifteen polygraphs were administered to Cartagena Flores and that the United

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[12](...continued)
Miguel Marte Ruiz (prospective government witness); Jose Montanez Ortiz (prospective government witness) (two polygraphs) (S.A. 17). The *in camera* response stated that the United States had now provided the court with "information concerning all polygraph examinations conducted in connection with the investigation and prosecution of this case" (S.A. 36). The court's February 28, 1985, order required the United States to deliver to defendants' counsel the information contained in the second *in camera* response with regard to Marte Ruiz and Montanez Ortiz. App. 863.

[13] The court also held that the claim is barred by the statute of limitations in the AEDPA, which requires a motion must be filed within one year of "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. 2255.

States did not reveal the results of all of them, the district court correctly found "the number of polygraphs * * * immaterial" since "at best, th[e] results would have had impeachment value," and "[t]he evidence, were it to be produced again, or for the first time, would be cumulative." *Id.* at 12-13.

The record demonstrates that Cartagena's statements to the polygraph examiner before November 15, 1983, are cumulative of other statements by him that were produced to the defense. In all his prior statements up until November 1983, Cartagena asserted that he was not present at the actual moment when the victims were killed. Until he testified before the federal grand jury in November 1983, Cartagena consistently maintained that he did not see the actual killings and did not know who shot the two victims.

On August 7, 1978, shortly after the incident at Cerro Maravilla, Cartagena Flores gave testimony to Commonwealth Prosecutor Miro Carrion. At that time, Cartagena testified that at around 12:25 p.m., while driving to the Rikavision tower, Commander Perez Casillas asked him if he heard shots, and he responded that he had not. App. 1-6. Before the first federal grand jury on January 9, 1980, Cartagena gave similar testimony, maintaining that when he arrived at the Rikavision tower, he saw two men carrying an injured person. He also stated that the injured person was placed in the back of Cartagena's vehicle, and Cartagena drove with Moreno Morales to the hospital in Jayuya. App. 8-46. When Cartagena was deposed in the civil suit brought by the victims' relatives, he gave a similar version of events. App. 47-103. He gave this same version again on

December 10, 1980, to Commonwealth Prosecutor Osvaldo Villanueva, App. 104-109, and in his testimony to the federal grand jury on October 13, 1983. App. 579-637.[14]

Thus Cartagena's "story" in the allegedly withheld polygraphs would very likely have been the same story he repeated each time he was questioned from August 1978 until November 1983. Cartagena was extensively interviewed during both Commonwealth and federal investigations into Cerro Maravilla, and gave this same version of events time and time again.[15] Additional evidence at trial that he had previously told a different story would have had no additional impeachment value, since the defense already had evidence that he had lied before two federal

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[14] In his October 13, 1983, testimony before the federal grand jury, Cartagena stated that Commander Perez Casillas told him while they were at the Mercedita Airport that the independence activists should not come down from Cerro Maravilla alive. App. 584-586. He also stated that after the first round of shots, he arrived at Rikavision tower and saw Dario Rosado and Soto Arrivi squatting or kneeling on the ground. The police officers were using "vulgar, strong language" and were hitting the two young men. App. 594-601. Cartagena himself admitted to shoving one of them. App. 601. He stated that they were alive and talking at this time. App. 604-605. He said he left the scene and when he returned he heard a second burst of firing. App. 605-610. He did not state, however, that he saw the actual moment of firing. He said that he did not look because "what was coming I didn't want to see." App. 608; see also App. 609.

[15] Cartagena did not admit until November 1983 that he saw Moreno Morales pointing a gun in the direction of the two victims as they kneeled, still alive, on the ground, and did not admit that he saw Moreno Morales's hand jerk with the recoil action of the gun following the firing. In November 1983, he gradually disclosed the full truth in a series of statements to the federal prosecutors and the Senate investigator.

grand jury panels.

Since the evidence pertained to "a witness whose credibility has already been shown to be questionable (like hav[ing] lied under oath in a grand jury as well as a civil trial and criminal trial), or who is subject to extensive attack by reason of other evidence," it was cumulative, and therefore not material. Magistrate's Recommendation at 13, citing cases. The district court did not, therefore, abuse its discretion in denying the petition without an evidentiary hearing on this issue because the allegations of the petition were either "conclusively refuted * * * by the files and records of the case," *Carbone,* 880 F.2d at 1502; *McGill*, 11 F.3d at 225, or, even if taken as true, would not entitle Moreno Morales to relief.

C. *The District Court Correctly Found That The United States Had No Duty To Disclose Other Impeachment Evidence That Was Not Under Its Control, But That Even If Such A Duty Existed, That Evidence Would Not Entitle Moreno Morales To Relief*

1. *Interview notes and statements of Cartagena Flores*

Moreno Morales argues (Br. 15-23) that the United States violated its duty under *Brady* by failing to provide him with copies of (1) handwritten notes of investigator Hector Rivera Cruz of a September 29, 1983, interview of Cartagena Flores made during the investigation of the Senate of Puerto Rico, and (2) sworn statements taken by Rivera Cruz, on October 3rd, November 7th, and November 9th, 1983. As Moreno Morales's own petition makes clear, the statements in question were obtained from "the Senate of Puerto Rico's vault where the

documents of the Cerro Maravilla are kept." S.A. 39-40. The district court found that "this evidence was not in the possession of the United States at the time of trial." Magistrate's Recommendation at 15. The only factual allegation supporting Moreno Morales's claim that the United States knew of the existence of these notes and statements taken by Puerto Rican authorities and had a duty to disclose them was that the handwritten notes from the September 29 debriefing state that Rivera Cruz went to meet with federal prosecutor Daniel Lopez Romo after the interview (S.A. 39). The United States responded to that allegation with affidavits of Lopez Romo and of federal prosecutor Steven Clark (App. 910-912; 917-918). Lopez Romo swore (App. 917-918):

> I know that we did not receive copies of any notes made by Hector Rivera Cruz or the non-public, sworn witness statements made to the Senate investigators. Specifically, we did not obtain a copy of (1) notes made by Hector Rivera Cruz regarding his interview of witness Montanez in November 1983, at which I was present, (2) notes made by Hector Rivera Cruz regarding his interviews of witness Cartagena in December 1983, or (3) the sworn statement of witness Cartagena to Senate investigators.

Clark swore that the federal investigation was conducted independently of the then concurrent investigation by the Senate of Puerto Rico, and that to his knowledge, the United States "did not have access to documents created or compiled by the Senate, except for public documents." App. 910. He stated that, although his recollection was limited due to the passage of time, he did "not recall seeing any notes made by, or non-public sworn witness statements made to, the Senate investigators." *Ibid.* The independent nature of each investigation is

confirmed by the fact that the Senate of Puerto Rico sought documents under the Freedom of Information Act (FOIA), 5 U.S.C. 552, from the United States Department of Justice and eventually filed suit in an effort to obtain "all evidence" collected by the Department in its investigations. This matter was litigated before the United States Court of Appeals for the D.C. Circuit. See *Senate of the Commonwealth of Puerto Rico on Behalf of Judiciary Comm.* v. *United States Dep't of Justice*, 823 F.2d 574 (D.C. Cir. 1987).

Moreover, the record reveals that the defense counsel at the time of trial were well aware that evidence gathered by the Senate of Puerto Rico had to be sought from the Senate itself and not from the federal prosecutors. In a proceeding before Magistrate Judge Simonpietri on August 14, 1984, defense counsel stated that the Senate had materials useful to their clients that they wanted to obtain. According to the minutes of this proceeding, "[i]t was also suggested that the defendants' counsel request the Senate for the Commonwealth of Puerto Rico to designate a person who may hear their request for access to records, etc., in the possession of the Senate. At the request of counsel, the Senate Investigator will be called by the Magistrate to learn under what conditions would the Senate's Commission receive defendants [sic] counsel." App. 839-840. Two days later, the magistrate ordered counsel for the defendants to prepare a letter to the President of the Senate asking for a conference to "discuss their discovery problems concerning records before the Senate." App. 841. The letter, which was to "designate, as precisely as possible, the material, records, etc., they would like to

examine and/or obtain," was to be delivered to the President of the Senate, with a copy to Hector Rivera Cruz, by not later than August 27, 1984. App. 841-842.

The record thus establishes that counsel for the defendants knew, prior to trial, of the existence of documents within the possession of the Senate of Puerto Rico and that the magistrate overseeing discovery ordered them to request such documents directly from the Senate, not the United States. Defense counsel never appealed this ruling, and Moreno Morales is consequently bound by it. "Where, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government." *United States* v. *Aichele*, 941 F.2d 761, 764 (9th Cir. 1991); see also *Lugo* v. *Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982) (finding no *Brady* violation where information was available to defense attorney through diligent discovery).

This Court has held that the government has no duty to produce evidence outside of its control. *United States* v. *Hughes*, 211 F.3d 676, 688 (2000). Courts in other circuits have likewise addressed allegations that a federal prosecutor has a duty to disclose evidence collected in a state investigation. In *United States* v. *Beers*, 189 F.3d 1297 (10th Cir. 1997), cert. denied, 529 U.S. 1077 (2000), the Albuquerque Police Department investigated and the State of New Mexico prosecuted a criminal case involving one of the federal government's witnesses. In rejecting the defendant's *Brady* argument concerning evidence collected in the state investigation, the Tenth Circuit stated that, while "[i]nformation possessed by other branches of the federal government, including investigating officers is

typically imputed to the prosecutors of the case," it would "decline to extend this principle for federal prosecutors to exculpatory materials in the possession of the state government * * *. *The state's knowledge and possession of potential impeachment evidence cannot be imputed to a federal prosecutor for purposes of establishing a* Brady *violation*." *Id*. at 1304 (emphasis added). See also *United States* v. *Kern*, 12 F.3d 122, 126 (8th Cir. 1993) ("We do not accept the defendants' proposal that we impute the knowledge of the State of Nebraska to a federal prosecutor."); *Aichele*, 941 F.2d at 764 (holding that a federal prosecutor had no duty to procure materials prepared for the state courts which were not otherwise under federal control); *United States* v. *Polizzi*, 801 F.2d 1543, 1552 (9th Cir. 1986) (finding no *Brady* or Jencks Act violation where prosecutor was neither aware of, nor in possession of, statements given by government witness in earlier state prosecution); *United States* v.*Walker*, 720 F.2d 1527, 1535 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (holding that knowledge of a deal between state officials and the federal government's chief witness could not be imputed to federal prosecutor); cf. *United States* v. *Durham*, 941 F.2d 858, 861 (9th Cir. 1991) (holding government had no obligation under Jencks Act to disclose to defendant notes taken by state investigator during interview of witness where government was not in possession of the notes).

In any event, there is no reasonable probability that production of the materials would have altered the outcome of the trial because they contained evidence that was cumulative of material that had already been disclosed to the

defense. That material included Cartagena Flores's January 9, 1980, grand jury testimony, his December 10, 1980, deposition in the civil suit brought by the victims' families, testimony before the Senate of Puerto Rico on September 28, 1983, and his October 13, 1983, grand jury testimony. Until he testified before the federal grand jury in November 1983, Cartagena Flores consistently maintained that he did not see the actual killings and did not know who shot the victims. Cartagena Flores admitted on direct examination that he had lied many times about the events at Cerro Maravilla and did not tell the whole truth until November 17, 1983. App. 806-816. Even with all of the impeachment material that was available to them, including sworn federal grand jury testimony, with which to challenge the credibility of Cartagena Flores's trial testimony, none of the defense counsel cross-examined him. Magistrate's Recommendation at 15; see Trial Tr. 880-881. It stretches credulity that the impeachment value of the handwritten notes of interviews and sworn statements given to Puerto Rican officials would have made a difference in the outcome of the trial.

2. *Handwritten notes of interview of Jose Montanez Ortiz*

As with the handwritten interview notes and statements of Cartagena Flores discussed above, the United States was never in possession of the handwritten notes taken by Hector Rivera Cruz on November 8, 1983, of an interview with Jose Montanez Ortiz. The United States therefore had no duty under *Brady* to disclose those notes to Moreno Morales or the other defendants.

In any event, the district court correctly found that the notes were

cumulative of other impeachment material consisting of prior inconsistent statements made by Montanez Ortiz that were available to the defense at trial. Under those circumstances, Moreno Morales cannot meet the materiality requirement of *Brady*.

Montanez Ortiz was deposed in 1980 in the civil suit filed by relatives of the Cerro Maravilla victims. In that deposition, Montanez Ortiz denied being at Cerro Maravilla at the time of the shootings. App. 110-192. Montanez Ortiz then testified before a federal grand jury on December 14, 1983. In that testimony, he admitted that he had lied in his civil deposition. App. 730-731. He testified before the grand jury that he was at Cerro Maravilla but was not in a position to see the shots being fired. *Id.* at 723. He stated, however, that he "suspected that they simply must have killed them." *Id.* at 722. After the shootings, Moreno Morales admitted to Montanez Ortiz that he had shot Soto Arrivi. *Id.* at 727.

This grand jury testimony was consistent with Montanez Ortiz's trial testimony in 1985. App. 761-774. Montanez Ortiz admitted in his direct testimony at trial that he had lied in the civil deposition. App. 775. Defense counsel were aware of the inconsistencies between Montanez Ortiz's civil deposition and trial testimony and questioned him about his prior statements. App. 781, 782-784, 785. The November 8, 1983, interview notes taken by Hector Rivera Cruz would not only have been cumulative of the civil deposition testimony but would also have been less valuable as impeachment material because the answers given during the interview were not under oath. As

demonstrated *supra*, impeachment evidence that is merely cumulative is not material evidence within the meaning of *Brady*, and any failure to disclose it would not, therefore, violate *Brady*. The district court's finding on this issue is therefore correct.[16]

D. *No Hearing Was Necessary Concerning Claims Of Perjury Based Upon Cartagena Flores's Recantation Because Even If Moreno Morales's Allegations Are Taken As True, He Was Not Entitled To Relief*

Based upon Cartagena Flores's 1996 recantation, Moreno Morales alleges that the government improperly pressured Cartagena Flores to change his story, and therefore, knew that his trial testimony was false. The petition does not, however, allege enough to show either that Cartagena Flores committed perjury at trial or that, if he did, the United States knew he had done so. Thus, the district court did not abuse its discretion in finding, without an evidentiary hearing, that the United States did not knowingly present perjured testimony at trial. *Carbone*, 880 F.2d at 1502.

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[16] Moreno Morales has not challenged the district court's determination that Antonio Mendez Rivera's 1996 testimony in the Senate of Puerto Rico is not newly discovered evidence. Accordingly, this Court need not reach that issue. In any event, the district court properly refused to address that issue in the petition. The claim that Mendez Rivera could not have seen who killed the victims because he was not present when the shootings occurred was available at the time of trial, since Montanez testified *at trial* that *he* did not witness the shootings and that Mendez Rivera was with him.

1. *The district court correctly concluded that the United States did not knowingly present perjured testimony.*

The United States had no reason to believe that Cartagena Flores was lying at trial. Indeed, the prosecutors had every reason to believe that he was not telling the whole truth in the initial version he gave of the events at Cerro Maravilla, since he had failed to pass the polygraphs that he took in October of 1983. Cartagena Flores's 1996 allegations that the prosecutors coerced him into changing his testimony are inadequate on their face to show that the federal prosecutors unconstitutionally coerced him into lying and then knowingly presented perjured testimony. Rather, those allegations - - that he was told that he had failed numerous polygraphs, that the "American" prosecutor, Steven Clark, would likely bring charges against him soon because he believed Cartagena Flores was lying, and that Cartagena Flores should think about the effect on his family if his immunity was withdrawn - - are fairly standard methods of persuading a witness to tell the truth.

When Cartagena Flores admitted in his third and final polygraph on November 15, 1983, that he was in a position to glance at the scene when he heard the second volley of shots and then testified before the federal grand jury on November 17, 1983, that he saw Moreno Morales's arm move with the recoil of the gun after he heard the shots, the United States had every reason to believe that Cartagena Flores was finally testifying truthfully, since this version of his testimony was consistent with the testimony from other witnesses. Cartagena

Flores's obvious emotional turmoil in testifying against his fellow police officers, including his own wife's brother, Raphael Torres Marrero, was noted on the record at trial by both prosecutors and defense counsel. See App. 788-790. That state of mind is consistent with a witness who initially attempted to deny what he saw, and then realized that he could not continue to hide the truth.

2. *Cartagena Flores's recantation does not prove that the United States convicted Moreno Morales through perjured testimony.*

Neither the fact of Cartagena Flores's recantation nor any of the other testimony that surfaced during the 1996 investigation by the Senate of Puerto Rico provides any reason at this time to think that Cartagena Flores was lying at trial. In any event, however, even if Cartagena Flores's trial testimony about having seen Moreno Morales shoot one of the victims is false, the record conclusively refutes the allegation that the United States knowingly obtained a conviction against Moreno Morales with perjured testimony because Cartagena's "recantation" does nothing to undermine his trial testimony against Moreno Morales on the counts on which he was tried and convicted.

When called before the Senate, Cartagena stated that he had lied in his sworn statement taken on November 16, 1983, because he had been told that he had not passed numerous polygraphs. He stated that he lied in that statement as to three areas: (1) that he saw the moment when the victims were shot, (2) that Moreno Morales had told him why the victims were killed, and (3) that Perez Casillas told him after the shootings that the victims were bad people and deserved

to die.

At the outset, this claim must be considered in light of the well-established principle that recantations are viewed with "considerable skepticism." *Carbone*, 880 F.2d at 1502. In addition, the reliability of this partial recantation must be judged in light of the fact that Cartagena Flores waited more than ten years after the conclusion of the trial in this case to come forward and did not do so spontaneously and voluntarily. Rather, Cartagena Flores was summoned to testify before a Special Commission of the Senate of Puerto Rico in 1996. The highly politicized nature of this case also counsels viewing the recantation with skepticism.

In any event, many of the statements made by Cartagena Flores in 1996 are actually consistent with his 1985 trial testimony and inconsistent with his initial cover-up story. More importantly, none of his 1996 Senate testimony undermines the evidence against Moreno Morales on the federal convictions. Moreno Morales was neither charged nor convicted of killing Dario Rosado or Soto Arrivi. Rather, he was convicted of conspiracy and perjury.

Nothing in Cartagena Flores's "recantation" is inconsistent with the testimony that he gave to the federal grand jury on October 13, 1983, especially since, by his own most recent account, he did not begin to lie until the following month. On October 13, 1983, he testified before the federal grand jury that Moreno Morales was one of the people present at Rikavision Tower between the time of the first and second volley of shots, which is when Dario Rosado and Soto

Arrivi were detained but still alive. App. 614-615. That grand jury testimony concerning Moreno Morales's presence at the scene is consistent with his trial testimony. See App. 791 ("In the car were Colonel Perez Casillas, Lieutenant Quiles, Sergeant Mateo, Moreno, and Montanez."), 792 ("They were there but I can't tell you the specific places where they were."), and 793 (Question: "Was there anybody else there other than yourself and the two subjects that . . . had been detained?" Answer: "The ones who got there in the car."). Cartagena did not repudiate this October 13, 1983, grand jury testimony when he testified before the Senate in 1996.

Moreno Morales was also convicted in Count 17 in which he was charged with giving false testimony to hide the fact that Jose Montanez Ortiz came to Toro Negro with Perez Casillas and Quiles Hernandez. App. 753-754. That conviction is supported by Cartagena Flores's 1996 Senate testimony that he saw Perez Casillas, Quiles Hernandez, and Montanez Ortiz at the Mercedita Airport on July 25, 1978. S.A. 146-147. Cartagena also told the Senate in 1996 that Perez Casillas stated before the shootings that those people, *i.e.*, the pro-independence activists, should not come down from up at the tower area alive. S.A. 147-148. This is evidence of the conspiracy on which Moreno Morales was convicted in Count One of the Indictment.

3. *The jury was in the best position to judge Cartagena Flores's trial testimony.*

Where, as here, a defendant presents post-trial evidence concerning recantations by a government trial witness, it is important to consider whether any previous alterations of testimony or inconsistencies in prior statements were made known to the jury in the original trial. Where such evidence has come before the jury, the jury is in the best position to evaluate the truthfulness of the witness's trial testimony. *United States* v. *Ramsey*, 761 F.2d 603, 604 (10th Cir. 1985), cert. denied, 474 U.S. 1082 (1986) (in case "riddled with recantations and reassertions," the district court judge is in the best position to determine whether the testimony was nonetheless sufficiently credible to support the jury's verdict). A review of the records of this case reveals that Cartagena Flores changed his testimony on several occasions and that these vacillations were disclosed both to the defense prior to trial and to the jury during Cartagena Flores's trial testimony.

On direct examination at trial, Cartagena was asked about each time he had testified prior to the point in 1983 when he changed his account. On the witness stand, he admitted that in each of those prior statements he had not told the truth. [17] Thus, the jury learned of Cartagena's prior inconsistent statements during direct

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[17] He further conceded that when he testified before the federal grand jury on October 13, 1983, he omitted some information. When asked what information he had been omitting, he responded: "The information was that I have always been saying that I was never close, – I mean when I went there the second time, that I hadn't seen anything," when in fact, "I had seen something." See App. 812.

examination. App. 806-812. The jurors had the opportunity to observe Cartagena's demeanor on the stand, and they apparently made the decision to credit his trial testimony.

In *Olson* v. *United States*, 989 F.2d 229 (7th Cir.), cert. denied, 510 U.S. 895 (1993), the defendant filed a Section 2255 motion on the basis of newly discovered evidence, claiming he was entitled to a new trial based on the sworn affidavits of two witnesses in which they recanted their prior testimony inculpating him. These witnesses had both originally testified before a grand jury that they had not witnessed the murder. They then changed their testimony and testified before a second grand jury and at trial that they had in fact witnessed the murder. *Id.* at 231. In affirming the district court's denial of the motion without an evidentiary hearing, the Seventh Circuit stated (*ibid.*):

> During Olson's trial the jury heard these varying stories and the witnesses' explanations for the variations; it chose to accept the witnesses' version of the testimony that they had in fact observed Olson shoot [the victim]. * * * By recanting, the witnesses are simply trying to change their trial stories back to their original grand jury stories – the same stories that the petit jury heard in cross examination and rejected. To give Olson a new trial on something that one jury already has decided would not put any important new facts before the jury, it simply would give Olson another roll of the dice.

Here, as in *Olson*, the jury "heard all versions of the story and convicted * * * discrepancies notwithstanding." *Id.* at 232. Such a verdict should not be disturbed. Moreover, defense counsel could not have been taken by surprise by Cartagena Flores's testimony at trial. His grand jury testimony certainly gave

ample forewarning. "If the defendant had every opportunity to meet the allegedly false testimony at trial, his failure to unmask its falsity at that time is some evidence that the testimony was true." *Ibid.* Defense counsel here failed to cross examine Cartagena Flores at all. In a similar situation, the Fifth Circuit held that a defendant could not claim "that the subsequent recantation constitutes 'newly discovered' evidence." *United States* v. *Gresham*, 118 F.3d 258, 268 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998). Although the witness in *Gresham* did not recant until after trial, the court stated: "defense counsel could have exposed her indecision by effectively cross-examining the witness. Having failed to examine the witness, the defense failed to exercise due diligence at trial." *Ibid.* The lack of cross examination here is similarly a failure of due diligence on the part of defense counsel.

4. *There is no reasonable likelihood that the testimony Cartagena Flores now claims is false could have affected the judgment of the jury nor would the content of the 1996 recantation result in an acquittal on retrial.*

As argued *supra*, much of the substance of Cartagena Flores's 1996 recantation actually supports Moreno Morales's convictions of conspiracy and perjury. The only area in which the recantation would change Cartagena Flores's trial testimony is that he now denies having seen Moreno Morales kill one of the victims. But that testimony is unnecessary to the convictions. Moreover, there is ample evidence, in addition to the parts of Cartagena Flores's trial testimony that he has not recanted, that supports the convictions.

Moreno Morales's conviction on Count 15, for making a false material declaration when he stated that he did not see anyone hit or kick either of the victims (see App. 751-752) is amply supported by the trial testimony of Jose Montanez Ortiz. Montanez Ortiz, who at the time of the incident at Cerro Maravilla was a supervisor in the intelligence division of the Police of Puerto Rico, described the initial encounter with Soto Arrivi and Dario Rosado. When asked who was present "during the entire afternoon and particularly during the time that Dario and Soto remained at the scene," among the persons he listed was "fellow worker Rafael Moreno." App. 764. He next described the victims being assaulted: "at that time the atmosphere was very hot . . . and there was a collective hysteria going on by which the arrested persons were beaten." *Id*. at 766. Montanez admitted that he also participated by striking Dario Rosado. *Id*. at 767. He also stated that a "piece of cement was raised up by fellow worker Moreno to drop it on top of Soto." *Ibid*. Montanez, however, prevented Moreno from hitting Soto with the cement. *Id*. at 767-768 (see also *id*. at 819, testimony of Antonio Mendez Rivera).

Montanez Ortiz also testified that on July 25, 1978, he flew to Mercedita Airport with Sergeant Nelson Gonzalez on the orders of Perez Casillas. See App. 761-762. This testimony supports Moreno Morales's conviction for lying about the fact that Nelson Gonzalez and Jose Montanez Ortiz came to Toro Negro with Perez Casillas and Quiles Hernandez. App. 753-754. Once at Toro Negro, Montanez Ortiz received instructions to go to protect the Rikavision facilities and

that "should the terrorists arrive, one of each should be given a shot." App. 763. Montanez described the victims as alive and testified that one of them was handcuffed during the time of this assault. *Id*. at 769.[18] Although Montanez was not present during the actual killing of the two victims, he testified that Moreno Morales "told [him] that someone [else] had not wanted or had not dared to shoot at Soto Arrivi and that he [Moreno Morales] took away his weapon and shot him." *Id*. at 774.

This testimony supports Moreno Morales's convictions under Counts 14, 16, and 17 of making false material declarations before the grand jury in testifying that when he arrived at Rikavision Tower, one of the victims was on the ground and the other was already injured and that he was present for less than one minute (see App. 749-751, 752-754), since it shows that when Moreno Morales first arrived, Dario Rosado and Soto Arrivi were both alive, were in police custody, and had not yet been shot.

Police officer, Antonio Mendez Rivera, also testified to witnessing the events at Cerro Maravilla. Mendez Rivera stated that he saw Cartagena kick "one of the individuals, who later turned out to be Arnaldo Dario Rosado." App. 818. This corroborates Cartagena's own testimony on this point, both at trial in 1985 and before the Senate in 1996.[19] Mendez Rivera also testified that he saw "agent

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[18] Page 769 of the Appendix is incorrectly paginated as 167.

[19] Cartagena admitted to the Senate in 1996 that he hit one of the victims.

Rafael Moreno, using a piece of material, tried to injure Arnaldo Dario Rosado, but [he] shouted something and [that] action was also prevented at [that] moment." *Id*. at 819. This description of Moreno's actions matches Montanez's testimony. Then, according to Mendez, "Moreno grab[bed] the weapon that Rafael Torres was using, and he fire[d] at the one who turned out to be the individual known as Soto Arrivi." *Ibid*. Here Mendez's account buttresses Montanez's testimony about what Moreno told him. When asked who was in the immediate area when the shots were fired, Mendez stated: "Rafael Moreno, Rafael Torres, and Luis Reveron." *Id*. at 820.

The strong, internally consistent, and mutually reinforcing testimony of Montanez and Mendez alone would have been sufficient to convict Moreno Morales. In this case, even if the court were to conclude that Cartagena has recanted his trial testimony, there is no probability that retrial would result in an acquittal. Accordingly, the Section 2255 motion was properly denied without an evidentiary hearing.

Finally, Moreno Morales's own recent confession guarantees that there is no reasonable likelihood that he could be acquitted in a new trial. Moreno Morales testified before the Special Commission of the Senate of Puerto Rico on December 11, 1996, several days after Cartagena Flores's purported "recantation." At that time, Moreno Morales stated that he saw Dario Rosado and Soto Arrivi on July 25, 1978, when they were still alive. He admitted that he attempted to hit one of the victims with a bag of cement but was prevented from doing so by another police

officer. This is consistent with the trial testimony of Montanez and Mendez. According to Moreno Morales, he took a gun from Torres and shot at Soto Arrivi. This is also consistent with the trial testimony of Montanez and Mendez. Moreno Morales accepted that he was responsible for this man's death and even asked forgiveness from the relatives of the victims. See App. 899-901.

Moreno Morales's 1996 Senate testimony thus directly supports his convictions for giving false declarations about whether he was present at Cerro Maravilla while Soto Arrivi and Dario Rosado were still alive, while they were assaulted before they were shot, and when the shots that struck and killed the victims were fired.[20] In light of this testimony, it is obvious that there is no actual probability that Moreno Morales, who has now publicly confessed his role in the killings, would be acquitted upon retrial of charges that he previously lied about his participation in and knowledge of the incident, thereby committing perjury and obstruction of justice.

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[20] The district court also recounted the 1996 Senate testimony of Nelson Gonzalez Perez, Rafael Torres Marrero, Luis Reveron Martinez, and Antonio Mendez Rivera that Moreno Morales shot Soto Arrivi. Magistrate's Recommendation at 16-17. This testimony, summarized in the Senate report, has not been translated from Spanish, and thus, has not been included in the appendix.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached Brief for the United States as Respondent-Appellee is proportionally spaced, has a typeface of 14 points, and contains 11,787 words.

January 21, 2003

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing Brief for the United States As Respondent-Appellee on the Petitioner-Appellant by mailing to counsel of record at the following address:

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This 21st day of January, 2003.

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