IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7641
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MATIAS MONTEMAYOR,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CA B 91 001; CR B 81 811)

(July 23, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I

Matias Montemayor was named in ten counts of a 16-count indictment that alleged that he was the leader of a continuing criminal enterprise engaged in various illegal drug activities between 1970 and 1981. In 1982 a jury convicted Montemayor of eight counts that included engaging in a continuing criminal

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

enterprise; conspiracy to distribute cocaine, heroin, and marijuana; distribution of cocaine, an unspecified amount of controlled substances, and a multi-kilogram quantity of cocaine; and conspiracy to manufacture and distribute heroin. This court affirmed on direct appeal. In response to Montemayor's 1984 Fed. R. Crim. P. 35 motion the district court reduced his sentence.

In 1991, Montemayor filed a 28 U.S.C. § 2255 motion on the grounds that Ricky Bowman, a material witness for the government, offered perjured testimony at trial with the government's knowledge or notice, later recanted his testimony, and admitted to being under the influence of illegal drugs while he was testifying and during his discussions with government agents.

A magistrate judge held an evidentiary hearing to examine the allegations raised in Montemayor's § 2255 motion and recommended denying Montemayor's petition. The district court adopted the magistrate judge's report and recommendation and denied Montemayor's petition for habeas. Montemayor appeals.

II

To prove a due process violation from the use of perjured testimony, Matias Montemayor has the burden of establishing that "(1) [Bowman] gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." May v. Collins, 955 F.2d 299, 315 (5th Cir.) cert. denied 112 S.Ct. 1925, petition for cert. filed (May 6, 1992) and petition for cert. filed

(Apr 14, 1993) (§ 2254 case). It is evident that Bowman's testimony was material and affected the jury's finding of guilt. Montemayor, however, fails to prove either that Bowman's testimony was false or that prosecutors knew that it was false.

"`[R]ecanting affidavits and witnesses are viewed with extreme suspicion by the courts." May, 955 F.2d at 314 (quoting U.S. v. Adi, 759 F.2d 404, 408 (5th Cir. 1985)). It is up to the district court to compare the trial record with the recanting witness's affidavit "and determine for himself whether the affidavit is worthy of belief." The district court's determination that a new trial is not warranted is reviewed for abuse of discretion. "[T]rial judges are in the best position to compare a witness's earlier testimony with his new version of the facts." The magistrate judge utilized the May v. Collins test and reported that Montemayor failed to prove his case at the initial stage of the inquiry because he did not show that Bowman's testimony was false. Thus, the magistrate judge did not consider the other two issues. According to the magistrate judge: ". . . it was not clear from Bowman's answers whether he did not remember having testified to these facts, or he did not remember that these facts ever occurred. Petitioner's counsel unsuccessfully attempted to show through Bowman's present testimony that the evidence introduced in Petitioner's trial was in fact false."

The magistrate judge described Montemayor's undertaking as:

> a task equivalent to a logical impossibility: proving a negative assertion. For example, whether MONTEMAYOR owned and operated a drug lab in Mexico is a fact question. If Bowman testifies today that he has no personal knowledge as to the lab's existence, such a testimony does not prove that the lab does not exist.

Id. at 18-19. This statement misses the point because it is not evident that it is logically impossible to prove a negative assertion. Although Montemayor's involvement with the lab was not dispositive of the issue of guilt, it reflects the magistrate judge's legal analysis. Montemayor's obligation, however, is to demonstrate that the primary evidence of his involvement in the counts of conviction was perjured and that the government was aware of this fact.

Montemayor's argument that the case must be reversed because the magistrate judge utilized an improper standard (as noted above) for evaluating his § 2255 claim, is without merit because the district court's judgment can be easily affirmed on other grounds that were noted by the magistrate judge. Contrary to Montemayor's assertion, the magistrate judge did find that Montemayor failed to show that Bowman's trial testimony was false. In this connection, the record here establishes that Bowman was an unreliable witness during the § 2255 hearing, that his motivations for coming forward almost ten years later are suspect, and that several government

agents testified that Bowman's trial testimony was consistent with the information that he provided them prior to the trial.

Furthermore, the trier of fact is uniquely qualified to evaluate the demeanor and credibility of witnesses. The magistrate judge specifically concluded that "Bowman's testimony is insufficient to establish that any of the evidence he had testified about in the 1982 trial was false." This conclusion is supported by the record of the § 2255 hearing. At the hearing Montemayor's attorney expressed his frustration with Bowman as a witness:

> Mr. Bowman, I'm having -- and I'll have to apologize to Mr. Smith and the Court, I'm having some difficulty in our -- in ask -- framing the question to you because I don't understand you when you're saying I don't remember. Either it never happened, you follow me, and you have to be more clear in your answer. When you say I don't remember, that means something never happened or you don't remember the testimony that way.[1]

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[1] At one point the following exchange occurred between Montemayor's attorney and Bowman:

> Q: Mr. Bowman, in your mind, is there a difference between something that never happened and the phrase, "I don't remember," . . .
> A: Say that again.
> Q: All right. . . . In your mind, is there a difference between when you say things, I -- I don't remember versus it never happened; does it mean the same thing or they're different things to you?
> [Government objects]
> A: I don't remember. Right.

Although the appellant's brief cites clear moments in the testimony, they are not reflective as a whole of Bowman's testimony.

Bowman frequently responded affirmatively regardless of the question's content. Although Bowman's testimony at Montemayor's trial was cogent, coherent, and sometimes involved lengthy recitals of intricate facts, his testimony at the § 2255 hearing was unfocused, confined to short answers, and often inconsistent. At the § 2255 hearing it was frequently unclear whether Bowman was attempting to testify that an event never happened, or that he did not remember it happening, or that it happened, but that Matias Montemayor was not present, or that he did not remember testifying on the subject. For example, after being confronted with his trial testimony that he, Matias Montemayor, and several others visited the heroin laboratory, the following exchange occurred between Bowman and the government:

> Q: Now, is it your testimony that you remember that or you don't remember that?
>
> A: I don't remember that.
>
> Q: You don't remember that. So is it your testimony that whether you remember it or not, you're for sure that Matias Montemayor was never -- never at any --
>
> A: I don't remember him --
>
> Q: -- cave?
>
> A: -- being at any -- any cave.
>
> Q: Now, you -- your testimony is you don't remember him being in any cave; is that your test -- that what you just said?
>
> A: I don't remember saying that.

> Q: And do you -- Is it your testimony that you don't remember ever seeing him in any caves . . .
>
> A: Yes. I've never seen him in the cave.

Next, Bowman was asked whether Benito Montemayor was at the cave on this particular occasion:

> A: No.
>
> Q: Well, he was not there?
>
> A: I don't remember. I --
>
> Q: You don't remember.
>
> A: -- don't remember even being here or --
>
> Q: You don't remember -- you -- you -- the truth is you don't even remember anything about this case; isn't that correct?
>
> A: True.

After this exchange, Montemayor's attorney resumed questioning Bowman:

> Q: If you don't remember anything abo[ut] the cave, why did you testify about a cave?
>
> A: You got me.

Although Bowman suggested that his motivation for testifying in part was his anger at his stepfather, Benito Montemayor, he does not explain why he testified against Matias Montemayor and the other defendants beyond implying that things just got out of control. His reason for attempting to change his testimony was that he could not sleep and he did not think that everything he said was "correct or true." Bowman could not explain how he was so

drugged out at the trial that he could not remember his testimony now, but at the time he could follow the government's instructions to testify to certain facts.

As we have noted earlier, credibility determinations are uniquely within the province of the district court when it sits as trier of fact, Kendall v. Block, 821 F.2d 1142, 1146 (5th Cir. 1987). Findings of fact by the district court in § 2255 cases will not be set aside unless clearly erroneous. U.S. v. McCord, 664 F.2d 60, 62 (5th Cir. 1981). The district court's assessment of Bowman's credibility was not clearly erroneous and the court did not abuse its discretion by denying Montemayor a new trial.[2]

III

For the reasons we have given, the judgment of the district court is

A F F I R M E D.

[2]Contrary to the magistrate judge's assertion that Montemayor did not raise the issue of prosecutorial knowledge of the falsity of Bowman's testimony, this position can be implied from Montemayor's statement that "agents for the prosecution knew or should have known of the perjury." Nevertheless, Bowman's assertions at the hearing that DEA agents knew that he was taking drugs, were contradicted by the agents themselves. There is no evidence indicating that the DEA agents knew that Bowman was under the influence of drugs during the time he testified against Montemayor.