

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 vs. )  
 )  
 RUBEN ZUNO-ARCE, )  
 )  
 Defendant-Appellant.)  
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 )  
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CASE NO. 93-50311  
(C.D. Cal. No. CR-87-422 ER)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL  
DISTRICT OF CALIFORNIA, THE HONORABLE EDWARD RAFEEDIE PRESIDING

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APPELLANT'S OPENING BRIEF

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EDWARD M. MEDVENE  
MITCHELL, SILBERBERG & KNUPP  
11377 West Olympic Boulevard  
Los Angeles, CA 90064  
Telephone: (310) 312-2000

JAMES E. BLANCARTE  
JACK R. LUELLEN  
LAW OFFICES OF  
JAMES E. BLANCARTE  
1875 Century Park East  
Suite 700  
Los Angeles, CA 90067-2508  
Telephone: (310) 788-2760

Attorneys for  
Defendant-Appellant  
RUBEN ZUNO-ARCE

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<sup>1</sup> As used herein, "CR" refers to the Clerk's Record; "CR P" to the Clerk's Record in the perjury case; "ER" to Appellant's Excerpts of Record; and "RT" to the Reporter's Transcript, which denotes the page in the transcript of Zuno's 1992 trial, unless followed by a "90" in which case the reference is to the volume and page number of the transcript of Zuno's 1990 trial.

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I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the prosecution's conduct in presenting contradictory versions of the alleged kidnapping meetings to two different juries -- versions that cannot co-exist -- undermines the integrity of the prosecution and mandates the dismissal of the indictment, or, at a minimum, a reversal of Zuno's conviction.
2. Whether the district court erred in denying Zuno's motion for a judgment of acquittal or, at a minimum, for a new trial because the government failed to introduce sufficient evidence to prove that Zuno acted with a purpose to gain entrance into, maintain or increase his position in a criminal enterprise engaged in racketeering activity.
3. Whether the district court erred in denying Zuno the opportunity to procure and present the testimony of four critical witnesses who would have refuted a principal government theory that Zuno knowingly arranged for his home to be utilized by the Guadalajara Narcotics Cartel (the "Cartel") in the Camarena kidnapping.
4. Whether the district court erred in denying Zuno's new trial motion because the government failed to make timely production of vital Brady material and, consequently, Zuno was precluded from introducing evidence that both supported an alternative theory for the kidnapping of Camarena and corroborated Zuno's contention that he was not present at Lope de Vega at the time of Camarena's interrogation.

5. Whether the district court erred by refusing to allow Zuno to present the critical and highly relevant testimony of David Macias-Barajas, an unavailable witness.

II.

**STATEMENT OF JURISDICTION**

Defendant Ruben Zuno-Arce appeals from a final judgement of the United States District Court for the Central District of California, the Honorable Edward Rafeedie presiding. The Court had jurisdiction under Title 18 United States Code Section 3231. This Court has appellate jurisdiction pursuant to Title 18 United States Code Section 3731. Zuno filed a timely notice of appeal on April 14, 1993. Zuno is presently incarcerated, serving a sentence of life imprisonment, pending appeal.

III.

**STATEMENT OF THE CASE**

On August 9, 1989, four and a half years after Enrique Camarena's ("Camarena") kidnapping, INS officials, acting pursuant to a Drug Enforcement Administration ("DEA") "hold," detained Zuno at the San Antonio airport. Zuno traveled to San Antonio on a commercial plane, using his own name, without any secrecy or concealment, as he had numerous times after the kidnapping.

After being notified of Zuno's detention, the DEA requested that the U.S. Attorney's office in Los Angeles seek a "material" witness warrant.<sup>2</sup> Judge Edward Rafeedie issued the

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<sup>2</sup> Though the government had already conducted an intensive, fifty-four month investigation involving the expenditure of hundreds of thousands of dollars to entice individuals to identify those involved in the kidnapping, Zuno was not charged as a participant in the kidnapping.

warrant on August 10, 1989. DEA agents arrested Zuno as a "material" witness in the then pending case of United States v. Raul Lopez-Alvarez, et al (CR No. 87-422(B)-ER) in which certain individuals were charged with Camarena's kidnapping and murder.

Zuno appeared before a federal grand jury on August 24 and August 31, 1989. The DEA hoped to acquire information from Zuno since it believed high-ranking Mexican government officials were involved in the kidnapping and believed Zuno had information of their involvement through his brother-in-law, the former president of Mexico, Luis Echeverria. The DEA also believed Zuno might be able to furnish additional information about the Lope de Vega house where Camarena was taken after his kidnapping. Zuno had owned that house for many years prior to the kidnapping, but had sold it only a month or so prior to February 7, 1985. (See Section VI, supra).

Zuno answered all questions asked at the grand jury proceeding. On September 5, 1989, Judge Rafeedie ordered Zuno released from custody as a "material" witness. Despite the court order, Zuno was not released. Instead, at the DEA's request, the INS transferred Zuno to San Antonio on the pretense that there would be a hearing to determine why Zuno should not be returned to Mexico. The INS never held the hearing.

It appears Zuno was only sent to San Antonio so the U.S. Attorney's office could quickly find a witness who might implicate Zuno in wrongdoing. Fortuitously, the DEA was able to find such a witness. On September 7, 1989, Lawrence Harrison ("Harrison"), a DEA informer since early 1987, who had never mentioned that Zuno knew either Ernesto Fonseca ("Fonseca") or Rafael Caro-Quintero

("Caro"), claimed for the first time that he had once seen Zuno with Caro at a public function and once seen him at the Fonseca home.<sup>3</sup>

On September 7, 1989, as a result of Harrison's grand jury testimony, Zuno was indicted for perjury based on the allegation that he testified falsely when he said he did not know Caro or Fonseca. (CR P1) Again, Zuno was not indicted for any involvement of any kind in Camarena's kidnapping.

On September 22, 1989, Raul Lopez Alvarez and Rene Verdugo were found guilty of the kidnapping and murder of Enrique Camarena. (CR 496) Zuno was not called as a witness and during the entirety of their several month trial, not one witness made any claim that Zuno was in any way involved in the Guadalajara Narcotics Cartel and/or the kidnapping and/or murder of Enrique Camarena.

Zuno's perjury trial was assigned to District Judge Robert Takasugi who granted Zuno's bail request, set his bond at \$200,000, and permitted him to return to Mexico pending trial. (CR P12) On October 10, 1989, this Court affirmed that order. (CR P81) Zuno abided by all bond conditions including returning to the United States to be present at court hearings.<sup>4</sup>

As of mid-November 1989, the government did not have a witness who claimed Zuno was involved in Camarena's kidnapping. On

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<sup>3</sup> Harrison, a man of many aliases (e.g., George Marshall Leyva, Lorenzo Victor Harrison, George Cumans, George Marshall Davis), has been convicted of a number of felonies including possession and distribution of narcotics, robbery, theft, gangsterism, illegal transport of firearms and impersonating an official. He has received and continues to receive compensation from the DEA and was granted immunity and relocation to the United States for himself and his family before he "recalled" that Zuno had met once with Caro and once with Fonseca.

<sup>4</sup> Pretrial hearings were held October 30, 1989 and December 11, 1989, and Zuno was present in court on both days.

November 23, 1989, the DEA interviewed Hector Cervantes Santos<sup>5</sup> ("Cervantes"), who had been sent to the DEA by Garate-Bustamonte ("Garate"), his former boss.<sup>6</sup>

Some days later, after receiving a \$3,500 advance from the DEA, a promise of \$3,000 per month, and relocation to the United States for himself and his family, Cervantes for the first time, some four years and ten months after the kidnapping, claimed he had seen Zuno at a meeting in early February 1985 where the Camarena kidnapping was planned. (RT 90:7:39-43; ER 4) Cervantes claimed he was a handy man and body guard for Javier Barba-Hernandez, a reputed Cartel leader, worked at Barba's home at 114 Tonalá (called La Quinta), and that at this location he observed various kidnapping meetings where Zuno was present. (RT 90:6:20-31; ER 2)

On December 8, 1989, Zuno and his wife flew to the United States so he could be present at pre-trial proceedings scheduled for December 11 in Judge Takasugi's court. Zuno's counsel had cautioned him that upon his return to the United States he might be arrested on a charge that he was involved in Camarena's kidnapping.<sup>7</sup> Zuno

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<sup>5</sup> Pursuant to Federal Rules of Evidence 201(b)(2), Zuno requests this Court take judicial notice of the previous trial testimony of Cervantes. Rule 201(b)(2) permits judicial notice of a fact that is "not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In particular, a court may take judicial notice of its own records in other cases. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

<sup>6</sup> Garate was a participant in a December 1984 meeting where Camarena's picture was passed around and his abduction was discussed. No witness has ever testified Zuno was at this meeting. Garate was never charged with participation in the kidnapping but instead the DEA paid him a monthly retainer in exchange for his supplying the DEA with potential witnesses.

<sup>7</sup> A grand jury indictment had issued on December 6, 1989, for the  
(continued...)

told counsel he was innocent, had nothing to fear from the U.S. Justice system, and would return as ordered by Judge Takasugi. On his arrival, DEA agents re-arrested Zuno based on the newly returned kidnapping indictment. Zuno pushed for a trial in the perjury case. The government's motion to continue the trial was denied. The government dismissed the perjury case on March 14, 1990. (CR P93)

Zuno went to trial on the kidnapping charges in May 1990. At trial, the government argued there were five meetings where the kidnapping was planned. Enrique Plascencia ("Plascencia") testified the initial meeting occurred in December of 1984, but he did not testify that Zuno was present at the meeting or implicate him in the kidnapping. (RT 90:19:15-16,44-45,116-119,137; ER) Cervantes testified at trial about the other four meetings. He claimed Zuno attended three of them. (RT 90:6:175-177;7:26,43) In contrast to Plascencia, Cervantes said the initial meeting where the kidnapping was discussed occurred at a baptism in September 1984. (RT 90:6:174-177; ER 2) However, prior to trial, he had never told DEA agents or representatives of the U.S. Attorney's Office about such a meeting. (RT 90:7:72-74; ER 2) There were innumerable other inconsistencies and contradictions between what Cervantes had told the DEA prior to trial and his testimony at trial. These included telling the DEA before hand that certain meetings occurred that at trial he said did not occur and claiming at trial that certain meetings occurred that he had not mentioned to the DEA.

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<sup>7</sup>(...continued)

first time charging Zuno with participating in planning the Camarena kidnapping. (CR 742) Subsequent discovery has shown that Cervantes was the only witness before the Grand Jury to claim Zuno had any involvement in the Camarena kidnapping.

In its closing argument, the prosecution strenuously argued that despite all of the contradictions in Cervantes' testimony he should be believed. The jury returned a guilty verdict on July 31, 1990. (CR 1315) On May 10, 1991, Judge Rafeedie set aside the jury verdict and ordered a new trial because of prosecutorial misconduct.<sup>8</sup> (CR 1506)

An investigation conducted by Zuno's counsel following the initial trial revealed that Cervantes was not who he claimed to be and was in fact a perjurer.<sup>9</sup> In late 1991, witnesses were identified to the court and government who were prepared to testify Cervantes had never worked for Barba; that one Pedro Cuellar Conrique performed the function Cervantes claimed he performed; that Cervantes was never at Barba's home where the meetings he had testified to allegedly occurred; and that Zuno was never at the location where the meetings had allegedly occurred.<sup>10</sup>

Cervantes' vulnerability as a potential witness was such that the prosecution either had to dismiss the kidnapping charges

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<sup>8</sup> The prosecutor had made an argument in closing that Camarena's body was found on land owned by Zuno. The district court found the argument improper in light of an earlier representation made by the government that it would make no such argument and which representation had caused the district court to exclude a critical defense exhibit which showed that the body was found on public land.

<sup>9</sup> Zuno is unaware of any effort by the government to prosecute Cervantes for perjury despite clear proof that his testimony was, in fact, perjured.

<sup>10</sup> In December 1991, Zuno presented to the Court and the Government significant evidence that established that Cervantes' testimony was untrue and that he was a complete fabrication. See Motion to Take the Deposition of a Percipient Witness, Pedro Conrique-Cuellar which was filed on November 19, 1991, and heard on December 9, 1991 (CR 643; ER 7); Motion to Take Foreign Depositions and accompanying declarations of Leo Gonzalez and Edward Medvene in Support Thereof filed on September 28, 1992. (CR 1791; ER 12)

against Zuno or somehow find someone else who would claim to have observed Zuno at meetings where the kidnapping was discussed.<sup>11</sup> The DEA had not been able to find such a person in the six preceding years. In August 1991, the DEA began questioning Fonseca's bodyguard, Jorge Godoy ("Godoy"). Godoy was debriefed on many occasions over the next eight months, and was asked for all information he knew about Enrique Camarena's kidnapping. Godoy never made any claim that Zuno had participated in any discussions about the kidnapping of Camarena. (RT 1383-1390; ER 30)

Rene Lopez Romero ("Lopez"), another Fonseca bodyguard and a friend of Godoy, began talking to the DEA around January 1992. During debriefings over the next several months, he was also asked for all information he knew about the Camarena kidnapping. Like Godoy, Lopez never claimed that Zuno had participated in any discussions about the kidnapping.<sup>12</sup> (RT 1398-1410; ER 30)

On March 27, 1992, this Court affirmed Judge Rafeedie's new trial order. (CR 1615) Within two weeks of the affirmance, Godoy and Lopez suddenly "recalled" being at kidnapping meetings where they had seen Zuno. (*Id.*) Prior to that time, Godoy and Lopez received significant amounts of money, as well as immunity from prosecution, relocation expenses and housing for themselves and

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<sup>11</sup> The evidence and statements undermining Cervantes' credibility were so overwhelming and devastating that at Zuno's second trial Cervantes was not even called as a witness.

<sup>12</sup> Godoy and Lopez are admitted career criminals. Both fled Guadalajara with Fonseca after Camarena's abduction. Lopez not only participated in the actual physical kidnapping of Camarena but in addition, participated in the restraint, torture and murder on one occasion of an American couple and on another of four American Jehovah's Witness missionaries. (RT 8-10)



their families. The timing of their respective "recollections" is particularly troublesome because, despite debriefings by DEA agents involved in the Zuno prosecution over periods of eight months (in Godoy's case) and at least 45 days (for Lopez) neither man had ever before recalled Zuno being involved in any way in kidnapping discussions. (Id.)<sup>13</sup>

Through the "material" witness arrest, the "perjury" charge, the indictment, and the trial based on Cervantes' testimony were ill-founded, they kept Zuno in this country long enough for the DEA to not only find Godoy and Lopez but to help them "remember" that Zuno supposedly had been at meetings seven years earlier.

In the second trial, as it had in the first, the government devoted most of its case to extremely inflammatory evidence, that as Judge Rafeedie commented, was not disputed by anyone, namely: (1) various individuals in the Cartel (but not Zuno) were engaged in gigantic marijuana and cocaine transactions, involving large sums of money, and the DEA was very effective in seizing their marijuana and cocaine and confiscating millions of dollars in drugs proceeds; and (2) Camarena was kidnapped, brutally tortured and murdered.<sup>14</sup> The real issue, as Judge Rafeedie saw it,

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<sup>13</sup> See Section VIII, supra, detailing the pressures exerted upon and the threats made to David Macias-Barajas by the DEA in an effort to coerce evidence implicating Zuno.

<sup>14</sup> Much of this forensics testimony included graphic details about Camarena's torture and the nature of his injuries. Dr. Spencer testified in detail about the "multiple fractures on both sides of the face and both sides of the skull," and that Camarena's death was caused by a Phillips screwdriver "being pounded in or thrust into the skull." (RT 268-269; ER 19) FBI forensic specialist John Dillon displayed to the jury "[s]oil deposition from the right knee of Body Number 1 [Camarena's body]," a "strip of adhesive blindfold associated with Body Number 1," and "debris from burial sheet  
(continued...)

was not whether those things had occurred, but whether there was "connecting" evidence showing that Zuno was a member of the Cartel and had participated in the planning of Camarena's kidnapping.

James Kuykendall, the resident agent in charge of the DEA's Guadalajara office from February 15, 1982 until the end of September 1985 (RT 59) described the DEA's efforts to "gather intelligence on the narcotic traffic and the activities of the major traffickers working in Mexico." (RT 60; ER 16) Many DEA agents detailed the Cartel's major operations (i.e., Zacatecas, Padrino, Bufalo and Verdugo's operation) and the successful efforts of the DEA, particularly Camarena, to eradicate marijuana fields, seize cocaine and confiscate drug proceeds. DEA agents also testified about their investigative efforts, including the searches of Cartel leaders' homes and the review of address books, papers and the like. In the entirety of the DEA's investigative effort, Zuno was not identified by any DEA agent as a Cartel member. (RT 90:15:66)

Additionally, a number of confidential informants deeply and intimately involved with the Cartel's operation testified about Cartel meetings and conversations among Cartel members. None of these witnesses named Zuno as being involved in any of the meetings or conversations. For example, Lawrence Harrison ("Harrison") testified that while in Fonseca's employ he monitored the Cartel's radio communications system on a 24-hour a day basis, overheard "literally thousands of conversations that in one way or another

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<sup>14</sup>(...continued)

associated with Body Number 1," and testified that these materials had an odor "[t]ypical of the decomposition of human tissue" and that the objects had a "kind of greasy or soapy appearance, consistent with a decomposed body." (RT 325-328; ER 21)

were drug related" and never heard Zuno's voice or even his name in any of these conversations (RT 658-659; ER 25) Frank Retamoza, the cousin of Cartel leader Felix-Gallardo, testified he was present at many drug lord meetings and was present when huge amounts of money were delivered to Cartel members. He testified he never saw Zuno at any of the meetings, nor did he ever deliver money to Zuno, and that, to the best of his knowledge, Zuno was not involved in any way in the Cartel. (RT 508-513,533; ER 22)

At the second trial, the government attempted to connect Zuno to the Cartel by presenting evidence and argument that Cartel leader Caro occupied the house at Lope de Vega in 1984, at a time when Zuno still owned the property, and that the sale of Lope de Vega by Zuno in December 1984 was "fishy," had an "odor" to it, and, in effect, was a "sham" transaction designed to distance Zuno from the anticipated use of the house by Caro in February 1985 in connection with the kidnapping. (RT 1616-1617,1677-1680; ER 33) The government's attempt to connect Zuno to the Cartel in this fashion was contrary to evidence in its possession. In addition, the government successfully opposed Zuno's motion to depose four critical witnesses located in Mexico who would have established that Zuno did not permit his house to be used by Caro nor did he sell it to Caro so it could be used in the Camarena murder. This evidence was singularly vital to negate Zuno's alleged relationship with Caro and the Cartel, and to rebut the testimony of Lopez and Godoy.

The government again alleged that Camarena's kidnapping had been planned at five meetings, but the five meetings claimed at Zuno's retrial were entirely different from those claimed at his first trial - different in location, persons present and what was

allegedly said. In order to keep the internal inconsistencies and contradictions from the jury, the government chose not to call Cervantes and Plascencia, the only witnesses at the first trial to testify about kidnapping meetings.

As an example of the contradictions, Cervantes in the first trial and Godoy in the retrial each claimed they were present at a different September 1984 kidnapping meeting. In Cervantes' version the meeting took place at one location with six participants and in Godoy's version it took place at a different location with thirty-nine participants. (RT 90:6:20-31 ER 2; RT 810-820; ER 26) Cervantes testified, the participants did not know which DEA agent was causing problems and were seeking to determine his identity, while in the Godoy version the participants knew who the DEA agent was and Manuel Aldana ("Aldana"), a participant in the meeting, specifically said he had attempted to bribe him and the agent refused the bribe. (Id.)

Both the Cervantes and Godoy versions were inconsistent with yet a third version of the initial kidnapping meeting. Plascencia (who the government did not call at Zuno's retrial) claimed at the first trial that he too was present at the initial kidnapping meeting and that it was held in December 1984; with some fourteen participants (not including Zuno); the participants knew Camarena was the agent causing problems; Camarena's photo was passed around; and Fonseca said he would be taken care of.

Moments before closing arguments, Zuno first learned of the existence of two reports that later proved to contain new and compelling evidence and supported an alternative and exculpatory theory for the kidnapping of Camarena, suggesting no planning

meetings took place, and corroborating Zuno's contention that he was not present at Lope de Vega at the time of the interrogation. (RT 1558-1559; ER 32) The alternative theory for the kidnapping and the evidence that Zuno was not present at Lope de Vega further undermined the credibility of Godoy and Lopez. Motions by Zuno for a mistrial or, in the alternative, for an evidentiary hearing based on the newly discovered evidence were denied. (RT 1569; ER 32)

In its closing statement, the prosecutor strenuously argued that Godoy and Lopez should be believed. (RT 1559-1560; ER 32) (RT 1668) The jury returned a guilty verdict on December 21, 1993. (CR 1960) Zuno was sentenced to life imprisonment. (CR 2016) This is a direct appeal from that conviction.

#### IV.

**THE PROSECUTION'S CONDUCT IN PRESENTING CONTRADICTIONARY VERSIONS OF THE ALLEGED KIDNAPPING MEETINGS TO TWO DIFFERENT JURIES -- VERSIONS THAT CANNOT CO-EXIST -- UNDERMINES THE INTEGRITY OF THE PROSECUTION AND MANDATES THE DISMISSAL OF THE INDICTMENT OR, AT A MINIMUM, A REVERSAL OF ZUNO'S CONVICTION**

At Zuno's retrial, the government knowingly presented witnesses whose testimony cannot co-exist with the evidence presented at his original trial. Critical scrutiny of the operative testimony reveals that different individuals testified in an inconsistent and contradictory fashion about different meetings, dates, locations, and things said.<sup>15</sup>

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<sup>15</sup> For the Court's convenience, Zuno has appended to Appellant's Opening Brief various charts (hereinafter "Charts") that outline in detail each meeting, the persons present and what was discussed. The initial chart summarizes the ten meetings testified about at Zuno's two trials. The remaining charts detail each individual meeting and  
(continued...)

A detailed review of the circumstances under which Godoy and Lopez first identified Zuno as a participant in the conspiracy meetings, the irreconcilable differences between the first and second trials, and the inconsistencies and contradictions in the testimony at Zuno's retrial reveal a serious miscarriage of justice occurred in this case. Accordingly, this Court should set aside the verdict, on any one of the following grounds: (1) The prosecutorial misconduct in this case requires the dismissal of the indictment against Zuno with prejudice as a sanction for the government's outrageous conduct; (2) the district court abused its discretion in denying Zuno's motion for a new trial in the interests of justice pursuant to Federal Rule of Criminal Procedure 33; or (3) the government failed to introduce legally sufficient evidence whereby any reasonable mind could conclude that Zuno conspired to kidnap Camarena pursuant to Fed. R. Criminal Procedure 29.

**A. The Timing And Circumstances Surrounding Godoy And Lopez' Sudden And Inexplicable "Recollection" Of Zuno Is Inherently Suspect And Undermines The Integrity Of The Prosecution.**

On March 27, 1992, this Court affirmed Judge Rafeedie's new trial order.<sup>15</sup> (CR 1618) The government realized that Cervantes, the only witness at Zuno's initial trial who testified that Zuno was present at conspiracy meetings, was not who he

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<sup>15</sup>(...continued)  
are arranged in chronological order based on the witnesses' testimony on direct examination.

<sup>16</sup> Significantly, the district court, in granting Zuno a new trial, observed that the government's case against Zuno was a "close," one witness case based on a "great deal of inference" and on "circumstantial" evidence that was "minimal in the view of the court." (RT 5/7/91:11)

purported to be and could not be presented as a credible witness.<sup>17</sup> The prosecution was faced with either dismissing the conspiracy charges against Zuno or finding someone else to testify that he saw Zuno at kidnapping meetings.

Within a matter of days, Godoy and Lopez,<sup>18</sup> suddenly recalled they had seen Zuno at alleged meetings where Camarena's kidnapping was discussed. (RT 909; ER 26; RT 1109-1110; ER 27)

It is particularly curious that Godoy did not mention any conspiracy meetings where Zuno was allegedly present until eight months after his first meeting with the DEA<sup>19</sup> (April 7, 1992). (RT 1381,1391; ER 30) Similarly, Lopez did not disclose his supposed knowledge of the alleged conspiracy meetings (which consisted primarily of who was present) until his fourth meeting with the DEA<sup>20</sup> (over 90 days after his arrival in the United

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<sup>17</sup> In late 1991, (four months after Godoy's arrival to the United States) witnesses were identified to the government and the court who submitted declarations and were prepared to testify that Cervantes never worked for Barba and that the true caretaker, Pedro Conrique-Cuellar, performed the functions Cervantes claimed he performed. ER 7) These declarations were corroborated by Barba's brother Salvador who stated he personally hired Pedro to take care of La Quinta. In particular, at no time during the employment of the true caretaker at La Quinta was there ever any person employed in any capacity by the name of Hector Cervantes-Santos, much less was there a Hector Cervantes-Santos performing the duties of caretaker of La Quinta. (CR 1791; ER 12)

<sup>18</sup> Lopez admitted to kidnapping Camarena as well as four American Jehovah's Witness missionaries and an American couple, all of whom were tortured and murdered. (RT 1008, 1022-26, 1070-1071, 1150, 1174; ER 27)

<sup>19</sup> Godoy was debriefed by DEA agents on August 30, September 3, and October 22, 1991, and April 6, 1992. There are no statements in any of the debriefing reports prepared by the DEA about Zuno being present at any conspiracy meetings. (RT 1383-90; ER 30)

<sup>20</sup> Lopez met with the DEA on March 5, April 9 and 14, 1992 and did not disclose any information about his purported knowledge of the alleged conspiracy meetings until April 15, 1992. (RT 1398-1410; ER 30)

States). (RT 1062), (RT 1109-1110; ER 27) Both implicated Zuno within eight days of one another and only after receiving significant sums of money, immunity, relocation and housing. (RT 849,876,888-89; ER 26)

Godoy's sudden recollection of Zuno's alleged involvement is particularly suspect because shortly after Camarena's abduction, he was brutally interrogated by Mexican officials about the kidnapping and he even signed a confession detailing his purported knowledge. (RT 853-857; ER 26) Godoy's confession does not contain a single reference to Zuno; much less evidence that he was present at conspiracy meetings. (RT 859-860; ER 26) Godoy's confession does, however, contain a glaring admission (which he confirmed at trial) that he did not work for Fonseca in November and December 1984; the precise months he allegedly attended the conspiracy meetings. (RT 859; ER 26)

**B. The Contradictory Nature Of The Cases Presented By The Government To Two Separate Juries Thoroughly Undermines The Integrity Of The Prosecution.**<sup>21</sup>

There are numerous irreconcilable differences in the evidence presented by the government at Zuno's two trials. See Charts.

1. At Zuno's first trial, Cervantes claimed that Zuno attended an initial meeting in September 1984 during a baptism at Barba's residence, "La Quinta," at which the participants wanted to

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<sup>21</sup> Even more troubling is the fact that the government's theory of the Camarena case has changed dramatically from United States v. Lopez-ALvarez, where no conspiracy meetings were even alleged.



learn the identity of the DEA agent causing trouble.<sup>22</sup> (RT 90:6:20, 28-30; ER 2)

At Zuno's retrial, however, Godoy claimed that the first meeting occurred at the Las Americas Hotel in late September/early October 1984 and that the participants, including Zuno, knew who the agent was because Aldana told everyone he tried to bribe him but he refused to accept a deal. (RT 810-819; ER 26) Significantly, Godoy further testified that he accompanied Fonseca to all meetings outside of his home and that he never attended a meeting at La Quinta where a baptism occurred. (RT 903-904)

2. Cervantes testified that at a post-wedding meeting in October 1984, Panaigua wanted to find out who the agent was because he wanted to know if he would cooperate, i.e., take a bribe. (RT 90:7:26-27; ER 4) Given Godoy's testimony that Aldana had previously tried to bribe (RT 818; ER 26) the agent but he refused, this testimony makes no sense.

3. Cervantes testified about meetings in October 1984 where Aldana was trying to find out the identification of the DEA Agent causing problems. (RT 90:7:23; ER 4) Godoy claimed, however, that at the Las Americas Hotel in September/October 1984 Aldana knew who the agent was because he tried to bribe him. (RT 818; ER 26)

4. Cervantes' testimony that the participants at the October meetings (pre- and post-wedding) still had not identified

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<sup>22</sup> Significantly, Cervantes never mentioned this meeting in either of the two previous grand jury sessions or during his numerous meetings with the DEA where he purportedly told them everything he knew about the kidnapping of Camarena. (RT 90:7:72-74; ER 4) Moreover, this testimony was contradicted by the testimony of another government witness, Plascencia who testified that the first meeting actually occurred in December and that Zuno was not present. (RT 90:6:121; ER 3)

the DEA agent (RT 90:7:23,27-28; ER 4) is incompatible with Godoy's claim that the participants knew who the agent was in September - October 1984 because they tried to bribe him. (RT 818; ER 26)<sup>23</sup>

5. Plascencia testified at the first trial about a December 1984 meeting at Fonseca's house called "La Bajadita" and that the participants knew who Camarena was because a photograph of Camarena was passed around, and Fonseca told everyone he would take care of Camarena.<sup>24</sup> (RT 90:6:129-140; ER 3) Godoy, however, claimed Zuno and others were present at a December meeting but that it occurred at Barba's residence called the Office, and the participants still did not know who the agent was. (RT 836-837; ER 26)

6. Conspicuously absent from all of the meetings testified to by Cervantes are, among others, Gardoqui, Castillo and Bartlett-Diaz. Indeed, Godoy and Lopez include at least 20 additional and/or different participants (than those testified to by Cervantes) at each meeting. See Charts. Most telling, however, of the witnesses' fabrication of meetings is the fact that not one Government witness at Zuno's second trial placed Juan Ramon Matta-Ballesteros, a major cartel figure and an alleged co-conspirator at Zuno's previous trial, at any of the alleged conspiracy meetings.<sup>25</sup>

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<sup>23</sup> Godoy further contradicts Cervantes for he testified that he attended the wedding testified to by Cervantes but that there were no meetings of any kind that occurred. (RT 905-906)

<sup>24</sup> Zuno is not alleged to be present.

<sup>25</sup> At Zuno's first trial, Zuno was always allegedly present at the conspiracy meetings with his alleged chauffeur, David Macias-Barajas ("Macias"). (RT 90:6:28; ER 2; RT 7:26, 42; ER 4) Curiously, at the retrial, Zuno no longer has a chauffeur and allegedly attended the newly claimed meetings alone. (RT 816, 823, 829, 836; ER 26; RT 1017; ER 27)

7. Godoy claimed that Cervantes worked at Barba's residence, the Office, where he attended a December 1984 meeting. (RT 834; ER 26) Cervantes, however, testified that he worked at Javier Barba's residence known as La Quinta, located at 114 Tonalá, and did not mention a residence allegedly owned by Barba called the Office or a meeting that took place there.<sup>26</sup>

C. The Testimony Of Godoy And Lopez Is So Internally Inconsistent And Inherently Unbelievable As To Further Undermine The Integrity Of The Government's Case.

The majority of the government's evidence of Zuno's alleged presence at conspiracy meetings came from Godoy and, to a much lesser extent, Lopez.<sup>27</sup> Godoy claimed that he was a bodyguard for Fonseca and accompanied him to four meetings where Zuno and approximately twenty others were allegedly present. See Charts. Godoy's testimony regarding these alleged meetings, however, was internally inconsistent and directly at odds with his prior statements to the DEA and Mexican officials and with independent evidence presented by the defense at trial.

1. Godoy's testimony that at the first meeting (Las Americas Hotel) the participants knew the identity of the agent, (RT 818; ER 26),<sup>28</sup> completely contradicts his testimony that in the

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<sup>26</sup> According to Cervantes, he was stationed at La Quinta on a twenty-four hour-a-day basis, with little opportunity to go anywhere else. More significant still, when Lopez was asked if he knew Cervantes, he replied "no." He did not even recognize Cervantes' picture. (RT 1081-1082; ER 27)

<sup>27</sup> Lopez's testimony consisted of primarily who was present at certain gatherings. He did, however, testify about the alleged discussion at the meeting at Fonseca's Mar Mar house, the "AK-47 meeting". (RT 1000-1006; ER 27) See Charts.

<sup>28</sup> Aldana tried to bribe him but he refused to accept a deal. Id.

remaining meetings the discussion revolved around efforts to learn the identity and whereabouts of the "troublesome" DEA agent. (RT 824-825, 832, 836-37; ER 26) See Charts. Logic dictates that these alleged traffickers would not regularly meet to discuss identifying an agent they had already identified.

2. Godoy testified that at the second, third and fourth meetings Zuno and others met solely to discuss their efforts to identify the DEA agent causing the Cartel trouble. This is contradicted by testimony of other government witnesses that as of the May 1984 meeting the participants, i.e., Aldana, Manuel Ibarra ("Ibarra"), etc., knew the identity of Camarena and his whereabouts.<sup>29</sup> Indeed, Lopez revealed that Fonseca and Castillo knew who the agent was because they knew he was going to be moved.<sup>30</sup> (RT 1006; ER 27)

3. Godoy testified that Zuno attended conspiracy meetings in November and December 1984. (RT 909, 910; ER 26) This testimony was false because Godoy admitted he only observed conspiracy meetings while in Fonseca's employ and that he did not work for Fonseca in November 1984 and December 1984. (RT 859; ER

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<sup>29</sup> The Cartel's knowledge of Camarena was confirmed by Agent Kuykendall, who testified that Manuel Ibarra-Herrera ("Ibarra") had met with Camarena in May 1984 to discuss the planning of the Zacatecas raid. (RT 127-129; ER 16) Moreover, the government also presented evidence that Camarena participated in the arrest of Chavez, Caro's right hand man in the Zacatecas operation. (RT 128-129) Agent Kuykendall testified that "Mr. Chavez knew at the time Mr. Camarena arrested him he [Camarena] was no longer undercover, he was a DEA agent." Kuykendall further testified that "Chavez knew . . . that Mr. Camarena was very much involved in the Zacatecas raid." (Id.)

<sup>30</sup> This agent must have been Camarena because, at the time of his abduction, Camarena was scheduled to be transferred to San Diego. (RT 6; 157)

26) Once Godoy realized the defense had evidence he did not work for Fonseca in November and December 1984, Godoy, for the first time at trial, tried to push the meeting dates back to September and October 1984.<sup>31</sup>

4. Godoy testified that, at the first, second and third conspiracy meetings, Caro and Fonseca were relying on the efforts of Aldana and Castillo to gather the information about the allegedly unknown DEA agent and were angered by their unsuccessful efforts.

(RT 818,824,832; ER 26) In contrast, Godoy claimed that at the final meeting, Castillo was yelling at Caro because he had not

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<sup>31</sup> Godoy testified at trial that the first meeting occurred at the Las Americas hotel around late September/early October, 1984. (RT 810; ER 26) However, this testimony is inconsistent with his statements to the DEA that this meeting occurred in late October/early November (RT 909; ER 26) and contradicted by another Government witness Lopez, who testified that the Los Americas gathering was in late October/early November 1984, not late September/early October. (RT 1120; ER 28)

In addition, Godoy testified on direct examination that the second meeting which allegedly occurred at Fonseca's house, was held two weeks after the meeting at the Las Americas Hotel (RT 822; ER 26) Once again, this testimony is inconsistent with what he told the DEA; that this meeting occurred in the latter part of November, 1984 (RT 909-910; ER 26) which he ultimately admitted on cross-examination was the correct date. (Id.)

The third meeting Godoy testified about took place at Javier Barba's house at 114 Tonola and purportedly occurred at the end of October, 1984 (RT 827-828; ER 26) This testimony is once again inconsistent with his statement to the DEA that this meeting occurred in late November/early December. (RT 910; ER 26) Indeed, when questioned further about the date of this meeting, he ultimately admitted on cross-examination that it took place in late November/early December, 1984. (Id.)

The final meeting Godoy testified about allegedly took place at a house owned by Javier Barba called "The Office" around the beginning of December, 1984 (RT 833-835; ER 26) which is directly contradicted by his testimony that he was not working for Fonseca in December, 1984 due to back problems. (RT 859; ER 26)

gathered the necessary information. (RT 836-837; ER 26) See Charts.

5. Godoy claimed Javier Barba owned a residence called "The Office" where a meeting occurred in December 1984. (RT 833; ER 26) Godoy's testimony, however, is directly contradicted by the unimpeached testimony of defense witness Salvador Delgado-Lopez, the estate lawyer for the Barba family, who testified he personally knew the owners of the property called The Office, Barba did not own and was never at The Office.<sup>32</sup> (RT 1453-1454)

In addition to the significant inconsistencies and contradictions in Godoy and Lopez's testimony about the alleged conspiracy meetings, the story itself is inherently incredible. It is highly unlikely that numerous prominent politicians would meet openly with reputed drug traffickers so many times in such a short period of time when there is no new information to discuss.<sup>33</sup> In addition, high ranking, public figures would not continue to meet with notorious, high profile drug lords to continually mull over the need to identify Camarena, when at least several of the individuals knew who Camarena was and where to find him. See Charts.

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<sup>32</sup> He further testified that the registered owner of the home where The Office is located (corner of Felice Avenue and the Highway to Tonola) is a man by the name of Bernardo Duarte, who does not know Barba or anything about the meetings. A contention the government did not even rebut. (RT 1466-1467)

<sup>33</sup> Lopez' claims that approximately 30 people gathered in Fonseca's bedroom at his Hildago Street residence just prior to the kidnapping and remained there for approximately two hours is absurd. (RT 1018-1019; ER 27) The government attempted to rehabilitate this story by asking if only some of the people went into the bedroom but the question was objected to and ultimately sustained by this Court. As a last resort, the Government asked "incidentally is this a large bedroom" to which Lopez responded affirmatively. (RT 1019; ER 27)

Godoy and Lopez's testimony is further undermined by Harrison's testimony that when the traffickers met the bodyguards would go off to an area by themselves and an order would be given for them not to get too close. (RT 656; ER 25) Moreover, the alleged plotting of Camarena's abduction three-four months in advance, is completely inconsistent with the Cartel's well established pattern of spontaneous, violent conduct.<sup>34</sup>

Finally, the Government's case lacks corroboration by any independent, non-criminal witness, or by any witness unrelated to the Cartel.<sup>35</sup>

**D. The Government's Conduct In Its Prosecution Of Zuno Mandates A Dismissal Of The Indictment Or At A Minimum A Reversal Of Zuno's Conviction.**

"Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." United States v. Kojavan, 93 Daily Journal D.A.R. 10030, 10035 (9th Cir. 1993) ("... lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules"); Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 802 107 S.Ct.

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<sup>34</sup> For example, the traffickers spontaneously beat to death two Americans who entered the La Langosta restaurant in January, 1985 because they thought the Americans were DEA agents. In addition, in 1985 four American Jehovah Witness missionaries going door to door in Guadalajara were abducted on sight and murdered by the traffickers because they thought they were DEA agents. (RT 1070,1071; ER 27 1150; ER 28)

<sup>35</sup> For example, the government after seven years of aggressive painstaking investigative work did not produce one employee of the Las Americas to corroborate Godoy and Lopez' testimony that prominent politicians visited with notorious drug lords at a public hotel in September 1984.

2124, 95 L.Ed.2d 740 (1987) ("[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict").

The prosecutors in this case did not meet these standards of responsibility. The two cases the government presented are internally inconsistent, contradictory and cannot co-exist. The government, in its overzealousness to convict Zuno, refused to recognize the obvious; that Cervantes in Zuno's initial trial and Godoy and Lopez at Zuno's retrial were not telling the truth. Instead, the government presented a totally different case at Zuno's retrial (that it claimed was the truth) which was contradictory and inconsistent with the case it previously presented (which it also claimed to be true). In presenting its new case, not only did the government elect not to call the only witness who testified against Zuno at his first trial, it also presented affirmative testimony in an effort to rehabilitate Cervantes.<sup>36</sup> See, e.g., United States v. Wallach, 935 F.2d 445, 457 (2d Cir. 1991) ("We fear that given the importance of [a witness's] testimony to the case, the prosecutors

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<sup>36</sup> At Zuno's retrial, the government did not even call Cervantes, the only witness at Zuno's first trial who claimed Zuno participated in the conspiracy meetings. Instead of confronting the fact that Cervantes was untruthful, the government placed Cervantes on its witness list for the retrial (but never called him) and had one of its new witnesses purport to change Cervantes' place of employment from what Cervantes testified to at the first trial in an effort to anticipate any challenge by the defense regarding his truthfulness. Indeed, Cervantes was purposely kept off the stand to hide the fact that his testimony was both internally inconsistent and contradictory to the testimony of Godoy and Lopez, the only witnesses at the retrial to testify that Zuno attended any conspiracy meetings.



may have consciously avoided recognizing the obvious -- [that he] was not telling the truth").<sup>37</sup>

The government's conscious disregard of the probable perjury of its witnesses mandates that this Court exercise its supervisory power and dismiss the indictment.<sup>38</sup> Moreover, whether viewed alone, together, or in comparison with Cervantes' testimony, the contradictions in the testimony of Godoy and Lopez were so glaring and critical that the district court abused its discretion by denying Zuno's Rule 33 motion. See Tibbs v. Florida, 457 U.S. 31, 38 n.12 (1986).

v.

**THE GOVERNMENT FAILED TO INTRODUCE LEGALLY SUFFICIENT  
EVIDENCE TO PROVE THAT ZUNO ACTED WITH A PURPOSE  
TO GAIN ENTRANCE INTO OR MAINTAIN OR INCREASE HIS POSITION  
IN A CRIMINAL ENTERPRISE ENGAGED IN RACKETEERING ACTIVITY**

To sustain a conviction on Counts 3 and 4 of the Indictment, the government was required to prove, under 18 U.S.C. section 1959(a)(5), that Zuno acted "for the purpose of maintaining or increasing [his] position. . .in an enterprise engaged in racketeering activity. . . ." (CR 1646; ER 11) The evidence

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<sup>37</sup> See also United States v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988) ("[I]t is disturbing to see the Justice Department change the color of its stripes to such a significant degree, portraying an organization, individual, or series of events variously as virtuous and honorable or as corrupt and perfidious, depending on the strategic necessities of the separate litigations").

<sup>38</sup> See United States v. Williams, 112 S.Ct. 1735, 1742 (1992) (supervisory power "may be used as a means of establishing standards of prosecutorial conduct before the courts themselves"); United States v. Bernal-Obeso, 989 F.2d 331, 337 (9th Cir. 1993); United States v. Resprepo, 930 F.2d 705, 712 (9th Cir. 1991); United States v. Barrera-Moreno, 951 F.2d 1089, 1099 (9th Cir. 1991).

presented by the government failed to show that Zuno was even a member of the Cartel, let alone that he acted to maintain or increase his position in the Cartel. Thus, a reasonable jury could not have convicted Zuno on either Count 3 or 4 in the Indictment.<sup>39</sup>

The government completely failed to present evidence demonstrating Zuno was a member of the Cartel. A number of prosecution witnesses testified in detail about the DEA's effective infiltration into and eradication of the Cartel's alleged narcotics enterprise. Government witnesses testified about the Cartel's Zacatecas and Bufalo marijuana businesses, Operation Padrino, and Verdugo's marijuana dealings and detailed the traffickers, financiers, politicians and military personnel involved in these operations. Despite the voluminous testimony concerning the DEA's effective eradication of particular Cartel drug endeavors, the government failed to present any evidence that Zuno was, in any way, involved in any of these Cartel operations.

Indeed, the government's evidence demonstrated that Zuno was not a Cartel member. James Kuykendall, resident agent in charge

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<sup>39</sup> Following his conviction, Zuno filed a motion, pursuant to Federal Rule of Criminal Procedure 29, for a judgment of acquittal on the grounds that the government had failed to present sufficient credible evidence to convict Zuno of the crimes charged (CR 1977), and a motion for a new trial, pursuant to Federal Rule of Criminal Procedure 33, contending that the jury's verdict was against the weight of the evidence. (CR 1976) Both motions were denied. (CR 1998) This Court reviews the denial of a motion for a judgment of acquittal to determine whether there was substantial relevant evidence adduced from which the jury could reasonably have found Zuno guilty beyond a reasonable doubt. See United States v. Ocampo, 937 F.2d 485, 488 (9th Cir. 1991); Miller v. Vasquez, 868 F.2d 1116, 1119 (9th Cir. 1989). "The denial of a motion for a new trial is reviewed for abuse of discretion." United States v. Sitton, 968 F.2d 947, 959 (9th Cir. 1992).

of the Guadalajara office,<sup>40</sup> testified in detail about the DEA's efforts to "gather intelligence on the narcotics traffic and the activities of the major traffickers working in Mexico." (RT 60; ER 13) Agent Kuykendall testified that as of September 1986 (some nineteen months after Camarena was abducted), despite his continuing involvement in the Camarena investigation, he had no evidence that Zuno had any involvement in Camarena's kidnapping. (RT 147; ER 13).

Lawrence Harrison worked for Fonseca (RT 586; ER 24), lived in one of Fonseca's homes (Id.), and saw Fonseca and Caro, along with many of their associates, on a daily basis. (RT 613; ER 24) Harrison attended a number (more "than ten, less than a hundred" (RT 655; ER 25)) of "high-level planning meetings of the core group of traffickers" (Id.), but never saw Zuno at any of these Cartel meetings. (RT 656; ER 25) Harrison monitored the Cartel's radio communications system on a 24-hour-a-day basis and overheard "literally thousands of conversations that in one way or another were drug-related" (Id.), but never once heard Zuno's voice (RT 659; ER 25), nor Zuno's name in any of these conversations. (Id.)

DEA Agent Thomas Gomez was assigned to follow some of the major traffickers, namely, Miguel Angel Felix-Gallardo, Fonseca, Caro, and Ramon Matta-Ballesteros and to "photograph them, record their radio transmissions, and attempt to identify any associates of these traffickers." (RT 590; ER 23) Notably, Agent Gomez did not reference Zuno once in his testimony.

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<sup>40</sup> As resident agent in charge, Agent Kuykendall "was present during most of the debriefings that were made of the various informants utilized in the office. [He] interviewed the agents to find out how their investigations were going. And, of course, [he] had to interview [sic] and approve all of the reports that were written on the investigations in the office." (RT 77)

As a matter of law, the government's evidence was insufficient to convict Zuno of having acted with a purpose to gain entrance into or maintain or increase his position in a criminal enterprise engaged in racketeering activity, as charged in Counts 3 and 4 of the Indictment, see United States v. Lopez-Alvarez, 970 F.2d 583, 594 (9th Cir. 1992) ("All the evidence merely supports the proposition that some members of Caro-Quintero's operation committed the violent acts against Zavala; there is no evidence specific to Lopez-Alvarez. . . . Accordingly, the defendant's conviction for violent crimes against Zavala in aid of the Caro-Quintero racketeering enterprise must be reversed."), and Zuno was entitled to a judgment of acquittal or, at a minimum, to a new trial.<sup>41</sup>

#### VI.

**ZUNO'S CONVICTION MUST BE REVERSED BECAUSE HE WAS ARBITRARILY DENIED THE OPPORTUNITY TO PROCURE AND PRESENT THE TESTIMONY OF FOUR CRITICAL WITNESSES WHO WOULD HAVE REFUTED THE GOVERNMENT'S THEORY THAT ZUNO KNOWINGLY ARRANGED FOR HIS HOME TO BE UTILIZED BY THE CARTEL IN THE CAMARENA KIDNAPPING**

Zuno's conviction must be reversed because the government improperly attempted to connect Zuno to the Cartel by presenting evidence and argument that (a) Cartel leader Caro occupied the house at Lope de Vega in 1984, at a time when Zuno still owned the property, and (b) the sale of Lope de Vega by Zuno in December 1984

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<sup>41</sup> Counts Six and Seven should be dismissed because the prosecution did not prove Zuno's involvement in Camarena's kidnapping. (See section IV, infra) In the alternative, since involvement with drugs was irrelevant to the charges in Counts Six and Seven, Zuno's motion for a new trial should have been granted because improperly admitted drug evidence undoubtedly influenced the jury's consideration of those Counts.

was "fishy," had an "odor" to it (as the prosecutor argued in closing) and, in effect, was a "sham" transaction designed to distance Zuno from the anticipated use of the house by Caro in February 1985 in connection with the Camarena kidnapping. The government's attempt to connect Zuno to the Cartel in this fashion was contrary to evidence in its possession. Reversal is required also because the district court erred in denying Zuno's motion to obtain the testimony of four critical witnesses which would have established that Zuno did not permit his house to be used by Caro nor did he sell it to Caro so it could be used in the Camarena murder.

A. The District Court Erred In Denying Zuno's Motion To Obtain The Testimony Of Four Critical Witnesses Located In Mexico Who Refused To Come To The United States Out Of Fear For Their Personal Safety.

Two months before the commencement of trial, Zuno filed a "Motion to Take the Deposition of Percipient Witnesses," (the "Motion") in which he proffered the testimony of four witnesses with first-hand knowledge and involvement in the December 1984 sale of Lope de Vega. (CR 1791; ER 12) The witnesses were located in Mexico, refused to come to the United States out of fear for their personal safety but were willing to sit for their depositions in Mexico. These witnesses would have testified that (a) the sale of Lope de Vega was a legitimate arms length transaction from Zuno to third parties, not Caro; (b) Zuno delivered the property to the buyer in December 1984 and the sale was finalized in or about January 1985, prior to the Camarena kidnapping; (c) the Lope de Vega property was shown to Caro by the broker for the buyer for the first

time after the sale was consummated; and (d) Zuno had no knowledge of Caro's subsequent occupancy of Lope de Vega. This testimony was critical to Zuno's defense that he did not know Caro and was not a member of the Cartel. On October 19, 1992, the district court denied the Motion (CR 1857) on the grounds that there had been "an insufficient showing that the witnesses would be unavailable to testify," and because "defendant only supplied declarations of counsel, and not the witnesses themselves (sic) . . . and it is not clear what it is these witnesses would testify to." (RT 10/19:22; ER 14). In fact, Zuno fully satisfied the criteria for foreign depositions under Rule 15 and the district court abused its discretion in denying the motion.<sup>42</sup>

1. Unavailability was conclusively established by the fact that the witnesses were located in Mexico, refused to come to the United States, could not be subpoenaed for trial, but were willing to sit for depositions in Mexico.

This Court has recognized that unavailability can seldom be shown with certainty, consequently, it is sufficient to show that there is a "likelihood" the witness will not be available at trial. United States v. Sines, 761 F.2d 1434, 1439 (9th Cir. 1985) ("[i]t would be unreasonable and undesirable to require . . . [a party] . . . to assert with certainty that a witness will be unavailable

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<sup>42</sup> Federal Rule of Criminal Procedure 15 (a) provides that in exceptional circumstances and in the interest of justice "the testimony of a prospective witness of a party be taken and preserved for use at trial . . . by deposition . . ." The factors to be considered in determining whether "exceptional circumstances" exist are whether the prospective deponent will be unavailable for trial, and whether an adequate showing has been made that the testimony would be favorable to the defendant. See United States v. Rivera, 859 F.2d 1204, 1207 (4th Cir. 1988), cert. denied, 490 U.S. 1020 (1989); United States v. Cutler, 806 F.2d 933, 936 (9th Cir. 1986).

for trial months ahead of time, simply to obtain authorization to take his deposition"); United States v. Cutler, 806 F.2d at 936 (a defendant may depose a witness where the witness "may" be unable to attend trial). All four witnesses proffered by Zuno resided in Mexico and refused to travel to the United States, though all said they would permit their depositions to be taken in Mexico. See ER 12; Declarations of James E. Blancarte ("Blancarte Decl.") at ¶ 6; Edward M. Medvene ("Medvene Decl.") at ¶ 6; and Leo Gonzales ("Gonzales Decl.") at ¶ 4. Zuno could not compel the attendance of the witnesses at trial in the United States by subpoena, thereby warranting their Rule 15 deposition. See, e.g., United States v. Rivera, 859 F.2d at 1207 (illegal alien witnesses, who had been deposed and had voluntarily left country were unavailable within meaning of Rule 15).

The witnesses refused to travel to the United States out of fear for their personal safety, the safety of their families and out of fear of prosecution in the United States. (ER 12; Blancarte Decl. at ¶ 6; Medvene Decl. ¶ 6; and Gonzales Decl. at ¶ 4) Their fear was well-founded and was corroborated by evidence of harassment and intimidation of defense witnesses from Mexico.<sup>43</sup> The defense does not have the power to afford its witnesses the protection

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<sup>43</sup> In the course of the proceedings below, Zuno was compelled to file several motions relating to witness harassment and intimidation. On July 14, 1992, Zuno filed a ". . . Motion for an Order Barring the Government and Any Person Acting. . . on Its Behalf From Contacting, Harassing, Intimidating. . . Defense Witnesses. . . ." (ER 8) The motion detailed the circumstances under which a defense witness, Sergio Velasco-Virgin, who previously planned to testify on Zuno's behalf, refused to come to the United States after receiving a series of threatening phone calls shortly following a meeting with defense counsel. (Medvene Decl. at ¶ 5) See also, Motion to Dismiss Indictment Because of Outrageous Government Conduct at pp. 11-14.

provided by the government, including immunity from prosecution, witness protection, relocation or subsistence. Moreover, here the defense made good faith but unsuccessful efforts to alleviate the fear of these witnesses in order to secure their presence in the United States.<sup>44</sup>

2. Contrary to the district court's erroneous finding, Zuno made a compelling showing that the testimony sought was absolutely essential to a fair trial because it was the only available evidence to rebut the government's theory that the sale of Lope de Vega was a sham transaction.

The government theorized that Zuno was a member of the Cartel because Caro allegedly occupied Lope de Vega in 1984, at a time when Zuno still owned the property. See e.g., Government's Trial Memorandum at p. 26 ("the government will introduce evidence that the house was used by co-defendant Caro during 1984").<sup>45</sup> Relying on the testimony of Harrison, the government argued to the jury in closing that Caro occupied Lope de Vega in 1984 and, in effect, that the Lope de Vega sale was nothing more than a "sham" transaction designed to distance Zuno from the anticipated use of

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<sup>44</sup> On April 30, 1990, in connection with Zuno's first trial, he moved for an order guaranteeing safe passage for certain witnesses from Mexico. (CR 999) On May 15, 1990, this motion was denied. (CR 1051) Cf. United States v. Puchi, 441 F.2d 697 (9th Cir. 1971), cert. denied 404 U.S. 853 (1971) (Court denied a motion under Rule 15 when the witness refused to attend trial after being granted safe passage from Mexico).

<sup>45</sup> The government opened to the jury, "the evidence will show . . . that Rafael Caro-Quintero was present at that house before January 11 of 1985, and that Ruben Zuno was present afterwards." (RT 27; ER 12) The government in its Trial Memorandum stated further, "Special Agent Camarena and Zavala were taken to the residence of Rafael Caro-Quintero and Ruben Zuno-Arce at 881 Lope de Vega in Guadalajara." See Government's Trial Memorandum at pp. 23-24.



the house in connection with the Camarena kidnapping. (RT 1597; ER 29)<sup>46</sup> The government introduced a deed and related documentary evidence to show that the sale price for Lope de Vega was artificially low suggesting a "sham," that Zuno did not have title to Lope de Vega in his own name until April 19, 1985 -- after the kidnapping, and that Zuno did not file the final deed of transfer until June 1985. See Government's Motion In Limine to Admit Deed and Related Documents. (RT 1141-1143; 1157) (RT 1144-1149; ER 29)<sup>47</sup>

In its closing argument and in rebuttal, the government centered its attack on the legitimacy of the Lope de Vega sale:

"I submit to you that there's something fishy about this transaction. . . . I ask you and, look at this, please write it down, Exhibit 183, it's a deed that is in evidence, and see how it contradicts the testimony of Zuno. . . .

[W]hy. . . does that deed say that as of June 3, '85 -- this is months after Camarena has been tortured at that residence --

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<sup>46</sup> Harrison testified that in 1984 he was ordered by Javier Barba-Hernandez, a Cartel leader, to go to "Caro's house" at Lope de Vega and fix the garage door. (RT 629-630) Harrison further testified that in 1984 while driving in Guadalajara near Lope de Vega he heard a radio transmission carrying Caro's voice. (RT 692-693)

<sup>47</sup> In support of this motion, the government argued that Zuno's recollection of the chronology of the sale was questionable, that there was a continuing collaboration going on for months after the murder and "contributes to our [the government's] argument that the sale was not exactly legitimate." (RT 1145-1146; ER 29) (Emphasis added) The district court initially declined to admit the deed and related documents on the grounds that the government had failed to produce evidence of the legal import of the documents. (RT 1244) Subsequently, the district court admitted the deed and related documents notwithstanding the fact that the government did not and could not refute the testimony of Zuno that the sale became final under Mexican law on January 11 when the sale documents were notarized. (RT 1146-1147; ER 29) The later deed was filed because Zuno had acquired the property when married, had later divorced, thereby necessitating that a deed be recorded to show his individual title. Such a deed could not be recorded until the divorce was final, and his divorce attorney had neglected to procure and file the deed after the divorce became final. (RT 1148; ER 29)

why as of June 3, '85 [is Zuno] still trying to register the property in his own name as an individual to sell it? He wants you to believe that the deal was done, completed by January of '85. But these records, the deed, Exhibit 183 completely contradicts that. . . .

Ladies and gentlemen, the point of all of this is that the transaction for the sale of Lope de Vega has a funny odor. Something's not right here. . . . Again, something smells funny here, ladies and gentlemen. And what smells funny, I submit to you, is that Zuno is, in fact, a member of this Cartel."

(RT 1616-1617, 1677-1680; ER 33).<sup>48</sup>

To rebut the government's argument, the defense proffered the testimony of four witnesses with first-hand knowledge of the sale. Dr. Ruben Sanchez-Barba would have testified that he and his brother, Jesus, were owners of a realty business in Guadalajara, Mexico, known as Terra Nova Realty; that he purchased Lope de Vega in a legitimate arm's length transaction totally unrelated to Caro; that his brother Jesus was an undisclosed principal and co-purchaser of Lope de Vega; that Zuno had no knowledge of Caro's subsequent occupancy of Lope de Vega since such occupancy occurred after the sale of Lope de Vega to Jesus and Dr. Ruben Sanchez-Barba; and that Ricardo Chavez-Barba and Guillermo Chavez-Barba (who were nephews of Dr. Sanchez-Barba and who worked at Terra Nova Realty) showed the Lope de Vega property to Caro for the first time subsequent to the sale of Lope de Vega by Zuno. See ER 12; Blancarte Decl. at ¶ 5<sup>49</sup>.

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<sup>48</sup> Finally, in opposition to Zuno's post-trial motions, the government argued that "Agent Camarena was taken to a house that defendant Zuno owned until only weeks before, when it was apparently sold to a straw purchaser and used by the Cartel." See, Government's Opposition to Motion for Judgment of Acquittal, at p. 17.

<sup>49</sup> Dr. Ruben Sanchez-Barba's testimony would have been corroborated by the testimony of Jesus Sanchez-Barba and Guillermo and Ricardo Chavez-Sanchez. (Transcript of Grand Jury Proceedings, March 5, 1985, at pp. 4-5; ER 10) (DEA-6 Report dated May 17, 1985 at ¶ 2; ER 9)

It is obvious from the foregoing that the evidence Zuno sought to obtain by deposition was not only favorable to his case, as required by Rule 15, but was absolutely essential to rebut the government's theory that the sale of Lope de Vega was a sham transaction.

3. Zuno made a sufficient showing pursuant to Rule 15 of the witnesses' proposed testimony and the Motion was timely.

The anticipated testimony of the witnesses was set forth with exacting particularity in the declarations of counsel and their investigator based on personal interviews with the witnesses in Mexico. See ER 12; Blancarte Decl. at ¶ 2; Medvene Decl. at ¶ 2; and Gonzales Decl. at ¶ 2. The district court erred in its conclusion that the attorney declarations were insufficient. First, attorney declarations are sufficient to meet the requirements of Rule 15. United States v. Sindona, 636 F.2d at 794 (court noted that "[i]t is proper for court to accept in its discretion, the representations of counsel with respect to unavailability of witness").

Second, the attorney declarations are corroborated by the above-described grand jury testimony of Jesus Sanchez-Barba and by a DEA-6 report prepared on May 17, 1985 summarizing an interview with two confidential informants. (ER 9) On July 23, 1992 the government disclosed that the confidential informants were Ricardo and Guillermo Chavez-Sanchez. The Report states that (a) they owned and operated Terra Nova Realty; (b) they are the nephews of Jesus and Dr. Ruben Sanchez-Barba; (c) in December 1984, Lope de Vega was obtained from Zuno; (d) in the first week of January 1985, they showed the house to Caro, "who did not like it because the house was

trashed out, as it had not been lived in for some time and was in a state of poor repair;" (e) Jesus became concerned that he "may get stuck with the property and subsequently purchased all new furniture, wallpaper and carpets for the house . . . the pool was fixed, filled and chlorinated, and a new sodded lawn was installed;" (f) this repair work was accomplished by subcontractors during the last three weeks of January 1985; and (g) Caro "subsequently" agreed to purchase the property from Jesus. (ER 9 at ¶¶ 2, 3)

Finally, the district court was mistaken in its suggestion that the Motion was untimely. First, Zuno filed the Motion a full two months prior to the commencement of trial allowing ample time to secure the depositions. Moreover, despite repeated and well-documented requests to the government, the defense did not obtain the identity of two of the witnesses (who were known to the government for many years) until on or about July 23, 1992, and was not able to interview any of the witnesses, to ascertain their unavailability or to secure the cooperation of the Mexican government in facilitating the depositions until shortly before the Motion was filed. Zuno could not file the Motion until he confirmed the identity of the witnesses and ascertained the contents of their testimony.

**B. The Government Knowingly Made A False Argument -- Linking Zuno To Caro And The Cartel By Virtue Of His Prior Ownership Of Lope de Vega -- And Compounded The Error By Purposefully Precluding Zuno's Presentation Of Facts To Rebut The Argument.**

The government advanced the theory of a "sham" transaction in order to link Zuno to the Cartel, knowing that the overwhelming weight of evidence in its possession did not support such a theory

but, rather, pointed to an opposite theory -- that the sale was a legitimate arms-length transaction. In the course of the government's exhaustive seven year probe of the Camarena murder, no less than five witnesses (and perhaps several more), from as early as May 1985, provided first-hand, eye-witness information (and in two cases sworn testimony) regarding the sale of Lope de Vega. The evidence from these witnesses pointed unerringly to a legitimate arms length transaction consummated in December-January, 1984-5.

Jesus Sanchez-Barba testified before a federal grand jury in 1985, that he and his brother Dr. Ruben Sanchez-Barba purchased Lope de Vega, remodelled it and sold it to Caro in January 1985. (ER 6 at pp. 4-5;)<sup>50</sup> Jesus testified that Caro did not occupy Lope de Vega until February 1985. (*Id.* at pp. 5-6)

The documents in the government's possession make clear that the sale in December 1984 was not "fishy" and did not have an "odor" to it as the prosecutor argued to the jury. The district court indicated its belief that the sale was legitimate and that it was not, as the prosecutor suggested, a "sham" transaction. The district court at sentencing remarked "[a] fair view of the evidence . . . does not suggest that he [Zuno] was the owner [of Lope de Vega] at the time of the events in this case and the evidence supports the defendant's claims that he [Zuno] sold the house to

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<sup>50</sup> Guillermo and Ricardo Chavez-Sanchez corroborated the testimony of Jesus Sanchez-Barba. (DEA-6 Report, May 17, 1985, at ¶¶ 1, 2; ER 9) They told DEA agents in separate 1985 interviews that Lope de Vega was purchased by Dr. Ruben and Jesus Sanchez-Barba, was remodelled and subsequently sold to Caro. (*Id.* at ¶ 2) They testified that they personally showed Lope de Vega to Caro for the first time in January 1985, that he did not like it because it was "trashed out," that Jesus feared he might be stuck with the property, that it was remodelled, and that Caro subsequently purchased the property. (*Id.* at ¶ 2)

someone else who then sold the house to Caro." (RT 3/24/93:17; ER 38) (Emphasis added) Knowing that witnesses from Mexico were afraid to come here to testify and that the district court had precluded depositions in Mexico based in significant part on the prosecutors objections, the government made an argument it knew was false and that Zuno could not effectively counter. In United States v. Kojayan, 93 Daily Journal D.A.R. 10030, 10035 (August 5, 1993), this Court stated "the prosecutor's job isn't just to win, but to win fairly, staying well within the rules."

VII.

ZUNO WAS DENIED A FAIR TRIAL BECAUSE THE GOVERNMENT FAILED TO MAKE TIMELY PRODUCTION OF VITAL BRADY MATERIAL AND, CONSEQUENTLY, ZUNO WAS PRECLUDED FROM INTRODUCING THIS NEW EVIDENCE THAT BOTH SUPPORTED AN ALTERNATIVE THEORY FOR THE KIDNAPPING OF CAMARENA AND CORROBORATED ZUNO'S CONTENTION THAT HE WAS NOT PRESENT AT LOPE DE VEGA AT THE TIME OF THE INTERROGATION .

On December 16, 1992, moments before closing arguments were to commence, the existence of new and compelling evidence to support an alternative and exculpatory theory for the kidnapping of Camarena came to light for the first time.<sup>51</sup> The government produced two reports detailing interviews by the FBI and the DEA of "a former Mexican Federal Judicial Police Officer (later identified

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<sup>51</sup> The defense did not actually gain access to the new evidence until after closing argument. Upon learning of the reports, the district court said he "want[ed] to take up something that is very disturbing to me," and later confirmed that the reports contained "clearly exculpatory information that should have been provided to the defendant." (RT 1558-1559; ER 32) It is apparent the district court regarded the reports as Brady material based on his decision to compel the government to produce the reports to Zuno. (RT 1570; ER 32)

as Manuel Ybarra), who was involved in the investigation of the Camarena case in Mexico," and whose investigation revealed that Camarena was kidnapped because of his romantic involvement with Sara Cosio, the mistress of Cartel leader Caro.<sup>52</sup> (RT 1559-1560; ER 32)

On March 15, 1993, Militelo Giovanni, a previously unknown witness who owned and operated the El Sirocco restaurant adjacent to the United States Consulate in Guadalajara at the time of Camarena's kidnapping, came forward and signed a sworn declaration that he had seen Camarena and Cosio together in his restaurant hours before the kidnapping.<sup>53</sup> (CR 2012; ER 7) This evidence directly contradicts the government's theory that Camarena was kidnapped as part of a well-planned act of retribution for the successful eradication efforts of the DEA. The government's failure to timely produce the reports therefore mandates a new trial.

A new trial is mandated for the additional reason that the reports also revealed that Ybarra assisted Comandante Florentino Ventura in the Camarena investigation and participated in the interrogation of several suspects. (ER 34, p.1) Those interrogated by Ybarra included Comandante Alfonso Velasquez and a suspect by the name of El Chango who were present at Lope de Vega when Camarena was interrogated, identified others who were present and did not identify Zuno as one of those present. The absence of any reference to Zuno being present at Lope de Vega directly contradicts the testimony of a principle government witness and is patently

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<sup>52</sup> At the time of his arrest in Costa Rica, Caro was in the company of Sara Cosio. (RT 316-317; ER 20)

<sup>53</sup> According to the government's evidence, Camarena was kidnapped as he departed the Consulate in mid-afternoon on February 7, 1985.

exculpatory. The timely disclosure of the reports would have permitted Zuno to interview Ybarra and the percipient witnesses Ybarra identifies and potentially to secure the testimony of these witnesses at trial.

Upon learning of the reports, Zuno's counsel moved for a mistrial and, in the alternative, for an opportunity to interview the witnesses and to present this evidence to the jury. The district court denied the motion. (RT 1567-1570; ER 32) Post-trial motions in which Zuno presented Giovanni's declaration and proffered him as a witness were also denied. (CR 2016; ER 37)

The prosecution's failure to disclose material evidence requires reversal where, as in the present case, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." Brumel-Alvarez, 976 F.2d 1235, 1242-43 (9th Cir. 1992) (citing United States v. Bagley, 473 U.S. 667, 682 (1985)); see also Derden v. McNeel, 938 F.2d 605, 617-619 (5th Cir. 1991) (Brady violation for failure to turn over radio log required reversal where log contradicted time frames for crime given by co-conspirators). The district court's denial of a motion for a new trial based upon the government's failure to timely disclose material Brady evidence is reviewed de novo. Brumel-Alvarez, 976 F.2d at 1238.



A. The Government Failed To Timely Disclose Brady Material That Supported An Alternative Theory For The Kidnapping Of Camarena And That In All Probability Would Have Resulted In An Acquittal.

The two withheld reports summarize interviews with Ybarra on April 24, 1991 and September 9, 1992.<sup>54</sup> The reports, taken together, contain vital Brady material in that Ybarra indicates knowledge, and an awareness of the identity of others with knowledge, that Agent Camarena was abducted because of a romantic relationship between Camarena and Cosio, and that at the time of Camarena's abduction there was no intent to torture or kill him. Following the disclosure of the contents of the two Brady reports, a percipient witness, Militelo Giovanni, came forward and provided a declaration which supports, corroborates and validates the theory for Camarena's kidnapping revealed in the Brady reports.<sup>55</sup>

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<sup>54</sup> The April 24, 1991 interview ("April 24 interview") was conducted by Special Agents Hector Berrellez, Salvador Leyva and Inspector Robert Baggs at San Diego, California. The September 9, 1992 interview ("September 9 interview") was conducted by FBI Special Agent Arthur V. Werge, Jr., at Phoenix, Arizona. (ER 34)

<sup>55</sup> The Giovanni Declaration states that, on the day Agent Camarena was kidnapped, February 7, 1985, Camarena visited a restaurant managed and operated by Mr. Giovanni, El Sirocco, which was then located immediately adjacent to the American Consulate in Guadalajara, Jalisco, Mexico. (ER 37; Giovanni Decl., ¶ 2) He was accompanied by Sara Cosio who Giovanni recognized "because she is a member of the Cosio-Viadurri family who are well-known in Guadalajara." (Id. at ¶ 5) Giovanni previously had seen Cosio with Caro. (Id.) During Camarena's February 7, 1985 visit to the El Sirocco Restaurant, Giovanni frequently visited Camarena's table (Id. at ¶ 7), where he observed that Camarena and Cosio were engaged in romantic hugging and kissing. (Id.) Later in the day, Camarena and Cosio left the El Sirocco Restaurant and "walked across the street and up the stairs into the El Camelot Restaurant." (Id. at ¶ 12) Approximately 30 or 40 minutes later, there was a commotion outside the El Camelot Restaurant. Mr. Giovanni was informed later that this commotion was the actual kidnapping of Camarena. (Id. at ¶ 13)

The theory that Camarena was abducted because of Caro's spontaneous, angry reaction to having learned of Cosio's relationship with Camarena is directly inconsistent with the government's theory of a series of conspiracy meetings to plan the kidnapping as an act of retribution. This "alternative" theory would likely have been accepted by the jury because it is consistent with the other evidence presented to the jury. Testimony that Caro acted in a spontaneous, irrational manner is far more consistent with other actions taken by Cartel members, including their decision to attack and murder four Jehovah's Witness missionaries they thought were DEA agents (RT 1070-1071; ER 27) and the American couple who accidentally showed up at the home of a Cartel member. (RT 1006,1008; ER 27) In both cases, the Cartel members acted spontaneously and ruthlessly to quickly eradicate the perceived threat or annoyance; in stark contrast to the government's theory of many meetings to decide how to deal with the DEA agent causing the Cartel problems.<sup>56</sup>

This theory is also inconsistent with the government's theory that Camarena was kidnapped by Cartel leaders in a carefully planned act of retribution for the successful efforts of Camarena and the DEA in discovering and eradicating the Cartel's marijuana fields; thus undermining a principal element of the charges against Zuno. The government was required to prove that Zuno "acted while Enrique Camarena-Salazar was engaged in, or on account of, the performance of official duties." (Jury Instructions No. 37) If

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<sup>56</sup> Even in the case of Camarena's kidnapping, evidence exists that the ultimate death of Camarena was spontaneous and unanticipated. (RT 1058)

Camarena was kidnapped because of his relationship with Cosio, Camarena could not had been kidnapped while engaged in, or on account of, the performance of his official duties. The jury was entitled to hear, weigh and consider this theory before rendering a verdict and the district court's failure to grant a new trial was error.

The district court erred in its conclusion that Zuno did not suffer any prejudice because the government had, before trial, disclosed that Sara Cosio was a non-testifying percipient witnesses and, thus, "the [government's] failure to disclose . . . did not have an adverse affect, but for the defendant's failure to pursue the witnesses further." (RT 3/1/93:9; ER 36) Zuno's need to investigate Cosio only arose after the DEA-6 was produced and the alternative theory for Camarena's kidnapping was revealed. Prior to that time, she was merely one of 74 non-testifying percipient witnesses.<sup>57</sup>

Similarly, the district court erred in its conclusion that the reason for the abduction was clearly demonstrated by "Camarena's knowledge of the drug operations" (Id. at 4) and the "very graphic interrogation and torture tape(s)" and, thus, it was "extremely unlikely that [the Giovanni Declaration] even if presented by competent witness[es], would have undermined confidence in the outcome and would necessitate or result in a different outcome." (RT 3/24/93:10; ER 38) As Zuno's counsel made clear at the hearing on Zuno's motion for reconsideration, "it is for the

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<sup>57</sup> Cosio's relationship with Caro, and her presence in Caro's Costa Rican mansion at the time of his arrest were well publicized, especially in Mexico.

jury, not the Court, to hear the testimony, to hear the counter theory. The government kept it from the jury." (Id. 8) Moreover, as the government itself pointed out, the tapes are incomplete (RT 1682; ER 33) and, consequently, do not foreclose the Cosio theory for the Camarena kidnapping.<sup>58</sup>

**B. The Withheld Brady Material Contradicts Testimony That Zuno Was Present At Lope De Vega During Camarena's Interrogation And, As Such, Its Disclosure Probably Would Have Resulted In An Acquittal.**

The withheld reports were also exculpatory and material because they provided evidence which directly contradicted the testimony of a government witness that Zuno was present at Lope de Vega during Camarena's interrogation. The April 24 interview identifies Comandante Alfonso Velasquez as having been present at the interrogation of Camarena at 881 Lope de Vega. Velasquez was interviewed by Ybarra and identified various persons present at the Camarena interrogation, but did not name Zuno. Similarly, both the April 24 and September 9 interviews identify a witness by the name of El Chango who was also interviewed by Ybarra and who identified various persons present at the Camarena interrogation but does not name Zuno. (ER 34)

The district court incorrectly contended that the omission of El Chango's name from the list of those present at Lope de Vega was not exculpatory and because the court did not believe Zuno could

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<sup>58</sup> Specifically, the government argued in closing that "the fact that there's no voice of . . . Zuno on the tape is another red herring . . . . Examine the transcripts carefully, and you see they start and begin midstream, that suggests to you that these are not all inclusive, that these are not all the tapes." (RT 1682; ER 33)

have made any effective use of this information. (RT 3/1/93:9-10; ER 36) Zuno's absence from the lists of names of persons allegedly at Lope de Vega during Camarena's interrogation was exculpatory. Cf. United States v. Bryan, 868 F.2d 1032, 1037 (9th Cir, 1989) (court held that the absence of evidence may be exculpatory in certain circumstances). The test is whether the absence of the evidence is itself probative. It turns on the facts presented.

Here the DEA-6 report, prepared on April 24, 1991, details an interview with Ybarra conducted by members of Operation Leyenda, the DEA group charged with investigating the Camarena case, including the agent in charge, Hector Berrellez. (ER 34) At the time of the interview, the government and the DEA were keenly aware of the distinct possibility that Zuno would be granted a new trial.<sup>59</sup> Given the status of the case against Zuno, it is only logical to conclude that Agent Berrellez likely questioned Ybarra about Zuno; especially after Ybarra provided information regarding Camarena's interrogation at Lope de Vega. Thus, the district court misapplied Bryan when it held that "Velasquez' failure to name Zuno as one of the persons at Lope de Vega does not alone exculpate Zuno." (RT 3/1:11; ER 36) If the reports had been timely disclosed, Zuno could have interviewed Ybarra and the percipient witnesses he mentions, and could have invoked the powers of the district court to

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<sup>59</sup> At the time of the interview, the district court had recently articulated its concern that the government had engaged in misconduct by misrepresenting to the court the nature of its intended use of evidence, thereby causing the court to exclude a key defense exhibit. The district court thereupon ordered Zuno to provide supplemental briefing on the issue. The district court heard arguments on Zuno's motion for a new trial on March 18, 1991 (CR 1450), and, at that hearing, ordered supplemental briefing by April 1, 1991. The district court eventually granted Zuno's motion for a new trial (CR 1506).

secure the testimony of these witnesses. Finally, the absence of any reference to Zuno's presence at Lope de Vega in either report directly contradicts the testimony of the government's principal witnesses and is patently exculpatory. This information was material to Zuno's defense and warranted the granting of a new trial.

C. The Declaration Of Militelo Giovanni Constituted Newly Discovered Evidence Which Mandated That The District Court Order A New Trial.

Even if this Court were to conclude that a new trial is not warranted on the grounds set forth above, a new trial is warranted based on the post-trial emergence of Giovanni and the evidence he provided in his declaration which constitute newly discovered evidence that, in the event of a retrial, would probably result in an acquittal. United States v. Lopez, 803 F.2d 969, 977 (9th Cir. 1986) (a new trial will be granted where (1) the party seeking the new trial was diligent in seeking to obtain the newly discovered evidence; (2) the evidence is material to the issues involved; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence indicates that a new trial would probably produce an acquittal).

Zuno did not learn that Camarena's kidnapping was a result of Caro's anger over Camarena's relationship with Cosio until after closing arguments. Zuno's diligence in obtaining a witness to corroborate that theory cannot be questioned. As fully detailed above, the Giovanni declaration corroborates, supports and reinforces a theory that is directly contradictory to the government's theory for Camarena's kidnapping. This alternative

theory is, on its face, more credible than the government's theory and is, unlike the government's theory, consistent with other evidence presented at trial and consistent with other actions taken by the Cartel. If at a new trial Zuno is able to present this alternative theory to the jury, support it with the credible and unimpeachable testimony of Giovanni, and bolster it by reference to other evidence in the record, including Caro's relationship with Cosio, the jury will likely find this theory more believable than the government's and acquit Zuno. The post-trial emergence of Giovanni requires the granting of a new trial.

VIII.

**THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO  
ALLOW ZUNO TO PRESENT THE CRITICAL AND HIGHLY RELEVANT  
TESTIMONY OF DAVID MACIAS-BARAJAS, AN UNAVAILABLE WITNESS**

At Zuno's 1990 trial, David Macias-Barajas ("Macias") testified at great length about the coercion exerted upon him by the government in an effort to extract testimony against Zuno. Macias' testimony explicitly detailed the overreaching by the DEA and other law enforcement officials in their prosecution of Zuno. For example, Macias testified that after he told members of the DEA and the U.S. Attorney's office that he did not know Zuno and had no information about him, he was transferred to the Terminal Island Federal Correctional Institute where he was placed in a punishment cell. (RT:90:21:25; ER 6) Macias was re-visited in his punishment cell by DEA Agent Berrellez, the head of Operation Leyenda, the DEA unit investigating the Camarena case. Berrellez again asked Macias about Zuno and said "Why do you think you are in that punishment cell?" (RT:90:21:27; ER 6) Macias also testified to inducements

offered by the government for testimony against Zuno. For example, Macias testified "He told me that I was passing up a lot of good things for me but that I did not want to earn them." These threats and inducements are particularly shocking when considered in light of the fact that Macias had, since his first meeting with the DEA, steadfastly asserted that he did not know Zuno. (See Id. at 16)

Macias' testimony would, by unavoidable implication, have called into question the creditability and reliability of Godoy and Lopez, the only government witnesses who claimed Zuno was present at a kidnapping meeting. Neither Godoy nor Lopez claimed Zuno had any involvement in Camarena's kidnapping until months after their DEA debriefings commenced. If the jury had been presented with Macias' testimony, Zuno could have argued that the government applied the same pressures and offered the same inducements to Godoy and Lopez and that they, unlike Macias, fabricated stories to appease the government and take advantage of the inducements.

Zuno sought to introduce Macias' testimony but the district court denied his request on the grounds that it was not relevant to the issues at trial. (RT 1445-1466) Macias' testimony was not only relevant but critical to Zuno's defense and the district court's refusal to allow its introduction was prejudicial error warranting a new trial.



IX.

CONCLUSION

Based on the foregoing, Zuno respectfully requests that this Court either vacate the judgment of conviction and dismiss the Indictment with prejudice as a sanction for the government's misconduct or, in the alternative, set aside the jury verdicts and enter a judgment of acquittal on all counts based on the insufficiency of the evidence presented by the government or, at the minimum, reverse the convictions remand the case to the district court for a new trial.

Dated: August 29 1993

Respectfully submitted,

EDWARD M. MEDVENE  
MITCHELL, SILBERBERG & KNUPP

JAMES E. BLANCARTE  
JACK R. LUELLEN  
LAW OFFICES OF JAMES E. BLANCARTE

By: 

Edward M. Medvene  
Attorneys for Appellant  
Ruben Zuno-Arce

X.

STATEMENT OF RELATED CASES

The following appeals are related to the instant case within the meaning of Circuit Rule 28-2.6, in that all arose out of the same case in the district court:

1. United States v. Verdugo-Urquidez, No. 88-5462;
2. United States v. Felix-Gutierrez, No. 89-50028;
3. United States v. Lopez-Alvarez, No. 88-55421;
4. United States v. Matta-Ballesteros, No. 91-50336;
5. United States v. Bernabe-Ramirez, No. 91-\_\_\_\_;
6. United States v. Vasquez-Velasco, No. 91-50342; and
7. United States v. Zuno-Arce, No. 91-50351.

