

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
vs.)
)
RUBEN ZUNO-ARCE,)
)
Defendant-Appellant.)
)
)
_____)

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 RAPEEDIE PRESIDING

APPELLANT'S OPENING BRIEF

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¹ 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.² Judge Edward Rafeedie issued the

² 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.³

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.⁴

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

³ 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.

⁴ 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 Santos⁵ ("Cervantes"), who had been sent to the DEA by Garate-Bustamonte ("Garate"), his former boss.⁶

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.⁷ Zuno

⁵ 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).

⁶ 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.

⁷ 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.

⁷(...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.

2 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.⁸ (CR 1506)

3 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.⁹ 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.¹⁰

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

⁸ 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.

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

¹⁰ 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.¹¹ 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.¹² (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

¹¹ 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.

¹² 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.)¹³

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.¹⁴ The real issue, as Judge Rafeedie saw it,

¹³ 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.

¹⁴ 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

¹⁴(...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.¹⁵

¹⁵ 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.¹⁵ (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

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

¹⁶ 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.¹⁷ 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,¹⁸ 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 DEA¹⁹ (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 DEA²⁰ (over 90 days after his arrival in the United

¹⁷ 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)

¹⁸ 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)

¹⁹ 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)

²⁰ 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)

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.⁵² (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.⁵³ (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

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

⁵³ 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, 1992.⁵⁴ 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.⁵⁵

⁵⁴ 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)

⁵⁵ 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.⁵⁶

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

⁵⁶ 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.⁵⁷

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

⁵⁷ 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.⁵⁸

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

⁵⁸ 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.⁵⁹ 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

⁵⁹ 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 28 1993

Respectfully submitted,

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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.

**SUMMARY OF CONSPIRACY MEETING
TESTIFIED ABOUT AT MR. ZUNO'S FIRST AND SECOND TRIALS**

<p>(1) September 1984 -- Cervantes (who only testified at Zuno's first trial) claimed that the first meeting occurred in September 1984 at "La Quinta", (where he worked) during the baptism of Barba's daughter. At that meeting, the participants, including Zuno did not know who the DEA agent was causing the Cartel problems.</p>	<p>(RT 90:6:20-31; ER 2)</p>
<p>(2) Between September/October 1984 -- Godoy (second trial) claimed that the first meeting occurred in late September/early October 1984 at the Las Americas Hotel and the participants knew who the DEA agent was because Aldana told the other participants, including Zuno, that he met with the agent and he refused to accept a deal.</p>	<p>(RT 810-820; ER 26)</p>
<p>(3) October 1984 -- Cervantes (first trial) claimed that the second meeting occurred in October 1984 at La Quinta just prior to the wedding of Barba's brother. Zuno was not present and the participants (including Aldana) still did not know who the agent was causing problems.</p>	<p>(RT 90:7:17-25; ER 4)</p>
<p>(4) October 1984 -- Cervantes (first trial) claimed that the third meeting occurred just after the wedding at Barba's brother, with Zuno in attendance, and again, the participants did not know who the agent was causing problems.</p>	<p>(RT 90:7:26-28; ER 4)</p>
<p>(5) October 1984 -- Godoy (second trial) testified that the second meeting occurred in October 1984 at Fonseca's Mar-Mar house, ("Ak-47" meeting), at which those present discussed trying to find out who the agent was that was causing problems.</p>	<p>(RT 821-825; ER 26)</p>
<p>(6) October 1984 -- Godoy (second trial) testified that the third meeting was at Barba's residence at 114 Tonola ("La Quinta") at the end of October 1984 where, again, the subject matter concerned trying to find out who the DEA agent was. Cervantes was not present at this meeting.</p>	<p>(RT 828-833; ER 26)</p>
<p>(7) December 1984 -- Plascencia (who only testified at Zuno's first trial) testified that the first kidnapping meeting actually occurred in December 1984 at Fonseca's home called "La Bajadita" and the participants knew who the agent was causing the problems because they actually passed around a photograph of Camarena and Fonseca told everyone that he would take care of Camarena. Zuno is not identified by Plascencia as having been present at this meeting.</p>	<p>(RT 90:6:121-141; ER 3)</p>
<p>(8) December 1984 -- Godoy (second trial) testified that the fourth meeting occurred in December 1984 at another residence of Barba's called "the Office" where Cervantes allegedly worked (which is different from where he worked at the first trial) and, again, the participants discussed trying to find out who the agent was causing problems.</p>	<p>(RT 834-837; ER 26)</p>
<p>(9) Early February 1985 -- Cervantes (first trial) claimed that the final meeting allegedly occurred a couple days before the kidnapping at La Quinta, where he worked, and only Caro, Fonseca, Barba and Zuno were present. At this time the participants allegedly knew who the agent was causing the problems.</p>	<p>(RT 90:7:39-43; ER 4)</p>
<p>(10) Early February 1985 -- Lopez (second trial) also testified to a meeting just prior to the kidnapping of Camarena but claimed it occurred at Fonseca's house located on Hildago Avenue and that approximately 25 people were present, including Zuno. He did not hear what was said.</p>	<p>(RT 1016-1019; ER 27)</p>

SUMMARY OF MEETING TESTIFIED ABOUT
AT FIRST AND SECOND TRIALS

BAPTISM MEETING (FIRST TRIAL)

Issue	Hector Cervantes-Santo's Testimony
A. Date/Place.	Beginning of September 1984 Meeting occurred at the home of Javier Barba Hernandez ("La Quinta") located on the road to Tonola at the baptism of Javier Barba's daughter, Yuremi (RT 90:6:20,28; ER 2 7:109; ER 4)
B. People Present.	Ruben Zuno-Arce Javier Garcia Paniagua Marcelino Garcia Paniagua Cochiloco Manuel Salcido-Usuerta Javier Barba-Hernandez (RT 90:6:28-29; ER 2)
C. Conversation.	"It dealt with a DEA agent who was causing trouble?" (RT 90:6:29; ER 2) "They only said that he was causing trouble and that <u>they wanted to know who the person was who was causing trouble.</u> " (RT 90:6:30; ER 2) "Ruben said 'that the person should be picked up.'" (RT 90:6:31; ER 2)

LAS AMERICAS MEETING (SECOND TRIAL)

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
A. Date/Place.	Between September and October 1984 at the Las Americas Hotel (RT 810; ER 26) [Told DEA this meeting occurred October/November 1984 (RT 909; ER 26)]	October/November 1984 at the Las Americas Hotel (RT 1120; ER 28)
B. People Present: Politicians, Police and Military.	General Gardoqui Lt. Col. Jorge Garma Ruben Zuno-Arce Miguel Aldana-Ibarra Enrique Alvarez del Castillo Benjamin Ochoa Manuel Bartlett Diaz Sergio Espino-Verdin Gabriel Gonzales-Gonzales Edgar Levi Gallardo Armando Cuellar Jorge Larios General Santoyo-Feria Carlos Aceves (outside hotel) (RT 811, 815-817, 820; ER 26)	General Gardoqui Jorge Garma Ruben Zuno-Arce Miguel Aldana Ibarra Enrique Alvarez del Castillo Benjamin Ochoa Manuel Bartlett Diaz Sergio Espino-Verdin Gabriel Gonzalez-Gonzalez Edgar Levi-Gallardo Armando Cuellar Jorge Larios Dionisio Santoyo Juan Gilberto Hernandez-Parra Manuel Ibarra-Herrera Alfonso Vasquez Armando Pavon-Reyes Enrique Alvarez del Castillo Carlos Fernandez Jorge Salazar Eleseo Soto Ruiz Velasco

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
Traffickers and Security.	Rafael Caro-Quintero Ernesto Fonseca-Carrillo Paco Tajeda Juan Jose Contreras-Subias Miguel Juarez-Medina Amando Betran Samuel Ramirez-Razo Miguel Angel Felix-Gallardo Manual Salcido-Uzueta Javier Barba Hernandez El Negro Eliseo Vasquez Velasco Antonio Vasquez-Velasco Rene Lopez-Romero Juan Jose Bernabe Ramirez Ernesto Pillado Garza Abelardo Ezequiel Godinez Roberto Zepeda Jose Guadalupe Valencia Jose Guadalupe Torres-Fernandez Jorge Fonseca-Uribe Antonio Campos El Gueron Ramiro Perez-Arrellano (RT 810, 815; ER 26)	Javier Barba Hernandez Rafael Caro-Quintero Ernesto Fonseca-Carrillo Miguel Angel Felix-Gallardo Manuel Salsito Sergio Salsito Jorge Fonseca Samuel Ramirez-Razo (RT 997-998)

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
C. Conversation.	<p>Fonseca and Caro asked Aldana "what was going on with the DEA agent, why they were losing so many fields and they weren't respecting all of that money that they were giving them." (RT 818; ER 26)</p> <p>Fonseca and Caro said to Aldana "Have you already talked to the DEA person?" (RT 818; ER 26)</p> <p><u>"Aldana answered that he had gone to speak with him, but that he didn't want to accept the deal. He didn't want any deal with the drug traffickers."</u> (RT 818; ER 26)</p> <p>"Ruben Zuno said that if the DEA agent didn't want to take anything or didn't want any deal then it was time to drop him." (RT 818; ER 26)</p> <p>"Mr. Manuel Bartlett Diaz, he was telling the drug traffickers that a solution would have to be made, found very soon, because he was going to be politically affected." (RT 819; ER 26)</p> <p>"And Mr. Enrique Alvarez del Castillo, as governor of the State of Jalisco, said that the solution had to be quick, otherwise they were going to discover all the support he was giving to the drug traffickers in the State of Jalisco." (RT 819; ER 26)</p>	<p>None. He was outside the Hotel the entire time standing guard.</p>

PRE-WEDDING MEETING (FIRST TRIAL)
 [Zuno not alleged to be present]

Issue	Hector Cervantes-Santo's Testimony
A. Date/Place.	October 1984 meeting at "La Quinta" just prior to the wedding celebration for Javier Barba's brother, Jorge Barba-Hernandez. (RT 90:7:18,23; ER 4)
B. People Present.	Miguel Aldana-Ibarra Manuel Ibarra-Herrera Juan Ramon Matta-Ballesteros and his assistant Javier Barba-Hernandez (RT 90:7:23; ER 4)
C. Conversation.	<p>"Aldana shows [Matta] a folder that says 'Police Files' and says [to Matta] that <u>'he will soon have the identification of the person who is causing the trouble who's a DEA agent.'</u>" (RT 90:7:23; ER 4)</p> <p>"Matta says 'silence is golden.'" (RT 90:7:24; ER 4)</p> <p>"They were talking about Zacatecas. I was over to one side. I only heard that they were talking about Zacatecas." (RT 90:7:24; ER 4)</p> <p>"Manuel Ibarra says that 'this is causing trouble for Mr. Bartlett Diaz, That the -- a stop should be put to the trouble.'" (RT 90:7:24; ER 4)</p> <p>"Aldana told Javier Barba 'that . . . an identification was needed of the DEA agent to know who the person was who was causing this trouble.'" (RT 90:7:25; ER 4)</p> <p>"Matta said that down south there had been a lot of trouble because of this person." (RT 90:7:25; ER 4)</p>

POST-WEDDING MEETING (FIRST TRIAL)

Issue	Hector Cervantes-Santo's Testimony
D. Date/Place.	October 1984 meeting in living room at "La Quinta" at the wedding celebration for Javier Barba's brother, Jorge Barba-Hernandez. (RT 90:7:26; ER 4)
E. People Present.	Ruben Zuno-Arce Javier Garcia-Paniagua Marcelino Garcia-Paniagua Miguel Aldana-Ibarra Manuel Ibarra-Herrera Juan Ramon Matta-Ballesteros Cochiloco Armando Pavon Reyes Rafael Caro-Quintero Ernesto Fonseca-Carrillo Javier Barba-Hernandez (RT 90:7:26-27; ER 4)
F. Conversation.	<p>"The subject matter was 'the DEA agent was continuing to cause trouble.'" (RT 90:7:27; ER 4)</p> <p>"Don Ruben said that he should be picked up <u>once they knew who he was.</u>" (RT 90:7:28; ER 4)</p> <p>"Caro said 'that he wanted to see the person face to face.'" (RT 90:7:28; ER 4)</p> <p>"Paniagua said 'that they wanted to identify that person to see if he would cooperate with them, or else -- I don't know what going to happen.'" (RT 90:7:28; ER 4)</p>

MAR MAR MEETING (SECOND TRIAL)
[also referred to as AK-47 meeting]

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
A. Date/Place.	Two weeks after meeting at hotel (RT 822; ER 26) at Ernesto Fonseca's house near Mar-Mar and Jardines del Country [Told DEA it occurred latter part of November 1984 (RT 910; ER 26)]	Fall 1984 at Ernesto Fonseca's residence located on Mar-Mar Street (RT 1000; ER 27)
B. People Present: Politicians, Police and Military. Traffickers and Security.	<p>Enrique Alvarez del Castillo Ruben Zuno-Arce Carlos Fernandez Cmdr. Gabriel Gonzalez-Gonzalez Cmdr. Jose Maria Carlos Ochoa Francisco Ramos-Ramos Edgar Levi-Gallardo Armando Cuellar-Lopez Jorge Larios-Valencia (RT 823; ER 26)</p> <p>Rafael Caro-Quintero Ernesto Fonseca-Carrillo Javier Barba-Hernandez Samuel Ramirez-Razo Abelardo (RT 821-823; ER 26)</p> <p>Ernesto Pillado-Garza Juan Jose Bernabe-Ramirez Rene Lopez-Romero Guadalupe Lopez-Hernandez The Petunia (RT 821, 823; ER 26)</p>	<p>Enrique Alvarez del Castillo Ruben Zuno-Arce Carlos Fernandez Gabriel Gonzalez-Gonzalez Jose Maria Carlos Ochoa Francisco Ramos Edgar Gallardo Armando Pavon-Reyes Jorge Larios Jorge Garma Benjamin Ochoa (RT 1002; ER 27)</p> <p>Rafael Caro-Quintero Ernesto Fonseca-Carrillo Javier Barba-Hernandez Samuel Ramirez-Razo Sergio Jorge Fonseca Felix-Gallardo Rene Lopez-Romero Roberto Mantano Guadalupe Hernandez (RT 1003; ER 27)</p>
(Cont. on page 8)		

Issue	Jorge Godoy-Lopez's Testimony	Rene Lopez-Romero's Testimony
C. Conversation.	<p>"Rafael Caro-Quintero asked Enrique Alvarez del Castillo whether they already had all the information about the DEA." (RT 824; ER 26)</p> <p><u>"Alvarez del Castillo answered 'I already have my people working.'"</u> (RT 824; ER 26)</p> <p>"Caro-Quintero got angry. He got very angry and said 'Give me all of the information about these people very soon so I can solve this problem with these DEA people.'" (RT 824; ER 26)</p> <p>"Rafael continued to pressure [Castillo], asking him for all the data." (RT 824; ER 26)</p> <p>"Mr. Zuno said 'Calm down, Rafael. Can't you see that the governor is already getting us all of the information. This operation has to be done properly and calm, and it has to be properly planned so that everything works out properly.'" (RT 824; ER 26)</p> <p>"Ernesto Fonseca . . . said to Samuel Ramirez-Razo 'Please hand me the present that we have for the governor.' It was an AK-47. It was gold colored and engraved." (RT 824; ER 26)</p> <p>"Caro shouted 'I don't want to become famous. This is going to be a very difficult fight. And I'd rather you guys become the</p>	<p>"Caro-Quintero told Castillo 'What happened to that person we put you in charge of.'" (RT 1004; ER 27)</p> <p><u>"Alvarez del Castillo replied 'We already have all the information. That person is located already.'"</u> (RT 1004; ER 27)</p> <p>"Ruben Zuno told Caro-Quintero 'There is no problem. Everything is going to come out all right. All the information, we are doing it correctly.'" (RT 1005; ER 27)</p> <p>Caro told Castillo and Zuno 'You had your time with that job. You should have already located that DEA person.'" (RT 1005; ER 27)</p> <p>"Ruben told Caro 'There is no problem. Everything is coming out just fine. Everything is going to be all right.'" (RT 1005; ER 27)</p> <p>"Samy Razo said 'The brother-in-law of my compadre hasn't come.'" (RT 1005; ER 27)</p> <p>"Samuel Ramirez-Razo told Ernesto Fonseca 'Compadre, have you given him the present?'" (RT 1006; ER 27)</p> <p>"Ernesto Fonseca told Samuel Ramirez-Razo no, bring it to me." (RT 1006; ER 27)</p>

114 TONALA STREET MEETING (SECOND TRIAL)

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
A. Date/Place.	End of October 1984 at Javier Barba's home "La Quinta" in Tonalá (RT 827,828; ER 26) [cross he told DEA occurred late November/early December, (1984)(RT 910; ER 26)]	Fall 1984 at Javier Barba's home located in Tonalá (RT 1014)
B. People Present: Politicians, Police and Military. Traffickers and Security.	<p>Manuel Bartlett-Díaz Ruben Zuno-Arce Enrique Alvarez del Castillo Sergio Espino-Verdin Miguel Aldana-Ibarra</p> <p>Javier Barba-Hernandez Rafael Caro-Quintero Ernesto Fonseca-Carrillo Samuel Ramirez-Razo Javier Vasquez-Velasco Ramiro Perez Arellano Rene Lopez-Romero Jose Guadalupe Valencia Jorge Fonseca Uribe El Gueron Roberto Zepeda Juan Jose Bernabe Ramirez El Primo Antonio Vasquez-Velasco The Freelancer (RT 828-829; ER 26)</p>	<p>Fonseca Jorge Godoy Lopez Rene Lopez Romero (RT 1015)</p>

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
C. Conversation.	<p>"I heard Ruben Zuno say 'That fucking Gringo. What is he doing here in Mexico? It's not his fucking country. We have to pick him up.'" (RT 832; ER 26)</p> <p>"Enrique Alvarez del Castillo was arguing for a prompt solution." (RT 832; ER 26)</p> <p>"Rafael Caro-Quintero said [to Aldana] 'What is happening with that dick of the DEA? <u>Why hadn't he gotten all of the data, all of the information.</u>'" (RT 832; ER 26)</p>	<p>Played pool and did not hear any of conversation. (RT 1015)</p>

DECEMBER MEETING (FIRST TRIAL)
 [Zuno not alleged to be present]

Issue	Enrique Plascencia-Aguilar's Testimony
A. Date/Place.	December 1984 at the residence of Ernesto Fonseca-Carrillo called "La Bajadita." (RT 90:6:121; ER 3)
B. People Present.	Antonio Garate Bustamante Ernesto Fonseca-Carrillo Samuel Ramirez-Razo Juan Gilberto-Hernandez Jorge Salazar Avelardo Fernandez Rafael Caro-Quintero Javier Queseda Antonio Vasquez-Velasco Ezequiel Cervantes Javier Vasquez-Velasco Eliseo Vasquez-Velasco Javier Barba-Hernandez Jorge Barba-Hernandez (RT 90:6:121; ER 3)
(Cont. on page 12)	

Issue

Enrique Plascencia-Aguilar's
Testimony

C. Conversation.

"Fonseca . . . takes a photograph and pushes it to one side, where Antonio Garate is (RT 90:6:129; ER 3) and says to him 'The kind of friends you have.'" (RT 90:6:129; ER 3)

"It is a picture of Camarena and Antonio Padilla." (RT 90:6:130;133; ER 3)

"Fonseca says to Antonio Garate as he is examining the photograph 'he wanted Antonio Garate Bustamante to kill Antonio Padilla de la Mora.'" (RT 90:6:134; ER 3)

"Fonseca also says that he or they would take care of attorney Camarena." (RT 90:6:135; ER 3)

"Antonio Garate says he cannot kill Antonio Padilla de la Mora because Padilla is one of Cochiloco's people." (RT 90:6:136; ER 3)

"Everyone present looks at the photograph." (RT 90:6:136; ER 3)

"A colonel in the army arrives and Ernesto-Fonseca calls Javier Barba and tells him to send Antonio Vasquez-Velasco to go where he is." (RT 90:6:137; ER 3)

"He is to open the safe, which is in his bedroom and he should take out approximately 10 centimeters of money, and he should bring that to him." (RT 90:6:137; ER 3)

"Fonseca Carrillo . . . asks [the Colonel] whether he needs more." (RT 90:6:140; ER 3)

The Colonel replies 'that amount is sufficient.' (RT 90:6:140; ER 3)

L'OFICINA MEETING (SECOND TRIAL)

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
A. Date/Place.	December 1984 at Javier Barba's residence called the office ("L'Oficina") located on Felice Avenue and highway to Tonalá (RT 833-835; ER 26) (one block from "La Quinta")	Not present.
B. People Present: Politicians, Police and Military. Traffickers and Security.	Enrique Alvarez del Castillo Miguel Aldana Ibarra Benjamin Ochoa Ruben Zuno-Arce Rafael Caro-Quintero Ernesto Fonseca-Carrillo Manuel Salcido-Uzeuta Juan Gilberto Hernandez-Parra Hector Cervantes-Santos (RT 836; ER 26)	

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
C. Conversation.	<p>"[Castillo] went in shouting: 'Couldn't they handle that fucking Gringo? If not, he would have to do everything.'" (RT 836; ER 26)</p> <p>"Castillo was addressing Caro. (RT 836; ER 26) Rafael answered "You can see, sir, that we are already working. You already saw that we shot a DEA car and it escaped." (RT 837; ER 26)</p> <p><u>"Ruben Zuno-Arce and . . . Miquel Aldana were askin what was happening with the information, why didn't they have the information."</u> (RT 837; ER 26)</p> <p>"Then, at one point, they were all high and they all wanted to pick up the people from the DEA." (RT 837; ER 26)</p>	

FEBRUARY 1985 MEETING (FIRST TRIAL)

Issue	Hector Cervantes-Santo's Testimony
A. Date/Place.	In early February 1985 at "La Quinta" (RT 90:7:39-40; ER 4)
B. People Present.	Rafael Caro-Quintero Ernesto Fonseca-Carrillo Ruben Zuno-Arce Javier Barba-Hernandez (RT 90:7:42; ER 4)
C. Conversation.	<p>"Rafael Caro-Quintero told Javier Barba that they should definitely pick up the DEA agent to find out how much he knew." (RT 90:7:42; ER 4)</p> <p>"Ruben said 'that he agreed that person should be picked up and that it should be found out how much he knew and who he was cooperating with, or working with.'" (RT 90:7:43; ER 4)</p> <p>"Mr. Zuno also said that he wanted to know how much he knew about my General Gardoqui." (RT 90:7:43; ER 4)</p> <p>"Don Ruben said 'that the ambassador was -- could become a problem, and that he should be picked up.'" (RT 90:7:116; ER 4) [cross-examined with Grand Jury testimony where he testified that Caro said "he wanted to go pick up [the ambassador] John Gavin." (RT 90:7:116,119; ER 4)]</p> <p>"Javier Barba said that 'no, that was very dangerous because it was the ambassador.'" (RT 90:7:116; ER 4)</p>

THE HILDAGO AVENUE MEETING (SECOND TRIAL)

Issue	Jorge Godoy-Lopez' Testimony	Rene Lopez-Romero's Testimony
A. Date/Place.	Not Present.	Early February 1985 at Fonseca's residence located on Hildago Avenue. (RT 1016; ER 27)
B. People Present: Politicians, Police and Military. Traffickers and Security.		Carlos Acevez Fernandez Manuel Bartlett-Diaz Enrique Alvarez del Castillo Ruben Zuno-Arce Juan Arevalo-Gardoqui Dionisio Santiago Jorge Garma Miguel Aldana Juan Gilberto Hernandez-Parra Manuel Ibarra-Herrera Alfonso Vasquez Sergio Espino Verdin Armando Pavon-Reyes Edgar Levi-Gallardo Armando Cuellar Jose Larios Rafael Caro-Quintero Ernesto Fonseca-Carrillo Javier Barba-Hernandez Felix-Gallardo Jorge Fonseca Avelardo Fernandez Manuel and Sergio Salcido Samuel Ramirez-Razo (RT 1016-1017; ER 27)
C. Conversation.		They met in bedroom for 1-2 hours. He did not hear any of the meeting in bedroom. (RT 1019; ER 27)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is Mitchell, Silberberg & Knupp, 11377 West Olympic Boulevard, Los Angeles, California 90064.

On August 30, 1993, I served the foregoing documents described as APPELLANT'S OPENING BRIEF; EXCERPTS OF RECORD (VOLUMES I AND II) on interested parties in this action by placing two true copies of the Opening Brief and one copy of the Excerpts of Record which were enclosed in a sealed envelope addressed as follows:

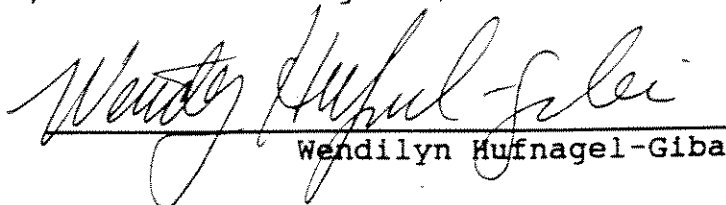
John L. Carlton, Esq.
Miriam A. Krinsky, Esq.
Assistant U.S. Attorney
Criminal Appeals Division
United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

and, following ordinary business practices, placing the envelope for collection and deposit in the U.S. Postal Service at 11377 West Olympic Boulevard, Los Angeles, California.

I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the U.S. Postal Service. Under that practice, all correspondence is deposited with the U.S. Postal Service on the same day that it is placed for collection and processing, in the ordinary course of business.

I am employed in the office of an attorney admitted to the bar of this Court at whose direction the service was made.

Executed on August 30, 1993 at Los Angeles, California.


Wendilyn Hufnagel-Giba