Applications/Ex Parte Applications/Motions/Requests

2:87-cr-00422-JAK USA v. Caro-Quintero et al

REOPENED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Lemon, John on 11/8/2018 at 6:55 PM PST and filed on 11/8/2018

Case Name: USA v. Caro-Quintero et al
Case Number: 2:87-cr-00422-JAK
Filer: Dft No. 3 - Rene Martin Verdugo-Urquidez
Document Number: 4393

Docket Text:
Amended NOTICE OF MOTION AND MOTION to Dismiss Case *for Grand Jury Misconduct*, Amended NOTICE OF MOTION AND MOTION to Dismiss on Speedy Trial Violations, Amended NOTICE OF MOTION AND MOTION for Order for Dismiss for Prosecutorial Misconduct Filed by Defendant Rene Martin Verdugo-Urquidez. Motion set for hearing on 12/13/2018 at 10:00 AM before Judge John A. Kronstadt. (Lemon, John)

2:87-cr-00422-JAK-3 Notice has been electronically mailed to:

Adam P Schleifer adam.schleifer@usdoj.gov, CaseView.ECF@usdoj.gov, USACAC.Civil@usdoj.gov, usacac.criminal@usdoj.gov

Donald C Randolph randolph@randolphassociates.com

Gregory W Staples USACAC.SACriminal@usdoj.gov, CaseView.ECF@usdoj.gov, greg.staples@usdoj.gov

Gretchen C Von Helms gvh@ronisandronis.com, marisa@ronisandronis.com

Joanna M Curtis joanna.curtis@usdoj.gov, CaseView.ECF@usdoj.gov, USACAC.Criminal@usdoj.gov

John C Lemon john@jcl-lawoffice.com, jlemonlaw@gmail.com

Mark Windsor Mark@windsorlaw.us

Mark F Adams markadamsesq@gmail.com

Mark F Fleming mark@markfleminglaw.com

Mary E Kelly zzCAC_FPD_Document_Receiving@fd.org

Robert K Steinberg triallaw01@aol.com

Timothy J Searight timothy.searight@usdoj.gov, CaseView.ECF@usdoj.gov, USACAC.Criminal@usdoj.gov

2:87-cr-00422-JAK-3 Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\fakepath\grand jury & delay motions.pdf
Electronic document Stamp:CMECF.widgit.ProcessingWindowDestroy() RONG>
[STAMP cacdStamp_ID=1020290914 [Date=11/8/2018] [FileNumber=26584724-0
] [8989daaec5aafd94ba76fa2931e309fe5cacf737ed1d5a7d8f5843c4cb7e978f6d6
a4a7dfb37c972c473d9a6b7ed214107cfa7fe081705324015a55bca289420]]

JOHN C. LEMON
California Bar No. 175847
LAW OFFICES OF JOHN C. LEMON, APC
1350 Columbia Street, Suite 600
San Diego, California 92101
(619) 794-0423
john@jcl-lawoffice.com

Attorney for Rene Verdugo

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(HONORABLE JOHN A. KRONSTADT)

UNITED STATES OF AMERICA, Plaintiff, v. RENE MARTIN VERDUGO-URQUIDEZ (3), Defendant.	Criminal No. 87cr422-JAK Date: December 13, 2018 Time: 10:00 a.m. **Amended Motions to Dismiss the Indictment for:** **1) Grand Jury Misconduct;** **2) Post-Indictment Delay; and** **3) A Pattern of Governmental Misconduct.**

TO: NICOLA T. HANNA, UNITED STATES ATTORNEY; AND
JOANNA M. CURTIS, ASSISTANT UNITED STATES ATTORNEY.

Consistent with this Court's order (CR 4391), Rene Verdugo-Urquidez moves for an order dismissing the indictment with prejudice on the basis of: 1) governmental misconduct before the grand jury; 2) post-indictment, pretrial delay; and 3) a pattern of governmental misconduct. These motions are based on the federal constitution, this Court's supervisory powers, the attached memorandum of points and authorities, and any supporting evidence that may later be presented to this Court.

Respectfully submitted,

Dated: November 8, 2018

/s/ John C. Lemon
JOHN C. LEMON
Attorney for Mr. Verdugo-Urquidez

Table of Contents

Table of Authorities

Cases

Memorandum of Points & Authorities

I.

Questions Presented

1. Although this Court vacated Verdugo's 1988 convictions on the basis of FBI Agent Michael Malone's false testimony at trial, Malone presented that same false testimony to Verdugo's grand jury in 1987. The Ninth Circuit has held that the government violates due process when it knowingly presents perjured testimony or deceives the grand jury in some significant way. Should this Court dismiss the indictment with prejudice because of Malone's perjured grand-jury testimony?

2. According to the Department of Justice, Agent Malone "repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials" and "[p]roblems with [his testimony] began to surface publicly in the late 1980s." Accordingly, in June 1997, the DOJ began reviewing Malone's work and making *Brady* disclosures to affected defendants. The government did not, however, disclose Malone's misconduct in Verdugo's case until late 2014. Should this Court dismiss the indictment for post-indictment delay?

3. In addition to presenting Malone's false testimony to both Verdugo's grand jury and trial jury, the government engaged in a pattern of litigation misconduct that included kidnapping Verdugo in violation of international law, withholding critical *Brady* material, delivering a remarkably improper closing argument, and derailing a DOJ investigation into Malone's false testimony. Should this Court dismiss the indictment on the basis of the government's 32-year pattern of prosecutorial misconduct?

II.

Introduction

On May 22, 2017, this Court granted a 28 U.S.C. § 2255 petition for Rene Verdugo based on governmental misconduct. Specifically, the Court found that the false trial testimony of FBI Agent Michael Malone "was material to [Verdugo's] conviction[s]" because "there is a reasonable likelihood that [it] could have affected the judgment of the jury."[1]

Verdugo now moves this Court to dismiss the indictment on three, independent (but related) bases. First, Malone also testified falsely before Verdugo's grand jury. This false testimony violated Verdugo's Fifth Amendment rights to due process and to a grand-jury indictment untainted by perjured testimony. These constitutional violations cannot be remedied 31 years after the fact.

Second, the Department of Justice was aware of a shocking pattern of misconduct by Malone no later than 1997, when it began reviewing files and making *Brady* disclosures in cases where Malone had testified or done lab work. Yet the government made no *Brady* disclosure to Verdugo. In fact, although the U.S. Attorney's Office for the Central District received a specific inquiry from the DOJ regarding Malone in 1997, it sat on that inquiry for six years before burying it in 2003, when it reported that Malone's testimony in Verdugo's case "was . . . not material to the convicted defendants in the case" and that in Verdugo's trial "Malone's testimony was only a single line of several strands of evidence that supported Verdugo's . . . convictions."

As a result of that false representation, the Department of Justice did not

---

[1] CR 4184 at 25. ("CR" refers to the Clerk's Record in 87cr422; "RT" refers to the Reporter's Transcript from Verdugo's 1988 trial.)

disclose Malone's misconduct in this case until late 2014 (and only then because it had launched a follow-up investigation into Malone on its own initiative).

The entirety of the government's malfeasance regarding Malone (starting with Malone's perjury before the grand jury) has resulted in a 31-year delay between Verdugo's indictment and his currently scheduled trial date. Even viewed in the light most favorable to the government, there is at least a 22-year delay between the current trial date and the latest possible time that Malone's misconduct was discovered (1997). This extraordinary delay – all of which Verdugo has spent in prison – is a continuing violation of his Sixth Amendment right to a speedy trial and requires dismissal of the indictment.

Third, beginning with its decision in 1986 to kidnap Verdugo in violation of the international treaty with Mexico and continuing through Malone's perjury and the subsequent cover-up of that perjury, the U.S. government has engaged in a decades-long pattern of litigation misconduct, which is an independent basis for dismissal of the indictment with prejudice.

III.

Statement of the Case

On February 7, 1985, DEA agent Enrique Camarena was kidnapped in Guadalajara, Mexico.[2] One month later, his body was found 60 miles outside of Guadalajara, along with that of Alfredo Zavala-Avelar, a pilot and informant.[3] The incident set off a firestorm that would become a decades-long investigation by the U.S. government (and others) into the drug-trafficking organizations that were presumably responsible.

---

[2] *United States v. Caro-Quintero*, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *overruled by United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[3] *See id.*

Since the late 1970s, the DEA had been monitoring the activities of Rene Verdugo, a Mexicali-based marijuana smuggler who was associated with Rafael Caro-Quintero,[4] a well-known Mexican drug trafficker and the putative head of the eponymous Caro-Quintero Cartel. On August 3, 1985, the government obtained an arrest warrant for Verdugo based on alleged drug-trafficking crimes.[5] On January 24, 1986, while driving his car in San Felipe, Mexico, Verdugo was kidnapped by Mexican police officers who had been hired by the DEA to bring him to the U.S. without any legal process, in violation of the extradition treaty with Mexico.[6]

The next day, the DEA raided Verdugo's two residences in Mexico, searching them both without a search warrant.[7] The U.S. District Court for the Southern District of California found that these warrantless, residential searches violated the Fourth Amendment. The Ninth Circuit affirmed that decision but the U.S. Supreme Court reversed.[8]

On March 16, 1988, the grand jury for the Central District of California returned a second superseding indictment against Verdugo and eight codefendants. In general, the indictment alleged that the "Caro-Quintero Narcotics Enterprise" was responsible for the abductions and murders of Camarena and Zavala-Avelar.[9]

---

[4] *United States v. Verdugo-Urquidez,* 856 F.2d 1214, 1215 (9th Cir. 1988), *overruled by United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990).

[5] *Id.* at 1215-16.

[6] *See id.* at 1216.

[7] *Id.* at 1217.

[8] *Verdugo-Urquidez,* 494 U.S. at 274-75.

[9] CR 21-4 at 2-3.

Verdugo's trial began on July 22, 1988.[10] The government's theory was that, as an allegedly high-ranking member of the Caro-Quintero organization, Verdugo was necessarily a coconspirator. As discussed more fully below, although Verdugo was in Guadalajara on February 7 and 8, 1985, there was little – if any – credible evidence to suggest that he had anything whatsoever to do with the abduction and murder of Camarena.[11] Essential to the government's case was the fraudulent expert testimony of FBI agent Michael Malone, whom the government relied upon to place *both* Camarena *and* Verdugo at the crime scene.[12]

On September 26, 1988, the jury returned guilty verdicts on all counts.[13] On October 26, 1988, Judge Rafeedie sentenced Verdugo to four consecutive 60-year terms (Counts 1-4) concurrent to life (Count 5).[14] Although the Ninth Circuit initially granted Verdugo relief on one of his claims, that holding was overturned by the U.S. Supreme Court.[15] On June 22, 1994, the Ninth Circuit entered a two-

---

[10] RT 1:1.

[11] *See* CR 4184 (order granting § 2255 petition) at 18-25 (finding false forensic testimony "material"); *see also United States v. Verdugo-Urquidez,* 1994 U.S. App. LEXIS 16083, *24 (9th Cir. 1994) ("In truth, the government's entire case with respect to all of the counts hangs by a single hair.") (Reinhardt, J., dissenting).

[12] CR 4184 at 23.

[13] CR 3865.

[14] RT 34:71.

[15] *See United States v. Verdugo-Urquidez,* 939 F.2d 1341, 1362 (9th Cir. 1991) (finding that "Verdugo ha[d] alleged sufficient facts to warrant an evidentiary hearing on the question whether the United States authorized or sponsored his abduction"), *overruled by United States v. Alvarez-Machain,* 504 U.S. 655 (1992).

to-one memorandum decision reversing Verdugo's conviction on Count 2 (the VCAR kidnapping and murder of Zavala-Avelar) for insufficient evidence but affirming his remaining convictions and sentences.[16]

On August 2, 1996, Verdugo filed a new-trial motion, which was denied by Judge Rafeedie on March 24, 1997.[17] The Ninth Circuit affirmed that decision in a memorandum on October 20, 1998.[18] On April 24, 1997, Verdugo filed a 28 U.S.C. § 2255 petition, which Judge Rafeedie denied with prejudice on August 31, 1999.[19]

On October 17, 2014, the DOJ disclosed to Verdugo for the first time that Malone's testimony at his trial had "exceed[ed] the limits of science."[20] On September 14, 2015, Verdugo filed a successive § 2255 petition,[21] which this Court granted on May 22, 2017.[22] The retrial is currently scheduled to begin on April 30, 2019.

//

//

//

---

[16] *Verdugo-Urquidez,* 1994 U.S. App. LEXIS 16083 at *19.

[17] *See* CR 2092, 2148.

[18] *United States v. Verdugo-Urquidez,* 1998 U.S. App. LEXIS 27090 (9th Cir. 1998).

[19] CR 2377.

[20] Exhibit B (combined 2014 DOJ disclosure correspondence) at 4.

[21] CR 2500.

[22] CR 4184.

IV.

Statement of Facts

A. The Government's Evidence Against Rene Verdugo

Over the course of an eight-week trial, the government presented evidence that Verdugo "was an important figure in Caro's trafficking activities" and that Caro had a motive to kidnap Camarena because Camarena had played a role in two significant seizures of Caro's marijuana.[23] The government also presented evidence that Verdugo (a Mexicali resident) was in Guadalajara on February 7-9, 1985. Hotel records from the Hyatt Regency reflected that he checked into the hotel on February 7, 1985, at 4:50 p.m. and checked out on February 9, 1985, at 7:19 a.m.[24]

Essential to the government's case was its allegation that Camarena had been held and interrogated in the guest house of Caro's residence at 881 Lope de Vega. Jorge Gomez-Espana testified that he saw Verdugo at Lope de Vega on February 7 or 8, 1985.[25] Gomez stated that he saw Verdugo and another person, whom Verdugo referred to as "commandante," at around 7:00 p.m. on one of those days. According to Gomez, Verdugo looked tired and mentioned that he had had a problem but that he had taken care of it.[26] The government argued that Verdugo's presence at Lope de Vega was not coincidental and that when Verdugo said that he had taken care of a problem, he was referring to Camarena.

Counsel for Verdugo countered that Verdugo was in Guadalajara because,

---

[23] CR 4184 at 3-4.

[24] *Id.* at 7-8.

[25] *Id.* at 7.

[26] *Id.* at 8.

two days earlier, on February 5, 1985, he had lost 4,000 pounds of Caro's marijuana and a $500,000 Sakorsky helicopter in a failed smuggling venture (which had nothing to do with either Camarena or the DEA).[27] Accordingly, Verdugo had to be in Guadalajara to explain to Caro what had happened to both his product and his helicopter. And when Verdugo told Gomez-Espana that he had taken care of a problem, he was referring to having placated his boss.[28]

A cooperating witness named Skip Hollestelle, who did not speak Spanish, testified that he overheard a conversation between Verdguo and an alleged trafficker named Don Walters, most of which was in Spanish. According to Hollestelle, however, part of the conversation was in English and he heard Verdugo say something about a "narc" and "someone being beat to shit and begging and crying."[29] The government argued that this was a reference to Camarena and that the alleged statement implicated Verdugo in the murder. Counsel for Verdugo argued that Hollestelle, an admitted perjurer who was receiving benefits for his testimony, was not telling the truth. In closing argument, the government responded by explicitly vouching for the credibility of its witness:

> The reason [why we didn't put on additional witnesses] is simple. We didn't think it needed any corroboration. . . . It is our view that Hollestelle's statement is sufficiently credible based on what he said. And again he said it before the grand jury prior to his testimony here.[30]

Verdugo did not discover until after the trial that Don Walters had testified

---

[27] *See* RT 30:8.

[28] *See id.*

[29] *See* RT 13:163-64.

[30] RT 32:42.

before the grand jury and squarely impeached Hollestelle on this point.[31] Although there was no dispute that the government had withheld that exculpatory information from Verdugo, the Ninth Circuit denied relief, finding that "Hollestelle was subjected to an extensive and effective cross-examination and [that] this evidence would not have altered the result of the proceeding."[32]

Another significant part of the government's case was that Camarena's interrogation was recorded. And Verdugo's voice is *not* on the tapes.[33] Notwithstanding that fact – as well as the fact that there was no credible evidence to support the inference – the government flat-out told the jury during closing argument that Verdugo had been in the room and had participated in Camarena's interrogation:

> You had better believe that this individual, Rene Verdugo, was in there immediately . . . wanting to know what else Camarena knew about [him]. "What else do you know about me? What else do you know about my operation? What else do you know about my helicopter business? What else do you know about people that are working for me? Who are your snitches? Who are your DEA snitches that are infiltrating our organization? How were you able to seize our helicopter and 4,000 pounds?"
>
> *He was there and that is why he was there.* That was the express reason he was there, and that is why he was in that room. *He participated in the interrogation. He was asking questions of the captive, Camarena,* and he was seeking information, and information was being passed on to him at various intervals during the time he was there and Special Agent Camarena was there. That is not coincidence,

---

[31] *See* Verdugo's New Trial Motion at 4. This motion, apparently filed on August 2, 1996, does not appear on PACER. It is instead attached as Exhibit I. Verdugo has also specifically requested the Walters grand-jury transcript in discovery but has not yet received it.

[32] *Verdugo-Urquidez,* 1998 U.S. App. LEXIS 27090 at *4.

[33] The government apparently did not recover all the tapes but there was no dispute that Verdugo's voice did not appear on any of the tapes in its possession. *See* RT 30:41-42.

ladies and gentlemen. *That is the way it happened.*[34]

It bears repeating that there simply was no evidence supporting those representations. Again, there *was* a tape and Verdugo's voice was *not* on it. Moreover, no percipient witness testified that Verdugo had been in the room where the government alleged that Camarena had been interrogated. Nor, for that matter, did any percipient witness place Camarena at Lope de Vega. For those two critical pieces of evidence, the government instead relied solely upon now-disgraced FBI forensic examiner Michael Malone, who testified that one of the hairs found in the putative interrogation room was "absolutely indistinguishable" from Verdugo's hair[35] and that the only possible interpretation of the forensic evidence regarding Camarena was that he was also in the room.[36]

B. Michael Malone's Background, the OIG Inquiries, and the FBI Lab Task Force

Michael Malone joined the FBI in 1970 and transferred to the Hairs and Fibers Unit in 1974.[37] He became "well known to many judges and the law enforcement community because of his forensic work on several high profile cases," including those of Green Beret surgeon Jeffrey MacDonald[38] and John Hinckley.[39] "Problems with Malone's analyses and testimony began to surface publicly in Florida, starting in the late 1980s, when several courts reversed murder

---

[34] RT 28:117 (emphasis added).

[35] RT 10:192; 11:3.

[36] RT 10:189.

[37] Exhibit A (2014 Office of Inspector General Report) at 45.

[38] This case was the subject of the book and TV program *Fatal Vision*.

[39] Exhibit A at 45.

convictions on the grounds that [his] microscopic hair comparisons were insufficiently reliable."[40] His "credibility also came under attack as the result of his testimony in 1985 before the Investigating Committee for the Judicial Council of the Eleventh Circuit," when another FBI Lab expert "alleged that Malone had testified falsely, outside of his expertise, and inaccurately."[41]

The Office of the Inspector General "first investigated the FBI Lab in 1994 when Frederic Whitehurst, an FBI Supervisory Special Agent . . . complained to the OIG and the Department's Criminal Division about irregularities at the FBI Lab."[42] Although Whitehurst did not implicate either Malone or the Hairs and Fibers Unit, the OIG evaluated Malone anyway "because a witness whom the OIG interviewed in connection with Whitehurst's allegations raised questions about the scientific integrity of specific testimony Malone had provided years earlier."[43] "The OIG concluded in its 1997 Report that Malone had testified falsely before a congressional committee."[44]

In 1996, two years after the OIG began its investigation but before it released its 1997 OIG Report, the Criminal Division of the Department of Justice created a task force to investigate numerous allegations surrounding the FBI Lab.[45] In June 1997, the Task Force identified 13 FBI Lab examiners whose work "warranted

---

[40] *Id.*

[41] *Id.*

[42] *Id.* at 2.

[43] *Id.* at 3, n.5.

[44] *Id.*

[45] *Id.* at 4.

closer scrutiny."[46] The Task Force's "mission" was to identify cases involving the 13 criticized examiners, advise prosecutors regarding their disclosure obligations, and "ensure that defendants' rights to a fair trial were not jeopardized by the conduct of any of the 13 affected examiners."[47]

The OIG would later conclude that, of those 13 examiners, Malone was – by far – the worst:

> We [] examined the decisions the Task Force made related to former FBI Lab Hairs and Fibers Unit examiner Michael Malone, who handled a disproportionately large number of cases and provided seriously flawed analyses and testimony in many cases the Task Force reviewed. We found that, of the 13 FBI Lab examiners whose cases the Task Force reviewed, Malone's conduct was the most egregious. He repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials.[48]

On June 6, 1997, the Assistant Attorney General issued a memorandum directing federal prosecutors "to assess the importance of the Lab evidence and examiner testimony to determine their materiality to the defendant's conviction" in all cases in which one of the 13 examiners had testified.[49] The Task Force designed "a case review form for federal prosecutors to complete – one form for each defendant and FBI Lab examiner involved in each identified case."[50] In the event that the prosecutor determined that the examiner's findings were "material to the defendant's conviction," the Task Force would request an independent review. And

---

[46] *Id.*

[47] *Id.*

[48] *Id.* at 7.

[49] *Id.* at 20.

[50] *Id.* (a sample form is attached to the 2014 OIG Report as Appendix D).

in the event that the independent review was exculpatory, the conclusions of the independent review would be disclosed to the defense.[51]

From 1999-2004, two hair and fiber experts, Cathryn Levine and Steven Robertson, reviewed the 162 referrals involving Malone.[52] For reasons discussed below, this review did *not* include Verdugo's case.[53] The Task Force completed its work in July 2004 and officially dissolved in August 2005.[54]

On October 17, 2014, the DOJ disclosed to one of Verdugo's trial attorneys, Michael Pancer, that Malone's testimony at Verdugo's trial "exceed[ed] the limits of science."[55] This disclosure was the result of a 2012 inquiry by the OIG into the FBI Lab Task Force to "ensur[e] that defendants potentially affected by the faulty FBI lab . . . were notified of the Lab deficiencies identified [in the 1997 OIG Report]."[56] This 2012 inquiry resulted in the 2014 OIG Report, which "concluded that the Department should have directed the Task Force to review *all* cases involving Michael Malone, the FBI Lab examiner whose misconduct was identified in the OIG's 1997 report and who was known by the Task Force as early as 1999 to be consistently problematic."[57]

//

---

[51] *Id.* at 22 (Case-Review-Process flow chart).

[52] *Id.* at 15, 33.

[53] Exhibit B (2014 correspondence from DOJ) at 1.

[54] Exhibit A at 5.

[55] Exhibit B at 3-5.

[56] *Id.* at 1-2, n.3.

[57] Exhibit A at ii (emphasis added).

C. The Task Force's Findings Regarding Malone (1999-2004)

From 1997-2004, the Task Force referred 312 cases to independent scientists, 162 of which contained hair and fiber analyses performed by Malone. One third of those 162 cases also included testimony by Malone.[58] Based on those reviews, the OIG concluded that Malone's findings were "problematic in one or more areas" in "96 percent" of his cases.[59] Independent examiner Steven Robertson concluded that the "most significant, recurring problems" were:

> 1. [Malone's] testimony that an individual hair could be determined to belong unequivocally to only one person in the world, based solely on microscopic analysis, [which] had no scientific basis at the time Malone testified. Robertson described Malone's testimony to this effect in many cases as "outlandish."
>
> 2. [Malone's] testimony to the statistical probability of a match was inappropriate in hair analyses based solely on microscopic analysis.
>
> 3. [Malone's] conclusions . . . had unclear and unsupported bases.
>
> 4. [Malone's] documentation was inadequate and often indecipherable.
>
> 5. [Malone's] testimony included analysis that was not documented in his lab report or bench notes.[60]

Further, in a staggering 94 percent of hair and fiber cases, either Malone had not conducted the appropriate forensic tests or it was impossible to determine whether he had. And in the same percentage of cases, Malone's conclusions were not supported by his bench notes.[61] In 54 percent of cases in which Malone testified, his testimony was inconsistent with his lab reports, while in 65 percent his

---

[58] *Id.* at 48.

[59] *Id.*

[60] *Id.* at 48-49.

[61] *Id.* at 49.

testimony was inconsistent with his bench notes.[62] The independent examiners also found that Malone's testimony was "consistently overstated and much stronger than either his lab reports or bench notes supported, resulting in misleading and inaccurate testimony."[63] With respect to fiber analysis, the examiners found that Malone did not understand "the appropriate use and limitations of an instrument known as a microspectrophotometer" and therefore "often came to scientifically inaccurate conclusions in his reports and testimony."[64]

D. Malone's grand-jury testimony was substantially the same as his trial testimony – that is, his opinions exceeded the limits of science.

1. Malone's Trial Testimony

Malone testified at trial in Verdugo's case on August 5 and 6, 1988. This false testimony was the subject of the DOJ's 2014 disclosure to the defense and the basis for Verdugo's successive 28 U.S.C. § 2255 petition, which this Court granted. In the interest of brevity, it will not be recounted in detail here. Briefly, however, the FBI[65] identified two distinct types of errors committed by Malone in this case[66] and 26 specific instances of erroneous testimony, which fell into one of those two

---

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] The review undertaken in Verdugo's case was by the FBI, rather than the independent examiners who reviewed Malone's work from 1999-2004. *See* Exhibit B at 9. The Innocence Project and NACDL also reviewed the testimony and found additional examples of the errors identified by the FBI Lab. *Id.* at 7-8.

[66] Exhibit B at 11.

categories.[67]

2. Malone's Grand Jury Testimony

Malone did not personally testify before the grand jury that returned the indictment in this case. He did, however, testify regarding the same subject matter before another grand jury in San Diego on September 26, 1986.[68] And that testimony was read – verbatim – to the grand jury in this case (87cr422) by another agent on two occasions: April 1, 1987, and December 9, 1987.[69]

Significantly, AUSA Jimmy Gurule interrupted both read backs to inform the grand jurors when the read back was about to focus on Rene Verdugo.[70] And when Gurule interrupted the read back that took place on April 1, 1987, he specifically represented to the grand jurors that one of Verdugo's hairs was found at Lope de Vega: "There is going to be mention here shortly of Rene Martin Verdugo, one of his hairs being found at 881 Lope de Vega."[71] The prosecutor thus vouched for the testimony of Malone regarding his most important opinion: that one of Verdugo's hairs was found in the alleged interrogation room at Lope de Vega. And that

---

[67] *Id.*

[68] Exhibit C.

[69] *See* Exhibits D and E, respectively. AUSA Gurule terminated the December 1987 readback before finishing the question-and-answer session that Malone had with the San Diego grand jurors. Gurule provided the Los Angeles grand jurors with copies of the transcript, however. *See* Exhibit E at 75.

[70] *See* Exhibit E at 60 ("You will be hearing evidence as Mr. Malone goes on further with his testimony about Rene Verdugo, another target in the Grand Jury investigation. I am highlighting that for you at this time.").

[71] Exhibit D at 77.

opinion, of course, was completely invalid.[72]

Not surprisingly, Malone's grand-jury performance featured most of his greatest hits, including both error types identified in the 2014 disclosure to Verdugo, as well as other dubious opinions that were criticized by the independent task-force examiners who encountered them in other cases during their 1999-2004 review. A brief summary follows.[73]

a. Malone's opinions regarding "perfect matches" were misleading and not supported by science.

Again, the government relied upon Malone – and only Malone – to place *both* Verdugo *and* Camarena in the room where Camarena was allegedly interrogated. Before the grand jury, Malone testified that "in the guest house there was one brown head hair which again perfectly matched the head hairs of Mr. Verdugo, and the hair from this guestroom is consistent with having originated from him."[74] He also testified that he "found head hairs that . . . matched the head hairs of [] Camarena purely"[75] and that two of the hairs from the guestroom rug "matched the head hairs of [] Camarena perfectly."[76]

---

[72] *See, e.g.,* Exhibit B at 11 (identifying Malone's "match" testimony regarding Verdugo's hair (at RT 10:192 and 11:3) as exceeding the limits of science).

[73] In the interest of brevity, this summary will not delve into all the ways in which Malone misinterpreted, misunderstood, or misrepresented the science underlying his opinions regarding hair, fiber, tape, and other physical evidence.

[74] Exhibit D at 78; Exhibit E at 63.

[75] Exhibit D at 72; Exhibit E at 57.

[76] Exhibit D at 73; Exhibit E at 58.

This testimony was almost identical to Malone's trial testimony,[77] which the FBI lab found to be unsupported by science.[78] Moreover, independent examiners retained by Verdugo, Jason Beckert and Skip Palenik of Microtrace, LLC,[79] found that Malone's use of phrases such as "matched purely" and "perfectly matched . . . all overstate the significance of a microscopical hair comparison."[80]

b. Malone bolstered his own testimony by offering probabilities that had no basis in science.

Before the grand jury, Malone embellished the significance of the hair associations that he made, explaining that "it would be highly unlikely that hair came from somebody else. . . . [I]t is very rare that you see hairs from people that match. Very, very rare."[81] Beckert and Palenik simply state that "[t]here is no scientific justification for this statement."[82]

In a similar vein, one of Malone's recurring riffs was to suggest match probabilities like "one in 5,000" (which was identified as error by the FBI Lab)[83] or an "untrue" match occurrence of only two times over twelve years and 10,000 samples,[84] which the independent examiners found to be "confusing and

---

77 *See, e.g.,* RT 10:189;10:192; 11:3; 11:25; 11:52.

78 Exhibit B at 11.

79 The *curricula vitae* for Beckert and Palenik are attached as Exhibit F.

80 Exhibit G (forensic report of Beckert and Palenik) at 10.

81 Exhibit D at 96.

82 Exhibit G at 10.

83 *See* Exhibit B at 11 (identifying RT 11:3 as error).

84 Exhibit D at 96.

misleading."[85] Beckert and Palenik also found this to be misleading because it gives "the impression that he has taken all of the hairs that he has examined over those twelve years and compared them *all* to each other . . . which is clearly not possible."[86]

c. Malone simply made up "science" to enhance his own credibility.

Another of Malone's preferred fabrications, which he reprised before Verdugo's grand jury, was bolstering his own credibility by emphasizing that he required "at least 15 individual microscopic characteristics" in a single hair and that 15 is "kind of our bottom line number. If we can't come up with 15 characteristics in our unknown hair, we will say the hair is no good and stop the exam right here. . . . If you come up with a hair with 20 characteristics, you've got an excellent hair to work with."[87]

The independent lab examiners from the 1999-2004 review found this same testimony (when offered in other cases) to be without any "scientific basis known to this reviewer" and "scientifically unsupportable."[88] Beckert and Palenik are in accord, stating that "[t]here is simply no scientific basis for this claim."[89]

Further, the prejudice from that false testimony was compounded before the grand jury because during the April 1997 readback, AUSA Gurule interrupted to vouch for, and embellish, this "science":

---

[85] Exhibit A (2014 OIG Report) at 51.

[86] Exhibit G at 11.

[87] Exhibit D at 22-23; Exhibit E at 18-19.

[88] Exhibit A 51-52.

[89] Exhibit G at 9.

> Let me interject at this point. Malone is saying hair, as I understand it, that in order to make a match, to be able to say with any degree of certainty that these two hairs are the same, *they came from the same person*, he says you have to be able to compare at least 15 characteristics on each. And if they are consistent, then you can say we have a good source here. Usually what they like to do is come up with at least 20 characteristics to say there's 20 different points of comparison on these two hairs and they all match and, because of these 20 points of comparison, *it came from the same source.*
>
> I believe he will state later on in his testimony that relative to the hairs that were found and were matched as coming from the same source, there were at least 20 characteristics that were found to be the same.[90]

AUSA Gurule thus represented to the grand jurors – as a representative of the U.S. government and as an officer of the court – that Malone could opine that two hairs came from the same person based on 15-20 "different points of comparison." That is, Gurule vouched for something that Malone made up out of whole cloth.

Malone is also now notorious among hair and fiber scientists for making unsupportable claims about a device called a "microspectrophotometer" (MSP). In this case, Malone told Verdugo's grand jury that he could use the MSP to identify dyes (and therefore match fibers).[91] The independent scientists conducting reviews from 1999-2004 "wrote in their reports that they did not believe Malone understood the appropriate use and limitations" of this device, which "cannot be used to identify dyes" – only colors.[92] Beckert and Palenik again concur with the independent examiners, noting that "[t]here are so many falsehoods in [Malone's statements about the MSP] that it is nearly impossible to know where to begin to address them."[93] They summarize Malone's testimony about the MSP as a "gross

---

[90] Exhibit D at 23 (emphasis added).

[91] Exhibit D at 13; Exhibit E at 10-11.

[92] Exhibit A at 49-50.

[93] Exhibit G at 4.

overstatement of the science" that "betray[s] his ignorance of the dye and fiber manufacturing industries as well as the basic function, capabilities, and interpretation of MSP data."[94]

d. Just as he did at trial, Malone opined that the only possible interpretation of the hair and fiber evidence was that Camarena had been held at Lope de Vega.

Ultimately, Malone relied upon a number of hair and fiber "matches" to opine – just like he did at trial – that "the only way all of these associations could have occurred is if [] Camarena were at Lope de Vega [and] in those two cars."[95] The FBI Lab identified this same testimony at trial as exceeding the limits of science,[96] while Beckert and Palenik concluded that "[e]ven assuming his technical work is correct, there are numerous logical errors in the reasoning used to support this claim."[97]

Agent Malone testified falsely before the grand jury.

E. In 1997, the DOJ directed the USAO to make *Brady* disclosures regarding Malone and to submit Malone's findings to an independent examiner, but the USAO made no such disclosures and misrepresented the importance of Malone's testimony in order to obstruct the independent review; Verdugo was accordingly not notified of Malone's misconduct until 2014.

On April 30, 1997, Lucy Thomson of the DOJ responded to a "request for information on Michael Malone" by John Carlton (the AUSA then in charge of the related Camarena cases).[98] That response included a memo "to Ken Nimmich from

---

[94] *Id.* at 5.

[95] Exhibit D at 74-75; Exhibit E at 59.

[96] *See* Exhibit B at 11 (identifying RT 10-189 as error).

[97] Exhibit G at 14.

[98] Exhibit H (timeline discovery regarding DOJ inquiry) at 1.

William Tobin" as well as transcripts from a proceeding in which Malone had testified falsely.[99] We can thus reasonably infer from Thomson's letter that Carlton had made a specific inquiry about the credibility of Malone.[100]

On June 6, 1997, the DOJ issued a memorandum to all U.S. Attorneys regarding the FBI Lab. This memorandum – sent to "all U.S. Attorneys, all First Assistants, all Criminal Chiefs, all Criminal Division Section Chiefs, and Office Directors" – advised these prosecutors that the Criminal Division and the FBI were conducting a review of cases identified by an OIG investigation into misconduct in the FBI Lab. Specifically, these agencies were working with federal prosecutors "to determine whether disclosure of information to the court or defense counsel was warranted."[101] The memo stated that "it is essential that you advise the Criminal Division Task Force immediately of any new developments or litigation . . . concerning FBI laboratory issues. This notification should include motions for new trial, motions attacking the validity of a conviction . . . related appellate issues, and *Brady* disclosures of FBI laboratory-related documents."[102] The notification further directed federal prosecutors that "all of the cases in which the 13 examiners performed laboratory examinations need to be reviewed" and that the included case-review forms must be returned by June 30, 1997.[103]

Critically, the memorandum also informed prosecutors that "[i]f you determine that the work and / or testimony of a laboratory examiner *was material* to

---

[99] *Id.*

[100] Carlton's request has not been produced in discovery.

[101] *Id.* at 3.

[102] *Id.*

[103] *Id.* at 4.

the verdict, the FBI and Criminal Division will work with your office to arrange for an independent, complete review of the Laboratory's findings and any related testimony."[104] On the other hand, even if the prosecutor determined that the lab work was not material, he or she was still required to submit a case summary and the reasons for his or her conclusion to the task force.[105]

Finally, with respect to the materiality determination itself, the memorandum advised prosecutors that they could resist a new-trial claim on materiality grounds if they could show that "evidence of the defendant's guilt was so strong that [the FBI Lab misconduct] could not have made a difference in the final result," but that courts "commonly turn th[is] evidence over to the defense."[106] "In other words," the memorandum concluded, "the best *Brady* policy is to resolve all doubts concerning materiality in favor of disclosure."[107]

On September 15, 1997, AUSA Carlton executed an FBI Lab Review Form for the related defendants, all of whom were itemized as an attachment. With respect to the materiality assessment ("Was the FBI Lab Work Material to the Verdict"), Carlton checked the "Yes" box.[108]

In the itemized attachment, however, Carlton simply stated that Verdugo "was present during the torture and interrogation of Agent Camarena."[109] He did not explain that this statement of fact was predicated exclusively upon Malone's

---

[104] *Id.* at 6 (emphasis in original).

[105] *Id.* at 5.

[106] *Id.* at 11.

[107] *Id.* at 10.

[108] *Id.* at 16.

[109] *Id.* at 18.

expert testimony.

Also on September 15, 1997, AUSA Jeffrey Eglash sent a letter to the task force stating that he was enclosing two completed review forms. Although Eglash's correspondence did not identify which cases had been reviewed,[110] he must have submitted the form that Carlton completed in this case because the task force would return the same form to AUSA Ng three years later.[111] No independent review was ever conducted, however, which should have been the next step in the process.

On February 17, 1998, codefendant Matta-Ballesteros filed a 28 U.S.C. § 2255 petition.[112] That petition (filed by one of Verdugo's trial attorneys, Michael Pancer) specifically requested *Brady* disclosures regarding the unreliability of Malone:

> New evidence has come to light which shows the testimony of FBI hair expert Michael Malone is suspect at best and, in the instant case, likely fabricated. A report by the Justice Department's Inspector General severely criticized agent Malone as having a history of falsifying scientific results and presenting false testimony to gain convictions. The report has been deemed by the Justice Department to be potential *Brady* material requiring disclosure to the defense.[113]

On March 26, 1998, Carlton wrote to DOJ Attorney Thomson again to thank her "for taking the time to talk with [him] and AUSA Larry Ng . . . about Michael Malone."[114] Carlton included a copy of Matta's §2255 petition (which he refers to

---

[110] *Id.* at 15.

[111] *Id.* at 91.

[112] *Id.* at 28; 98cv1121-ER CR 1.

[113] Exhibit H at 44; *see also id.* at 56 - 63.

[114] *Id.* at 27.

as a new-trial motion) "in which the Malone issue is raised."[115] Sometime later, Carlton sent a fax (with an illegible date stamp) to Thompson. The cover sheet stated:

> Lucy – here is the lab report prepared by Mike Malone in the Camarena case, re Matta-Ballesteros. Please confirm that the positive findings re the Matta hairs were double checked and confirmed by another examiner. I believe Wayne Oakes may have done so.[116]

On April 10, 1998, Thompson sent a responsive fax with "confirmation sheets" by Wayne Oaks and Chester Blythe.[117]

On May 15, 1998, Carlton and Ng filed the government's opposition to Matta's § 2255 petition and motion for new trial.[118] Rather than "resolv[ing] all doubts regarding materiality in favor of disclosure" – as the June 6, 1997 DOJ memo expressly advised them to do – the prosecutors instead argued (in bold face) that "**Matta Is Not Entitled To A New Trial Based Upon Newly Discovered Information About The FBI Laboratory And / Or Special Agent Michael Malone**."[119] Specifically, the government took the position that its failure to turn over impeachment material regarding Malone was not a *Brady* violation and that Matta's claim that newly discovered information about Malone warranted a new trial was "deficient."[120] The government also represented to the Court that there was no factual support for a claim that Malone had committed perjury:

---

115 *Id.*

116 *Id.* at 83.

117 *Id.* at 84-87.

118 CR 2246.

119 *Id.* at 57.

120 *Id.* at 58.

> Matta also states that new evidence "suggests" that Agent Malone "may have provided false testimony in order to convict Mr. Matta." There is no support for this passing assertion, which Matta fails to mention again.[121]

With respect to Malone's "match" testimony placing Matta at the crime scene, the government argued that Matta's failure to present a defense expert confirmed Malone's conclusions:

> [Matta's] failure to call the experts whom he hired and who also examined the hair evidence is a tacit admission that their conclusions were consistent with those of Agent Malone and would not impeach him. The absence of any evidence contradicting Agent Malone's central testimony was mute but powerful confirmation of his conclusions.[122]

Perhaps most disturbingly, the government also cited with approval another district court's characterization of "defense accusations against [] Malone as 'only possibilities, amplified by hyperbole'" as well as the same court's conclusion that "[t]he findings of the OIG Report and the information in [a] *Wall Street Journal* article were found to be 'thin and collateral evidence,' and unpersuasive."[123]

It bears mentioning again that the government filed this brief in May 1998 – 11 months after the DOJ specifically instructed the USAO to assess the materiality of Malone's testimony because that testimony was highly suspect, eight months after one of the same prosecutors who wrote the brief – John Carlton – responded to that inquiry by confirming that Malone's testimony was indeed material to the convictions, and at the *same time* that Verdugo was actively litigating his own new-trial motion and § 2255 petition. But instead of making the *Brady* disclosures that

---

[121] *Id.* at 57, n.38 (citations omitted).

[122] *Id.* at 62.

[123] *Id.* at 63 (citations omitted).

were highly recommended in the DOJ memo or – at the very least – ensuring that the independent review mandated by Carlton's materiality determination was actually conducted, the USAO circled its wagons around Malone while arguing that the withheld impeachment evidence would not have affected the verdict.

In his reply brief, counsel for Matta – aware of the OIG report but presumably oblivious to the pending DOJ inquiry – nonetheless hit the nail on the head:

> The government engages in legal maneuvering to duck the issue of FBI Agent Malone's credibility problem as well as the possibility that [] Malone testifies to results of which he actually has no knowledge and fabricates findings to help gain convictions.[124]

That maneuvering was ultimately successful, as Judge Rafeedie denied the petition, concluding that "Matta does not demonstrate . . . that this purported impeachment evidence would have resulted in [his] acquittal."[125] Of course, like defense counsel, Judge Rafeedie was also presumably oblivious to the pending DOJ inquiry; he noted in support of his ruling that Matta's own expert "confirmed that the FBI Hair and Fibers Unit was well regarded in the field."[126]

On September 25, 2000, Amy Jabloner of the DOJ sent a fax to AUSA Ng as a follow-up to a conversation regarding the FBI Lab Review Form submitted by Carlton on September 15, 1997 (where Carlton identified Malone's testimony as material to the convictions). This appears to be an overture by the DOJ in support of its representation that in the event of a finding of materiality, it would "work with [the USAO] to arrange for an independent, complete review of the

---

[124] CR 2265 at 39.

[125] 98cv1121 CR 2 at 10.

[126] *Id.* at 10, n.6.

Laboratory's findings and any related testimony."[127]

Jabloner wrote: "As we discussed, I have attached the form signed by John Carlton as well as the attachments that relate to the individual defendants in the case *and a disclosure letter*."[128] Jabloner then, is obviously providing Ng with a copy of the form submitted by Carlton, as well as what we can reasonably infer was a template *Brady* disclosure letter for the defendants. For reasons that have still not been revealed to the defense, no such disclosure letter was ever sent.

Almost three years later, on April 11, 2003, Jack Geise from the FBI Lab Task Force emailed AUSA Ng about the task-force review, noting that he was aware that Ng had "already had the pleasure of litigating some of the task force issues in the Matta case."[129] He then requested verification that "the testimony involved was not material to the other convicted defendants or that the issues concerning the validity of that testimony / analysis ha[ve] been disclosed to those defendants or their counsel."[130]

On July 18, 2003, Geise emailed Ng again about the still-pending case reviews.[131] He wrote:

> The FBI Lab Task Force is sorry to be bothering you once again about the need to complete the review as to cases affected by the Inspector General's report on the FBI Lab issued in 1997. I fully realize that this kind of bureaucratic request may not appear significant compared to the needs of ongoing criminal cases, although *there are potential Brady implications*. . . .

---

[127] Exhibit H at 6.

[128] *Id.* at 91 (emphasis added).

[129] *Id.* at 96.

[130] *Id.*

[131] *Id.* at 95.

> This review has encompassed approximately 3,000 cases prosecuted in hundreds of state and local prosecutor's offices and all of the U.S. Attorney's offices. At the moment there are approximately 50 cases remaining to be reviewed in approximately a dozen districts. Your office has the distinction of being one of the twelve. . . .
>
> The FBI . . . is hoping to complete the entire project by the middle of the next fiscal year. *Depending on your input, the FBI may have to have an independent scientific review of the evidence,* which can take up to six months. We therefore need to receive your response on the cases pending in your office by August 15th. We've been asked to supply to the Deputy Attorney General a list of noncompliant districts after that date. I would much appreciate it if you would spare me the need to act as a hall monitor in this fashion.[132]

On July 28, 2003, Ng responded to Geise. In a striking about-face, Ng told Geise that Malone's testimony was *not* material to Verdugo's convictions:

> I apologize for the lengthy delay in getting this information to the FBI Lab Task Force concerning its inquiries re the series of cases arising out of the kidnapping, torture and murder of DEA SA Enrique Camarena in 1985.
>
> Based on my review of the files in the Camarena series of cases, I would verify the following. . . :
>
> The Malone testimony / analysis involved in those cases was / is either not material to the convicted defendants in the case or the issues relating to that testimony / analysis was disclosed to those defendants. The Malone testimony was an issue in Matta's 2255 / new trial motions. *In the Verdugo and Zuno trials, Malone's testimony was only a single line of several strands of evidence that supported Verdugo's and Zuno's convictions.* In any case, I believe that the government disclosed the Malone issues to defense counsel for all the convicted defendants shortly after those issues came to light.[133]

As this Court is aware, Ng's representation that "Malone's testimony was only a single line of several strands of evidence that supported Verdugo's . . . convictions" is simply untrue. Not only is it a gross misrepresentation of the quality of the government's case-in-chief (that relied solely upon Malone to place both

---

[132] *Id.* (emphasis added).

[133] *Id.* at 93 (emphasis added).

Camarena and Verdugo at the crime scene), it is also, obviously, inconsistent with the opposite assessment made by AUSA Carlton six years earlier. Further, it is absolutely irreconcilable with a 1989 article about the Camarena case written by Malone himself, where he boasted that his innovative forensic testimony was responsible for the guilty verdicts:

> In some cases, certain routine procedures had to be ignored or unconventional methods employed. However, in many instances, detailed trial testimony overcame the limitations of certain evidence, and eventually, almost all of the [forensic] evidence introduced at the trial made a tremendous impact on the outcome of this proceeding. After an 8-week trial . . . all the defendants were found guilty, convicted on all counts and are currently serving lengthy prison sentences.[134]

Ng's representation that "the government disclosed the Malone issues to defense counsel for all the convicted defendants" is also untrue. While Verdugo's trial counsel, Michael Pancer, represented Matta for purposes of his § 2255 petition and was therefore aware that Malone had come under scrutiny, Matta's *Brady* claim was based on publicly available information – not an affirmative disclosure by the government.[135] And no disclosure had been made to Verdugo. Indeed, neither Pancer nor Verdugo's appellate attorney, Patrick Hall, were aware of Malone's misconduct in Verdugo's case until it was disclosed in October 2014.[136]

The government has still not revealed to the defense why an independent examination was not undertaken when AUSA Carlton first responded to the DOJ

---

[134] *The Enrique Camarena Case: A Forensic Nightmare,* by Michael P. Malone. Exhibit H at 21, 26 (emphasis added).

[135] *See* 98cv1121 CR 1 at 5 ("substantial new evidence only recently discovered by Petitioner severely impeaches Malone and calls into question Malone's testimony").

[136] *See* CR 2500 at 46-47 (Decs. of Michael Pancer and Pat Hall).

inquiry with an affirmative materiality determination in September 1997. In any event, over six years later, AUSA Ng did his part to ensure that an independent review would never take place. But for the DOJ's *sua sponte* reopening of the investigation in 2012, Rene Verdudgo would still be serving 180 years concurrent to life thanks to the false testimony of Michael Malone and the false representations of the USAO for the Central District.[137]

F. The Successive § 2255 Petition and the Continuances for DNA Testing

Based on the FBI's October 17, 2014 disclosure that Malone's testimony in Verdugo's case "exceed[ed] the limits of science," the USAO did not oppose a successive § 2255 petition on procedural grounds. It did not, however, stipulate that Verdugo should receive a new trial. It instead opposed relief, arguing vigorously that Malone's testimony was not material to Verdugo's convictions. Verdugo then had to seek appointed counsel, who was not able to file the § 2255 petition until September 14, 2015.[138] The government did not file its opposition until August 30, 2016 – almost a year later.[139] And this Court did not decide the petition until May 22, 2017.

The government then secured a number of continuances, ostensibly for the purpose of DNA testing (which could have been done during the pendency of the § 2255 proceeding).[140] Finally, on October 20, 2017, the government's DNA lab

---

[137] References to the USAO in this pleading do not include the current trial team assigned to this case. Although undersigned counsel believes that significant discovery is still outstanding, the current prosecutors appear to be making good-faith efforts to comply with their *Brady* obligations.

[138] *See* CR 2500.

[139] *See* 15cv9274-JAK CR 20.

[140] *See* CR 4195 at 5; 4221 at 3; 4224.

reported that its testing was inconclusive as to Verdugo.[141] Six days later, the USAO filed a statement regarding jury trial where it perfunctorily declared that "it is the government's intention to proceed to trial with respect to [Verdugo and Matta]."[142] The Court then had to go through the process of appointing new counsel for both defendants.

On March 1, 2018, Verdugo filed a motion to dismiss based on violations of the Speedy Trial Act, arguing that the USAO had obtained six months of continuances by repeatedly assuring previous defense counsel that it would dismiss the case if the DNA results did not inculpate Verdugo.[143] In support of that motion, Verdugo's previous counsel, Todd Burns, supplied a declaration stating that "the government convinced me not to oppose what worked out to be at least a six-month delay in the proceedings by making a promise that it did not fulfill."[144]

Importantly, although this Court denied that motion, it did not do so because it made contrary findings of fact. Rather, it concluded that the defendants could not show that the alleged misrepresentations "had a material effect on the Court's decisions to grant the continuances."[145] Furthermore, the government did not support its opposition with a competing declaration.[146] In other words, Burns's declaration (stating that the government didn't keep its promise to dismiss the case) was uncontested.

---

[141] CR 4229-1 at 5-7.

[142] CR 4227 at 1-2.

[143] CR 4333.

[144] CR 4336 at 10.

[145] CR 4345 at 2.

[146] *See* CR 4338.

In sum, 27 years after Verdugo's trial, the government disclosed Malone's false testimony for the first time. At that point, it could have either dismissed the case outright or at least consented to a new trial. It instead dragged out the process for three years by taking the untenable position that Malone's testimony was not material. It then obtained another six months of delay by promising to dismiss the case if it did not obtain a DNA match.

Rene Verdugo has now been in prison for almost 33 years, still waiting for a fair trial.

V.

Malone's perjury before the grand jury was material to the indictment and cannot be remedied 31 years after the fact; this Court should dismiss the indictment with prejudice.

A. Verdugo's grand jury was "deceived in [a] significant way" by Malone's false testimony; this deception requires dismissal of the indictment.

Verdugo's grand jury, just like his trial jury, was deceived by Malone's false testimony. That misconduct outstrips the presumption of regularity for grand-jury proceedings and requires dismissal of the indictment. Indeed, in *United States v. Claiborne,* the Ninth Circuit noted that although "courts have attached a presumption of regularity to grand jury proceedings . . . defendants may overcome [that presumption] and obtain dismissal of indictments returned against them on a proper showing of grand jury abuse."[147] The remedy of dismissal is required "only in flagrant cases in which the grand jury has been overreached or deceived in some significant way."[148] One way that "[d]efendants may establish such grand jury abuse [is] by demonstrating that the prosecutor obtained an indictment by

---

[147] 765 F.2d 784, 791 (9th Cir. 1985).

[148] *United States v. Samango,* 607 F.2d 877, 882 (9th Cir. 1979).

knowingly submitting perjured testimony to the grand jury."[149] And while the government may argue that Verdugo cannot prove that the USAO was aware of Malone's perjury when he testified before the grand jury in 1987, that argument fails for three distinct reasons.

First, knowledge of Malone's perjury is attributable to the government because Malone was not a civilian witness. Rather, he was a federal agent, expert witness, and a *de facto* member of the prosecution team. Accordingly, when Malone testified falsely, he did so as a representative of the United States and his conduct is directly attributable to the sovereign. In *United States v. Endicott,* the Ninth Circuit specifically addressed this issue and held that when an agent fails to disclose the use of false testimony, his "knowledge can be imputed to the prosecutors."[150]

Second, "[a]lthough deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role."[151] That was certainly the case here, where AUSA Gurule punctuated the readback of Malone's false testimony by repeating, highlighting, and embellishing his opinions for the grand jurors. The grand jury was thus "overreached or deceived

---

[149] *Claiborne,* 765 F.2d at 791.

[150] 869 F.2d 452, 456 (9th Cir. 1989); *see also United States v. Butler,* 567 F.2d 885, 891 (9th Cir. 1978) ("Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of the nondisclosure."); *cf. also* CR 4184 at 16 (this Court's order imputing Malone's knowledge that the testimony "was actually false when it was presented at trial" to the prosecutor under the *Napue* standard).

[151] *Samango,* 607 F.2d at 882.

in [a] significant way."[152]

Third, the Ninth Circuit held in *United States v. Basurto* that "the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached."[153] At a minimum, the government is on notice *now* that its indictment is based on perjured testimony and, as discussed below, the perjury here was obviously material. The government cannot, therefore, retry Verdugo on this indictment.

B. Malone's perjury was material to the indictment.

"[P]erjury before a grand jury must be material to justify dismissal of the indictment."[154] The standard is whether "sufficient non-perjurious testimony exists to support the indictment."[155] If so, this Court can assume that "the grand jury would have returned an indictment without the perjurious evidence.[156] Importantly, the Ninth Circuit has equated this standard with the *Napue*[157] standard for false testimony presented at trial:

> The [Supreme] Court held in *Napue* that the prosecution's use of known false testimony at trial required a reversal of the petitioner's conviction. The same result must obtain when the government allows a defendant to stand trial on an indictment which it knows to be based in part upon perjured testimony. The consequences to the defendant of

---

[152] *Id.*

[153] 497 F.2d 781, 785 (9th Cir. 1974).

[154] *Claiborne,* 765 F.2d at 791.

[155] *Id.*

[156] *Id.*

[157] *Napue v. Illinois,* 360 U.S. 264 (1959).

> perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court.[158]

The standard for dismissal is easily satisfied here. Although the government has not produced the transcripts of every grand-jury witness in this case, it is reasonable to infer that its case before the grand jury was very similar to what it presented at trial, where the government relied on Malone – and only Malone – to place both Camarena and Verdugo in the alleged interrogation room. The prosecutor at trial described Malone's testimony as "a critical aspect of the government's case" and this Court found that the "Government emphasized to the jury that the forensic evidence demonstrated that [Verdugo] was present at the guest house at Lope de Vega and that he should be responsible for the actions that allegedly occurred there."[159]

Again, the Ninth Circuit has held that the *Napue* standard – which Verdugo has already satisfied – applies to perjury before a grand jury. Malone's perjury was material.

C. The appropriate remedy is dismissal with prejudice under either the Due Process clause or this Court's supervisory powers.

Malone committed perjury before the grand jury and that perjury was material to the indictment. This indictment must therefore be dismissed. The only serious question is whether this Court will permit the government – after 31 years – to return to the grand jury to obtain a superseding indictment.

This Court may dismiss an indictment with prejudice under "either of two

---

[158] *Basurto*, 497 F.2d at 786.

[159] CR 4184 at 24.

theories": 1) a due-process violation; or 2) under the Court's supervisory powers.[160] In the event that the Court exercises its supervisory powers, dismissal with prejudice is appropriate "only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations.'"[161]

Here, Verdugo has established a due-process violation. The government knowingly obtained an indictment through the use of false testimony. That is a violation of Verdugo's Fifth Amendment rights to both due process and to a grand-jury indictment.[162] At a minimum, Verdugo has established that there is a "grave doubt" that the indictment "was free from the substantial influence" of Malone's perjury. This Court may therefore dismiss the indictment under either the Fifth Amendment or its supervisory powers.

There are a number of obvious factors that require dismissal with prejudice. First, the government relied upon Malone's false testimony to both obtain the indictment and to convict Verdugo. Second, it engaged in that misconduct 31 years ago and Verdugo has been in prison the entire time. Third, had the government not committed additional, gross misconduct by obstructing the task-force investigation, Malone's perjury would have at least been discovered circa 1999 instead of in 2014.

In short, Verdugo has been substantially prejudiced. This Court should not permit the government to obtain an indictment through perjury, obtain a conviction

---

[160] *United States v. Chapman,* 524 F.3d 1073, 1084 (9th Cir. 2008).

[161] *Bank of Nova Scotia v. United States,* 487 U.S. 250, 256 (1988) (quoting *United States v. Mechanik,* 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)).

[162] *See Napue,* 360 U.S. at 265 (due process); *Basurto,* 497 F.2d at 785 (grand jury).

through perjury, obstruct an investigation into that perjury, and then return to the grand jury to hit the reset button after 31 years. The indictment should be dismissed with prejudice.

VI.

Because of the government's malfeasance, Verdugo has suffered over 31 years of post-indictment delay; this Sixth Amendment violation requires dismissal of the indictment with prejudice.

A. Introduction

Rene Verdugo has been waiting – in prison – for over 30 years for a fair trial. Furthermore, 17 of those 30 years passed between the time that the USAO was specifically advised by the DOJ that the testimony of its star witness was highly suspect and the DOJ's belated disclosure of the false testimony. Another three-and-a-half years then went by while the government first litigated the materiality of Malone's testimony and then conducted DNA testing. This unprecedented delay – all because of the government's misconduct – requires dismissal of the indictment.

B. All the *Barker* factors weigh heavily in favor of dismissal of the indictment.

The Sixth Amendment guarantees the right to a speedy trial.[163] In determining whether that right has been violated, this Court must consider the four factors identified by the Supreme Court in *Barker v. Wingo:* (1) the length of the delay, (2) the reason for the delay, (3) the defendant's prior assertion of the right, and (4) the prejudice resulting from the delay.[164] Each of those factors weighs heavily in favor of Verdugo here.

First, "[t]he length of the delay is a 'threshold' factor, and a sufficiently

---

[163] *Doggett v. United States,* 505 U.S. 647, 651 (1992).

[164] *United States v. Alexander,* 817 F.3d 1178, 1181 (9th Cir. 2016) (citing *Barker v. Wingo* 407 U.S. 514, 530 (1972)).

lengthy delay 'necessitates an examination of the other three factors."[165] It goes without saying that a 31-year delay between indictment and trial satisfies this threshold inquiry.

"The second factor, the reason for the delay, is the focal inquiry. If the government can show that the delay was wholly justifiable because it proceeded with reasonable diligence, the defendant's speedy trial claim generally cannot succeed in the absence of showing actual prejudice from the delay."[166] On the other hand, "[i]f the government intentionally delayed or negligently pursued the proceedings, [] prejudice may be presumed, and its weight in the defendant's favor depends on the reason for the delay and the length of the delay."[167]

Here, at a minimum, there are 17 years of delay that are directly attributable to the prosecutor's malfeasance and litigation practice. On June 6, 1997, the DOJ put the USAO on notice that Malone's testimony was highly suspect. The USAO then waited six years before sabotaging the investigation when (on July 28, 2003) it told the DOJ that Malone's testimony was not material. As a result, Malone's perjury would not be disclosed to Verdugo until October 17, 2014. The government then tacked on another three-and-a-half years of delay by opposing Verdugo's § 2255 petition and then by continuing the proceedings for DNA testing.

But that is in the light most favorable to the government. The reality is that all 31 years of this delay are directly attributable to the government because Malone was not just any government witness; he was an FBI agent and expert witness who played a pivotal role in three related trials. His misconduct is therefore directly

---

[165] *Id.*

[166] *Id.* at 1182 (quotation omitted).

[167] *Id.*

attributable to the government.[168] Both the length of the delay and the reasons for the delay thus weigh heavily in favor of dismissal.

In fact, this prong of the *Barker* test is dispositive. In *Doggett* the Supreme Court remarked that "a bad-faith delay [of eight-and-a-half years] would present an overwhelming case for dismissal."[169] Here, Verdugo has suffered a 31-year-bad-faith delay. That fact – alone – resolves this claim in his favor.

The third factor is the defendant's assertion of his speedy-trial right.[170] Verdugo was indicted in March 1988 and went to trial for the first time later that summer. After being convicted, he pursued a number of possible avenues for post-conviction relief but that litigation had nothing whatsoever to do with the delay. Since his convictions were reversed, he consented to continuances for DNA testing (under false pretenses) before later agreeing to an April 2019 trial date only so that his new lawyer would have time to prepare for trial. Verdugo has consistently asserted his speedy-trial right.

"The last factor [this Court] consider[s] is the prejudice to the defendant. The amount of prejudice a defendant must show is inversely proportional to the length and reason for the delay."[171] Because both of those are extraordinary here, Verdugo need demonstrate little, if any, prejudice. Moreover, he has presumptive prejudice because post-accusation delay of one year or more is "presumptively prejudicial."[172] But of course, Verdugo also has significant actual prejudice. Specifically, 31 years

---

[168] *Endicott,* 869 F.2d at 456; *Butler,* 657 F.2d at 891.

[169] 505 U.S. at 656 (citing *Barker*, 407 U.S. at 531).

[170] *Id.* at 1183.

[171] *Id.*

[172] *Doggett,* 505 U.S. at 652 n.1.

of "oppressive pretrial incarceration," as well as the impairment of his defense in myriad ways too numerous to recount in this pleading.[173]

In short, the length of delay here is *sui generis* – half of Verdugo's lifetime – and the reason for it is a pattern of governmental misconduct. This Sixth Amendment violation requires dismissal of the indictment.

VII.

This Court should also dismiss the indictment as a sanction for the government's 32-year pattern of litigation misconduct.

A. The government's overreaching in this case is not limited to Malone's perjury and the subsequent cover up.

Certainly, the kidnapping and murder of Enrique Camarena was a heinous crime. But throughout the government's furious response, it has consistently abandoned its obligation as a sovereign "not just to win, but to see that justice is done."[174] And in so doing, it has time-and-again trampled on the rights of Rene Verdugo who, incidentally, had nothing whatsoever to do with the kidnapping and murder of either Camarena or Zavala-Avelar.[175]

First, the government hired bounty hunters to kidnap Verdugo in violation of the extradition treaty with Mexico, depriving him of due process under international law. The very next day, DEA Agents raided both of Verdugo's residences in

---

[173] *See Barker*, 407 U.S. at 532 (identifying actual prejudice as "oppressive pretrial incarceration," "anxiety and concern of the accused," and "the possibility that the defense will be impaired").

[174] *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1124 (9th Cir. 2000).

[175] *See United States v. Verdugo-Urquidez*, 1994 U.S. App. LEXIS 16083, *20 (9th Cir. 1994) ("[I]t would seem, ironically, that . . . the government ultimately lacked the evidence necessary to prove that the men it kidnapped [(Machain and Verdugo)] were guilty.") (Reinhardt, J., dissenting).

Mexico without a warrant. The government then obtained an indictment through Malone's perjury before the grand jury.

At trial, the government not only presented Malone's perjury again, it also failed to disclose the grand-jury testimony of Don Walters, which squarely impeached Skip Hollestelle's testimony that he had overheard Verdugo tell Walters about a "narc" and "someone beat to shit and begging and crying."[176]

Further, in closing argument, the prosecutor vouched for Hollestelle, telling the jurors that "[i]t is our view that Hollestelle's statement is sufficiently credible."[177] Indeed, throughout the closing arguments the prosecutors repeatedly violated the rules of professional conduct by vouching for the quality of the government's evidence and the integrity of the prosecution.[178] Particularly damaging to Verdugo was that the prosecutor told the jury – without any basis in fact – that Verdugo "was in that room. He participated in the interrogation. He was asking questions of [] Camarena . . . That is the way it happened."[179]

There is another portion of the government's closing argument that has to be addressed here. Stunning in its audacity, the following passage underscores the intense personal commitment of the government's trial team, as well as how far they were willing to push the envelope in order to secure a conviction:

---

[176] *See* Exhibit I at 64-66.

[177] RT 32:42.

[178] "As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses. Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity or suggesting that information not presented to the jury supports the witness's testimony." *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir. 1993).

[179] RT 28:117.

> What [the defense] arguments boiled down to was a personal, vicious attack on Mr. Gurule and myself. . . . Every brick, every pipe, every rock that could be picked up and thrown our way, I think, has been.
>
> I kept waiting for these counsel to attack our families, maybe our mothers. That is how personal it got.
>
> Now what makes it the most outrageous is that they have accused Mr. Gurule and me of doing something improper, of somehow being unethical . . . . Now, that is outrageous. They have accused us of somehow presenting perjured testimony, of somehow coaching the witnesses, of somehow manipulating the evidence so that it would come out in a different way from what it actually meant.
>
> Ladies and Gentlemen, did the prosecutors in this particular case ever do anything improper in this particular trial? I am here to tell you that we absolutely did not. Let me tell you this. There is no case, however important, however serious, that would justify anything unethical. You'd better believe that. Every prosecutor in this particular courthouse, every prosecutor that is an Assistant United States Attorney, feels the same way and if for one minute there was anything the least bit unethical in any particular prosecution, that particular prosecutor would be out the door. . . .
>
> Do you think for one minute, for even a small period of time, if anything improper had been done in this courtroom, that his Honor in this particular court would not have been on our backs like a guillotine and immediately stopped it all through this particular trial? Of course. Of course.
>
> Let me tell you something else. Special Agent Camarena, as you know, died in the service of his country. He died in the same way that a Marine on a foreign shore would die for his country. He died for what he stood for, and I want you to know that there is not one person – the prosecution, the *agents* – that would do one thing to dishonor his memory. Kiki Camarena died for all the things this country stands for. It would be shameful to his wife, to his children, to conduct ourselves in anything other than the highest ethical conduct, and we have. . . .
>
> We stand by our conduct. We are proud of the case we have presented to you. We are proud of the agents and their work and what they have done.[180]

The prosecutor thus invoked the prestige and integrity of the United States (and all the things it stands for), every prosecutor involved in the case (and their mothers), every prosecutor in the L.A. federal courthouse, every Assistant United

---

[180] RT 32:4-5 (emphasis added).

States Attorney, the trial court, the U.S. Marine Corps, and the honor of Agent Camarena, his wife, and his children to assure the jurors that "not one" prosecutor or agent would do "even one thing" to dishonor Camarena's memory. That was flagrant misconduct.[181]

Of course, after 30 years, we now know that it was also completely untrue. There was at least one federal agent who was willing to commit perjury to win. And at least one federal prosecutor who was willing to cover up that perjury to preserve the victory.

B. The government's pattern of misconduct warrants the sanction of dismissal with prejudice.

Again, this Court can dismiss an indictment on the basis of either a due-process violation or under its supervisory powers.[182] In cases of flagrant prosecutorial misconduct, "a district court may exercise its supervisory power to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct."[183] "A court may [also] dismiss an indictment under its supervisory powers [] when the defendant suffers substantial prejudice."[184]

Where the defendant alleges a pattern of litigation misconduct, "the standard the Court must apply . . . is whether, in its totality the Government's conduct was so

---

[181] *See, e.g., United States v. Smith*, 962 F.2d 923, 933-34 (9th Cir. 1992) (reversing for plain error where prosecutor argued that "If I did anything wrong in this trial, I wouldn't be here. The court wouldn't allow that to happen.").

[182] *Chapman*, 524 F.3d at 1084.

[183] *Id.* (quotation omitted).

[184] *Id.* at 1087.

improper and harmful to the Defendant[] as to have violated [his] rights, undermined the very foundations of judicial integrity, or otherwise been so egregious as to require a deterrent sanction."[185]

The government's three-decade pattern of misconduct warrants the sanction of dismissal with prejudice here.

VIII.

Conclusion

The contaminated indictment was the product of Malone's willfully false testimony before the grand jury. Further, this was not a one-off; it was part of a pattern of gross misconduct committed by Malone in literally hundreds of other cases over two decades. Compounding the prejudice of Malone's perjury in this case is the USAO's subsequent cover-up, which has resulted in a 31-year pretrial delay.

And virtually every step of the way, the government has disregarded both the law and ethical standards of professional conduct in its zeal to make an example of Rene Verdugo, who has been in prison for 32 years for a crime that he did not commit. The appropriate remedy for these constitutional violations is dismissal of the indictment with prejudice.

Respectfully submitted,

Dated: November 8, 2018

/s/ John C. Lemon
JOHN C. LEMON
MARK F. FLEMING
Attorneys for Mr. Verdugo-Urquidez

---

[185] *United States v. Aguilar Noriega*, 831 F. Supp. 2d 1180, 1191 n.12 (C.D. Cal. 2011).