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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

I.	Questions Presented	1
II.	Introduction	2
III.	Statement of the Case	3
IV.	Statement of Facts	7
A.	The Government’s Evidence Against Rene Verdugo	7
B.	Michael Malone’s Background, the OIG Inquiries and the FBI Lab	10
C.	The Task Force’s Findings Regarding Malone (1999-2004)	14
D.	Malone’s grand-jury testimony was substantially the same as his trial testimony – that is, his opinions exceeded the limits of science.	15
1.	<i>Malone’s Trial Testimony</i>	15
2.	<i>Malone’s Grand Jury Testimony</i>	16
a.	<i>Malone’s opinions regarding “perfect matches” were misleading and not supported by science.</i>	17
b.	<i>Malone bolstered his own testimony by offering probabilities that had no basis in science.</i>	18
c.	<i>Malone simply made up “science” to enhance his own credibility.</i>	19
d.	<i>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.</i>	21
E.	In 1997, the DOJ directed the USA to make <i>Brady</i> 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.	21
F.	The Successive § 2255 Petition and the Continuances for DNA Testing	31

1	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.	33
2			
3	A.	Verdugo's grand jury was "deceived in a significant way" by Malone's false testimony; this deception requires dismissal of the indictment.	33
4			
5	B.	Malone's perjury was material to the indictment.	35
6	C.	The appropriate remedy is dismissal with prejudice under either the Due Process clause or this Court's supervisory powers.	36
7			
8	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.	38
9			
10	A.	Introduction	38
11	B.	All the <i>Barker</i> factors weigh heavily in favor of dismissal of the indictment.	38
12			
13	VII.	This Court should also dismiss the indictment as a sanction for the government's 32-year pattern of litigation misconduct.	41
14	A.	The government's overreaching in this case is not limited to Malone's perjury and the subsequent cover up.	41
15			
16	B.	The government's pattern of misconduct warrants the sanction of dismissal with prejudice.	44
17	VIII.	Conclusion	45

Table of Authorities

Cases

<i>Bank of Nova Scotia v. United States</i> , 487 U.S. 250 (1988)	37
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	38-39
<i>Doggett v. United States</i> , 505 U.S. 647 (1992)	38-39
<i>N. Mariana Islands v. Bowie</i> , 243 F.3d 1109 (9th Cir. 2000)	41
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959)	34-36
<i>United States v. Aguilar Noriega</i> , 831 F. Supp. 2d 1180 (C.D. Cal. 2011)	45
<i>United States v. Alexander</i> , 817 F.3d 1178 (9th Cir. 2016)	38
<i>United States v. Basurto</i> , 497 F.2d 781 (9th Cir. 1974)	35
<i>United States v. Butler</i> , 567 F.2d 885 (9th Cir. 1978)	34, 40
<i>United States v. Caro-Quintero</i> , 745 F. Supp. 599 (C.D. Cal.) (1990), <i>overruled by</i> <i>United States v. Alvarez-Machain</i> , 504 U.S. 655 (1992)	3
<i>United States v. Chapman</i> , 524 F.3d 1073 (9th Cir. 2008)	37
<i>United States v. Claiborne</i> , 765 F.2d 784 (9th Cir. 1985)	33
<i>United States v. Endicott</i> , 869 F.2d 452 (9th Cir. 1989)	34, 40
<i>United States v. Mechanik</i> , 475 U.S. 66 (1986)	37
<i>United States v. Necochea</i> , 986 F.2d 1273 (9th Cir. 1993)	42
<i>United States v. Samango</i> , 607 F.2d 877 (9th Cir. 1979)	33-34

1	<i>United States v. Smith,</i>	
2	962 F.2d 923 (9th Cir. 1992)	44
3	<i>United States v. Verdugo-Urquidez,</i>	
4	856 F.2d 1214 (9th Cir. 1988), <i>overruled by</i>	
5	<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990).	4
6	<i>United States v. Verdugo-Urquidez,</i>	
7	939 F.2d 1341 (9th Cir. 1991).	5
8	<i>United States v. Verdugo-Urquidez,</i>	
9	1994 U.S. App. LEXIS 16083 (9th Cir. 1994).	5, 6, 41
10	<i>United States v. Verdugo-Urquidez,</i>	
11	1998 U.S. App. LEXIS 27090 (9th Cir. 1998)	6, 9

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.*

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

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

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

20 ⁴ *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1215 (9th Cir.
21 1988), *overruled by United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

22 ⁵ *Id.* at 1215-16.

23 ⁶ *See id.* at 1216.

24 ⁷ *Id.* at 1217.

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

26 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).

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

4 On August 2, 1996, Verdugo filed a new-trial motion, which was denied by
 5 Judge Rafeedie on March 24, 1997.¹⁷ The Ninth Circuit affirmed that decision in a
 6 memorandum on October 20, 1998.¹⁸ On April 24, 1997, Verdugo filed a 28
 7 U.S.C. § 2255 petition, which Judge Rafeedie denied with prejudice on August 31,
 8 1999.¹⁹

9 On October 17, 2014, the DOJ disclosed to Verdugo for the first time that
 10 Malone's testimony at his trial had "exceed[ed] the limits of science."²⁰ On
 11 September 14, 2015, Verdugo filed a successive § 2255 petition,²¹ which this Court
 12 granted on May 22, 2017.²² The retrial is currently scheduled to begin on April 30,
 13 2019.

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16 //

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

20 ¹⁷ *See* CR 2092, 2148.

21 ¹⁸ *United States v. Verdugo-Urquidez*, 1998 U.S. App. LEXIS 27090
 22 (9th Cir. 1998).

23 ¹⁹ CR 2377.

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

25 ²¹ CR 2500.

26 ²² CR 4184.

1 **IV.**

2 **Statement of Facts**

3 **A. The Government's Evidence Against Rene Verdugo**

4 Over the course of an eight-week trial, the government presented evidence
5 that Verdugo "was an important figure in Caro's trafficking activities" and that
6 Caro had a motive to kidnap Camarena because Camarena had played a role in two
7 significant seizures of Caro's marijuana.²³ The government also presented
8 evidence that Verdugo (a Mexicali resident) was in Guadalajara on February 7-9,
9 1985. Hotel records from the Hyatt Regency reflected that he checked into the
10 hotel on February 7, 1985, at 4:50 p.m. and checked out on February 9, 1985, at
11 7:19 a.m.²⁴

12 Essential to the government's case was its allegation that Camarena had
13 been held and interrogated in the guest house of Caro's residence at 881 Lope de
14 Vega. Jorge Gomez-Espana testified that he saw Verdugo at Lope de Vega on
15 February 7 or 8, 1985.²⁵ Gomez stated that he saw Verdugo and another person,
16 whom Verdugo referred to as "commandante," at around 7:00 p.m. on one of those
17 days. According to Gomez, Verdugo looked tired and mentioned that he had had a
18 problem but that he had taken care of it.²⁶ The government argued that Verdugo's
19 presence at Lope de Vega was not coincidental and that when Verdugo said that he
20 had taken care of a problem, he was referring to Camarena.

21 Counsel for Verdugo countered that Verdugo was in Guadalajara because,
22

23 ²³ CR 4184 at 3-4.

24 ²⁴ *Id.* at 7-8.

25 ²⁵ *Id.* at 7.

26 ²⁶ *Id.* at 8.

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

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

17 The reason [why we didn't put on additional witnesses] is simple. We
 18 didn't think it needed any corroboration. . . . It is our view that
 19 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

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

23 ²⁷ See RT 30:8.

24 ²⁸ See *id.*

25 ²⁹ See RT 13:163-64.

26 ³⁰ RT 32:42.

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

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

12 You had better believe that this individual, Rene Verdugo, was in
 13 there immediately . . . wanting to know what else Camarena knew
 14 about [him]. “What else do you know about me? What else do you
 15 know about my operation? What else do you know about my
 16 helicopter business? What else do you know about people that are
 17 working for me? Who are your snitches? Who are your DEA
 18 snitches that are infiltrating our organization? How were you able to
 19 seize our helicopter and 4,000 pounds?”

20 *He was there and that is why he was there.* That was the express
 21 reason he was there, and that is why he was in that room. *He*
 22 *participated in the interrogation. He was asking questions of the*
 23 *captive, Camarena,* and he was seeking information, and information
 24 was being passed on to him at various intervals during the time he was
 25 there and Special Agent Camarena was there. That is not coincidence,

26 ³¹ See Verdugo’s New Trial Motion at 4. This motion, apparently filed
 27 on August 2, 1996, does not appear on PACER. It is instead attached as Exhibit I.
 28 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.

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

2 It bears repeating that there simply was no evidence supporting those
3 representations. Again, there was a tape and Verdugo's voice was *not* on it.
4 Moreover, no percipient witness testified that Verdugo had been in the room where
5 the government alleged that Camarena had been interrogated. Nor, for that matter,
6 did any percipient witness place Camarena at Lope de Vega. For those two critical
7 pieces of evidence, the government instead relied solely upon now-disgraced FBI
8 forensic examiner Michael Malone, who testified that one of the hairs found in the
9 putative interrogation room was "absolutely indistinguishable" from Verdugo's
10 hair³⁵ and that the only possible interpretation of the forensic evidence regarding
11 Camarena was that he was also in the room.³⁶

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

14 Michael Malone joined the FBI in 1970 and transferred to the Hairs and
15 Fibers Unit in 1974.³⁷ He became "well known to many judges and the law
16 enforcement community because of his forensic work on several high profile
17 cases," including those of Green Beret surgeon Jeffrey MacDonald³⁸ and John
18 Hinckley.³⁹ "Problems with Malone's analyses and testimony began to surface
19 publicly in Florida, starting in the late 1980s, when several courts reversed murder
20

21 ³⁴ RT 28:117 (emphasis added).

22 ³⁵ RT 10:192; 11:3.

23 ³⁶ RT 10:189.

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

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

26 ³⁹ Exhibit A at 45.

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

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

15 In 1996, two years after the OIG began its investigation but before it released
 16 its 1997 OIG Report, the Criminal Division of the Department of Justice created a
 17 task force to investigate numerous allegations surrounding the FBI Lab.⁴⁵ In June
 18 1997, the Task Force identified 13 FBI Lab examiners whose work “warranted
 19

20
 21 ⁴⁰ *Id.*

22 ⁴¹ *Id.*

23 ⁴² *Id.* at 2.

24 ⁴³ *Id.* at 3, n.5.

25 ⁴⁴ *Id.*

26 ⁴⁵ *Id.* at 4.

1 closer scrutiny.”⁴⁶ The Task Force’s “mission” was to identify cases involving the
 2 13 criticized examiners, advise prosecutors regarding their disclosure obligations,
 3 and “ensure that defendants’ rights to a fair trial were not jeopardized by the
 4 conduct of any of the 13 affected examiners.”⁴⁷

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

7 We [] examined the decisions the Task Force made related to former
 8 FBI Lab Hairs and Fibers Unit examiner Michael Malone, who
 9 handled a disproportionately large number of cases and provided
 10 seriously flawed analyses and testimony in many cases the Task Force
 11 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

12 On June 6, 1997, the Assistant Attorney General issued a memorandum
 13 directing federal prosecutors “to assess the importance of the Lab evidence and
 14 examiner testimony to determine their materiality to the defendant’s conviction” in
 15 all cases in which one of the 13 examiners had testified.⁴⁹ The Task Force designed
 16 “a case review form for federal prosecutors to complete – one form for each
 17 defendant and FBI Lab examiner involved in each identified case.”⁵⁰ In the event
 18 that the prosecutor determined that the examiner’s findings were “material to the
 19 defendant’s conviction,” the Task Force would request an independent review. And
 20

21 ⁴⁶ *Id.*

22 ⁴⁷ *Id.*

23 ⁴⁸ *Id.* at 7.

24 ⁴⁹ *Id.* at 20.

25 ⁵⁰ *Id.* (a sample form is attached to the 2014 OIG Report as Appendix
 26 D).
 27

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

3 From 1999-2004, two hair and fiber experts, Cathryn Levine and Steven
 4 Robertson, reviewed the 162 referrals involving Malone.⁵² For reasons discussed
 5 below, this review did *not* include Verdugo's case.⁵³ The Task Force completed its
 6 work in July 2004 and officially dissolved in August 2005.⁵⁴

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

17 //

18
 19 ⁵¹ *Id.* at 22 (Case-Review-Process flow chart).

20
 21 ⁵² *Id.* at 15, 33.

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

23 ⁵⁴ Exhibit A at 5.

24 ⁵⁵ Exhibit B at 3-5.

25 ⁵⁶ *Id.* at 1-2, n.3.

26 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.

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

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

10 1. *Malone’s Trial Testimony*

11 Malone testified at trial in Verdugo’s case on August 5 and 6, 1988. This
 12 false testimony was the subject of the DOJ’s 2014 disclosure to the defense and the
 13 basis for Verdugo’s successive 28 U.S.C. § 2255 petition, which this Court granted.
 14 In the interest of brevity, it will not be recounted in detail here. Briefly, however,
 15 the FBI⁶⁵ identified two distinct types of errors committed by Malone in this case⁶⁶
 16 and 26 specific instances of erroneous testimony, which fell into one of those two
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 18
 19

20 ⁶² *Id.*

21 ⁶³ *Id.*

22 ⁶⁴ *Id.*

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

27 ⁶⁶ Exhibit B at 11.

1 categories.⁶⁷

2 2. *Malone's Grand Jury Testimony*

3 Malone did not personally testify before the grand jury that returned the
4 indictment in this case. He did, however, testify regarding the same subject matter
5 before another grand jury in San Diego on September 26, 1986.⁶⁸ And that
6 testimony was read – verbatim – to the grand jury in this case (87cr422) by another
7 agent on two occasions: April 1, 1987, and December 9, 1987.⁶⁹

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

18 ⁶⁷ *Id.*

19 ⁶⁸ Exhibit C.

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

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

27 ⁷¹ Exhibit D at 77.

1 opinion, of course, was completely invalid.⁷²

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

7 a. *Malone’s opinions regarding “perfect matches” were*
8 *misleading and not supported by science.*

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

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19 ⁷² See, e.g., Exhibit B at 11 (identifying Malone’s “match” testimony
20 regarding Verdugo’s hair (at RT 10:192 and 11:3) as exceeding the limits of
21 science).

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

25 ⁷⁴ Exhibit D at 78; Exhibit E at 63.

26 ⁷⁵ Exhibit D at 72; Exhibit E at 57.

27 ⁷⁶ Exhibit D at 73; Exhibit E at 58.

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

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

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

13 In a similar vein, one of Malone's recurring riffs was to suggest match
 14 probabilities like "one in 5,000" (which was identified as error by the FBI Lab)⁸³ or
 15 an "untrue" match occurrence of only two times over twelve years and 10,000
 16 samples,⁸⁴ which the independent examiners found to be "confusing and
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18 ⁷⁷ See, e.g., RT 10:189;10:192; 11:3; 11:25; 11:52.

19 ⁷⁸ Exhibit B at 11.

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

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

22 ⁸¹ Exhibit D at 96.

23 ⁸² Exhibit G at 10.

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

25 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.

1 Let me interject at this point. Malone is saying hair, as I understand it,
 2 that in order to make a match, to be able to say with any degree of
 3 certainty that these two hairs are the same, *they came from the same*
 4 *person*, he says you have to be able to compare at least 15
 5 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*.

6 I believe he will state later on in his testimony that relative to the hairs
 7 that were found and were matched as coming from the same source,⁹⁰
 there were at least 20 characteristics that were found to be the same.

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

12 Malone is also now notorious among hair and fiber scientists for making
 13 unsupportable claims about a device called a “microspectrophotometer” (MSP). In
 14 this case, Malone told Verdugo’s grand jury that he could use the MSP to identify
 15 dyes (and therefore match fibers).⁹¹ The independent scientists conducting reviews
 16 from 1999-2004 “wrote in their reports that they did not believe Malone understood
 17 the appropriate use and limitations” of this device, which “cannot be used to
 18 identify dyes” – only colors.⁹² Beckert and Palenik again concur with the
 19 independent examiners, noting that “[t]here are so many falsehoods in [Malone’s
 20 statements about the MSP] that it is nearly impossible to know where to begin to
 21 address them.”⁹³ They summarize Malone’s testimony about the MSP as a “gross
 22

23 ⁹⁰ Exhibit D at 23 (emphasis added).

24 ⁹¹ Exhibit D at 13; Exhibit E at 10-11.

25 ⁹² Exhibit A at 49-50.

26 ⁹³ Exhibit G at 4.

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

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

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

14 Agent Malone testified falsely before the grand jury.

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

21 On April 30, 1997, Lucy Thomson of the DOJ responded to a “request for
22 information on Michael Malone” by John Carlton (the AUSA then in charge of the
23 related Camarena cases).⁹⁸ That response included a memo “to Ken Nimmich from
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25 ⁹⁴ *Id.* at 5.

26 ⁹⁵ Exhibit D at 74-75; Exhibit E at 59.

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

28 ⁹⁷ Exhibit G at 14.

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

1 William Tobin” as well as transcripts from a proceeding in which Malone had
 2 testified falsely.⁹⁹ We can thus reasonably infer from Thomson’s letter that Carlton
 3 had made a specific inquiry about the credibility of Malone.¹⁰⁰

4 On June 6, 1997, the DOJ issued a memorandum to all U.S. Attorneys
 5 regarding the FBI Lab. This memorandum – sent to “all U.S. Attorneys, all First
 6 Assistants, all Criminal Chiefs, all Criminal Division Section Chiefs, and Office
 7 Directors” – advised these prosecutors that the Criminal Division and the FBI were
 8 conducting a review of cases identified by an OIG investigation into misconduct in
 9 the FBI Lab. Specifically, these agencies were working with federal prosecutors “to
 10 determine whether disclosure of information to the court or defense counsel was
 11 warranted.”¹⁰¹ The memo stated that “it is essential that you advise the Criminal
 12 Division Task Force immediately of any new developments or litigation . . .
 13 concerning FBI laboratory issues. This notification should include motions for new
 14 trial, motions attacking the validity of a conviction . . . related appellate issues, and
 15 *Brady* disclosures of FBI laboratory-related documents.”¹⁰² The notification further
 16 directed federal prosecutors that “all of the cases in which the 13 examiners
 17 performed laboratory examinations need to be reviewed” and that the included case-
 18 review forms must be returned by June 30, 1997.¹⁰³

19 Critically, the memorandum also informed prosecutors that “[i]f you
 20 determine that the work and / or testimony of a laboratory examiner *was material* to
 21

22 ⁹⁹ *Id.*

23 ¹⁰⁰ Carlton’s request has not been produced in discovery.

24 ¹⁰¹ *Id.* at 3.

25 ¹⁰² *Id.*

26 ¹⁰³ *Id.* at 4.

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

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

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

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

21 ¹⁰⁴ *Id.* at 6 (emphasis in original).

22 ¹⁰⁵ *Id.* at 5.

23 ¹⁰⁶ *Id.* at 11.

24 ¹⁰⁷ *Id.* at 10.

25 ¹⁰⁸ *Id.* at 16.

26 ¹⁰⁹ *Id.* at 18.

1 expert testimony.

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

8 On February 17, 1998, codefendant Matta-Ballesteros filed a 28 U.S.C. §
9 2255 petition.¹¹² That petition (filed by one of Verdugo's trial attorneys, Michael
10 Pancer) specifically requested *Brady* disclosures regarding the unreliability of
11 Malone:

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

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

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

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

7 On April 10, 1998, Thompson sent a responsive fax with “confirmation sheets” by
 8 Wayne Oakes and Chester Blythe.¹¹⁷

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

21 ¹¹⁵ *Id.*

22 ¹¹⁶ *Id.* at 83.

23 ¹¹⁷ *Id.* at 84-87.

24 ¹¹⁸ CR 2246.

25 ¹¹⁹ *Id.* at 57.

26 ¹²⁰ *Id.* at 58.

1 Matta also states that new evidence “suggests” that Agent Malone
 2 “may have provided false testimony in order to convict Mr. Matta.”
 3 There is no support for this passing assertion, which Matta fails to
 4 mention again.¹²¹

5 With respect to Malone’s “match” testimony placing Matta at the crime
 6 scene, the government argued that Matta’s failure to present a defense expert
 7 confirmed Malone’s conclusions:

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

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

19 It bears mentioning again that the government filed this brief in May 1998 –
 20 11 months after the DOJ specifically instructed the USAO to assess the materiality
 21 of Malone’s testimony because that testimony was highly suspect, eight months
 22 after one of the same prosecutors who wrote the brief – John Carlton – responded to
 23 that inquiry by confirming that Malone’s testimony was indeed material to the
 24 convictions, and at the *same time* that Verdugo was actively litigating his own new-
 25 trial motion and § 2255 petition. But instead of making the *Brady* disclosures that

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

27 ¹²² *Id.* at 62.

28 ¹²³ *Id.* at 63 (citations omitted).

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

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

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

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

17 On September 25, 2000, Amy Jabloner of the DOJ sent a fax to AUSA Ng as
 18 a follow-up to a conversation regarding the FBI Lab Review Form submitted by
 19 Carlton on September 15, 1997 (where Carlton identified Malone’s testimony as
 20 material to the convictions). This appears to be an overture by the DOJ in support
 21 of its representation that in the event of a finding of materiality, it would “work
 22 with [the USAO] to arrange for an independent, complete review of the
 23

24 ¹²⁴ CR 2265 at 39.

25 ¹²⁵ 98cv1121 CR 2 at 10.

26 ¹²⁶ *Id.* at 10, n.6.

1 Laboratory's findings and any related testimony.”¹²⁷

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

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

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

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

22 ¹²⁷ Exhibit H at 6.

23 ¹²⁸ *Id.* at 91 (emphasis added).

24 ¹²⁹ *Id.* at 96.

25 ¹³⁰ *Id.*

26 ¹³¹ *Id.* at 95.

1 This review has encompassed approximately 3,000 cases prosecuted in
 2 hundreds of state and local prosecutor's offices and all of the U.S.
 3 Attorney's offices. At the moment there are approximately 50 cases
 4 remaining to be reviewed in approximately a dozen districts. Your
 5 office has the distinction of being one of the twelve. . . .

6 The FBI . . . is hoping to complete the entire project by the middle of
 7 the next fiscal year. *Depending on your input, the FBI may have to*
 8 *have an independent scientific review of the evidence*, which can take
 9 up to six months. We therefore need to receive your response on the
 10 cases pending in your office by August 15th. We've been asked to
 11 supply to the Deputy Attorney General a list of noncompliant districts
 12 after that date. I would much appreciate it if you would spare me the
 13 need to act as a hall monitor in this fashion.¹³²

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

16 I apologize for the lengthy delay in getting this information to the FBI
 17 Lab Task Force concerning its inquiries re the series of cases arising
 18 out of the kidnapping, torture and murder of DEA SA Enrique
 19 Camarena in 1985.

20 Based on my review of the files in the Camarena series of cases, I
 21 would verify the following. . . :

22 The Malone testimony / analysis involved in those cases was / is either
 23 not material to the convicted defendants in the case or the issues
 24 relating to that testimony / analysis was disclosed to those defendants.
 25 The Malone testimony was an issue in Matta's 2255 / new trial
 26 motions. *In the Verdugo and Zuno trials, Malone's testimony was only*
 27 *a single line of several strands of evidence that supported Verdugo's*
 28 *and Zuno's convictions.* In any case, I believe that the government
 29 disclosed the Malone issues to defense counsel for all the convicted
 30 defendants shortly after those issues came to light.¹³³

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

35 ¹³² *Id.* (emphasis added).

36 ¹³³ *Id.* at 93 (emphasis added).

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

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

14 Ng's representation that "the government disclosed the Malone issues to
 15 defense counsel for all the convicted defendants" is also untrue. While Verdugo's
 16 trial counsel, Michael Pancer, represented Matta for purposes of his § 2255 petition
 17 and was therefore aware that Malone had come under scrutiny, Matta's *Brady* claim
 18 was based on publicly available information – not an affirmative disclosure by the
 19 government.¹³⁵ And no disclosure had been made to Verdugo. Indeed, neither
 20 Pancer nor Verdugo's appellate attorney, Patrick Hall, were aware of Malone's
 21 misconduct in Verdugo's case until it was disclosed in October 2014.¹³⁶

22 The government has still not revealed to the defense why an independent
 23 examination was not undertaken when AUSA Carlton first responded to the DOJ
 24

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

27 ¹³⁵ See 98cv1121 CR 1 at 5 ("substantial new evidence only recently
 28 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 Verdugo 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.

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

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

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

20
 21 ¹⁴¹ CR 4229-1 at 5-7.

22 ¹⁴² CR 4227 at 1-2.

23 ¹⁴³ CR 4333.

24 ¹⁴⁴ CR 4336 at 10.

25 ¹⁴⁵ CR 4345 at 2.

26 ¹⁴⁶ See CR 4338.

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

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

9 V.

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

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

14 Verdugo's grand jury, just like his trial jury, was deceived by Malone's false
 15 testimony. That misconduct outstrips the presumption of regularity for grand-jury
 16 proceedings and requires dismissal of the indictment. Indeed, in *United States v.*
 17 *Claiborne*, the Ninth Circuit noted that although "courts have attached a
 18 presumption of regularity to grand jury proceedings . . . defendants may overcome
 19 [that presumption] and obtain dismissal of indictments returned against them on a
 20 proper showing of grand jury abuse."¹⁴⁷ The remedy of dismissal is required "only
 21 in flagrant cases in which the grand jury has been overreached or deceived in some
 22 significant way."¹⁴⁸ One way that "[d]efendants may establish such grand jury
 23 abuse [is] by demonstrating that the prosecutor obtained an indictment by
 24

25 ¹⁴⁷ 765 F.2d 784, 791 (9th Cir. 1985).

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

1 knowingly submitting perjured testimony to the grand jury.”¹⁴⁹ And while the
 2 government may argue that Verdugo cannot prove that the USAO was aware of
 3 Malone’s perjury when he testified before the grand jury in 1987, that argument
 4 fails for three distinct reasons.

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

13 Second, “[a]lthough deliberate introduction of perjured testimony is perhaps
 14 the most flagrant example of misconduct, other prosecutorial behavior, even if
 15 unintentional, can also cause improper influence and usurpation of the grand jury’s
 16 role.”¹⁵¹ That was certainly the case here, where AUSA Gurule punctuated the
 17 readback of Malone’s false testimony by repeating, highlighting, and embellishing
 18 his opinions for the grand jurors. The grand jury was thus “overreached or deceived
 19
 20

21 ¹⁴⁹ *Claiborne*, 765 F.2d at 791.

22 ¹⁵⁰ 869 F.2d 452, 456 (9th Cir. 1989); *see also United States v. Butler*,
 23 567 F.2d 885, 891 (9th Cir. 1978) (“Since the investigative officers are part of the
 24 prosecution, the taint on the trial is no less if they, rather than the prosecutor, were
 25 guilty of the nondisclosure.”); *cf. also* CR 4184 at 16 (this Court’s order imputing
 26 Malone’s knowledge that the testimony “was actually false when it was presented
 at trial” to the prosecutor under the *Napue* standard).

27 ¹⁵¹ *Samango*, 607 F.2d at 882.

1 in [a] significant way.”¹⁵²

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

10 **B. Malone’s perjury was material to the indictment.**

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

17 The [Supreme] Court held in *Napue* that the prosecution’s use of
18 known false testimony at trial required a reversal of the petitioner’s
19 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

21 ¹⁵² *Id.*

22 ¹⁵³ 497 F.2d 781, 785 (9th Cir. 1974).

23 ¹⁵⁴ *Claiborne*, 765 F.2d at 791.

24 ¹⁵⁵ *Id.*

25 ¹⁵⁶ *Id.*

26 ¹⁵⁷ *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.⁵⁸

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).

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

4 VI.

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

7 A. Introduction

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

15 B. All the *Barker* factors weigh heavily in favor of dismissal of the 16 indictment.

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

23 First, "[t]he length of the delay is a 'threshold' factor, and a sufficiently
 24

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

26 ¹⁶⁴ *United States v. Alexander*, 817 F.3d 1178, 1181 (9th Cir. 2016)
 27 (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.*

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

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

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

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

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

23 ¹⁶⁹ 505 U.S. at 656 (citing *Barker*, 407 U.S. at 531).

24 ¹⁷⁰ *Id.* at 1183.

25 ¹⁷¹ *Id.*

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

1 of “oppressive pretrial incarceration,” as well as the impairment of his defense in
2 myriad ways too numerous to recount in this pleading.¹⁷³

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

6 VII.

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

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

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

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

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

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

25 ¹⁷⁵ See *United States v. Verdugo-Urquidez*, 1994 U.S. App. LEXIS
26 16083, *20 (9th Cir. 1994) (“[I]t would seem, ironically, that . . . the government
27 ultimately lacked the evidence necessary to prove that the men it kidnapped
28 [(Machain and Verdugo)] were guilty.”) (Reinhardt, J., dissenting).

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

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

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

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

19 ¹⁷⁶ See Exhibit I at 64-66.

20 ¹⁷⁷ RT 32:42.

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

27 ¹⁷⁹ RT 28:117.

1 What [the defense] arguments boiled down to was a personal, vicious
 2 attack on Mr. Gurule and myself. . . . Every brick, every pipe, every
 3 rock that could be picked up and thrown our way, I think, has been.

4 I kept waiting for these counsel to attack our families, maybe our
 5 mothers. That is how personal it got.

6 Now what makes it the most outrageous is that they have accused Mr.
 7 Gurule and me of doing something improper, of somehow being
 8 unethical Now, that is outrageous. They have accused us of
 9 somehow presenting perjured testimony, of somehow coaching the
 10 witnesses, of somehow manipulating the evidence so that it would come
 11 out in a different way from what it actually meant.

12 Ladies and Gentlemen, did the prosecutors in this particular case ever
 13 do anything improper in this particular trial? I am here to tell you that
 14 we absolutely did not. Let me tell you this. There is no case, however
 15 important, however serious, that would justify anything unethical.
 16 You'd better believe that. Every prosecutor in this particular
 17 courthouse, every prosecutor that is an Assistant United States
 18 Attorney, feels the same way and if for one minute there was anything
 19 the least bit unethical in any particular prosecution, that particular
 20 prosecutor would be out the door. . . .

21 Do you think for one minute, for even a small period of time, if
 22 anything improper had been done in this courtroom, that his Honor in
 23 this particular court would not have been on our backs like a guillotine
 24 and immediately stopped it all through this particular trial? Of course.
 25 Of course.

26 Let me tell you something else. Special Agent Camarena, as you know,
 27 died in the service of his country. He died in the same way that
 28 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).

1 States Attorney, the trial court, the U.S. Marine Corps, and the honor of Agent
 2 Camarena, his wife, and his children to assure the jurors that “not one” prosecutor or
 3 agent would do “even one thing” to dishonor Camarena’s memory. That was
 4 flagrant misconduct.¹⁸¹

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

9 **B. The government’s pattern of misconduct warrants the sanction of**
 10 **dismissal with prejudice.**

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

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

21
 22 ¹⁸¹ See, e.g., *United States v. Smith*, 962 F.2d 923, 933-34 (9th Cir. 1992)
 23 (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.”).

24 ¹⁸² *Chapman*, 524 F.3d at 1084.

25 ¹⁸³ *Id.* (quotation omitted).

26 ¹⁸⁴ *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
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¹⁸⁵ *United States v. Aguilar Noriega*, 831 F. Supp. 2d 1180, 1191 n.12 (C.D. Cal. 2011).