

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

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v.

*

Criminal No. JFM-90-0476

ALONZO GOMEZ

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**MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL
ON GROUNDS OF NEWLY DISCOVERED EXCULPATORY EVIDENCE
WHICH PROVES INNOCENCE**

The Defendant, Mr. Alonzo Gomez, through his attorneys, James K. Bredar, Federal Public Defender for the District of Maryland, and Kathryn R. Frey, Staff Attorney, submits this memorandum in support of his Motion for a New Trial on Grounds of Newly Discovered Evidence Which Proves Innocence.

**I. THE CRUCIAL AND EXCULPATORY NEWLY
DISCOVERED EVIDENCE NECESSITATES A NEW TRIAL**

A. THE NEWLY DISCOVERED EVIDENCE

The newly discovered evidence is the testimony of David Lucumi. This evidence completely supports Mr. Gomez' unwavering insistence of his innocence. The facts to which Mr. Lucumi will testify are set forth in the attached signed and sworn affidavit.¹ Exhibit 1²

¹ Mr. Lucumi retained counsel, Mr. Jose O. Castaneda, Esq., of Port Chester, New York, prior to speaking with undersigned counsel and prior to furnishing the attached affidavit.

² Attached to this Motion for the Court's consideration are nine exhibits: E.1. - Affidavit of David Lucumi; E.2. - Trial

(hereinafter "E.1."). Mr. Lucumi will testify that on the morning of November 28, 1990 he telephoned Mr. Gomez and asked him to drive to Queens, New York to fix his taxi cab. Gomez was Lucumi's auto mechanic. When Gomez arrived Lucumi told him he no longer needed him to repair the taxi. Instead, Lucumi asked him if he would accompany him to Baltimore, Maryland to deliver a car. E.1. at 1-4.

Lucumi told Gomez he needed his assistance for two reasons: first, since Gomez was an auto mechanic he would ensure that the car was running properly, and second, Lucumi would need a ride back to New York after he delivered the car to Baltimore. Lucumi offered Gomez five hundred (\$500) dollars for his services. Id.

Lucumi never told Gomez that the car had a secret compartment which contained one hundred six thousand (\$106,000) dollars or that the purpose of the trip was to deliver the money. Gomez had never seen this car prior to November 28, 1990. Lucumi did not discuss either money or drugs with Gomez. Lucumi drove the car to Baltimore and Gomez sat in the front passenger's seat. Horatio Zapata, an acquaintance of Lucumi's, drove a Ford minivan to Baltimore in which Lucumi intended the three would return to New York. Id.

Transcript, part one (opening statements, direct and cross examination of S/A Marrero, direct and cross examination of S/A Ellenes, direct examination of S/A Gaasche, direct and cross examination of S/A Tomaszewski); E.3. - Trial Transcript, part two (direct and cross examination of S/A Johnson, direct and cross examination of Alonzo Gomez, closing arguments); E.4. - Transcript of Sentencing Proceedings (David Lucumi); E.5. - Transcript of Sentencing Proceedings (Alonzo Gomez); E.6. - Transcripts of tape recorded phone calls between S/A Marrero and Mr. Lucumi; E.7. - Pre-Trial Discovery Motion; E.8. - Affidavit of Mr. Leslie Stein, Esq.; E.9. - Mandate from the United States Court of Appeals for the Fourth Circuit.

Upon arrival in Baltimore, Lucumi met privately with S/A Marrero, who was working undercover for the Drug Enforcement Agency (D.E.A.). After meeting alone, Lucumi and Marrero approached the car. Lucumi will testify that he caused the secret compartment on the rear driver's side to open. He caused it to open by simultaneously stepping on the brake and applying a quarter to the heads of two screws which were located under the steering column to the left. Gomez did not know of the existence of the secret compartment, he did not know how to open the secret compartment, and therefore, he could not have opened the secret compartment.

E.1.

At the time when Lucumi caused the secret compartment to open Gomez was seated in the front passenger's seat of the car. Gomez was never seated in the back of the car. Before Gomez got into the car Lucumi asked him to open "it". He was referring to the door of the car.

Id.

Gomez first saw the money that was stored in the secret compartment of the car when Lucumi took it out to show Marrero. At this time, Gomez was seated in the front passenger's seat of the car. After showing the money to Marrero, Lucumi accompanied him to his car. After seeing the money for the first time, Gomez left the car and walked to the minivan in which Zapata was sitting. This is the last time Lucumi saw Gomez before he was arrested. Id.

On December 12, 1990 Mr. Gomez was charged in the same indictment as Mr. Lucumi with conspiracy to possess with intent to distribute cocaine. On April 8, 1991, a jury trial commenced as to Mr. Gomez only. As of that date, Mr. Lucumi had not yet pleaded guilty. At trial Mr. Gomez testified on his own behalf. There was only one other person who knew the truth about Mr. Gomez' agreement to travel to Baltimore and who could corroborate his testimony.

That person was Mr. Lucumi. On the advice of his counsel, Mr. William Murphy, Lucumi refused to speak with Gomez' attorney, Mr. Leslie Stein, Esq., or testify on Gomez' behalf.

This newly discovered evidence is compelling. Mr. Gomez has steadfastly maintained his innocence. The new evidence strongly supports his claim. Mr. Gomez has been incarcerated since November 28, 1990, for two years and eight months. He has served a quarter of his one hundred twenty one (121) month sentence; factoring in good-time credits, he has served almost one-third of this sentence. For the following reasons, he respectfully requests that this Court grant his Motion for a New Trial.

**B. LEGAL STANDARDS GOVERNING NEW TRIAL MOTIONS
UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 33**

This Court has broad power to grant a motion for a new trial on grounds of newly discovered evidence pursuant to F.R.C.P. 33. United States v. McBride, 862 F.2d 1316, 1320 (8th Cir. 1988); Arizona v. Washington, 434 U.S. 497, 514 (1978). F.R.C.P. 33 provides in relevant part:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment³ . . .

The Fourth Circuit has adopted a five part test which ordinarily applies in cases in which

³ "Final judgment" is two years from the date of judgment of conviction or, when an appeal is taken, from the date the appellate court issued the mandate. United States v. Spector, 888 F.2d 583 (8th Cir. 1989); Wright, Federal Practice and Procedure: Criminal 2d § 558. In this case, judgment of conviction was entered on July 23, 1991. An appeal was taken and the mandate was issued on June 29, 1992. E.9. Accordingly, this timely motion confers jurisdiction on this Court.

the defendant seeks a new trial. United States v. Bales, 813 F.2d 1289 (4th Cir. 1987). To obtain a new trial based on newly discovered evidence the defendant must show: (1) the evidence is newly discovered; (2) the defendant exercised due diligence; (3) the evidence relied upon is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence would probably result in acquittal at a new trial. Bales, 813 F.2d at 1295. A district court's decision to grant a new trial is reviewable only for an abuse of discretion. United States v. Arrington, 757 F.2d 1484 (4th Cir. 1985).⁴

This evidence constitutes "newly discovered evidence" and due diligence was exercised. The government explicitly conceded these issues at Mr. Gomez' sentencing hearing on July 22, 1991. E.5. at 3-5. Accordingly, prong one and two of the Bales test are satisfied. Presiding over that hearing, the Honorable Judge Motz summarized the government's position as follows:

[M]y understanding is that the government, very responsibly, has taken the position that it would agree that if Mr. Lucumi ends up proffering testimony which would be deemed to be favorable to Mr. Gomez, that it would deem that evidence to be newly discovered so that it can be presented at any time within the next two years. I think that position has been taken at least implicitly in the government's memorandum and Mr. Alsup [the AUSA] confirmed it today.

⁴ The interest of justice requires a new trial when the five part test is satisfied. See e.g., United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991) (district court's refusal to grant new trial was an abuse of discretion); United States v. Saban-Gutierrez, 783 F.Supp. 1538 (D.P.R. 1991), aff'd, 961 F.2d 1565 (1st Cir. 1992) (district court granted new trial motion and appellate court affirmed); United States v. Kladouris, 739 F.Supp. 1221 (N.D. Ill. 1990) (new trial granted); United States v. Atkinson, 429 F.Supp. 864 (E.D.N.C. 1977) (same); United States v. Lipowski, 423 F.Supp. 864 (D.N.J. 1976) (same); United States v. Gordon, 246 F.Supp. 522 (D.D.C. 1965) (same); United States v. Coates, 174 F.2d 959 (D.C. Cir. 1949) (Prettyman, J.) (same).

E.5. at 4. In response, the government confirmed that it would treat Mr. Lucumi's potential future testimony as newly discovered evidence under F.R.C.P. 33 if proffered within the proper time limits. Specifically, it stated, "You have stated the government's position accurately, Your Honor." E.5. at 4. Therefore, the only issues in this motion are whether the newly discovered evidence is not merely cumulative or impeaching but rather material to guilt or innocence, and whether the evidence would probably result in acquittal at a new trial.

C. FACTUAL BACKGROUND

(1) The Government's Case

In order to evaluate the crucial significance of the newly discovered evidence, it is necessary to review in some detail the relevant trial testimony. The government's case was based on speculation and entirely uncorroborated testimony. Its theory, as argued in closing, was two-fold. First, the government claimed that Mr. Gomez agreed to travel with Mr. Lucumi to Baltimore for the purpose of delivering money. E.3. at 44. Specifically, it alleged that Gomez knew that money would be exchanged for drugs in Baltimore based on telephone conversations between Lucumi and Marrero, to which Gomez was not a party. Id. at 45-46. Second, it theorized that Gomez opened the secret compartment. Id. at 47. However, there was no direct evidence as to who actually opened the secret compartment. The government's case against Gomez was weak and circumstantial.

At trial, the government's case consisted of testimony from four Drug Enforcement Agents, only one of whom testified about Mr. Gomez' actions in the park at Fells Point in

Baltimore.⁵ The government's case primarily relied upon the testimony of S/A Marrero. Prior to November 28, 1990, the date of the arrest, Marrero was given an assignment to call a beeper number on a tip that a drug transaction was pending. Marrero called and asked for "Mantura" who was later determined to be Lucumi.

In total, Marrero and Lucumi spoke on five occasions.⁶ During their first conversation

⁵ Testimony by the other three government witnesses does not bear on Mr. Gomez' guilt or innocence. To briefly summarize, a video tape of the interior of the Oldsmobile Toronado was offered into evidence through S/A Ellenes. Ellenes testified he saw the car when it entered the Fells Point area and again later after the arrests. Therefore, he had no knowledge of the pertinent events that occurred before the car reached Baltimore or during the time period in question prior to arrest. Ellenes could not explain how the secret compartment was opened during the transaction between Marrero and Lucumi (nor could anyone) and in fact never did determine how the mechanism worked. E.2. at 111.

S/A Gaasche testified that he saw the van and the Oldsmobile which appeared to be travelling together on Interstate 95. E.2. at 123.

S/A Tomaszewski testified that he worked in an undercover capacity on a bench in the park where Lucumi met Marrero. He heard Lucumi and Marrero speaking in Spanish. He did not understand the conversation. He did not see the Oldsmobile Toronado until after the arrest. He did not see Gomez until after his arrest. E.2. at 129.

⁶ The first call was placed by Marrero to Lucumi on November 26, 1990 at approximately 7:00 p.m. E.6. at 1(a-c). The second call was placed by Marrero to Lucumi on November 27, 1990 at approximately 5:16 p.m. E.6. at 2(a-c). The third, fourth, and fifth phone calls were made on November 28, 1990. Each time Lucumi spoke with Marrero from his cellular car phone. E.6. at 3(a-c), 4(a-e), and 5(a-e).

on November 26, they discussed the quantity of drugs and the cost. E.6. at 1(a-c). Gomez was not present. The next day Marrero and Lucumi arranged the tentative time, date, and place of the transaction. E.6. at 2. Specifically, they agreed to meet in a park in Fells Point in Baltimore at 4:00 p.m. E.6. at 2(b). Again, Gomez was not present.

On November 28, 1990, Marrero and Lucumi spoke on the phone three times while Lucumi and Gomez were en route to Baltimore. Each time, Mr. Lucumi spoke on his cellular car phone to Marrero. The government alleged that Gomez must be guilty based on his mere presence during these one sided conversations and argued this to the jury in closing. E.3 at 48. To illustrate, the government argued that during the third conversation Lucumi said he was coming with "all my stuff." E.3. at 48; E.6. at 3(c). However, Gomez did not pay attention to what Lucumi was saying when he was on the phone. E.3. at 26. Even had Gomez been listening, "stuff" is entirely ambiguous and hardly enough to convict someone of conspiracy to possess with intent to distribute cocaine. Furthermore, there is an inherent incongruity of this aspect of the government's case: If Lucumi was not concealing the money from Gomez he would not have spoken to Marrero in code language, but the government argued that while on the one hand Lucumi was not concealing the money from Gomez on the other hand he still spoke in code language to Marrero when in Gomez' presence. In any event, had Gomez been listening, during the side of the call that he could have heard there was no mention of money or drugs. E.6. The phone calls were open to entirely innocent interpretation.

Marrero never spoke to Gomez on the phone. In fact, he never even spoke with Gomez

in person. Marrero was not privy to conversations between Gomez and Lucumi regarding the purpose of the trip to Baltimore. Marrero actually knew very little about Gomez' involvement. Marrero had no direct knowledge as to whether Gomez knew the car contained money.

Next, Marrero testified about the actions he observed upon Lucumi's and Gomez' arrival in Fells Point. E.2. at 75. Once they arrived, Lucumi got out of and walked away from the car. E.2. at 79. Lucumi and Marrero met in the park and spoke privately. E.2. at 94. After speaking alone, Lucumi and Marrero returned to the car together. E.2. at 80.

Marrero's testimony as to Gomez' actions in the park was replete with inconsistencies. First he testified that Gomez was standing outside the driver's side of the car. E.2. at 80-81. Then he said he was standing outside the passenger's side of the car. E.2. at 81. Marrero testified that Gomez eventually got inside the car on the passenger's side. E.2. at 82. On direct examination he contended that Gomez entered the car when Lucumi told him to "Open the compartment, whatever." E.2. at 82. On cross examination he clarified that in fact all he heard Lucumi say was "Open it." E.2. at 95. He ultimately conceded that he did not know whether Lucumi meant open the door, the trunk, or the compartment. E.2. at 95.

Next, Marrero maintained that when Gomez first entered the car, he got into the front passenger's seat. E.2. at 82. Marrero said that Gomez later moved to the back seat on the passenger's side and remained there.⁷ E.2. at 82. After Gomez was in the back seat Marrero

⁷ The defense called Agent Johnson to impeach Marrero on whether Marrero ever saw Mr. Gomez in the back seat. At the preliminary hearing, Agent Johnson testified that after the arrests, Johnson debriefed Marrero. At trial, Johnson confirmed that at the preliminary hearing he testified that Marrero told him Mr. Gomez was in the front, not the back, seat. E.3. at 4.

heard the "pop" which he initially believed was the trunk opening. E.2. at 82. On direct examination Marrero testified that Lucumi was sitting in the front driver's seat when he heard the "pop." E.2. at 82. On cross examination he testified that at that time Lucumi was standing outside of the car. E.2. at 98. Next, he learned from Lucumi that the pop was the secret compartment in which the money was hidden. E.2. at 82. He did not know for certain who had opened the secret compartment.

Marrero testified that Lucumi retrieved the money, which was wrapped in plastic, from the secret compartment. E.2. at 84. Upon Marrero's request, Lucumi unwrapped one of the packages. E.2. at 85. Before Marrero and Lucumi left the car, Lucumi placed the three bags of money on the back seat. E.2. at 87, 100. Marrero never saw Gomez touch the money.

(2) The Defense Case

The defense case consisted Agent Johnson's testimony, see footnote 7, supra, and Alonzo Gomez' testimony. Mr. Gomez maintained his innocence at trial. He testified that on November 28, 1990 Mr. Lucumi called and asked him to fix his taxi cab.⁸ E.3. at 20. Gomez was scheduled to deliver some parts to a customer in New York that day so he agreed. Id. at 21. When he arrived in Queens, New York, Lucumi informed him that he no longer needed maintenance on his taxi but wanted Gomez to accompany him to Baltimore because he was delivering an Oldsmobile Toronado ("car"). Id. at 22. Gomez believed Lucumi was selling this car. Id. at 23.

⁸ Alonzo Gomez was an auto mechanic.

Lucumi asked him to ride along in case there were noises so that Gomez could fix the problem. Also, Lucumi told Gomez he would need a ride back to New York after he delivered the car. Id. Zapata drove with them in a separate van which was to be used for the return ride home. Id. at 24. Lucumi offered Gomez five hundred dollars (\$500) for his help. Id. at 23-24.

Mr. Gomez saw the car for the first time on November 28, 1990. E.3. at 23. He observed the cellular car phone when he entered the car. Id. at 26. He knew Mr. Lucumi was a taxi cab driver and thought that a car phone was a tool of the trade. E.3. at 26. Gomez did not pay attention to the substance of the phone conversations Mr. Lucumi had during the drive. E.3. at 26.

Upon arrival in Baltimore, Lucumi met someone (later determined to be Marrero) in a nearby park. E.3. at 27. Meanwhile, Gomez spoke with Zapata near the parked van. Id. When Lucumi and Marrero returned to the Oldsmobile Gomez returned to the passenger's side of the car. Id. at 28. When Lucumi asked Gomez to "open it" Gomez opened the door and sat down in the front passenger's seat. Id. He believed Lucumi had him get in the car for the purpose of going for a test drive. Id. at 29. Gomez believed they were in Baltimore to sell this car and his function was that of the mechanic. During this time period Gomez never got into the back seat of the car. Id. at 30.

Gomez testified that Lucumi opened the driver's side door and did something near the dashboard. Id. at 29. Next, Gomez heard something pop toward the back of the car. Id. He looked back and saw something open. Id. This was the first time he was aware of the secret compartment. Id.

Gomez then observed Lucumi pull plastic bags from the compartment. Id. at 30. Gomez,

still seated in the front passenger's seat, saw that the plastic, transparent bags contained money. Id. Gomez testified that upon seeing the money, "I knew something was wrong and I got scared and just wanted to get out of there." Id. Next, Lucumi and Marrero left the car and walked toward the park. Id. at 31. Gomez immediately left the car, leaving the money on the back seat exposed, and got into the van with Zapata. Id. Gomez asked Zapata to leave because he sensed something was wrong. Id.

Gomez did not know the money was in the car. He and Lucumi never discussed money or drugs. Gomez did not know of the existence of the secret compartment until it was opened. He did not open it. Gomez never heard the subject of narcotics discussed by Lucumi or Marrero. Id.

This review of the government's case and Mr. Gomez' case shows that the government's case, even without Mr. Lucumi's testimony, was particularly weak. In light of Lucumi's testimony, the government's case must fail. In summary, the government's theory was based on Gomez' presence while Lucumi spoke on the phone with Marrero. These were conversations to which Gomez testified without contradiction that he did not pay any attention. Even if he had, the portion of the conversation that Gomez could have heard was ambiguous and innocent. There was no mention of money or drugs and therefore the government's case necessarily requires a great deal of speculation.

The government's theory also required the jury to infer that it was Mr. Gomez who opened the secret compartment. Gomez testified that he did not open the compartment. Marrero testified that Gomez was in the back seat of the car when he heard the pop. Lucumi's testimony compels the conclusion that Gomez did not open the compartment. First, Lucumi will testify that it was

he who opened the compartment. Second, his description of how he caused the compartment to be opened necessarily requires that the person who opened it be in the front driver's seat.

This part of the government's theory was wholly reliant upon Gomez' placement in the back seat. Under the government's theory, Gomez was in the back passenger's seat of the car when Marrero heard the "pop." Lucumi's testimony that it was he who caused the compartment to open and that he did this by manipulating some mechanisms from the front driver's side causes the government's theory to entirely collapse.

Mr. Lucumi's testimony throws more than a reasonable doubt onto Mr. Gomez' guilt. The government's theory is far more untenable now than it was at the first trial. It now must rest solely on three innocent phone conversations during which Mr. Gomez was merely present. Mere presence alone is not enough to support a conviction. See United States v. Sanchez, 961 F.2d 1169 (5th Cir.), cert. denied, 113 S.Ct. 330 (1992); United States v. Spooone, 741 F.2d 680 (4th Cir. 1984).

D. THE NEWLY DISCOVERED EVIDENCE IS NOT MERELY CUMULATIVE OR IMPEACHING, AND IS EXCULPATORY AND MATERIAL TO MR. GOMEZ' ACTUAL INNOCENCE.

Portions of Mr. Lucumi's testimony are entirely new. E.1. at 2, par. 11. This new evidence was not offered by either the government or the defense at trial because it was in the sole possession of Mr. Lucumi. This evidence is overwhelmingly significant. It unveils the mystery of the secret compartment and refutes the government's theory of the case in great part. Lucumi will testify that only he, and not Gomez, knew of the existence of the secret compartments. E.1. at 2, par. 11. He will not only testify that it was he who opened the secret compartment located on the driver's side panel of the back seat, but he will finally reveal how the secret compartment

was opened. E.1. at 1-4.

Case law establishes that a new trial is warranted when entirely new and material evidence is discovered. In United States v. Liebo, 923 F.2d 1308 (8th Cir.), reh'g denied (1991), the Eighth Circuit held that the district court's refusal to grant a new trial was an abuse of discretion. During Liebo's trial on the bribery count, no evidence was presented on the crucial issue of whether Liebo received approval from an authorized superior concerning a particular payment. The newly discovered evidence showed that he had gotten prior such approval. This entirely new evidence was not cumulative because it was new and material, and a new trial was granted. As in Liebo, the newly discovered evidence in this case is entirely new and it is therefore by definition not cumulative. Because this evidence finally paints the complete and truthful picture of the events of November 28, 1990, and this evidence directly shows Mr. Gomez' innocence, the evidence is material.

When a defendant testifies at trial without corroboration, later discovered new evidence corroborating his trial testimony is material and not cumulative. United States v. Siddiqi, 959 F.2d 1167 (2d Cir. 1992). In Siddiqi, the defendant testified at trial. He did not present any corroborating testimony. After he was convicted he presented to the court newly discovered evidence corroborating his trial testimony. The government argued that this evidence was merely cumulative because the defendant had testified and the new evidence was therefore duplicitous. Rejecting the government's argument and finding that Siddiqi's new evidence not merely cumulative but rather material, the court held that where no corroborative evidence of defendant's testimony is offered at trial, new corroborative evidence is not merely cumulative because it is of a different kind and from a source other than the self-serving testimony of the defendant. Id. at

1172.

Applying the reasoning of Siddiqi to the present case, it is clear that a new trial should be granted. Mr. Gomez testified on his own behalf. He was unable to present corroborating testimony at trial because Mr. Lucumi, the only person who knew he was innocent, refused to testify. New evidence has now become available to him which fully corroborates his trial testimony. This newly discovered evidence is eyewitness testimony from an individual with direct knowledge of Mr. Gomez' understanding regarding the trip and his actions during the trip. It is not cumulative because it is of a different kind and of a source different from what could have been perceived by the jury as his own self-serving testimony.

Mr. Lucumi's testimony will corroborate Mr. Gomez' testimony in several respects. He will confirm that Gomez believed the purpose of the trip to Baltimore was to deliver a car. E.1. at 1, par. 4. He will explain that he promised Gomez five hundred dollars (\$500) for his assistance. Id. at 2, par. 6. He will confirm that he told Gomez that he needed an auto mechanic in case there was car trouble and that he needed a ride back to New York from Baltimore. Id. at 1, par. 5.

He will also testify that he never told Gomez that the car contained one hundred six thousand dollars (\$106,000) and that he never told Gomez he was delivering money to Baltimore. E.1. at 2, par. 7. This testimony also corroborates Gomez' trial testimony. He will also confirm that Gomez did not know of the existence of the secret compartments and that he, not Gomez, opened the compartment. Id. at 2, par. 11. He will testify that the first time Gomez could have learned of the presence of the money in the car was when he (Lucumi) reached into the secret compartment and presented the money to Marrero. Id. at 3, par. 14. He will corroborate that

Gomez was seated in the front passenger's seat when he (Lucumi) showed Marrero the money. Id. at 3, par. 13. Lucumi will testify that Gomez was never seated in the back seat of the Oldsmobile. Id. He will testify that after he and Marrero left the car, Gomez got out and walked to the van in which Zapata was seated. Id. at 3, par. 14. No one at trial testified to corroborate Gomez' version of the events of November 28, 1990 therefore Lucumi's proffered testimony is not cumulative.

Material evidence that otherwise satisfies the Bales test warrants a new trial. Bales, supra. Evidence is material if it proves actual guilt or innocence. Evidence is also material if it refutes an essential element of the government's case to which only a single uncorroborated witness has testified. United States v. Davis, 960 F.2d 820 (9th Cir. 1992). Mr. Gomez was convicted of conspiracy to possess with the intent to distribute cocaine. The elements of a conspiracy are: (1) an agreement to accomplish an illegal objective, (2) coupled with one or more acts in furtherance of the illegal purpose, and (3) the requisite intent to commit the underlying substantive offense. United States v. Clark, 928 F.2d 639, 641-42 (4th Cir. 1991). The elements of possession with intent to distribute are: (1) knowingly; (2) possess cocaine; (3) with the intent to distribute. United States v. Jones, 945 F.2d 747 (4th Cir. 1991). Only the government's sole and uncorroborated witness, S/A Marrero, gave his version as to Mr. Gomez' actions. This alone supported the government's theory. Mr. Lucumi's testimony is material because it demonstrates Mr. Gomez' innocence. Mr. Lucumi's testimony bears not just on one element of the government's case but on all elements. For this reason this evidence is material, not merely impeaching or cumulative and the interest of justice demands a new trial. Bales, supra; Davis, supra.

Moreover, where material evidence also impeaches the testimony of an uncorroborated witness on an essential element, a new trial must be granted in the "interest of justice" pursuant to F.R.C.P. 33. Davis at 825. In addition to the already compelling reason to grant a new trial - because the new evidence refutes all elements of the government's case - Lucumi's testimony directly contradicts, and therefore impeaches, Marrero's uncorroborated trial testimony. For example, Marrero said Gomez was in the back seat of the car while Gomez maintained he was only seated in the front passenger's seat. E.2. at 82; E.3. at 30. Lucumi will testify that Gomez remained in the front seat. E.1. at 3, par. 13. Also, Marrero's testimony implied that Gomez opened the secret compartment. E.1. at 82-83. Gomez testified he did not open the compartment. E.3. at 29-30. Lucumi's testimony will confirm this. E.1. at 2, par. 11-12.

In Davis, the court stated that it would grant a new trial if solely impeaching evidence impeached an uncorroborated witness on an essential element of the government's case, because absent that uncorroborated witness' testimony there was not sufficient evidence to convict beyond a reasonable doubt. Under the reasoning of Davis, a fortiori, a new trial must be granted in this case where the evidence is not solely or "merely" impeaching of Marrero but is material in and of itself and refutes not just one element, but all elements of the governments case. Davis, supra. For the foregoing reasons, prong four of the Bales test is satisfied.

E. MR. LUCUMI'S TESTIMONY IS LIKELY TO RESULT IN ACQUITTAL IF A NEW TRIAL IS GRANTED

Mr. Lucumi's testimony will fill in the critical pieces of information that were missing at Mr. Gomez' trial. This newly discovered evidence would probably result in acquittal at a new trial and therefore prong five of the Bales test is satisfied. Accordingly, in the interest of justice

and pursuit of the truth, this Court should grant Mr. Gomez' motion.

Mr. Lucumi's testimony renders the government's theory of the case hollow and deficient. At trial, the government's allegations were tenuous; they were based on conclusions drawn only from conjecture. The newly discovered evidence directly rebuts and discredits the government's hypothesis that Gomez opened the compartment; Lucumi candidly discloses that it was he who opened it. Furthermore, Lucumi's direct and personal knowledge of what he told Gomez, coupled with Gomez' assertion of his innocence weighed in balance with the government's theory which was based on guesswork derived from one-sided innocuous phone conversations would probably, if not certainly, result in acquittal at a new trial.

New evidence corroborating a defendant's uncorroborated trial testimony would probably lead to an acquittal if presented to a jury. United States v. Siddiqi, 959 F.2d 1167 (2d Cir. 1992). In Siddiqi, the court found that the defendant satisfied this prong of the test noting that the conviction was based in great part on the jury's disbelief of the defendant and the lack of any corroborating evidence. Like in Siddiqi, Mr. Gomez testified on his own behalf at trial. There was no corroboration of his testimony trial. The jury did not believe Mr. Gomez. There will probably be a different result if Lucumi testifies at a new trial and corroborates Gomez' testimony. Therefore, as the court held in Siddiqi, the last element of the test to determine whether a new trial should be granted has been met in this case.

Newly discovered evidence by a former co-defendant exculpating the defendant requires a new trial in the interest of justice. Newsom v. United States, 311 F.2d 74 (5th Cir. 1962). Reversing the district court's refusal to grant a new trial where the new trial would probably result in acquittal the court in Newsom reasoned, "[e]very practicable precaution should be taken to

insure that the verdict really speaks the truth, for if it does not an innocent man may be imprisoned for years." Id. at 79. Similarly, in Ledet v. United States, 297 F.2d 737 (5th Cir. 1962), then Chief Judge Tuttle, writing for the court, reversed the district court's refusal to grant a new trial in a case with facts strikingly similar to the present case.

In Ledet, co-defendant Bourg and defendant Ledet were arrested after a search of a car driven by Bourg revealed forty one (41) grams of heroin under the passenger seat and two loaded .38 caliber revolvers covered with a handkerchief in the front seat. The two men had known each other for several years. Ledet testified that he accompanied Bourg on this adventure when Bourg offered to pay all expenses. He also testified that he had absolutely no knowledge of the heroin or the revolvers. Bourg did not testify. After both were convicted, Bourg came forward and, in an affidavit, entirely exonerated Ledet.

Reversing the district court's refusal to grant a new trial, Chief Judge Tuttle reasoned that although new trial motions are usually viewed with suspicion, in this case where the connection between the defendant and the contraband was attenuated and where the co-defendant's testimony would be entirely consistent with defendant's trial testimony of complete innocence, a new trial was warranted. He further reasoned that "the previous silent witness who knows most about the transaction may be given an opportunity to testify to facts he has now asserted in the form of an affidavit." Id. at 739.

Applying Newsom and Ledet to the case at hand, a new trial must be granted. As in Newsom and Ledet, in this case Mr. Lucumi, a previously silent co-defendant who can affirm the validity of the other individual's claim of innocence, must be given the opportunity to be heard in the interest of justice to Mr. Gomez. The primary factors in Newsom and Ledet exist in this

case: (1) a conviction based on weak and circumstantial evidence and (2) a later disclosure by a co-defendant who refused to testify at the first trial because he risked self-incrimination. Under the reasoning in Newsom and Ledet, this Court should grant Mr. Gomez' motion for a new trial.

Furthermore, testimony given by Mr. Lucumi at his sentencing hearing casts serious doubt on Mr. Gomez' conviction. E.4. At his sentencing hearing on July 15, 1991, the government questioned Mr. Lucumi and he responded as follows:

Q: What precisely did Mr. Gomez ask you to testify to?

A: That I would come with him to deliver a car, that is all.

Q: Is that the truth?

A: I said nothing more to him.

The government also asked and Mr. Lucumi answered:

Q: What did you tell Mr. Gomez before you came down to Baltimore?

A: That I had to come to deliver that car.

Finally:

Q: Let me ask you this. Did you tell Mr. Gomez that you were on your way to Baltimore to purchase cocaine?

A: They never told me I was coming for cocaine. How - could I tell that to him.

E.4. at 6 (emphasis added). At this point in the questioning Judge Motz became concerned. He stated, "Don't you think if you are really getting into this Mr. Gomez' lawyer ought to be here?"

E.4. at 7.

A few days later on July 22, 1991 at Mr. Gomez' sentencing hearing Judge Motz, referring to Mr. Lucumi's sentencing hearing, said:

Mr. Lucumi has now been sentenced. I will state for the record that in the sentencing hearing there was starting to be some testimony about Mr. Gomez' role, because Mr. Murphy thought it was appropriate to show that Mr. Gomez, excuse me, Mr. Lucumi had not obstructed justice by, I guess the point was to give false testimony, and there was some direct testimony given by Mr. Lucumi on the point which, frankly, I think was somewhat inconclusive. I don't know that. I just say it was inconclusive. To some extent it could be proven to be favorable to Mr. Gomez. I do think that.

E.5. at 3 (emphasis added).

The judge who presided over this case voiced concerns about the effect of the potential testimony of Mr. Lucumi. Additionally, only marginal evidence was produced at trial. The testimony of Mr. Lucumi in July of 1991 is consistent with his now proffered testimony. Accordingly, it is abundantly clear that had Lucumi testified, Gomez probably would have been acquitted.

Mr. Lucumi is prepared to testify truthfully and fully if a new trial is granted pursuant to this motion. Mr. Lucumi would testify to the facts set forth in the attached signed and sworn affidavit. All five prongs of the Bales test are satisfied. In the interest of justice to Mr. Gomez a new trial must be granted in this case.

II. THE GOVERNMENT'S FAILURE TO PROVIDE THE DEFENSE WITH CRUCIAL STATEMENTS EXCULPATING MR. GOMEZ WAS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE MANDATE OF BRADY v. MARYLAND AND THEREFORE A NEW TRIAL IS WARRANTED

Immediately upon his arrest, Mr. Lucumi told the arresting officer, S/A Johnson, that

neither Mr. Gomez nor Mr. Zapata⁹ knew about the money or the illegal purpose of the trip to Baltimore. E.1. at 3, par. 15. This vital piece of evidence was never disclosed to Mr. Gomez or his attorney, Mr. Leslie A. Stein, Esq. E.8. By failing to disclose this information to the defense, the government violated Mr. Gomez' Due Process rights, as guaranteed by the Fifth Amendment of the United States Constitution.

In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that, "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. To prevail under Brady the defendant must establish: (1) the prosecution suppressed the evidence; (2) that such evidence was favorable to the defense; and (3) that the suppressed evidence was material. United States v. Sink, 586 F.2d 1041, 1051 (5th Cir. 1978), cert. denied 443 U.S. 912 (1979).

All exculpatory information must be disclosed whether possessed by the government or anyone over whom it has authority. The prosecution is responsible for nondisclosure of Brady material by other government agents (i.e., D.E.A.) even if the Brady information was unknown to the prosecution. Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964). In Barbee, the Fourth Circuit reversed the district court's denial of a writ of habeas corpus and remanded with instructions to either issue the writ or, if the State elected, to commence a new trial. The court reasoned:

[T]he effect of the nondisclosure [is not] neutralized because the prosecuting

⁹ Mr. Zapata was never formally charged in connection with this offense.

attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether it was purposely, or negligently, withheld. . . . The police are also a part of the prosecution, and the taint on the trial is no less if they, rather than the State's attorney, were guilty of the nondisclosure.

Id. at 846 (footnote omitted). This issue of nondisclosure is a "question of fundamental fairness rising to the level of constitutional due process." Id. at 847. See also United States v. Antone, 603 F.2d 566 (5th Cir. 1979) (declining to draw a distinction between different government agencies the court reasoned that the "prosecution team" included investigative and prosecutorial personnel); United States v. Menos, 866 F.2d 1304 (11th Cir.), cert. denied, 493 U.S. 932 (1989) (same).

In the present case, Mr. Lucumi made statements to a D.E.A. agent exculpating Mr. Gomez. If the government was in possession of this information, it had a duty to disclose it; even if the government did not know about the existence of this statement, it is deemed to have possession of this statement.¹⁰ Therefore, it suppressed the evidence by failing to disclose it. Mr. Gomez made a pre-trial request for all Brady material. E.7. In violation of its duty, the government failed to disclose the newly discovered exculpatory Brady material. United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). The evidence it failed to disclose was favorable to the defense.

Both exculpatory and impeaching evidence are deemed "favorable" to the defense. Bagley, 473 U.S. at 676. The nondisclosed evidence in this case was primarily exculpatory as to Mr.

¹⁰ The defense has no information suggesting that the prosecution actually knew about the exculpatory statement. However, as explained above, actual knowledge by the prosecution is not required.

Gomez and secondarily impeaching of Johnson. It is exculpatory because it goes to Mr. Gomez' innocence. It is impeaching because it could have cast doubt on the credibility of Johnson, the lead D.E.A. agent in charge of investigating the case against Mr. Gomez.

The reliability of a witness may be determinative of guilt or innocence of a defendant and nondisclosure of evidence that would severely affect the credibility of that witness is a denial of due process. See Napue v. Illinois, 360 U.S. 264 (1959); United States ex. rel. Wilson v. Warden Cannon, 538 F.2d 1272 (7th Cir. 1976). Had the defense known of the existence of Lucumi's statement to Johnson, it would have interrogated Johnson on this issue; since it was unaware of the this statement, it was unable to present to the jury persuasive and credible evidence of Gomez' innocence. Examination of Johnson concerning this statement made by Lucumi would have cast serious doubt on the foundation of the government's case.

Agents Johnson and Marrero worked together on this case. They were both in Fells Point at the time of Lucumi's arrest. Lucumi's statement regarding Gomez' innocence was made to Johnson immediately after Lucumi's arrest. It is likely that Marrero knew of the existence of this exculpatory statement and the defense was denied the opportunity to cross-examine Marrero on this issue at the first trial. Denial of this opportunity was due solely to the government's non-disclosure. In United States ex. rel. Annunziato v. Manson, the court granted a new trial where impeaching Brady evidence was not disclosed as to the only witness who directly tied the defendant to the offense. Annunziato, 425 F.Supp. 1272 (1977), aff'd, 566 F.2d 410 (2d Cir. 1977). As in Annunziato, Marrero was the sole link between Gomez and the illegal activity. Marrero's testimony was entirely void of any mention of Lucumi's post-arrest exculpatory statement. Confrontation of Marrero with Lucumi's statement about Gomez' innocence would

surely have undermined Marrero's believability.

The standard for materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. "Reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id.; See United States v. Spangoulo, 960 F.2d 990, 994 (11th Cir. 1992) (district court abused its discretion by failing to grant a new trial where the government failed to disclose material and exculpatory information). This standard is more lenient than the standard for a new trial under F.R.C.P. 33.

The newly discovered Brady material would have so undermined any notion that Mr. Gomez was guilty that the result the jury reached would have been different. This is not a case where the undisclosed Brady material only impeaches a witness' credibility, though such evidence is deemed Brady material warranting a new trial if not disclosed. Bagley, supra. This is also not a case where the evidence was so overwhelming at trial that the undisclosed material would have had no impact. Rather, this is a case where the undisclosed exculpatory evidence goes to the heart of the case. It is powerful and reliable. Mr. Lucumi made this statement immediately after his arrest. This spontaneous statement is trustworthy because by implication it inculpated Mr. Lucumi. Had a jury been presented with this evidence at trial, Mr. Gomez would probably not presently be serving a one hundred twenty one (121) month sentence.

III. CONCLUSION

Mr. Lucumi's testimony so dilutes the government's case against Mr. Gomez that a new trial will yield a different and just result. Mr. Lucumi's testimony concerning who opened the secret compartment and how it was opened discredits the government's theory of the case which

was based on speculation drawn from Marrero's testimony. The government's case is thereby reduced to Mr. Gomez' mere presence in the car with Mr. Lucumi. Mere presence and mere association alone are not enough to convict. United States v. Sanchez, 961 F.2d 1169 (5th Cir.); United States v. Spoons, 741 F.2d 680 (4th Cir. 1984); United States v. Paige, 324 F.2d 31 (4th Cir. 1963). In the interest of justice, Mr. Gomez urges this court to grant this Motion for a New Trial on Grounds of Newly Discovered Exculpatory Evidence Proving Innocence.

REQUEST FOR A HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, a hearing is requested on the Defendant's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of July, 1993, a copy of the foregoing Memorandum In Support Of Motion For A New Trial On Grounds Of Newly Discovered Exculpatory Evidence Which Proves Innocence and Request for Hearing was mailed to James Alsup, Assistant United States Attorney, Office of the United States Attorney, 820 U.S. Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201.

KATHRYN R. FREY
Staff Attorney