

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 98-8429-J, 99-8169-J

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VIRGINIA HIGH,
GEORGE HIGH,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District of Georgia

BRIEF FOR APPELLEE

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Appellee,	:	
	:	
v.	:	APPEAL NOS. 98-8429-J, 99-8169-J
	:	
VIRGINIA HIGH,	:	
GEORGE HIGH,	:	
	:	
Appellants.	:	

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

- (1) Michael Abbott, Trial Counsel for Virginia High;
- (2) Richard H. Deane, Jr., United States Attorney, Northern District of Georgia;
- (3) George High, Defendant-Appellant;
- (4) Virginia High, Defendant-Appellant;
- (5) William A. Morrison, Trial Counsel for George High;
- (6) H. Allen Moye, Assistant United States Attorney;
- (7) United States of America; and
- (8) The Honorable Robert L. Vining, Jr., Senior, United States District Court Judge, Northern District of Georgia.

STATEMENT REGARDING ORAL ARGUMENT

The government respectfully submits that oral argument is not necessary in this case. The issues and positions of the parties, as presented in the record and briefs, are sufficient to enable the Court to reach a just determination.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this direct appeal from the district court's denial of the Appellants' motions for a new trial, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

- I. IN APPEAL 99-8169: WHETHER THE DISTRICT COURT PROPERLY CONCLUDED THAT THE MOTION FOR NEW TRIAL WAS NOT BASED UPON NEWLY-DISCOVERED EVIDENCE.
- II. IN APPEAL 98-8429: WHETHER THE DISTRICT COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL BASED UPON NEWLY-DISCOVERED EVIDENCE.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

George and Virginia High, Defendants-Appellants, were jointly indicted with thirteen other co-defendants on December 10, 1992, in a superseding indictment, on counts charging drug distribution and laundering of monies derived from drug sales. (R1-89; R4-89). Pleas of not guilty were entered at arraignment. (R1-146; R4-110)

On the government's motion, the case was declared to be a complex case. (R1-106, 166; R4-106, 166). The case was severed for trial, and the High's were tried together with each other and with co-defendants Alex Gracia and Robert Ward, in September, 1993, before the Hon. Robert L. Vining, Jr., United States District Judge.

After a trial which lasted several weeks, the jury returned verdicts finding the High's guilty of participating in a conspiracy to distribute and possess with the intent to distribute cocaine (Count 1); finding them guilty of participating in a conspiracy to launder drug proceeds, to structure currency transactions and to defraud the United States (Count 13); finding George High guilty of weapons violations (Counts 3 and 9); finding the High's guilty of separate violations of 31 U.S.C. § 5324 (Counts 14 - George High only; 16, 19, 21, 22 - Virginia High only); and, finding Virginia High guilty of violations of 18 U.S.C. § 1956 (Counts 17, 18, 20, 23, 24). (R2-348; R5-349).

The High's were each sentenced to terms of incarceration totaling 97 months. (R2-394; R5-390). Based upon the intervening

decision of the Supreme Court in *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655 (1994), the district court declined to impose sentence on those counts charging Title 31 violations, and instead offered each defendant the opportunity to file a motion to set aside the convictions. (R19-12; R20-9).

After the imposition of sentence, separate motions for new trial were filed by the High's, and those motions were later granted as to the substantive structuring offenses. (R2-353, 401; R3-465; R5-393, 398; R6-466). Timely notices of appeal were filed, and this Court affirmed in part, but reversed the convictions of the High's on Count Thirteen. *United States v. High*, 117 F.3d 464 (11th Cir. 1997). The government subsequently dismissed Count Thirteen. (R3-543; R6-544).

A. The Appeal in Case 98-8429

On July 21, 1997, after the decision by this Court in *United States v. High*, *supra*, Virginia High filed a motion for new trial, (R6-509), and a motion to vacate sentence, pursuant to 28 U.S.C. §2255. (R6-510;1:97-CV-2305). The district court denied the motion for new trial and the motion to vacate as amended. (R6-547-4). Judgment was entered denying the 28 U.S.C. §2255 motion. (R6-548).

Virginia High filed a notice of appeal, which the government construed as being from the district court's general denial of the various motions. (R6-550). As to the Motion to Vacate, the district court denied certificate of appealability, (R6-554), as did this Court. (R6-557). This Court, on April 23, 1999, and

based upon the responses of the parties to a jurisdictional question, determined that it had jurisdiction to consider the appeal from the denial of the motion for new trial only.

B. The Appeal in Case 99-8169

On December 13, 1998, the High's filed a joint motion for new trial based upon newly discovered evidence. (R3-559; R6-559). The motion for new trial was accompanied by an Affidavit executed by George High, only, which is a 12-page narrative, devoid of any citation to the record. The motion was also accompanied by a 16-page narrative of "Statement of Facts" citing 73 issues alleged to be "prima facie" evidence that the court should grant his Rule 33 motion. (R3-559, Statement of Facts, p. 16).

The district court denied the motion. (R3-561; R6-561) The district court found that the defendants had not shown that any of the "alleged 'newly discovered evidence' was not already known to them at the time they filed their direct appeals or, in the case of Virginia High, when she filed her previous motion for new trial." *Id.*

The High's jointly filed a notice of appeal to this Court, which specified only the motion for new trial and the order entered thereon. (R3-563; R6-563).

C. Consolidation of the Appeals

On June 26, 1999, Virginia High filed in this Court in Appeal No. 98-842 a pro se brief on behalf of her and George High, entitled "Appeal of Motion under 28 U.S.C. § 2255 to Dismiss, Vacate, Set Aside, or Correct Sentence." On June 29, 1999,

Appellants filed a motion in this Court to file a joint brief in both cases, Nos. 98-8429-J and 99-8169-J.

The Appellants are currently incarcerated.

2. Statement of the Facts

The facts of the criminal case were established in the published opinion of this Court. *High*, 117 F.3d at 466-468. In the multiple-object cocaine distribution and possession case, this Court affirmed George and Virginia High's convictions for conspiracy to distribute and possess with intent to distribute cocaine, and aiding and abetting a conspiracy. *High*, at 465. In light of the Supreme Court's decision in *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655 (1994), this Court reversed the convictions for conspiracy to launder drug proceeds, structure currency transactions and defraud the United States, and remanded the case for a new trial on Count Thirteen. *Id.* As noted above, the government dismissed Count Thirteen upon remand.

3. Standard of Review

This Court will review the district court's denial of a motion for new trial based on newly-discovered evidence under the abuse of discretion standard. *United States v. Fernandez*, 136 F.3d 1434, 1438 (11th Cir. 1998); *United States v. Obregon*, 893 F.2d 1307, 1312 (11th Cir. 1990).

SUMMARY OF THE ARGUMENT

The only issue which is properly before this Court is whether the district court abused its discretion by denying the motion for new trial. The district court did not reach the merits of any of the issues presented by Appellants in their joint brief. Instead, the district court denied the motion for new trial based upon newly discovered evidence because the court concluded that the evidence was not "newly discovered." The defendants have not attempted to address this issue in their brief. Instead, they have presented to this Court arguments which were not addressed by the district court below. The challenges are not properly before this Court.

The argument that counsel was ineffective is not considered newly discovered evidence for a motion for a new trial, and the motions do not satisfy the five requirements under the newly discovered evidence inquiry to sufficiently demonstrate that a motion for new trial was warranted. The arguments before this Court are not based on newly discovered evidence, but are merely belated complaints about trial counsel, which are more properly addressed in a 28 U.S.C. § 2255 motion, or trial court errors, which Appellants could have raised in a direct appeal of the conviction.

ARGUMENT AND CITATIONS OF AUTHORITY

- I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT THE MOTION FOR NEW TRIAL PRESENTED NO NEWLY DISCOVERED EVIDENCE.

After reviewing the motion for new trial (R3-559; R6-559), the district court denied the same. (R3-561, R6-561). The Court stated

Because the defendants, in their new trial, have not shown that any of the alleged "newly discovered evidence" was not already known to them at the time they filed their direct appeals or, in the case of Virginia High, when she filed her previous motion for new trial, the court hereby denies the motion for new trial.

(R3-561-2; R6-561-2).

A defendant may file a motion for new trial anytime within two years from the date of the final judgment.¹ Fed.R.Cr.P. 33 (1998). Rule 33 of the Federal Rules Of Criminal Procedure also establishes two distinct requirements governing new trial motions depending upon when the motion is filed. See *id.*; *United States v. Hall*, 854 F.2d 1269, 1270 (11th Cir. 1988). If the defendant moves for a new trial within seven days after the verdict, a new trial may be granted if "required in the interest of justice." Fed.R.Crim.P. 33 (1999); *United States v. DiBernardo*, 880 F.2d 1216, 1223 (11th Cir. 1989). The trial court has broad discretion when ruling on a new

¹ Effective December 1, 1998, Federal Rule of Criminal Procedure 33 was changed to allow a new trial motion based on newly discovered evidence to be filed within three years after verdict or finding of guilty. Fed.R.Cr.P. 33 (1999). Under either version of Rule 33, the old or the new version, Appellants' motions for new trial based on newly discovered evidence were untimely filed because the motions for new trial were filed on August 5, 1997, (R6-509), and December 17, 1998, (R3-559), which is outside the two and three year period from entry of the judgments on September 25, 1994.

trial motion filed within this seven day period. *Hall*, 854 F.2d at 1270-1271.²

However, once this seven day period has elapsed, the "interest of justice" standard no longer applies, and the defendant must demonstrate the existence of "newly discovered evidence" in order to obtain a new trial. *Id.*; Fed.R.Crim.P. 33 (1999); *DiBernardo*, 880 F.2d at 1223. See also, *United States v. Hill*, ___ F.3d ___, 1999 WL 386306, *1 (11th Cir. 1999) (Rule 33 is jurisdictional, and after expiration of seven days, district court lacks jurisdiction to hear motion for new trial, or extend period of time in which motion may be filed).

Here, Appellants filed the joint motion for new trial from which this appeal is taken on December 17, 1998. (R3-559; R6-559). Assuming that the motions were timely, the "newly discovered evidence" standard governs this Court's inquiry. See *DiBernardo*, 880 F.2d at 1224. That standard requires that a defendant must prove that the evidence possesses five characteristics: (1) it was discovered following the trial, (2) the failure to discover this evidence earlier was not due to defendant's lack of due diligence,

² A majority of Circuits have held that information giving rise to ineffective assistance claims does not constitute newly discovered evidence for purposes of Rule 33. See *United States v. Laird*, 948 F.2d 444, 446 (8th Cir. 1991); *United States v. Seago*, 930 F.2d 482, 489-90 (6th Cir. 1991); *United States v. Lema*, 909 F.2d 561, 566 (1st Cir. 1990); *United States v. Miller*, 869 F.2d 1418, 1422 (10th Cir. 1989); *United States v. Ugalde*, 861 F.2d 802, 806 (5th Cir. 1988), cert. denied, 490 U.S. 1097, 109 S.Ct. 2447, 104 L.Ed.2d 1002 (1989); *United States v. Dukes*, 727 F.2d 34, 39-40 (2d Cir. 1984); *United States v. Lara-Hernandez*, 588 F.2d 272, 275 (9th Cir. 1978); *United States v. Ellison*, 557 F.2d 128, 133 (7th Cir.), cert. denied, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1977). But see *United States v. Brown*, 476 F.2d 933, 935 n. 11 (D.C.Cir. 1973).

(3) it is more than merely cumulative or impeaching evidence, (4) it is material, and (5) it is probable that, had this evidence been presented at trial, it would have produced a different result. *Hall*, 854 F.2d at 1271; *DiBernardo*, 880 F.2d at 1224; *Bentley v. United States*, 701 F.2d 897, 898 (11th Cir. 1983).

Relief based upon newly discovered evidence is designed to afford the court authority to grant relief where despite the fair conduct of the trial, it later clearly appears to the trial judge that because of facts unknown at the time of trial, substantial justice was not done. See *United States v. Johnson*, 327 U.S. 106, 112, 66 S.Ct. 464, 467 (1946). Rule 33 enables the district court to afford relief when new information is discovered that bolsters a claim of "actual innocence". *United States v. Smith*, 62 F.3d 641, 649 (4th Cir. 1995). Here, there is no actual innocence as this Court determined in its review of the sufficiency of the evidence claims on direct appeal. *High*, 117 F.3d at 469.

The district court has addressed the issue of whether the evidence is newly-discovered, and has concluded that the evidence is not newly-discovered. It is not hard to understand the basis for the district court's conclusion. First, the district judge was the same judge who had presided over the trial, and was familiar with the trial record, as well as the post-trial record. See, *Bentley*, *supra*, at 899. Second, a reading of the narrative statement of facts provided by Appellant George High relies exclusively upon evidence presented at trial, or upon facts related to events to which he was a participant. In order to get the benefit of the two-year time limit of Rule 33, the factual evidence

itself, not the unappreciated legal significance of those facts, is what must be unknown to a criminal defendant prior to the return of the jury verdict. If those facts are known, as the district court has concluded here, then a motion for a new trial must be made within seven days despite the "practical difficulties" such a rule presents to defendants. *United States v. Calderon*, 127 F.3d 1314, 1352 (11th Cir. 1997). The "Affidavit" (R3-559-2-13) contained no newly-discovered evidence. Similarly, the "Statement of Facts" (R3-559-14-28) contains nothing but a statement of alleged errors, none of which state facts which are "newly discovered." Appellant's own self-serving affidavit, totally unsubstantiated by any objectively credible source are insufficient to support a Rule 33 motion for new trial. *Id.*, at 1354. See, e.g. *United States v. Ugalde*, 861 F.2d 802, 806 (5th Cir.1988), cert. denied 490 U.S. 1097, 109 S.Ct. 2447, 104 L.Ed.2d 1002 (1989).

Appellants' brief does not discuss the district court's conclusion. Instead, Appellants' have addressed the merits of the substantive issues which the district court concluded it was without jurisdiction to reach. Where the record establishes that the district court lacked jurisdiction over the motion for new trial, this Court has refused to address the underlying substantive issues of a defendant's motion for new trial because the motion was untimely. *United States v. Bramlett*, 116 F.3d 1403, 1406 (11th Cir. 1997) (case involving the "interest of justice" standard under Rule 33).

Because the district court has properly found that the evidence was not newly discovered, and the Appellants have not

questioned that finding before this Court, this Court should not reach the merits of the issues which the Appellants attempted to present to the district court.

II. THE DISTRICT COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL FILED BY VIRGINIA HIGH BECAUSE IT WAS NOT BASED UPON NEWLY DISCOVERED EVIDENCE.

Virginia High filed a *pro se* motion for new trial based upon the reversal of this Court. (R6-509-1). In the motion, she made conclusory allegations, without any supporting information that, (1) the court erred in denying her motion for acquittal; (2) the verdict was contrary to the weight of the evidence; (3) the court erred in charging the jury; (4) the court erred by failing to sever her case from her co-defendants; (5) there was an illegal search and seizure of the wrong business; (6) the evidence did not sufficiently demonstrate an agreement for the multiple conspiracies; and (7) the court erred by failing to grant a mistrial. *Id.* The government did not file a response.

The district court denied the motion for new trial, (R6-547). The district court stated that the "motion for new trial simply restates arguments that have been made to and rejected by this court previously." (R6-547-1). The district court noted that the only ground which Virginia High had not previously raised related to the opinion of this Court relating to improper charge on Count Thirteen, the conviction on which count this Court reversed and remanded for a new trial. (*Id.*). The district court ruled that there was no viable basis for the defendant's motion, inasmuch as

the government had dismissed Count Thirteen. (R3-543; R6-544, 547-2).

The district court correctly denied Virginia High's motion for new trial as a matter of law because Virginia High's motion failed to satisfy any part of the five-part test for newly-discovered evidence. In particular, the grounds stated in the motion were stated only as conclusions, unsupported by any factual statement or argument relying upon facts. Therefore, the motion on its face failed to even allege that the evidence upon which Virginia High was relying was discovered following the trial. *Hall*, 854 F.3d at 1270.

The district court did not abuse its discretion by denying the motion for new trial.

CONCLUSION

For the above and foregoing reasons, the government respectfully requests that this Court affirm the district court's denial of the Appellants' motions for new trial.

Respectfully submitted,

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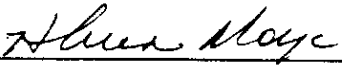
CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States Mail a copy of same in an envelope with correct postage for delivery:

Virginia High
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P.O. Box 7006
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This 27th day of JULY, 1999.



H. ALLEN MOYE
ASSISTANT UNITED STATES ATTORNEY