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,

Defendant-Appellant.

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;

(8) The Honorable Robert L. Vining, Jr., Senior, United States District Court Judge, Northern District of Georgia; and

(9) M. Elizabeth Wells, Appointed Counsel for this appeal.

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. WHETHER THE DISTRICT COURT PROPERLY DENIED THE MOTIONS FOR NEW TRIAL BASED UPON NEWLY-DISCOVERED EVIDENCE.

II. WHETHER THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTIONS FOR APPOINTMENT OF COUNSEL FOR REPRESENTATION IN THEIR MOTIONS FOR NEW TRIAL BASED UPON NEWLY-DISCOVERED EVIDENCE.

III. WHETHER APPELLANTS MAY RAISE FOR THE FIRST TIME ON APPEAL FROM DENIAL OF THEIR MOTIONS FOR NEW TRIAL, SENTENCING ARGUMENTS THAT WERE NOT PRESENTED TO THE DISTRICT COURT.

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 co-defendants Alex Gracia and Robert Ward, in September, 1993, before the Hon. Robert L. Vining, Jr., United States District Judge. (R9; R12-20,22,24).

On October 13, 1993, 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); of participating in a conspiracy to launder drug proceeds, structure currency transactions and 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; Counts 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.[1] *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 August 5, 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; R6-512, 1:97-CV-2305). Virginia High also filed a separate letter requesting the appointment of counsel because her trial counsel declined to represent her beyond the direct appeal. (R6-513). On February 26, 1998, the district court denied the motion for new trial and the motion to vacate as amended, as well as Virginia High's request for appointment of counsel. (R6-547-4).

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[1]The 60-month sentence rendered by the district court on Count 13 was to run concurrent with the sentence imposed on other counts of conviction. (R23-9; R24-11).

Judgment was entered denying the 28 U.S.C. §2255 motion, on February 27, 1998. (R6-548).

Virginia High filed a notice of appeal on March 16, 1998, which the government construed as being from the district court's February 26, 1998, denial of the various motions. (R6-550). As to the Motion to Vacate, the district court denied a 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 appeared to have jurisdiction to consider the appeal from the denial of the motion for new trial only. (R6-570).

B. The Appeal in Case 99-8169

On December 17, 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 "Statement of Facts" citing 73 issues alleged to be "prima facie" evidence that the court should grant the Rule 33 motion. (R3-559; R6-559, Statement of Facts, p. 16). The motion also alleged issues related to the effectiveness of trial counsel. (R6-559, ¶ 73).

On December 31, 1998, the High's filed a joint motion for appointment of counsel and alleged that each of them had been denied effective assistance of counsel from investigation of the criminal case through the post-conviction process. (R6-560-2).

The motion for appointment of counsel was accompanied by an Affidavit executed by George High only, which is a 10-page documentation of case law and a narrative attacking the Highs' defense counsel and the prosecution. (R6-560-7-10). The motion contains no citation to the record.

The district court denied the motion for new trial. (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 district court also denied the motion for appointment of counsel. *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, in Appeal No. 98-8429, filed 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. After the docketing of these cases in this Court, Virginia High filed a *pro se* brief. The government filed its brief, and a corrected brief on July 28, and August 20, 1999. With permission from this Court, the

government subsequently filed a second corrected brief to address those issues which were raised separately by George High. George High's brief was served on the government after the government had filed its original brief.

On June 2, 2000, after the parties had filed briefs and the briefing schedule was closed, this Court appointed counsel to represent Appellants. Appointed counsel submitted a brief on behalf of the Appellants on September 16, 2000.

2. Statement of the Facts

The facts of the criminal case were set out by this Court in the published opinion on direct appeal. *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

I. This Court reviews 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).

II. This Court reviews the district court's denial of a motion for appointment of counsel based on newly-discovered evidence under the abuse of discretion standard. *United States v. Lee*, 513 F.2d 423, 424 (D.C. Cir. 1975); *United States v. Birrell*, 482 F.2d 890, 892 (2d Cir. 1973); *Dirring v. United States*, 353 F.2d 519, 520 (1st Cir. 1965).

III. Theories or arguments in support of a claim which were not presented to the district court ordinarily will not be considered by the appellate court. *See Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994); *Allen v. Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984). If considered, the claimed error is to be reviewed for plain error only. *See Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Webb*, 943 F.2d 43, 44 (11th Cir. 1991).

SUMMARY OF THE ARGUMENT

I. The district court properly denied Appellants' motions for new trial on the basis of newly-discovered evidence. The district court considered the issues only to determine if they were properly before the court on a motion for new trial based upon newly-discovered evidence. The district court correctly concluded that the motions did not rely upon "newly-discovered evidence" because the Appellants failed to satisfy the five-part test for "newly discovered evidence." For that reason, the district court lacked jurisdiction to consider the motions, and properly denied them.

II. The district court correctly denied Appellants' motions for appointment of counsel to investigate their case for presentation of their motions for new trial based on alleged newly-discovered evidence. The issues presented in the motions for new trial were not based upon newly-discovered evidence. Thus, the district court did not have jurisdiction to consider the motions. Thus, the district court did not abuse its discretion in denying the motions for appointment of counsel to investigate their case.

III. Appellants' sentencing arguments were not presented to the district court, and are not properly before this Court. However, even if the issues deserve any merit, the district court did not plainly err by failing to address the issues, particularly in the context of a motion for new trial based upon newly discovered evidence.

ARGUMENT AND CITATIONS OF AUTHORITY

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

After reviewing the motions for new trial (R3-559; R6-509; R6-559), the district court denied the motions. (R3-547; R3-561, R6-561). The Court stated in its January 15, 1999, order,

> [b]ecause the defendants, in their motion for 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 based on newly discovered evidence *only within three years after the verdict or finding of guilty.* Fed.R.Crim.P. 33 (1999)(emphasis added). The modified rule became effective December 1, 1998. The previous rule allowed a defendant to file a motion for new trial based on newly discovered evidence *only before or within two years after final judgment.* Fed.R.Cr.P. 33 (1998)(emphasis added).

Rule 33 of the Federal Rules of Criminal Procedure 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

trial motion filed within this seven-day period. *Hall*, 854 F.2d at 1270-1271.

However, once this seven-day period has elapsed, the district court no longer has jurisdiction to hear a motion for new trial, or extend period of time in which motion may be filed, when based upon the "interest of justice" standard. *Id.*; *United States v. Hill*, 177 F.3d 1251 (11th Cir. 1999); Fed.R.Crim.P. 33 (1999); *DiBernardo*, 880 F.2d at 1223. Because the time periods in Rule 33 are jurisdictional, once the seven-day period elapses, a district court has jurisdiction to consider a motion for new trial only if the motion is founded upon "newly discovered evidence." Fed.R.Crim.P. 33 (2000)(emphasis added); *United States v. Corrigan*, 217 F.3d 841, 2000 WL 991699 **3 (4th Cir. 2000)(Table);[2] *DiBernardo*, 880 F.2d at 1223-24.

In order to demonstrate the existence of "newly discovered evidence", 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, (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. *DiBernardo*, 880 F.2d at 1224; *Hall*, 854 F.2d at 1271; *Bentley v. United States*, 701 F.2d 897, 898 (11th Cir. 1983). A motion made pursuant to Rule 33 of

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[2]A copy of the unpublished opinion is attached and incorporated herein. 11th Cir. R. 36-2.

the Federal Rules of Criminal Procedure 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 (1946).[3]

A. Virginia High's Motion for New Trial

On August 5, 1997, Virginia High filed a timely motion for new trial. (R6-509). The motion was filed prior to the issuance of the October 15, 1997 mandate, (R6-534). *United States v. Dayton*, 981 F.2d 1200, 1203 (11th Cir. 1993)(interpreting "final judgment" in Rule 33 to run from the return of the mandate after a criminal conviction has been affirmed). The district court found that the motion for new trial filed by Virginia High because it was not based upon newly discovered evidence. (R6-547).

Virginia High's *pro se* motion for new trial was based upon the decision 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

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[3]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). *See also United States v. Ugalde*, 861 F.2d 802, 806 (5th Cir. 1988)(proffered evidence goes directly to proof of guilt or innocence)(citations omitted). Here, there is no claim of actual innocence.

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 district court denied the motion for new trial without requesting a response from the government. (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."[4] (R6-547-1). The district court noted that the only ground that Virginia High had not previously raised related to the opinion of this Court relating to an 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 the issue was moot because the government had dismissed Count Thirteen. (R3-543; R6-544, 547-2).

The district court correctly denied Virginia High's motion for new trial. Because Virginia High's motion failed to establish that

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[4]The district court need not address issues previously adjudicated on direct appeal. *See generally Davis v. United States*, 417 U.S. 333, 342 (1974)(claims raised and disposed of in a previous appeal are precluded from reconsideration in a § 2255 proceeding); *United States v. Nyhuis*, 211 F.3d 1340, 1345 (11th Cir. 2000); *United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981).

it was based upon newly-discovered evidence, the district court lacked jurisdiction to consider the motion further.[5]

B. George and Virginia High's Joint Motion for New Trial

Appellants filed a joint motion for new trial on December 17, 1998. (R3-559; R6-559). The joint motion was filed after the effective date of the amendment of Rule 33 on December 1, 1998. The amended rule states that the motion for new trial may be made within three years after the verdict or finding of guilty. Fed.R.Crim.P. 33 (1999). The verdicts of guilty were rendered by the jury on October 13, 1993. (R2-348; R5-349). Three years from the verdict date expired on October 12, 1996. The time limits set forth in Rule 33 are jurisdictional. *See Corrigan, supra; United States v. Smith*, 62 F.3d 641, 648 (4th Cir. 1995). Thus, the joint motion for new trial was untimely under the modified Rule 33, and the district court lacked jurisdiction to consider it.

Even assuming that the motion was timely, the "newly discovered evidence" standard would govern the district court's inquiry. *See DiBernardo*, 880 F.2d at 1224; *Hall*, 854 F.2d at 1271. Here, the district court found that the evidence offered by Appellants failed to meet the five-part test for "newly discovered evidence." (R3-561-2; R6-561-2).

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[5]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 finding that the evidence was not newly-discovered is not clearly erroneous. First, the district judge was the same judge who presided over the trial, and was familiar with the trial record, as well as the post-trial record. *See, Bentley, supra*, at 899. Second, the narrative statement of facts provided by Appellant George High relates exclusively to evidence presented at trial, or to facts from events in which he was a participant. In order for evidence to be "newly discovered evidence", the factual matters themselves, not the legal significance of those facts, must be unknown to a criminal defendant prior to the return of the jury verdict. If those facts are known, as the district court concluded, 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) contained nothing but a statement of alleged errors, none of which relied upon facts which were "newly discovered." Additionally, ineffective assistance of counsel issues are generally not considered newly discovered evidence.[6] (R6-559-

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[6]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); *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.

13,16). Appellant's own self-serving affidavit, uncorroborated by evidence from any objectively credible source was insufficient to support a Rule 33 motion for new trial. *Calderon*, 127 F.3d at 1354. *See, e.g. Ugalde*, 861 F.2d at 806.

The district court correctly denied the joint motion for new trial as a matter of law since the motion was both untimely and was not founded upon newly-discovered evidence. For both of these reasons, the district court lacked jurisdiction to consider the motion for new trial.

Because the district court did not address the merits of the issues raised, this Court need not address the merits of the issues.

II. THE DISTRICT COURT DID NOT ERR BY DENYING APPELLANTS' MOTIONS FOR APPOINTMENT OF COUNSEL TO REPRESENT THEM IN THEIR MOTIONS FOR NEW TRIAL.

Appellants argue that they should have been provided counsel to adequately investigate their case. (Appellant's Brief, pp. 13-17). Appellants request that this Court remand their case to the district court with an order directing that the Highs be appointed counsel, and that they be allowed to file successive motions for new trial and out-of-time 28 U.S.C. § 2255 motions to vacate. *Id.* at 17.

The record does not demonstrate that counsel was needed to assist Appellants with their motions for new trial. A defendant is not entitled under the Criminal Justice Act, 18 U.S.C. § 3006A, or

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1977). *But see United States v. Brown*, 476 F.2d 933, 935 n. 11 (D.C.Cir. 1973).

the Sixth Amendment, to appointment of counsel on a motion for new trial. *See United States v. Tajeddini*, 945 F.2d 458, 469-70 (1st Cir. 1991), *abrogated on other grounds, Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *United States v. Lee*, 513 F.2d 423 (D.C. Cir. 1975); *United States v. Birrell*, 482 F.2d 890, 892 (2d Cir. 1973); *Dirring v. United States*, 353 F.2d 519 (1st Cir. 1965). Though counsel may be critical during certain post-conviction criminal proceedings, such is not the case here.

The district court denied Virginia High's request for appointment of counsel based on its finding that there was no viable basis for a new trial, (R6-547-2), and there was no demonstration made by Virginia High that her counsel rendered ineffective assistance of counsel. (R6-547-4). Indeed, the basis for Virginia High's request for appointment of counsel was the fact that her trial counsel was no longer going to represent her in any post-conviction proceeding. *See* R6-513. The district court further denied Appellants appointment of counsel based on its finding that the Highs had failed to demonstrate that the motions were founded upon alleged "newly discovered evidence" not known to them at the time they filed their direct appeals, or in the case of Virginia, at the time she filed her previous motion for new trial. (R6-561-2).

Likewise, Appellants' reliance on *Williams v. Turpin*, 87 F.3d 1204 (11th Cir. 1996), *aff'd on remand*, 185 F.3d 1223 (1999)(right to effective counsel at motion for new trial) is not persuasive. *Williams* held that a criminal defendant has a constitutional right

to effective counsel at the motion for new trial stage of Georgia's Unified Appeal Procedure, and that defendant was entitled to an evidentiary hearing. 87 F.3d at 1208-11. *Williams* is procedurally different from the instant case. First, this Court has never held that a defendant tried in federal court is constitutionally entitled to counsel in connection with a new trial motion under Rule 33.[7] Second, in *Williams*, the defendant first raised his claim of ineffective assistance of trial counsel through his newly appointed appellate attorney, in his motion for new trial. *Id.* at 1207. Williams had a lawyer at his motion for new trial hearing, and Williams was entitled to an additional evidentiary hearing for purposes of establishing cause and prejudice for failing to present his newly-discovered evidence earlier, and only because he had proffered "specific facts" sufficient to support a finding of cause and prejudice that would entitle him to an evidentiary hearing. *Id.* at 1211. Unlike *Williams*, here, the district court was not presented with any specific facts to substantiate that appointed counsel was warranted to assist the Highs in an investigation merely based on their incarceration status. *See* Appellant's Brief, p. 16.

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[7]The government recognizes that a defendant is entitled to counsel throughout the criminal process, including during the direct appeal process. *See Ross v. Moffitt*, 417 U.S. 600, 615-16 (1974); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963); *Douglas v People*, 372 U.S. 353, 357 (1963). However, here the Appellants had the benefit of counsel on direct appeal to this Court. While a motion for new trial under Rule 33 may be part of the direct appeal process, here it was not. Instead, the motions were filed following this Court's decision on direct appeal.

Here, by finding that the evidence was not "newly discovered," the district court implicitly found that it lacked jurisdiction to even consider the merits of the issues raised. (R6-547-1; R6-561). Therefore, the district court did not err in failing to appoint counsel to represent the Highs because the district court lacked jurisdiction to address the merits of the motion.

III. APPELLANTS HAVE PRESENTED SENTENCING ARGUMENTS TO THIS COURT WHICH WERE NOT PRESENTED TO THE DISTRICT COURT.

Appellant George High argues that the district court erred at sentencing by failing to state reasons for imposing a sentence at a particular point in the guideline range. (Appellant's Brief, p. 17). Appellants further argue that the district court erred by failing to conduct a separate sentencing hearing after remand by this Court from the direct appeal of the convictions and sentences, and failing to refund the special assessment to the Appellants for the dismissed count. (Appellant's Brief, p. 20). These arguments were not presented below in connection with the motions for new trial. For this reason, these issues should not be addressed by this Court on appeal. *See Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994); *Allen v. Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984).

While the failure to present these arguments in the district court ordinarily would constitute a waiver on appeal, assuming that this Court considers these arguments, there would not be any plain error.

A. George High's Sentencing Complaint

The district court sentenced George High to 97 months in prison. (R2-394). The district court reached that sentence by sentencing George High at base offense level 28, criminal history I, and sentenced him at the high end of the resulting guideline range of 78-97 months. (R24-9).

George High's principal complaint seems to be that he was sentenced at the high end of the guideline range and the district court believed that it only had to state a particular reason if the sentence "exceeded the recommended guidelines by twenty-four months rather than simply exceeded twenty-four months." (Appellants' Brief, pp. 18,19). However, a sentence within the guideline range generally will not be reviewed on appeal, and the district court is not even required to state its reasons for selecting a particular point within the range where, as here, the range does not exceed 24 months. *See* 18 U.S.C. §§ 3553(c)(1), 3742(a); *United States v. Veteto*, 920 F.2d 823, 826 (11th Cir. 1991); *United States v. Parrado*, 911 F.3d 1567, 1572-73 (11th Cir. 1991); *United States v. Alamin*, 895 F.2d 1335, 1337 (11th Cir. 1990). *See also United States v. Webb*, 943 F.2d 43, 44 (11th Cir. 1991)(reviewing sentence within guideline range only for plain error, where no objection was raised below).

Nevertheless, there was no explanation needed by the district court because George High's sentence did not exceed 24 months. The difference between the low and high end of the guideline range is only 19 months. The district court did state that the sentence

imposed was within the guideline range that did not exceed 24 months and there was no reason for the court to depart. (R24-12). During the sentencing, the district court stated that the evidence at trial had shown that the boss in the conspiracy with the special real estate skill was actually Mrs. High. (R24-7). As Appellants correctly state, during Virginia High's sentencing on the same date, after the district court found that the sentence did not exceed 24 months, the district court found that the sentence was sufficient punishment, would deter future criminal activity and would protect the public. (R23-10). Thus, it is evident that the district court made findings regarding Ms. High that it did not make regarding Mr. High but did so because she was more involved in the real estate money laundering activities. Therefore, the district court did not err in failing to state any reasons for imposing the 97-month sentence imposed on George High.

B. Appellants' Special Assessment Complaint

Appellants' principal argument, here, seems to be that they are suffering from collateral consequences by the fact that each of them may have paid the special assessment amount to the district court based on the dismissed count - Count 13. (Appellant's Brief, p. 20). Assuming that Appellants did pay the assessment amount on Count 13,[8] the solution is for this Court to remand with specific instruction to the district court to refund that amount to each Appellant. However, there is no need for this Court to review the

[8]Appellants have offered no proof of their payment of this amount.

sentence otherwise. *See United States v. Witek*, 61 F.3d 819 n.8 (11th Cir. 1991); *United States v. Caldwell*, 776 F.2d 989, 1006 n. 21 (11th Cir. 1985). Here, any other error, by the district court in connection with Appellants' sentencing arguments was not clear or obvious. *See Johnson v. United States*, 520 U.S. 461 (1997).

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,

RICHARD H. DEANE, JR.
UNITED STATES ATTORNEY

H. ALLEN MOYE
ASSISTANT UNITED STATES ATTORNEY

Assisted by:
LORAINE MCNEILL
Paralegal Specialist

(Cite as: 217 F.3d 841, 2000 WL 991699 (4th Cir.(N.C.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

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United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Mark CORRIGAN, Defendant-Appellant.

No. 98-4075.

Submitted June 30, 2000.
Decided July 19, 2000.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge. (CR-96-128-H).

Richard B. Glazier, H. Gerald Beaver, Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., Fayetteville, NC, for appellant.

Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, William Flint Boyer, Third-Year Law Student, Raleigh, NC, for appellee.

Before MURNAGHAN, WILKINS, and MOTZ, Circuit Judges.

OPINION

PER CURIAM

****1** Mark Corrigan appeals his convictions and 188-month sentence imposed after a jury found him guilty of money laundering, conspiracy to commit mail fraud, two counts of mail fraud, and two counts of making false statements. Corrigan challenges his convictions for making false statements, asserting that the district court erred by not submitting the materiality element to the jury. Next, he contends that the district court erred by denying his motion to substitute counsel, as well as his motion to set aside the verdict and for a new trial. Corrigan also attacks his sentence, asserting that the district court erred in applying a nine-level enhancement under U.S. Sentencing Guidelines Manual § 2S1.1(b)(2)(J) (1997), for laundered funds exceeding $10,000,000, and a four-level adjustment under USSG § 3B1.1(a) for his role as a leader or organizer. Finding no reversible error, we affirm Corrigan's convictions and sentence.

I.

Corrigan first challenges his convictions for making false statements (18 U.S.C.A. §§ 2, 1001 (West 2000)), arguing that the district court erred by not submitting the materiality element to the jury. Corrigan asserts that this is a structural error warranting reversing and remanding for a new trial. In the alternative, Corrigan asserts that even if a harmless error analysis applies, the error is not harmless.

To prove a violation of 18 U.S.C.A. § 1001, the government must prove that Corrigan made a false statement to a governmental agency knowingly or willfully and that the false statement was material to a matter within the agency's jurisdiction. See United States v. Sarihifard, 155 F.3d 301, 306 (4th Cir.1998). Although Corrigan correctly asserts that the district court erred by not submitting the materiality element to the jury, see United States v. Gaudin, 515 U.S. 506, 522-23 (1995), his assertion that the error is a structural defect is incorrect. In Neder v. United States, 527 U.S. 1 (1999), [FN1] the Supreme Court has made it clear that harmless error analysis is required even when an element of an offense has been entirely removed from the jury's consideration. See id. at 4.

> FN1. Neder applies retroactively to Corrigan's case because his case was pending on direct review when the Supreme Court issued its decision. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987). The Supreme Court decided Neder eight months before Corrigan filed his brief in this Court.

To determine whether the removal of an element from the jury's consideration is harmless error, the Court must determine "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " Id. at 15 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). "[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly

found to be harmless." Id. at 17. Thus, an error is harmless "if the element was uncontested and supported by overwhelming evidence." United States v. Brown, 202 F.3d 691, 700-01 (4th Cir.2000) (footnote omitted); see also Neder, 527 U.S. at 19 ("In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.").

**2 We find, after a thorough review of the record, that Corrigan's false statements on the documents filed with the governmental agency charged with regulating the tobacco industry were material. See Neder, 527 U.S. at 16 (defining "material" and finding that "the failure to report [over $5,000,000 in] income incontrovertibly establishes that [defendant's] false statements were material to the determination of his income tax liability"). Because Corrigan did not contest the materiality of his statements at trial or on appeal and because the evidence of materiality was overwhelming, we find that the district court's failure to submit that element to the jury was harmless error.

See Neder, 527 U.S. at 17. Corrigan therefore is not entitled to a new trial on this basis.

II.

Corrigan next challenges the district court's denial of his motion to substitute counsel. Corrigan asserts that the district court erred in finding that his counsel of choice labored under a conflict of interest that could not be waived. He also contends that the district court erred in not allowing his then-current counsel to withdraw. [FN2] We review the district court's denial for an abuse of discretion. See United States v. DeTemple, 162 F.3d 279, 288 (4th Cir.1998), cert. denied, 526 U.S. 1137 (1999).

FN2. Corrigan has different counsel on appeal.

Corrigan contends that the district court erred in finding that the attorneys he sought to substitute would have a conflict of interest if they represented both Corrigan and Cecil Humphries, one of Corrigan's co-defendants and a potential government witness. Applying the principles set forth in Wheat v. United States, 486 U.S. 153 (1988), we find no abuse of discretion in the district court's decision to disqualify Corrigan's proposed counsel and to decline to accept Corrigan's waiver of the conflict. See id. at 163-64 (finding that while "[t]he District Court must recognize a presumption in favor of petitioner's counsel of choice, ... that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict"); see also Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (recognizing that "a conflict may also prevent an attorney ... from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another"); United States v. Williams, 81 F.3d 1321, 1324-25 (4th Cir.1996) (upholding district court's decision to disqualify attorney who represented other members of conspiracy, given that dual representation posed threat to attorney's ability to effectively and fairly cross-examine government's potential witness).

Corrigan also asserts that the district court erred in not granting his then- current counsel's motion to withdraw. Under the standards set forth in United States v. DeTemple, 162 F.3d 279, 288 (4th Cir.1998), cert. denied, 526 U.S. 1137 (1999), we find no abuse of discretion in the district court's denial of counsel's motion to withdraw.

III.

**3 Corrigan next contends on appeal that the district court erred in denying his motion to set aside the verdict under Fed.R.Crim.P. 29(c), and for a new trial under Fed.R.Crim.P. 33. He asserts that he is entitled to a new trial because trial counsel labored under an actual conflict of interest and that counsel provided ineffective assistance.

Although Corrigan mentions the Rule 29 motion to set aside the verdict in the caption of the appellate brief section discussing the issue, he provides no argument with regard to that motion in the body of the brief. We therefore find that Corrigan has abandoned the Rule 29 issue on appeal. See Edwards v. City of Goldsboro, 178 F.3d 231, 241 n. 6 (4th Cir.1999) (noting that issues not briefed or argued on appeal are deemed abandoned).

With regard to Corrigan's Rule 33 motion, we find that the district court did not have jurisdiction to consider the motion because it was filed outside the applicable time period. See Fed.R.Crim.P. 33 (requiring that a motion for new trial based on any ground other than newly discovered evidence be filed "within 7 days after the verdict or finding of guilty or within such further

time as the court may fix during the 7-day period"); see also United States v. Smith, 62 F.3d 641, 648 (4th Cir.1995) (finding that time period for filing a new trial motion is jurisdictional). Moreover, Corrigan's Rule 33 motion alleging numerous instances of ineffective assistance of counsel cannot be construed as a timely motion alleging "newly discovered evidence." See Fed.R.Crim.P. 33 ("A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty."); see also Smith, 62 F.3d at 648 (holding that "information supporting an ineffective assistance claim is not 'evidence' within the meaning of Rule 33 and, therefore, ... a motion for a new trial predicated on ineffective assistance of counsel must be brought, if at all, within seven days of [the verdict]").

IV.

Finally, Corrigan challenges his sentence, contending that the district court clearly erred in enhancing his base offense level by nine levels under USSG § 2S1.1(b)(2)(J) for laundered funds exceeding $10,000,000 and by four levels under USSG § 3B1.1(a) for his role in the offense. Our review of the record leads us to conclude that the district court did not clearly err in either instance. See United State v. Hull, 160 F.3d 265, 273 (5th Cir.1998) (stating standard of review for § 2S1.1(b) enhancement) cert. denied, 525 U.S. 1169 (1999), and cert. denied, 526 U.S. 1136 (1999); United States v. Lipford, 203 F.3d 259, 272 (4th Cir.2000) (stating standard of review for § 3B1.1(a) adjustment).

Corrigan asserts that the district court overstated the amount of the laundered funds by attributing transactions not directly conducted by him, effectively double-counting some sales. [FN3] Contrary to Corrigan's assertion, the district court appropriately relied on trial testimony establishing that 12,700,000 pounds of excess tobacco were sold in the dead card scheme during the 1990 to 1992 tobacco seasons using dead cards held or controlled by Corrigan and his co-defendants. The court multiplied the number of pounds by the amount per pound assessed for quantities above a farmer's quota ($1.25 per pound), for a total of $15,875,000 in funds laundered. Finally, although Corrigan contends that he should be held accountable for only the amount he handled personally--approximately $8,000,000--this approach is contrary to the relevant conduct provisions in the guidelines. See USSG § 1B1.3(a). We therefore find no clear error in the district court's calculation of the amount of the funds laundered by Corrigan. See Hull, 160 F.3d at 273.

FN3. To the extent that Corrigan challenges the district court's decision to group the money laundering and fraud offenses under USSG § 3D1.2(d), we find no plain error. See Lipford, 203 F.3d at 271 (stating standard of review); United States v. Walker, 112 F.3d 163, 167 (4th Cir.1997) (holding that money laundering counts may be grouped with other offenses if they are both part of an ongoing or continuous scheme).

**4 Corrigan also challenges the adjustment for his role in the offense, focusing his argument on appeal on the conduct of his co-conspirators. [FN4] A four-level adjustment in the offense level should be made under § 3B1.1(a) "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." USSG § 3B1.1(a). We find that the four-level adjustment was proper, given that Corrigan revised the process by which the proceeds of the sales of excess tobacco were handled, funneling the funds through his corporate bank account in Virginia and personally transporting large sums in his private plane to expedite the transfers. Moreover, at one point during the scheme, Corrigan controlled over twenty books in which the government required tobacco sales to be recorded. We therefore find no clear error in the district court's decision to adjust Corrigan's offense level by four levels. See Lipford, 203 F.3d at 272.

FN4. Corrigan also takes issue with the district court's authority to impose an adjustment greater than the adjustment recommended in the presentence report, when the government did not object to the recommended adjustment and the court did not provide Corrigan with prior notice of its intent to impose an additional level. Although parties are entitled to reasonable notice that the sentencing court contemplates a departure, see United States v. Burns, 501 U.S. 129, 138 (1991), there is no support for Corrigan's assertion that this rule also applies to increasing an adjustment by one level. Cf. Walker, 112 F.3d at 166 (finding that notice requirement does not apply to district court's decision to withhold adjustment for acceptance of responsibility).

V.

Accordingly, we affirm Corrigan's convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

END OF DOCUMENT

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:

M. Elizabeth Wells
Federal Defender Program, Inc.
100 Peachtree Street, Suite 200
Atlanta, Georgia 30303.

This 27th day of OCTOBER, 2000.

H. ALLEN MOYE
ASSISTANT UNITED STATES ATTORNEY