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JAN 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRENT F. WILLIAMS; GUY ANDREW WILLIAMS, Defendants-Appellants.	Nos. 16-10375 16-10423 D.C. No. 2:09-cr-01492-ROS MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Jack Zouhary, District Judge, Presiding**

Submitted January 16, 2018***

Before: REINHARDT, TROTT, and HURWITZ, Circuit Judges.

In these consolidated appeals, Brent F. Williams and Guy Andrew Williams appeal pro se from the district court's order denying their motions under Federal

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Rule of Criminal Procedure 33(b)(1) seeking new trials on their criminal charges for conspiracy, wire fraud, mail fraud, and transactional money laundering.

Appellants raise several claims premised on the assumption that the Department of Justice lacked authority to bring charges against them absent a pre-indictment enforcement action by the Securities and Exchange Commission ("SEC"). Contrary to appellants' contentions, neither the SEC "nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice." 17 C.F.R. § 202.5(f). Therefore, the district court did not abuse its discretion by rejecting appellants' subject matter jurisdiction, *Brady*, and prosecutorial authority claims. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc).

Nor did the district court err by rejecting appellant's remaining contentions that the prosecutors lacked authority. The United States Attorneys' Manual, on which appellants rely, "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." *United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir. 1993) (internal quotations omitted). And, in any event, appellants have not shown that the prosecution of their criminal charges was contrary to any protocols.

We do not consider appellants' remaining arguments, which they failed to raise in their direct appeals and were not a basis for their motions for new trials. *See United States v. Antonakeas*, 255 F.3d 714, 721 (9th Cir. 2001) (declining to consider issue raised for the first time on appeal); *United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998) (declining to consider claims that have could have been raised in an earlier appeal but were not).

The motion for immediate release pending appeal is denied as moot.

AFFIRMED.

FILED

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRENT F. WILLIAMS; GUY ANDREW WILLIAMS, Defendants-Appellants.	No. 16-10375 16-10423 D.C. No. 2:09-cr-01492-ROS District of Arizona, Phoenix ORDER

Before: TROTT and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Appellants' petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 48) are denied.

No further filings will be entertained in this closed case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

-vs-

Guy Andrew Williams

and

Brent F. Williams,

Defendants.

Case No. CR-09-01492-PHX-ROS

ORDER

JUDGE JACK ZOUHARY

On June 28, 2013, Defendants Guy Williams and Brent Williams were convicted of multiple criminal charges stemming from their involvement in a Ponzi scheme. On June 18, 2016, Defendants filed successive Motions for New Trial (Docs. 1616 & 1620), this time *pro se*, primarily arguing their convictions were invalid under a decidedly idiosyncratic interpretation of *Heckler v. Chaney*, 470 U.S. 821 (1985). The Government opposed, Defendants replied, and the Government supplemented (Docs. 1617–1619).

Defendants' Motions are brought under Federal Criminal Rule 33 based on "newly discovered evidence." Rule 33(b)(1) provides "[a]ny motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Defendants filed their Motions shortly before the three-year anniversary of their convictions. Thus, the Motions are timely and must be addressed on their merits.

To be entitled to a new trial under Rule 33(b)(1), Defendants must show the "newly discovered evidence" meets five requirements: "(1) the evidence is newly discovered; (2) [Defendants were] diligent in seeking the evidence; (3) the evidence is material to the issues at trial; (4) the evidence is not (a) cumulative or (b) merely impeaching; and (5) the evidence indicates [Defendants] would probably be acquitted in a new trial." *United States v. Hinkson*, 585 F.3d 1247, 1264 (9th Cir. 2009). Defendants meet none of these requirements.

Defendants' Motions generally seem to be based on a recent discovery that, prior to their criminal trial, "the Securities and Exchange Commission had refused to prosecute or enforce the Mathon securities, through either civil or criminal process" (Doc. 1616 at 28). Defendants claim "the prosecutor knew the Securities and Exchange Commission had refused to [take enforcement action], and that no fraud actually existed," but the prosecutor "withheld and destroyed the exculpatory evidence" regarding the SEC's decision (Doc. 1616 at 32). Defendants further state the Government "withheld, concealed and suppressed" the SEC's failure to take enforcement action in order to prevent Defendants from learning another governmental entity had "usurp[ed] the function and authority of the SEC" (Doc. 1616 at 33). These claims revolve around the false belief that the SEC is the only entity that could have prosecuted Defendants for their actions.

Defendants have not identified any "newly discovered evidence." As explained by the Government, prior to trial Defendants were well aware the SEC had investigated their activities (Doc. 1617 at 2). And given that the criminal case was brought by the Department of Justice, Defendants were aware long ago that it was not the SEC pursuing criminal charges against them. Thus, it is simply not possible Defendants only recently learned of the SEC's investigation or non-involvement in this case. Defendants fail the first and most basic requirement of a Rule 33(b)(1) motion.

Moreover, Defendants have not established they were diligent in obtaining the allegedly new evidence. Defendants waited until almost three years after their convictions to file their Motions and offer no explanation for this delay. Without evidence establishing Defendants were diligently pursuing the evidence, the Motions fail the second requirement. *See United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005) (noting defendant had not been diligent in obtaining evidence when evidence "could have been obtained at any time").

The remaining three requirements involve the merits of the "newly discovered evidence," and direct this Court to address (1) whether the evidence is material, (2) is merely cumulative or impeaching, and (3) would result in Defendants being acquitted at another trial. Defendants argue the "newly discovered evidence" is of great importance because it establishes the wrong entity prosecuted them. This conclusion is not only wrong, but it is wholly unsupported.

Defendants presume the SEC was the sole entity with the power to bring criminal charges against them. In support of this position, Defendants repeatedly cite the statement in *Heckler*, 470 U.S. at 831, that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Defendants apparently interpret this statement to mean the SEC's failure to bring criminal charges against them precluded any *other* governmental entity from doing so. In other words, the criminal prosecution pursued by the Department of Justice was, somehow, beyond its authority. Defendants believe the SEC's failure to act is material and would result in their acquittal at a new trial. Defendants do not understand that enforcement of the criminal laws rests on the Department of Justice, not the SEC. *Cf. United States v. Hickey*, 367 F.3d 888, 893 (9th Cir. 2004) ("The SEC brought its [civil] action pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. It was not acting as the federal

sovereign vindicating the criminal law of the United States.") (internal quotation marks and citation omitted). Under the SEC's own regulations, when there are indications of criminal activity in connection with securities, the SEC may refer the case to the DOJ for criminal prosecution. In other words, neither the SEC "nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice." 17 C.F.R. § 202.5(f). Defendants' misunderstanding of *Heckler* does not change this fact.

Defendants' remaining two arguments in support of their request for new trials can be addressed very briefly. First, Defendants claim the alleged failure by the prosecution to turn over evidence regarding the SEC's actions violated *Brady v. Maryland*, 373 U.S. 83 (1963). Though Defendants do not coherently develop this argument, they appear to base their *Brady* claim on the prosecution's failure to tell them the SEC was not pursuing criminal charges against them. The standard for obtaining a new trial based on purported *Brady* violations is less onerous than that applicable to a Rule 33 motion but still requires Defendants to establish the withheld information was favorable, was not disclosed before or at trial, and prejudiced Defendants as a result of the non-disclosure. *United States v. Mazzarella*, 784 F.3d 532, 538 (9th Cir. 2015). Here, Defendants have not identified the favorable information at issue and, as explained earlier, Defendants' claim that only the SEC can pursue criminal charges reflects a misunderstanding of applicable law. In addition, Defendants were aware of the SEC involvement long before trial (Doc. 1617). Defendants have no plausible *Brady* claim.

Second, Defendants take issue with Wendy Coy's designation as a special assistant U.S. Attorney in this case. Defendants do not explain how Coy's involvement would entitle them to a new

trial, especially given the evidence that Coy did not actively participate at the trial. The Government has satisfied this Court that Coy was properly designated to assist (Doc. 1619). Defendants' request for a new trial on this basis has no merit.

Three years after their conviction, Defendants continue to resist the jury's properly founded verdict of guilt. Instead of conjuring up specious motions, their time would be better spent recognizing and atoning for their crime.

The Motions for New Trial (Doc. 1616 & 1620) are denied.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

August 9, 2016

Additional material from this filing is available in the Clerk's Office.