

EXHIBIT A

17-810-cr
United States v. Davis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 23rd day of March, two thousand eighteen.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

17-810-cr

MATTHEW DAVIS, AKA SEALED DEFENDANT 1,
AKA MATT,

Defendant-Appellant.

Appearing for Appellant: Walter Mack, Doar Rieck Kaley & Mack, New York, N.Y.

Appearing for Appellee: Jessica Lonergan, Assistant United States Attorney (Abigail Kurland, Margaret Garnett, Assistant U.S. Attorneys, *on the brief*) for Geoffrey S. Berman, U.S. Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Forrest, J.).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,
AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.**

Matthew Davis appeals from the March 21, 2017 memorandum decision and order of the United States District Court for the Southern District of New York (Forrest, J.) denying his motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

In April 2015, Davis was convicted, after a jury trial, of one count of conspiracy to distribute five kilograms or more of cocaine and 280 grams or more of crack cocaine, in violation of 21 U.S.C. § 846. He appealed his conviction, and this court affirmed in a summary order, *United States v. Davis*, 687 F. App'x 75 (2d Cir. 2017) (summary order). Davis moved for a new trial pursuant to Rule 33, arguing newly discovered evidence tainted his conviction.

Davis's Rule 33 motion was based on the testimony of Robert Parris as a government cooperator in *United States v. Jamal Smalls*, No. 14-cr-167. Parris was originally a government witness in Davis's trial, and the government provided Davis with 18 U.S.C. § 3500 material roughly three weeks before the trial started. The government ultimately decided against calling Parris to testify in Davis's trial. Davis argues that Parris's testimony in Smalls's trial demonstrates that Davis was merely a friend of the Smalls family, and not a member of the narcotics conspiracy.

This court reviews the denial of a Rule 33 motion for a new trial for abuse of discretion. See *United States v. McCourt*, 562 F.3d 458, 475 (2d Cir. 2009). Federal Rule of Criminal Procedure 33(a) provides that “[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” In deciding a Rule 33 motion, “[t]he test is whether it would be a manifest injustice to let the guilty verdict stand.” *United States v. Lin Guang*, 511 F.3d 110, 119 (2d Cir. 2007) (internal quotation marks omitted). “For a trial judge to grant a Rule 33 motion, he must harbor a real concern that an innocent person may have been convicted.” *Id.* (internal quotation marks omitted). To merit relief based on a claim of newly discovered evidence, the burden is on the defendant to satisfy five elements: (1) that the evidence is “newly discovered after trial;” (2) that “facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence;” (3) that “the evidence is material;” (4) that the evidence “is not merely cumulative or impeaching;” and (5) that “the evidence would likely result in an acquittal.” *United States v. Owen*, 500 F.3d 83, 88 (2d Cir. 2007) (internal citations omitted).

The district court correctly determined that Davis's Rule 33 motion satisfies none of the standards for a successful Rule 33 motion. First, the government turned over Parris's Section 3500 materials before trial, which included Parris's diagram of the members of the conspiracy and did not include Davis's name. As the Section 3500 materials provided insight into Parris's testimony, and Davis's counsel did not interview Parris or call him as a witness, Davis cannot be said to have acted diligently.

Nor can the evidence be considered material, or even exculpatory. Parris's testimony was consistent with other witnesses: at best Parris's testimony at Davis's trial would provide material for impeachment. Finally, the evidence is unlikely to have led to an acquittal. The testimony at Davis's trial provided a sufficient basis for his conviction, and nothing in Parris's Section 3500 materials directly contradicts that evidence.

We have considered the remainder of Davis's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of August, two thousand eighteen,

United States of America,

Appellee,

ORDER

Docket No: 17-810

v.

Matthew Davis, AKA Sealed Defendant 1, AKA Matt,

Defendant – Appellant.

Appellant, Matthew Davis, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

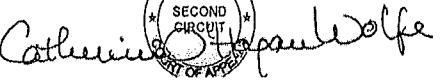

Catherine O'Hagan Wolfe

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: March 21, 2017

-----X-----
UNITED STATES OF AMERICA

:
-v-
:

14 Cr. 296 (KBF)

MATTHEW DAVIS,

:
: MEMORANDUM
: DECISION & ORDER

Defendant.

-----X-----

KATHERINE B. FORREST, District Judge:

Before this Court is defendant Matthew Davis's motion for a new trial based on "newly discovered evidence." As best the Court can tell, the "new evidence" is a transcript of a witness's testimony (Robert Parris), in a different trial that occurred several months after Davis's had concluded. The Court has reviewed defendant's submissions in connection with his application for a new trial, along with all of the exhibits, and finds the motion lacks any merit whatsoever.

The core of defendant's motion appears to be how Parris described Davis during this subsequent trial. According to the defendant, this description was fundamentally at odds with how Davis was portrayed during his own trial months earlier. This Court disagrees. Having read the transcript, there is simply no "there, there." The Parris testimony concerned a different defendant – and was directed events particularly relevant to him.. That defendant Davis is not a core focus is more a statement of the different issues on trial than anything else. In all events, the transcript actually confirms Davis's presence at certain events and places him among the relevant players; if anything, it appears to the Court that Parris's testimony would be inculpatory rather than otherwise.

Defendant Davis's application is more of a fishing expedition than a motion for a new trial based on newly discovered evidence. His brief in support seeks an evidentiary hearing at which various questions could be asked of Parris for the purpose of determining whether he in fact has exculpatory evidence. But a Rule 33 motion based on newly discovered evidence is supposed to have such evidence at the ready – not be seeking it.

The Court has also considered defendant's concerns regarding the 3500 materials. The Court has reviewed the materials, and reviewed his arguments and finds no basis for a Rule 33 motion based on them.

In short, defendant Davis's motion is without any merit and is DENIED.

The Clerk of Court is directed to terminate the motion at ECF no. 141.

SO ORDERED.

Dated: New York, New York
 March 21, 2017



KATHERINE B. FORREST
United States District Judge

EXHIBIT D

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

Matthew Davis

) JUDGMENT IN A CRIMINAL CASE
)
) Case Number: S3 14-cr-00296-KBF-1
) USM Number: 69975-054
)
) Defendant's Attorney
) David M Stern, Jeremy Schneider

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) One (1) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|-----------------|------------------------------------|---------------|-------|
| 21:846-ND.F | CONSPIRACY TO DISTRIBUTE NARCOTICS | 12/31/2013 | 1 |

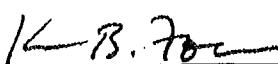
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

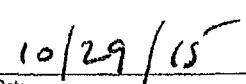
Count(s) Open and Underlying is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/27/2015
Date of Imposition of Judgment


Signature of Judge

Katherine B. Forrest, USDJ
Name and Title of Judge


Date

| |
|-------------------------------|
| USDC SDNY |
| DOCUMENT |
| ELECTRONICALLY FILED |
| DOC #: |
| DATE FILED <u>OCT 29 2015</u> |

DEFENDANT: Matthew Davis
CASE NUMBER: S3:14-cr-00296-KBF-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Two Hundred and Forty (240) Months

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant be housed as close to New York City, as possible.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Matthew Davis

CASE NUMBER: S3 14-cr-00296-KBF-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Ten (10) Years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Matthew Davis

CASE NUMBER: S3 14-cr-00296-KBF-1

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from unlawful use of a controlled substance.

The defendant shall submit to one drug test within 15 days of commencement of probation or supervised release and at least two drug tests thereafter for use of a controlled substance.

The defendant is prohibited from possessing a firearm or other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant must participate in a program approved by the probation department for alcohol abuse.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. This search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant shall be supervised by the district of residence.

DEFENDANT: Matthew Davis

CASE NUMBER: S3 14-cr-00296-KBF-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| <u>Assessment</u> | <u>Fine</u> | <u>Restitution</u> |
|-------------------------|-------------|--------------------|
| TOTALS \$ 100.00 | \$ | \$ |

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss*</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|--------------------|----------------------------|-------------------------------|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| TOTALS | \$ <u>0.00</u> | \$ <u>0.00</u> | |

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Matthew Davis
CASE NUMBER: S3 14-cr-00296-KBF-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.