IN THE SUPREME COURT OF THE UNITED STATES

RAFAEL BEIER,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a criminal defendant's discovery of a recognized mental impairment after conviction at trial constitute newly discovered evidence under Federal Rule of Criminal Procedure 33(b)(1) even though the defendant is aware of the facts underlying the cause of the mental impairment before trial?

2. What should lower federal courts consider when determining whether newly discovered evidence "would probably result in an acquittal" on a motion for new trial under Federal Rule of Criminal Procedure 33(b)(1)?

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No. _____

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Petitioner/Defendant, RAFAEL BEIER, (hereinafter BEIER) respectfully prays that a writ of certiorari issue to review the unpublished memorandum of the United States Court of Appeals for the Ninth Circuit entered on July 2, 2019, affirming his conviction and sentence.

MEMORANDUM AND ORDER BELOW

The Ninth Circuit Court of Appeals' unpublished memorandum affirming Beier's conviction and sentence was filed on July 2, 2019, and is attached in the Appendix (App.) at 1-7. The order denying the petition for rehearing and suggestion for rehearing *en banc* was filed on October 1, 2019, and is also attached. App. at 8. This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

PERTINENT FEDERAL RULE OF CRIMINAL PROCEDURE

Federal Rule of Criminal Procedure 33 states in pertinent part:

> **New Trial**
>
> (a) **Defendant's Motion**. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) **Time to File**.
>
> (1) **Newly Discovered Evidence**. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty....

Fed. R. Crim. P. 33.

STATEMENT OF THE CASE

1. **Introduction**.

Rule 33 of the Federal Rules of Criminal Procedure permits a criminal defendant to move the trial court for a new trial based on newly discovered evidence so long as the motion is filed within 3 years of a jury verdict or finding of guilty. Fed.R.Crim.P. 33(b)(1). The factors federal district courts are to consider to determine if a new trial is warranted under Rule 33 are similar among the federal circuit courts of appeals.[1]

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[1] In the Ninth Circuit, "[t]o prevail on a Rule 33 motion for a new trial based on newly discovered evidence, a defendant must satisfy a five-part test: '(1) the evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the

Beier was diagnosed by a forensic psychiatric expert with a universally recognized mental disease and defect after a jury found him guilty of multiple drug trafficking offenses in the United States District Court in Idaho. The expert found that Beier's impaired mental condition resulted from traumatic brain injury caused by several blows to his head beginning in 1996 with a serious vehicle accident, and running through a 2012 physical beating. The expert concluded that the impairment was substantial enough to support the mental defenses of diminished capacity and insanity.[2]

Beier moved the district court for a new trial under Rule 33(b)(1) based on newly discovered evidence of his mental disease and defect. The district court denied the motion. On appeal, the Ninth Circuit affirmed the district court in an unpublished memorandum. App. at 3-

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evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal.'" *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005) (quoting *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir.1991)); *see also*, *United States v. Desir*, 273 F.3d 39, 42 (1st Cir. 2001); *United States v. Owen*, 500 F.3d 83, 87 (2d Cir. 2007); *United States v. Jasin*, 280 F.3d 355, 361 (3d Cir. 2002); *United States v. Robinson*, 627 F.3d 941, 948 (4th Cir. 2010); *United States v. Wall*, 389 F.3d 457, 467 (5th Cir. 2004); *United States v. Glover*, 21 F.3d 133, 138 (6th Cir. 1994); *United States v. Theodosopoulos*, 48 F.3d 1438, 1448 (7th Cir. 1995); *United States v. Gustafson*, 728 F.2d 1078, 1084 (8th Cir. 1984); *United States v. Jordan*, 806 F.3d 1244, 1252 (10th Cir. 2015); *United States v. DiBernardo,* 880 F.2d 1216, 1224 (11th Cir. 1989); and *United States v. Gloster*, 185 F.3d 910, 914 (D.C. Cir. 1999).

Some circuits require trial courts to evaluate the "nature" of the evidence to determine if newly discovered evidence will probably produce an acquittal under the fifth factor. This is an important distinction left out of the Ninth Circuit and other circuits' definition of the fifth factor that require that "the evidence indicate that a new trial will probably result in acquittal," without reference to the "nature" of the evidence. This important distinction will be discussed in detail below. *See*, Reasons for Granting the Writ, § 2, *infra.*

[2] The expert also concluded Beier was incompetent to be sentenced and was incompetent to stand trial. The district court found Beier competent after an evidentiary hearing. The district court's competency finding was appealed and affirmed by the Ninth Circuit. That decision is not challenged in this petition.

4. In doing so, the Ninth Circuit split from the Fifth, Eighth and Tenths Circuits in deciding what constitutes newly discovered evidence when a mental disease or defect is discovered after a defendant is convicted at trial.

Since Beier knew about his 1996 vehicle accident before trial, the Ninth Circuit concluded that the discovery of his mental impairment resulting from the accident was not "newly discovered." App. at 3. The Ninth Circuit held that Beier "could have discovered" the mental disease and defect "prior to sentencing by exercising reasonable due diligence...."[3] App. at 3-4. The Ninth Circuit then concluded that "because the district court found [Beier] competent and rejected his insanity and diminished capacity arguments, the evidence, even if new, did not indicate that [Beier] would probably be acquitted at a new trial." App. at 4. The Ninth Circuit held that Beier's discovery of the mental disease and defect after trial failed to meet "the second and fifth *Harrington* factors,[4] and the district court did not abuse its discretion." *Id.*

Contrary to the Ninth Circuit, the Fifth, Eighth and Tenth Circuits hold that a mental disease and defect constitute "newly discovered evidence" when the mental impairment is diagnosed after trial. These circuits conclude that a determination on whether a mental impairment constitutes newly discovered evidence does rest on whether a defendant knew of the

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[3] Since this was a motion for new trial, the unpublished memorandum's use of the word "sentencing" is in error. App. at 4. Beier learned of the expert's diagnosis of a mental disease and defect before sentencing, but he did not know of that condition before his jury trial.

The Ninth Circuit also wrote that "initial counsel's failure to order a competency evaluation is not properly challenged in a motion for new trial." App. at 4. Beier did not raise a claim of ineffective assistance of trial counsel on direct appeal. DktEntry 15 at 60-72. Beier's motion for new trial was based solely on discovery of Beier's mental impairment, diagnosed by a forensic expert after trial, but before sentencing.

[4] *See*, note 1, *supra.*

circumstances that caused the impaired mental condition before trial. *See*, *Nagell v. United States*, 354 F.2d 441, 448-49 (5th Cir. 1966); *United States v. Massa*, 804 F.2d 1020, 1022 (8th Cir. 1986); and *United States v. Herrera*, 481 F.3d 1266, 1271 (10th Cir. 2007). The Ninth Circuit's decision here results in a significant split from these circuit decisions.

2. **Facts of this case at trial**.

A grand jury in the District of Idaho indicted Beier with one count of conspiracy to distribute controlled substances, i.e. pain pills in the form of oxycodone and hydrocondone, sixty-six counts of distribution of the pain pills and four counts of distributing the pain pills to a minor.[5] DktEntry 12-1 at 1-8.[6] Beier was convicted after a jury trial on the conspiracy count, sixty-one counts of distribution and four counts of distribution to a minor. DktEntry 12-1 at 9-22. At all times alleged in the indictment, Beier was a medical doctor authorized to dispense controlled substances by prescription and owned a family medical clinic in Silver Valley, Idaho.[7]

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[5] *See*, 21 U.S.C. §§ 841(a)(1), 846 and 859.

[6] "DktEntry 12-1" is the first of twelve volumes of the Appellant's Excerpts of Record filed in the Ninth Circuit. The Docket Entry for the Appellant's Excerpts of Record is 12. Therefore, the excerpts of record, volumes 1 through 12, filed electronically with the Ninth Circuit, will be used as record citations for this petition.

[7] Schedule II and schedule III controlled substances cannot be dispensed to the ultimate user, unless supported by a prescription issued by a "practitioner." 21 U.S.C. § 829(a) and (b). A practitioner "means a physician ... licensed, registered, or otherwise permitted, by the United States ... to distribute, [or] dispense ... a controlled substance in the course of professional practice...." 21 U.S.C. § 820(21).

If a physician dispenses or distributes a controlled substance outside his professional practice, he is not a "practitioner" and is subject to distribution charges under 21 U.S.C § 841 (a)(1). *United States v. Rosenberg*, 515 F.2d 190, 193 (9th Cir. 1975) ("a doctor who acts other than in the course of professional practice is not a practitioner under the Act...").

The federal charges stemmed from pain pill prescriptions Beier wrote for five women between April 5, 2012 and May 28, 2014. DktEntry 12-1 at 2-8. Beier met each of these women at the Showgirls' strip-club in Stateline, Idaho.

Destiny Blaski met him while working as a dancer at Showgirls. She developed a serious addiction from prescription pills she received from Beier. She started having sex with Beier, and testified, "if she didn't sleep with him, eventually the money would stop and so would the pills." DktEntry 12-3 at 365-448; *see*, DktEntry 12-3 at 382-83.

Blaski found people who gave her their personal information to obtain pain pill prescriptions from Beier in their names. Dr. Beier would make fake patient charts to make the prescriptions appear legitimate. Blaski would acquire the prescriptions from Beier. The person named in the prescription would fill it for Blaksi. Blaski gave them pills for their help and kept the remaining pills to sell. DktEntry 12-3 at 384-85. These transactions were evidenced by records from the Idaho Board of Pharmacy, admitted as exhibits during trial. DktEntry 12-3 at 407-15.

Stacy Bernstein was addicted to pain pills. She began purchasing prescriptions from Beier and had no medical reason for pain pills. DktEntry 12-4 at 620-51. Maegan Feidt, a dancer at Showgirls, testified that she paid Beier for prescriptions and had no medical reason for pain pills. DktEtntry 12-4 at 652-85.

Fawnie Bracamonte bought prescriptions from Beier. She sold the pills obtained from those prescriptions. She would either text or call Beier to obtain new prescriptions. At trial, she identified text messages to and from Beier's cell phone that corroborated her testimony. DktEntry 12-2 at 219-88; DktEtnry 12-3 at 297-325.

Beier wrote prescriptions for Jordan Newkirk in her grandmother's name. Newkirk smoked some pills and sold the others. She helped set up a controlled purchase of a prescription from Beier with the Drug Enforcement Agency (DEA). DEA provided Newkirk with $1000.00, and thereafter, she met Beier at a supermarket where they went into a restroom. She disrobed in the restroom to prove to Beier she was not wearing a recording device. Thereafter, she gave the $1000.00 to Beier.

A short time later, video surveillance from a nearby hospital showed Beier and Newkirk entering the hospital restroom. That is where Beier wrote the script in the grandmother's name and gave it to Newkirk. The DEA arrested Beier. They seized the money and a prescription pad from Beier's car. DktEntry 12-4 at 742-77; DktEntry 12-5 at 786-90.

Beier testified in his defense at trial. He denied everything. DktEntry 12-6 at 994-1092; DktEntry 12-7 at 1110-1145.

Beier explained he was "on a mission to try to save Destiny [Blaski]." DktEntry 12-7 at 1135. He testified he wrote prescriptions for hydrocodone for Blaski after a breast augmentation surgery and other prescriptions he wrote for her "very sparingly" for back and neck pain. DktEntry 12-6 at 1027-28.

In a secretly recorded conversation by Blaski, Beier stated he had been selling pain pill prescriptions for two years. In this recording, Ms. Blaski expressed concern to Beier that he might be selling a pain pill prescription to a police informant.[8]

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[8] The recorded conversation is contained in electronic format in a DVD filed with the Ninth Circuit on January 25, 2019. *See*, DktEntry 36.

At trial, Beier explained that the video recorded conversation did not involve selling pain pill prescriptions. The conversation involved illegally harvested ginseng. DktEntry 12-6 at 1033-34; DktEntry 12-7 at 1139; DktEntry 12-7 at 1142-44. Beier explained that Ms. Blaski was not worried he would sell pain pill prescriptions to a police informant. Instead, she worried that he would sell illegally harvested ginseng to a "Russian client" who may be "an undercover cop." DktEntry 12-7 at 1143.

Beier characterized Bracamonte's testimony as "total lies." DktEntry 12-6 at 1036. He denied selling prescriptions to Bracamonte. He testified that he prescribed Bracomonte pain pills for facial trauma and migraine headaches. *Id.*; DktEntry-7 at 1110. He denied contacting her on her cell phone or in text messages. He denied the phone number containing the text messages belonged to his cell phone.[9] DktEntry 12-6 at 1036-39.

Beier denied receiving money from Newkirk for the prescription he wrote in the hospital restroom. DktEntry 12-6 at 1084. Beier denied asking Newkirk to prove to him that she was not wearing a recording device. DktEntry 12-6 at 1083. He denied ever writing prescriptions for Newkirk's grandmother outside of his clinic, except for the prescription written at the hospital. DktEntry 12–6 at 1058.

When asked if he had "ever [sold] prescriptions for cash," Beier responded, "[a]soluetly not." When asked if he "ever [wrote] prescriptions for no medical purpose," Beier responded, "[a]solutely not." When asked if he was "guilty of any of these counts that have been lodged

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[9] The text messages from Bracamonte's phone in Government Exhibit 1039 reference text messages from "Doctor." Other text messages from her phone refer to "mr. beier," "MR. BAIER, and rafeal (sic)." *See*, DktEntry 36.

against [him]..." Beier responded, "[a]bsolutely not." DktEntry 12-6 at 1091-92.[10]

3. **Newly discovered mental disease and defect after trial**.

In 1996, Beier was involved in a roll-over vehicle accident with his son, Dresden Beier. DktEntry 12-10 at 1728, 1731, 1779 and Dkt 12-11 at 2084. Beier, Dresden Beier and another passenger of Beier's truck all lost consciousness. *Id.* Beier was the last person to regain consciousness, but never sought medical attention. *Id.*

Beier reported other episodes of head trauma after the 1996 accident. Beier reported that police beat him up in 1997 or 1998, with no loss of consciousness. In 2006, a "'horse reared up' and hit him in the face," requiring stitches. Beier reported he was "'beat up'" in 2012, taken to the hospital and does not recall the events. DktEntry 12-10 at 1737 and 2003-07; and DktEntry 12-11 at 2084. Beier's family described significant personality changes in Beier, beginning some time after the 1996 vehicle accident. DktEntry 12-8 at 1450-1537.

Beier's son, Dresden Beier, MD., described significant changes after the 1996 accident. DktEntry 12-8 at 1503-1532. He said that before the accident his father was "a normal guy." *Id.* at 1512. Dresden said his father "was not aware that he was doing anything wrong" with Destiny. *Id.* 1516. Dresden said the person he knew before the 1996 accident and the person that developed after the accident were "[t]otally different people." *Id.* at 1517.

Beier's oldest son, Branden Beier, observed similar changes in Beier's personality after the 1996 truck accident. DktyEntry 12-8 at 1450-78. Branden testified, it became "really difficult for [his Dad] to actually see the same thing or whatever the situation was in the same

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[10] All of the prescriptions alleged in the substantive counts of the fourth superseding indictment were evidenced by Board of Pharmacy records from Idaho and Washington states, and were admitted at trial. *See,* DktEntry 12-1 at 2-7.

way that maybe [others] would rationalize or see an event." *Id.* at 1554. Both Branden and Dresden observed their father change his style of clothing, dressing like he was in his 20s, instead of his late-50s or early-60s. *Id.* at 1463 and 1512-13. Both described this as different from before, and Branden described this as "[v]ery unusual." *Id.*

Beier's wife, Yanhau Gao, testified that over time Beier began neglecting his medical practice. Dkt12-8 at 1484. Around 2011, she had to cut Beier off from access to finances. *Id.* at 1485. Ms. Goa learned that Beier was taking money from the business and giving it to Blaski. *Id.* She did not believe that Beier "[knew] the boundaries." *Id.* at 1490.

After trial, Beier acquired new counsel for sentencing. New counsel "detected an acute inability [in Beier] to rationalize and process facts that are obvious in his case, especially those facts that are beyond dispute and that run [] counter [to his] view of the case." DktEntry 12-10 at 2008-09. New counsel believed that Beier's "rigidity and his thought process is due to an impaired mental condition as opposed to some criminal design." New counsel observed that Beier presented "himself as authentic even though his view consistently [] strays from real facts." *Id.* at 2009.

Before Beier's sentencing, the district court granted new counsel's request to elicit neuropsychologist, Elizabeth Ziegler, Ph.D, to conduct a competency evaluation. After neuropsychological testing , Dr. Zeigler "strongly suspected some degree of delusional disorder...." DktEntry 12-10 at 1784. She recommended that "Dr. Beier undergo a more specialized forensic psychiatric evaluation to better evaluate his delusional thought process and undergo an MRI to rule out structural abnormalities." *Id.*

The district court granted a request for Richard S. Adler, M.D., to conduct the more specialized forensic psychiatric evaluation to determine competency to be sentenced. New counsel also sought Dr. Adler's opinion on whether Beier suffered from a diminished capacity or was insane at the time of the offenses due to a mental disease or defect. *Id.* at 2010.

After a thorough and comprehensive examination, including collaboration with other experts and neuroradiological imaging, Dr. Adler concluded that a reduced mental capacity impaired Beier's ability to form the intent to commit the crimes, and impaired his ability to distinguish right from wrong. He concluded that Beier's mental "incapacity exist[ed] by virtue of *both* a mental disease and a mental defect, namely Mild Neurocognitive Disorder (mild-NCD) Due to Traumatic Brain Injury (TBI)..." DktEntry 12-10 at 1726, 1752, and 1908-19 (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)).

To diagnose mild-NCD, the DSM-5 requires "[e]vidence of modest cognitive decline from a previous level of performance in one or more cognitive domains (complex attention, executive function, learning and memory, language, perceptual-motor, or social cognition)." DktEntry 12-10 at 1913. The DSM-5 suggests that cognitive impairments be "documented by standardized neuro-psychological testing..." *Id.* "Traumatic brain injury" (TBI) is a cause of mild-NCD *Id.*

The DMS-5 instructs that mild-NCD may be accompanied by "psychotic symptoms ..." where "[p]aranoia and other delusions are common features, and often a *persecutory theme* may be a prominent aspect of delusional ideation." *Id.* at 1914 (emphasis added). However, "disorganized speech and disorganized behavior are not characteristic of psychosis in NCDs." DktEntry 12-10 at 1914.

"[D]isinibition" is an "important behavioral symptom[]" associated with a NCD. *Id.* Mild-NCD impairments are evidenced by a 1-2 standard deviation below the norm, which results in functioning between the 3rd and 16th percentiles. *Id.* at 1915. Neurocognitive disorder "may go undiagnosed in high-functioning individuals..." *Id.* "Norms are more challenging to interpret in individuals with very high ... levels of education..." *Id.* at 1916.

Dr. Adler compiled an abundance of information from forensic interviews and from other experts that supported his opinions that Beier had a diminished capacity and was insane at the time he committed his offenses due to mild-NCD caused by TBI. This information included:

* Preliminary neuropsychological testing by Elizabeth Ziegler, Ph.D., where she "strongly suspect[ed] some degree of delusional disorder ..." DktEntry 12-10 at 1730-31 and1784.

* Bureau of Prisons (BOP) psychiatrist, Grant Haven, M.D., diagnosed Beier with an unspecified neurocognitive disorder under the International Classification of Disorders, a diagnosis that includes an element of impaired awareness. DktEntry 12-8 at 1356-58; DktEntry 12-10 at 1905-07.

* Dr. Adler forensically interviewed Beier's trial counsel who observed that Beier "*'had an inability to perceive his own behavior*'" and described Beier as "'*mentally 'separated from what he was really doing.*'" DktEntry 12-10 at 1727 (emphasis in original).[11]

* Dr. Alder forensically interviewed Beier's son, Branden Beier, who noticed personality changes after the 1996 accident. The changes included, "chang[ing] his style of clothes ...

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[11] Trial counsel told Dr. Adler that he "may have made a big mistake in" failing to entertain a competency evaluation. *Id.*

dressing 'like a teenager ... a regression in maturity.'" Braden indicated his father lacked "'the accountability factor,' and that his reasoning was 'very odd ... he minimized things.'" *Id.* at 1728-29.

* Additional neuropsychological testing by Paul Connor, Ph.D, established cognitive impairments between the 3rd and 16th percentiles in: (1) working memory - 9th percentile; (2) story recall - 12th and 13th percentiles; (3) social perception related to auditory skills - 9th percentile; and (4) significant impairment was found "on an executive functioning/problem-solving test, " - 5th percentile. *Id.* at 1740-41.

* An MRI test from the University of Washington School of Medicine,[12] accompanied by "sophisticated quantitative analysis," detected brain defects in "[o]ne of the most important functions of the brain associated with the frontal cortex [] 'metacognitive evaluations of oneself and others." Dr. Adler reported that "[w]hat this means is having the perspective on the basis, rationale, and/or motivation of your own behavior and other persons' behavior" [and] ... this is precisely what Beier can no longer do properly" as a result of his mild-NCD due to TBI. *Id.* at 1742-45 and 1750.

* Dr. Adler obtained a PET test and sought quantitative analysis by expert Andrew Newberg, M.D.[13] Dr. Newberg's quantitative analysis revealed decreased activity in areas of Beier's brain that cause "heightened emotions such as excessive anger or impulsive behaviors, or reduced emotions such as depression." Dr. Newberg saw increased activity

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[12] Magnetic Resonance Image to detect decreased brain volume in different areas of the brain.

[13] Positron Emission Tomography to detect either increased or decreased "metabolic activity" in the brain.

in areas of his brain "associated with problems with concentration or executive functioning such as rapid processing of information or complex problem solving." *Id.* at 1745-46.

All objective neuropsychological testing, radiological neuroimaging and forensic interviews were consistent in supporting Dr. Adler's diagnosis that Beier suffered from significant neurocognitive impairment.

Dr. Adler concluded that "[b]y virtue of [mild-NCD due to TBI], [Beier] continues to maintain a perspective on his case that departs from the 'plain facts,' and his thinking is so separated from reality, that it warrants being described as 'psychotic' as well as 'delusional.'" *Id.* at 1752. Dr. Adler concluded that "there appears to be a direct connection between these cognitive impairments and his ability to form the intent and understand right from wrong associated with the subject crimes." *Id.*

At an evidentiary hearing on Beier's motion for new trial based on newly discovered evidence, Dr. Alder elaborated:

* the impact of Beier's mental disease and defect met both prongs for the insanity defense under federal law.[14] DktEntry 12-8 at 1320-27.

* "Dr. Beier ... is psychotic; his reasoning is not actually based in reality;" he "maintained ... that what he was doing was helping people ... [a]nd ... the helping of people supersedes and is not related to actually breaking the law or failing to appropriately transact his medical responsibilities; that he maintains that this was solely

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[14] Insanity requires clear and convincing evidence that "at the time of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts." 18 U.S.C. § 17(a).

due to being conned or being taken unawares or undermined by the behavior of others ... which is what leads me to calling the thinking psychotic." *Id.* 1321.

* "[Beier] doesn't understand that, first and foremost, he is doing something that is against the law. He believes that he is helping, and that helping supersedes or in some way diminishes from those other considerations." *Id.* at 1321-22.

* "So there's some comment where [Beier] says, 'They are trying to indict me,' which [] would suggest that he understands the legal wrongfulness. But then there's the area of having consideration of the moral wrongfulness. And he believes he is doing God's work. I think he conveyed that he regards himself as being a saint. And he has all kinds of moral and religious considerations that do affect that arm of the wrongfulness, the moral wrongfulness."[15] *Id.* at 1322. Dr. Adler's report and testimony supported an insanity defense that was not presented to the jury at Beier's trial.

* Based on the same reasoning, Dr. Adler testified that the "psychotic nature of Dr. Beier's mental makeup ... that he couldn't form the intent to commit the crime ... based on his mental disease or defect." *Id.* at 1322-23. Similarly, Dr. Adler's report and

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[15] The Ninth Circuit holds that for purposes of the insanity defense, "wrongfulness" under 18 U.S.C. § 17(a) means moral wrongfulness rather than criminal wrongfulness. *United States v. Fresonke*, 549 F.2d 1253, 1255–56 (9th Cir. 1977) ("a defendant lacks substantial capacity to appreciate the wrongfulness of his conduct if he knows his conduct to be criminal but commits it because of a delusion that it is morally justified.'") (quoting *United States v. McGraw*, 515 F.2d 758, 760 (9th Cir. 1975)); *see also United States v. Sullivan*, 544 F.2d 1052, 1056 (9th Cir. 1976) ("someone who commits a criminal act under a false belief, the result of mental disease or defect, that such act is justified, does indeed lack substantial capacity to appreciate the wrongfulness of his conduct, irrespective of whether he can be correctly diagnosed, medically, as 'delusional'" [and] [t]he Wade test for legal insanity requires no more."

testimony supported a diminished capacity defense under Ninth Circuit precedence.[16] That defense was not presented to the jury at Beier's trial.

Dr. Alder's collaborative work with other experts supported two mental defenses that were not presented prior at his trial. The fact that Beier suffered from mild-NCD due to TBI as a result of past events of head trauma was unknown prior to trial. This evidence was discovered only after new counsel sought and obtained a complete forensic psychiatric evaluation from Dr. Adler based on Dr. Ziegler's recommendation.

At the evidentiary hearing, the government offered a report of evaluation and the testimony from Cynthia A. Low, Ph.D., a BOP psychologist.[17] Dr. Low evaluated Beier and offered her testimony only as it related to Beier's competency to proceed to sentencing. Neither Dr. Low's report nor her testimony included opinions on the mental defenses raised by Beier in his motion for new trial. Dr. Low was not asked by the government to evaluate Beier for the

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[16] Under Ninth Circuit case law, diminished capacity applies only when specific intent is an element of the offense. *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988). A doctor, authorized to write prescriptions for controlled substances, must intend to "distribute controlled substances for no legitimate medical purpose and outside the usual course of professional practice" in order to be convicted of unlawful distribution of a controlled substance. *United States v. Feingold*, 454 F.3d 1001, 1010 (9th Cir. 2006).

Likewise, conspiracy is a specific intent crime under Ninth Circuit law. "The defendant must have joined the agreement knowing its purpose and intending to help accomplish that purpose." *United States v. Espinoza-Valdez*, 889 F.3d 654, 656 (9th Cir. 2018) (citing *United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009)). Therefore, diminished capacity and insanity were available legal defenses to all counts of conviction handed down by the jury.

[17] The government called Craig Panos, M.D, at the evidentiary hearing to counter Dr. Adler. Dr. Panos is a clinical doctor, and has handled "well over a thousand" patients with either concussions or traumatic brain injury." Dr. Panos, however, did not conduct a forensic assessment of Beier, nor does he do forensic work. DktEntry 12-9 at 1545-47.

presence of potential mental defenses. DktEntry 12-9 at 1586-87.

In her report, Dr. Low, accepted Dr. Adler's diagnosis of mild-NCD due to TBI. DktEntry 12-11 at 2095. Nonetheless, Dr. Low provided "an alternate/additional hypothesis for some of [Dr.] Beier's symptoms," writing, Beier's "symptoms appear to be better explained by long-standing personality traits and maladaptive coping mechanisms." *Id.*

Dr. Low's report, however, contains significant observations that are consistent with Dr. Adler's diagnosis, and the affect this mental impairment had on Dr. Beier. For example, she reported,

> [Beier] discussed the injustices of his current conviction, stating, "The whole thing is lies." The defendant spoke in detail of how various witnesses lied about him and they received immunity for doing so. He discussed testimony about him allegedly giving large amounts of money to people (supposedly in exchange for selling drugs or prescriptions) but stated he did not have such money and still had financial burdens. He also spoke of a woman breaking into his clinic and stealing his prescription pad. Mr. Beier sounded bitter in stating none of these people were charged with anything and he claimed his trial was a "farce." He further complained of the retained attorney he had then, who did not spend very much time on his case. He advised this attorney of various witnesses to contact to testify Mr. Beier had been "scammed," but the attorney did not seek them.

DktEntry 12-11 at 2085.

Dr. Low further observed,

> [Beier] emphasizes being a naive and gullible victim in various matters, and being easily "conned" and "scammed"....
> ....
>
> Mr. Beier presented as extremely defensive and indignant. He claimed information from the PSR was inaccurate and stated all the witnesses were not credible and were lying because the case involved a drug ring. He reported the prosecution "bought" the

> witnesses. He alleged there was no verification of certain things, despite being read different parts of the PSR. Mr. Beier then asserted, "It's like a witch hunt," and then briefly spoke of the Salem witch trials. He also complained of the "crooked authorities," who "manipulated tons of stuff," and then mentioned Christ being crucified unnecessarily.

DktEntry 12-11 at 2095-96.

Dr. Low's various observations of Beier are entirely consistent with the DSM-5 where it instructs that "often a persecutory theme may be a prominent aspect of delusional ideation" in persons with a NCD. DktEntry 12-10 at 1914. Beier denied to all experts having any mental problems. DktEntry 12-10 at 1737, 1776, 1780 and DktEntry 12-11 at 2084 and 2095 ("Beier does not appear to possess much insight into his mental and emotional functioning....).

Dr. Adler testified that "[t]here was no data from anyone at any time that [Beier] was exaggerating or embellishing." DktEntry 12-8 at 58. Testing showed that Beier's "minimization is not conscious, [and] not intentional." *Id.* at 58-59. Dr. Alder testified that "[t]his was not some kind of fakery." *Id.* at 59. This is consistent with Dr. Ziegler's assessment that Beier's "psychological defensiveness largely appeared to be unconscious and part of his psychiatric make-up rather than a volitional intent to distort the examiner's evaluation." DktEntry 12-10 at 1780.

Dr. Low found that Beier was a "reliable historian," and "*[h]is credibility was sound.*" DktEntry 12-11 at 2078 (emphasis added). All of the experts' observations are consistent with new counsel's observations that Beier "presents himself as authentic even though his view consistently strays from the real facts." DktEntry 12-10 at 2009.

Even though both Dr. Adler and Dr. Low agreed that Beier suffered from mild-NCD due to TBI, a universally recognized mental disease and defect in the DMS-5, the district court found defense experts testimony at the evidentiary hearing "circumspect." The district court found the experts had a "bias in favor of the Defendant." App. at 15.

Nonetheless, the district court found that Beier suffered from NCD due to TBI as diagnosed by Dr. Adler. App. at 18. The district court then found that Beier's "mental defect ... is extremely slight." *Id.* at 18. This finding is contrary to the DSM-5 which requires evidence of a "modest impairment in cognitive performance" to support a diagnosis of mild-NCD. DktEntry 12-10 at 1913.

The district court denied Beier's motion for a new trial based on the newly discovered evidence. The district court in total wrote: "the Court finds the Defendant's mild mental disease and defect did not ... render him [unable] to form the necessary intent to commit the offenses of which he was convicted. Therefore, the Court finds the interests of justice do not warrant granting a new trial in this case. The Motion is denied." App at 26.

The district court's order did not address the newly discovered evidence in relation to an insanity defense. *Id.* The district court did not apply the legal test in *Harrington* in denying Beier's motion for a new trial. *See*, n. 1, *supra*; App. at 25-26. Thereafter, the district court sentenced Beier to serve 192 months in prison where he remains. DktEntry 12-1 at 63.

Beier now asks this Court to grant this petition for writ of certiorari to resolve a split in the circuits on what constitutes newly discovered evidence. He further asks the Court to grant this petition to establish the criteria that guides lower courts in determining when newly discovered evidence will probably result in acquittal on a defendant's motion for new trial.

REASONS FOR GRANTING THE WRIT

1. **The Court should resolve the split among circuits on what constitutes newly discovered evidence under Rule 33 when a mental impairment is discovered after trial.**

The Ninth Circuit held that Beier's discovery of a recognized mental impairment after trial did not constitute newly discovered evidence because he was aware of the head injuries that caused the impairment before trial, therefore, Beier did not act with diligence. App. at 3-4. This runs contrary to the Fifth, Eighth and Tenth Circuit's application of Rule 33(b)(1).

These circuits hold that the diagnosis of an impaired mental condition after trial is the newly discovered evidence. The fact that a criminal defendant knew of the facts underlying the cause of the impaired mental condition is not determinative. *Nagell* from the Fifth Circuit is most instructive.

In *Nagell*, the defendant was convicted after a jury trial with a 1963 attempted bank robbery. *Nagell*, 354 F.2d at 442-43. At trial, the defense contended that the government could not prove the defendant was sane at the time of the attempted robbery. *Id.* Pretrial proceedings lasted nearly nine month that included psychiatric evaluations, a competency hearing, and multiple changes in counsel. *Id.* at 443-45. The defendant had many outburst in court, he demanded he was not insane and insisted he was competent to stand trial. *Id.* The Fifth Circuit stated, "[t]he possibility of insanity was quickly recognized." *Id.* at 443.

The government filed a request for competency determination four days after the defendants arrest. *Id.* The defendant was found competent to stand trial. *Id.* at 444. During trial, several experts testified that the defendant was sane at the time of the crime. *Id.* at 445-56.

After trial, defense counsel learned that the defendant sustained organic brain damage

from a 1954 plane crash he was in while serving in the Army. *Id.* at 443 and 446-47. Expert examinations after trial caused expert opinions to change about the defendant's sanity. The experts concluded that the defendant was insane at the time of the offense as evidenced by the previously unknown organic brain damage. *Id.* at 447-48.

The district court denied a motion for new trial. The factor that "gave the trial court genuine difficulty was the contention by the government ... that since appellant all the time knew of the crucial facts and concealed them from his counsel then the motion must be denied for lack of diligence." *Id.* at 448. The Fifth Circuit rejected that reasoning, stating

> If the concealment has come from a sound mind this undoubtedly would be right. But the proof is really without substantial dispute that appellant was suffering from a mental disorder which caused, if not compelled, him to follow this course. He is thus no more to be bound by it in a serious matter of this kind than any other situation involving mental derangement.

Id. at 448049.

The Fifth Circuit concluded that "all five requirements" for a new trial based on newly discovered evidence under Rule 33 "were met." *Id.* at 448. The court recognized that the rule "empowers the trial court to 'grant a new trial to a defendant if required in the interest of justice.'" *Id.* The court said, [w]e agree with this, especially since the whole purpose of the court is to do justice and prevent injustice." *Id.*

The Fifth Circuit also emphasized the type of evidence that was newly discovered. Since the newly discovered evidence involved a mental impairment, the court seemed cautious to deny this defendant his legal defense. *Id.* at 449. Lastly, the Fifth Circuit stated, "we do not decide the merits of the case." It reversed the conviction, stating, "another jury should have an opportunity

to decide the guilt or innocence of this man in the light of this new evidence." *Id.*

In *Massa*, the Eighth Circuit addressed what is meant by newly discovered evidence when a mental impairment is discovered after trial. In that case, the defendant was convicted of forty-three counts of embezzlement. *Massa.* 804 F.2d at 1021.

After trial, the defense submitted an affidavit from a psychiatric expert who concluded that the defendant's "'magical thinking'" about his co-defendant "prevented him from seeing 'the big picture' [and] from knowing that he and [the co-defendant] were engaged in an embezzlement scheme." *Id.* at 1022. The defendant claimed this newly discovered evidence justified a new trial. *Id.*

The district court denied a new trial, in part, because "'[t]he factual circumstances supporting [the expert's] affidavit were certainly known to both defendant and his family well before the trial of this action,' and, therefore, the court could not infer diligence on the part of the movant to discover this evidence before trial." The Eighth Circuit stated, "[w]e cannot agree with the [district] court's reasoning on this point." *Id.* The Eighth Circuit wrote,

> Although the factual details underlying [the expert's] affidavit were known to Massa prior to trial, he did not know that an expert would opine that those details of his life had so affected his mental state as to render him incapable of committing the crimes with which he was charged.

Id. Just as the Fifth Circuit concluded, the timing of the discovery of the underlying impaired mental condition is the focal point for newly discovery evidence, not the defendant's knowledge of the past factual circumstances that caused the mental impairment.[18]

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[18] Nonetheless, the Eighth Circuit affirmed the district court's denial of a new trial, concluding, a jury would not excuse the defendant of his criminal conduct, and stating, "[a] dependent weak-willed personality is not unique to Massa, and it is certainly no an excuse for

In *Herrera*, the defendant was convicted of conspiracy to distribute 500 grams or more of cocaine. *Herrera*, 481 F.3d at 1268. Four months after his conviction, he filed a motion for new trial based on newly discovered evidence under Rule 33. *Id.*

The crux of the motion was the post-trial diagnosis that the defendant suffered from diabetes. *Id.* The defendant received information that a "doctor could opine generally to the cognitive manifestations of the onset of acute diabetes, magnified by a staph infection ... [and] the combination of medical conditions could cause 'cognitive deficits related to lack of concentration and diminished mental functioning.'" *Id.* at 1269.

The Tenth Circuit affirmed the district court's denial of a new trial based on newly discovered evidence. It concluded that the defendant knew of the symptoms of the diabetes before trial and even consulted a doctor on his medical condition before trial. Thus, a formal diagnosis that was learned a day or two after trial did not constitute newly discovered evidence. *Id.* at 1270-71.

Of significance to this petition is the following passage in *Herrera*:

> This is not to say that a post-trial diagnosis of a serious medical condition cannot satisfy Rule 33. Several cases suggest that diagnoses made available only after trial could in some circumstances form a basis for a new trial, even where the symptoms were known or knowable during trial. *See, e.g., Nagell v. United States*, 354 F.2d 441 (5th Cir.1966) (holding that a previously unknown brain injury the defendant suffered more than ten years prior is newly discovered evidence of his competence even though defendant knew about the injury); *United States v. Massa*, 804 F.2d 1020, 1022-23 (8th Cir.1986) (disagreeing with a district court holding that a post-trial psychiatric assessment could not be newly discovered evidence because the factual circumstances supporting the evaluation were known to defendant

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criminal behavior recognized by the law." *Id.* at 1023.

> at trial); *United States v. Escobar*, 68 Fed.Appx. 836 (9th Cir.2003) (finding that a post-trial re-evaluation of defendant's intelligence could be newly discovered evidence); *Smith v. United States*, 996 F.2d 1219, 1993 WL 206559, 1993 U.S.App. LEXIS 14520 (7th Cir. June 14, 1993) (deciding that an after trial diagnosis of "possible paranoid schizophrenia" could be newly discovered evidence, even though motion was rejected on other grounds).
>
> These cases, of course, involve serious mental conditions and not physical infirmities ...

Id.

Nagell, *Massa* and *Herrera* all establish that determination of whether an impaired mental condition constitutes newly discovered evidence does not turn on when the defendant knew of the factual circumstances that caused the impaired mental condition, but rests on when the impaired mental condition is diagnosed, and if the diagnosis occurs after conviction at trial, the diagnosis is the newly discovered evidence. The Ninth Circuit's decision here creates a significant split from these circuit decisions. App. at 3-4. Consequently, the Court is urged to grant this petition to resolve the split among circuit court, and to ensure the uniform application of Rule 33(b)(1) among lower courts.

2. **This case presents the Court with the opportunity to set out uniform guidelines for lower courts in determining when newly discovered evidence justifies a new trial under Rule 33.**

In *United States v. Agurs*, the Court recognized that a criminal "defendant should have a severe burden of demonstrating that newly discovered evidence probably would result in acquittal" to warrant a new trial under Rule 33. 427 U.S. 97, 111 (1976). The Court also recognized that "[t]his is the standard generally applied by lower courts in evaluating motions for new trial under [Rule] 33." *Id.* at 111 n. 19.

This "high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged[]" by a defendant in a motion for new trial under Rule 33. *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (citing *United States v. Johnson*, 327 U.S. 106, 112 (1946)). Rules on motions for a new trial based on newly discovered evidence are "designed to afford 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." *Johnson*, 327 U.S. at 112.

Findings by a trial court made in relation to a motion for new trial "must remain 'undisturbed except for most extraordinary circumstances.'" *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 356-57 (1963) (citing *Johnson*, 327 U.S. at 111). The Court, however, has not previously addressed what lower courts should consider when deciding whether newly discovered evidence, material to the case, "would probably result in acquittal" at a new trial under the fifth factor of the test.[19]

The circuits consistently recognize that certain types of evidence discovered after trial will generally preclude a lower court from granting a new trial based on newly discovered evidence under Rule 33(b)(1). For example, there is a consensus that newly discovered evidence that is cumulative to the evidence adduced at the first trial, or newly discovered evidence that simply impeaches a witness who testified at trial, is insufficient to the grant of a new trial.[20]

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[19] *See*, n. 1, *supra*.

[20] *See*, n. 1, *supra*.

However, the manner in which the circuits define the fifth factor of the test for a new trial vary. Guidance from the Court that identifies for lower courts what considerations should be made to ensure greater uniformity in applying of the fifth factor is important.

As noted, the fifth factor in the Ninth Circuit requires that the newly discovered "evidence must indicate that a new trial would probably result in an acquittal." *Harrington*, 410 F.3d at 601 (quotation in original) (citation omitted); *see*, n. 1, *supra*. Other circuits use nearly identical language to define this fifth factor. *See*, *Desir*, 273 F.3d at 42 (First); *Owen*, 500 F.3d at 87 (Second); *Wall*, 389 F.3d at 467 (Fifth); *Glover*, 21 F.3d at 138 (Sixth); and *Theodosopoulos*, 48 F.3d at 1448 (Seventh).

Other circuits define the fifth factor differently, resulting in a subtle yet important distinction from the Ninth Circuit and the other circuits. In these circuits, the fifth factor requires that the newly discovered evidence "be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Jasin*, 280 F.3d at 361 (Third); *Robinson*, 627 F.3d at 948 (Fourth); *Gustafson*, 728 F.2d at 1084 (Eighth); *Jordan*, 806 F.3d at 1252 (Tenth); *DiBernardo*, 880 F.2d at 1224 (Eleventh); and *Goster*, 185 F.3d at 914 (District of Columbia).

The Ninth Circuit and the other circuits that require that "the [newly discovered] evidence [to] indicate that a new trial would probably result in acquittal," fails to direct trial courts to the "nature" of the evidence. The other circuits direct trial courts to assess the "nature" of the evidence to determine if a new trial is warranted.

The impact on the distinction between the Ninth Circuit and the other circuits that articulate the fifth factor without directing trial courts to the nature of the newly discovered

evidence, from those circuits that require evaluation of the "nature" of the evidence, is best portrayed in *United States v. Fulcher*, 250 F.3d 244 (4th Cir. 2001). In *Fulcher*, the defendants were convicted after trial of various federal offenses for running a marijuana distribution network at the Bland Correctional Center (BBC), a prison in Virginia. *Id.* at 246.

Before sentencing, the district court received an *ex parte* letter from a DEA agent. The letter explained that, while the agent did not specifically authorize the defendants to work as government operatives, the agent learned of additional facts after trial that would lead the defendants to reasonably believe they were acting as government agents. *Id* at 246-48. After an evidentiary hearing, district court granted the defendants' motion for a new trial under Rule 33 because the agent's letter and testimony at the hearing established newly discovered evidence material to two lines of defense: (1) a public authority defense; and (2) a challenge to the required *mens rea* element for the offenses. *Id.* at 248. The government appealed.

The Fourth Circuit employed the five factor test for determining whether the district court abused its discretion. *Id.* at 249. The fifth factor in the Fourth Circuit requires that the new evidence "be such, *and of such nature*, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Id.* at 249 (quoting *United States v. Custis*, 988 F.2d 1355, 1359 (4th Cir. 1989)) (emphasis added). The Fourth Circuit concluded that the district court did not abuse its discretion in finding that all five factors for granting a Rule 33 motion for new trial were met. *Id.* 249-55.

The Fourth Circuit incorporated the analysis relating to the third and fourth factors into its

analysis of the fifth factor.[21] *Id.* at 255. It concluded that the new evidence "would paint a significantly more persuasive picture than the one presented to the jury at trial." *Id.* at 251. It concluded that the new evidence supported "a defense strategy aimed at negating the *mens rea* for the crime, an essential element of the prosecution's case." *Id.* at 252. The evidence also established an affirmative defense of public authority, i.e., "reasonable reliance upon the actual authority of a government official to engage him in a covert activity." *Id.* at 254.

The government attempted to counter the materiality of these defenses, asserting that neither the defendants' motion, nor the evidence at the hearing, established the DEA agent had actual authority to engage the defendants as covert operators. *Id.* at 254. The Fourth Circuit rejected this argument, stating "if defendants can establish at a new trial that DEA officials authorized them to conduct the operation and that such officials had the actual authority to do so, defendants would be entitled to appropriate jury instructions on the defenses of public authority and innocent intent." *Id.* at 254-55.

Significantly, the Fourth Circuit stated, "[s]ince the jury would then be entitled to acquit the defendants if it concluded that defendants' activities were legitimately authorized, we hold that the district court did not abuse its discretion in concluding that the newly discovered evidence is "material to the issues involved.'" *Id.* at 255. The court reiterated, "if the jury credits [the agents'] testimony that DEA officials may have led defendants to believe that they were acting pursuant to governmental authority, 'it would certainly create[] a record more favorable for the [defendants].'" *Id.*

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[21] Those factors are: "(c) the evidence relied on must not be merely cumulative or impeaching; [and] (d) it must be material to the issues involved...." *Fulcher*, 250 F.3d at 249.

In line with *Fulcher*, the nature of the evidence need not guarantee nor create an almost certain acquittal to justify a new trial under Rule 33. Instead, the nature of the newly discovered evidence must be of such a nature that if a jury at a new trial decides to accept the evidence as credible, the jury would probably acquit the defendant. *Id.*

This rational is consistent with *Nagell*. There, the Fifth Circuit concluded that it was not deciding the merits of the defendant's insanity defense. 354 U.S. at 449. Instead, the Fifth Circuit reversed the district court's denial of the motion for new trial, stating, "we believe another jury should have an opportunity to decide the guilt or innocence of this man in the light of this new evidence." *Id.*

Absent a requirement to assess the nature of the newly discover evidence, the Ninth Circuit and the other circuits' leave trial courts unguided on how to evaluate newly discovered evidence in determining whether the evidence would produce an acquittal. Indeed, the Ninth Circuit here concluded that Beier did not establish that the newly discovered evidence would probably result in acquittal because the district court found he was competent to stand trial.[22]

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[22] The Ninth Circuit's conclusion conflicts with intra-circuit case law. The Ninth Circuit recognizes legal differences between competency to stand trial and mental defenses at trial. *See*, *United States v. Christian*, 749 F.3d 806, 811 (9th Cir. 2014) ("Diminished capacity concerns 'whether the defendant possessed the ability to attain the culpable states of mind which defines the crime[,] [whereas] [c]ompetency ... depends on "whether the defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of understanding--and whether he has a rational as well as factual understanding of the proceedings against him.'"') (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (*per curiam*)).

Moreover, the district court in *Nagell* determined the defendant was competent. *Nagell*, 354 F.2d at 444. Nonetheless, the Fifth Circuit reversed the district's denial of a new trial to allow the defendant to present his insanity defense. *Id.* at 449. Likewise, the district court's competency finding here should not control whether Beier receives a new trial that allows him to present credible evidence supporting mental defenses based on the newly discovered evidence of his mental impairment.

App. at 4. There was no assessment by the Ninth Circuit about the nature of the new mental impairment evidence in relation to the mental defenses, nor any assessment of how this type of evidence may impact a jury at a new trial. *Id.*

This case demonstrates that if trial courts are not directed to assess the nature of newly discovered evidence to determine if the evidence indicates that a new trial would probably produce an acquittal, then there is nothing that guides or aids the lower courts discretion in assessing the strength of the fifth factor in a defendant's motion. This scenario allows the district courts to be the ultimate trier of guilt or innocence instead of a jury. In fact, the district court in this case specifically found that Beier's mental impairment did not render him incapable of forming the intent to commit the offenses, a finding typically reserved for a jury at trial. App. at 26. Unless there is some requirement for the district court to assess the nature of the evidence, and what impact the new evidence would on a jury, there is little to guide the trial court's discretion. *See*, *Fulcher*, 250 F.3d at 254-44. Thus, insisting that lower courts look to the nature of the evidence would establish a universal framework upon which lower courts can better exercise discretion under Rule 33(b)(1).

The nature of the newly discovered evidence in this case is Dr. Adler's diagnosis of a significant mental disease and defect that supports two mental defenses - diminished capacity and insanity. Beier did not raise these defenses at trial, as he did not know of his mental impairment, and therefore, he had no factual basis to do so. The defense of diminished capacity vitiates intent, an essential element in each of the offenses charged against Beier, and insanity is a statutorily recognized legal defense. If the jury accepts the newly discovered evidence as

credible, then the new trial would probably produce an acquittal. *Fulcher*, 250 F.3d at 255.

In addition, the newly discovered evidence in this case is much stronger than the evidence at issue in *Fulcher*. Here, Dr. Adler's opinions are supported by an extensive and comprehensive forensic psychiatric evaluation consisting of forensic interviews with family members and collaboration with other forensic experts. Dr. Adler had objective neuropsychological testing by two neuropsychological experts that supported his diagnosis. Dr. Alder had results from MRI and PET radiological neuroimaging testing that showed brain damage in critical areas of Beier's brain.

This newly discovered evidence essentially counters the underlying presupposition in Rule 33 "that all elements of a presumptively accurate and fair proceeding were present" at Beier's trial. *Strickland*, 466 U.S. at 694. The government's evidence at trial was overwhelming, effectively closing any viable defense challenging the facts underlying the charges.

The nature of newly discover evidence here offered Beier the only defenses that would have given him an accurate and fair defense at trial. Thus, it can be said in this case that "substantial justice was not done" since Beier did not have an opportunity to present his only viable defenses at a new trial. *See*, *Johnson*, 327 U.S. at 112.

This case presents the Court the opportunity to set out guidelines for lower courts to uniformly apply the factors relevant to determining motions for new trial under Rule 33(b)(1).

3. **This case is an ideal vehicle for the Court to resolve the questions presented and announce a uniform test for determining motions for new trial based on newly discovered evidence under Rule 33.**

The split among the circuits created by the Ninth Circuit's unpublished memorandum denying Beier's motion for new trial impacts the consistent application of Rule 33 in the lower federal courts. The Court is the only forum that can resolve this split in the circuits to promote uniform application of the Court's rule.

This case gives the Court an excellent opportunity to guide lower courts when a defendant seeks the extraordinary remedy of a new trial based on newly discovered evidence under Rule 33(b)(1). The Court is the only forum that can establish uniformity in the lower courts, considering the important variation that exists among the circuits in defining the fifth factor of the test for granting a new trial based on newly discovered evidence.

The Court has not previously addressed or analyzed in a single decision the factors lower courts should examine on a criminal defendant's motion for new trial based on newly discovered evidence under Rule 33(b)(1). This case presents the Court with an ideal vehicle to solidify in a single decision the appropriate factors lower courts are to consider in determining whether to grant a motion for new trial.

As indicated, the circuits are mostly uniform in the factors district courts must examine. *See*, n. 1, *supra*. However, the Ninth Circuit splits with the Fifth Circuits, Eighth and Tenth on what constitutes newly discovered evidence. This case gives the Court an opportunity to address the first and second factors and resolve this circuit split.[23]

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[23] Those factors are: "(1) the evidence must be newly discovered; and (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part." *See,* n. 1, *supra*.

This case also gives the Court the opportunity to define what constitutes "material" newly discovered evidence. The circuits are consistent in that cumulative evidence or evidence that merely impeaches a witness who testified at trial is not "material," nor is that type of evidence sufficient to obtain a new trial. *See*, n. 1, *supra.* This case gives the Court the opportunity to address the fourth element relating to materiality of newly discovered evidence. The new evidence here is material, and just as in *Fulcher*, the newly discovered evidence obviates an essential element of the offenses, and gives rise to legally recognized defenses. Both defenses would probably produce an acquittal if the new evidence is found credible by a jury at a new trial. *Fulcher*, 250 F.3d at 254-55.

Finally, this case provides the Court the opportunity to give lower courts the framework on which to uniformly apply the fifth factor. Requiring that the newly discovered evidence "be such, and of such a nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal" directs lower courts to assess the nature of evidence discovered after trial and the impact the new evidence would have on a jury at a new trial.

Here, Beier learned of the new evidence supporting diminished capacity and insanity defenses within months after his trial. He moved for a new trial before his sentencing. The jury did not receive any evidence about Beier's mental condition at his trial.

Beier's blanket denial of any wrongdoing at his first trial could not overcome the strength of the government's case. The newly discovered evidence of his mental impairment would offer a jury the only credible basis upon which to acquit Beier at a new trial. The evidence that supports the mental defenses is abundant, including objective neuropsychological testing and neuroradiological testing gathered by Dr. Adler in collaboration with other experts. The nature

of the newly discovered evidence would probably result in an acquittal if accepted as credible by a jury at a new trial. *Fulcher*, 250 F.3d at 255.

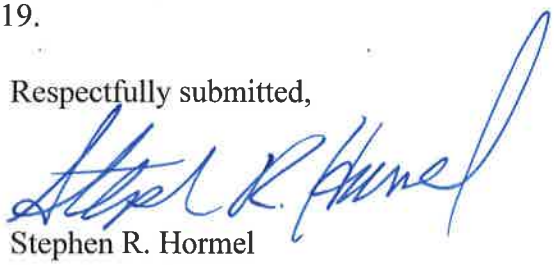
Therefore, the Court should take the opportunity that this case presents to resolve the split in the circuits. The facts of this case also gives the Court an ideal opportunity to establish the appropriate criteria to guide lower courts for determining whether a new trial should be granted based on newly discovered evidence under Rule 33(b)(1). Resolution of both questions is important to the uniform application of Rule 33(b)(1) in the lower courts.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 30th day of December, 2019.

Respectfully submitted,



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Appendix