No._____

In The
Supreme Court of the United States

MOSTAFA KAMEL MOSTAFA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a claim of ineffective assistance of counsel may be raised under Rule 33(b)(1) of the Federal Rules of Criminal Procedure?

2. Whether the production of evidence *to defense counsel* as compared to *access to* that evidence *by the defendant* should be distinguished in the context of a claim of ineffective assistance of counsel?

DIRECTLY RELATED PROCEEDINGS

This petition is directly related to the following:

- United States v. Mustafa, Docket No. 04 Cr. 356 (KFB), U.S. District Court for the Southern District of New York. Judgment entered January 12, 2015.
- United States v. Mustafa, Docket No. 15-0211. U.S. Court of Appeals for the Second Circuit. Opinion entered October 23, 2018.
- United States v. Mustafa, Docket No. 04 Cr. 356 (AT), U.S. District Court for the Southern District of New York. Order entered July 12, 2019.
- United States v. Mustafa, Docket No. 04 Cr. 356 (AT), U.S. District Court for the Southern District of New York. Order entered August 2, 2019.
- United States v. Mostafa, Docket No. 19-2520 (2d Cir.). Opinion entered October 13, 2021.[1]

[1] The Court of Appeals corrected the caption of this case to reflect the correct spelling of Petitioner's name.

Table of Contents

Table of Authorities

CASES

STATUES AND OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mostafa Kamel Mostafa (a/k/a Mustafa Kamel Mustafa a/k/a Abu Hamza) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit in United States v. Mostafa, Slip Op., 19-2520 (2d Cir. October 13, 2021), is available in an unpublished opinion at 2021 U.S. App. LEXIS 30478, 2021 WL 4771837 (2d Cir. October 13, 2021), and at Pet.App.1; the decision denying Petitioner's motion for rehearing and/or rehearing *en banc* is available in an unpublished order, dated, August 26, 2022, at Pet.App.7; the opinion of the United States District Court for the Southern District of New York denying the relief requested is available in an unpublished order, dated, July 12, 2019, at Pet.App.8; and the opinion of the United States District Court denying reconsideration of the relief requested is available in an unpublished order, dated, August 2, 2019, at Pet.App.18.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 2021, and an order denying Petitioner's motion for rehearing and/or rehearing *en banc* was denied on August 26, 2022. This petition is timely filed within the statutory time limitation given that extensions of time to file the instant petition were applied for in a timely fashion on November 5, 2022, and December 15, 2022, and granted on November 9, 2022, and December 20, 2022, respectively, by the Honorable Sonia Sotomayor. This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be … deprived of life, liberty, or property, without due process of law[.]

The Effective Assistance Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right … to have Assistance of Counsel for his defense.

Rule 33(b)(1) of the Federal Rules of Criminal Procedure:

> *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….

Rule 43(a)(2) of the Federal Rules of Criminal Procedure:

> *When Required.* Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at … every trial stage….

STATEMENT

This case presents two clear and straightforward questions of federal criminal law, the first of which has divided the Circuit Courts of Appeal and created inconsistent avenues of relief in the lower courts based upon no more than geographic location, and the second of which presents an issue of exceptional importance that would be equally beneficial to all jurisdictions to resolve.

First, whether Rule 33(b)(1) of the Federal Rules of Criminal Procedure may be relied upon to pursue a claim of ineffective assistance of trial counsel? Second, whether evidence known to defense counsel but not the defendant, can be relied upon by the defendant as newly discovered evidence when raising a claim an ineffective assistance of counsel? A

resolution of one or both of these questions will resolve issues that have vexed the lower courts for years.

To the first question, the current tally stands at 3-2, with the Court of Appeals in this case siding with the minority of courts in holding that a claim of ineffective assistance of counsel, based upon evidence made known to the defendant only after trial, may not be raised in a post-trial motion under Rule 33(b)(1) and must instead wait to be raised pursuant to 28 U.S.C. § 2255 – a result that forces unnecessary delay when prompt resolution under Rule 33(b)(1) would be otherwise within reach.

The second question relates to the fundamental right of an accused to be present at his own trial, and specifically the impact, in the context of a claim of ineffective assistance of counsel, of an attorney's decision to waive the presence of a criminal defendant at sidebars and certain other conferences over the defendant's objection.

In this case, Petitioner is a Muslim imam who had been based in London, England, and who is viewed as one of the highest profile alleged terrorists ever extradited from Europe to the United States for criminal prosecution. Petitioner's offenses, prosecuted in the Southern District of New York, spanned the globe and were alleged to include his participation in a conspiracy to kidnap hostages in Yemen, a separate conspiracy to create terrorist training camps within the United States, specifically in Bly, Oregon, and supporting the Taliban in Afghanistan through financial means. Petitioner never denied his specific actions but did deny his alleged role in each charged conspiracy and argued that his actions were for lawful purposes, not in support of any crime.

The prosecution of Petitioner's offenses was extensive and included both traditional discovery as well as *classified* discovery produced pursuant to the Classified Information

Procedures Act ("CIPA"), 18 U.S.C. App. 3, which requires the storage of such material only in a separate, secure, facility authorized to maintain "SECRET" level national security documents. Petitioner was denied the opportunity to review the classified discovery and Petitioner's trial counsel waived Petitioner's right to participate in certain sidebars and conferences, over Petitioner's objection and even when classified discovery was not referenced. Petitioner testified on his own behalf and denied the charges but did not learn what had been discussed in those sidebars and conferences until after trial was complete – thereby depriving him of the ability to assist his attorneys in his own defense.

Following a jury verdict convicting Petitioner of all charges, Petitioner was sentenced to a term of life imprisonment by the Honorable Kathleen B. Forrest, United States District Court Judge for the Southern District of New York, which he is serving at ADX Florence, in Florence, Colorado.

Upon Petitioner's direct appeal of his conviction and sentence, the Second Circuit Court of Appeals reversed Petitioner's convictions on two counts of his eleven-count Indictment but affirmed his judgment of conviction in all other respects. See United States v. Mustafa, 753 Fed.App'x 22 (2d Cir. 2018), cert. denied, 140 S.Ct. 274 (2019) (hereinafter referenced as, "initial appeal").

While Petitioner's initial appeal was pending, Petitioner sought and received from the District Court an extension of time to file a pro se post-trial motion to vacate his conviction and sentence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Thereafter, on April 29, 2019, the District Court received and filed Petitioner's pro se Rule 33 motion (04 Cr. 356 (AT) (SDNY), Doc. No. 549), which was deemed timely filed pursuant to the "prison mailbox" rule. See Houston v. Lack, 487 U.S. 266 (1988).

As relevant here, Petitioner's pro se Rule 33 motion argued that he had been excluded from certain portions of trial without his personal consent (i.e., that Petitioner's attorney waived Petitioner's right to be present at certain sidebars and conferences over Petitioner's objection). Petitioner likewise explained that he had not been informed of the content or general context of those proceedings until he was permitted the opportunity to review his trial transcripts after trial was complete. Construed liberally, see Billy-Eko v. United States, 8 F.3d 111, 117 (2d Cir. 1993), Petitioner argued that the production of evidence to *defense counsel*, which was made known through reading the transcripts, is distinguishable from *access to* that evidence by *the defendant*. Through counsel, Petitioner argued on appeal that this distinction deprived him of his Sixth Amendment right to effective assistance of counsel, see Strickland v. United States, 466 U.S. 668 (1984), his Fifth Amendment right to Due Process, see United States v. Hernandez, 873 F.2d 516, 518 (2d Cir. 1989), and his statutory and "fundamental" right to be present, see Fed.R.Crim.P. 43(a)(2); see also Kentucky v. Stincer, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."), because it deprived Petitioner of the ability to aid his counsel in his own defense specifically in relation to factual disputes to which Petitioner had the better understanding. As this Court has long held, "due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence,' " Stincer, 482 U.S. at 745, quoting, Snyder v. Massachusetts, 291 U.S. 97, 108 (1934); that is exactly what Petitioner was deprived of here.

At trial the Government's most important witness was Evan Kohlmann, who was called as both a fact-witness as well as an expert. Kohlmann's testimony, however, was rife

with errors, and Petitioner's exclusion from sidebars and certain conferences prevented him from assisting his attorneys in recognizing the errors and advancing effective objections to Kohlmann's testimony.

For example, during an April 23, 2014, sidebar, the Government revealed Kohlmann's source of information regarding Yemen was Ahmed Ressam, a convicted terrorist who became a Government witness in other cases. Notably, it was known to Petitioner that Ressam (also known as the Millennial Bomber) was Algerian, not Yemeni, and that Ressam had no direct connection to the individuals implicated in the Yemen kidnapping charges. Had Petitioner been present at sidebar or made privy to what was discussed he could have provided his attorneys with information establishing that Ressam's information was based upon multiple layers of hearsay, not first-hand knowledge, which would have supported counsel's objections to Kohlmann's testimony regarding events related to the Yemeni kidnapping charges for which Petitioner received two life sentences. Without Petitioner's assistance, counsel was unable to prevent Kohlmann from testifying – without any other evidence – that the Yemen group was linked to Al Qaeda, a crucial fact that would most likely have made a difference in the jury's determination of those charges.

Another example relating to Kohlmann arose when he testified that Ibn Shaykh al-Libi died in 2001 fighting against the United States in the Battle of Tora Bora and that Ayman al-Zawahiri eulogized al-Libi at the time. In fact, as Petitioner well knew, Ibn Shaykh al-Libi did not die until 2009 and his death occurred in Libyan custody, not on the battlefield. *See Libya/US: Investigate Death of Former CIA Prisoner*, Human Rights Watch Press Release, dated, May 11, 2009 (available at https://www.hrw.org/news/2009/05/11/libya/us-investigate-death-former-cia-prisoner). Had Petitioner been privy to all relevant

proceedings he could have alerted counsel to this error, and even more of Kohlmann's inaccurate testimony would have been exposed. See Petition for Certiorari, dated, June 28, 2019, United States v. Mustafa Kamel Mustafa, Supreme Court Docket No. 19-5345, at 4-8 (discussing bias challenges that had been made to Kohlmann's testimony).

Unrelated to Kohlmann, another example occurred on May 7, 2014. During the courtroom discussion taking place at the start of the day's proceedings, the parties were discussing whether Petitioner could introduce evidence that he had been approached by MI5 and Scotland Yard to secure the release of the kidnap victims in a prior incident in Kashmir in 1997 – an argument crucial to Petitioner's defense that he was trying to do the same things again (i.e., secure the release of kidnapping victims) the following year in Yemen. The court precluded introduction of the evidence, and due to Petitioner's exclusion from related proceedings, he again could not assist counsel in rebutting the Government's arguments.

Petitioner argued below that had he been present at the sidebars and conferences or provided timely access to the transcripts of those proceedings he could have, inter alia, helped establish that Kohlmann's knowledge was too littered with factual errors and bias to permit his qualification as an expert, and could have aided the introduction of evidence supporting his defense that his conduct related to the Yemen kidnappings was a lawful effort to help free the victims. At the least, revealing Kohlmann's factual errors would have fatally undermined his credibility and rendered his testimony unpersuasive. Thus, waiving Petitioner's right to be present at the relevant proceedings, and then by stifling Petitioner's ability to review transcripts of those proceedings in a timely manner, Petitioner's ability to assist counsel in his own defense was meaningfully extinguished. Moreover, by waiving Petitioner's fundamental, Constitutional, right to be present, *over Petitioner's objection* and

without a record establishing that counsels' waiver was tactically or strategically sound, Petitioner's Sixth Amendment right to effective assistance of counsel was violated.

The Second Circuit denied Petitioner's appeal concluding, in relevant part, that its holding in United States v. Castillo, 14 F.3d 802, 805 (2d Cir. 1994), which itself relied upon United States v. Dukes, 727 F.2d 34, 39 (2d Cir. 1984), precludes claims of ineffective assistance of counsel raised under Fed.R.Crim.P. 33(b)(1). See Mostafa, Slip Op., at 5 (Pet.App.5). On reconsideration, the Second Circuit likewise rejected, inter alia, Petitioner's distinction between the production of evidence and information to defense counsel rather than the defendant himself. See Order, dated, August 26, 2022, at Pet.App.**7**. Here, it is these two conclusions that we take issue and seek certiorari.

REASONS FOR GRANTING THE PETITION

Point I

The decision below deepens a conflict on a question of law in federal criminal practice, namely, whether a claim of ineffective assistance of counsel may be raised in a post-trial motion under Rule 33(b)(1) of the Federal Rules of Criminal Procedure when the evidence at issue was discovered by the defendant after trial.

The Second Circuit's decision in this case deepens a conflict among federal courts of appeal regarding whether a claim of ineffective assistance of counsel may be raised under Rule 33(b)(1) of the Federal Rules of Criminal Procedure or may only be raised on direct appeal, assuming the necessary facts were adjudicated below, or through a collateral proceeding pursuant to 28 U.S.C. § 2255, assuming they were not.

Specifically, Rule 33(b)(1) grants criminal defendants the ability to seek a new trial based upon "newly discovered evidence" immediately post-trial or "within 3 years after the verdict or finding of guilty." Thus, the question comes down to whether the facts underlying

a claim of ineffective assistance of counsel may qualify under Rule 33(b)(1) as "newly discovered evidence".

As it stands, all Circuits to have weighed in agree that "an ineffective assistance of counsel claim may not serve as the basis for a new trial under the 'newly discovered evidence' prong of Rule 33, where the facts alleged in support of the motion *were known to the defendant at the time of trial*." United States v. Torres, 115 F.3d 1033, 1035 (D.C. Cir. 1997) (emphasis added) (citing decisions by First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits). This makes sense because if the information was known to the defendant at the time of trial, then it cannot be newly discovered post-trial.

But the question here is distinct, as it relates to information *unknown to the defendant at the time of trial*. When, as here, the claim of ineffective assistance of counsel is based upon evidence that became known to the defendant *only after* trial was complete, the Circuits are divided. The Fourth, Tenth, and D.C. Circuits have held that Rule 33(b)(1) *permits* claims of ineffective assistance of counsel based upon newly discovered evidence when the evidence became known to the defendant only after trial, see United States v. Martinez, 136 F.3d 972, 979 (4th Cir. 1998); United States v. Allen, 554 F.2d 398, 404 (10th Cir. 1977); United States v. Thompson, 475 F.2d 931, 932 (D.C. Cir. 1973) (per curiam). This conclusion makes logical sense and permits prompt redress and adjudication of Sixth Amendment claims.

As explained by the D.C. Circuit, "Where evidence of ineffectiveness of trial counsel is brought to the attention of the court for the first time in support of that motion, that evidence is 'newly discovered' for purposes of Rule 33," United States v. Brown, 476 F.2d 933, 955 n.11 (D.C. Cir. 1973) (citations omitted); even more so when the information in question was only provided to the defendant *by defense counsel* post-trial, see Thompson, 475 F.2d at 932

(holding that when raising "allegations of ineffectiveness … [a criminal defendant] is not relegated to his postconviction remedies [i.e., 28 U.S.C. § 2255] to secure a hearing on his claim. 'He may raise and more fully support [that] claim ... on a motion for a new trial…' " under Rule 33(b)(1)).

On the other hand, the underlying opinion here by the Second Circuit joins an approach previously taken only by the Fifth Circuit, delaying defendants their right to exercise their Sixth Amendment right to effective assistance of counsel until brought in a collateral post-conviction proceeding pursuant to 28 U.S.C. § 2255, see Mostafa, Slip Op. at 5 (Pet.App.5); United States v. Medina, 118 F.3d 371, 372 (5th Cir. 1997).

Petitioner submits that the approach of the Second and Fifth Circuits create an unnecessary and inordinate delay of a defendant's right to enforce his Constitutional rights, particularly given that an earlier path was clearly granted by Congress vis-à-vis Rule 33(b)(1). The approach of the Second and Fifth Circuits also makes no logical sense since it creates a scenario in which the evidence underlying a claim of ineffective assistance counsel is viewed differently under Rule 33(b)(1) than 28 U.S.C. § 2255, even when in both instances the evidence was not known to the defendant until after trial and thus in both instances the evidence was "newly discovered" to the defendant. On the other hand, the approach of the Fourth, Tenth, and D.C. Circuits flows cleanly from a plain reading of the language of the statute and treats the term "newly discovered evidence" the same under both Fed.R.Crim.P. 33(b)(1) and 28 U.S.C. § 2255. Thus, the conflict between the Circuits plainly warrants this Court's review, and Petitioner submits that the majority view of the Fourth, Tenth, and D.C. Circuits is the correct one.

Point II

The proceeding also involved a question of exceptional importance: Whether the production of evidence *to defense counsel* as compared to *access to* that evidence *by the defendant* should be distinguished for determining what constitutes "newly discovered evidence" within the context of a claim of ineffective assistance of counsel.

The distinction between production of evidence to defense counsel and a defendant's access to that evidence is a point often glossed over but directly relates to "[t]he right of an accused to be present at his own trial" – which "is a fundamental right." United States v. Hernandez, supra, 873 F.2d 516, 518 (2d Cir. 1989), citing, inter alia, Kentucky v. Stincer, supra, 482 U.S. 730 (1987). To that end, "the centuries-old right granted to an accused to be present … at a federal criminal trial may not be denied without violating the accused's Fifth and Sixth Amendment rights." Hernandez, 873 F.2d at 518, quoting, United States v. Bifield, 702 F.2d 342, 349 (2d Cir. 1983); see also Polizzi v. United States, 926 F.2d 1311, 1318 (2d Cir. 1991). This principle is likewise articulated under Rule 43(a)(2) of the Federal Rules of Criminal Procedure. See Clark v. Stinson, 214 F.3d 315, 322 (2d Cir. 2000).

A defendant's constitutional right to be present applies to most criminal proceedings. See Fed.R.Crim.P. 43(a). "If fact issues are presented … as they often will be," for example, "on a pretrial motion to suppress evidence or on some motions for new trial, it would seem that a defendant has a right to be present." Clark, 214 F.3d at 322 (holding that defendants have a right to be present at a pretrial Wade hearing), quoting, 3A Charles Alan Wright, Federal Practice and Procedure § 721.1 at 12 (2d ed. 1982).

A defendant may waive his right to be present at trial *expressly* or by voluntarily failing to appear, see Taylor v. United States, 414 U.S. 17, 20 (1973), and "[w]ith regard to a defendant's absence from a portion of his trial, failure to readily object at the time the

decision is made to proceed without the accused can constitute a waiver," Clark, 214 F.3d at 323-24, citing, United States v. Gagnon, 470 U.S. 522, 528-29 (1985) (holding that defendant waived his right to be present at an *in camera* hearing when no objection was made at trial). However, waivers of Constitutional rights cannot be lightly presumed. See Brookhart v. Janis, 384 U.S. 1, 4, (1966).

Here, Petitioner asserted that he never knowingly and voluntarily waived his right to be present at any portion of his trial. Specifically, Petitioner contended that he informed his attorneys of his desire to be present, but that his attorneys never informed the trial court of his objection. While "defense counsel may waive a defendant's Sixth Amendment right to confrontation where the decision is one of trial tactics or strategy that might be considered sound," United States v. Pittman, 194 F.3d 59, 64 (2d Cir. 1999), the record here is incomplete and the Court cannot presume that counsels' decision to proceeding without Petitioner was sound. As this Court has explained, "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' " Brookhart, 384 U.S. at 4, citing, Glasser v. United States, 315 U.S. 60, 70-71 (1942), and quoting, Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

In the pleadings below, Petitioner argued that his Fifth Amendment right to Due Process was violated when he was denied access to certain proceedings and likewise denied access to the transcripts of those proceedings. The Second Circuit held that Petitioner "is unable to explain why these transcripts should be considered 'newly discovered.' He has made no showing that he was unaware that limited proceedings were conducted in his absence." Pet.App.5. While it cannot be disputed that Petitioner was aware that proceedings

were conducted in his absence, he informed his counsel that he objected to his exclusion from those proceedings, and he was not provided copies of the transcripts to those proceedings until approximately four months after trial.

Furthermore, in denying Petitioner's overlapping Sixth Amendment ineffective assistance of counsel claim, the Second Circuit implicitly concluded that if *trial counsel* was at the proceedings, the delay in providing Petitioner with the transcripts of those proceedings cannot form the basis for a claim of "newly discovered evidence." Petitioner counters, however, that while he was aware of the existence of the proceedings, he was not aware of all that occurred during those proceedings until he received the transcripts after trial. As such, the transcripts contained information that was newly discovered *to him*. Moreover, Petitioner was materially harmed. Had he been present for the proceedings or provided access to the transcripts in a timely fashion, he would have been able to assist counsel in recognizing the false statements made by the Government's principal witness, Evan Kohlmann.

Creating the record of *why* defense counsel failed to alert the trial court to Petitioner's objections is necessary to fully adjudicate Petitioner's claim of ineffective assistance of counsel. The answer to that question is outside the trial record and would only be discoverable after trial; clearly meeting the requirements of newly discovered evidence under Fed.R.Crim.P. 33(b)(1). Likewise, the transcripts disclosed to Petitioner by counsel only after trial, must be viewed as newly discovered evidence for purposes of Rule 33(b)(1), since prior to Petitioner gaining access to those transcripts he lacked access to the evidence upon which his claim of ineffective assistance could be based.

Stated simply, the relevant facts supporting Petitioner's ineffective assistance claim were not known to him at the time of trial because he was improperly excluded from the relevant proceedings over his objection and did not receive the transcripts of those proceedings until after trial. It is therefore both the transcripts, and counsel's explanation for failing to raise Petitioner's objection to his exclusion from the proceedings, that constitute the newly discovered evidence central to Petitioner's present claims – none of which should have been foreclosed by the Second Circuit's prior precedent but nonetheless was.

Yet, the plain language of Rule 33(b)(1) states clearly, "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Newly discovered evidence, of course, is understood as evidence not within the trial record. Even the Second Circuit has acknowledged that "[f]or evidence to be considered newly discovered for purposes of Rule 33, a defendant must show that the evidence was discovered after trial and that it could not have been discovered sooner with the exercise of diligence." Dukes, 727 F.2d at 38 (citations omitted).

That definition fits the evidence discovered by Petitioner here. Indeed, any examination of trial counsel's effectiveness requires the introduction of new evidence related to trial counsels' judgment, strategic decisions, or lack thereof; none of which is part of the trial record and all of which may only be presented to the court through affidavits, testimony, or exhibits likewise not part of the record. Affidavits and testimony are generally written or taken after executing an attorney/client privilege waiver (which no objectively effective counsel would agree to do *during* trial), and the exhibits most often relate to

evidence defense counsel failed to introduce or investigate, or questions defense counsel failed to raise, during witness examinations and arguments.

Thus, because ineffective assistance of counsel claims can generally only be established through the introduction of new evidence,[2] it fits clearly within the contours of Rule 33(b)(1), and it is only a corruption of the clear language of the statute to deny that it fits those clear contours. Moreover, it makes no sense to hold that evidence of ineffective assistance is not new where that evidence is only known to the ineffective counsel. It is the defendant who has a constitutional right to effective assistance of counsel, and it is the defendant who determines whether to argue that his prior counsel was ineffective in derogation of that right. Thus, as a matter of logic and common sense, if the evidence at issue is newly discovered *to the defendant*, it should be considered "newly discovered evidence" under Rule 33(b)(1).

The importance of this issue to so many criminal cases likewise warrants this Court's review.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
January 23, 2023

Respectfully submitted,

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[2] The sole exception to this is a *per se* error. See, e.g., United States v. Cronic, 466 U.S. 648 (1984).

APPENDIX

TABLE OF APPENDICES

Page

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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 13th day of October, two thousand twenty-one.

PRESENT:

PIERRE N. LEVAL,
ROBERT D. SACK,
MICHAEL H. PARK,
Circuit Judges.

UNITED STATES OF AMERICA,

***Appellee*,**

v. **19-2520**

MOSTAFA KAMEL MOSTAFA,

Defendant-Appellant.[*]

FOR APPELLEE: Ian McGinley, Karl Metzner, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY (*on submission*).

FOR DEFENDANT-APPELLANT: Michael K. Bachrach, Law Office of Michael K. Bachrach, New York, NY (*on submission*).

[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

Appeal from the denial of a motion for a new trial and a motion for reconsideration of the United States District Court for the Southern District of New York (Torres, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the district court are **AFFIRMED**.

On May 19, 2014, a jury convicted Defendant-Appellant Mostafa Kamel Mostafa[1] on eleven terrorism-related counts. Those counts included taking and conspiring to take hostages, 18 U.S.C. § 1203 (Counts One and Two); providing material support and resources to terrorists and conspiring to do the same, *id.* §§ 371, 2339A (Counts Three, Four, Seven, and Eight); providing material support and resources to a foreign terrorist organization and conspiring to do the same, *id.* § 2339B(a)(1) (Counts Five, Six, Nine, and Ten); and conspiring to supply goods and services to the Taliban in violation of the International Emergency Economic Powers Act ("IEEPA"), 18 U.S.C. § 371, 50 U.S.C. § 1705, 31 C.F.R. §§ 545.204, 545.206(b) (Count Eleven).

A jury convicted Mostafa on all eleven counts; the district court sentenced him to life imprisonment; and he appealed. We reversed Mostafa's conviction on Counts Seven and Eight for insufficient evidence due to the more limited scope of the material-support prohibitions before their amendment in October 2001. *United States v. Mustafa*, 753 F. App'x 22, 29–32 (2d Cir. 2018). We rejected Mostafa's remaining arguments and affirmed his conviction on all other counts. *Id.* at 27–29, 32–37. Mostafa, proceeding *pro se*, then filed a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. He now appeals the district court's denial of that motion and his subsequently filed motion for reconsideration. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

[1] Appellant has notified the Court that the correct legal spelling of his name is "Mostafa Kamel Mostafa," as reflected in the district court's amended judgment.

We review the denial of a Rule 33 motion for abuse of discretion. *See United States v. James*, 712 F.3d 79, 107 (2d Cir. 2013). The same standard of review applies to the district court's determination on whether to conduct a hearing on the motion. *See United States v. DiTomasso*, 932 F.3d 58, 70 (2d Cir. 2019). When considering a motion under Rule 33, a district court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). This discretion should be exercised "sparingly and in the most extraordinary circumstances, and only in order to avert a perceived miscarriage of justice." *United States v. Gramins*, 939 F.3d 429, 444 (2d Cir. 2019) (internal quotation marks and citations omitted). "[T]he 'ultimate test' for granting a new trial pursuant to [Rule 33] is 'whether letting a guilty verdict stand would be a *manifest injustice*.'" *Id.* (quoting *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001)).

A defendant generally must file a Rule 33 motion "within 14 days after the verdict." Fed. R. Crim. P. 33(b)(2). But if a defendant seeks a new trial based on newly discovered evidence, the motion "must be filed within 3 years after the verdict." Fed. R. Crim. P. 33(b)(1). A court may grant a new trial based on newly discovered evidence "only upon a showing that (1) the evidence was newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence would likely result in an acquittal." *United States v. Forbes*, 790 F.3d 403, 406–07 (2d Cir. 2015) (internal quotation marks and brackets omitted).

In his opening brief, Mostafa asserts that he was denied the right to effective assistance of counsel because his attorney waived Mostafa's appearance for portions of the trial. Mostafa also urges the Court to construe his Rule 33 motion to the district court liberally so as to encompass this ineffective-assistance claim. Mostafa seeks remand for a factual hearing because the district

court never considered the claim. We reject this argument and decline to remand.

As an initial matter, the district court did not err in limiting the grounds for Mostafa's motion for retrial to newly discovered evidence. We review a district court's decision on whether to deem a Rule 33 motion timely for abuse of discretion. *See United States v. Malachowski*, 623 F. App'x 555, 557 (2d Cir. 2015). On April 13, 2017, the district court granted Mostafa an 18-month extension to file his Rule 33 motion. But the order extended *only* the 3-year deadline to file a motion for a new trial based on newly discovered evidence. The district court clearly noted that the deadline it was extending was "set to expire on May 19, 2017," a date exactly 3 years from Mostafa's May 19, 2014 conviction. Order, *United States v. Mustafa*, No. 04-cr-356 (S.D.N.Y. Apr. 13, 2017), ECF No. 532. The court later used the same language to extend this deadline for five more months. The court did not extend the 14-day deadline for Rule 33 motions based on other grounds, so Mostafa's deadline for any such motions had thus long expired by the time he filed the motion at issue here.

In his *pro se* brief with this Court,[2] Mostafa argues that conditions of his confinement and the logistics concerning replacement of his trial counsel made it impossible to comply with the 14-day deadline. But an extension of the Rule 33 deadline requires the movant to prove "excusable neglect." Fed. R. Crim. P. 45(b)(1)(B); *United States v. Brown*, 623 F.3d 104, 113 n.5 (2d Cir. 2010). Even if Mostafa was unable to file his motion within 14 days of conviction, he provides no explanation for the nearly four-year delay in raising grounds other than newly discovered evidence in support of his Rule 33 motion. The district court did not abuse its discretion in limiting Mostafa's arguments to those based on newly discovered evidence.

[2] Mostafa filed his opening brief with the assistance of pro bono counsel, but he also submitted a *pro se* reply brief. We consider the issues raised in both submissions.

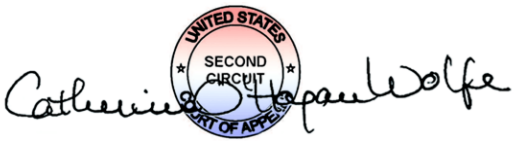
Moreover, Mostafa's ineffective assistance claims do not present new evidence within the meaning of Rule 33. *See United States v. Castillo*, 14 F.3d 802, 805 (2d Cir. 1994). Mostafa bases his claims on trial transcripts, but he is unable to explain why these transcripts should be considered "newly discovered." He has made no showing that he was unaware that limited proceedings were conducted in his absence. The district court thus properly declined to consider this claim under Rule 33. Further, Mostafa has already filed a 42 U.S.C. § 2255 motion with the district court stating that the motion "is intended as a placeholder until such time as more thorough briefing can be completed." Def. Letter at 2, *United States v. Mustafa*, No. 04-cr-356 (S.D.N.Y. Oct. 5, 2020), ECF No. 572. The court stayed briefing on that motion pending resolution of this appeal. Thus, "[s]hould [Mostafa] choose to further pursue his ineffective assistance claim, habeas proceedings will provide 'the forum best suited to developing the facts necessary to determining the adequacy of representation.'" *United States v. Cammacho*, 462 F. App'x 81, 83 (2d Cir. 2012) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)).

We have also reviewed and liberally construed the arguments raised by Mostafa in his *pro se* supplemental brief. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474–75 (2d Cir. 2006); *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998) (explaining that *pro se* litigants must still abide by Federal Rule of Appellate Procedure 28(a), that "requires appellants in their briefs to provide the court with a clear statement of the issues on appeal"). To begin, Mostafa has not demonstrated that his asserted grounds for retrial are based on newly discovered evidence. Even assuming that they were, they would not demonstrate "exceptional circumstances" such that the district court abused its discretion in refusing to "intrude upon the jury function" by ordering a new trial. *United States v. McCourty*, 562 F.3d 458, 475–76 (2d Cir. 2009) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). For the most part, Mostafa rehashes arguments

we rejected in his prior appeal. Mostafa also argues that his trial counsel was ineffective by failing to provide him with exculpatory discovery. Even if we were to assume that Mostafa was not aware of this supposed failure during trial, Mostafa does not assert any facts showing that he made any effort to obtain this discovery earlier; his claim therefore cannot be the basis for a Rule 33 motion. Lastly, to the extent that Mostafa now contends that there was insufficient evidence for the jury to convict on Counts One and Two, we reject that argument. The jury's conviction on these counts was supported by ample evidence. *See, e.g.*, Tr. 3502–03, 3476–78, 2779–81 (testimony showing that Mostafa provided satellite telephones to the kidnappers); Tr. 2909–18 (Mostafa's October 2000 taped interview, in which he voiced support for the man who led the kidnapping and admitted to speaking with him during the hostage taking).

In sum, the district court did not err in finding that there was "no 'real concern that an innocent person may have been convicted.'" App'x at 105 (quoting *Ferguson*, 246 F.3d at 134). We have considered the remainder of Mostafa's arguments and find them to be without merit. For the foregoing reasons, we affirm the orders of the district court. Mostafa's request for remand for further factual development is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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 26th day of August, two thousand twenty-two.

United States of America,

Appellee,

v.

Mostafa Kamel Mostafa,

Defendant - Appellant.

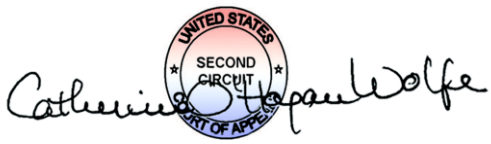
ORDER

Docket No: 19-2520

Appellant Mostafa Kamel Mostafa 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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

MUSTAFA KAMEL MUSTAFA,
a/k/a "Abu Hamza al-Masri,"

Defendant.

04 Cr. 356-1 (AT)

ORDER

ANALISA TORRES, District Judge:

On May 19, 2014, after a month-long trial, a jury found Defendant, Mustafa Kamel Mustafa, guilty of eleven counts of crimes relating to terrorism. ECF No. 366. Specifically, Defendant was convicted of hostage taking, 18 U.S.C. § 1203 (Counts One and Two); providing material support for terrorism, *id.* §§ 371, 2339A (Counts Three, Four, Seven, and Eight); providing material support to a designated foreign terrorist organization, *i.e.*, al Qaeda, *id.* § 2339B(a)(1) (Counts Five, Six, Nine, and Ten); and supplying goods and services to the Taliban, *id.* § 371; 50 U.S.C. § 1705(b); 31 C.F.R. §§ 545.204, 545.206(b) (Count Eleven). ECF No. 463. Defendant now moves for a new trial pursuant to Federal Rule of Criminal Procedure 33. Def. Mot., ECF No. 549. For the reasons stated below, Defendant's motion is DENIED.

BACKGROUND

Eleven counts were filed against Defendant in an indictment dated April 19, 2004 (the "Indictment"). ECF No. 1. These charges related to Defendant's direction of three terrorist plots. First, in late December 1998, Defendant participated in a hostage-taking in Yemen in an attempt to coerce the Yemeni government into freeing some of his followers from prison, including his stepson, which resulted in the murder of four tourists (Counts One and Two). *Id.* ¶¶ 1–4. Second, in late 1999, Defendant tasked two of his followers with the mission of

establishing a camp in Bly, Oregon (the "Bly Training Camp") to train men to fight with al Qaeda and engage in acts of murder in Afghanistan (Counts Three through Six). *Id.* ¶¶ 5–12. Third, from 2000 to 2001, Defendant provided support to al Qaeda and the Taliban in Afghanistan in a variety of ways, including by dispatching a follower to train and fight with al Qaeda and by sending money and other support to the Taliban (Counts Seven through Eleven). *Id.* ¶¶ 13–25. Trial began on April 14, 2014 and ended on May 19, 2014, when the jury returned guilty verdicts on all counts. *See* 4/14/14 & 5/19/14 ECF Entries.

On January 9, 2015, the Honorable Katherine B. Forrest sentenced Defendant to life imprisonment on Counts One and Two; five years' imprisonment on Counts Three, Seven, and Eleven; ten years' imprisonment on Counts Four, Five, and Six; and fifteen years' imprisonment on Counts Seven, Eight, Nine, and Ten. ECF Nos. 463, 474. All sentences were to run concurrently. *Id.*

Defendant then appealed to the United States Court of Appeals for the Second Circuit. ECF No. 466. While the matter was pending on appeal before the Second Circuit, on April 13, 2017, Judge Forrest granted Defendant's request to extend his deadline for filing a Rule 33 motion until November 19, 2018. ECF No. 532. On October 18, 2018, the case was reassigned to this Court, ECF No. 534, and on October 18, 2018, the Court extended that deadline again, until April 18, 2019, ECF No. 535.

On October 23, 2018, the Second Circuit affirmed Defendant's judgment of conviction on all counts except Counts Seven and Eight, which it reversed on jurisdictional grounds. *See United States v. Mustafa*, 753 F. App'x 22 (2d Cir. Oct. 23, 2018). The Second Circuit did not order resentencing. *Id.* On April 16, 2019, Defendant filed a motion for a new trial under Rule

33. ECF Nos. 548–549.

DISCUSSION

I. Legal Standard

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." Fed. R. Crim. P. 33(a). In evaluating a Rule 33 motion, the trial court must be satisfied that "competent, satisfactory and sufficient evidence in the record supports the jury verdict." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (internal quotation marks and citation omitted). "The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." *Id.*

Under Rule 33, trial courts have "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." *United States v. Polouizzi*, 564 F.3d 142, 159 (2d Cir. 2009) (internal quotation marks and citation omitted). However, "[t]he defendant bears the burden of proving that he is entitled to a new trial under Rule 33." *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009). Before ordering a new trial pursuant to Rule 33, "a district court must find that there is a real concern that an innocent person may have been convicted." *Id.* (internal quotation marks and citation omitted). "The test is whether 'it would be a manifest injustice to let the guilty verdict stand.'" *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) (citation omitted).

Given the stringency of the Rule 33 standard, "motions for a new trial are disfavored in this Circuit," *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995), and Rule 33 motions are granted only "sparingly and in the most extraordinary circumstances," *Ferguson*, 246 F.3d at

134 (internal quotation marks and citation omitted).

II. Analysis

At the outset, the Government argues that Defendant's Rule 33 motion should be denied as time-barred. Gov. Opp. 4–6, ECF No. 554. New trial motions grounded on newly discovered evidence "must be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). A motion for a new trial based on any other grounds "must be filed within 14 days after the verdict or finding of guilty." *Id.* at (b)(2).

Defendant's trial concluded on May 19, 2014, when he was found guilty on all counts. He did not file a Rule 33 motion within 14 days after the verdict. Instead, on March 23, 2017, Defendant filed a "pro se motion requesting 18 months extension of time to file his Rule 33 motion," ECF No. 532 at 2, and on April 13, 2017, the Court extended his deadline for filing such a motion until November 19, 2018, *id.* at 1. The deadline was then extended again until April 18, 2019. ECF No. 535. However, because Defendant only requested an extension of time to file his Rule 33 motion long after the verdict was entered on May 19, 2014, he is now limited to claims based on "newly discovered" evidence.

Where a motion for a new trial is 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. James*, 712 F.3d 79, 107 (2d Cir. 2013) (internal quotation marks and citation omitted).

At the outset, the Court finds that Defendant cannot satisfy the first element—that the evidence is "newly discovered after trial." Specifically, Defendant's first argument relates to the Second Circuit's reversal of Counts Seven and Eight, which is not newly discovered evidence. *See* Def. Mot. 5–10. Defendant's second point relates to his conditions of confinement "during Trial 2014." *Id.* at 10–21. However, Defendant was clearly aware of these purported conditions in 2014. For his third claim, Defendant seemingly relies on the trial transcripts as "new post-trial finding[s]," *id.* at 30, but these transcripts are not "new" evidence because the trial took place in 2014 and Defendant was present for it. His fourth claim appears to be based on extradition documents, about which he claims the Government "misled the [Court] about [their] relevance or necessity to the case," *id.* at 37, and classified documents that the Court excluded Defendant from cross-examining a witness about, *id.* at 39. These documents are, however, not newly discovered as they were discussed at trial.[1] For his remaining claims, Defendant does not even attempt to identify any newly discovered evidence. *See* Def. Mot. 52–61.

Moreover, even if Defendant did identify newly discovered evidence, he cannot satisfy the other four elements necessary to grant a Rule 33 motion: due diligence on his part to obtain the evidence, that the evidence is material, that the evidence is not merely cumulative or impeaching, and that the evidence would likely result in acquittal. *James*, 712 F.3d at 107. The majority of Defendant's motion simply repeats the arguments made before—and rejected by—the Second Circuit. *Compare Mustafa*, 753 F. App'x 22, *with* Def. Mot.

First, Defendant claims that because the Second Circuit reversed his convictions on Counts Seven and Eight, he is entitled to a new trial on all counts. Def. Mot. 5–9. The Second

[1] Additionally, the Government represents that "documents related to [Defendant's] extradition were produced to him during pre-trial discovery, in advance of his trial in 2014." Gov. Opp. 7.

Circuit, of course, did not order a new trial, even though Defendant urged the court to do so on appeal. *See generally* Brief for Defendant-Appellant, *United States v. Mustafa*, No. 15-211 (2d Cir. Oct. 12, 2017), ECF No. 72. Further, there was no potential prejudicial spillover to Defendant from the evidence adduced at trial related to Defendant's conduct on Counts Seven and Eight (on which his convictions were reversed), because that same evidence was admissible to prove his guilt on Counts Nine, Ten, and Eleven, which also covered his support for terrorism by sending a follower to an al Qaeda training camp in Afghanistan. *See Mustafa*, 753 F. App'x at 28–32. Nor did the Second Circuit's reversal of Defendant's convictions on Counts Seven and Eight on jurisdictional grounds impact the Government's jurisdiction over the other counts in the Indictment. Counts Seven and Eight had particular jurisdictional requirements not applicable to the other counts. *Id.* at 30–31. As the Second Circuit found, Counts Nine and Ten had a sufficient jurisdictional nexus to the United States. *Id.* at 28 ("The [jurisdictional] challenge fails as to Mustafa's Counts Nine and Ten convictions for providing material support to al Qaeda in violation of 18 U.S.C. § 2339B because, since 1996, Congress has expressly provided for that statute's extraterritorial application."). There was also a sufficient jurisdictional nexus over Counts One and Two because two of the hostages in Yemen were American. *See United States v. Mostafa*, 965 F. Supp. 2d 451, 459 (S.D.N.Y. 2013) (denying Defendant's pretrial motion to dismiss Counts One and Two on jurisdictional grounds, noting that "as stated [in 18 U.S.C. § 1203] . . . , where the conduct alleged occurred outside of the United States, there is no violation unless the person seized or detained is a U.S. national[, and h]ere it is alleged that two of the hostages were American citizens"). Jurisdiction and venue were also proper as to Counts Three through Six because the Bly Training Camp was located in the United States and

Defendant's coconspirators, Haroon Aswat and Oussama Kassir, traveled into the Southern District of New York in order to take a bus to Seattle to scout the Bly location for the terrorist training camp. ECF No. 5 ¶ 7(d). This was an act in furtherance of the commission of the crimes charged. *See* 18 U.S.C. § 3237(a) ("[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.").

Second, Defendant appears to argue that the conditions of his pretrial confinement rendered him unable to testify at trial and ran counter to assurances the United States made to the United Kingdom during his extradition. Def. Mot. 10–21. Any claim that Defendant's mental abilities were impacted at trial, however, are contradicted by his own trial testimony, where he stated that he previously had some problems with his memory, but those problems had improved "dramatically" in time for trial. Trial Tr. 2987, ECF No. 400.[2] Further, both defense counsel and Judge Forrest noted that Defendant had no problem testifying clearly and articulately at trial. *See* Trial Tr. 3080–81, ECF No. 402; *see also Mustafa*, 753 F. App'x at 37–38, (noting that Defendant was not prejudiced from being precluded from testifying about his years in solitary confinement as being "evident from his and his counsel's statements to the district court that anticipated memory and articulation problems were not, in fact, impeding his trial testimony, a fact confirmed by the court's own observations"). Defendant's claim that in extradition proceedings, the United States made assurances to the United Kingdom that he would not be designated to ADX Florence, the maximum-security prison in Florence, Colorado, is also flatly

[2] Specifically, Defendant testified that although he "had a problem with the memory before," "since the trial started [he] improved quite dramatically interacting, seeing people, walking, watching, different activities around [him]." Trial Tr. 2987:8–13.

contradicted by the record and was already rejected by the Second Circuit. *Mustafa*, 753 F. App'x at 42 (rejecting Defendant's claim that the United States made a commitment to the United Kingdom that he would not be designated to ADX Florence and noting that a declaration submitted in extradition proceedings "alerted the surrendering courts that there was some possibility that Mustafa could be designated to ADX Florence").

Third, Defendant claims that trial testimony of prosecution witness Evan Kohlmann was improper because he testified as both an expert and a fact witness. Def. Mot. 22–35. The Second Circuit rejected this claim as well, because Judge Forrest gave a clear instruction to the jury after Kohlmann finished his expert testimony that the remainder of his testimony related to observed facts. *Mustafa*, 753 F. App'x at 34 ("[T]he district court's instructions, together with the inherently distinct nature and subject matter of Kohlmann's expert and fact testimony, satisfactorily safeguarded against juror confusion and, thus, no relief from judgment is warranted.").

Fourth, Defendant claims that the Government hid evidence from him. Def. Mot. 36–51. The Court presumes that Defendant is referring to Judge Forrest's precluding cross-examination of Kohlmann about certain classified information, *id.* at 39–40, and additional information about the Government's acquisition of two faxes sent by cooperating witness James Ujaama to Defendant in October and November 1999. The Second Circuit rejected both claims. As to the Kohlmann information, the Second Circuit found preclusion of cross-examination about certain matters appropriate, because "even if the classified information would also have shown motive and bias, the district court reasonably concluded that further examination on the matter would have been only marginally relevant and essentially repetitive." *Mustafa*, 753 F. App'x at 34

(internal quotation marks and citation omitted). With respect to the faxes, the Second Circuit held that Defendant may not have any suppression remedy under precedent holding that a foreign national cannot raise a Fourth Amendment challenge to searches conducted abroad, and that, in any event, his motion for additional discovery on this matter was untimely. *Id.* at 43–44. Thus, to the extent that Defendant did not learn of certain information, this information was not material to his defense and had no impact on the outcome of the trial.

Fifth, Defendant claims that it would be in the "public interest" to order a new trial because his conviction was harmful to the international image of the United States and national security interests. Def. Mot. 52–58. This is not a cognizable legal argument. In any event, the Court agrees with the Government that "Defendant's conviction and life sentence after a lengthy and fair trial of participating in a kidnapping that killed two Americans, setting up a terrorist training camp in the United States, and supporting al Qaeda, whose mission it is to destroy the United States, sent a strong deterrence message to like-minded individuals who might be similarly inclined to inspire others to support violent jihad and harm the United States." Gov. Opp. 9–10.

Finally, Defendant argues that cooperating witness James Ujaama lied on the witness stand. Def. Mot. 59–61. Ujaama testified for almost four days and was subject to a vigorous cross-examination about his offense conduct, prior bad acts, and any potential biases. *See* Trial Tr. 1935–2704, ECF Nos. 392, 394, 396, 398. Because courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." *Sanchez*, 969 F.2d at 1414. An example of exceptional

circumstances is where testimony is "patently incredible or defies physical realities," and even a court's identification of problematic testimony does not automatically meet this standard. *Id.* Here, the jury credited Ujaama's testimony and Defendant offers no basis to disturb that assessment. *See United States v. Vasquez*, 267 F.3d 79, 90–91 (2d Cir. 2001) (deferring to jury's assessment of credibility notwithstanding appellant's claim of "inconsistencies and lies" within testimony of Government's witnesses).

The Court finds no "real concern that an innocent person may have been convicted." *Ferguson*, 246 F.3d at 134 (internal quotation marks and citation omitted). Accordingly, because there is no "manifest injustice" in "letting [the] guilty verdict stand," *id.*, Defendant's Rule 33 motion for a new trial is DENIED.

CONCLUSION

For the reasons stated above, Defendant's motion is DENIED. The Clerk of Court is directed to terminate the motions at ECF Nos. 548, 549, and 555.

SO ORDERED.

Dated: July 12, 2019
New York, New York

ANALISA TORRES
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

MUSTAFA KAMEL MUSTAFA,
a/k/a "Abu Hamza al-Masri,"

Defendant.

04 Cr. 356 (AT)

ORDER

ANALISA TORRES, District Judge:

On May 19, 2014, after a month-long trial, a jury found Defendant, Mustafa Kamel Mustafa, guilty of eleven counts of crimes relating to terrorism. ECF No. 366. On October 23, 2018, the Second Circuit affirmed Defendant's judgment of conviction on all counts except Counts Seven and Eight, which it reversed on jurisdictional grounds. *See United States v. Mustafa*, 753 F. App'x 22 (2d Cir. Oct. 23, 2018). The Second Circuit did not order resentencing. *Id.* On April 16, 2019, Defendant moved for a new trial pursuant to Federal Rule of Criminal Procedure 33. ECF Nos. 548–549. On July 12, 2019 (the "Order"), the Court denied Defendant's Rule 33 motion, finding that there was no "manifest injustice in letting the guilty verdict stand." Order at 10, ECF No. 556. On July 19, 2019, Defendant filed a letter seeking reconsideration of the Order or, in the alternative, leave to appeal. Def. Mot., ECF No. 559.[1] For the reasons stated below, Defendant's motion for reconsideration and a certificate of appealability is DENIED.

Motions for reconsideration are governed by Rule 6.3 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, and are entrusted to the "sound discretion" of the district court. *Davidson v. Scully*, 172 F. Supp. 2d 458, 462 (S.D.N.Y. 2001). "Although the federal and local rules of criminal procedure do not specifically provide for motions for reconsideration, courts in this district have applied Local Civil Rule 6.3 in criminal cases." *United States v. Muse*, No. 06 Cr. 600, 2007 WL 1536704, at *2 (S.D.N.Y. May 29, 2007). "A motion for reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Id.* (internal quotation marks and citation omitted); *see also United States v. Yannotti*, 457 F. Supp. 2d 385, 389 (S.D.N.Y. 2006). "Local Rule 6.3 is narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the court." *Id.* (internal quotation marks and citation omitted). "The decision whether to grant or deny a motion for reconsideration is within the court's sound discretion." *Id.*

[1] On June 26, 2019, Defendant filed a motion seeking leave to submit a reply to the Government's opposition brief. ECF No. 560. However, this letter motion was not received by the Court until July 30, 2019. *Id.* In the meantime, on July 23, 2019, Defendant filed his reply brief, which was dated July 12, 2019. ECF No. 557. Accordingly, Defendant's motion for leave to file a reply brief is DENIED as moot, as Defendant has already filed his reply brief. *See* ECF No. 557.

Defendant argues, *inter alia*, that the Court erred because the Government's opposition to Defendant's Rule 33 motion "contained many naked lies and untrue descriptions" and "distorted the [Second] Cir[cuit's] purposed rulings," and because the Court did not receive Defendant's reply memorandum before issuing the Order. *See* Def. Mot. at 1–2.[2] The Court has considered Defendant's arguments, and even under a liberal interpretation of his motion, Defendant has failed to demonstrate that the Court overlooked any controlling decisions or data.[3] As the Court held in the Order, Defendant does not establish that the evidence he cites is "newly discovered after trial" and, in any event, "he cannot satisfy the other four elements necessary to grant a Rule 33 motion: due diligence on his part to obtain the evidence, that the evidence is material, that the evidence is not merely cumulative or impeaching, and that the evidence would likely result in acquittal." Order at 5.

Accordingly, Defendant's motion for reconsideration is DENIED. Because Defendant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c); *see also Matthews v. United States*, 682 F.3d 180, 185 (2d Cir. 2012). In addition, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith, and, therefore, *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

The Clerk of Court is directed to terminate the motions at ECF Nos. 559–560.

SO ORDERED.

Dated: August 2, 2019
New York, New York

ANALISA TORRES
United States District Judge

[2] Although the Court did not receive Defendant's reply brief (the "reply") filed at ECF No. 557 until after the Court issued its decision, it has now reviewed the reply and finds that it does not alter the Court's analysis or holding in the Order because the reply merely reiterates or expands upon arguments made in Defendant's Rule 33 motion and to the extent the reply raises new arguments, the Court finds them to be without merit.

[3] Defendant argues that the Government lied in its opposition brief when it stated that two Americans were killed in the kidnapping at issue. Def. Mot. at 2. As the Second Circuit stated, "Mustafa aided and abetted the terrorist Islamic Army of Aden in its kidnapping of 16 non-Muslim tourists in Yemen—two of them Americans—in an effort to compel the Yemeni government to release certain of Mustafa's followers from custody." *Mustafa*, 753 F. App'x at 27. Four of the hostages were killed, although they were not Americans. *See id.* Defendant is, therefore, correct that two Americans were not killed in the relevant kidnapping, but he is not entitled to reconsideration on this basis because the Court still agrees with the Government that "[D]efendant's conviction and life sentence after a lengthy and fair trial of participating in a kidnapping that [involved] two Americans, setting up a terrorist training camp in the United States, and supporting al Qaeda, whose mission it is to destroy the United States, sent a strong deterrence message to like-minded individuals who might be similarly inclined to inspire others to support violent jihad and harm the United States." Gov. Opp. 9–10, ECF No. 554.