

IN THE SUPREME COURT OF THE UNITED STATES

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No. \_\_\_\_\_

MUSTAFA KAMEL MUSTAFA, APPLICANT

v.

UNITED STATES OF AMERICA

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APPLICATION FOR AN EXTENTION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Mustafa Kamel Mustafa a/k/a Abu Hamza, respectfully requests a 45-day extension of time, to and including January 8, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The Court of Appeals entered its judgment on October 13, 2021, App., *infra*, 1a-6a, and denied Applicant's petition for rehearing and/or rehearing *en banc* on August 26, 2022, *id.* at 7a. Unless extended, the time for filing a petition for a writ of certiorari will expire on Thursday, November 24, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. Applicant was indicted in the Southern District of New York on numerous counts of terrorism-related activity, specifically: (1) conspiracy to take hostages (18 U.S.C. § 1203); (2) hostage taking (18 U.S.C. § 1203); (3) conspiracy to provide and conceal material support and resources to terrorists (18 U.S.C. §§ 371, 956, 2339A); (4) providing and concealing material support and resources to terrorists (18 U.S.C. §§ 956, 2339A, and 2); (5)

conspiracy to provide material support and resources to a foreign terrorist organization (18 U.S.C. § 2339B); (6) providing material support and resources to a foreign terrorist organization (18 U.S.C. §§ 2339B and 2); (7) conspiracy to provide and conceal material support and resources to terrorists (18 U.S.C. §§ 956, 2339A); (8) providing and concealing material support and resources to terrorists (18 U.S.C. §§ 956, 2339A, and 2); (9) conspiracy to provide material support and resources to a foreign terrorist organization (18 U.S.C. § 2339B); (10) providing material support and resources to a foreign terrorist organization (18 U.S.C. §§ 2339B and 2); and (11) conspiracy to supply goods and services to the Taliban (18 U.S.C. § 371; 50 U.S.C. § 1705 [1996 ed.]; 31 C.F.R. §§ 545.204, 545.206 [1999 ed.]).

2. Following a jury verdict, Applicant 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 arguable violation of the extradition order than resulted in his transfer to the United States for trial. Applicant's trial followed a lengthy extradition battle that lasted over eight years and was ultimately resolved by the European Court of Human Rights, and only upon the assurance that Applicant would not serve an extended sentence at ADX Florence, which is now the case.

3. Applicant direct appeal of his conviction and sentence was granted in part and denied in part by the Second Circuit Court of Appeals on October 23, 2018, and the portions of the appeal that thereafter formed the basis for a petition for certiorari to this Court were thereafter denied certiorari on October 7, 2019.

4. While Applicant's direct appeal of his conviction and sentence was still pending, Applicant filed a pro se motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. On July 12, 2019, the Honorable Analisa Torres, United States

District Judge for the Southern District of New York, denied Applicant's pro se post-conviction motion for a new trial, and on August 2, 2019, denied Applicant's pro se motion for reconsideration of the same. Applicant thereafter filed a timely pro se Notice of Appeal.

5. The Second Circuit Court of Appeals appointed the undersigned counsel to represent Applicant in relation to the denial of Applicant's pro se post-conviction motions (hereafter referred to as the "Rule 33 appeal") as the undersigned had previously represented Applicant in relation to Applicant's prior direct appeal.

6. As stated, on October 13, 2021, the Court of Appeals entered its Judgment denying Applicant's Rule 33 appeal, App., infra, 1a-6a, and on August 26, 2022, denied Applicant's petition for rehearing and/or rehearing en banc, id. at 7a. It is that appeal, the Rule 33 appeal, that will form the subject of Applicant's forthcoming petition for certiorari.

7. Applicant is a Muslim imam who had been based in London, England, and who, without question, is the highest profile alleged terrorist ever extradited from Europe to the United States for criminal prosecution. His offenses, prosecuted in the Southern District of New York, spanned the globe and were alleged to include a hostage taking in Yemen, support for the Taliban in Afghanistan, militant fundamentalist propaganda in England, and the creation of terrorist training camps within the United States.

8. The prosecution of Applicant's offenses was extensive, including *unclassified* discovery so voluminous that it filled an entire conference room with banker's boxes stacked to the ceiling. Applicant's trial (and both appeals) also involved and referenced substantial *classified* material subject and controlled by the strict requirements of 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.

9. Because Applicant's counsel possessed the requisite national security clearance, but Applicant himself did not, Applicant's counsel was provided access to the classified material relevant to Applicant's defense but Applicant himself was prohibited from being given access to that information.

10. The questions anticipated to be presented in the forthcoming petition for certiorari are: (1) Whether a claim of ineffective assistance of counsel may be raised under Rule 33(b)(1) of the Federal Rules of Criminal Procedure if the newly discovered evidence is newly discovered *to the defendant*? And (2), whether 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? An answer to both of these questions will raise Fifth and Sixth Amendment concerns.

11. An extension of time is necessary to complete the instant appeal for two different reasons. First and foremost, because Applicant is being detained at ADX Florence under highly restrictive Special Administrative Measures ("SAMs"), his communications even with counsel are greatly limited and often severely delayed. It is, for example, common place for it to take up to four weeks for letters from Applicant to be received by counsel due to the extensive security review process that all mail – even legal mail – is required to be undertaken in relation to this case. Similarly, it often takes the same lengthy period of time to schedule legal telephone calls with Applicant, and such communication is necessary prior to filing the forthcoming petition for certiorari. Additionally, counsel has had three appellate briefs due in the Second Circuit Court of Appeals over the past month (October) that took up

considerable time as well as one other appellate brief and one other cert. petition both due this month (November).

12. Accordingly, counsel for Applicant respectfully requests a 45-day extension of time, to and including January 8, 2023, within which to file a petition for writ of certiorari.

Dated: November 5, 2022

Respectfully submitted,

MICHAEL K. BACHRACH  
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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

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

1                   At a stated term of the United States Court of Appeals for the Second Circuit,  
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of  
3 New York, on the 13<sup>th</sup> day of October, two thousand twenty-one.  
4

5 **PRESENT:**

6                   **PIERRE N. LEVAL,**  
7                   **ROBERT D. SACK,**  
8                   **MICHAEL H. PARK,**  
9                   *Circuit Judges.*

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12 **UNITED STATES OF AMERICA,**

13  
14                   *Appellee,*

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16                   v.

19-2520

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18 **MOSTAFA KAMEL MOSTAFA,**

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20                   *Defendant-Appellant.\**  
21 \_\_\_\_\_

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23 **FOR APPELLEE:**

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

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28 **FOR DEFENDANT-APPELLANT:**

Michael K. Bachrach, Law Office of Michael K. Bachrach, New York, NY (*on submission*).

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

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

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

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

13 A jury convicted Mostafa on all eleven counts; the district court sentenced him to life  
14 imprisonment; and he appealed. We reversed Mostafa’s conviction on Counts Seven and Eight  
15 for insufficient evidence due to the more limited scope of the material-support prohibitions before  
16 their amendment in October 2001. *United States v. Mustafa*, 753 F. App’x 22, 29–32 (2d Cir.  
17 2018). We rejected Mostafa’s remaining arguments and affirmed his conviction on all other  
18 counts. *Id.* at 27–29, 32–37. Mostafa, proceeding *pro se*, then filed a motion for a new trial under  
19 Rule 33 of the Federal Rules of Criminal Procedure. He now appeals the district court’s denial of  
20 that motion and his subsequently filed motion for reconsideration. We assume the parties’  
21 familiarity with the underlying facts, procedural history, and issues on appeal.

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<sup>1</sup> 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.

1 We review the denial of a Rule 33 motion for abuse of discretion. *See United States v.*  
2 *James*, 712 F.3d 79, 107 (2d Cir. 2013). The same standard of review applies to the district court’s  
3 determination on whether to conduct a hearing on the motion. *See United States v. DiTomasso*,  
4 932 F.3d 58, 70 (2d Cir. 2019). When considering a motion under Rule 33, a district court “may  
5 vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P.  
6 33(a). This discretion should be exercised “sparingly and in the most extraordinary circumstances,  
7 and only in order to avert a perceived miscarriage of justice.” *United States v. Gramins*, 939 F.3d  
8 429, 444 (2d Cir. 2019) (internal quotation marks and citations omitted). “[T]he ‘ultimate test’ for  
9 granting a new trial pursuant to [Rule 33] is ‘whether letting a guilty verdict stand would be a  
10 *manifest injustice.*’” *Id.* (quoting *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001)).

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

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



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

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

14 In his *pro se* brief with this Court,<sup>2</sup> Mostafa argues that conditions of his confinement and  
15 the logistics concerning replacement of his trial counsel made it impossible to comply with the 14-  
16 day deadline. But an extension of the Rule 33 deadline requires the movant to prove "excusable  
17 neglect." Fed. R. Crim. P. 45(b)(1)(B); *United States v. Brown*, 623 F.3d 104, 113 n.5 (2d Cir.  
18 2010). Even if Mostafa was unable to file his motion within 14 days of conviction, he provides  
19 no explanation for the nearly four-year delay in raising grounds other than newly discovered  
20 evidence in support of his Rule 33 motion. The district court did not abuse its discretion in limiting  
21 Mostafa's arguments to those based on newly discovered evidence.

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<sup>2</sup> 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.

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


14           We have also reviewed and liberally construed the arguments raised by Mostafa in his *pro*  
15 *se* supplemental brief. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474–75 (2d Cir.  
16 2006); *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998) (explaining that *pro se* litigants must  
17 still abide by Federal Rule of Appellate Procedure 28(a), that “requires appellants in their briefs to  
18 provide the court with a clear statement of the issues on appeal”). To begin, Mostafa has not  
19 demonstrated that his asserted grounds for retrial are based on newly discovered evidence. Even  
20 assuming that they were, they would not demonstrate “exceptional circumstances” such that the  
21 district court abused its discretion in refusing to “intrude upon the jury function” by ordering a  
22 new trial. *United States v. McCourty*, 562 F.3d 458, 475–76 (2d Cir. 2009) (quoting *United States*  
23 *v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). For the most part, Mostafa rehashes arguments

1 we rejected in his prior appeal. Mostafa also argues that his trial counsel was ineffective by failing  
2 to provide him with exculpatory discovery. Even if we were to assume that Mostafa was not aware  
3 of this supposed failure during trial, Mostafa does not assert any facts showing that he made any  
4 effort to obtain this discovery earlier; his claim therefore cannot be the basis for a Rule 33 motion.  
5 Lastly, to the extent that Mostafa now contends that there was insufficient evidence for the jury to  
6 convict on Counts One and Two, we reject that argument. The jury's conviction on these counts  
7 was supported by ample evidence. *See, e.g.*, Tr. 3502–03, 3476–78, 2779–81 (testimony showing  
8 that Mostafa provided satellite telephones to the kidnappers); Tr. 2909–18 (Mostafa's October  
9 2000 taped interview, in which he voiced support for the man who led the kidnapping and admitted  
10 to speaking with him during the hostage taking).

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

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

A circular official seal of the United States Second Circuit Court of Appeals is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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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 26<sup>th</sup> day of August, two thousand twenty-two.

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United States of America,

Appellee,

v.

Mostafa Kamel Mostafa,

Defendant - Appellant.

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**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

  
Catherine O'Hagan Wolfe

