

No. 24-6010

FILED

JUL 23 2024

OFFICE OF THE CLERK  
SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS CANTIZANO — PETITIONER  
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United State Court of Appeals for the Ninth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carlos Cantizano : No. 68677-112

(Your Name)

Federal Correctional Institution

P.O. Box 9000

(Address)

Safford, AZ 85548

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

May the Court of Appeals, after approving a notice of appeal, withdraw the briefing schedule on the basis that I requested appointment of counsel to assist me in presenting my claim? Thereby, the court became aware that even though I had a legitimate legal issue I was not able of presenting the problem by myself, in immediacy. Thus, the court bullied me with an order to show cause. Ultimately, denied my request to reinstate my appeal and then Affirmed the district court's decision that contained an impermissible ruling. All done in violation of the right of due process.

If the district court erroneously recharacterized a parties Rule 33 (b)(1) new trial motion, that was submitted under Criminal Rule 37 during the direct appeal, as a motion for collateral relief under title § 2255. Thus, prevented a timely assertion of the motion before the Court of Appeals affirmed the conviction. If the date that the initial motion was submitted equitably tolls the time for review regardless that the Rule 37 motion was filed after the direct appeal, due to the district court's own improper action that caused the filing delay. May the court refuse to correct their own, intentional, clerical error? And is the district court's interpretation of Federal Rules of Criminal Procedure statute of limitations not subject to review through a second appeal?

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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### OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was APRIL 24, 2024.

[ ] No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 7, 2024, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including        (date) on        (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was       . A copy of that decision appears at Appendix       .

[ ] A timely petition for rehearing was thereafter denied on the following date:       , and a copy of the order denying rehearing appears at Appendix       .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including        (date) on        (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### The Fifth Amendment of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use, without just compensation.

### Federal Rules of Criminal Procedure - Rule 33. 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 of finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) **Other Grounds.** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

### Federal Rules of Criminal Procedure - Rule 36 : ( APPENDIX - F )

### Federal Rules of Criminal Procedure - Rule 37 : ( APPENDIX - G )

### Federal Rules of Criminal Procedure - Rule 45 : ( APPENDIX - H )

## STATEMENT OF THE CASE

While on Direct Appeal, my newly discovered evidence came into existence on September of 2020, less than a month past Criminal Rule 33's three-year deadline which expired on July 28, 2020. I was appointed my appellate attorney, Mr. Tony Farmani, on October 20, 2020. Mr. Farmani, acknowledged I had legitimate newly discovered evidence and even assisted me in asserting the proper legal category and provided documentation to assist in its presentation. Toward the end of my direct appeal I discovered he had backtracked his position and wanted me to present the new evidence myself after the direct appeal. I confronted my counsel. I wanted him to present the Federal Rules of Criminal Procedure Rule 33 new trial motion to the district court using Federal Rules of Criminal Procedure Rule 37. He refused. On January 27, 2023 he filed to withdraw as my counsel because I told him I would report him to the State Bar Association for refusing to help me present my new evidence. The Court of Appeals granted his removal on February 1, 2023. With my newly acquired (forced) pro se status that allowed me to file motions myself, I took several months to prepare my Rule 33 motion for submission.

On April 21, 2023 I filed in the District Court my Criminal Rule 33 (b)(1) new trial motion under Criminal Rule 37 because my appeal remained undecided; now (Case no. 4:14-cr-02097-JAS-JR; Dkt. Entry No. 283). However, the District Court erroneously recharacterized my motion and filed it as a motion to vacate under title 28 U.S.C. 2255, which isn't allowed during a direct appeal, (*Castro v. United States*, 540 U.S. 375, (2003)). My motion was docketed under a new civil case number, (Case no. 4:23-cv-00196-JAS-PSOT; Docket Entry No. 1).

On April 27, 2023 I also filed a motion in the Court of Appeals requesting a stay of the appeal pending the outcome of my Rule 33 (b)(1) motion in the district court, and appointment of counsel to assist me on my first appeal.

My motion was denied on April 28, 2023, (Case no. 19-10373; Dkt. Entry No. 90). Then, the Court of Appeals proceeded to issue their MANDATE on May 8, 2023, (Case no. 19-10373; Dkt. Entry No. 91; later recalled and reissued the mandate on - June 1, 2023).

On May 11, 2023 the District Judge issued his order that corrected the clerical error by closing the (recharacterized) 2255 civil case number, 4:23-cv-00196-JAS-PSOT, then, transferred the Rule 37 motion to the original case number, 4:14-cr-02097-JAS-JR, that was now a closed case. Reasoning, that the Rule 37 motion was now being filed by the court Judge.. after the Court of Appeals had issued their mandate. Therefore, the Rule 37 motion was now untimely filed after the direct appeal had concluded. Nevertheless, the District Judge then proceeded to entertain the Rule 37 motion and denied it under the original case number, (Appendix-B; Dkt. Entry #285).

Thereafter, on June 12, 2023 the District Judge entertained my timely filed Motion for Reconsideration. Where I brought to Judge Soto's attention that he had misapprehended the reason I gave for the untimely filing of the Rule 33 motion, (The newly discovered evidence came into existence shortly after the three year deadline, and the further filing delay was caused by my appellate counsels refusal to present the issue, both, unavoidable even with diligence as they were not within my control.). (Dkt. Entry # 292).

Strangely, the district court on June 27, 2023 approved an EX PARTE MOTION for forensic funding paid out to Roloff Digital Forensics, (Case no. 4:14-cr-02097-JAS-JR; Dkt. Entry #294), It was submitted by Lance Wood who wasn't my attorney (as I was pro se) and filed without my consent. I did not like that the record now gave the impression that funding was provided to verify the new evidence, I took action. On July 14, 2023 I filed a motion requesting a 60 day extension of time so I could investigate the purpose behind the filing of this Ex Parte Motion or appointment of

counsel to help me protect my newly discovered evidence, (Dkt. Entry # 295).

On July 19, 2023 the District Judge filed his ruling that ignored my motion for an extension of time or appointment of counsel, and then denied my Motion for Reconsideration, (Appendix - D); (Dkt. Entry # 296).

Clearly, the Honorable Judge J. Soto didn't apply the excusable neglect standard associated with Fed. R. Crim. Proc. 45 (b)(1)(B) to my Motion for Reconsideration in a proper manner. Since, Judge Soto didn't question, Tony Farmani, the appellate counsel who refused to pursue my newly discovered evidence, Instead, the Judge may have questioned, Lance Wood, the wrong attorney. In 2019 Mr. Wood was my district court counsel who I recall telling not to pay the last forensic examination made by Roloff Forensics. Because, they failed to use a different analyst as "we" requested. They used the same analyst who refused to examine the FrostWire program's props. file as I requested. Which incidentally in 2020 that was the location where the new mathematical evidence was discovered. It is unclear why the Court approved funding over three years later for a flawed report without consulting me, but it is clear that Lance Wood affected the court's final decision.

On August 3, 2023 I filed a timely Motion for Clarification, (Dkt. Entry # 297). I cited, *Eberhart v. United States*, 546 U.S. 12,13 (2005), and asked Judge Soto ; Has not the Government abandoned their objection to the court reviewing an untimely Rule 33 motion under, *Eberhart* ? Thus, shouldn't the court move on to the merits of the non-jurisdictional motion considering that the trial prosecutor isn't opposing its review. After a month I got the premonition that the Judge planned to deny my Rule 33 motion under the semblance that the court record didn't support my claim. Seeing as I wasn't being allowed counsel to hold an evidentiary hearing on the new evidence as required under

Rule 33, to correct the record. I took action.

On September 13, 2023 I submitted my own EX PARTE MOTION TO APPOINT EXPERT (forensic expert and fees) (Under Seal); to verify the truthfulness of the newly discovered mathematical evidence in order to correct the court record myself. (Case No. 4:14-cr-02097-JAS-JR; Docket Entry # 298).

On September 20, 2023 the District Judge issued a one page ruling ordering that all pending motions in this case are denied on the basis that a "Review of the record reflects that this case is closed and the Ninth Circuit has upheld Defendant's conviction." (Appendix - E); (Dkt. Entry # 299).

On September 30, 2023 I submitted my Notice of Appeal to the District Court. It was returned to me unfiled on October 11, 2023. The court Clerk cited Docket entry # 299's court order that no further filings would be entertained in this closed case.

On October 25, 2023 I filed a timely Notice of Appeal in the Ninth Circuit Court of Appeals. It was accepted and case no. 23-3048 was opened and I was given a briefing schedule, (C.A.#23-3048; Dkt Entry No.1).

On November 14, 2023 I filed a motion requesting appointment of counsel. Because, I'm not a lawyer and I realized I needed help perfecting my argument for the opening brief, (C.A. #23-3048 ; Dkt Entry No. 5).

On January 19, 2024 the Court of Appeals denied my request for an appointment of counsel, rescinded the briefing schedule, and ordered me to show cause in order to reinstate my appeal, as I no longer had a legal claim. (C.A. #23-3048 ; Dkt. Entry No. 8). Remember, I am not an attorney, I am a pro-se movant that couldn't comprehend the district courts last action.

I believed I had overcome the untimeliness of the Rule 33 motion in accordance to Rule 45 and *Eberhart* but it went disregarded. I also knew there was clearly malfeasance with the court's recharacterizing the Rule 37

motion in order to place it within a different category. Therefore, that is what I argued to the Ninth Circuit. (C.A. # 23-3048 ; Dkt. Entry No. 13).

On April 24, 2024 the Court of Appeals in a single page ruling without an explanation denied my request to reinstate my appeal. (Appendix - A); (Dkt. Entry 15).

On May 14, 2024 I filed a timely Motion for Reconsideration. (Dkt Entry No. 16). The Government responded. (Dkt. Entry. No. 17).

On June 27, 2024 I mailed a notice to the Court of Appeals requesting that I be notified when the Court issued its final ruling, for purpose of Writ of Certiorari to the Supreme Court. (Docket Entry No. 18). For the reason that the court's PACER (Public Access to Courts Electronic Records) system for almost a month had been giving the following message, "No summary data was found for case 23-3048", the Pacer customer service center had not been able to fix the problem.

On July 9, 2024 I received a response from the Clerk informing me that my case had already been decided on April 24, 2024 and provided a copy of Docket Entry no. 15. This response was clearly an intentional clerical error that was intended to deprive me of a court notice informing me of when the Court ruled on Docket Entries Number 16 and 17.

The detriment being I could end up filing an untimely writ of certiorari, as a result of the Clerk's action. This is how I learned that the court clerk could, whether intentionally or accidentally, create a clerical error that could later be used by the court to deprive a movant of fair legal proceedings, which is what occurred with my Rule 37 filing.

On July 27, 2024 I submitted my last motion, an Addendum to my Motion for Reconsideration, where I tried to argue the clerical error.

Unfortunately, this all occurred during a month long prison modified lock-down. Where I was denied law library access due to a staff shortage. Therefore, I did the best I could knowing that the court was about to

give their decision to deny my Motion for Reconsideration. (Dkt. Entry No. 21).

On August 7, 2024 the Court of Appeals under the Mail-Box Rule responded to my last motion. The Court gave a one page ruling, without an explanation, issuing their MANDATE. Which denied my request to reinstate my appeal. (Appendix - C); (Case no. 23-3048; Dkt. Entry No. 22).

Toward the end of August of 2024 the prison lock-down ended I regained access to phone service, where I was informed that the PACER problem had been corrected, and I was updated on the status of my case. I also regained access to the law library. I have searched and searched but cases with the exact circumstance as mine are not present.

However, in October of 2024 I did find a case that is dissimilar to mine but the Honorable Judge Barkett gives an opinion in a dissent that matched what had occurred to me. Explaining that it's not the improper recharacterization of my motion that I should be arguing but rather that the improper recharacterization by the Court is what caused my motion to be filed untimely. Therefore, as I'm a pro se movant with no legal training, my last chance to correct what occurred in the lower courts is to bring my unfortunate circumstance to the court of last resort, The United States Supreme Court.



## REASONS FOR GRANTING THE PETITION

In respect to my first question to the United States Supreme Court. On the district court's May 11, 2023 ruling, (APPENDIX-B) the Honorable Judge J. Soto states that my Federal Rules of Criminal Procedure 37 motion was filed by the court Clerk as a motion under statute 28 U.S.C. § 2255 to "facilitate" the consideration of the motion. This is an untrue statement since the Judge would know that a 2255 motion is not allowed to be filed during an appellant's direct appeal. See, *Castro v. United States*, 540 U.S. 375, 124 S. Ct. 786, 157 L. Ed 2d 778 (2003) (citation omitted). It would make the motion impossible to be ruled upon. This was an erroneous recharacterization of the Rule 37 motion therefore clearly a "clerical error" committed by the court Clerk.

Judge Soto supposedly corrected the court's error by closing the 2255 civil case number then he transferred the motion to the original criminal case number where it should have been filed in the first place.

For clarities sake, by the time the Judge took this action the Court of Appeals had already denied my motion to stay the proceedings - pending the outcome of my Rule 33 motion in the district court - and then issued their MANDATE, thereby, closing my appeal: Correctly, a Rule 37 motion can only be filed before the appellate court issues their decision just like a 2255 motion can only be filed after the appeal has concluded. Therefore, the filing of the Rule 37 motion was untimely because the appellate case was now closed.

However, Judge Soto at his discretion can correct a clerical error under Federal Rules of Criminal Procedure 36, which is the only way to fix this court error. Analyzing the circumstance, even if Judge Soto would have been aware that the appellate court case was closed he still would have been required to correct the clerical error that the court created which caused the untimely filing. In order to be able to docket the Rule 37 motion into the proper case number. Where I was clearly entitled to equitable tolling of -

the statute of limitations in this matter. See, *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (citation omitted).

My circumstance automatically establishes the two elements required for equitable tolling without my input. (1) that he has been pursuing his rights diligently : My Rule 37 motion was submitted on April 16, 2023 under the Mail-Box Rule while the case was still open, thus, it was timely filed.

(2) that some extraordinary circumstance stood in his way and prevented timely filing : The improper recharacterization of my petition by the district court prevented me from timely asserting my Rule 37 motion before the case was closed. The improper recharacterization was an "extraordinary circumstance beyond my control which caused the filing to be untimely".

Equitable tolling suspends the closed case issue.

Furthermore, an indicative ruling, or any dependence on the closed appellate case is no longer required because Rule 37 gives the district court jurisdiction to make a full decision on the motion under certain conditions.

See, Federal Rules of Criminal Procedure 37 Advisory Committee's Notes (2012). "Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure." (APPENDIX - G, at page two paragraph one). In my circumstance the court of appeals relinquished its jurisdiction to the district court when they issued a mandate that didn't expressly or impliedly preclude the district court from considering for the first time the newly discovered evidence on a Rule 37 / 33 motion.

Therefore, the only way to overcome the closed case issue is for the Judge to first correct the clerical error through equitable tolling using Rule 36.

In this regard I have found it very confusing that Judge Soto entertained my Rule 33 motion. He gave his opinion and justification why my Rule 33 motion -

was now untimely and then ruled upon the motion. (APPENDIX-B, at pages 2 and 3). This implied that he had *sua sponte* corrected the clerical error since he was clearly aware of the timeliness issue that was caused by the court's own clerk and a Judge has a moral responsibility to correct the court's own mistakes. Moreover, the Judge is not allowed to entertain the Rule 33 motion if the case remained closed!

The problem, as I see it, is that Judge Soto was negligent in his correction of the clerical error and is picking and choosing which motions he will review and rule on or not. Even though he is claiming that the case is closed. In explanation, on September 20, 2023's final court order (APPENDIX-E). Judge Soto denied a review of my pending motions, (Docket Entries No. 295, 297, and 298) on the basis that this is a closed case. Yet, on May 11, 2023's order (APPENDIX-B) Judge Soto reviewed and denied my Rule 33 motion, as untimely, even though it was filed on the same closed case and he clearly doesn't nullify that ruling on his final order. (another clerical error by the court?) The Court of Appeals has upheld this unfair action on their April 24, 2024 order (APPENDIX-A) when they summarily affirmed the district court's orders entered on May 11, 2023 and on September 20, 2023.

This would mean that if I re-raise my Rule 33 motion under a 2255 petition it can be denied on the basis that it was already ruled upon in the district court and was affirmed by the court of appeals, regardless that it was decided while on a closed case. My opinion is that the lower court is in error because if the district Judge didn't actually correct the untimely Rule 37 filing error matter, that the district court clerk caused, then the case remained closed and "all" the motions ruled on under the Rule 37 motion cannot be sustained. Therefore that false ruling must be reversed. And it is the Court of Appeals job to remand for correction not to support the district courts erroneous action.

I will now just speak plainly. I want to point out that I did have two legitimate issues that could have been presented in my appellate opening brief. First, the equitable tolling due to an extraordinary circumstance caused by the district court that would have conclusively overcome the untimely Rule 37 motion. Second, the courts erroneous adjudication of the Rule 33 motion as part of the denial of the untimely Rule 37 motion which was an impermissible ruling on a closed case. As I presented them earlier.

Therefore, I want to point out that the appellate court had already issued me a briefing schedule and would have allowed me to proceed in filing the opening brief, If I had never requested an appointment of counsel.

Additionally, the court could have denied me counsel and still allowed me to proceed in filing an opening brief. Since I wrote the Rule 37/33 motion I have been denied counsel by the Supreme Court, my 1st appellate court, and the district court. I have brushed it off and moved on to do the work myself. I am confident I would have reached the two defenses above in time for my opening brief, even without appointment of counsel. Therefore, the appellate court erred in demanding the order to show cause which only appears to have helped the district court further their questionable actions.

It is my opinion that the district court intentionally misfiled my Rule 37 motion to instigate an untimely motion. Then on their May 11, 2023 order (APPENDIX-B) they issued the impermissible Rule 33 decision along with the Rule 37 decision. Which may or may not have been intentional. However, it does void the whole May 11, 2023 decision since the Rule 33 decision can't be separated from the other. And that decision does cause me prejudice in a future filing of a 2255 motion since the 33 motion was already ruled on in that closed case. This violates my right of due process under the Fifth Amendment of the Constitution.

Consequently, the court of appeals has sanctioned this erroneous action by affirming the May 11, 2023 decision (APPENDIX-A) then issuing a Mandate on the matter. (APPENDIX-C).

This calls for the Supreme Court to exercise their supervisory power under Rule 10(a). As the Court of Appeals has departed from the accepted and usual course of judicial proceedings by sanctioning the erroneous ruling made by the lower court and not correcting it.

I ask the Supreme Court to rule in my favor and not allow a clerical error that goes uncorrected as a method to deny a movant their right to fair judicial proceedings. Which hurts all parties subjected to clerical errors of this type. Thank you and God bless.

*Carlo Cantijero*

## CONCLUSION

I, Carlos Cantizano, respectfully pray that the U.S. Supreme Court remands my case to the Court of Appeals with an order to reinstate my appeal so I may present my opening brief with an equitable tolling argument, for the untimely Rule 37 motion, that was caused by the district court Clerk's clerical error. Or at least remand my case to the Court of Appeals with an order to correct their clerical error that affirmed the Rule 33 motion on a closed Rule 37 case. So I may proceed to re-raise my Rule 33 motion in a 2255 petition.

Respectfully submitted on: November 4, 2024



Defendant - Appellant

## VERIFICATION OF THE PETITION

I, Carlos Cantizano, hereby, declare that the foregoing petition for a writ of certiorari is truthful and accurate under penalty of perjury under the laws of the United States of America.

Signed on: November 4, 2024

  
Carlos Cantizano  
Defendant - Appellant

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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United States of America,  
Plaintiff,  
v.  
Carlos Cantizano,  
Defendant/Movant.

No. CV-23-00196-TUC-JAS  
CR-14-02097-TUC-JAS (JR)

**ORDER**

15 On April 21, 2023, Movant Carlos Cantizano, who is confined in the Federal  
16 Correctional Institution-Safford in Safford, Arizona, filed a pro se “Motion for Indicative  
17 Relief Under F.R. Crim. P. Rule 37 for New Trial Under F.R. Crim. P. Rule 33” (Doc. 1  
18 in CV-23-00196-TUC-JAS and Doc. 283 in CR-14-02097-TUC-JAS (JR)). In a May 11,  
19 2023 Order, the Court denied the Motion for Indicative Relief and closed this civil case.  
20 On May 19, 2023, Movant filed a “Motion for Extension of Time to file a Petition for  
21 Rehearing” (Doc. 5 in CV-23-00196, Doc. 286 in CR-14-02097). On June 12, 2023,  
22 Movant filed a Motion for Reconsideration (Doc. 292 in CR-14-02097).

23 **I. Motion for Extension of Time to File a Petition for Rehearing**

24 The Court denied Movant’s Motion for Extension of Time to File a Petition for  
25 Rehearing in a May 26, 2023 Order (Doc. 287 in CR-14-02097) that was docketed in  
26 Movant’s criminal case, but was not docketed in the civil case. The Court will therefore  
27 deny the Motion for Extension of Time to File a Petition for Rehearing in the civil case.

28 ....

APPENDIX - D

1       **II. Motion for Reconsideration**

2       In his Motion for Reconsideration, Movant asserts the Court erred in denying his  
3       Motion for Indicative Relief and asks the Court to reconsider its decision.

4       Motions for reconsideration should be granted only in rare circumstances.  
5       *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). A motion for  
6       reconsideration is appropriate where the district court “(1) is presented with newly  
7       discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,  
8       or (3) if there is an intervening change in controlling law.” *Sch. Dist. No. 1J, Multnomah*  
9       *County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Such motions should not be  
10      used for the purpose of asking a court ““to rethink what the court had already thought  
11      through – rightly or wrongly.”” *Defenders of Wildlife*, 909 F. Supp. at 1351 (*quoting Above*  
12      *the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A motion  
13      for reconsideration “may not be used to raise arguments or present evidence for the first  
14      time when they could reasonably have been raised earlier in the litigation.” *Kona Enters.,*  
15      *Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for  
16      reconsideration repeat any argument previously made in support of or in opposition to a  
17      motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D.  
18      Ariz. 2003). Mere disagreement with a previous order is an insufficient basis for  
19      reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw.  
20      1988).

21      The Court has reviewed Movant’s Motion for Indicative Relief, the May 11, 2023  
22      Order, and Movant’s Motion for Reconsideration. The Court finds no basis to reconsider  
23      its decision. Thus, the Court will deny Movant’s Motion for Reconsideration.

24      ....

25      ....

26      ....

27      ....

28      ....

1 **IT IS ORDERED:**

2 (1) Movant's "Motion for Extension of Time to File a Petition for  
3 Rehearing" (Doc. 5 in CV-23-00196) is **denied**.

4 (2) Movant's Motion for Reconsideration (Doc. 292 in CR-14-02097) is **denied**.

5 (3) The Clerk of Court is directed that no further documents shall be filed in  
6 CV-23-00196.

7 Dated this 18th day of July, 2023.

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11 Honorable James A. Soto  
12 United States District Judge  
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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 United States of America,

No. CV 23-00196-TUC-JAS

10 Plaintiff,

CR 14-02097-TUC-JAS (JR)

11 v.

**ORDER**

12 Carlos Cantizano,

13 Defendant/Movant.

14  
15 On April 21, 2023, Movant Carlos Cantizano, who is confined in the Federal  
16 Correctional Institution-Safford in Safford, Arizona, filed a pro se “Motion for Indicative  
17 Relief Under F.R. Crim. P. Rule 37 for New Trial Under F.R. Crim. P. Rule 33” (Doc. 1  
18 in CV 23-00196-TUC-JAS and Doc. 283 in CR 14-02097-TUC-JAS (JR)). To facilitate  
19 consideration of the Motion, the Clerk of Court docketed it as a motion under 28 U.S.C.  
20 § 2255 and opened this corresponding civil case. However, because Movant has clearly  
21 presented his claims as a motion for new trial, and not a request for collateral relief, the  
22 Court will not construe the motion as filed under 2255. The Court will close the civil case  
23 and deny the Motion.

24 **I. Procedural History**

25 On July 28, 2017, Movant was convicted by a jury of distribution of child  
26 pornography and possession of child pornography. On October 21, 2019, the Court  
27 sentenced Movant to concurrent 120-month terms of imprisonment, followed by lifetime  
28 supervised release.

1 On October 22, 2019, Movant filed a Notice of Appeal in the Ninth Circuit Court  
2 of Appeals. The appeal is currently pending.

3 **II. Motion**

4 Movant contends he is entitled to a new trial under Rule 33 of the Federal Rules of  
5 Criminal Procedure because:

6 (1) "The Government violated the Due Process Clause of the Fifth Amendment  
7 by presenting fabricated evidence [of] its subsequent false statement and  
8 failed to correct it once presented"; and  
9 (2) "The Government violated the Due Process Clause of the Fifth Amendment  
10 by sponsoring false testimony that their computer examiner asked an  
11 absentee witness to identify the Defendant's computer."

12 Movant seeks a "certified ruling that this Court would grant a new trial if the  
13 Appeal[s] Court remands for that purpose, or that the motion raises a substantial issue that  
14 can only be resolved by the District Court, thru an evidentiary hearing on remand."

15 **III. Discussion**

16 Rule 33 of the Federal Rules of Criminal Procedure states, in relevant part:

17 (a) Upon the defendant's motion, the court may vacate any  
18 judgment and grant a new trial if the interest of justice so  
19 requires.

20 (b)(1) Any motion for a new trial grounded on newly  
21 discovered evidence must be filed within 3 years after the  
22 verdict or finding of guilty. If an appeal is pending, the court  
23 may not grant a motion for a new trial until the appellate court  
24 remands the case.

25 Rule 37(a) of the Federal Rules of Criminal Procedure provides:

26 If a **timely** motion is made for relief that the court lacks  
27 authority to grant because of an appeal that has been docketed  
28 and is pending, the court may:

(1) defer considering the motion;  
(2) deny the motion; or

(3) ... state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(Emphasis added.)

The jury verdict in Movant's criminal case was issued on July 28, 2017. Movant filed the pending Motion on April 21, 2023, well past Rule 33's three-year deadline. Movant states that he did not discover the new evidence until September 2020, due to his counsel's failure to timely question a witness. Movant does not allege facts showing the evidence<sup>1</sup> was not reasonably discoverable at an earlier date or explain why he waited more than two and half years to file his Motion after discovering the new evidence. Moreover, Rule 37 only permits the Court to issue an indicative order if the Movant makes a *timely* motion for relief that the court lacks authority to grant because of a pending appeal. Accordingly, the Court will deny Movant's Motion for Indicative Relief.

Movant should note that if he is denied relief on appeal, the only other basis for relief from a final criminal judgment is a collateral attack pursuant to 28 U.S.C. § 2255.

**IT IS ORDERED:**

(1) Because the Court **does not construe** the Motion as filed under 28 U.S.C. 2255, the Clerk of Court must close the civil case, CV 23-00196-TUC-JAS.

(2) The "Motion for Indicative Relief Under F.R. Crim. P. Rule 37 for New Trial Under F.R. Crim. P. Rule 33" (Doc. 238 in CR 14-02097-TUC-JAS (JR)) is denied.

Dated this 11th day of May, 2023.

T. C. Soto

Honorable James A. Soto  
United States District Judge

<sup>1</sup> The evidence in question includes a witness declaration and data regarding dates and sizes of file transfers on the computer that was used as evidence in Movant's criminal trial.