No. 98-724

In the Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES CUNNINGHAM, AKA "CHUCK", PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion for a new trial, where petitioner wished to introduce as "newly discovered evidence" the testimony of a co-conspirator who had been a fugitive at the time of petitioner's trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 141 F.3d 1189 (Table).

JURISDICTION

The court of appeals entered its judgment on April 8, 1998. A petition for rehearing was denied on August 3, 1998. Pet. App. 13-14. The petition for a writ of certiorari was filed on October 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner

was convicted of conspiracy to import cocaine and attempting to import cocaine, both in violation of 21 U.S.C. 963. He was sentenced to 300 months' imprisonment. The court of appeals affirmed. *United States* v. *Vega-Fleites*, 89 F.3d 853 (Table).[1] Following the Eleventh Circuit's decision, petitioner filed a motion for a new trial claiming that he had obtained newly discovered, exculpatory evidence. The district court denied the motion. Pet. App. 3-10. The court of appeals affirmed. *Id.* at 1- 2.

1. Petitioner participated as a planner, manager, and supervisor in a large-scale conspiracy to import cocaine into the United States. See App., *infra*, 8a. Between January and September 1989, the conspiracy transported thousands of kilograms of cocaine on a freighter from Columbia to the Bahamas, where the cocaine was loaded onto smaller boats for importation into the United States. *Id.* at 2a-3a. Petitioner belonged to a subgroup of the conspiracy, headed by David Lemieux, that was responsible for offloading the cocaine from ships near the Bahamas and bringing it into the United States. No. 97-5242 Gov't C.A. Br. 7.

The evidence at trial showed that, in July 1989, petitioner, along with Lemieux and two other co-conspirators, examined a marina in Miami, Florida, to determine its suitability for use as a site for them to offload cocaine that had been brought into the United States. No. 93-4013 Gov't C.A. Br. 7-8. On July 27, 1989, petitioner, Lemieux, and others were aboard a boat in the Bahamas waiting to offload the freighter, but they aborted the scheme when they detected law enforcement surveillance. *Id.* at 8-9. Telephone records also

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[1] The court of appeals' decision is reproduced in the appendix to this brief.

showed that petitioner made calls to four other members of the conspiracy, including Lemieux and one of the principal organizers of the conspiracy, during the time frame of the importation scheme. *Id.* at 14.

At the time of petitioner's trial in May 1992, Lemieux, who had been indicted with petitioner, remained a fugitive. Pet. App. 3. Although petitioner resided with Lemieux's mother throughout the trial, petitioner did not assert at any time that Lemieux would testify on his behalf, nor did he make any apparent effort to locate Lemieux or to seek the court's assistance in obtaining his testimony. No. 97-5242 Gov't C.A. Br. 32 n.12, 35-36. At trial, petitioner testified in his own defense. He claimed that Lemieux was a life-long friend with whom he had gone to the Bahamas to fish, and that he knew nothing of Lemieux's plan to import cocaine during the trip. *Id.* at 8. He attempted to explain the records showing telephone calls to co-conspirators by stating that he had lent his calling card to Lemieux. *Id.* at 8-9.

The jury found petitioner guilty of conspiracy to import cocaine and the attempted importation of cocaine, both in violation of 21 U.S.C. 963. At sentencing, the district court enhanced petitioner's sentence because it found that petitioner was a manager in the conspiracy. App., *infra*, 3a.

2. The court of appeals affirmed, concluding that the jury reasonably could have disbelieved petitioner's innocent explanation for his presence during the July 1989 offload attempt. App., *infra*, 7a (noting that petitioner "was present at times when it would be 'highly unlikely that conspirators attempting a . . . smuggling operation would have tolerated the *recurrent* presence of [] mere bystander[s]'") (quoting *United States* v. *Baptista-Rodriguez*, 17 F.3d 1354, 1374 (11th Cir.

1994)). The court of appeals further noted that "[t]he evidence shows that [petitioner] coordinated the offloading of the cocaine, exercised decision-making authority, and played a part in planning and controlling others involved in the conspiracy." App., *infra*, 8a.

3. In September 1992, three months after petitioner's trial, Lemieux was arrested by British authorities in England. Lemieux was subsequently convicted in England on other charges and sentenced to 16 years' imprisonment.[2] Pet. App. 3. In January 1994, petitioner's counsel "was made aware that David Lemieux had been arrested in Great Britain." Mot. for New Trial 3. Three years later, following the court of appeals' affirmance of petitioner's conviction and sentence, petitioner filed a motion for a new trial on the ground that Lemieux's availability to provide exculpatory testimony constituted newly discovered evidence. Pet. App. 3. In support of the motion, petitioner submitted a three-page affidavit in which Lemieux stated that petitioner had no knowledge of the illegal activities. See Aff. of D. Lemieux, attached to Mot. for New Trial. While his new trial motion was pending, petitioner submitted a transcript of a sworn interview with Lemieux taken on March 13, 1997. Pet. App. 17-45. During that interview, Lemieux repeated that his relationship with petitioner was purely personal, that petitioner was unaware that the purpose of the July 1989 trip was drug smuggling, and that petitioner had no involvement in Lemieux's drug smuggling activities. *Ibid.*

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[2] The United States sought Lemieux's deportation from England, but those efforts were unsuccessful, and Lemieux apparently will serve his sentence in England before there is a possibility of his being returned to the United States to stand trial. Pet. App. 3.

The district court denied the motion for a new trial. Pet. App. 3-10. The court invoked the "general rule" that "the post-trial testimony of a co-conspirator who refused to testify at trial" does not constitute "newly discovered evidence." *Id.* at 4. The court further explained that, "if [petitioner] is actually innocent, then [petitioner] certainly knew, even before trial, that Lemieux could testify that he knew of no facts which would demonstrate that [petitioner] was involved in the conspiracy or drug offenses. * * * Lemieux's present willingness to provide an affidavit only provides a newly available means through which [petitioner] can present that evidence." *Id.* at 8. The court further concluded that petitioner's motion identified no particular circumstances that would otherwise justify characterizing Lemieux's testimony as newly discovered. *Id.* at 5-7.

4. The court of appeals again affirmed. Pet. App. 1-2. The court noted that the district court's ruling was "due special deference" (*id.* at 2), and concluded that the district court had not abused its discretion in denying petitioner's new trial motion.

ARGUMENT

Petitioner argues (Pet. 7-14) that the court of appeals' determination that Lemieux's testimony was not "newly discovered evidence" conflicts with the rulings of other circuits. Because this case presents no such conflict, the court of appeals' ruling is correct, and further review would not alter the outcome of petitioner's case, this Court's review is not warranted.

1. Under Federal Rule of Criminal Procedure 33, a motion for a new trial must be filed within seven days of judgment, except for new trial motions "based on the ground of newly discovered evidence," which "may be

made only before or within two years after final judgment." Petitioner contends (Pet. 7-12) that review is warranted because the courts of appeals are in disagreement about whether evidence from witnesses who are known but "unavailable" at trial may constitute "newly discovered evidence" within the meaning of Rule 33. The decisions on which he relies do not assist him, however.

a. Under Rule 33, evidence of which the defendant knows, but cannot gain access to until after trial, is not "newly discovered." Consistent with that principle, a defendant who simply offers "the post-trial testimony of a co-conspirator who refused to testify at trial" does not meet the requirement of presenting newly discovered evidence. See, *e.g.*, *United States* v. *Dale*, 991 F.2d 819, 838-839 (D.C. Cir.) (describing that position as the "unanimous view of circuits that have considered the question"), cert. denied, 510 U.S. 906 (1993); see also, *e.g.*, *United States* v. *Freeman*, 77 F.3d 812, 817 (5th Cir. 1996) ("When a defendant is aware of a co-defendant's proposed testimony prior to trial, it cannot be deemed newly discovered under Rule 33 even if the co-defendant was unavailable."); *United States* v. *Glover*, 21 F.3d 133, 138 (6th Cir.) ("While Morgan's testimony may have been newly available, it was not in fact 'newly discovered evidence' within the meaning of Rule 33."), cert. denied, 513 U.S. 948 (1994); *United States* v. *Offutt*, 736 F.2d 1199, 1202 (8th Cir. 1984) ("[W]hen a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not 'newly discovered.'").

That principle applies here. Petitioner has not made, and could not make, any claim that he was unaware of Lemieux's potential testimony at the time of trial. To

the contrary, petitioner's assertion that he is innocent and had only a friendship with Lemieux presupposes that he believed at the time of trial that Lemieux would corroborate the nature of their friendship. The purported new evidence from Lemieux is, therefore, not "newly discovered."

There are sound reasons, moreover, to view such newly available evidence from a co-conspirator with considerable skepticism. While Lemieux has not yet been convicted, the 16 years that must elapse before he could face trial in the United States (while Lemieux completes his British prison term), the uncertainties that attend any international extradition effort, and the strength of the evidence already compiled against Lemieux, as displayed in petitioner's trial, leave Lemieux little to lose by attempting to help his co-conspirator. *Freeman*, 77 F.3d at 817 ("[I]t is not unusual for the obviously guilty defendant to try to assume the entire guilt," especially where he "had nothing to lose.").

b. Petitioner contends (Pet. 9) that the First and Sixth Circuits have ruled that a defendant's post-trial discovery of the location and availability of an exculpatory witness, including a co-defendant, is grounds for a new trial under Rule 33. The narrow holdings of the decisions on which petitioner relies afford no support for his claim that the district court in this case abused its discretion by denying his new trial motion.

In *United States* v. *Montilla-Rivera*, 115 F.3d 1060 (1997), the First Circuit held that the post-trial exculpatory testimony of the two co-defendants in that case *might* warrant a new trial. *Id.* at 1066-1067 (stating that, in contrast to other circuits, the First Circuit has no per se rule that formerly unavailable testimony cannot be "newly discovered evidence"). That decision, however, represented an extremely narrow view of

when such relief might be justified and, as such, is of no help to petitioner. The First Circuit specifically reconfirmed that proffers of "new" evidence by co-conspirators must be viewed "with great skepticism" and stated that it "share[d] the general skepticism concerning those statements" expressed by other courts. *Ibid.* The First Circuit simply concluded, based on the "unusual combination of circumstances" presented (*id.* at 1067) in that case, that the co-conspirator statements warranted a hearing at which the district court could decide whether to grant a new trial (*ibid.*).

No analogous unusual circumstances obtain here. To the contrary, in contrast to the case against the defendant in *Montilla-Rivera* (see 115 F.3d at 1067), the evidence against petitioner was strong and emanated from a variety of sources. See App., *infra*, 6a-8a; No. 93-4013 Gov't C.A. Br. 4-15, 33-36; No. 97-5242 Gov't C.A. Br. 7-9. Further, counsel for petitioner undertook no "significant efforts to procure [Lemieux's] testimony before his own conviction." *Montilla-Rivera*, 115 F.3d at 1067-1068. Accordingly, it is unlikely that the First Circuit would decide the present case any differently than did the Eleventh Circuit. In any event, the record-specific determination of whether the particular facts presented in this case are sufficient to dispel the skepticism that normally attaches to co-conspirator testimony does not present any legal issue that would merit this Court's review.[3]

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[3] As petitioner notes (Pet. 10), the First Circuit in *Montilla-Rivera* cited *United States* v. *Ouimette*, 798 F.2d 47 (2d Cir. 1986), cert. denied, 488 U.S. 863 (1988), as support for its general analysis, "[a]t least in the context of newly available evidence from one not a codefendant." 115 F.3d at 1066. *Ouimette* offers no help to petitioner. *Ouimette* involved an effort to introduce the previously unknown efforts of the police department to coerce an eye-

Nor is petitioner assisted (Pet. 10-12) by the Sixth Circuit's decision in *United States* v. *Garland*, 991 F.2d 328 (1993). In *Garland*, the defendant sought a new trial based on the judgment of a foreign court, which directly supported his claim of innocence. *Id.* at 330-332. That judgment, which provided "dramatic and probative" evidence supporting the defendant's claim, did not exist until after the defendant's trial "and thus could not have been 'discovered' earlier." *Id.* at 335. The court of appeals also held that the proposed testimony of a witness, who was not a co-defendant or co-conspirator, constituted newly discovered evidence because "it provide[d] a verifying link" between the defendant's defense and the intervening foreign judgment. *Ibid.* *Garland* thus gives no support to a claim that evidence may be newly discovered when it would come from a co-conspirator known to the defendant—as is confirmed by the Sixth Circuit's later decision rejecting such evidence in *Glover*, 21 F.3d at 138-139.[4]

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witness not to testify. 798 F.2d at 51. While the court of appeals agreed that the testimony of the eyewitness alone was not newly discovered, *ibid.*, the court ruled that the witness's testimony "concerning the pressure put on him by the Providence police to dissuade him from testifying for the defense is certainly new in the sense that it was discovered after trial." *Ibid.* The nature of Ouimette's claim, as well as the government's affirmative interference with the evidentiary process, thus sharply distinguish the Second Circuit's ruling from the decision at hand.

[4] Petitioner also suggests (Pet. 12) that the court of appeals' decision conflicts with the Fourth Circuit's unpublished decision in *United States* v. *Purnell*, No. 97-4057, 1998 WL 405942 (June 9, 1998). *Purnell*, however, involved the potentially exculpatory testimony of a witness, not a co-defendant. *Id.* at *3. Further, the court of appeals found that the defendant learned of the evidence only after trial and after diligently trying to uncover it in a timely fashion. *Id.* at *1, *3. In any event, the Fourth Circuit's decision in

2. Further review is also unwarranted because petitioner cannot satisfy the other criteria necessary to obtain a new trial under Rule 33. A ruling by this Court on whether Lemieux's testimony qualifies as newly discovered would, therefore, be unlikely to have any practical impact on petitioner's case.

When considering motions for new trials, courts generally require the defendant to show that the evidence (1) is newly discovered and was unknown at the time of trial; (2) is material, and is not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) could not have been uncovered earlier through the exercise of due diligence by the defendant. 3 Charles Alan Wright, *Federal Practice & Procedure: Criminal* § 557 (2d ed. 1982) (collecting cases); see also Pet. App. 4. Moreover, motions for new trials on the ground of newly discovered evidence are not favored and should be granted only with great caution. See *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946) (great deference accorded to district court's decision and review of affidavits proposing new evidence).[5] In addition to being not newly discovered, petitioner's proposed testimony fails each of the other prongs of the test for granting a new trial.

First, petitioner did not exercise due diligence to uncover the testimony earlier. Petitioner made no effort, before or during his trial, to notify the district court of the existence of potentially exculpatory testimony.

Purnell would not create a genuine inter-circuit conflict because the unpublished ruling has no precedential force. See 4th Cir. R. 36(a)-(c).

[5] See also *Glover*, 21 F.3d at 138; *United States* v. *Kamel*, 965 F.2d 484, 490 (7th Cir. 1992); *United States* v. *Kelley*, 929 F.2d 582, 586 (10th Cir.), cert. denied, 502 U.S. 926 (1991).

Although petitioner was living with Lemieux's mother throughout the trial, he does not claim that he made any effort to locate Lemieux or obtain his testimony for submission as evidence at the trial. He sought no continuance or subpoena from the court to assist him in locating or obtaining Lemieux's testimony in a timely fashion. Moreover, even when petitioner learned of Lemieux's presence in Great Britain, he delayed another three years—until after the court of appeals had rejected his direct appeal from the conviction—before notifying the court of Lemieux's availability and moving for a new trial. Petitioner thus has failed to show due diligence in pursuing Lemieux's testimony. See *United States* v. *Frye*, 548 F.2d 765, 769 n.6 (8th Cir. 1977).

Second, Lemieux's testimony would simply echo petitioner's own testimony before the jury. The cumulative protestations of innocence by co-conspirators do not constitute the type of evidence that should support the grant of a new trial.

Third, Lemieux's testimony would be unlikely to produce an acquittal. As noted, Lemieux's proposed testimony adds little substantively to petitioner's rendition of events, which the jury rejected. More importantly, Lemieux's statements contradict petitioner's testimony in important regards. Lemieux repeatedly refuses to adopt petitioner's contention (Pet. 4) that petitioner was brought along as an unwitting "decoy" to provide cover for the drug operation. See Pet. App. 29, 32, 33.

Lemieux also offers little support for petitioner's claim (Mot. for New Trial 18-19) that Lemieux, not petitioner, used petitioner's calling card and telephone to contact other members of the conspiracy. See Pet. App. 37-40 (Lemieux largely unable to recall using the card or phone for contacting drug-trafficking associates;

claims it was primarily used "to call girls and stuff," *id.* at 37).

Petitioner and Lemieux provide differing explanations for petitioner's presence with Lemieux, in July 1989, at the marina that was being inspected as a site for offloading cocaine. Petitioner claims that Lemieux "wanted his opinion about a boat he had purchased, for [petitioner] was very knowledgeable about boats." Mot. for New Trial 16. Lemieux, on the other hand, declined to adopt that explanation when he was interviewed by petitioner's counsel (Pet. App. 23) and claimed instead that he and petitioner were on their way to a regularly scheduled breakfast, when Lemieux advised petitioner that he had to go look at a boat first. *Ibid.*[6] The discrepancies between petitioner's and Lemieux's testimony make it unlikely that the additional testimony of a co-conspirator would cause the jury to resolve its credibility determination any differently in a new trial.

Finally, Lemieux's claim (Pet. App. 30, 32) that he brought petitioner aboard the boat in the Bahamas only because he knew that nothing more than a "dry run" of the offload was planned is flatly contradicted by the testimony of multiple witnesses at trial and the realities of drug trafficking (see No. 97-5242 Gov't C.A. Br. 39-40), and thus would be likely to undercut Lemieux's credibility rather than assist petitioner's defense.

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[6] Moreover, Lemieux's story itself is not consistent. His original affidavit made no mention of the breakfast meeting and, instead, concurred with petitioner that the purpose of the visit was to look at a boat. Similarly, his affidavit admitted to using petitioner's calling card to support his smuggling operation, while his lengthier statements during the interview with counsel evade such an acknowledgment. See Aff. 3, attached to Mot. for New Trial.

Because petitioner's new trial motion must be denied regardless of whether Lemieux's testimony constitutes newly discovered evidence, and because the holding below that Lemieux's testimony would not constitute such evidence conflicts with no other appellate decision, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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