No. 13-641

In the Supreme Court of the United States

JOSHUA PERSON, 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 a witness's proffered testimony constitutes "newly discovered evidence" for purposes of a motion for a new trial under Federal Rule of Criminal Procedure 33 if the defendant knew the substance of the witness's testimony before trial but did not locate the witness until after the trial was complete.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the *Federal Reporter* but is reprinted in 522 Fed. Appx. 724. The opinion of the district court (Pet. App. 10-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2013. A petition for rehearing was denied on August 26, 2013 (Pet. App. 28). The petition for a writ of certiorari was filed on November 21, 2013. 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 Northern District of Alabama, petitioner was convicted on one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C.

922(g)(1). Pet. App. 10. The district court sentenced petitioner to 180 months in prison, to be followed by two years of supervised release. *Id.* at 10-11; Judgment 2-3. Petitioner filed motions for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, which the district court denied. Pet. App. 10-27; 2:10cr377 Docket entry No. (Dkt. No.) 58. The court of appeals affirmed. Pet. App. 1-9.

1. On March 18, 2010, petitioner drove to his stepdaughter's home in Birmingham, Alabama, and parked his car on the street. Pet. App. 3. A Birmingham police officer patrolling in the area approached the car and told petitioner that the car radio was playing too loudly. *Id.* at 3, 17. Petitioner turned off the radio, but the officer asked petitioner to "sit in the back of [the] patrol car while he wrote * * * a noise citation," and petitioner complied. *Id.* at 17.

While petitioner was sitting in the patrol car, the officer asked him whether "there was anything in [petitioner's] vehicle" that the officer "need[ed] to know about." Pet. App. 17. Petitioner responded that his son's pistol was underneath the driver's seat and that his son had driven the car earlier in the day. *Ibid.* The officer asked if petitioner had a permit for the gun, and petitioner acknowledged that he did not. *Ibid.*

The officer walked over to petitioner's car and found a loaded Ruger .40 caliber pistol in the spot where petitioner had said it would be. Pet. App. 4. The officer then arrested petitioner for carrying a weapon without a permit, a misdemeanor violation of the Birmingham municipal code. *Id.* at 4, 11, 17.

2. On September 29, 2010, a federal grand jury indicted petitioner on one count of unlawful possession

of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner did not testify at trial; his stepdaughter, Marguerite Johnson, was the only defense witness. Pet. App. 18. Johnson testified that the gun in petitioner's car belonged to petitioner's stepson, William Hall, and that Hall had driven petitioner's car on the afternoon of March 18, 2010. *Ibid.* She explained that Hall came to her home in the early afternoon of that day, that she saw Hall get out of the car with his gun, and that when Hall left her home he said he was going to pick up petitioner. *Ibid.*

Based on that testimony, defense counsel argued to the jury that petitioner was not in actual or constructive possession of the gun. On December 7, 2011, the jury found petitioner guilty. Pet. App. 10.

3. a. On February 10, 2012, petitioner's counsel moved to withdraw from the case and requested that new counsel be appointed. See Dkt. No. 49, at 1 (stating without elaboration that "serious professional considerations require termination of the representation"). The district court granted the motion and appointed new counsel a few days later. Dkt. Nos. 49-50; see Dkt. No. 89, at 4.

b. On March 14, 2012, approximately three months after the jury's verdict, petitioner filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Pet. App. 10-11; see Dkt. No. 55. Under Rule 33, the court may "grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict," Fed. R. Crim. P. 33(b)(2), but a motion that is "grounded on newly

discovered evidence" may be filed up to "3 years after the verdict," Fed. R. Crim. P. 33(b)(1).

Petitioner's Rule 33 motion argued that his "trial counsel failed to present available, helpful witnesses," Dkt. No. 55, at 1—a ground that the motion expressly identified as one "other than newly discovered evidence." Fed. R. Crim. P. 33(b)(2); see Dkt. No. 55, at 1 (making motion "pursuant to Federal Rule of Criminal Procedure, 33(b)(2)"); *id.* at 2-3. According to the motion, "[trial] counsel failed to exhaust all means available to him to obtain the testimony of the owner of the pistol, the [petitioner's] son [William Hall]. The son was available and willing to testify as to the ownership of the pistol and his acts in placing the pistol under the driver's seat of the [petitioner's] vehicle." *Id.* at 2; see *ibid.* (contending that "[b]ut for [trial] counsel not exercising due diligence in seeking to obtain the testimony of the owner of the pistol, * * * the result of the proceeding would have been different"). The motion also argued that trial counsel did not adequately advise petitioner about petitioner's right to testify to these facts in his own defense. *Ibid.*

The district court denied the motion as untimely. See Dkt. No. 58, at 4. The court explained that because the motion was "not based on newly discovered evidence" it was subject to the 14-day time limit set forth in Rule 33(b)(2), and had been filed several months too late. *Id.* at 3; see *id.* at 2-3. (explaining that the 14-day limit is a rigid one and citing *Eberhart* v. *United States*, 546 U.S. 12, 13 (2005) (per curiam)).

c. On June 7, 2012, the district court sentenced petitioner to 180 months in prison, to be followed by two years of supervised release. Judgment 2-3. Petitioner had four prior convictions for burglary that qualified

as "violent felon[ies]" under the Armed Career Criminal Act of 1984 and was therefore subject to a mandatory minimum punishment of 15 years in prison. See 18 U.S.C. 924(e)(1); Pet. App. 10 n.2; Presentence Investigation Report paras. 11, 17, 31, 49.

d. On August 20, 2012, approximately eight months after the verdict, petitioner—now represented by a third set of lawyers—made another motion for a new trial under Rule 33. See Pet. App. 11; Dkt. No. 79; see also Dkt. No. 86 (amended version of motion filed on September 4, 2012). That motion argued that "William Hall was not available to testify on his stepfather's behalf at trial" and that Hall's testimony was therefore "newly-discovered evidence" within the meaning of Rule 33(b)(1). Dkt. No. 86, at 2-3, 5-8. The motion included affidavits from Hall and from petitioner about the testimony they would give if the court ordered a new trial. See *id.* at 7.

On September 7, 2012, the district court held an evidentiary hearing. See Dkt. No. 89. Hall testified that he owned and legally carried a gun, borrowed petitioner's car on March 18, 2010, put the gun under the driver's seat, left work in the middle of the afternoon to return the car to petitioner, and forgot to retrieve the gun or tell petitioner that it was in the car. Pet. App. 19; Dkt. No. 89, at 10-11. Hall also testified that he learned later that day that petitioner had been arrested on a misdemeanor gun charge, and discussed the incident with petitioner on that day or the next, but thought the charge would be dropped and did not believe that his testimony was needed. Dkt. No. 89, at 11-13, 17-19. Finally, Hall testified that he left Birmingham in August 2010—moving to Georgia (where he did not have a phone) and Tennessee (where he

did)—and did not return until after petitioner's trial was over. *Id.* at 14-15. According to Hall, while he was away he periodically called his mother, who never reported that petitioner was looking for him, and he never contacted petitioner. *Id.* at 15-16; see Pet. App. 18-19.

Petitioner testified that he was unaware that Hall's gun was beneath the driver's seat of his car until he stopped outside his stepdaughter's home and leaned over to retrieve food from the car's floorboard—which, according to petitioner, was precisely the moment when the Birmingham police officer approached him. Pet. App. 19-20. Petitioner also stated that he had been in contact with Hall in early August 2010, began attempting to contact Hall again in December 2010 by calling Hall's mother, and was told by the mother that she was not in touch with her son. Dkt. No. 89, at 25-27. Petitioner testified that he did not know another way to contact Hall and did not speak to Hall again until December 2011, after petitioner's trial. *Id.* at 27.

On September 21, 2012, the district court denied the second Rule 33 motion. Pet. App. 10-27. The court concluded that Hall's testimony was not "newly discovered evidence" because, at the time of trial, petitioner knew that Hall was a potential witness and knew or should have known the substance of Hall's testimony. *Id.* at 24; see *id.* at 25 (explaining that petitioner's own testimony was not newly discovered either). Because petitioner's motion was based on a "reason other than newly discovered evidence," the court explained, it was untimely pursuant to Rule 33(b)(2). *Id.* at 13.

The district court observed, however, that the case raised ineffective-assistance issues that could be "taken up in a Motion to Vacate under 28 U.S.C. § 2255, if one is timely filed." Pet. App. 26 & n.9. The court was "troubled" by trial counsel's apparent failure to "understand the significance of Hall's" testimony, to "counsel [petitioner] about the significance" of his own testimony, or "to timely move for a new trial under Rule 33." *Id.* at 25-26. In the court's view, "Hall's and [petitioner's] testimony would likely have produced a different result at trial." *Id.* at 26; see *id.* at 23.

4. The court of appeals affirmed in a per curiam opinion. Pet. App. 1-9. With respect to petitioner's challenge to his conviction, the court ruled that the evidence presented at trial was sufficient to support the jury's verdict that petitioner, a convicted felon, knowingly possessed a firearm that was in or affected interstate commerce. *Id.* at 2-3. The court explained that "the government may establish constructive possession by showing that the defendant exercised ownership, dominion, or control over the object itself or over the premises or vehicle in which it is concealed," *id.* at 3; see *id.* at 5, and concluded that the government had made that showing despite "uncontradicted testimony offered at trial indicat[ing] that the firearm belonged to [petitioner's] son and that his son had driven his car on the date of the incident," *ibid.*

As for petitioner's request for a new trial, the court of appeals held that Hall's proffered testimony was not "newly discovered" within the meaning of Rule 33 because petitioner was aware of the "substance" of Hall's testimony before the trial and knew that the testimony could be exculpatory. Pet. App. 7-8. The court declined to revisit longstanding circuit prece-

dent establishing that "known but previously unavailable testimony * * * is not newly discovered for purposes of Rule 33." *Id.* at 9; see *id.* at 8 (citing *United States* v. *DiBernardo*, 880 F.2d 1216, 1224 (11th Cir. 1989), and *United States* v. *Metz*, 652 F.2d 478, 480 (5th Cir. 1981)).

ARGUMENT

Petitioner contends (Pet. 7-13) that this case implicates a conflict among the circuits on whether newly available evidence should be considered "newly discovered" within the meaning of Federal Rule of Criminal Procedure 33. The court of appeals correctly ruled that evidence of which a defendant was aware before trial cannot be "newly discovered" after the trial. Only one circuit has taken a broader view of the meaning of "newly discovered evidence," and that view does not aid petitioner. In addition, this case—in which petitioner has at times contended that the testimony in question was indeed available and could have been obtained through the exercise of sufficient diligence—is an unsuitable vehicle for resolution of the question on which petitioner claims the circuits are divided. Accordingly, further review is not warranted.[1]

1. The court of appeals correctly held that Hall's proffered testimony did not constitute "newly discovered evidence" under Rule 33, which authorizes a district court to grant a new trial under certain cir-

[1] This Court has previously denied several petitions asserting the same purported conflict. See *Griffin* v. *United States*, 133 S. Ct. 1457 (2013) (No. 12-485); *Jasin* v. *United States*, 537 U.S. 947 (2002) (No. 01-10649); *Cunningham* v. *United States*, 526 U.S. 1003 (1999) (No. 98-724).

cumstances "if the interest of justice so requires." Fed. R. Crim. P. 33(a).

Rule 33(b)(1) provides that a motion for a new trial "grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). When considering a motion for a new trial based on newly discovered evidence, courts generally require the defendant to show that the evidence (i) is newly discovered and was unknown at the time of trial; (ii) could not have been uncovered earlier though the exercise of due diligence by the defendant; (iii) is not merely cumulative or impeaching; (iv) is material to the issues involved; and (v) will probably produce an acquittal. See Pet. App. 6-7; see also 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 584, at 451-455 (4th ed. 2011).

In this case, the court of appeals concluded that petitioner had not met the first of those requirements. As the court explained, "Hall's newly available testimony, which indicated that he inadvertently left his gun under the driver's seat of [petitioner's] car without his knowledge, was not newly discovered for purposes of Rule 33 because [petitioner] knew of the substance of Hall's testimony before trial." Pet. App. 7; see *id.* at 8-9 (deeming Hall's testimony to be "known before trial" even though petitioner "may not have known all the details of Hall's testimony," because petitioner "was aware of the general thrust of that testimony and that it could be exculpatory").

That conclusion was sound. Evidence that a defendant knew about before trial cannot be "newly discovered" after the trial is over. "One does not 'discover' evidence after trial that one was *aware of* prior to

trial," and "[t]o hold otherwise stretches the meaning of the word 'discover' beyond its common understanding." *United States* v. *Owen*, 500 F.3d 83, 89-90 (2d Cir. 2007), cert. denied, 552 U.S. 1237 (2008). And Rule 33(b) says nothing about newly *available* evidence—a term that would have swept more broadly than the one that the Rule actually uses. See *United States* v. *Jasin*, 280 F.3d 355, 368-369 (3d Cir.), cert. denied, 537 U.S. 947 (2002).

Giving the phrase "newly discovered evidence" its natural meaning does not preclude relief for a defendant who is aware of potentially exculpatory evidence that is unavailable at the time of trial. Such a defendant can seek assistance from the district court before or during the trial, or can make a motion for a new trial within 14 days of the verdict, see Fed. R. Crim. P. 33(b)(2). In this case, had petitioner filed his Rule 33 motion within the 14-day time limit that applies to "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence," *ibid.*, he would not have had to attempt to characterize as "newly discovered" evidence that he knew about on the very day of his arrest by the Birmingham police, see, *e.g.*, Dkt. No. 89, at 17-19, and the district court would have considered the motion on its merits.

2. Petitioner acknowledges (Pet. 9-10) that eight circuits have squarely held that evidence is "newly discovered" for purposes of Rule 33 only if the evidence was not known by the moving party at the time of trial. See Pet. App. 7-9; *Jasin*, 280 F.3d at 368-369; *United States* v. *Bales*, 813 F.2d 1289, 1295 (4th Cir. 1987); *United States* v. *Munoz*, 957 F.2d 171, 173 (5th Cir.), cert. denied, 506 U.S. 919 (1992); *United States* v. *Theodosopoulos*, 48 F.3d 1438, 1448-1449 (7th Cir.),

cert. denied, 516 U.S. 871 (1995); *United States* v. *Lockett*, 919 F.2d 585, 591-592 (9th Cir. 1990); *United States* v. *Muldrow*, 19 F.3d 1332, 1339 (10th Cir.), cert denied, 513 U.S. 862 (1994); *United States* v. *Dale*, 991 F.2d 819, 838 (D.C. Cir.) (per curiam), cert. denied, 510 U.S. 906, and 510 U.S. 1030 (1993). Petitioner contends, however, that the First, Second, Sixth, and Eighth Circuits have adopted a rule under which Hall's testimony would have been considered "newly discovered" because it was unavailable at the time of trial. See Pet. 9. That contention is incorrect.

Three of the circuits in question—the Second Circuit, the Sixth Circuit, and the Eighth Circuit—have expressly agreed with the approach taken by the court below. In *United States* v. *Owen*, 500 F.3d 83 (2007), cert. denied, 552 U.S. 1237 (2008), the Second Circuit held that "previously known, but newly available, evidence is not newly discovered within the meaning of Rule 33." *Id.* at 90. Petitioner suggests that the Second Circuit reached the opposite conclusion in *United States* v. *Ouimette*, 798 F.2d 47 (1986), cert. denied, 488 U.S. 863 (1988). But *Ouimette* itself involved evidence that was not known before trial—a defendant's discovery after trial that the police had dissuaded an eyewitness from providing exculpatory testimony. See *id.* at 51. Accordingly, as the Second Circuit has explained, "*Ouimette* does not support the proposition that testimony the defendant was aware of prior to or during trial, but only became available after trial, is newly discovered evidence within the meaning of Rule 33." *Owen*, 500 F.3d at 88 n.2.

The Sixth Circuit also has ruled that newly available testimony is not "newly discovered evidence" under Rule 33 if the defendant was "well aware" of the

testimony before trial. *United States* v. *Glover*, 21 F.3d 133, 138, cert. denied, 513 U.S. 948 (1994); see *United States* v. *Turns*, 198 F.3d 584, 587 (2000) (citing additional Sixth Circuit cases reaching the same conclusion). Petitioner says that the Sixth Circuit took a contrary view in *United States* v. *Garland*, 991 F.2d 328 (1993)—but that case involved evidence that came into existence only after the trial, which in turn imbued previously unavailable testimony with new significance. See *id.* at 335. Because that circumstance is not present in the instant case, *Garland* does not suggest that the Sixth Circuit would depart from the rule set forth in *Glover* to rule in favor of a defendant like petitioner.

The Eighth Circuit has likewise rejected the proposition that "'newly available' evidence is * * * 'synonymous' with 'newly discovered' evidence." *United States* v. *Lofton*, 333 F.3d 874, 876 (2003); see *ibid.* (holding that previously unavailable testimony of a codefendant does not qualify as "newly discovered evidence" under Rule 33). Petitioner cites *United States* v. *Parker*, 267 F.3d 839 (8th Cir. 2001), cert. denied, 535 U.S. 1011 (2002), for the proposition that the two types of evidence are indeed synonymous. But *Parker* did not involve evidence that was known to the defendant before the trial but unavailable at that time; rather, it involved evidence that defendant not only knew about but also could readily have obtained before the trial began. See *id.* at 846. Accordingly, *Parker*'s passing statement that one element of the test for a new trial is that "the evidence must have been unknown or unavailable to the defendant at the time of trial" is merely dicta. *Ibid.*; see *ibid.* (citing *United States* v. *Zuazo*, 243 F.3d 428, 431 (8th Cir.

2001), which states simply that "[a] defendant is entitled to a new trial based on newly discovered evidence only if he can show * * * that the evidence was not discovered until after the trial").

In contrast to these (and other) circuits, the First Circuit has allowed a small window for a defendant to obtain a new trial based on a codefendant's previously known testimony, but petitioner could not prevail even under the First Circuit's standard. In *United States* v. *Montilla-Rivera*, 115 F.3d 1060 (1997), the First Circuit held that the post-trial exculpatory testimony of the defendant's two codefendants might warrant a new trial. *Id.* at 1065-1066. *Montilla-Rivera* made clear that the court "share[d] the general skepticism concerning those statements" expressed by other courts. *Id.* at 1067. It concluded, however, that "the better rule is not to categorically exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong [of the new-trial test] but to consider it, albeit with great skepticism, in the context of all prongs." *Id.* at 1066.

Applying that stringent standard, the First Circuit concluded that in light of the "unusual combination of circumstances" present in that case, the codefendants' statements warranted a hearing at which the district court could decide whether to grant a new trial. *Montilla-Rivera*, 115 F.3d at 1067. But it cautioned that its rule "by no means confers any automatic right * * * to a new trial or even to a hearing." *Ibid.* On remand, in fact, the district court denied the defendant's motion for a new trial, and the First Circuit affirmed. See *United States* v. *Montilla-Rivera*, 171 F.3d 37, 39, 42 (1999). The First Circuit has subsequently emphasized that the decision in *Montilla-*

Rivera turned on the "unusual circumstances" in that case. *United States* v. *Del-Valle*, 566 F.3d 31, 39 (2009) (quoting *Montilla-Rivera*, 115 F.3d at 1066).

Petitioner's case "does not present the same sort of 'unusual circumstances' that animated [the] decision in *Montilla-Rivera*." *Del-Valle*, 566 F.3d at 39. *Montilla-Rivera* found "little distinction between evidence which a defendant could not present because he did not know of it and evidence which he could not present because the witness was unavailable despite exercising due diligence," 115 F.3d at 1066, and listed among the "unusual circumstances" of the case the fact that the defendant had made "significant efforts" to obtain the missing testimony and had given a satisfactory explanation of why it was not available at the time of trial, *id.* at 1067-1068.

In contrast, petitioner did not show that Hall's testimony was "unavailable" in the sense in which the First Circuit used that term. In particular, although petitioner took the modest step of phoning Hall's mother, the record does not reflect that petitioner's trial counsel made any effort at all to locate Hall and secure his testimony. Indeed, petitioner argued in his first Rule 33 motion that trial counsel "failed to exhaust all means available to him to obtain the testimony" of Hall, who was "available and willing to testify." Dkt. No. 55, at 2; see Pet. App. 20, 25 (district court's statement that "the court cannot discern * * * if trial counsel tried to find Mr. Hall"); see also Dkt. No. 86-1, at 2 (affidavit from Hall stating that while he was in Georgia he was living with his aunt). And the testimony of Hall had not been rendered inaccessible by his invocation of the Fifth Amendment. Cf. *Montilla-Rivera*, 115 F.3d at 1065. For those reasons, the re-

sult in petitioner's case would not have been different if his Rule 33 motion had been decided under the approach taken by the First Circuit.

3. Finally, this case is a poor vehicle for consideration of whether "newly discovered evidence" should be interpreted to mean "newly available evidence." As discussed above, petitioner did not establish that Hall was actually unavailable to testify at trial. For the same reasons, petitioner also failed to establish that Hall's testimony could not have been uncovered earlier though the exercise of due diligence. See Dkt. No. 55, at 2 (petitioner's first Rule 33 motion arguing that trial counsel did not "exercis[e] due diligence in seeking to obtain the testimony of the owner of the pistol"). Because lack of due diligence constitutes an independent reason for denial of the new-trial motion, see Pet. App. 6-7, petitioner could not benefit from a rule that would deem evidence known to a defendant before trial to be "newly discovered" after the trial in certain circumstances. See generally *United States* v. *Johnson*, 327 U.S. 106, 112-113 (1946) (explaining that motions for new trials based on newly discovered evidence are not favored and should be granted only with caution).[2]

As the district court explained, some of petitioner's arguments in favor of a new trial can—as in petitioner's first Rule 33 motion—be framed as arguments that trial counsel rendered ineffective assistance by failing to locate and present an available witness. Pet.

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[2] Although the district court stated in passing that the "'newly discovered' evidence" issue was the only obstacle to granting petitioner's motion, Pet. App. 27, the court did not separately analyze the diligence issue, and it made statements suggesting that trial counsel had not been diligent, see *id.* at 25.

App. 11, 20-21, 25-26. Petitioner will therefore have a further opportunity to litigate his claims about Hall's testimony in post-conviction proceedings under 28 U.S.C. 2255. At that time, he will be able to develop a more complete factual record concerning trial counsel's reasons for failing to put Hall on the stand (as well as counsel's reasons for advising petitioner not to testify in his own defense).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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