

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

Criminal Case No. 09-cr-00151-CMA-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. LAWANNA CLARK,

Defendant.

MOTION FOR NEW TRIAL

Defendant Lawanna Clark, by and through counsel, Richard K. Kornfeld of Recht & Kornfeld, P.C., respectfully moves this Court for a new trial pursuant to Federal Rule of Criminal Procedure 33. In support of said Motion, Defendant states as follows:

1. After a two day trial, a jury convicted Defendant of Perjury Before the Grand Jury in violation of Title 18, U.S.C., § 1623(a).

2. More specifically, the jury unanimously found that the third alleged perjurious statement listed in the Indictment, i.e. Defendant's answer of "No" to the question "You never withdrew any money from the [IRP] bank account?," constituted perjury. The jury did not find that the other two statements listed in the Indictment were perjurious.

3. The verdict appears to be a classic example of a compromise among the jury in that both the government and defense presented cases, and argued accordingly, that Defendant Clark's conduct was "all or nothing" in nature, i.e. the government argued that Defendant knowingly lied with respect to all three statements, and the defense argued that the Defendant did not intend to mislead the jury with respect to any of the statements.

4. In light of the jury's verdict, Defendant and her family engaged the services of Judith A. Housley, a Board Certified Forensic Document Examiner, who has been retained in the past in numerous criminal cases by both the government and the defense. A copy of Ms. Housley's Curriculum Vitae is attached hereto as Exhibit 1. Ms. Housley examined withdrawal slips and checks allegedly executed by Defendant at Wells Fargo banks. These examined documents were portions of the Wells Fargo bank records introduced by the government as Exhibit 12¹. Ms. Housley compared these questioned documents to known handwriting samples of Defendant, and found, within a reasonable degree of scientific certainty, that the questioned documents do not appear to contain the known handwriting/signature of Defendant and instead were consistent with known handwriting/signatures of Yolanda B. Walker. A copy of Ms. Housley's report is attached hereto as Exhibit 2.

5. Pursuant to Federal Rule of Criminal Procedure 33, a Defendant may move within three years after final judgment for a new trial based on newly discovered evidence. Fed.R.Crim.P. 33(b)(1) ("any motion for a new trial grounded on newly discovered evidence must be filed within three years after the verdict or finding of guilty"). In determining whether to grant a motion for new trial when the motion is based on new evidence, a court must determine whether the interest of justice would be served by granting the motion. "The 'interest of justice' standard applies to all motions for new trials, including those predicated on newly discovered evidence." United States v. Quintanilla, 193 F.3d 1139, 1147 (10th Cir. 1999); See also, United States v. Sinclair, 109 F.3d 1527, 1531 (10th Cir. 1997). "[T]he issue is whether in light of the new evidence, justice requires a new trial to be granted." United States v. Carmichael, 269 F.2d 588, 595 (D. N.J. 2003).

¹ The Bates numbers of the examined articles are as follows: 00000869, 00000870, 00000872, 00000887, 00000889, 00000897, 00000898, 00000903.

6. In the Tenth Circuit, a defendant is entitled to a new trial based on newly discovered evidence if he demonstrates: 1) The evidence was discovered after trial; 2) The failure to learn of the evidence was not caused by his own lack of diligence; 3) The new evidence is not merely impeaching; 4) The new evidence is material to the principal issues involved; and, 5) The new evidence is of such a nature that in a new trial it would “probably produce an acquittal”. United States v. Redcorn, 528 F.3d 727, 743-44 (10th Cir. 2008). A trial court is afforded discretion in ruling on a Rule 33 motion and is free to weigh the evidence and assess witness credibility. Tibbs v. Florida, 457 U.S. 31, 37-38 and n. 11 (1982).

7. In the present case, the handwriting evidence constitutes newly discovered evidence for purposes of a Rule 33 motion. The handwriting evidence constitutes newly discovered evidence because it was not until after the trial that the Defendant understood the jury was focusing on her alleged bank withdrawals, rather than upon her overall banking transactions and overall statements. While it is true that all three statements listed in the Indictment were known to the Defendant, Defendant made the tactical and practical decision not to engage in time consuming and expensive handwriting analysis given the overall discovery in the case and the fact that the government had not engaged in a similar effort to tie Defendant to this evidence through forensic analysis. As the Court is aware, intent and materiality were the battles in the case.

8. The tactical and practical decision not to pursue this evidence prior to trial speaks to the second prong of the Rule 33 test, i.e. that the Movant must have exercised due diligence. The Tenth Circuit has explained that the due diligence required to warrant a new trial is simply “reasonable diligence” such that defendants may not “keep an evidentiary trump card in the event of a conviction.” United States v. LaValle, 439 F.3d 670, 701 (10th Cir. 2006) quoting Quintanilla, 193 F.3d at 1147.

9. In the present case, the tactical decision was to pursue an all or nothing strategy; in other words, to take the position that Ms. Clark did not intend to lie at any point during the testimony, and to argue that any falsehoods were not knowing and intentional. Nothing in the record or in the discovery suggested that Ms. Clark had some different motivation to lie with respect to bank withdrawals as opposed to with respect to her income. There was no reason to differentiate between motivations or other factors pertaining to her answers regarding income versus her answers regarding banking activity. Further, the government also did not exercise its ability to pursue handwriting analysis or other forms of forensic evidence with respect to the bank records. Put simply, this did not appear to be a significant issue in the pretrial context. Further, the practical reality to pursuing such evidence was that Defendant, who initially retained undersigned counsel, simply could not afford to do so. Subsequently, undersigned counsel was appointed pursuant to the Criminal Justice Act, meaning that any expert expenditure would have required court approval. Undersigned counsel did not believe, prior to trial, that the Court would have been inclined to approve such an expenditure in light of what appeared at the time to be the tangential relevance of any such evidence. Indeed, this is not a case in which Clark failed to exercise due diligence in locating evidence prior to trial.

10. As to the third prong, i.e. that the new evidence is not merely impeaching, that test is met with respect to the newly discovered handwriting evidence. As set forth above, the discovery was devoid of any handwriting or forensic analysis of any of the documentary evidence in this case. While defense counsel did point out, through a witness on cross examination, that several signatures purported to be those of the Defendant did appear to be different when compared with the naked eye, that evidence did not constitute forensic analysis of Defendant's handwriting. Therefore, the newly discovered evidence is neither cumulative nor impeachment evidence. Rather, it is factual clarification of what turned out to be a key issue

before the jury, i.e. whether Defendant Clark withdrew money from the IRP account as evidenced by several banking documents. The newly discovered evidence establishes Clark's innocence on this point.

11. To warrant a new trial, a defendant must also demonstrate that the newly discovered evidence is material. Newly discovered evidence is immaterial if it does not impact the defendant's guilt or innocence. See, e.g. United States v. Blackthorne, 378 F.3d 449, 452 (5th Cir. 2004). In the present case, the newly discovered evidence bears upon an element of the charged offense, and therefore is unquestionably material. The element to which the newly discovered evidence applies is whether Clark knowingly lied to the grand jury. Evidence reflecting that Clark did not engage in the withdrawal banking transactions at issue directly bears on the issue of whether she lied to the grand jury.

12. Finally, a defendant is entitled to a new trial if the newly discovered evidence demonstrates "a reasonable probability of acquittal." United States v. Gutierrez-Hermosillo, 142 F.3d 1225, 1233 (10th Cir. 1998). Courts have held that newly discovered evidence that is materially exculpatory raises a probability that the defendant will be acquitted at a new trial, thereby establishing a defendant's right to a new trial. See, e.g., United States v. Loyd, 71 F.3d 408, 412 (DC Cir. 1995) (New trial was warranted by newly discovered tax returns of the defendant's clients where "materially exculpatory evidence contained therein raised reasonable probability of a different result on re-trial"). In the present case, handwriting analysis and testimony that suggest someone else engaged in the banking transactions purportedly involving Defendant constitute the type of evidence that would directly contradict a jury finding that Defendant lied with respect to the banking transactions at issue in Question C of the Verdict Form. The materiality of evidence pertaining to who engaged in the withdrawals at the counter

of the bank is unquestionably material to the issue of Defendant's guilt, and demonstrates "a reasonable probability of acquittal" in that this evidence directly undermines the jury's verdict.

13. For the reasons set forth above, Defendant respectfully asserts the handwriting evidence constitutes new evidence that, despite the exercise of due diligence, had not been discovered prior to trial. Even assuming, *arguendo*, the Court disagrees with this analysis, it cannot ignore the substantive fact of this forensic document analysis and its effect of undermining the jury's verdict. Accordingly, Defendant maintains that, regardless of whether this Court finds that the forensic document analysis constitutes newly discovered evidence, the interest of justice requires the Court to order a new trial.

WHEREFORE, the Defendant respectfully moves this Court for a new trial.

Respectfully submitted,

RECHT & KORNFELD, P.C.

s/Richard K. Kornfeld
RICHARD K. KORNFELD
Attorney for Defendant
1600 Stout St., Suite 1000
Denver, Colorado 80202
(303) 573-1900
(303) 446-9400 (fax)
admin@rechtkornfeld.com

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2009, I electronically filed the foregoing **Motion for New Trial** with the Clerk of Court using the CM/ECF system which will send notification of such filing to all listed parties.

s/Mike Shomler
Mike Shomler