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6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9 United States of America,
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11 Plaintiff,
12
13 v.
14 Felix Hernandez-Castillo,
15
16 Defendant.

CR-05-985-PHX-EHC

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO
VACATE JURY VERDICT AND
REMAND ANEW**

14 The United States, by and through undersigned counsel, requests the Court to deny
15 defendant's Motion to Vacate Jury Verdict and Remand Anew because the motion was not
16 timely filed. Alternatively the motion should fail because the defendant does not present any
17 newly discovered evidence to justify the remedy requested.

18 **I. Background**

19 The defendant was indicted on September 27, 2005, for one count of Conspiracy to
20 Possess With Intent to Distribute Five Kilograms or More of Cocaine and one count of
21 Possession with Intent to Distribute Five Kilograms or More of Cocaine. A plea offer letter was
22 sent to defense counsel with a deadline of April 28, 2006, to plead guilty with an agreement to
23 cooperate and a later deadline of May 5, 2006, to plead guilty without cooperation but including
24 some sentencing concessions. The deadlines were later continued to May 26, 2006. The
25 defendant did not accept either plea offer. The trial was continued through the summer of 2006.
26 On August 31, 2006, the government made its final offer to the defendant to plead guilty with
27 a recommendation of 120 months, the mandatory minimum sentence. The offer was rejected.
28 The trial began September 19, 2006 and concluded with a guilty verdict on September 21, 2006.

1 On October 4, 2006, the defendant filed a Motion to Dismiss Counsel for Ineffective
2 Assistance. The Court appointed present defense counsel on November 1, 2006. A motion to
3 extend time to file a motion for new trial was filed on defendant's behalf on November 13, 2006.

4 Defense counsel filed a motion to have the defendant examined by a mental health care
5 practitioner on December 11, 2006. The Court granted the motion on March 6, 2007. The
6 defendant was evaluated by Dr. Marc W. Walter, Ph.D. and a report was made on April 12,
7 2007. Thereafter, defense counsel filed Defendant's Motion to Vacate Jury Verdict and Remand
8 Anew on May 4, 2007.

9 **II. Law and Argument**

10 **A The Court Lacks Jurisdiction to Grant Defendant's Motion**

11 "Any motion for a new trial grounded on any reason other than newly discovered
12 evidence must be filed within 7 days after the verdict or finding of guilty." Fed. R. Evid.
13 33(b)(2). "Because Rule 33's time limitations are jurisdictional, a district court is powerless to
14 consider an untimely motion for a new trial. *United States v. Cook*, 705 F.2d 350, 351 (9th Cir.
15 1983) (string citation omitted). The verdict in the present case was entered on September 21,
16 2006. Defendant's Motion to Vacate Verdict and Remand Anew, pursuant to Fed. R. Evid. 33,
17 was filed November 13, 2006. Pursuant to Fed. R. Evid. 33(b)(2), the defendant's motion must
18 be denied because it was not timely filed.

19 **B. Defendant's Motion is Not Based Upon Newly Discovered Evidence**

20 "Any motion for new trial grounded on newly discovered evidence must be filed within
21 3 years after the verdict or finding of guilty." Fed. R. Evid. 33(b)(1). "[A] rule 33 motion based
22 upon 'newly discovered evidence' is limited to where the newly discovered evidence relates to
23 the elements of the crime charged." *United States v. Hanoum*, 33 F.3d 1128, 1130 (9th Cir.
24 1994)(Court refused to find alleged ineffective assistance of counsel to be newly discovered
25 evidence because the evidence itself was not new to defendant, only the allegation of counsel's
26 inappropriate repression of the evidence was new.) As an initial matter, the impact of John Starr
27 cannot be argued by defendant to be evidence that relates to an element of the crime charged.

1 In fact, the defendant does not argue that it is evidence related to the charges, he argues that it
2 is evidence of an influence on his decision to go to trial. Further, the fact that the alleged advice
3 of John Starr was bad should have been crystal clear to the defendant and his family the moment
4 the verdict was read, if not much earlier. Therefore, the alleged impact of John Starr cannot be
5 considered evidence related to the crimes charged, newly discovered or otherwise.

6 **III. Conclusion**

7 Defendant's motion argues at length that the defendant was inappropriately influenced
8 by John Starr and but-for that influence defendant would have elected to enter a plea agreement
9 rather than go to trial. However, the remedy in Fed. R. Evid. 33 is unavailable to defendant
10 because the motion was neither timely filed, nor does it present newly discovered evidence that
11 would justify granting the motion. Therefore, the government requests the court to deny
12 Defendant's Motion to Vacate Jury Verdict and Remand Anew.

13 Excludable delay under 18 U.S.C. § 3161(h) may occur as a result of this motion or an
14 order based thereon.

15 Respectfully submitted this 21st day of June, 2007.

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