

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES :
 :
 v. : CRIMINAL No. 04-CR-796
 :
 ANTHONY GAGLIARDI :

MEMORANDUM

Padova, J.

July 5, 2005

On May 27, 2005, a criminal jury convicted Defendant of conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846, and attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846, 841(a) and 841(b)(1)(B). Presently before the Court is Defendant Anthony Gagliardi's *pro se* Motion for a New Trial pursuant to Federal Rule of Criminal Procedure 33.

I. BACKGROUND

On December 15, 2004, a grand jury returned a four-count indictment charging Defendant with one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. § 856 (Count One); one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count Two); and two counts of attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 (Counts Three and Four). On May 27, 2005, a criminal jury convicted Defendant of Counts One and Three of the Indictment, which charged Defendant with conspiracy to distribute cocaine and attempt to possess cocaine with intent to distribute, respectively. Defendant now moves the Court for a new trial

pursuant to Federal Rule of Criminal Procedure 33.

II. LEGAL STANDARD

Federal Rule of Criminal Procedure 33 provides that "on the defendant's motion the court may vacate a judgment and grant a new trial . . . if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Whether to grant a Rule 33 motion lies within the district court's sound discretion." United States v. Ortiz, 182 F. Supp. 2d 443, 446 (E.D. Pa. 2000) (quotation omitted). Courts, however, will only grant a motion for a new trial on two grounds. First, a court may grant a motion for a new trial if it finds that "there is a serious danger that a miscarriage of justice has occurred - that is, that an innocent person has been convicted." United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (quotation omitted). Second, a court must grant a motion for a new trial if it finds that "errors occurred during the trial, and it is reasonably possible that such error, or combination of errors, substantially influenced the jury's decision." United States v. Rich, 326 F. Supp. 2d 670, 673 (E.D. Pa. 2004) (citing United States v. Copple, 24 F.3d 535, 547 n. 17 (3d Cir. 1994)).

III. DISCUSSION

In the instant Motion, Defendant argues that he is entitled to a new trial because (1) his conviction was based on perjured testimony; (2) he should have received a bill of particulars; (3) there is insufficient evidence to support the jury's verdict; (4)

he is in the possession of newly discovered evidence; and (5) the trial was fraught with prosecutorial misconduct. The Court will address each of Defendant's arguments in turn.

A. Perjured Testimony

Defendant argues that he is entitled to a new trial because the Government relied on perjured testimony to obtain his conviction. Specifically, Defendant argues that the Government's witness, Steven Carnivale, repeatedly lied while on the witness stand, and wrongfully accused Defendant of having participated in a criminal drug conspiracy. Defendant contends that the conclusion that Carnivale committed perjury during Defendant's trial is inescapable, because Carnivale's statements contradicted testimony Carnivale had given at other trials as well as the testimony of other witnesses and evidence presented at Defendant's trial. In order for perjured testimony to form the basis for a new trial, the court must be satisfied that: "(1) the testimony given by a material witness was false; (2) the jury might have reached a different conclusion; and (3) the party seeking a new trial was surprised by the false testimony and unable to meet it, or did not know of its falsity until after trial." United States v. McLaughlin, 89 F. Supp. 2d 617, 621 (E.D. Pa. 2000) (citing United States v. Bales, Crim. No. 95-149, 1997 WL 825245, at *3 (E.D. Pa. Dec. 19, 1997)).

The mere fact that "testimony is inconsistent with that of

other witnesses or with that of the same witness at another trial . . . does not mean that perjury occurred during Defendant's criminal trial" Bales, 1997 WL 825245, at *5. Moreover, Defendant in this case was well aware of the content of Carnivale's testimony prior to trial, and filed several pre-trial motions in this Court alleging that Carnivale would commit perjury if called to the witness stand. In addition, the Government provided Defendant with extensive discovery relating to Carnivale's testimony, and Defendant had access to several court transcripts of testimony given by Carnivale in other criminal matters. The Court, therefore, finds that even if Carnivale did testify falsely, Defendant was neither surprised by the false testimony and unable to meet it, nor unaware of the falsity of the testimony until the trial had concluded. See McLaughlin, 89 F. Supp. 2d at 621. Accordingly, Defendant's Motion for a new trial is denied in this respect.

B. Bill of Particulars

Defendant next argues that he is entitled to a new trial because the Government did not provide him with a bill of particulars as requested by Defendant prior to trial. "A bill of particulars is a 'formal, detailed statement of the claims or charges brought by a plaintiff or a prosecutor.'" United States v. Urban, 404 F.3d 754, 771 (3d Cir. 2005) (quoting Black's Law Dictionary 177 (8th ed. 2004)). "The purpose of a bill of

particulars is to inform the defendant of the nature of the charges brought against him, to adequately prepare his defense, to avoid surprise during trial and to protect him against a second prosecution for an inadequately described offense." Id. (quoting United States v. Addonizio, 451 F.2d 49, 62-63 (3d Cir. 1972)). A bill of particulars must be issued "[o]nly where an indictment fails to perform these functions, and thereby 'significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial.'" Id. at 771-72 (quoting United States v. Rosa, 891 F.2d 1063, 1066 (3d Cir. 1989)). "Full discovery . . . obviates the need for a bill of particulars." United States v. Giese, 597 F.2d 1170, 1180 (9th Cir. 1979) (cited with approval in Urban, 404 F.3d at 772); see also United States v. Kemp, Crim. No. 04-370, 2004 WL 2757867, at *8 (E.D. Pa. Dec. 2, 2004) ("Courts are especially reluctant to direct the filing of a bill of particulars when the government has provided the defendant with extensive pre-trial discovery.").

Here, Defendant had moved the Court to order the Government to issue a bill of particulars prior to trial. After holding argument, the Court dismissed Defendant's motion as moot because the Government assured the Court that it had provided Defendant with the most specific information available to the Government itself. Defendant now argues that a bill of particulars should have been issued because, contrary to the Government's earlier

assurances, the Government's evidence at trial did include more specific information regarding the dates and places where alleged drug transactions occurred.

The Indictment in this case informed Defendant that Count One charged him with having conspired with Steven Carnivale and others to distribute in excess of five kilograms of cocaine from in or about March 2002 to on or about December 8, 2002. (Indict. ¶ 1.) The Indictment further alleged that Defendant, in furtherance of the conspiracy, received approximately one half kilogram of cocaine for distribution on two separate occasions in or about August or September 2002, as well as on one occasion on or about October 8, 2002 or October 9, 2002. (Id. ¶¶ 5-6.) Moreover, the Indictment alleged that Defendant had arranged to possess for distribution "approximately two . . . kilograms of cocaine from an approximately three . . . kilogram shipment of cocaine sent by Federal Express in a package shipped to Levittown, Pennsylvania" on or about October 29, 2002. (Id. ¶ 7.) The Indictment further stated that Defendant, in furtherance of the conspiracy, received approximately one half kilogram of cocaine for distribution on November 14, 2002, and on November 18, 2002. (Id. ¶ 8-9.) Finally, the Indictment alleged that Defendant, again in furtherance of the conspiracy, had phone conversations with Steven Carnivale on or about December 8, 2002 "in an effort to possess for distribution approximately two . . . kilograms of cocaine from an approximate ten . . . kilogram

shipment of cocaine from California.” (Id. ¶ 10.)

Count Two of the Indictment charged Defendant with knowingly and intentionally possessing with intent to distribute approximately 500 grams of cocaine on or about October 8, 2002 or October 9, 2002. (Id. at 4.) Count Three of the Indictment charged Defendant with knowingly and intentionally attempting to possess with intent to distribute approximately two kilograms of cocaine on or about October 29, 2002. (Id. at 5.) Count Four of the Indictment charged Defendant with knowingly and intentionally attempting to possess with intent to distribute approximately two kilograms of cocaine on or about December 8, 2002. (Id. at 6.)

The Court concludes that the Indictment informed Defendant of the nature of the charges against him with specificity, and provided Defendant with detailed guidance regarding what the government would seek to prove at trial. See Kemp, 2004 WL 2757867, at *8-9. Moreover, the Court notes that Defendant received full discovery from the Government in this case, including all tapes, transcripts and investigation reports regarding Steven Carnivale, Joseph Seneca, and Defendant, as well as all recordings of drug conversations between Steven Carnivale and Cooperating Witness #1, Cooperating Witness #2, Cooperating Witness #6, and Cooperating Witness #7. Defendant further had access to all transcripts of prior proceedings in which Steven Carnivale testified. This extensive discovery obviated the need for a bill

of particulars in this case. See Giese, 597 F.2d at 1180. Accordingly, Defendant's Motion for a new trial is denied in this respect.

C. Newly Discovered Evidence

Defendant also argues that he is entitled to a new trial on the basis of newly discovered evidence. In a motion for a new trial on the basis of newly discovered evidence, the defendant bears a heavy burden of establishing the following:

- (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial;
- (b) facts must be alleged from which the court may infer diligence on the part of the movant;
- (c) the evidence relied on, must not be merely cumulative or impeaching;
- (d) it must be material to the issues involved; and
- (e) it must be such, and of such a nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976) (citations omitted); see also United States v. DiSalvo, 34 F.3d 1204, 1215 (3d Cir. 1994).

Here, Defendant argues that a pole camera video recording from October 3, 2002, and used by the Government in its case in chief at trial, constitutes newly discovered evidence. However, only evidence that was not known at the time of trial and could not have been discovered by a diligent search before then is considered to be newly discovered evidence for purposes of a motion for a new trial. See Iannelli, 528 F.2d at 1292. The Government's use of the October 3, 2002 pole camera video recording therefore precludes

Defendant's Motion. Moreover, the Court notes that the October 3, 2002 video tape was provided to Defendant by the Government on May 13, 2005, and identified as discovery number 437. (Govt's Resp. at 4.) The mere fact that Defendant may have overlooked this video tape when preparing for trial does not render the recording newly discovered evidence for purposes of a Rule 33 motion. Accordingly, Defendant's Motion for a new trial is denied in this respect.

D. Prosecutorial Misconduct

Defendant further argues that he is entitled to a new trial on the basis of prosecutorial misconduct in the form of (1) the Government's knowing use of perjured testimony; (2) the Government's failure to provide Defendant with a bill of particulars; (3) the Government's use of newly discovered evidence; and (4) the Government's interference with Defendant's ability to call Antonio Nieves to the witness stand. A district court may grant a new trial on the basis of prosecutorial misconduct. United States v. Dixon, 658 F.2d 181, 193 (3d Cir. 1981). Prosecutorial misconduct, however, does not always warrant a new trial. United States v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995). Rather, a conviction will only be set aside "when the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" United States v. Walker, Crim. Nos. 94-488, 94-554, 2000 WL 378532, at *10 (E.D. Pa. Apr. 4, 2000) (quoting Darden v. Wainwright, 477 U.S.

168, 181 (1986)). Accordingly, a defendant seeking a new trial on the basis of prosecutorial misconduct must prove not only that prosecutorial misconduct in fact occurred, but also that it rose to such a level as to render the jury's verdict unreliable. Id. at *10 (quotations omitted).

1. Perjury

Defendant argues that the Government engaged in prosecutorial misconduct when it allowed Steven Carnivale to testify although it knew that Carnivale would commit perjury on the witness stand. "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995) (quotation omitted). "The same is true when the government, although not soliciting false evidence, allows it to go uncorrected when it appears at trial." United States v. Biberfeld, 957 F.2d 98, 102 (3d. Cir. 1992). As noted above, however, the mere fact that a witness's testimony conflicted with the testimony of other witnesses or even his own testimony at other trials "does not mean that perjury occurred during Defendant's criminal trial or that the prosecutor knowingly used perjured testimony." Bales, 1997 WL 825245, at *5.

Here, Defendant has brought forward no new evidence in support of his Motion that was not available to him at trial and could,

therefore, have been used by Defendant to impeach Carnivale's testimony. "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.'" United States v. Scheffer, 523 U.S. 303, 313 (1998) (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)). "Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" Scheffer, 523 U.S. at 313 (quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)). Accordingly, "it is improper for a district court to substitute its judgment of the facts and the credibility of the witnesses for that of the jury." United States v. Haut, 107 F.3d 213, 220 (3d Cir. 1997) (internal quotations omitted).

Here, Defendant is, in effect, asking the Court to disregard the jury's determination that Carnivale's testimony was, at least in part, reliable, and instead find that Carnivale committed perjury. Defendant has set forth no new evidence in support of his allegations, and was given every opportunity at trial to impeach Carnivale's testimony and submit evidence to the jury which would prove that Carnivale had testified falsely. Based on the record before it, the Court cannot overrule the jury's determination that Carnivale's testimony was truthful. As Defendant has failed to persuade the Court that Carnivale's testimony was in fact perjured,

the Court further concludes that the Government did not knowingly present perjured testimony to the jury or allowed it to go forward uncorrected when it appeared. Defendant, therefore, has failed to establish that the Government engaged in prosecutorial misconduct by allowing Steven Carnivale to testify.

2. Bill of particulars

Defendant further argues that the Government engaged in prosecutorial misconduct when it refused to provide him with a bill of particulars. As noted above, however, the Court did not order the Government to provide Defendant with a bill of particulars, and such bill was not necessary to allow Defendant to prepare adequately for his defense and to avoid unfair surprise during trial. Defendant, therefore, has failed to establish that the Government engaged in prosecutorial misconduct when it refused to provide Defendant with a bill of particulars.

3. Government's use of newly discovered evidence

Defendant next argues that the Government engaged in prosecutorial misconduct when it introduced a pole camera video recording of October 3, 2002 at trial. Defendant contends that the Government did not make this evidence available to him prior to trial and, consequently, should not have been allowed to rely on it in order to secure his conviction. As noted above, however, the October 3, 2002 video recording was provided to Defendant prior to trial as discovery #437. Defendant, therefore, has failed to

establish that the Government engaged in prosecutorial misconduct when it introduced the October 3, 2002 pole camera recording as evidence during Defendant's criminal trial.

4. Interference with witness availability

Defendant also argues that the Government engaged in prosecutorial misconduct because it interfered with the availability of Antonio Nieves as a defense witness. Criminal defendants have a fundamental right to "offer testimony of witnesses and to compel their attendance, if necessary, in support of a defense to criminal liability." United States v. Cruz-Jiminez, 977 F.2d 95, 100 (3d Cir. 1992). When the proposed witness is incarcerated, this basic constitutional right is implemented "through the common law writ of habeas corpus ad testificandum under the authority that 28 U.S.C.A. § 2241(c)(5) and the All Writs Act, 28 U.S.C.A. § 1651(a), gives federal district courts." Id. A defendant's right to call incarcerated witnesses at trial, however, extends only to prisoners who are necessary at trial. 28 U.S.C.A. § 2241(c)(5).

Whether it is "necessary" to bring the prisoner into court to testify at trial depends on the nature of the testimony he is likely to give in relation to the substantive law governing the particular offense charged. If the witness's likely testimony is material to a defense that a defendant has properly raised, the witness's testimony becomes relevant and material[,] and the accused is entitled to secure the witness's attendance.

Cruz-Jiminez, 977 F.2d at 100.

A criminal defendant invokes his right to secure the prisoner's attendance by moving the district court to exercised its discretion to issue a writ of habeas corpus ad testificandum pursuant to 28 U.S.C.A. § 2241(c)(5). Id. at 99. "In addition to section 2241(c)(5), when a defendant in a criminal case requests the issuance of a writ of habeas corpus ad testificandum, constitutional considerations and the procedural considerations of Federal Rule of Criminal Procedure 17(b) both apply." Id. Fed. R. Crim. P. 17(b) states as follows:

Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

Fed. R. Crim. P. 17(b).

Defendant maintains that the Government interfered with his constitutional right to call Antonio Nieves, who was in federal custody, as a defense witness. Defendant states that, the day before he intended to call Nieves to the witness stand, the Government informed him that he would have to pay \$500 in order to secure Nieves' availability. Defendant contends that this amounted to prosecutorial misconduct because the Government was aware that Defendant would not be able to afford \$500.

At the time Defendant was informed that it would cost \$500 to

transport Nieves to the courthouse, the Court had already issued a writ ordering the United States Marshal's to produce Nieves as a witness. Defendant, to whom the writ was given, handwrote on the document that "Defendant has seen fit to cancel this writ upon further thought," and signed and dated this statement. (Doc. No. 122.) At no time did Defendant apply to the Court, ex parte or otherwise, to have this cost paid by the Government due to Defendant's inability to pay, as required by Fed. R. Crim. P. 17(b), nor did Defendant ever inform the Court that his decision not to call Nieves was motivated by financial concerns. Consequently, the Government was not required to disregard Defendant's written statement that he no longer wished to call Nieves, and produce Nieves as a defense witness at trial. Indeed, without the formal writ issued by the Court which Defendant saw fit to cancel, the Government could not request that the Bureau of Prisons produce Nieves. The Government, therefore, did not engage in prosecutorial misconduct when it refrained from producing Nieves at Defendant's trial. Accordingly, Defendant's Motion for a new trial on the basis of prosecutorial misconduct is denied.

E. Sufficiency of Evidence

Defendant further argues that he is entitled to a new trial because the Government presented insufficient evidence to support the jury's guilty verdict on Counts One and Three of the Indictment. Defendant seems to confuse the standard for a motion

for a acquittal under Rule 29 based upon insufficient evidence to support a conviction, with the standard for a motion for a new trial under Rule 33 based upon a conviction that was against the weight of the evidence. As Defendant is acting *pro se*, the Court will treat Defendant's submission in this respect as a motion for a judgment of acquittal under Rule 29, or in the alternative, a motion for a new trial under Rule 33.

1. Rule 29(c) motion for acquittal

Rule 29(c) provides that a defendant may, within seven days after the verdict or such longer time as the court may prescribe, file a motion for judgment of acquittal. Fed. R. Crim. P. 29(c). The purpose of a Rule 29(c) motion is to "determine whether the Government has adduced sufficient evidence respecting each element of the offense charged to permit jury consideration." United States v. Gambone, 167 F. Supp. 2d 803, 809 (E.D. Pa. 2001) (citation omitted). "A defendant challenging the sufficiency of the evidence bears a heavy burden." United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992). "A verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987) (citation omitted). "A conviction may be based upon circumstantial evidence, provided that the evidence sufficiently supports the verdict." United States v. Tyler, Crim. No. 2:01-CR-429-WY-3, 2003

WL 22016883, at *1 (E.D. Pa. June 19, 2003).

In ruling on a Rule 29(c) motion, "the court may not re-weigh the evidence, nor reassess the credibility of witnesses, as both of these functions are for the jury." Rich, 326 F. Supp. 2d at 678. Moreover, "the court must view the evidence and the inferences logically deductible therefrom in the light most favorable to the government" United States v. McNeill, 887 F.2d 448, 450 (3d Cir. 1989). A finding of insufficiency of evidence is "confined to cases where there prosecution's failure is clear." United States v. Smith, 294 F.3d 473, 477 (3d Cir. 2002) (quotation omitted).

Defendant argues that the Government presented insufficient evidence at trial to permit the jury to convict him of Count One, which charged him with conspiracy to distribute cocaine from March 2002 to on or about December 8, 2002, and Count Three, which charged him with attempt to possess cocaine on or about October 29, 2002. Defendant does not dispute that the Government's witnesses Steven Carnivale and Thomas Carmean testified that Defendant was a member of the Carnivale drug conspiracy. Similarly, Defendant does not dispute that Carnivale and Carmean testified that, on October 29, 2002, Defendant waited for a drug shipment with them and expected to receive approximately two kilograms of cocaine for further distribution. Rather, Defendant argues only that the testimony of these witnesses was false and inconsistent with the

testimony of other witnesses, their own prior statements, and the audio and video evidence the Government introduced at trial.

It is well established that “‘uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction.’” United States v. Perez, 280 F.3d 318, 344 (3d Cir. 2002) (quoting United States v. DeLarosa, 450 F.2d 1057, 1060 (3d Cir. 1971)). This is particularly the case where the defense has ample opportunity to cross-examine the Government’s witnesses and the jury was specifically instructed as to its role in weighing witnesses’ testimony and credibility. Perez, 280 F.3d at 344. Here, Defendant conducted a detailed cross-examination of Carnivale and Carmean, with whom the Government had entered into plea agreements, and attempted to expose their potential for bias and self-interest. Moreover, the Court gave specific instructions to the jury regarding its role in weighing witness testimony, and the potential dangers involved in relying on the testimony of co-conspirators. Finally, the Government presented video and audio tape recordings of Defendant’s interactions with Carnivale at trial, which tended to corroborate the testimony given by Carnivale and Carmean. Viewing the evidence in the light most favorable to the Government, the Court therefore concludes that there was sufficient evidence for a reasonable jury to find Defendant guilty of Count One, charging him with conspiracy to possess cocaine with intent to distribute, and Count Three, charging him with attempt to

possess cocaine with intent to distribute. Accordingly, Defendant's Motion for acquittal is denied.

2. Rule 33 motion for a new trial

The Court also considers Defendant's argument with respect to the sufficiency of the evidence as a Motion for a new trial under Rule 33 on grounds that the verdict was against the weight of the evidence. Pursuant to Rule 33, "[o]n a defendant's motion the court may grant a new trial to that defendant if the interest of justice so requires." Fed. R. Crim. P. 33. A new trial may be granted is if the verdict is against the weight of the evidence. Tibbs v. Florida, 457 U.S. 31, 37-39 n.11-12 (1982); United States v. Steptoe, Crim. No. 01-429-02, 2003 WL 22016866, at *2 (E.D. Pa. June 19, 2003). However,

a district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it "believes that there is a serious danger that a miscarriage of justice has occurred - that is, that an innocent person has been convicted."

United States v. Brennan, 326 F.3d 176, 188-89 (3d Cir. 2003) (quoting United States v. Santos, 20 F.3d 280, 285 (7th Cir. 1994)).

"Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." Brennan, 326 F.3d at

189 (citations omitted). "Motions for a new trial based on the weight of the evidence are not favored. Such motions are to be granted sparingly and only in exceptional cases." Gov't of the Virgin Islands v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987) (citations omitted).

The Court, having exercised its own judgment in reviewing the evidence presented at trial as outlined above, concludes that this is not one of the exceptional cases in which the verdict was against the weight of the evidence and a new trial is warranted. The Government presented substantial evidence in the form of witness testimony and audio as well as video recordings which indicated that Defendant was a member of Carnivale's drug conspiracy and attempted to possess cocaine with intent to distribute on or about October 29, 2002. The jury's guilty verdict on Counts One and Three of the Indictment, therefore, did not constitute a miscarriage of justice. Accordingly, Defendant's Motion for a new trial is denied in this respect.

F. Writ of Error Coram Nobis

Finally, Defendant states that his instant Motion also seeks a writ of error coram nobis. The writ of error coram nobis is "an ancient writ that was available at common law to correct factual errors in both civil and criminal cases." United States v. Rankin, 1 F. Supp. 2d 445, 453 (E.D. Pa. 1998) (citing United States v. Morgan, 346 U.S. 502, 507 (1954)). The power of federal courts to

issue a writ of error coram nobis emanates from the All Writs Act, 28 U.S.C. § 1651(a). The writ of error coram nobis "is usually used in the modern sense to 'attack allegedly invalid convictions which have continuing consequences.'" United States v. Fiola, Crim. No. 91-673, 1996 WL 694172, at *2 (E.D. Pa. Dec. 2, 1996) (quoting United States v. Stoneman, 870 F.2d 102, 105 (3d Cir. 1989)). The writ, therefore, "is [a] procedural tool whose purpose is to correct errors of fact only, and its function is to bring before the court rendering the judgment matters of fact which, if known at [the] time judgment was rendered, would have prevented its rendition." Miller v. Pappert, No. Civ. A. 04-3635, 2004 WL 2004402, at *1 (E.D. Pa. Sept. 8, 2004) (quotation omitted). The writ of error coram nobis is an extraordinary remedy which is only available where "no other relief was available at the time of trial, an error 'of the most fundamental character' is involved and 'sound reasons exist[] for failure to seek appropriate earlier relief.'" United States v. Angel, Crim. No. 94-189, 1999 WL 975122, at *1 (E.D. Pa. Oct. 8, 1999) (quoting Morgan, 346 U.S. at 512).

"[A] criminal defendant may not challenge his sentence under a motion for a writ of error coram nobis when he could raise the same challenge in a motion under [28 U.S.C.] § 2255." Id. at *2. Thus, the writ of error coram nobis "has been traditionally used to attack convictions with continuing consequences when the petitioner is no longer in custody for purposes of 28 U.S.C. § 2255." United

States v. Baptiste, 223 F.3d 188, 189 (3d Cir. 2000) (quotation omitted). As Defendant currently remains incarcerated and can attack the validity of his conviction pursuant to 28 U.S.C. § 2255, he is not eligible for writ of error coram nobis relief at this time. See id.; Angel, 1999 WL 975122, at *2; Pappert, 1004 WL 2004402, at *1. Accordingly, Defendant's Motion is denied in this respect.

IV. CONCLUSION

For the foregoing reasons, Defendant's *pro se* "Motion under Rule 33" is denied in its entirety.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES :
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 v. : CRIMINAL No. 04-CR-796
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 ANTHONY GAGLIARDI :

O R D E R

AND NOW, this 5th day of July, 2005, upon consideration of Defendant's *pro se* "Motion under Rule 33" (Doc. No. 135), and the Government's submission received in response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.