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The Fourth Circuit Has the Most Liberal Rule 33 Interpretation

Tanisha Palvia and Jim McLoughlin of Moore & Van Allen analyze the Rule 33 standard, the path to the Supreme Court for this important circuit split, and its potential impact on criminal cases.

The federal circuits are split on the standard for granting a new trial under Rule 33 of the Federal Rules of Criminal Procedure after a criminal conviction. In May, the Fourth Circuit weighed in, adding to the divide.

In *U.S. v. Rafiekian*, the court affirmed the district court's grant of a new trial, which was based solely on the trial judge's disagreement with jury inferences drawn from the evidence.

Rafiekian II arose from the prosecution of an executive of former national security adviser Michael Flynn's Flynn Intel Group. Bijan Rafiekian was accused of acting as an unregistered agent of Turkey as well as conspiring to act as an unregistered agent and to make a false Foreign Agents Registration Act filing.

After the jury voted to convict, the district court granted Rafiekian's Rule 29 motion, concluding no rational juror could find that he had acted as an unregistered agent for Turkey or that he had filed a false FARA registration. The district court conditionally ordered a new trial under Rule 33. The government appealed.

In *Rafiekian I*, a Fourth Circuit panel reversed the Rule 29 acquittal. The panel also ruled the district court had not explained its Rule 33 ruling sufficiently. On remand, in a 51-page opinion, the district court again granted a new trial based solely on disagreement with jury inferences from the evidence. The government appealed again.

A Fourth Circuit panel of three judges affirmed the grant of the new trial, holding on a Rule 33 motion, the test is whether the "evidence weighs so heavily against the verdict that it would be unjust to enter judgment" and finding the district court did not abuse its discretion when basing its decision solely on disagreement with jury inferences.

The panel held that the "key question ... is not what *kinds* of evidence support the verdict, but the *weight of that evidence*." The panel took its 1992 decision, *United States v. Campbell*, one step further, ruling that disagreement with jury inferences alone can be the basis for granting a new trial, a holding that no other circuit has explicitly adopted.

Critical to the result, the panel limited its review to an abuse of discretion by the district court. Combination of the abuse of discretion standard of review with the more lenient Rule 33 standard vests significant power over new trial decisions with the district courts.

The panel's decision also emphasizes how critical it is to understand the differing standards for a Rule 29 motion for judgment of acquittal and a Rule 33 motion for a new trial.

Succeeding under Rule 29 is rare because the evidence, which must be viewed in the light most favorable to the government, must be so deficient that acquittal is the only correct verdict. Since no such rule applies under Rule 33, the defense has a more level playing field.

The panel rejected the government's argument that federal circuits are unanimous that a new trial can't be granted solely based on disagreement with jury inferences and that Rule 33 requires "specific defects or indicia of unreliability in the trial evidence."

On the surface, Rule 33 arguably provides little guidance on what the standard should be—it permits grant of a new trial when "the interest of justice so requires."

The notes of the Advisory Committee on Rules address the timing of the motion, but don't comment on the standard, stating "other[than timing], it substantially continues existing practice." The circuits have little consensus. The First and Third grant a Rule 33 motion if a "miscarriage of justice" or "manifest injustice" would result.

The Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh grant the motion only when "the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand," but the Fifth has acknowledged that it "has not always articulated a uniform standard."

The Tenth and DC circuits require "a definite and firm conviction that a mistake has been committed." With the Fourth adding yet another standard to the mix, it is time for the US Supreme Court to weigh in to resolve the issue once and for all.

With *Rafiekian*, the Fourth Circuit now has the most liberal interpretation of the Rule 33 standard, making this issue ripe for the Supreme Court to address.

The government has a strong interest in settling the issue, since, as the law stands—at least in the Fourth Circuit—cases based entirely on inferences drawn from circumstantial evidence (such as most white-collar crimes) are susceptible to new trial determinations based solely on a district court disagreeing with the jury's inferences.

On May 13, the government requested more time from the Fourth Circuit to file a petition for rehearing en banc, which requests all judges of the Fourth Circuit to hear a case. The motion was granted, extending the time to file to July 3, 2023. But that deadline passed, and the government didn't file the petition for rehearing, leaving the Supreme Court as the only remaining path for review.

The case is *United States v. Bijan Rafiekian*, 68 F.4th 177 (4th Cir. 2023), decided May 18, 2023.

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