

OCT 17 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

VIRGIL L. BURRIS, AKA Kooka,

Defendant - Appellant.

No. 10-30347

D.C. No. 2:07-cr-00179-RHW-5

MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
Robert H. Whaley, Senior District Judge, Presiding

Submitted October 13, 2011**
Seattle, Washington

Before: **KOZINSKI**, Chief Judge, **PAEZ**, Circuit Judge, and **COLLINS**,
District Judge.***

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Raner C. Collins, District Judge for the U.S. District Court for Arizona, sitting by designation.

One requirement for getting a new trial based on newly discovered evidence is that “the new evidence must not be merely cumulative or impeaching.” Lindsey v. United States, 368 F.2d 633, 634 (9th Cir. 1966); see United States v. Kulczyk, 931 F.2d 542, 549 (9th Cir. 1991). Burriss presents Swan’s recantation, but Swan has repudiated his recantation. “[W]here the recantation has itself been repudiated, . . . the recantation becomes merely impeaching and could be used at a new trial only for the purpose of cross examining the witness, and not as substantive evidence.” Lindsey, 368 F.2d at 636. This case does not present a rare exception where impeachment evidence alone might support a new trial, see United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992), because other witnesses corroborated aspects of Swan’s trial testimony.

AFFIRMED.