No. 19-2946

IN THE

Supreme Court of the United States

JACK ALBERT CHAPPELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2946

United States of America

Appellee

v.

Jack Albert Chappell

Appellant

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:16-cr-00052-DLH-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

April 23, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals

For the Eighth Circuit

No. 19-2946

United States of America

Plaintiff - Appellee

v.

Jack Albert Chappell

Defendant - Appellant

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: October 21, 2020
Filed: March 10, 2021

Before COLLOTON, GRASZ, and STRAS, Circuit Judges.

GRASZ, Circuit Judge.

Jack Albert Chappell appeals the district court's[1] denial of his request for a new trial based on newly discovered evidence, a related *Brady* challenge, and his request for a lighter sentence. We affirm.

I. Background

After a four-day trial, a jury found Chappell guilty of conspiring to launder money and conspiring to distribute and possess with intent to distribute a controlled substance. On day one, Chappell's counsel asked the district court to drug test Leslee Ball, an unindicted coconspirator and expected government witness. Chappell's counsel believed that Ball "continu[ed] to use pretty significant narcotics" and alleged that "she had a drug overdose about three or four days ago." The district court declined to drug test her, but stated it planned to assess her competence to testify, state of mind, and sobriety by listening to her testimony. It also reminded Chappell's counsel that he could cross-examine her.

On day three, Ball testified. Chappell's counsel and the district court asked about her substance use. Ball told the jury that she received treatment for alcoholism two years before trial but eventually relapsed. She also testified about sporadic methamphetamine use, starting years before trial, but described herself as "more of a drinker" than a methamphetamine user. No one asked her about any recent substance use in the weeks, days, or hours before she testified. After the district court asked its own questions, both parties declined a second chance to question Ball.

While in custody before sentencing, Chappell spoke to Ball multiple times. In one recorded call, the pair discussed a conversation between Ball and the government about a drug test. Soon after, Ball allegedly contacted Chappell's

[1]The Honorable Daniel L. Hovland, then Chief Judge, now United States District Judge for the District of North Dakota.

counsel, stating that: (1) before testifying, she told the government that she could not pass a drug test; and (2) she testified against Chappell while drunk and high.

Based on those revelations, Chappell moved for a new trial and asserted that the government violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by withholding this information. In support, he submitted e-mails and his calls with Ball. He did not submit a verified statement from Ball.

The district court concluded that it lacked new evidence to justify a new trial.[2] While crediting the recorded calls as supporting-but-inconclusive evidence, the district court explained this evidence could only impeach Ball, not bar her testimony. Additionally, the district court "did not detect any impairment" during her testimony. And it considered it "highly unlikely that . . . Ball's alleged impairment" would lead to an acquittal given the "overwhelming" evidence from five other cooperating witnesses.

The district court also rejected alleged constitutional violations under *Brady* or *Giglio v. United States*, 405 U.S. 150, 153 (1972), by noting that Chappell's counsel alerted the court and the government to Ball's alleged recent overdose but asked no on-the-stand questions about her recent substance use.

At sentencing, Chappell asked for a fifty-percent downward variance for diagnosed-but-untreated physical pain caused by broken metal hardware in his neck. Doctors had told Chappell that he needed significant invasive surgery and referred him to the Mayo Clinic. The district court did not vary downward as it sentenced Chappell to serve concurrent 360 and 240-month sentences. The district court planned to strongly encourage the Bureau of Prisons to place Chappell at a federal medical center, preferably near the Mayo Clinic.

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[2]The district court did not hold an evidentiary hearing because no one knew where to find Ball.

II. Discussion

Chappell anchors the appeal of his conviction to an alleged but unproven lie. To grant relief, we need more. The record leaves us with no room to reverse his sentence, either.

A. New Trial

Chappell asks for a new trial because Ball allegedly lied about recent substance use and testified while under the influence of those substances. We review the denial of Chappell's motion for a clear abuse of discretion. *United States v. Baker*, 479 F.3d 574, 577 (8th Cir. 2007). A district court may vacate a conviction based on newly discovered evidence. Fed. R. Crim. P. 33(b)(1). To receive a new trial, the moving party must show that: (1) the evidence was actually newly discovered since trial; (2) the moving party acted diligently; (3) the newly discovered evidence is neither merely cumulative nor impeaching; (4) the newly discovered evidence is material to the issues involved; and (5) it is probable that the newly discovered evidence would produce an acquittal. *United States v. Shumaker*, 866 F.3d 956, 961 (8th Cir. 2017).

Chappell's newly-discovered-evidence challenge fails because he cannot satisfy most, if not all, of the elements that he must to receive a new trial.

At the outset, his appellate brief cited trial testimony to show that Ball lied on the stand. But during oral argument, counsel conceded that the cited testimony came not from Ball, but from a different witness.[3] A review of the trial testimony—which

[3]That concession also defeats any entitlement to a new trial based on newly discovered evidence under the theory that the government knowingly used perjured testimony to convict Chappell. *Cf. United States v. Lewis*, 976 F.3d 787, 797 (8th Cir. 2020) (recognizing that for a conviction to be set aside, the government must have known it was using perjured testimony).

includes no question about Ball's recent or near-trial drug or alcohol use—disproves the argument that Ball lied on the stand about recent or near-trial drug or alcohol use. Thus, Chappell's challenge, to the extent that it relies on Ball's purportedly perjured testimony, lacks merit.

Then, we turn to the argument that Chappell should receive a new trial based on Ball's post-trial revelation that she testified while drunk and high. First, we question whether Chappell has presented any evidence that would qualify as "new evidence." *United States v. Hill*, 737 F.3d 683, 687 (10th Cir. 2013) ("Implicit in a claim of newly discovered evidence is that there is new *evidence*—that is, material that is admissible at trial.") (emphasis in original). Ball's unverified allegations about her impairment (including her conversation with the government), as relayed through Chappell's counsel or through the recorded phone calls, seem unlikely to be admissible at trial. *E.g., id.; see also United States v. Chapman*, 851 F.3d 363, 382 (5th Cir. 2017) (rejecting "an un-notarized written declaration by [defendant's] counsel restating what [the alleged gun owner] had revealed to counsel" because "[s]uch representations from defense counsel repeating statements that [the alleged gun owner] had made to counsel are inadmissible hearsay and a motion for new trial may not be based on inadmissible evidence.") (internal citation and quotation marks omitted). To be clear, this does not mean that a criminal defendant can never use a government witness's post-trial recorded perjury admissions to seek Rule 33(b) relief.

But even if we assume that Chappell meets the first element, he cannot satisfy the other four. He cannot show diligence. His drug-test request cannot explain away his counsel's failure to ask a sworn-in Ball about recent substance use despite receiving an additional chance to do so.

Further, Chappell's "newly discovered evidence only impeached." *United States v. Lewis*, 976 F.3d 787, 795 (8th Cir. 2020). According to Chappell, the newly discovered evidence could have challenged Ball's competency to testify and her testimony's admissibility. *See* Fed. R. Evid. 601; Fed. R. Evid. 403. But Chappell

fails to negate Ball's presumed competency to testify. *See* Fed. R. Evid. 601 ("Every person is competent to be a witness unless these rules provide otherwise."); *see also United States v. Hyson*, 721 F.2d 856, 864 (1st Cir. 1983) ("There is no provision in the rules for the exclusion of testimony because a witness is mentally incompetent."). Bare assertions cannot show incompetency, especially when coupled with Chappell's two chances to question Ball at trial. *See United States v. Skorniak*, 59 F.3d 750, 755 (8th Cir. 1995) (no abuse of discretion in allowing testimony when defendant could cross-examine witness about his history of mental health complications and substance use). And the record does not undermine the district court's finding that Ball lacked an impairment when she testified. Chappell's argument also fails because it rests on the unsupported perjury contention.

Finally, "[b]ecause the newly discovered evidence only impeached, it was not material." *Lewis*, 976 F.3d at 795. Nor was it probable that an acquittal would flow from that evidence. *See id.* Without any support, Chappell characterizes Ball's testimony as "the critical lynch-pin of the [g]overnment's case" and as weightier than the testimony of the other five government witnesses. After carefully reviewing the record, we agree with the district court that the evidence of guilt—even without Ball's testimony—was "overwhelming and compelling." Thus, even if Chappell had blocked Ball's testimony, an acquittal seems unlikely.

Without satisfying all new-trial elements, we conclude that the district court did not abuse its discretion in denying a new trial.

B. *Brady*

We review denials of constitutional claims de novo. *United States v. Dones-Vargas*, 936 F.3d 720, 722 (8th Cir. 2019). Under the Due Process Clause of the Fifth Amendment to the United States Constitution, the government must disclose to the accused favorable evidence that is material to guilt, punishment, or the credibility of a witness. *Id.* (citing *Brady*, 373 U.S. at 87 (guilt and punishment evidence), and *Giglio*, 405 U.S. at 154 (witness credibility)). "To establish a due

process violation, a defendant must show that the evidence in question was favorable to him, that the government suppressed the evidence, and that the evidence was material." *Dones-Vargas*, 936 F.3d at 722.

Generally, "[e]vidence is material when there is a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995)). A "'reasonable probability' of a different result" exists when "the nondisclosure 'undermines confidence in the outcome of the trial.'" *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)). To decide if impeachment evidence is "material," we examine the record as a whole because "[t]he relative strengths of the prosecution's case and the impeachment value of the undisclosed evidence bear on whether disclosure in time for use at trial would have made a difference." *Id.*

Even if the government "conceal[ed]" Ball's "mental state," Chappell cannot show that such evidence counts as "material" impeachment evidence. In *Dones-Vargas*, we upheld a denial of a *Brady* and *Giglio* challenge to undisclosed paid-witness testimony because the government's case "did not hinge" on that evidence when other witnesses testified to the same or similar facts. 936 F.3d at 722–23. Likewise, the government's case against Chappell "did not hinge" on Ball's testimony (*id.*), when, as the district court noted, five other witnesses presented "overwhelming and compelling" testimony against Chappell. Accordingly, we conclude that Chappell cannot establish "materiality." In turn, we conclude that the district court did not abuse its discretion in deciding against a *Brady* violation.

C. Sentencing

"We review the denial of a motion for downward variance by reviewing the sentence for reasonableness, applying a deferential abuse-of-discretion standard." *United States v. Angeles-Moctezuma*, 927 F.3d 1033, 1037 (8th Cir. 2019). A sentencing court abuses its discretion and imposes an unreasonable sentence by, among other things, failing to consider a relevant sentencing factor that should have

received significant weight. *United States v. Mousseau*, 517 F.3d 1044, 1048 (8th Cir. 2008). It must make an individualized assessment of the appropriate sentence under the facts presented, and it must consider the factors set out in 18 U.S.C. § 3553(a). *United States v. Duke*, 932 F.3d 1056, 1062 (8th Cir. 2019).

After reviewing the briefs and presentence investigation report, as well as the parties' arguments, the district court decided that the United States Sentencing Guidelines set out a sufficient-but-not-greater-than-necessary sentence. In denying the downward variance, the district court: (1) made an individualized assessment under the facts presented; (2) considered the § 3553 factors (including Chappell's medical condition); and (3) gave a reasoned basis for exercising its judgment. *Id.* at 1061. Additionally, the specific and strong recommendation for a medical-facility placement confirms that the district court considered Chappell's medical condition, even if it did not reduce his sentence on that basis. Chappell fails to show that the district court abused its discretion or imposed an unreasonable sentence.

The judgment of the district court is affirmed.

COLLOTON, Circuit Judge, concurring in the judgment.

I do not share the majority's apparent doubt that a trial witness's post-trial recorded admissions that she used drugs and drank alcohol shortly before testifying would be new evidence for purposes of Federal Rule of Criminal Procedure 33. When a witness's post-trial statements could be used to impeach the witness's trial testimony, they would be admissible through cross-examination of the witness. Where, as here, the new evidence would be used for impeachment purposes, it often will not be material, and a new trial will not be warranted. *E.g.*, *United States v. Bohmont*, 413 F. App'x 946, 957-58 (8th Cir. 2011) (per curiam) (post-trial discovery that prosecution witness "submitted a methamphetamine-positive urine sample on the day he testified at trial" did not justify a new trial because "[a]t most, this new evidence is cumulative impeachment evidence"); *United States v. Holmes*, 421 F.3d 683, 688 (8th Cir. 2005) (affirming denial of new trial where proffered

hearsay affidavit would have had "negligible" value if "used to impeach" a witness's testimony at a new trial); *United States v. L'Donna*, 179 F.3d 626, 629 (8th Cir. 1999) (new evidence of witness's perjury did not warrant new trial where evidence of guilt was great, and "there was no foreseeable likelihood that any possible further impeachment value" from new evidence would have affected the verdict); *United States v. Kraemer*, 810 F.2d 173, 177 (8th Cir. 1987) (per curiam) (new evidence did not warrant new trial because "[a]t a second trial, if Michaeloff's testimony were thoroughly impeached, Kraemer probably still would be convicted."). But lack of materiality should not be confused with lack of new evidence, for it is possible that new evidence affecting a witness's credibility in a particular case could be so damaging to the prosecution that a new trial would be required. *See United States v. Wallach*, 935 F.2d 445, 458-59 (2d Cir. 1991) (new evidence that key witness committed perjury required new trial).

There are ample grounds to affirm the district court's ruling in this case based on lack of materiality and diligence, and I concur in the majority's reasoning on those points. I also agree that there was no violation of the Due Process Clause and that the court imposed a reasonable sentence.

Local AO 245B (Rev. 2/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of North Dakota

UNITED STATES OF AMERICA
v.
JACK ALBERT CHAPPELL

JUDGMENT IN A CRIMINAL CASE

Case Number: **1:16-cr-52-01**

USM Number: **16729-059**

Theodore T. Sandberg
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) **One (1) and Ten (10) of the Superseding Indictment.**
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC §§ 841(a)(1), 841(b)(1)(C), 846 and 18 USC § 2	Conspiracy to Distribute and Possess with Intent to Distribute a Controlled Substance	2016	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) **12 of the Superseding Indictment.**

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 6, 2019
Date of Imposition of Judgment

Signature of Judge

Daniel L. Hovland **U.S. Chief District Judge**
Name and Title of Judge

September 6, 2019
Date

DEFENDANT: **JACK ALBERT CHAPPELL**
CASE NUMBER: **1:16-cr-52-01**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
218USC §§ 1956(h) and 2	Conspiracy to Commit Money Laundering	2016	10

DEFENDANT: **JACK ALBERT CHAPPELL**
CASE NUMBER: **1:16-cr-52-01**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

360 MONTHS, with credit for time served, on Count 1, to run concurrent with Count 10, and 240 MONTHS, with credit for time served, on Count 10, to run concurrent with Count 1.

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the Defendant be placed at a medical facility in Rochester, MN, or in a correctional facility as close as possible to California.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 1 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JACK ALBERT CHAPPELL**
CASE NUMBER: **1:16-cr-52-01**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
5 YEARS on Counts 1 and 10 YEARS on Count 10, terms to run concurrent with one another.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 2091, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **JACK ALBERT CHAPPELL**
CASE NUMBER: **1:16-cr-52-01**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: **JACK ALBERT CHAPPELL**
CASE NUMBER: **1:16-cr-52-01**

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a chemical dependency treatment program as approved by the supervising probation officer.

2. You must totally abstain from the use of alcohol and illegal drugs or the possession of a controlled substance, as defined in 21 U.S.C. § 802 or state statute, unless prescribed by a licensed medical practitioner; and any use of inhalants or psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair your physical or mental functioning.

3. You must submit to drug/alcohol screening at the direction of the United States Probation Officer to verify compliance. Failure or refusal to submit to testing can result in mandatory revocation. Tampering with the collection process or specimen may be considered the same as a positive test result.

4. You must submit your person, residence, workplace, vehicle, computer (including password), and/or possessions to a search conducted by a United States Probation Officer based upon reasonable suspicion of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation, additional criminal charges, and arrest. You must notify any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: **JACK ALBERT CHAPPELL**
CASE NUMBER: **1:16-cr-52-01**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	**$ 200.00**	**$**	**$**	**$**

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	**$ 0.00**	**$ 0.00**

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **JACK ALBERT CHAPPELL**
CASE NUMBER: **1:16-cr-52-01**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ **200.00** due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 1193, Bismarck, North Dakota, 58502-1193.

While on supervised release, the Defendant shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America,	)	
	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT'S**
	)	**MOTION FOR NEW TRIAL**
	)	
vs.	)	
	)	Case No. 1:16-cr-052
Jack Albert Chappell,	)	
	)	
Defendant.	)	

Before the Court is Defendant Jack Chappell's "Motion for New Trial" filed on July 12, 2019. See Doc. No. 604. The Government filed a response in opposition on July 25, 2019. See Doc. No. 610. Chappell filed a supplemental brief on August 19, 2019. See Doc. No. 614. For the reasons explained below, the motion is denied.

I. BACKGROUND

Trial in this case commenced on February 26, 2019. The Government presented numerous witnesses including law enforcement and six cooperating individuals who had worked directly with Chappell in some capacity. One of the Government's witnesses was Leslee Ball, an unindicted co-conspirator. At the conclusion of trial, Chappell was convicted of conspiracy to distribute and possess with intent to distribute a controlled substance (methamphetamine) and conspiracy to commit money laundering. On July 12, 2019, Chappell filed a motion for new trial based upon newly discovered evidence. In his motion, Chappelle alleges the newly discovered evidence concerns Leslee Ball being under the influence of alcohol and/or a controlled substance when she testified at trial, calling into question her competency to testify. Chappelle further alleges the

Government failed to disclose that it asked Ms. Ball if she could pass a drug test prior to her testimony and she told the prosecutor she could not pass a drug test. Chappell contends this failure constitutes a *Brady* violation. Sentencing is scheduled for September 6, 2019.

II. LEGAL DISCUSSION

Chappell moves for a new trial under Rule 33 of the Federal Rules of Civil Procedure. The Eighth Circuit has described a district court's discretion in granting a new trial:

> Federal Rule of Criminal Procedure 33(a) provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "The district court has broad, but limited, discretion to grant or deny a motion for a new trial based on the sufficiency of the evidence, and 'it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.'" United States v. Aguilera, 625 F.3d 482, 486 (8th Cir. 2010) (quoting United States v. Campos, 306 F.3d 577, 579 (8th Cir. 2002)). But "[m]otions for new trial based on the sufficiency of the evidence are generally disfavored, . . . and '[u]nless the district court ultimately determines that a miscarriage of justice will occur, the jury's verdict must be allowed to stand.'" Id. at 487 (last alteration in original) (quoting Campos, 306 F.3d at 579).

United States v. Vega, 676 F.3d 708, 722 (8th Cir. 2012).

The Eighth Circuit has also explained, "A district court may grant a new trial under Rule 33 only if the evidence weighs so heavily against the verdict that a miscarriage of justice may have occurred." United States v. McClellon, 578 F.3d 846, 857 (8th Cir. 2009) (quoting United States v. Starr, 533 F.3d 985, 999 (8th Cir. 2008)). A trial court has broad discretion in deciding whether to grant a motion for a new trial. United States v. Walker, 393 F.3d 842, 848 (8th Cir. 2005) (citing United States v. Red Elk, 368 F.3d 1047, 1053 (8th Cir. 2004)). The Eighth Circuit has made it clear that motions for a new trial are generally disfavored and are to be granted only where a serious miscarriage of justice may have occurred. United States v. Rice, 449 F.3d 887, 893 (8th Cir. 2006).

There are five factors which must ordinarily be met to justify the grant of a new trial on the grounds of newly discovered evidence: "(1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved, and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal." United States v. McColgin, 535 F.2d 471, 476 (8th Cir. 1976) (quoting United States v. Pope, 415 F.2d 685, 691 (8th Cir. 1969)).

In this case, the newly discovered evidence arose from a phone call Ms. Ball made to defense counsel on June 5, 2019, during which she informed defense counsel she had consumed alcohol and methamphetamine the day before she testified at trial and was still under the influence when she testified. In addition, Ms. Ball also apparently claimed that she was asked by the Government before she testified if she could pass a drug test and she informed the Government she could not. Ms. Ball also made statements in recorded jailhouse phone calls to Chappell post-trial where she asserts she was under the influence of drugs and alcohol when she testified. Chappell complains the Government knew Ms. Ball was intoxicated before she testified and did not provide him that information which he claims would have assisted him in his cross-examination of Ms. Ball.

Although defense counsel attempted to obtain an affidavit from Ms. Ball, all attempts to contact her by phone and mail since the phone call to defense counsel on June 5, 2019, have failed. Thus, Ms. Ball's alleged statements remain unverified and an evidentiary hearing would be fruitless as her whereabouts are unknown. There is no affidavit for the Court to review and no new evidence for the Court to consider.

The record reveals that at the end of the first day of trial defense counsel, outside the presence of the jury, asked the Court to order Ms. Ball to be drug tested before she testified. The following colloquy occurred outside the presence of the jury.

> THE COURT: All right. Anything else we can take care of before we close the record for today?
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> MR. SANDBERG: Your Honor, on behalf of the defense, we are aware that the government will be calling Ms. Leslee Ball. It's our understanding that Ms. Ball, along with everybody, but Ms. Ball in particular, because she's an unindicted co-conspirator, has been for the most part free to roam about the country. I don't know if she's gone roaming or anything of that nature, but I know from my information that she is continuing to use pretty significant narcotics. That doesn't preclude someone from taking the stand, but I would ask if the Court would consider requiring Ms. Ball to be drug tested before she gets on the stand under oath. It's my understanding –
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> THE COURT: Is she on -- is she on paper from any jurisdiction?
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> MR. SANDBERG: Not that I'm aware of. I'm understanding she had a drug overdose about three or four days ago.
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> THE COURT: Well, I'm not certain if somebody is not on paper of some sort, that I can just order them to be drug tested before they take the stand. I mean, I can observe her and make my own determination as to whether she's competent to testify or not. I'm not inclined to order drug tests for people that are not on some form of supervision or -- state or federal, but –
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> MR. SANDBERG: I understand, Your Honor.
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> THE COURT: But you can certainly cross-examine her, and I'll assess her competence and state of mind and level of sobriety to the best that I can based on how she responds to questions.

See Doc. No. 606, p. 3-4. Thus, both parties and the Court were on notice of Ms. Ball's possible use of alcohol and drugs prior to her testimony.

Ms. Ball testified on the third day of trial. The record reveals that neither party questioned her regarding any recent use of drugs or alcohol. See Doc. No. 606, pp. 5-54. Ms. Ball detailed her

past use of drugs and alcohol on direct and cross-examination. The Court also questioned Ms. Ball but did not detect any impairment. See Doc. No. 606, p. 51-53. A careful review of her testimony reveals she gave thoughtful and complete answers to all questions, and there was no indication that she was under the influence of drugs or alcohol when she testified at trial.

Ms. Ball's apparent claim that she was under the influence when she testified at trial is unsubstantiated by the record and she has never attested to that fact. The jailhouse telephone calls between Ms. Ball and Chappell do offer support to the contention but are not conclusive. However, even if true, this information would only constitute impeachment evidence. See United States v. Hyson, 721 F.2d 856, 864 (1st Cir. 1983) (noting every person is competent to testify and competency goes to the issue of credibility); United States v. Roach, 590 F.2d 181, 185-86 (5th Cir. 1979) (noting that under Fed. R. Evid. 601 questions of capacity or competency go to the weight and credibility of the witness). Newly discovered evidence which serves only to impeach a witness does not warrant a new trial. See United States v. Baker, 479 F.3d 574, 577 (8th Cir. 2007); United States v. Dogskin, 265 F.3d 682, 685 (8th Cir. 2001).

More importantly, it is highly unlikely that Ms. Ball's alleged impairment would have resulted in an acquittal as five other cooperating individuals testified against Chappell and fully corroborated Ms. Ball's testimony. The testimony of the other five cooperating individual was overwhelming and compelling. The testimony of co-defendant David Hollingshead was more than sufficient, in and of itself, to support the guilty verdict as to Chappell. From the Court's perspective, even if Ms. Ball had never testified at trial, the evidence of guilt was overwhelming.

As for the alleged *Brady* violation, the Government has made it clear in its response that it learned of Ms. Ball's alleged drug usage and overdose from defense counsel prior to trial. It was

only after defense counsel asked the Court to order Ms. Ball to be tested for drugs that the Government informed Ms. Ball of the drug testing discussion. The defense was aware of this potential issue prior to Ms. Ball's testimony and brought the issue to the Court's attention. However, neither the prosecutor nor defense counsel questioned Ms. Ball at trial as to whether she had ever consumed alcohol or street drugs in the days before she testified at trial, or whether she was intoxicated or impaired on the day she appeared in court for the trial. Suffice it to say, the record before the Court contains no evidence of a *Brady* or *Giglio* violation.

III. CONCLUSION

Based upon a careful consideration of the evidence presented at trial, and in the exercise of its broad discretion, the Court finds Chappell is not entitled to a new trial. No miscarriage of justice has occurred and the jury verdict should stand. Accordingly, Chappell's motion for a new trial (Doc. No. 604) is **DENIED**.

IT IS SO ORDERED.

Dated this 29th day of August, 2019.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court