# APPENDIX

# APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 21-13693-AA

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

DONATUS O. MBANEFO

Defendant-Appellant.

---

Appeal from the United States District Court

For the Middle District of Georgia

---

ON PETITIONS FOR REHEARING AND PETITIONS

FOR REHEARING EN BANC

BEFORE: BRANCH, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

# APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 21-13693

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Versus

DONATUS O. MBANEFO,

Defendant-Appellant.

Appeal from the United States District Court

For the Middle District of Georgia

D.C. Docket No. 7:16-cr-00002-HL-TQL-6

Before Branch, Grant, and Brasher Circuit Judges.

PER CURIAM:

Almost three years after a jury convicted physician Donatus Mbanefo for abusing his ability to prescribe controlled substances, he filed a motion for new trial. The district court denied the motion, holding that his claims of error lacked merit and were not based on newly discovered evidence. After careful review, we affirm.

I.

Donatus Mbanefo was convicted by a jury of conspiracy to unlawfully dispense Schedule II, III, and IV controlled substances and unlawful dispensation of controlled substances. 21 U.S.C.§§ 846; 841(a)(1), (b)(1)(C), (b)(2). Mbanefo had worked as a physician at the Relief Institute of Columbus. But that pain management clinic as revealed at Mbanefo's trial, was merely a façade for a pill mill, handing out prescriptions without legitimate medical purpose. The Drug Enforcement Agency caught on to the clinic because pharmacies and former physicians reported the suspicious prescriptions and practices.

The DEA investigation revealed that patients would often travel in groups from all over the country to be seen at the clinic, receive large opioid prescriptions in

exchange for cash payments, and then travel to pharmacies in other states to fill the prescriptions. The clinic would often schedule large numbers of patients and stay open late into the records of patient visits, testified at trial that Mbanefo failed to properly check patients' prescription histories, failed to perform sufficient physical examination or testing and prescribed aberrant quantities of opioids. The Government also introduced at trial evidence extracted from over 75 boxes of patient files and the DEA seized when it closed the clinic. A DEA agent testified how a team of analysts uploaded the medical and prescription data from the patient files unto an Excel spreadsheet. In Excel the government used the "pivot table" tool to make summary charts displaying the types and quantities of prescriptions Mbanefo



wrote-most of which were for Schedule II drugs like oxycodone. Mbanefo through counsel objected to these summary charts arguing that they were not admissible because the patient files had been neither "admitted nor presented to the jury". The district court asked whether the government had shared the 75 boxes of patient files and the Excel spreadsheets with him, and he conceded that the government had, so the district court admitted the summary charts.

Based on this and other evidence, the jury found Mbanefo guilty, and the district court sentenced him to 96 months imprisonment. On direct appeal, Mbanefo argued that the evidence was insufficient to sustain his conviction, and that the district

court gave an improper jury instruction, and that the court's drug quantity finding at sentencing was clearly erroneous. United States v. Bacon 809 F.App'x 757, 759-61 (11th Cir. 2020) (Unpublished). This Court affirmed his conviction and sentence. Id. at 761.

Mbanefo launched a collateral attack a few months later, filing a 28 U.S.C. § 2255 motion where he raised several claims of ineffective assistance of counsel. The district court denied the motion, then this court granted a certificate of appealability as to two claims. We do not address here the the claims raised in that separate appeal of the § 2255 motion.

While his § 2255 motion was still pending before the district court, Mbanefo also filed a motion for new trial. The district court denied the new trial motion and Mbanefo now appeals1

II

"We review a district court's denial of a motion for new trial for abuse of discretion" *United States v. Campa,* 459 F.3d 1121, 1151 (11th Cir. 2006) (en banc).

III

Motions for new trial based on newly discovered evidence are highly disfavored in the Eleventh Circuit and should be granted only with great caution. Indeed the defendant bears the burden of justifying a new trial" Id. (quotation omitted). "Any motion for a new trial grounded on any reason other than newly discovered evidence

must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2).

---



1Mbanefo asks this Court for leave to file an amended reply brief because the original exceeded the word limit. The motion is GRANTED.

Mbanefo filed his new-trial motion nearly three years after trial and thus must base his motion on newly discovered evidence. Fed. R. Crim. P. 33(b)(1). To do so, he must establish that (1) the evidence was discovered after trial, (2) is material, and (3) is not merely cumulative or impeaching. *United Statesv. Caldwell*, 963 F.3d 1067, 1078-79 (11th Cir. 2020). He must also show that (4) his failure to discover the evidence was not due to lack of diligence and (5) the evidence is of such a nature that a new trial would probably produce a different result. Id.

Mbanefo makes three main arguments: a juror misconduct claim; a suppression claim under *Brady v. Maryland, 373 U.S. 83 (1963)* and *Giglio v. United States, 405 U.S. 150 (1972);* and a selective prosecution claim. Because the claims are not premised on newly discovered evidence and he forfeited the selective prosecution claim, none of them justify a new trial. According to Mbanefo, five months after the

trial, he learned that his trial counsel knew a juror "personally"- several years earlier, counsel had brought a successful 42 U.S.C. § 1983 case against the juror's "brother who was a Georgia State Trooper". Mbanefo argued that "with his background knowledge" his counsel was wrong to allow her "to be empaneled" on the jury and that the juror was biased against him because she hid the fact that "she was related to a law enforcement officer" and "was familiar with the trial counsel". But as Mbanefo admits, these facts were not discovered after trial. In fact, he protests that his attorney recognized her at trial and chose not to strike her from the jury. Mbanefo claims only that his attorney did not share the information with him until after the trial. And that lack of communication does not amount to newly discovered evidence. A "defendant is 'deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts notice of which can be charged upon the attorney'" *New York v. Hill*, 528 U.S. 110, 115 (2000) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962). Because Mbanefo through his counsel was fully aware of any juror misconduct before trial, it is not newly discovered evidence.2

And the claim would have failed on the merits regardless. A dishonest juror response to "a material question on *voir dire*" warrants a new trial only when the defendant also presents proof of "actual bias" either "by express admission or by proofs of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001).

2 Mbanefo also raises an "actual innocence" claim restyled before this Court as an "insufficient evidence" claim, but it fails for the same reason-it is not based on newly discovered evidence.

Mbanefo has not even shown that the juror recognized his trial counsel's connection to the prior § 1983 action, let alone any actual bias. And the fact that her brother worked in law enforcement is not so related to Mbanefo's unlawful prescribing that we must presume bias exists. The district court thus did not abuse its discretion when it denied the motion for new trial based on juror misconduct. Mbanefo also argues that the government unlawfully suppressed *Brady* evidence because it did not share the "Pivot Table" that summarized the clinic physicians' prescribing data. He claims that the table would have proved that Mbanefo was not "one of the top 2 prescribers at the time [he] was charged in the original indictment" and that he was not "one of the top 3 prescribers at the time the superseding indictment was returned." To make out a *Brady* claim, a defendant must show that (1) the government withheld evidence favorable to the defendant; (2) the defendant did not possess and could not obtain that evidence with any reasonable diligence; and (3) had the government disclosed the evidence, there is a reasonable probability that the outcome would have been different. *United States v. Vallejo,* 297 F.3d 1154, 1164 (11thCir. 2002).

Mbanefo relatedly claims that the failure to produce the table resulted in *Giglio* error. He says that it would have revealed that the prosecutor made false statements that Mbanefo was one of the clinic's "top three prescribers". To establish *Giglio* error, a defendant must (1) "identify evidence that government withheld" that would have revealed that the statement were false, (2) establish that the government "knowingly used perjured testimony" or failed to correct what it "subsequently learned was false testimony" and (3) show that "such use was material" to the judgment. *United States v Stein*, 846 F.3d 1135, 1147(11th Cir. 2017) (quotation omitted)

Both claims fail for the same reason: the government did not withhold the evidence, despite what Mbanefo says to the contrary. As the government witness explained, a "pivot table" is "a tool" built into Excel "that helps you summarize or visualize" data in a spreadsheet. And no one disputes that the government provided both the 75 boxes of patient data to Mbanefo. Because that spreadsheet contained all the data Mbanefo wanted from the "Pivot Table"-including the prescribing records for the other physicians at the clinic-his *Brady* claim and his *Giglio* claims fail. Mbanefo cannot complain because, with reasonable diligence,



could have analyzed the spreadsheet data himself. *See United States v. Jordan,* 316 F.3d 1215, 1253(11th Cir. 2003).

Mbanefo argues for a new trial on selective prosecution grounds, claiming that he "was prosecuted because of his age and race. But "a claim of selective prosecution is not the proper subject of a Rule 33(b)(1) motion for a new trial" because it "has no bearing on the integrity of the trial or the verdict". *United States v. Scrushy*, 721 F.3d 1288, 1305(11th Cir. 2013).

Besides that Mbanefo forfeited that claim by failing to raise it before trial. The defense of selective prosecution "must be raised by pretrial motion if the basis of the motion is then reasonably available." Fed. R. Crim. P. 12(b)(3)(A)(iv). If the defendant fails to do so, "the motion is untimely" and may not be considered unless he can show "good cause" for the delay. Fed. R. Crim. P. 12(c)(3). Mbanefo argued that the government withheld necessary information about whether other doctors worked at the clinic for a similar period or produced similar quantities of unlawful prescriptions. But as we explained above as to his *Brady* and *Giglio* claims, Mbanefo had access to these facts before trial. He thus cannot show good cause for failing to raise a timely selective prosecution defense. *See Scrushy*, 721 F.3d at 1306

*3*

* * *

Because Mbanefo seeks a new trial without producing newly discovered evidence to support his request, the court properly exercised its discretion to deny the motion. The district court's order is **AFFIRMED**

---

*3* Along with the motion for new trial, Mbanefo also filed a motion for both discovery and dismissal of the indictment, which focused largely on his selective prosecution claim. Because the selective prosecution claim was forfeited and the other underlying claims lack merit, we also affirm the denial of that motion.

# APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 21-13693-AA

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DONATUS O. MBANEFO,

Defendant - Appellant.

---

Appeal from the United States District Court
for the Middle District of Georgia

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BRANCH, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE MIDDLE DISTRICT OF GEORGIA**

**VALDOSTA DIVISION**

**UNITED STATES OF AMERICA**

V. Case No. 7:16-CR-2(HL)

**DONATUS O. MBANEFO**

Defendant.

**ORDER**

Before the Court is Defendant Donatus O. Mbanefo's Motion for New Trial (Doc. 584). For the following reasons, Defendant's motion is denied.

## I. PROCEDURAL BACKGROUND

A grand jury in this district returned an indictment against Defendant Dr. Donatus O. Mbanefo and five co-defendants on February 10, 2016.

(Doc.1). Defendant was charged in Count One with conspiracy to distribute or dispense controlled substances without a legitimate medical purpose and not in the normal course of medical practice in violation of 21 U.S.C § 846 i/c/w, 21 U.S.C. § § 841(a)(1), (b)(1)(c), (b)(1)(E), and (b)(2). Counts 2 and 3 charged Defendant with two substantive counts of dispensing controlled substances without a legitimate medical purpose in violation of 18 U.S.C. § 2 and 21U.S.C. § § 841 (a)(1), (b)(1)(C), and (b)(2). Count Six charged Defendant with conspiracy to launder money in violation of 18 U.S.C. § 1956 (a)(1)(A)(i). A superseding indictment was returned on June 15, 2016, adding two additional co-defendants but not otherwise altering the charges against Defendant. (Doc.88). The superseding indictment alleged that the eight defendants conspired to operate the Wellness center of Valdosta and the Relief Institute of Columbus as pill mills enriching themselves by unlawfully dispensing controlled substances. (Id).

Defendant entered a plea of not guilty on February 25, 2016 (Doc. 46). The Court thereafter declared the case complex. Over the next two years, the case continued through discovery and multiple motion headings. All but Defendant and co-Defendant Dr. William Bacon pleaded guilty before trial.

The two doctors proceeded to trial on May 29, 2018. On June 13, 2018 following an eleven-day trial, the jury convicted Defendant of conspiracy to distribute or dispense controlled substances without a legitimate medical purpose and not in the usual course of medicine and two substantive counts of unlawful dispensation of controlled substances. (Doc.325). The jury acquitted Defendant on the charge of conspiring to launder money. (Id.). On December 5, 2018, the Court sentenced Defendant to a total term of imprisonment of 96 months to be followed by three years supervised release. (Doc.464).

Defendant appealed. (Doc.480). On appeal, Defendant argued that the evidence was insufficient to support the conviction; that the court constructively amended his substantive counts; and that the Court erred in calculating the drug quantity attributable to him. The Eleventh Circuit Court of Appeals affirmed Defendant's conviction on April 13, 2020 (Doc. 529).

Defendant filed a timely Motion to Vacate, Set Aside or Correct sentence pursuant to 28 U.S.C. § 2255 on June 4, 2020. (Doc. 543). Defendant's motion raised ten grounds for relief based on trial and appellate counsel's alleged ineffective assistance of counsel:

1.Trial counsel failed to timely release and review discovery.

2.Trial counsel failed to notify the trial court of a tainted juror.

3Trial counsel failed to retain a medical expert.

4.Trial counsel failed to have sufficient contact and to prepare Defendant to testify at trial.

5.Trial counsel failed to file pretrial motion to dismiss the indictment on grounds of grand jury abuse.

6.Trial counsel failed to file pretrial motions to dismiss the indictment based on selective prosecution.

7.Trial counsel failed to file pretrial motions to dismiss the indictment based on a charge of single versus multiple conspiracies.

8.Trial counsel failed to file pretrial severance motions.

9.Trial counsel withheld exculpatory evidence and testimony.

10.Appellate counsel failed to raise certain claims on appeal, failed to file a reply to the Government's brief, failed to discuss oral argument with Defendant and failed to attend oral argument.

Id. Finding no merit to any of Defendant's asserted grounds for relief, the Magistrate Judge recommended denying Defendant's motion on April 12, 2021. (Doc.589). The Court adopted the Recommendation over Defendant's objections on October 7, 2021. (Doc.601).

While Defendant's § 2255 motion was pending, he filed the present motion for new trial. (Doc.584). Additionally, Defendant filed a Motion to Obtain Court Records (Doc. 587, 594), Motion to Proceed in Forma Pauperis. (Doc. 588), and Motion for Discovery or for the Dismissal of the Indictment. (Doc. 593).

## III DISSCUSSION

Defendant moves the Court to grant his motion for new trial based on newly discovered evidence. Defendant alleges that the Government engaged in selective prosecution, intentionally withheld evidence from the jury and suborned false testimony from witnesses. Defendant further argues that a motion for new trial is warranted because the jury pool was tainted by the impaneling of an impartial juror. Defendant claims fail because he has not shown that the evidence upon which he relies was not available at the time of trial, nor has he demonstrated that the evidence is material and that it would have influenced the verdict.

Under Federal Rule of Criminal Procedure 33, a court may grant a motion for new trial based on either newly discovered evidence or on any other grounds "if the interest of justice so requires". Fed. R. Crim. P. 33(a). The decision to grant or deny a motion for new trial rests in the sound discretion of the trial court. United States v. Martinez, 763

F.2d 1297, 1312 (11th Cir. 1985). However, "[c]ourts are to grant them sparingly and with caution, doing so only in those really exceptional cases". Martinez, 763 F.2d at 1313. "The Court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable". Id at 1312-1313 (citations omitted).

A motion for new trial premised on newly discovered evidence must be filed within three years of the verdict. Fed. R. Crim. P. 33(b).[1] "Motions for a new trial based on newly discovered evidence are highly disfavored in the Eleventh Circuit and should be granted only with great caution" United States v. Campa, 459 F.3d 1121, 1151 (11th Cir. 2006) (quoting United States v. Devila, 216 F.3d 1009, 1015-16 (11th Cir. 2000), vacated in part on other grounds, 242 F.3d 995, 996 (11th Cir. 2001)). In other to justify a new trial, newly discovered evidence 'need not relate only on the question of innocence but may be probative of another issue of law". United States v. Beasley, 582 F.2d 337, 339 (5th Cir. 1978)[2]. For instance, "a Brady violation as well as questions regarding the fairness or impartiality of a jury may be grounds for a new trial" Campa, 459 F.3d at 1151. The defendant "bears the burden of justifying a new trial." Id. (quotation omitted).

"Newly discovered evidence" is "evidence that could not have been discovered with due diligence at the time of trial" United States v Johnson, 586 F.2d 147, 148 (5th Cir. 1979) (quotation omitted). To

succeed on a motion for new trial based on newly discovered evidence, a defendant must establish that: (1) the evidence was discovered after trial; (2) the defendant exercised due care to discover the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is of such a nature that a new trial likely would produce a different result. Fed. R. Crim. P. 33(a); United States v. Caldwell, 963 F.3d 1067, 1078-79 (11th Cir. 2020). "[F]ailure to satisfy any one of these elements is fatal to a motion for new trial." United States v. Lee, 68 F.3d 1267, 1274 (11th Cir 1995).

1 A motion for new trial based on any other ground must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b)(2). To the extent that Defendant's motion for new trial may be construed as raising any ground for relief other than newly discovered evidence, the motion is **DENIED** as untimely.

2 Fifth Circuit decisions issued prior to October 1, 1981, are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

### A. Brady Violation

Defendant argues that the Government violated Brady v. Maryland, 373 U.S. 83 (1963) by intentionally suppressing evidence of a Dr. Moseley, an alleged unindicted co-conspirator who worked at the same clinic as Defendant, for a similar duration and who exhibited similar prescribing habits. (Doc. 584 p. 5). According to Defendant, the

Government was aware of this individual yet purposely excluded him from prosecution and withheld testimony concerning his involvement in the subject clinics. (Id) Defendant contends that he is entitled to a new trial because "there was a reasonable probability that had the duration of Dr. Moseley's employment been disclosed to the jury, the result of the proceeding would have been different". (Id). Defendant suggests that the withheld evidence "would have created reasonable doubts that did not otherwise exist to engage the jury to convict Defendant". (Id. at p. 6).

In Brady, the Supreme Court held that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution". 373 U.S. at 87. The duty to disclose extends to impeachment, as well as exculpatory evidence and applies even to evidence not requested by the accused. Stickler v. Greene, 527 U.S. 263, 280 (1999). To establish entitlement to a new trial based on a Brady claim of newly discovered evidence, the defendant must show that: (1) the government possessed favorable evidence to the defendant; (2) the defendant did not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a

reasonable probability that the outcome would have been different." United States v. Vallejo, 297 F.3d 1154, 1165(11th Cir. 2002). A "reasonable probability is "a probability sufficient to undermine confidence in the outcome". United States v. Bagley, 473 U.S. 667, 682 (1985).

Defendant's motion for new trial fails because he has not shown that the Government did not disclose evidence of Dr. Moseley's involvement at the clinics prior to trial. Rather, Defendant argues only that the Government did not introduce evidence concerning Dr. Moseley at trial. Furthermore, Defendant has not established that the jury's verdict would have been different had the Government elected to present evidence of an additional conspirator.

### B. Giglio Violation

Defendant next argues that the Government violated Giglio v. United States, 405 U.S. 150 (1972) through the introduction of false testimony. Defendant alleges that the Government "made false and material statements unsupported by the records to mislead the grand jury to indict the Defendant". (Doc. 584, p. 9). Defendant states that the Government additionally made false and misleading statements "to intentionally mislead the Court and the petit jury to convict the Defendant". (Id. at p. 10).

Defendant specifically points to portions of the Government's closing arguments during which the Government refers to Defendant as one of the top three prescribers at the clinics. Defendant contends these statements were misleading because the Government failed to acknowledge the conduct of Dr. Moseley in comparison to Defendant and the other indicted physicians. Defendant further emphasizes an alleged inconsistency between remarks made by the Government concerning whether Dr. Poynter reported the clinic to federal authorities after working at one of the clinics for one day and Dr. Poynter's grand jury testimony that he did not contact the authorities.

"Giglio error is a species of Brady error that occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecutor knew, or should have known, of the perjury." Ventura v. Att'y Gen., Fla., 419 F.3d 1269, 1276-77 (11th Cir. 2006) (quotation omitted). To succeed on a Giglio challenge, the defendant must demonstrate that the Government "knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." United States v. Dickerson, 248 F.3d 1036, 1041 (11th Cir. 2001).

Defendant's motion for new trial again fails because he has not shown that the evidence he highlights was not disclosed prior to trial. Nor has

Defendant demonstrated that the Government knowingly suborned perjured testimony. Accordingly, Defendant has not met his burden of justifying grounds for a new trial based on an alleged Giglio violation.

### C. Impartial Juror

Defendant alleges that six months after the jury announced his guilt, trial counsel revealed to Defendant his familiarity with one of the jurors. At some point in 2012, trial counsel filed a civil rights lawsuit against a Georgia state trooper. The case later settled out of court, and the parties voluntarily dismissed the suit. See Merenda v. Tabor, No. 5:10-CV-493 (MTT)(M.D. Ga. April 11, 2013). The sister of the state trooper was empaneled as a juror in Defendant's criminal trial. Defendant suggests that this juror "intentionally denied that she was related to a law enforcement officer[,] confirming her dishonesty". (Doc 584, p 12-13). As a result of her involvement with the jury, Defendant contends that he "was convicted by a biased jury" and therefore, that he is entitled to a new trial. (Id. at p. 12).

"[A] motion for new trial based on juror misconduct is a form of new trial motion for newly discovered evidence." United States v. Bolinger, 837 F.2d 436, 439 (11th Cir. 1988) (citing United States v. Jones, 597 F.2d 485, 488 (5th Cir. 1979)). Where, as here, a defendant argues that a juror failed to answer honestly a material question on voir dire, and

then further show that a correct response would have provided a valid basis for a challenge for cause." McDonough Power Equip. Inc. v. Greenwood, 464 U.S. 548, 556 (1984). The first prong of the McDonough test requires a determination of whether the juror's answers were false. "[United States v. Perkins, 748 F.2d 1519, 1531 (11th Cir 1984). (Internal quotation marks omitted).

Defendant has produced no evidence that the juror dishonestly answered any question during voir dire. But even assuming the juror did withhold information concerning her relationship generally to a law enforcement officer or more specifically to trial counsel, Defendant has put forth no evidence of actual bias. Defendant claims that his attorney discovered a relationship between the juror and one of his prior civic cases; however, Defendant has not established that the juror was aware of the connection such that bias could be presumed. Accordingly, Defendant is not entitled to a new trial on this basis.

### D. Selective Prosecution

Defendant alleges that he is entitled to a new trial because the Government engaged in selective prosecution. Defendant alleges that the Government violated his right to equal protection under the Fourteenth Amendment when the Government made the decision to

prosecute him and two other doctors of color but not other similarly situated white physicians employed by the same clinics. Defendant's motion fails for two reasons. First, Defendant failed to raise the defense of selective prosecution before trial, thereby waiving the defense. Second, "a claim of selective prosecution is not the proper subject of a Rule 33(b)(1) motion for new trial" as selective prosecution has "no bearing on the determination of factual guilt.'" United States v. Scrushy, 721 F.3d 1288, 1305 (11th Cir. 2013) (quoting United States v. Jones, 52 F.3d 924, 927 (11th Cir. 1995)).

"[S]elective prosecution is a defect in the institution of the prosecution that has no bearing on the determination of factual guilt." Jones 52 F.3d at 927 (citing United States v. Jennings, 991 F.2d 725, 730 (11th Cir. 1993)). "Federal Rule of Criminal Procedure 12(b) requires that this defense be raised by pretrial motion[.]" Id at 927 n.5. "If the defendant fails to raise a selective prosecution defense prior to trial, the defendant waives the defense[.]" Id. (citing Fed. R. Crim. P. 12(f)). "However, the court may grant relief from [the] waiver if the defendant shows cause for [the] delay in raising the defense." Id.

Defendant concedes that he did not assert a claim of selective prosecution prior to trial. (Doc. 584 p. 14). He claims that waiver of the claim should be excused for good cause because (1) "[t]he elements of this claim were not timely known to the Defendant after due

diligence"; (2) "[t]he prosecutor repeatedly made false statements that deflected the need to research this claim"; and (3) "Defendant erroneously believed after his indictment and arrest [] that he and trial codefendant were the most culpable offenders in the 2 clinics." (Id.).

Defendant's argument fails because he has not established that evidence of selective prosecution was not available before trial. As discussed in relation to Defendant's claims under Brady and Giglio, Defendant has not shown that the Government withheld evidence from Defendant that could have been beneficial to crafting a defense. Defendant's argument instead reveals only that the Government was strategic in how it presented its evidence to the jury. Defendant's excuse for the delay in raising a defense of selective prosecution is therefore unavailing.

Even if Defendant could establish good cause for failing to raise a timely selective prosecution defense, Defendant's selective prosecution claim fails on the merits. To prevail on a claim of selective prosecution, the defendant bears a "demanding burden" of demonstrating by "clear" evidence "that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." United States v. Jordan, 635 F.3d F. 3d 1181, 1188 (11th Cir. 2011)3. To satisfy the discriminatory effect element of a selective prosecution claim, the defendant must demonstrate that other similarly situated individuals

of a different race were engaged in substantially the same conduct but were not prosecuted for those actions. United States v. Smith, 231 F. 3d 800, 808(11th Cir. 2000). The Eleventh Circuit defines similarly situated as

> One who engaged in the same type of conduct which means that the comparator committed the same basic crime in substantially the same manner as the defendant-so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan-and against whom the evidence was strong or stronger than that against the defendant. Id at 810

To establish a discriminatory purpose, a defendant must show the decision maker "selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of' its adverse effects upon an identifiable group." Jordan, 635 F.3d at 1188 (quoting Wayte v. United States, 470 U.S. 598, 610 (1985))

Defendant arguably has shown that other similarly situated physicians of another race were not prosecuted. However, Defendant has not demonstrated that the Government was motivated by a discriminatory purpose. Ultimately, though, Defendant's motion for new trial based on selective prosecution fails because Defendant cannot prove that "a new trial would probably produce a different

3 Defendant filed a motion for discovery seeking evidence in support of his selective prosecution claim. (Doc. 593). "[I]n order to obtain discovery in support of such a claim, a defendant must provide 'some evidence tending to show the existence of the essential elements of the defense". Jordan, 635 F.3d at 1188 (internal quotation marks and citation omitted). The standard for obtaining discovery for a selective prosecution claim is especially rigorous. United States v. Armstrong, 517 U.S. 456, 468 (1996) ("The justification for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim",). Moreover, to establish that he is entitled to discovery in support of his motion for new trial, Defendant must also demonstrate that the evidence he seeks was discovered only after trial and that he exercised due diligence to discover the evidence. See United States v. Jernigan, 341 F.3d 1273, 1287 (11th Cir. 2003). Because the Court concludes that the Defendant can meet neither of these burdens, the Court finds that Defendant is not entitled to discovery and **DENIES** Defendant's motion.

result" United States v. Jernigan, 341 F.3d 1273, 1287 (11th Cir. 2003). "Even assuming improper motivation on the part of the Government in its decision to bring charges, that taint does not extend, and in fact is presumed not to extend, to the jury's verdict" as the jury is presumed to have considered only the evidence submitted and the law as delivered by the court. United States v. Scrushy, No. 2:05-cv-119-MEF, 2012 WL 204159, at *5 (M.D. Ala. Jan. 24, 2012), aff'd by Scrushy, 721 F.3d at 1305 ("Whether the decision to prosecute [the defendant] was motivated by improper reasons has no bearing on the integrity of the trial or the verdict and therefore is not the proper subject of a Rule

33(b)(1) motion."). The Court therefore denies Defendant's motion for new trial based on selective prosecution.

### E. Actual Innocence

Defendant's final argument in support of his motion for new trial is that he is actually innocent. Defendant claims that had certain excluded evidence been presented at trial "no reasonable jury would have found Defendant guilty of the conspiracy charge beyond all reasonable doubts." (Docs. 584 p. 18). He points to emails and telephone calls between himself and the owners of the clinic prior to his engagement with the clinic and alleges these exhibits evidence that the owners were deceptive and that "there could not have been a conspiratorial meeting of the minds." (Id.).

Defendant admits this evidence is not newly discovered. A motion for new trial based on grounds other than newly discovered evidence must be filed within seven days of the verdict. Fed R. Crim. P. 33(b)(2). Defendant's motion for new trial premised on his actual innocence therefore is not timely and shall be denied.

## IV CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant Donatus O. Mbanefo's Motion a New Trial. (Doc. 584). The Court **DENIES as moot** Defendant's motion to Obtain Court Records (Doc. 587, 594) and

corresponding Motion to Proceed In Forma Pauperis (Doc. 588). Having disposed of all Defendant's pending motions, the Court **finds as MOOT** Defendant's Motion Requesting for a Status Update. (Doc. 597).

**SO ORDERED** this 14th day of October, 2021,

**s/ Hugh Lawson**

**HUGH LAWSON, SENIOR JUDGE**

aks