NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1078

UNITED STATES OF AMERICA

v.

EDWIN PAWLOWSKI,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 5:17-cr-00390-001)
District Judge: Honorable Juan R. Sánchez

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 14, 2024
Before: JORDAN, PHIPPS, and NYGAARD, Circuit Judges

(Opinion filed: June 26, 2024)

OPINION*

PER CURIAM

Appellant Edwin Pawlowski, proceeding pro se, appeals from the District Court's denial of his motion for a new trial. For the following reasons, we will affirm.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Pawlowski, the former mayor of the City of Allentown, was convicted of 38 corruption-related offenses in 2018. He was sentenced to 180 months' imprisonment. We affirmed that sentence on direct appeal. See United States v. Pawlowski, 27 F.4th 897 (3d Cir. 2022).

In 2020, Pawlowski filed a motion for an evidentiary hearing, arguing that an investigating law enforcement agent's comments on a 2019 podcast suggested that the Government withheld exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).[1] The District Court construed it as a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33 and denied it. Pawlowski filed a timely notice of appeal.

We have jurisdiction under 28 U.S.C. § 1291. Where, as here, a motion for a new trial is based on questions of law as well as fact, we conduct a de novo review of the District Court's legal conclusions and a "clearly erroneous" review of any fact findings.[2]

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[1] Pawlowski argued that the podcast revealed that the Government failed to disclose: (1) evidence showing that the FBI used a confidential source or undercover agent to make contact with a public official in an attempt to connect with Pawlowski's associates; (2) evidence that an undercover agent acted as an investor to "entrap" Pawlowski in a "pay-to-play" scheme; (3) data from a cell phone belonging to Pawlowski's campaign manager; (4) data from various devices belonging to an employee of Pawlowski's campaign manager; and (5) evidence that Pawlowski's campaign funds were seized to prevent him from using the money to hire counsel. See Dkt. No. 289 at 4-9. The District Court held the motion in abeyance pending the outcome of Pawlowski's direct appeal, then ordered the Government to produce a variety of documents and documentation of the evidence's production during discovery. The Government complied.

[2] Our review is limited to those arguments put forth in Pawlowski's opening brief, and we deem forfeited any other potential challenges to the denial order. See M.S. by & through

United States v. Pelullo, 399 F.3d 197, 202 (3d Cir. 2005). Where a Rule 33 motion is based on newly discovered evidence, the movant shoulders a "heavy burden," see United States v. Brown, 595 F.3d 498, 511 (3d Cir. 2010), of proving five elements: the evidence must be (1) newly and (2) diligently discovered; (3) not merely cumulative or impeaching; (4) material; and (5) capable of "probably" producing an acquittal on a new trial,[3] see United States v. Schneider, 801 F.3d 186, 201-02 (3d Cir. 2015). "If just one of the requirements is not satisfied, a defendant's Rule 33 motion must fail." United States v. Kelly, 539 F.3d 172, 182 (3d Cir. 2008)

Despite Pawlowski's general assertions otherwise, most of the evidence discussed on the podcast was produced during discovery, so it was not "newly discovered" as

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Hall v. Susquehanna Twp. Sch. Dist., 969 F.3d 120, 124 n.2 (3d Cir. 2020) (holding that the appellant forfeited claims by failing to raise them in the opening brief). Among other issues, Pawlowski has not challenged the District Court's conclusion that it had already resolved his claims regarding two categories of allegedly withheld evidence, and therefore we need not address that conclusion or remand for further proceedings as to it. Pawlowski asserts on appeal that the Government failed to prove all the elements required to support his fraud and bribery convictions, and that his wire and mail fraud conviction should be reversed in light of recent Supreme Court decisions, but he failed to raise those arguments to the District Court, and we will not address them for the first time on appeal. See United States v. Dowdell, 70 F.4th 134, 146 (3d Cir. 2023).

[3] The Brady standard overlaps with the Rule 33 standard. See Pelullo, 399 F.3d at 209 (explaining that, to establish a due process violation under Brady, a defendant must show that "(1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment") (cleaned up). Therefore, the Government's failure to disclose evidence violates due process, and thus requires a new trial, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Scarfo, 41 F.4th 136, 228 (3d Cir. 2022) (cleaned up).

required by Rule 33. See United States v. Cimera, 459 F.3d 452, 461 (3d Cir. 2006) (explaining that "the evidence must be in fact, newly discovered, i.e., discovered since the trial"). Before trial, the Government provided the content of conversations between a confidential source or undercover agent and a public official,[4] information about its use of an undercover agent posing as a potential developer to gain access to Pawlowski's associates,[5] and data from Pawlowski's campaign manager's phone and devices belonging to an employee of the campaign manager. Further, Pawlowski has not established that any of this evidence was material. See generally Lesko v. Sec'y Pa. Dep't of Corr., 34 F.4th 211, 233 (3d Cir. 2022) (noting that, under Brady, "pure speculation" is "not enough to show materiality"). The District Court thus properly concluded that Pawlowski failed to meet his burden under Rule 33.

Pawlowski also argues that his rights under Brady were violated because the Government failed to disclose that it seized his assets for the purpose of restricting his ability to acquire counsel of his choice.[6] To the extent Pawlowski can raise this claim

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[4] The Government produced only summaries, rather than recordings, of three of those conversations. It conceded that it produced neither a recording nor summary of one conversation, which the District Court reviewed in camera. The District Court concluded that the content of those four recordings was "entirely inculpatory," Dkt. No. 344 at 4, so, even if they were withheld, they were not subject to Brady disclosure, see United States v. Boone, 279 F.3d 163, 189-90 (3d Cir. 2002). Pawlowski does not challenge that conclusion on appeal.

[5] Pawlowski's counsel relied on recordings resulting from this investigatory tactic during its cross-examination of the campaign manager's employee.

[6] Pawlowski was represented by privately retained counsel throughout his criminal proceedings and on direct appeal.

through a Rule 33 motion, cf. United States v. DeRewal, 10 F.3d 100, 104-05 (3d Cir. 1993) (explaining § 2255 motion was proper vehicle to bring Sixth Amendment claim, not Rule 33 motion), it fails under the relevant standard because Pawlowski has not shown that the reason for seizing his assets is material. See United States v. Walker, 657 F.3d 160, 188 (3d Cir. 2011) ("[T]he touchstone of materiality is a reasonable probability of a different result." (internal quotations and citation omitted)). The District Court also correctly concluded that it was permissible for the Government to seize tainted assets, even if they were intended for the payment of an attorney. See United States v. Monsanto, 491 U.S. 600, 616 (1989) (explaining that "the Government may—without offending the Fifth or Sixth Amendment—obtain forfeiture of property that a defendant might have wished to use to pay his attorney").

We discern no abuse of discretion in the District Court's decision not to hold an evidentiary hearing, especially after the Government produced documentation of its prior discovery disclosures. See United States v. Noel, 905 F.3d 258, 275 n.10 (3d Cir. 2018) (explaining that a district court may forgo a hearing on a Rule 33 motion "where the motion is capable of resolution on the existing record").

Accordingly, we will affirm the judgment of the District Court.[7]

[7] Pawlowski's motions to file briefs exceeding the page limits are granted.

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
UNITED STATES OF AMERICA
v.
EDWIN PAWLOWSKI

CRIMINAL ACTION
No. 17-390-1
MEMORANDUM
Juan R. Sánchez, C.J. January 5, 2023
Petitioner Edwin Pawlowski, currently serving a 180-month term of imprisonment for a slew of corruption-related offenses, moves for a new trial pursuant to Federal Rule of Criminal Procedure 33 on the basis of newly discovered evidence. He alleges the Government withheld exculpatory evidence at trial and requests an evidentiary hearing to discern the extent of the violations. Because the evidence Pawlowski claims is newly discovered was in fact produced during discovery, is not material, or does not suggest the possibility of acquittal, Pawlowski's motion will be denied.
BACKGROUND
On March 1, 2018, Pawlowski, the former mayor of the City of Allentown, Pennsylvania, was convicted of 38 counts of corruption-related offenses arising out of his orchestration of a wideranging pay-to-play scheme while in public office. The Court later sentenced him to 180 months of incarceration.
After his conviction, Pawlowski filed a motion to "Compel Post Conviction Discovery/Brady Material." See Def.'s Mot. Compel 1, ECF No. 237. This motion alleged the Government failed to turn over the following evidence: (1) reports and schedules from Sam Ruchlewicz; (2) a tablet from Alison Fleck; (3) data from Fran Dougherty; (4) emails from Mike Fleck; (5) second phones and email accounts from Ruchlewicz and Fleck; and (6) texts deleted by

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Ruchlewicz. See id. at 4-5. The Court denied this motion, as Pawlowski failed to contest the Government's assertion that the requested content was either produced during discovery or never in the Government's possession. Order, Dec. 10, 2018, ECF No. 258.
Sixteen months later, Pawlowski made a similar filing entitled "Motion for Evidentiary Hearing Contingent Upon Newly Discovered Exculpatory Brady Type Material." Def.'s Mot. Hearing 1, ECF No. 289. In this motion, Pawlowski asserts the existence of the following exculpatory evidence not turned over during discovery: (1) various iPods, computers, and phones from Ruchlewicz; (2) a second cell phone from Fleck; (3) tape recordings between a confidential informant and an unknown public official; (4) the Government's intent to deprive Pawlowski of money to pay for an attorney; and (5) the Government's entrapment techniques and strategies. See id. at 4-8. The existence of this evidence was allegedly discovered through a podcast interview given by Special Agent Scott Curtis on May 2, 2019, focusing on his experience investigating the Pawlowski case. Id. at 3. Pawlowski had filed an appeal of his sentence, so this Court entered an Order holding the motion in abeyance pending the outcome of that appeal. Order of Jan. 29, 2021, ECF No. 310. As the Third Circuit Court of Appeals has affirmed Pawlowski's sentence, the motion is now ripe for adjudication.
STANDARD OF REVIEW
A Court may grant a new trial under Rule 33 "if the interest of justice so requires." Fed. R. Crim. P. 33. The decision to grant such a motion lies "within the district court's sound discretion." United States v. Ortiz, 182 F. Supp. 2d 443, 446 (E.D. Pa. 2000) (internal quotation marks and

citation omitted). In the Third Circuit, Rule 33 motions are disfavored and "should be granted sparingly and only in exceptional cases." Gov't of V.I. v. Derricks, 810 F.2d 50, 55 (3d Cir 1987).

To show that a new trial is necessary on the ground of newly discovered evidence, a plaintiff must show:

(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 [defendant]; (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 nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Kelly, 539 F.3d 172, 181-82 (3d Cir. 2008) (internal citation omitted). The movant has a "heavy burden of proving each of these requirements." United States v. Cimera, 459 F.3d 452, 458 (3d Cir. 2006).

A court need not hold an evidentiary hearing in every case where a defendant seeks a new trial on the basis of newly discovered evidence. United States v. Herman, 614 F.2d 369, 372 (3d Cir. 1980). Instead, a Rule 33 motion may be decided "either on affidavits or after an evidentiary hearing." Kelly, 539 F.3d at 188 (emphasis added). The decision to not hold a hearing is especially sound when a record on the issue was developed at trial, and when the judge who rules on the motion also presided at trial. Herman, 614 F.2d at 372. A hearing is only required in "exceptional circumstances." United States v. Bergrin, Civ. No. 20-2828, 2022 WL 1024624, at *7 (3d Cir. Apr. 6, 2022) (quoting United States v. Glinn, 965 F.3d 940, 942 (8th Cir. 2020)).

DISCUSSION

The motion now before the Court asserts the existence of five pieces of newly discovered evidence: (1) devices from Ruchlewicz; (2) a cell phone from Fleck; (3) recordings between a confidential informant and a public official; (4) the Government's intent behind seizing Pawlowski's assets; and (5) the Government's entrapment strategy. Def.'s Mot. Hearing 5-8, ECF No. 289. Because the Court already considered the first and second items, they need not be addressed again here. See Order, Dec. 10, 2018, ECF No. 258. The balance of the remaining

evidence Pawlowski claims is newly discovered does not satisfy the heavy burden of proving the need for a new trial. See Cimera, 459 F.2d at 458. The evidence was either not "newly discovered" within the meaning of Rule 33, is not material, or does not suggest that, but for its absence, Pawlowski would have been acquitted. See Kelly, 539 F.3d at 181-82. Accordingly, the motion will be denied.

First, Pawlowski claims Curtis, while speaking on the podcast, identified recordings made between a confidential informant and a public official which were not disclosed during discovery. Def.'s Mot. Hearing 5, ECF No. 289. Almost all of these conversations, however, were in fact turned over to the defense on August 3, 2017. Gov't.'s Resp. 2, ECF No. 336 (screenshots of discovery hard drive). The Government admits the FBI inadvertently failed to produce four recordings. Gov't.'s Mem. Opp. Def.'s Mot. Hearing 8-9, ECF No. 333. The content of three of the four of these recordings was disclosed to Pawlowski before trial, notwithstanding the Government's unintentional withholding of the recordings themselves, their content was disclosed before trial. See Aff., Nov. 25, 2013 at 3, ECF No. 336-1 (noting the affidavit included "[s]ummaries of recorded conversations"). The information gleaned from all four of these recordings was also entirely inculpatory, meaning they were not Brady material and would not have supported Pawlowski's acquittal.1 Because the Government turned over all but four recordings, and each of these contained inculpatory information the majority of which was previously shared Pawlowski's allegedly new discovery of them does not warrant a new trial.

1 Transcripts or summaries of three of the four recordings were produced during discovery and contain wholly inculpatory information. See Third Fifteen Day Report 8-9, ECF No. 336-3 (suggesting payment in exchange for support in transferring a liquor license); id. at 9-10 ("We took care of that liquor thing for you."); Aff., Mar. 31, 2014 at 155, ECF No. 342-1 (describing payment in exchange for favorable treatment in development project). The fourth recording, made on July 12, 2014, has been reviewed by the Court in camera and does not contain any exculpatory information.

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Second, Pawlowski claims Curtis' interview revealed new evidence of the FBI's alleged "entrapment" strategy. Def.'s Mot. Hearing 6, ECF No. 289. Curtis shared that the FBI hired an undercover agent to act as a potential developer in determining whether Pawlowski was soliciting "pay-to-play" bids. Id. at 7. Again, the Government disclosed this information during discovery, as it was included in Curtis' wiretap affidavit. See Aff., Nov. 25, 2013 at 3, ECF No. 336-1 (revealing the use of an undercover FBI employee in the investigation), id. at 11 (describing how the undercover agent posed as a potential developer and used a confidential source to gain access to Pawlowski's associates). Therefore, the evidence is not newly discovered.
Finally, Pawlowski alleges Curtis revealed for the first time an allegedly improper motive in the FBI's impoundment of three bank accounts. Def.'s Mot. Hearing 6, ECF No. 289. In his interview, Curtis stated that he seized funds from Pawlowski's campaign accounts because Pawlowski "could utilize those campaign funds to pay for attorneys to defend himself in this investigation. So we wanted to minimize his opportunity to do that and cut off the funding there." Episode 164: Scott Curtis Mayor of Allentown, Campaign Contribution Bribery, FBI RETIRED CASE FILE REVIEW WITH JERRI WILLIAMS (May 1, 2019), https://jerriwilliams.com/episode-164-scott-curtis-mayor-of-allentown-campaign-contribution-bribery/.
Seizing assets intended for payment of an attorney is permissible. See Luis v. United States, 578 U.S. 5, 12 (2016); United States v. Monsanto, 491 U.S. 600, 616 (1989) ("The Government may without offending the Fifth or Sixth Amendment obtain forfeiture of property that a defendant might have wished to use to pay his attorney."). Again, the fact of the assets' seizure is not newly discovered. See Aff., Apr. 4, 2016 at 21-22, ECF No. 336-2. Curtis' musings on the "perceived strategic benefits" of this decision are not material to the issues resulting in Pawlowski's conviction. See Gov't.'s Mem. Opp. Def.'s Mot. Hearing 13, ECF No. 333; Kelly,

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539 F.3d at 181. At most, evidence of the Government's strategy might be impeaching, which is insufficient to establish cause for a new trial under Rule 33. See Kelly, 539 F.3d at 181. Finally, there is no suggestion of prejudice such that Pawlowski would have been acquitted with this evidence in hand, given he had the same counsel before, during, and after the seizures. See Gov't.'s Mem. Opp. Def.'s Mot. Hearing 13, ECF No. 333. As with his two other claims, Pawlowski has not met the requirements for a new trial.
A district court need only order an evidentiary hearing on a Rule 33 motion if the petitioner shows "clear, strong, substantial and incontrovertible evidence" of impropriety. United States v. James, 513 F. App'x 232, 233 (3d Cir. 2013) (internal citation omitted). Because Pawlowski has not met this burden, the Court need not hold a hearing on the matter. Pawlowski's motion will be denied.
An appropriate Order follows.
BY THE COURT:
/s/ Juan R. Sánchez .
Juan R. Sánchez, C.J.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1078

UNITED STATES OF AMERICA

v.

EDWIN PAWLOWSKI,
Appellant

(Related to E.D. Pa. No. 5:17-cr-00390-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and NYGAARD,* *Circuit Judges*.

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* Judge Nygaard's vote is limited to panel rehearing.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Peter J. Phipps*
Circuit Judge

Date: July 26, 2024
CJG/cc: Matthew T. Newcomer, Esq.
Edwin Pawlowski