IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 5:17CR50010-001
	)	
JONATHAN E. WOODS	)	

GOVERNMENT'S RESPONSE TO DEFENDANT WOODS'S MOTION FOR RELIEF PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 33 FOR *BRADY* VIOLATIONS

Comes now the United States of America, by and through David Clay Fowlkes, Acting United States Attorney for the Western District of Arkansas, and Corey R. Amundson, Chief of the Public Integrity Section of the Department of Justice, and for their Response to Defendant Woods's Motion for Relief Pursuant to Federal Rule of Criminal Procedure 33 for *Brady* Violations and Brief in Support (Docs. 552 & 553) submits as follows:

I. BACKGROUND

A. Relevant District Court Procedural History

On March 1, 2017, Jonathan Woods ("Woods") was indicted by a grand jury in the Western District of Arkansas, charging Woods with 12 counts of honest services wire fraud, one count of honest services mail fraud, and one count of money laundering. (Doc. 1). Woods was indicted by way of a Superseding Indictment on April 18, 2017. (Doc. 29). A Second Superseding Indictment was issued on September 13, 2017, charging Woods with conspiracy to commit honest services mail and wire fraud, 14 counts of honest services wire fraud, one count of honest services mail fraud, and one count of money laundering. (Doc. 74). The Indictment alleged, generally, that Woods and Arkansas state representative Micah Neal directed state general improvement funds

("GIF") from the Northwest Arkansas Economic Development District ("NWAEDD") in exchange for kickbacks funneled through third parties. Specifically, Woods directed GIF to Ecclesia College ("Ecclesia") in exchange for kickbacks provided to him through co-defendant Randall Shelton's ("Shelton") company, Paradigm Strategic Consulting. Similarly, Woods also directed GIF to Ameriworks, a supposed business entity that had an association with the healthcare organization Alternative Opportunities ("AO"), in exchange for kickbacks provided to him by Milton "Rusty" Cranford ("Cranford").

Relevant Evidence at Trial Regarding the Hiring of Christina Mitchell

On April 9, 2018, a jury trial commenced as to Woods and Shelton. As relevant to Woods's Motion, on April 23 and 24, 2018, the Government presented exhibits and testimony that related to the Ameriworks GIF grant from NWAEDD and AO's hiring of Woods's wife, Christina Mitchell ("Mitchell"). The Government called Tammy Pierce, the human resource manager for Preferred Family Healthcare ("PFH," formerly AO). (Trial Tr. Vol. 11 at 3218-19). Ms. Pierce testified about the hiring of Mitchell. The evidence at trial showed that Mitchell was hired to a position at AO, at the time Woods was taking official action for the benefit of AO, and at a salary of $70,000 per year. (Trial Tr. Vol. 11 at 3226—Vol. 12 at 3269). When Mitchell resigned after two months, her replacement was hired at a rate of $35,000 per year, half the salary paid to Mitchell. (*Id.*). During cross-examination, Ms. Pierce stated that Mitchell was qualified for the position, highlighting her professional experience. (Trial Tr. Vol. 12 at 3278-79). Ms. Pierce also testified that Mitchell was the "most qualified" of the applicants for the position. (*Id.* at 3292).

The Government also called Landon Jenkins, PFH's network and systems administrator, to introduce emails between Woods, Cranford, and other AO executives. (*Id.* at 3316).[1] One of the emails introduced through Jenkins was Government Exhibit 301, an email from Woods to Cranford on August 13, 2013, forwarding an email from Mike Norton, the executive director of the NWAEDD, who stated, "The [NWAEDD] received the General Improvement Funds (GIF) disbursements today. Act 793 has disbursements of $1,470,000. Am I correct that you have $840 of that? Can you give me the breakdown of the rest." (Trial Tr. Vol. 12 at 3351-52).

On October 15, 2013, AO chief financial officer Tom Goss ("Goss") and Cranford had an email conversation discussing the hiring of Mitchell, Woods's then-fiancée. In the email, Goss told Cranford that they want to "interview John's wife for an executive position of employment—employee placement for all of Arkansas. Pay would be $90,000. Get with Bontiea [Goss]. A salary of that size needs a title to go with it. We will have [Decision Point] pay money out of [Ameriworks]." (Gov. Ex. 303; Trial Tr. Vol. 12 at 3366). Cranford responded to this email asking, "Are we in trouble," to which Tom responded "Senator is taken care of. He is new bubba for our team." (Trial Tr. Vol. 12 at 3367). The following day, on October 14, Mitchell sent her resume to Cranford stating, in part, "Mr. Cranford, please find the attached resume as requested, and thank you for taking the time to review my skills and interest in your organization." (Gov. Ex. 304; Trial Tr. Vol. 12 at 3368-69).

Five days later, on October 19, Woods sent an email to Goss and Cranford discussing efforts he was making to secure funds from the state of Arkansas to move another company

[1] The Court found the emails between Woods, Cranford, and AO chief financial officer Tom Goss were admissible as statements of co-conspirators in furtherance of the conspiracy. (*See* Trial Tr. Vol. # at 3328, 3359-60). The Court also found that there was a sufficient foundation to admit the emails as business records. (*Id.* at 3360).

associated with AO, Pro One, to Arkansas. (Gov. Ex. 305, Trial Tr. Vol. 12 at 3372-73). On October 22, 2013, Goss emailed Woods asking about alternative forms of funding for the Pro One move to include "additional GIF" and "help in the Feb session [referring to the 2014 fiscal session of the Arkansas Legislature]" and stating, "We need about $4.7 mm". (Gov. Ex. 306, Trial Tr. Vol. 12 at 3377). Woods responded, in part, "I will do everything in my power to help you. I will look into all grants of all shapes and sizes…I have no doubt I can secure more funding in the near future. I think $4.7 million is easy…Thank you again and please let me know if I can help with anything else." (Gov. Ex. 306). Cranford responded, "Your (sic) our guy buddy. We know you will." *Id.*

On December 16, 2013, Cranford emailed Joe Krueger, executive director of AO Employment/Workforce Services, with copy to Bontiea Goss re "1 million dollars" stating, in part, "Joe, her (sic) is the grant so you can see what we have been approved for." (Gov. Ex. 308). Bontiea Goss responded, "Joe These (sic) is a woman in NW Ar that Rusty would like to hire to Direct the project, with your consultation. As we get closer to beginning, please get with Rusty on her." *Id.* On February 7, 2014, Krueger approved the hiring of Mitchell at a salary of $70,000. (Gov. Ex. 292).

Jury Verdict

On May 3, 2018, the jury returned guilty verdicts for Woods on one count of conspiracy to commit honest services fraud, 12 counts of honest services fraud, and one count of money laundering. (Doc. 378). Only two of those counts exclusively involved the bribery scheme involving Cranford and Ameriworks (counts four and sixteen), with eleven counts involving the Ecclesia bribery scheme only, and one count, the conspiracy charge (count one), involving both bribery schemes.

Sentencing Hearing and Relevant Information Regarding the $1 Million GIF to AO

On September 5, 2018, a sentencing hearing was held for Woods. Of relevance to Woods's current motion, Woods objected to paragraphs 182 and 192 of the Presentence Investigation Report ("PSR"), which calculated the benefit received from the bribery schemes and relevant conduct to be between $1.5 million and $3.5 million. That amount included the $1 million GIF grant issued to AO by the Arkansas Department of Human Services ("DHS") on December 3, 2013. (PSR ¶ 182). The Government argued the intended loss amount was more than $1.5 million without the $1 million GIF grant from DHS, but that the $1 million GIF grant could also be included as relevant conduct to reach the $1.5 million dollar calculation for benefit received. (Doc. 444 at 8-20).

At sentencing, the Government offered evidence to support the inclusion of the $1 million GIF grant as part of relevant conduct, which included the plea agreement of Rusty Cranford in which he admitted, among other things, that he paid Woods more than $5,000 in cash and assisted Woods in obtaining employment at AO for an individual close to Woods, all in exchange for Woods sponsoring and voting to approve legislation that provided GIF monies to a DHS agency and for influencing a $1 million grant of GIF money to AO and a $400,000 grant to a non-profit corporation that sought to create manufacturing jobs in northwest Arkansas. (Sent. Tr. 28 Gov. Ex. 4). The Government also introduced communications between Woods, Cranford, and employees of the State of Arkansas showing that Woods sponsored Act 791, which funded the $1 million GIF grant and directed the $1 million grant to AO.[2]

The Court found the $1 million GIF grant to AO was relevant conduct and should be included in the loss amount as it was part of a related bribe scheme involving Woods, Cranford,

[2] All of the evidence introduced at sentencing regarding the $1 million GIF grant was summarized in the Government's sentencing memorandum, Doc. 444.

and AO. (Sent. Tr. at 105). The Court determined the Offense Level to be a 41 with a Criminal History Category of I, resulting in an advisory guideline range of 324-405 months imprisonment. (*Id.* at 118). The Court varied downward from the advisory guideline range and imposed a sentence of 220 months imprisonment. (*Id.* at 174). This sentence was still below the advisory guideline range without the inclusion of the $1 million GIF as relevant conduct, which would have been 262-327 months imprisonment.[3]

B. Jeremy Hutchinson Counsel's October 20, 2017 Letter

On October 20, 2017, counsel for Jeremy Hutchinson, a former Arkansas state senator now convicted of bribery conduct,[4] sent a letter to the Government alleging, generally, that FBI Special Agent Michael Lowe ("SA Lowe") knowingly coerced Hutchinson into disclosing attorney-client privileged information. Although the Government believed this accusation was baseless and not relevant to the Woods prosecution, in light of the allegations of prosecutorial misconduct from Woods and his co-defendants pending at the time, the Government disclosed the allegation to this Court in an *ex parte* filing, in an effort to seek guidance regarding its discovery obligations. (Doc. 207). The Government disclosure also included information from its internal examination into the substance of the allegation. (*Id*.).

On November 29, 2017, with knowledge of all the allegations of government misconduct made by Woods and Shelton (Doc. 461-5), the Court entered an Order terminating the Government's request for review of the allegation contained in the October 20, 2017 letter from

[3] The benefit received without the $1 million GIF grant would have been $1,021,500 resulting in an Offense Level of 39 instead of 41.

[4] *United States v. Hutchinson*, E. D. Ark. Case No. 4:18CR00450; *United States v. Hutchinson*, W. D. Mo. Case No. 19003048-03-CR-S-BCW; and *United States v. Hutchinson*, W. D. Ark. Case No. 5:19CR50049-001 (transferred to the Eastern District of Arkansas as Case No. 4:19CR00333).

Hutchinson's counsel, finding that the Court was "not presently aware of any reason why the materials described therein should be disclosed to the Defendants in this case." (Doc. 213).

C. Litigation of Hutchinson's Claim in the Eastern District of Arkansas

On February 7, 2019, Hutchinson moved to dismiss an indictment filed against him pending in the Eastern District of Arkansas. *United States v. Hutchinson*, E.D. Ark. Case No. 4:18CR00450 (Doc. 20). In support of his motion, Hutchinson alleged, among other things, that SA Lowe coerced him into making statements to the FBI, including providing information about Woods and Cranford. (*Hutchinson* Doc. 21 at 24-25). The Government responded to Hutchinson's motion and detailed Hutchinson's disclosure of Woods's attempt to extort $30,000 from Cranford. (*Hutchinson* Doc. 27 at 10). On June 10-11, 2019, a hearing was held on the Motion to Dismiss; however, before the District Court could issue a ruling on the motion, Hutchinson admitted his wrongdoing and entered into a plea agreement on June 25, 2019. (*Hutchinson* Doc. 69).

Relevant to Woods's current motion, on March 28, 2019, prior to Hutchinson pleading guilty, Woods and Shelton both sought to intervene in Hutchinson's Eastern District of Arkansas case and obtain relief from that Court's discovery protective order so that they could obtain information that the Government had provided Hutchinson. (*Hutchinson* Doc. 37). In the brief in support of their Motion to Intervene, Woods and Shelton stated that they "were unable to determine the starting point for the government's investigation," but "learned that Jeremy Hutchinson gave statements to the FBI concerning allegations of illicit behavior by Intervenor Woods in connection with Rusty Cranford." (*Hutchinson* Doc. 38 at 5). Woods and Shelton related how they were aware SA Lowe and FBI Special Agent Robert Cessario ("Cessario") had "exchanged text messages and phone calls…the morning prior to wiping the computer," but that they were unaware that SA Lowe had any involvement in the investigation of Woods, and that information raised "a new and much

larger suspicion about" the contact between SA Lowe and Cessario. (*Hutchinson* Doc. 38 at 6). The Government opposed this request. (*Hutchinson* Doc. 42).

The District Court in the Eastern District of Arkansas denied Woods's and Shelton's Motion to Intervene after finding that there was no authority for their request. (*Hutchinson* Doc. 44 at 4). However, that Court stated that even if there was authority for allowing Woods and Shelton to intervene, it would still deny the request. (*Id.*).

D. Appellate Procedural History

Prior to submitting his Appellate Brief in his appeal of his conviction in this Court, Woods filed a Joint Motion to Review Missing and Sealed Documents for Purposes of Preparing Appellant's Briefs on Appeal with the Eighth Circuit Court of Appeals ("Woods's Motion to Unseal"). Motion to Unseal, *United States v. Woods*, 978 F.3d 554 (8th Cir. February 4, 2019). Woods's Motion to Unseal sought access to various District Court records that were under seal and filed *ex parte*, to include the Government's *ex parte* request for review of the allegations contained in the letter from Hutchinson's counsel dated October 20, 2017 (Doc. 207), as well as the related terminating Order (Doc. 213) "for purposes of preparing Appellants' briefs on appeal." *Id*. at 2. In response, the Government did not object to the unsealing of the *ex parte* filings related to the allegation of Government misconduct contained in the letter from Hutchinson's attorney (Docs. 205, 206 and 213) and did not object to Woods's attorney having unredacted access to the Government's ex parte submission (Doc. 207). Response at 11-12 (8th Cir. Feb. 14, 2019 ID: 4756720). The Eighth Circuit granted Woods's Motion to Unseal and provided access to the Government's submission (Doc. 207) as well as the terminating Order (Doc. 213). Order (8th Cir. Feb. 27, 2019 ID: 4760547)[5].

[5] The Eighth Circuit Order stated, in part, "The clerk is directed to unseal district court docket entries 120, 122, 205, 206, and 213. The clerk is directed to provide counsel for Woods and Shelton

Three months after receiving access to those materials, Woods submitted his brief to the Eighth Circuit on June 5, 2019. Although aware of the allegation made in the October 20, 2017 letter from Hutchinson's counsel after having been given access to the Government's *ex parte* filing, as well as this Court's Order on the *ex parte* filing, Woods did not challenge this Court's finding that the information was not discoverable. Woods later filed a reply to the Government's brief in which he again did not reference the allegations in the letter from Hutchinson's counsel. He also never challenged the Court's Order on direct appeal.

After oral arguments, Woods's conviction was affirmed. *United States v. Woods*, 978 F.3d 554 (8th Cir. 2020). Woods's Petition for Rehearing was also denied. Order (8th Cir. December 17, 2020).

E. Motion For New Trial

On May 3, 2021, Woods filed a Motion for a New Trial. (Doc. 552). Woods argues that he is entitled to a new trial because 1) the Government failed to disclose that Hutchinson had advised Cranford that the hiring of Mitchell was legal and ethical; 2) the Government failed to disclose that SA Lowe had any involvement in the investigation into the allegations against Woods; and 3) the Government failed to disclose the allegation that SA Lowe coerced Hutchinson into revealing attorney-client privilege. (*Id*.). For the reasons outlined below, Woods's Motion is without merit, has been waived, and should be denied.

II. APPLICABLE LAW

Woods seeks a new trial under Rule 33 of the Federal Rules of Criminal Procedure, which allows a grant of a new trial "if the interest of justice so requires." The Court may grant a new trial under Rule 33 "only if the evidence weighs heavily enough against the verdict that a miscarriage

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with access to district court docket entries 207 and 253, subject to the terms of the protective order at district court docket entry 14."

of justice may have occurred." *United States v. Lacey*, 219 F.3d 779, 783 (8th Cir. 2000) (quoting *United States v. Brown*, 956 F.2d 782, 786 (8th Cir. 1992)). The power of a court to grant a new trial should only be invoked in an exceptional case where the evidence preponderates heavily against the verdict. *United States v. Starr*, 533 F.3d 985, 1000 (8th Cir. 2008). "Although the district court possesses broad discretion to grant a new trial under Rule 33, it must exercise the Rule 33 authority sparingly and with caution." *United States v. McClellon*, 578 F.3d 846, 857 (8th Cir. 2009).

To receive a new trial based on newly discovered evidence, a defendant must show "(1) that the evidence was not discovered until after the trial; (2) that due diligence would not have revealed the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such as to be likely to lead to an acquittal." *United States v. Coplen*, 565 F.3d 1094, 1096 (8th Cir. 2009) (citing *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001)).

III. ARGUMENT

Before addressing the specific claims made in Woods's Motion, the Government would point out that Woods's Motion provides no basis for a new trial as to the counts of conviction involving the Ecclesia bribe scheme. The jury found Shelton guilty for the bribe scheme involving Ecclesia and Woods without considering (following the Court's instructions) any of the evidence regarding the Ameriworks bribe scheme. This demonstrates that the proof of the Ecclesia bribe scheme and Woods's involvement in it were in no way dependent on or influenced by the evidence presented regarding the Ameriworks bribe scheme. Thus, Woods's Motion, to the extent it relates only to evidence regarding the Ameriworks bribe scheme, cannot affect the validity of Woods's convictions for the counts involving the Ecclesia bribe scheme.

A. Hutchinson's Opinion on the Hiring of Christina Mitchell

Woods alleges that Hutchinson made a statement to SA Lowe that he "vetted" the hiring of Mitchell for AO, and that her "employment and pay were proper and in accordance with her ability and experience." (Doc. 553 at 6). Woods does not explain the source of this information, how he came into possession of this information, or when he came into possession of it. However, the Government has found materials in its possession that are similar to the information alleged by Woods, which were not produced in discovery.

On July 15, 2014, Hutchinson, in his role as a confidential source, provided information to SA Lowe. SA Lowe kept notes of his conversation with Hutchinson, and the Government can advise that those notes reflect the following exchange: "After giving Dayspring $—Woods told Rusty he wanted them to hire his wife. R asked J—Is she qualified, (yes) Is there a position?—yes—funded by GIF. -Then yes you can hire her."[6]

The notes indicate that Hutchinson disclosed the following information: 1) Woods asked Cranford to hire Mitchell after directing GIF to AO; 2) Cranford asked Hutchinson about Woods's request; 3) Hutchinson asked whether a position existed and whether she was qualified for the position; 4) Cranford told Hutchinson that there was a position funded with the GIF Woods directed to them and that she was qualified; and 5) based on the representations from Cranford, it was Hutchinson's opinion that AO could hire Mitchell.

[6] In filing an official internal report of the encounter, SA Lowe anonymized Hutchinson's identity and characterized the exchange as: "Woods provided just under $1 million to Dayspring through the GIF. This took place around February 2014. A short time after Woods was able to provide money to Dayspring through the GIF, Woods told Cranford, he wanted Dayspring to hire his wife (name unknown). Dayspring concluded Woods' wife was qualified and there was a position open, although created by the funds provided by the GIF. Dayspring concluded she was qualified for the position. Dayspring did in fact hire Woods' wife."

In deciding not to produce this material to Woods, the Government reviewed SA Lowe's summary of the statement from Hutchinson and determined that the whole of the statement inculpates, not exculpates, Woods in a bribery scheme, and was thus not *Brady* information. Also, as the Court is aware, the Government did not call Hutchinson or Cranford as witnesses, the only two people who would be able to testify to this conversation. Accordingly, the Government determined that the summary was not Jencks Act or *Giglio* information. Based on these determinations by the Government, neither SA Lowe's notes nor the anonymized summary of the statement by Hutchinson were produced in discovery.

Woods argues the importance of this information is that "[b]oth the conviction and length of the sentence are undermined by the failure of the government to disclose exculpatory information that Mitchell's employment was properly vetted by someone without interest and that her pay was in accordance with her skills and experience." (Doc. 553 at 10). It is absurd to call Hutchinson, who stands convicted for his involvement in a bribery scheme involving AO, "someone without interest" who was responsible for "properly" vetting new hires. It is likewise inconsequential that Mitchell's pay was commensurate with her skills and experience, even assuming that is true.

As the Government was aware at the time of trial and as all parties are now aware, when Hutchinson claimed he had this conversation with Cranford, he, like Woods, was involved in a bribe scheme with Cranford. *United States v. Hutchinson*, W.D. Mo. Case no. 6:19-CR-03048. Hutchinson has entered into a plea agreement admitting that Cranford and AO hired Hutchinson, paid him a monthly retainer, and provided him travel and entertainment in exchange for Hutchinson agreeing to take and taking official action. (*Hutchinson* Doc. 58 (plea agreement)). Rather than being exculpatory, this conversation is more akin to Cranford asking Hutchinson, who

Cranford bribed through retainer fees, if a similar arrangement with Woods involving the hiring of Mitchell was remotely defensible if anyone questioned the legitimacy of her hiring.

Even if a truly disinterested party had opined that AO was justified in hiring Mitchell to a position funded with Woods's GIF and directed to AO by Woods, Woods was unaware that any such opinion existed at the time. Such an opinion bears only upon the mental state of Cranford and AO, not Woods. Any potential advice of counsel defense would not be available to Woods as he never received, much less relied upon, said advice. *See United States v. Rice*, 449 F.3d 887 (8th Cir. 2006) ("to rely upon the advice of counsel in his defense, a defendant must show that he: (i) fully disclosed all material facts to his attorney before seeking advice; and (ii) actually relied on his counsel's advice in the good faith belief that his conduct was legal").

Additionally, Mitchell's qualifications for the position and whether the pay was in line with her skills and experience are irrelevant so long as Mitchell was hired as payment to Woods for using his official position to direct GIF money to AO as now admitted by Cranford. *Cf. United States v. Maggio*, 862 F.3d 642, 647 (8th Cir. 2017)("Finally, Maggio's undeveloped suggestion that he did nothing wrong because 'the remittitur was legally required' reflects a fundamental misunderstanding of his crime. Simply put, Maggio admitted he took money intending it to color his judgment in a case. That was illegal, whether or not a judge who was not corrupt might have ruled the same way." (involving a guilty plea pursuant to 18 U.S.C. § 666 by an Arkansas state court judge for granting a remittitur in a civil case in exchange for a bribe)).

There were also other potential sources of information to show the hiring and pay were "appropriate," as the defense contends, without the statement from Hutchinson. For example, Woods could have presented testimony from other officials at AO, experts from within the industry, or Mitchell herself to further this claim in his defense. In fact, Mitchell was listed as a

defense witness but never called to testify. Woods also knew from the emails produced in discovery and emails introduced at trial (Gov. Tr. Exs. 291 and 308) that Joe Krueger, the executive director of AO Employment/Workforce Services, was involved in Mitchell's hiring. The Government also produced in discovery in November 2017 an audio recording and transcript of an interview with Krueger. Yet Woods did not call Krueger as a witness.

Ultimately, the jury and this Court heard evidence from Tammy Pierce that Mitchell was not only qualified for the position, but that she was the "most qualified" of the applicants for the position. (Trial Tr. Vol. 12 at 3278-79, 3292). Any additional evidence that Mitchell was qualified for the position would be cumulative, and evidence that is merely cumulative is not sufficient for a grant of new trial. *Coplen*, 565 F.3d at 1096.

In order to obtain a new trial, Woods must demonstrate "that the evidence is such as to be likely to lead to an acquittal." *Coplen*, 565 F.3d at 1096 (citing *Zuazo*, 243 F.3d at 431). Woods now asserts, "[t]here is a reasonable likelihood that this information would have affected the jury's decision to convict, or, at a minimum, this Court would not have found enhancements based on the million dollars to [AO]." (Doc. 553 at 10). This statement assumes that Woods would have been able to present this information at trial or at sentencing without being rebutted by the Government. Woods makes no effort to explain how he would have presented this information at trial. At the time of trial, Cranford had been indicted in Missouri for a bribery conspiracy involving AO and Hutchinson knew he was under investigation for his involvement in the bribe scheme involving Cranford and AO. Both were represented by counsel. Had Woods attempted to call Hutchinson or Cranford as witnesses, it was extremely likely that they would have invoked their Fifth Amendment privilege against self-incrimination. Had they testified; the Government would have been able to impeach both with evidence regarding their own bribe scheme.

As already detailed herein and in his plea agreement in the Western District of Missouri, Hutchinson has admitted to receiving kickbacks in the form of employment from Cranford and AO, and his likely testimony now would be the same. Considering Hutchinson's plea of guilty admitting his own employment related bribe scheme involving Cranford and AO, very little weight, if any, would be given to any testimony he might have relating to his opinion on the legitimacy of Mitchell's hiring. If anything, evidence that Cranford bribed Hutchinson with employment as an attorney with AO would lend even more credence to the idea that Woods was bribed with the employment of Mitchell. As for the likely effect of Cranford's testimony, Cranford has admitted as part of his plea agreement that he bribed Woods with cash payments and the hiring of Mitchell in exchange for Woods directing the GIF grants to Ameriworks and the $1 million GIF grant to AO. It was also disclosed in discovery to Woods on April 23, 2018 (prior to the Government resting its case), that Cranford acknowledged his role in paying kickbacks to Woods in exchange for GIF bills that benefitted Ameriworks and AO. The testimony of both individuals would have made and would now make Woods's conviction more likely, not less.

The same is true regarding any claim that this information would have had any effect on Woods's sentencing. In light of all the evidence showing that the employment of Mitchell was part of a bribery scheme or schemes involving Woods and Cranford, including Cranford's own admission in his plea agreement, there is no reason to believe that the claimed newly discovered evidence would have had any effect on the Court's finding by a preponderance of the evidence that the $1 million GIF grant to AO was part of the relevant conduct for purposes of calculating the advisory sentencing guidelines, or any effect on the sentence Woods actually received as the Court varied downward even from what the advisory guideline would have been without including the $1 million GIF grant.

B. The Allegation that SA Lowe Coerced Hutchinson to Violate Attorney-Client Privilege

Woods next argues that he is entitled to a new trial because the Government failed to advise him of Hutchinson's allegation of October 20, 2017, that SA Lowe coerced him into revealing attorney-client privileged information. Woods argues that this information would have aided his claims of outrageous government conduct, as well as his claim that the Government violated attorney-client privilege via the surreptitious recordings made by Neal. For the reasons below, Woods's claims are without merit.

As this Court is aware, the Government brought this allegation lodged against SA Lowe by Hutchinson's counsel to the Court's attention. (Doc. 207-1). Specifically, the notice advised this Court that the Government had received a letter from Hutchinson's counsel dated October 20, 2017, that alleged:

> (a) that when Rusty Cranford disclosed the alleged $30,000 extortion attempt by Jon Woods to Hutchinson, he was a client of Hutchinson's, who is an attorney, and thus, this communication was protected by an attorney-client privilege; and (b) in a June 11, 2014, interview of Hutchinson, that was conducted before he was a CHS and in which Hutchinson was confronted with evidence of his criminal conduct, Hutchinson informed the FBI case agent conducting the interview, who is not part of the prosecutorial team investigating this matter, that he had "some useful information but that disclosing it would violate the attorney-client privilege." Hutchinson alleges that the case agent then "directed" and "instructed" Hutchinson to give the agent the information to which Hutchinson reported the $30,000 extortion attempt by Woods.

(*Id.* at 3).

In addition to the allegation of a breach of the attorney-client privilege by SA Lowe, the *ex parte* disclosure also detailed how the Government had learned of allegations of Woods's criminal conduct at issue in this matter from multiple sources independent of Hutchinson: 1) information received as early as March 20, 2014; 2) information received on April 15, 2014; and 3) information

received on July 16, 2014. (*Id.* at 4). As the Court can see, the disclosure of the extortion attempt by Hutchinson to SA Lowe does not set "the initial framework of the entire investigation into Jon Woods" as he claims.

This Court, after considering the *ex parte* disclosure made by the Government in light of Woods's pending outrageous government conduct claims, determined that the information Woods now claims entitles him to a new trial was not subject to discovery. (Doc. 213). The Court's ruling that this information was not exculpatory and not discoverable was correct and has been bolstered by the facts about Hutchinson, Cranford, and others that have come to light since the trial of this case.

Woods requests a new trial based upon "newly discovered evidence" that this Court had already determined was not subject to disclosure. For that reason alone, his Motion should fail. Additionally, Woods was made aware of this *ex parte* filing and this Court's ruling on it while this matter was pending on appeal-prior to filing his brief.

Woods neither raised the *Brady* allegation as a basis for relief on appeal, nor did he address this Court's discovery ruling at the Eighth Circuit. Now he appears to desire a second bite at the apple by dressing this information up as "newly discovered evidence." Despite his efforts, Woods has waived the issue by not pursuing it on direct appeal when he became aware of it. *See United States v. Kress*, 58 F.3d 370, 373 (8th Cir. 1995) ("Where a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter.").

C. SA Lowe's Involvement in the Investigation

Woods's final basis for seeking a new trial is his claim that he was unaware that SA Lowe worked on the investigation into Woods. (Doc. 553 at 19). Woods claims, without reference, that SA Lowe "had a long-standing and important role in the investigation that ultimately resulted in

Woods' indictment," and that had he been aware of this, he would have investigated the purpose of a phone call Cessario made to SA Lowe around the time of the hard drive wipe. (*Id*. at 19-20). Woods baselessly alleges that the timing of the call between Cessario and SA Lowe "is circumstantial evidence the hard drive contained matters important to Agent Lowe as well." (*Id*. at 20).

First, Woods's claim that he was unaware SA Lowe had some involvement in the investigation is inaccurate. By letter dated November 16, 2017, the Government disclosed to Woods two statements taken by SA Lowe and made by Hutchinson regarding Woods directing GIF to Ecclesia in exchange for a kickback. In that disclosure, SA Lowe was identified by name as the source for the information. Additionally, on April 23, 2018, the Government disclosed a redacted FBI 302 summary of a proffer statement made by Cranford on April 11, 2018. The 302 indicates that SA Lowe was present for the proffer interview. In short, the Government provided information in discovery to Woods that confirmed SA Lowe's involvement in the investigation at least as early as November 2017. This is not newly discovered evidence. For that reason alone, Woods's claim that SA Lowe's involvement in the investigation is "newly discovered evidence" fails.

Second, the Government notes that Woods does not argue that he was unaware that Cessario contacted SA Lowe around the time of the hard drive wipe; rather, he alleges that they would have investigated the purpose of the call had they known SA Lowe was involved in the investigation (which they did, as previously addressed herein). Woods was aware of the call between Cessario and SA Lowe but made the decision not to pursue this line of investigation. The call itself is not newly discovered evidence, and Woods chose not to investigate it. For that reason,

Woods's claim should fail as a new trial cannot be granted where due diligence would have revealed the evidence. *See Coplen*, 565 F.3d at 1096.

Lastly, there are multiple reasons why Cessario and SA Lowe could have had phone contact that are unrelated to Cessario's wipe of the hard drive. Woods has not demonstrated what, if anything, might have come from any further inquiry into the call. He merely speculates that there might have been something discoverable there. The mere unlikely hope of the existence of additional information is not evidence that is likely to lead to an acquittal and is an insufficient showing to warrant the grant of a new trial. *Id.* In addition, the reason why this Court and the Eighth Circuit found that the Cessario wipe of the hard drive did not in any way affect the fairness of Woods's trial was because all of the recordings that Neal made were not lost but were recovered from the assistant to Neal's attorney and provided to Woods for use at trial. Thus, even if Woods could show (which he cannot) that he was unaware of SA Lowe's involvement in the investigation, he cannot show that this alleged lack of knowledge had any effect on the Court's ruling regarding the Neal recordings, which was premised on the fact that no recordings were lost.[7]

[7] Notably, while Woods possessed hours of recordings made by Neal prior to trial, none of the recordings were thought by Woods to be exculpatory as he presented none of the recordings or parts of the recordings in his defense at trial

CONCLUSION

Based upon the foregoing, the United States respectfully requests that the Court deny Defendant Woods's Motion for Relief Pursuant to Federal Rule of Criminal Procedure 33 for *Brady* Violations (Doc. 552).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st of May 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Patrick Benca and Lee Short, Attorneys for Defendant Jonathan E. Woods.

/s/ Kenneth Elser
Kenneth Elser
Assistant U.S. Attorney