IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	**§**	
	§	
v.	**§**	
	§	
HOLLIS GREENLAW (01)	**§**	**Case No. 4:21-cr-289-O**
BENJAMIN WISSINK (02)	**§**	
CARA OBERT (03)	**§**	
BRANDON JESTER (04)	**§**	

ORDER

Before the Court are Defendants' Motions for a New Trial Pursuant to Rule 33 (ECF Nos. 317, 320, 321, 324), filed February 7, 2022; Defendants' Notice of Joinder in Co-Defendants Motions (ECF Nos. 325–328), filed February 7 and 9; Defendant Jester's Supplemental Amendment (ECF No. 331), filed February 9; Government's Omnibus Response (ECF No. 341), filed February 25; and Defendants' Replies (ECF Nos. 343, 345, 347, 348), filed March 4. On May 9, Defendants filed an Amended Consolidated Rule 33 Motion for New Trial Based on Newly Discovered Evidence, Supporting Brief, and Request for Evidentiary Hearing (ECF No. 420). Pursuant to the Court's Order (ECF No. 421) the Government filed its Response and Objection (ECF No. 427) on May 12, and Defendants filed their Reply on May 17 (ECF No. 436).

For the reasons that follow, the Court finds these Motions (ECF Nos. 317, 320, 321, 324, 420) should be, and are, **DENIED**.

I. BACKGROUND

On October 15, 2021, a grandy jury returned a ten-count indictment against Defendants. *See* ECF No. 1. On January 21, 2022, a jury found each Defendant guilty on all ten counts. *See* ECF No. 298. Defendants are to be sentenced on May 20, *see* ECF No. 299, and now seek a new

trial, alleging errors at both the pre-trial and trial stages. The issues are briefed and ripe for this Court's review.

II. LEGAL STANDARD

"The grant of a new trial is necessarily an extreme measure, because it is not the role of the judge to sit as a thirteenth member of the jury." *United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir. 1997) (citation omitted). "The remedy of a new trial is rarely used; it is warranted only where there would be a miscarriage of justice or where the evidence preponderates heavily against the verdict." *Id.* (citation omitted).

Rule 33 permits the district court to vacate judgment and grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33. "However, Rule 33 divides motions for new trial based on the interest of justice into two different subcategories: (1) motions based on newly discovered evidence; and (2) motions based on 'other grounds.'" *United States v. Wall*, 389 F.3d 457, 466 (5th Cir. 2004).

III. ANALYSIS

a. Defendants' Motion to Dismiss for Failure to State an Offense

First, Defendants reassert arguments made in their Motion to Dismiss for Failure to State an Offense (ECF No. 128). *See* Def. Obert's Mot. 15, ECF No. 317. The Court previously rejected these arguments when denying the Motion to Dismiss. *See* ECF No. 239. Defendants raise no new grounds for the Court to find the Indictment failed to allege a criminal claim. Thus, the Court finds Defendants have failed to satisfy Rule 33's requirements.

b. Defendants' Motion to Dismiss for Prosecutorial Vindictiveness

Next, Defendants reassert arguments made in their pretrial Motion to Dismiss for Vindictive Prosecution (ECF No. 126). *See* Def. Greenlaw's Mot. 13–15, ECF No. 321.

Defendants further argue the continued participation of the NDTX USAO after Defendants filed a Bivens suit and FTCA administrative action provide a reason for a new trial. *See* Def. Greenlaw's Mot. 15–17, ECF No. 321. And once again, the Defendants fail to articulate any reason, other than those previously rejected by the Court, that shows vindictive prosecution, or that the continued participation of NDTX USAO was improper. Therefore, for the reasons stated in the Court's previous Order (ECF No. 186), the Defendants have failed to articulate grounds for a new trial on this basis.

c. Motion to Dismiss for Violations of Defendants' Fourth, Fifth, and Sixth Amendment Rights

Defendants reassert arguments made in their Motion to Dismiss for Fourth, Fifth, and Sixth Amendment Violations (ECF No. 129), arguing "the government blatantly and extensively violated their attorney client privilege." Def. Greenlaw's Mot. 17, ECF No. 321. The Court denied the Defendants' Motion to Dismiss (ECF No. 206), and Defendants fail to present any trial-specific, or new, arguments that would entitle them to a new trial. Therefore, for the same reasons discussed in the Court's previous Order, the Court finds no sufficient Rule 33 argument.

d. Motion for a Franks Hearing and Suppression of Evidence

Defendants again raise argument previously rejected by the Court, *see* ECF Nos. 24, 79, alleging the Court erred in denying their motions to suppress and for a Franks hearing. Def. Wissink's Mot. 15–17, ECF No. 320. Defendants fail to raise any new arguments, therefore, for the reasons previously stated, the Court finds they are not entitled to a new trial on these grounds.

e. Third Motion to Continue

Defendants requested multiple continuances leading up to trial. *See* ECF Nos. 69, 82, 190. Two were joint (ECF Nos. 69, 82). The Court granted one in full (ECF No. 70) and granted the

other in part (ECF No. 91). Defendants then filed a third, opposed, Motion to Continue (ECF No. 190), which the Court denied (ECF No. 199). Defendants now argue that had the Court granted their third requested continuance, they would have been better prepared for trial. *See* Def. Greenlaw's Mot. 2–5, ECF No. 321. For the reasons previously stated, *see* ECF No. 199, and because Defendants fail to articulate any specific, sufficient harm, the Court rejects this argument and denies Defendants' Motions on these grounds.

f. Time Limits

Prior to trial, the Court imposed 15-hour time limits on each side. *See* ECF No. 230. Defendants objected prior to trial (ECF No. 244) but did not raise this issue again during trial. Defendants now argue the Court abused its discretion by imposing these time limits. Def. Greenlaw's Mot. 5–6, ECF No. 321; Def. Jester's Mot. 25–28, ECF No. 324.

As stated by the Fifth Circuit, "[i]f anything, it seems that time limits in criminal cases will generally pose more of a challenge for the prosecution as it typically presents far more of the evidence given that it has the burden of proof." *United States v. Morrison*, 833 F.3d 491, 504 (5th Cir. 2016). Defendants have failed to show the time limits unreasonably limited their defense and constituted an abuse of this Court's broad discretion. This is particularly true because "defense counsel did not make an offer of proof sufficient to preserve the objection to the exclusion of [any specific] testimony." *Id.* at 505.

At no point during the trial did Defendants request more time. Rather, a reasonable interpretation of Defendants' actions leads the Court to believe Defendants attempted to use these time limits as a litigation strategy, taking advantage of the challenge to the prosecution raised by the Fifth Circuit in *Morrison*. In this case, as trial testimony was coming to an end, the Government asked if Defendants intended to testify. Defendant Greenlaw's counsel indicated Greenlaw would

do so, but counsel for Defendants Obert, Wissink, and Jester remained silent. *See* Transcript 167–68, ECF No. 307. But at the conclusion of Greenlaw's counsel's re-direct of Greenlaw, before the Court could ask whether codefendants' counsel wished to ask any questions on re-direct, Obert's counsel announced he was calling her as a witness. Thus, the Court made a reasonable inference that this was planned and not a spur-of-the-moment decision. *Id.* at 209–210. In the end, three of the four Defendants—Greenlaw, Obert, and Jester—chose to testify.

It appears Defendants planned on the Government not having enough time to cross examine the testifying Defendants. Indeed, during a sidebar conversation between counsel and the Court during the cross examination of Defendant Obert, Defendants asserted that their tracking of the time indicated that the Government's time had expired. The Government's calculation nearly matched the Court's, which indicated the Government had time remaining. The reasonable inference is that Defendants strategically made no request for additional time to ensure the Government received no additional time so as to limit the Government's opportunity to engage in full cross examination.

Therefore, the reasonable inference is that Defendants strategically (1) failed to disclose that two more Defendants would testify, and (2) believed the Government would not have time to adequately cross examine those Defendants who testified. Regardless, had a specific rationale, supporting additional time to fully examine a witness (by either side) been presented, the Court surely would have granted the request. But no such request, or even a specific hardship, was presented to the Court. Thus, the Court finds the Defendants have failed to show they are entitled to a new trial on these grounds.

g. Constructive Amendment of Indictment

Defendants argue the Government constructively amended the indictment. Def. Wissink's Mot. 8, ECF No. 320. The Court disagrees, the Government's arguments at trial were proper, and did not constructively amend the Indictment. Thus, the Motion is denied on these grounds.

h. Excluding Evidence

Next, the Defendants argue they are entitled to a new trial because the Court erroneously excluded evidence. Each specific exclusion is addressed below.

1. Timothy McCormick

The Defendants argue the Court erred in prohibiting Timothy McCormick to testify as an expert witness. Def. Jester's Mot. 22–23, ECF No. 324. Prior to trial, the Court found Defendants failed to provide sufficient disclosures, even after providing them an opportunity to cure the deficiencies, to allow McCormick to testify as an expert. ECF No. 233. The Court therefore limited McCormick's testimony to that of a lay witness, and Defendants presented his lay witness testimony. *Id*. Defendants have presented no trial-specific or new arguments warranting a new trial on this issue.

2. Testimony Regarding K.B. and H.C.

Defendants attempt to rehash arguments the Court rejected multiple times prior to, and during, trial. They argue that testimony regarding K.B. and H.C. should have been admissible, and without it, Defendants constitutional rights were violated. Def. Obert's Mot. 24–25, ECF No. 317. As stated previously, evidence relating to K.B. is irrelevant to the issues presented at trial and would have been extremely time consuming and confusing. ECF No. 137. Therefore, the Court finds the Defendants have failed to satisfy Rule 33's requirements.

3. Rule 16 Violation and Defense Exhibits

Finally, Defendants argue the Court erred in excluding several exhibits from trial because Defendants failed to timely disclose them to the Government. Def. Wissink's Mot. 17–20, ECF No. 320. For the reasons previously articulated at trial, the Court disagrees. Transcript 283–286, ECF No. 307. Therefore, the Motion is denied on these grounds.

i. Jury Instructions

Defendants argue they are entitled to a new trial because the Court erred in its giving of jury instructions. Def. Obert's Mot. 2, 7, 9–12, ECF No. 317; Def. Greenlaw's Mot 12, ECF No. 321; Def. Wissink's Mot. 1, 15 ECF No. 320. The Court disagrees; the jury instructions were proper as the Court previously found when adopting the instructions. Therefore, the Defendants have failed to show they are entitled to a new trial on these grounds.

j. Prosecutorial Misconduct

Defendants assert that the Government committed prosecutorial misconduct throughout the trial. *See* Def. Obert's Mot. 17–25; Def. Wissink 820, ECF No. 324. The Court disagrees. Even if any misstatements were made, the Defendants have failed to show "the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *United States v. Iredia*, 866 F.2d 114 (5th Cir.) (per curiam), *cert. denied*, 492 U.S. 921 (1989). Thus, Defendants' substantial rights were not affected, as required for a new trial. *United States v. Alaniz*, 726 F.3d 586, 615 (5th Cir. 2013). Therefore, Defendants have failed to show they are entitled to a new trial on these grounds.

k. Jury Verdict

The Defendants argue they are entitled to a new trial because the jury's verdict was against the weight of the evidence. Def. Greenlaw's Mot. 17, ECF No. 321; Def. Jester's Mot. 23, ECF No. 324. The Court disagrees. To grant a new trial on these grounds, "[t]he evidence must

preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Shoemaker*, 746 F.3d 614, 631 (5th Cir. 2014) (citation omitted). That is not the case here. There was a substantial amount of evidence at trial that would allow the jury to reach their verdict of guilty. Therefore, Defendants have failed to show they are entitled to a new trial on these grounds.

l. Brady Evidence

In their latest motion for new trial based on newly discovered evidence, Defendants cite what they allege is Brady evidence that was not properly disclosed by the prosecution as grounds for a new trial. "Motions for new trial based on newly discovered evidence are disfavored and reviewed with great caution." *United States v. Wall*, 389 F.3d 457, 467 (5th Cir. 2004). The Defendants "bear a heavy burden." *United States v. Rodriguez*, 437 F.2d 940, 941 (5th Cir. 1971). "As a general rule, there are five prerequisites (typically referred to as the *Berry* rule) that must be met to justify a new trial on the ground of newly discovered evidence." *Wall*, 389 F.3d at 467. These five requirements are as follows:

> (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal.

Id. "If the defendant fails to demonstrate any one of these factors, the motion for new trial should be denied." *Id.* The Court finds Defendants fall short on many factors. Specifically, the Court finds the evidence was made available to the Defendants prior to trial and any lack of knowledge of the contents is likely due to Defendants' lack of diligence. Additionally, the Defendants fail to show the evidence was material or likely to produce an acquittal.

Defendants similarly fail to satisfy the necessary elements to prevail on a *Brady* claim: (1) the prosecution suppressed evidence, (2) the evidence was favorable, (3) the evidence was material to either guilt or punishment, and (4) discovery of the allegedly favorable evidence was not the result of a lack of due diligence. *United States v. Skilling*, 554 F.3d 529, 574 (5th Cir. 2009), *vacated in part on other grounds*, 561 U.S. 358 (2010). As a preliminary, and dispositive matter, the alleged *Brady* evidence was seized and subject to the protection privileged documents are entitled. Thus, the prosecution team would not have been permitted to possess or review that evidence. The Defendants therefore fail on the first element, the prosecutors cannot suppress evidence it did not possess. Further, the evidence cited by Defendants as *Brady* evidence is not material to guilt or punishment. There is no need to analyze the remaining factors, Defendants have failed to show they are entitled to a new trial on these grounds.

m. Cumulative Error Doctrine

Finally, Defendants seek relief under the Cumulative Error Doctrine. But "non-errors have no weight in a cumulative error analysis." *United States v. Stanford*, 823 F.3d 814, 842 (5th Cir. 2016) (citation omitted). As explained, there is nothing to accumulate. Thus, Defendants are not entitled to a new trial under this Doctrine.

IV. CONCLUSION

For the reasons stated above, and throughout the course of this litigation, the Court **DENIES** Defendants' Motions.

SO ORDERED on this **18th day of May, 2022.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE