ORAL ARGUMENT REQUESTED

No. 04-1540

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant,

v.

ROD SCHULTZ,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE WILEY P. DANIEL

BRIEF OF THE UNITED STATES AS APPELLEE

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United States v. *LaVallee*, No. 04-1538

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-1540

UNITED STATES OF AMERICA,

Appellee

v.

ROD SCHULTZ,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF THE UNITED STATES AS APPELLEE

JURISDICTION

This appeal arises from the denial of a motion for a new trial in a federal criminal prosecution. The district court had jurisdiction over the original case under 18 U.S.C. 3231. While the appeal from the defendant's conviction was pending before this Court on direct appeal, the district court had jurisdiction to consider and deny his motion. See *United States* v. *Varah*, 952 F.2d 1181, 1182 (10th Cir. 1991). This Court has jurisdiction over the defendant's appeal from the denial of his motion under 28 U.S.C. 1291.

ISSUES PRESENTED

1. Whether the district court abused its discretion in denying Schultz's motion for a new trial based on allegedly newly discovered evidence, that is, the testimony of the victim, where Schultz presented no evidence that he had been diligent in seeking this testimony for use at trial and the district court concluded the testimony would not probably have resulted in Schultz being acquitted.

2. Whether the district court erred in denying Schultz's motion for a new trial based on a supposed violation of *Brady* v. *Maryland*, 373 U.S. 87 (1963), where the district court ruled that the evidence — a video tape of the defendant on the day following his beating by the defendant — was neither favorable to the defendant nor material.

STATEMENT OF THE CASE

This prosecution arose out of an investigation of wide-spread abuse of prisoners and falsifying records to cover up that abuse at the United States Penitentiary, Florence, Colorado (USP-Florence). The facts regarding the prosecution are set out more fully in the government's opening brief as appellee/cross-appellant in Nos. 03-1515, 03-1522, 03-1523, and 04-1000.

On February 6, 2001, Rod Schultz and six other corrections officers were charged in a superceding indictment with one count of violating 18 U.S.C. 241 (conspiracy to deprive the inmates of their rights) and nine counts of violating 18 U.S.C. 242 (deprivation of rights under color of law). The indictment alleged a conspiracy among the correctional officers to physically abuse inmates and to

conceal the truth about the incidents through, among other means, filing false reports and creating apparent injuries to support claims of being attacked by inmates.

After a three-month trial, on June 24, 2003, the jury convicted Schultz on the conspiracy count and one count of violating Section 242. That count charged Schultz with unlawfully beating inmate Pedro Castillo on April 5, 1996. (Defendant Michael LaVallee was also convicted of beating Castillo.) Schultz was acquitted of the other two counts against him. On November 21, 2003, the district court sentenced Schultz to 41 months' imprisonment.

Schultz and the other two convicted defendants timely appealed their convictions and sentences. The government cross-appealed the defendants' sentences. Those appeals are pending in Nos. 03-1515, 03-1522, 03-1523, and 04-1000. Briefing has been completed, but no date has been set for oral argument.

On June 14, 2004, Schultz moved the district court for a new trial under Rule 33, Federal Rules of Criminal Procedure, based on "newly discovered evidence." R. 1537 (NT I).[1] On September 14, 2004, Schultz filed an amended motion for new trial, claiming that the government had suppressed exculpatory

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[1] This brief uses the following abbreviations: "Br." denotes the brief of appellant Schultz in this case, No. 04-1540. "R." denotes the record number in the district court's docket. A roman numeral enclosed in parentheses — for example, "(LIII)" — denotes the volume in the record on appeal in Nos. 03-1515, 03-1522, 03-1523, and 04-1000. A roman numeral enclosed in parentheses preceded by the letters "NT" — for example, "(NT I)" — denotes the volume in the record on appeal in this case.

evidence in violation of *Brady* v. *Maryland*. R. 1564 (NT I). Defendant Michael LaVallee joined that part of the motion for a new trial.

On October 4 and December 6, 2004, the district court held hearings on the new trial motions and heard testimony from witnesses. By order dated December 10, 2004, the court denied the motions for new trial. R. 1615 (NT I). Schultz and LaVallee timely appealed.[2]

STATEMENT OF THE FACTS

1. Evidence Presented At Trial

Schultz and LaVallee were convicted of beating inmate Castillo and of conspiring to deprive inmates of their rights. The government's opening brief in the direct appeals sets out the facts more fully. This brief repeats only some of the facts relevant to the beating of Castillo. At trial, Officers Charlotte Gutierrez and Kenneth Mitchell testified regarding the beating of Castillo, including Schultz's role in it. Castillo was not called as a witness.

Castillo was known as a self-mutilator, that is, when he was upset or did not get his way, he would cut himself with something, such as a paper clip. He also did this to get attention. Trl. Tr. at 1402 (LIII). Castillo was an orderly in the Special Housing Unit (SHU) and so was responsible for cleaning as directed by the officers. Trl. Tr. at 1385 (LIII); Trl. Tr. at 1391 (LIII). As an orderly, he would be permitted more freedom in his movements within the SHU; unlike other prisoners,

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[2] On August 15, 2005, this Court granted LaVallee's motion to dismiss his appeal in No. 04-1538.

he was not in lock down 23 hours per day. Trl. Tr. at 1391 (LIII).

Sometime prior to the April 5, 1996, beating, Officer Gutierrez had gotten into an argument with Castillo's cellmate, Mendez. Castillo intervened in the argument and Gutierrez then argued with Castillo. Trl. Tr. at 1391-1392 (LIII); see also Trl. Tr. at 1879 (LV); Trl. Tr. at 1733 (LIV). Castillo became upset with Gutierrez, and he threw a mop and bucket of water onto the floor. Trl. Tr. at 1392 (LIII). Because of this, Castillo lost his job as orderly and had to return to his cell like the rest of the inmates in segregation. Trl. Tr. at 1392 (LIII).

Later in the shift, officers met in the officer's station to discuss "how to get back at inmate Castillo" for his earlier misconduct. Trl. Tr. at 1875 (LV). The officers present included LaVallee, Schultz, Gutierrez, and Kenneth Mitchell. See Trl. Tr. at 1875 (LV); Trl. Tr. at 1395 (LIII). The officers discussed how they would justify going into Castillo's cell to beat him. Trl. Tr. at 1398 (LIII).

The officers were assigned different roles. Schultz was to "accidentally" knock over the camera that had been set up outside Castillo's cell so that it would not record the officers entering the cell. Trl. Tr. at 1877-1878 (LV). Officer Freeman was to observe Castillo and report that he was harming himself, and Mitchell was to respond to Freeman's report. Trl. Tr. at 1878 (LV). Schultz knocked the camera over as planned, Trl. Tr. at 1880 (LV), and Freeman stated "he's doing it," so Mitchell responded, Trl. Tr. at 1878-1879 (LV). Freeman opened the door to Castillo's cell and Mitchell followed him inside, and defendant Shatto also entered the cell. Trl. Tr. at 1879-1881 (LV). Castillo was sitting on his

bunk, doing nothing. Trl. Tr. at 1881 (LV). Mitchell and another officer pulled Castillo off the top bunk, took him down to the floor and restrained him with handcuffs. Trl. Tr. at 1879, 1882 (LV). Castillo struggled somewhat, but Mitchell and the other officer were able to put the restraints on. Trl. Tr. at 1882 (LV). Castillo did not hit anyone. Trl. Tr. at 1882-1883 (LV). Schultz restrained Mendez and removed him from the cell, Trl. Tr. at 1879-1880 (LV), and Gutierrez put him in a holding cell. Trl. Tr. at 1399-1400 (LIII). Schultz then returned to Castillo's cell. Trl. Tr. at 1880 (LV).

Mitchell, Schultz, and Shatto escorted Castillo to a holding cell. Trl. Tr. at 1880-1881, 1883 (LV). When they got there, Mitchell, LaVallee, and Schultz entered. Trl. Tr. at 1883 (LV). Mitchell held Castillo against the wall, facing it; Castillo was talking and possibly yelling, but he was not moving. Trl. Tr. at 1884 (LV). As Mitchell held him, Schultz and LaVallee came up behind him and each struck him two or three times in the back with his fist. Trl. Tr. at 1884-1885 (LV). Both officers hit Castillo hard enough that it made a smacking sound. Trl. Tr. at 1885 (LV). While he was being struck, Castillo posed no threat, and he was still handcuffed. Trl. Tr. at 1884-1885 (LV). Mitchell then released Castillo and backed out of the cell. Trl. Tr. at 1885 (LV). As he left the cell, Gutierrez entered. Trl. Tr. at 1885-1886 (LV). Mitchell returned to the officer's station, which was 15 to 20 feet away, and he could hear from the holding cell the smacking sound as the officers continued to strike Castillo. Trl. Tr. at 1886 (LV).

When Gutierrez entered the holding cell, LaVallee told her to kick Castillo.

Gutierrez at first kicked LaVallee's hand, but she kicked again and struck Castillo in the buttocks. Trl. Tr. at 1401 (LIII).

The officers involved in the incident with Castillo filed false reports to justify the beating. Mitchell did not write his own report; it was written by one of the other officers and he signed it. Trl. Tr. at 1888 (LV). Schultz or LaVallee told Mitchell to "stick to your [report], and there will be no problems." Trl. Tr. at 1889 (LV). Schultz's report falsely stated that Castillo had been cutting himself with a paper clip. Trl. Tr. at 1908 (LV). None of the reports mentioned that Castillo was beaten in the holding cell.

2. Post-Trial Proceedings In The District Court

On June 14, 2004, Schultz moved the district court for a new trial under Rule 33, Federal Rules of Criminal Procedure, based on "newly discovered evidence." R. 1537 (NT I). Schultz's motion included an affidavit from a private investigator asserting that he had interviewed Pedro Castillo in February 2004, after looking for him for six weeks, and that Castillo told him that Rod Schultz never beat him and that Schultz was not at the USP-Florence on April 5, 1996, when Castillo was beaten by corrections officers. R. 1537 (Braun Aff. at 1) (NT I). In response to this motion, government attorneys Mark Blumberg and Kobie Flowers and FBI Special Agent Antonio Castaneda interviewed Pedro Castillo, as well as his brother, Reinaldo Castillo. They obtained from Pedro and Reinaldo affidavits, which were submitted to the district court with the government's response to the motion for new trial. R. 1552 (NT I).

Pedro Castillo stated in his affidavit that the federal investigators on June 25, 2004, showed him a photograph of Rod Schultz, Castillo recognized Schultz, and he told the investigators that Schultz had not participated in beating him on April 5, 1996. R. 1532 (Pedro Castillo 7/19/04 Aff. at ¶ 7) (NT I).[3] Castillo also stated that he informed the investigators that he was certain that Schultz had not beaten him on April 5, 1996, because "he had not been on duty or present in the SHU at all on April 5, 1996." *Id*. at ¶ 9. Castillo further stated that when he was informed by the investigators that Bureau of Prisons (BOP) documents, including a memorandum signed by Schultz, established that Schultz was on duty that day, Castillo stated: "I acknowledged that my memory of the events is vague and unreliable due to the number of officers who beat me and the passage of time. I cannot now say whether Rod Schultz did or did not participate in beating me on April 5, 1996." *Id.* at ¶ 10, 11. Castillo was shown photographs of Freeman and Shatto and informed the investigators that neither of them were on duty or present on April 5, 1996. *Id.* at 12.

Reinaldo Castillo's affidavit discussed his brother's mental abilities, including Reinaldo's need to take care of his brother by feeding him and paying his rent. R. 1552 (Reinaldo Castillo 7/19/04 Aff. at ¶ 6) (NT I).

In August 2004, Schultz requested the government to search for a videotape

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[3] Castillo executed his affidavit in Spanish. An English translation of the Spanish affidavit was provided to the district court. This brief quotes from the English translation of the affidavit.

of the April 5, 1996, incident made by corrections officers. Prior to trial, the government had repeatedly searched for this videotape, and for a videotape depicting an incident involving Castillo on April 6, 1996, without success. In response to this latest request, the government attorneys again asked the BOP personnel to search for the April 5, 1996, videotape. The April 5 tape was again not found, but the April 6 tape was found. That tape was found in a storage area that had been thoroughly searched prior to trial in an effort to find either the April 5 or April 6 tape, but at that time the tape was not located. R. 1593 (Grundy Aff. ¶ 11-16; Diehl Aff. ¶ 6-9) (NT I). The April 6 tape had not been properly stored. It was not stored in an evidence locker as it should have been, and it did not have the appropriate chain of custody documents. R. 1593 (Storey Aff. ¶ 9; Synsvoll Aff. ¶ 16) (NT I).

The government provided the April 6 tape to Schultz's counsel on September 9, 2004. On September 14, 2004, Schultz filed an amended motion for new trial, claiming that the government had failed to produce the April 6 videotape for trial in violation of *Brady* v. *Maryland*. Defendant Michael LaVallee joined that motion for a new trial. R. 1564 (NT I).

On October 4, 2004, the district court held a hearing on the new trial motion at which Pedro Castillo and his brother Reinaldo testified. Pedro testified that Schultz did not beat him and that Schultz was not present on April 5, 1996, when he was beaten by corrections officers. Tr., 10/4/04 Hr'g, at 35, 37-38; 45-46 (NT II). Reinaldo Castillo also testified. Miguel Braun, the private investigator, was

present but was not called as a witness.

The district court ordered the government to submit affidavits regarding the efforts to find the April 5 and April 6, 1996, videotapes. Four affidavits were submitted to the court on October 25, 2004. R. 1593 (NT I). An affidavit was submitted from Christopher Synsvoll, a supervisory attorney at USP-Florence, describing the efforts to locate the videotapes prior to trial and also how the April 6, 1996, videotape was located during the search for the April 5 tape in August and September 2004. An affidavit was also submitted from Jenifer Grundy, a BOP attorney who had personally searched for the April 5 and April 6 videotapes in 2002. An affidavit was also submitted from Carmen Diehl, a legal instruments examiner at USP-Florence, describing his efforts to locate the April 5 and April 6 videotapes prior to trial. Finally, an affidavit was submitted by Thomas Storey, a Special Investigative Agent at USP-Florence, describing the search he made in August and September 2004 for the April 5 videotape and how, during that search, the April 6 videotape was discovered.

On December 6, 2004, the district court resumed the hearing on the new trial motions. Three FBI agents who had been involved in the interviews of Pedro Castillo in 2000 testified. Retired Special Agent Richard Karr had been the case agent during the investigation of the unlawful beatings at USP-Florence. Tr., 12/6/04 Hr'g, at 145 (NT III). In June 2000, Agent Karr arranged for an agent in California to interview Pedro Castillo, who was then incarcerated in Lompoc Penitentiary, California. Agent Karr did not provide any photographs to the agent

in California and did not direct that a photo line-up be used. Tr., 12/6/04 Hr'g, at 200-203, 213 (NT III). Agent Karr believed that a photo line-up would not have necessarily excluded a defendant as a suspect, even if Castillo had not been able to identify him. Tr., 12/6/04 Hr'g, at 213 (NT III).

Retired Special Agent Daniel Payne testified about his interviews with Castillo at Lompoc in June and December 2000. Agent Payne asked Castillo to identify by name the persons involved in the beating because he was trying to determine if Castillo could identify them. Tr., 12/6/04 Hr'g, at 229-230 (NT III). He testified that it was not common to use photographs in such an interview. Tr., 12/6/04 Hr'g, at 229 (NT III). Castillo was able to name Gutierrez and an officer he identified as "Naval," but he was unable to identify any others. See Tr., 12/6/04 Hr'g, at 235 (NT III).[4] Agent Payne testified that photographs were never discussed with Castillo during the interviews. Tr., 12/6/04 Hr'g, at 236 (NT III). Special Agent Michael Plunkett testified that he believed he had attended the December 2000 interview because he was a new agent and wanted to observe Agent Payne conduct an interview. Tr., 12/6/04 Hr'g, at 238 (NT III). Agent Plunkett testified that he had not suggested to Agent Payne that photographs should be shown to Castillo. Tr., 12/6/04 Hr'g, at 242 (NT III). Schultz wanted to also call Agent Castaneda as a witness. Agent Castaneda was present, but the

[4] In 2004, federal investigators showed Castillo a photograph of Michael LaVallee, and Castillo stated that this was the person he had identified in 2000 as "Naval." R. 1552 (Pedro Castillo 7/19/04 Aff. ¶ 6) (NT I).

district court, after hearing Schultz's explanation of what he hoped to show with Castaneda's testimony, concluded his testimony would not have been relevant and ruled he could not testify. Tr., 12/6/04 Hr'g, at 215-224 (NT III).

The district court also watched the April 6, 1996, videotape. The government provides here a summary of what the videotape depicts. The tape has three segments, only one of which involves Pedro Castillo.[5] The third segment begins with Castillo in his cell. Schultz is heard at the door of the cell speaking to him. Castillo is apparently claiming to have swallowed razor blades. Castillo appears to be disturbed or agitated; he is sitting on his bunk fidgeting. He has what appears to be a large bandage wrapped around his torso. At one point, Castillo declines to answer Schultz's question, and Schultz comments that Castillo does not want to talk to him.

It appears that a physician's assistant arrives and Castillo shows him a cup that apparently contains blood, to show that he is spitting up blood. The physician's assistant apparently directs that Castillo be taken to the infirmary for x-rays. Castillo is ordered to put his hands through the food slot so he can be cuffed, and he complies. Castillo is brought out into the hall, and Schultz puts a belly chain around him and then attaches the cuffs to the belly chain. Schultz then leads Castillo to the infirmary. (The video recording stops after Castillo is placed in the x-ray room and begins again when he is taken out.) Castillo is returned to his cell.

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[5] The first segment depicts a cell move in the segregation unit on April 6, 1996. The second segment depicts a corrections officer moving a different inmate.

The video recording begins again, apparently at a later time, with Castillo again sitting on his bunk. He uses some object to cut at his chest and knees. Eventually he is able to cut himself so that he bleeds. Castillo's cell mate gets the attention of one of the officers and states that Castillo is cutting himself. The guards then perform a forced cell move. They direct the cell mate to cuff up and he complies. Several officers then enter the cell and put restraints on Castillo. They move Castillo to a holding cell where he is examined by a physician's assistant.

By order dated December 10, 2004, the district court denied the motions for new trial. R. 1615 (NT I) (also attached to appellant's brief). First, as to the new trial motion based on Castillo's testimony, the court found that Schultz had not met his burden to show that he had been diligent in obtaining this evidence. Order at 4. The court found that although Schultz knew that he was accused of beating Castillo, he had failed to show any efforts he had made to locate and interview Castillo. Order at 4. The court also concluded that Castillo's testimony would not probably have resulted in an acquittal because Castillo's testimony was inconsistent with Schultz's defense, Castillo's own prior statements, and the testimony of the two corrections officers who testified at trial. Order at 6.

The district court then found that Schultz was not entitled to a new trial based on the newly discovered evidence of the April 6, 1996, videotape. The court concluded that the tape was not material and would not probably result in an acquittal. Order at 7. The court concluded that the videotape was not inconsistent

with the government's trial evidence and the tape did not prove that Schultz was not involved in beating Castillo on April 5, 1996. Order at 7. In response to Schultz's argument based on *Brady*, the court concluded that the tape was not favorable to the defense but was "at best * * * neutral." Order at 8. The court also concluded that the tape was not material under *Brady* because it did not prove that Castillo was not beaten on April 5 nor that Schultz was not involved. Order at 8.

SUMMARY OF THE ARGUMENT

1. The district court did not abuse its discretion in denying Schultz's motion for new trial based on Castillo's testimony that Schultz did not beat him because he was not present on April 5, 1996. To obtain a new trial based on newly discovered evidence, a defendant must show, among other things, that he exercised due diligence in seeking the evidence prior to trial and that the evidence would probably result in an acquittal.

Schultz presented no evidence that he had been diligent in seeking Castillo's testimony. Schultz argues that he should be relieved of his duty to present such evidence. The district court found that the government had not put on perjured testimony. That finding was not clearly erroneous. Nor does Schultz show why, even if the government had put on false testimony, that would relieve him of his duty to show due diligence.

The district court found that Castillo's testimony would not have probably resulted in an acquittal. This finding was not an abuse of discretion. The district court questioned Castillo's credibility because he was unstable. Moreover,

Castillo's testimony that Schultz was not present when he was beaten contradicted the testimony of two officers who were present at the beating and was inconsistent with Schultz's own defense. Schultz had filed a report stating he was present during the incident on April 5, 1996; the report did not indicate anyone had beaten Castillo. At trial, Schultz maintained the report was true.

2. The district court did not err in denying Schultz's motion for a new trial based on the failure to disclose a videotape depicting Castillo on the day after he was beaten by Schultz. The tape is not favorable to the defense nor is it material to guilt because it does not counter any of the government's evidence supporting Schultz's conviction.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED SCHULTZ'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

A. Standard Of Review

This Court reviews a denial of a motion for new trial under Rule 33, Federal Rules of Criminal Procedure, for abuse of discretion. *United States* v. *Higgins*, 282 F.3d 1261, 1278 (10th Cir. 2002). A district court abuses its discretion in denying a motion for a new trial "only if it is arbitrary, capricious, whimsical, or manifestly unreasonable." *United States* v. *Combs*, 267 F.3d 1167, 1176 (2001); see also *United States* v. *Stiger*, 413 F.3d 1185, 1194 (10th Cir. 2005) ("In reviewing a court's determination for abuse of discretion, we will not disturb the

determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment.") (internal quotation marks omitted).

B. Legal Standard

Rule 33(a), Federal Rules of Criminal Procedure, provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "[A] motion for new trial is regarded with disfavor and should only be granted with great caution." *United States* v. *Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999). In the context of a motion for new trial based on newly discovered evidence, this Court applies a five part test to determine whether the "interest of justice requires" a new trial. To obtain a new trial, Schultz was required to show:

> (1) the evidence was discovered after trial, (2) the failure to learn of the evidence was not caused by [his] own lack of diligence, (3) the new evidence is not merely impeaching, (4) the new evidence is material to the principal issue involved, and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal.

Id. at 1147. Although Schultz argues (Br. 35) that the "interest of justice" standard is a separate inquiry from the five-part test, this Court has held that the five-part test determines when the interest of justice standard has been met. *Quintanilla*, 193 F.3d at 1147.

C. The District Court Did Not Abuse Its Discretion In Concluding Schultz Failed To Meet His Burden To Obtain A New Trial

1. The District Court Did Not Abuse Its Discretion In Finding Schultz Had Not Shown Due Diligence

The government does not take issue with Schultz's contention that he did not "discover" Castillo's testimony until after trial, as required by the first element of the five-part test. Schultz concedes (Br. 27), however, that the second element — that he used due diligence in trying to obtain the evidence — is "a visible problem" for him. The district court ruled that this element had not been met:

> Defendants did not show that the failure to discover this evidence was not caused by Defendants' lack of diligence. Defendants have known since the indictment that they were charged with the beating of Pedro Castillo. As Defendants maintained their innocence in connection with this beating, they certainly knew or should have known to interview Castillo to see what the basis of his claim was. Further, Defendant Schultz should have known from the FBI 302 reports provided to him that he was not identified by name, and that Castillo may not have implicated him specifically in the beating. Again, this should have put him on notice that he might want to interview Castillo. Neither Defendant Schultz nor LaVallee have detailed in their motions or their oral argument any efforts that they made to locate Castillo and interview him before trial. Further, they have not shown that they did try to locate him prior to trial and could not do so. Indeed, the Government states that Castillo was available to be interviewed while he was incarcerated in the [BOP] or that he could be located after he was released through information in the BOP's possession.

Order at 4. The district court found that "Castillo was readily available because he was under the control of the Bureau of Prisons until sometime in 2002. And then after that, there was an ability to find him and talk to him if someone had wanted to." Tr., 12/6/04 Hr'g, at 302 (NT III).

This is not a case in which the defendant explained the steps he took to locate the evidence and the district court found it insufficient. Here, Schultz took the position that he was not required to show due diligence despite the district court's repeated admonitions that he bore the burden of showing the second element had been met. See, *e.g.*, Tr., 10/4/04 Hr'g, at 72-73, 100-101 (NT II). Schultz informed the district court he would only provide "argument" in support of his burden on the second element, but not evidence. Tr., 10/4/04 Hr'g, at 72 (NT II). Thus, unless Schultz can show he was entirely relieved of his burden to show the second element, he failed to meet his burden to obtain a new trial.

Schultz argues (Br. 28) that he can meet his burden on the second element because "[t]he government produced inaccurate and misleading reports." Schultz's legal argument is baseless. Schultz relies on *obiter dictum* in this Court's decision *United States* v. *Sinclair*, 109 F.3d 1527 (10th Cir. 1997). This Court contrasted the "possibility" standard adopted by some courts with this Court's "probability" standard — that is, under the fifth element of the test, the newly discovered evidence must be such that it "would probably produce an acquittal." 109 F.3d at 1531. This Court noted that some courts had limited the application of the "possibility" standard to cases where "the government knowingly, recklessly, or negligently used the perjured testimony." 109 F.3d at 1532 (collecting cases). This Court declined to adopt the "possibility" standard under the facts of *Sinclair* but noted that the standard "*might* be appropriate when the government has knowingly, recklessly, or negligently offered false testimony." 109 F.3d at 1532

(emphasis added).

Schultz argues that the *obiter dictum* from *Sinclair* about when the "possibility" standard might be appropriate for analyzing the fifth element of the test somehow shows that some lower standard is appropriate for the second element in this case. But Schultz only argues (Br. 30-33) that the government knowingly or at least recklessly or negligently used perjured testimony. Under the *dictum* of *Sinclair*, that discussion *might* be relevant to the fifth element — the probability that the new trial will result in an acquittal. The government will address Schultz's allegations in the context of the fifth element below. But it appears that no court has ever held or even suggested that government misconduct would eliminate the defendant's burden to show that he had been diligent. At bottom, Schultz asks this Court to ignore his refusal to put on any evidence regarding due diligence merely because he has made unsupported allegations of government misconduct. This Court should decline his invitation.

Moreover, the district court disagreed that the reports provided to Schultz were inaccurate or misled him regarding whether Castillo had specifically identified him. Order at 4. The testimony of the FBI agents at the December 6, 2005, hearing demonstrated that the reports were accurate: When he was interviewed in 2000 in California, Castillo maintained that all of the five or more guards who had entered his cell participated in the beating, but he was only able to name two, neither of whom was Schultz, and one of those names was incorrect.

See, Tr., 12/6/04 Hr'g, at 158-174, 228-235 (NT III).[6]

Schultz failed to show that the government's conduct during the investigation was in any way improper. More importantly, Schultz failed to show — or even attempt to show — any connection between the government's conduct and Schultz's failure to look for Castillo until sometime in 2004.

2. The District Court Did Not Abuse Its Discretion In Concluding That Castillo's Testimony Would Not Probably Result In An Acquittal

In addressing the fifth element, the district court concluded that Castillo's testimony would not likely result in Schultz's acquittal for several reasons:

> First, Castillo's new statement that Schultz was not there on the day in question is inconsistent with Schultz's defense that he was on duty that day and that no one who was on duty beat him. Second, Castillo's new statement is inconsistent with other statements given to the FBI (that all of the officers who moved him on the day in question beat him and/or that he does not know if Schultz beat him). Fourth [*sic*], two corrections officers testified that Schultz did beat Castillo. Given the inconsistencies, even in Castillo's own statements, I find that an acquittal would not probably result from Castillo's statements.

Order at 6. The district court also questioned Castillo's credibility based on his

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[6] Although it is unclear why Schultz believes this supports his argument regarding the second element, Schultz complains (Br. 29) that the government had threatened witnesses during the investigation. Although Schultz cites supposed incidents of misconduct in his appellate brief, those pretrial allegations related to the motions of other defendants to suppress evidence (the September 25, 2001 testimony) or the various motions of all the defendants dismiss the indictment (the May 2002 testimony). One defendant withdrew his motion to suppress, Tr., 9/25/01 Hr'g, at 142 (X), and the district court rejected the other, R. 363, 9/27/01 Order at 5-6 (II). On January 3, 2003, the district court rejected all the defendants' arguments in support of their motions to dismiss the indictment. R. 726. Schultz did not challenge those rulings in his direct appeal.

emotional instability. Order at 6 n.1.[7]

The district court did not abuse its discretion in finding Castillo's testimony would not probably result in an acquittal. Castillo's testimony was not credible, it was subject to impeachment, and is inconsistent with Schultz's defense at trial.

Schultz's arguments on appeal, as in the district court, rest on the assumption that Castillo's testimony is unquestionably true and that the testimony of Officers Mitchell and Gutierrez was therefore unquestionably false. But the district court made the opposite finding, and Schultz does not argue that this finding was clearly erroneous. Schultz simply ignores the district court's adverse credibility finding.

Moreover, Castillo could be subjected to substantial impeachment regarding the basis of his belief that Schultz had not beaten him. Indeed, at the October 4, 2004, hearing, Castillo seemed to indicate, although his testimony is not entirely clear, that he believed that Schultz was not present on the day he was beaten

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[7] At the December 6, 2004, hearing, the district court stated, in response to Schultz's reliance on Castillo's version of events, "Mr. Castillo said what he said, but I'm not so sure about his — what's the right word to use — his level of lucidity. He said one thing on direct examination. Then on cross-examination, he changed his story a little bit. I mean, there's some questions to be raised about whether or not the Court should accept at face value what Mr. Castillo said." Tr., 12/6/04 Hr'g, at 262 (NT III). Later, in ruling on the motions for new trial, the district court stated, "Mr. Castillo requires a lot of care and attention right now, based on what his brother said. I'm not so sure that he's of sound mind. I'm not making a finding that he's not. * * * I'm not convinced that even if Castillo had testified, the jury would have necessarily believed something today that was at variance with what may have actually happened in 1996." Tr., 12/6/04 Hr'g, at 303-304 (NT III).

because someone had told him that Schultz was not present. Tr., 10/4/04 Hr'g, at 55 ("I would like to tell Your Honor that what they told me is that they took that gentleman off the shift, that's what they told me.") (NT II).[8] Castillo did not indicate who had told him this or when, but obviously Castillo's testimony at a new trial that Schultz was not present would be subject to significant impeachment if it were shown that this "recollection" was in fact something suggested to him by someone else rather than his own memory of events.[9] And Castillo's recollection could be further impeached because during the June 25, 2004, interview by FBI agents, the agents showed Castillo photographs of Cecil Freeman and Ken Shatto, who, as discussed above, were involved in the forced cell move on April 5, 1996, and like Schultz had submitted reports afterwards; Castillo, however, stated that neither of them had been involved. R. 1552 (Castillo Aff. ¶ 12) (NT I); see also Tr., 12/6/04 Hr'g, at 174-175 (NT III).

Finally, Schultz has steadfastly ignored the glaring contradiction, recognized by the district court, between Castillo's testimony and Schultz's defense at trial. Castillo maintained that all of the five or more officers involved in moving him beat him, but that Schultz was not one of them because he was not present. Schultz

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[8] In stating that someone told him Schultz was not present, Castillo may be trying to answer the district court's prior question "And how do you know [Schultz did not beat you]?" Tr., 10/4/04 Hr'g, at 55 (NT II).

[9] Miguel Braun, the private investigator who first interviewed Castillo in 2004, was present at the October 6, 2004, hearing but did not testify. The record does not reflect, therefore, any further information about the interview at which Castillo apparently first stated that Schultz had not been present that day.

maintained at trial that his reports on the April 5, 1996, incident were true: He participated in moving Castillo and no officer beat him. Schultz would thus have to somehow convince the jury that Castillo should be believed when he states that Schultz did not beat him, but not be believed when he states that five or more officers beat him and that Schultz was not present. In this regard, Castillo's testimony is more supportive of Mitchell's and Gutierrez's testimony incriminating Schultz than of Schultz's defense.

Schultz ignores another glaring problem with his using Castillo's testimony: Castillo's testimony, even if entirely true, strongly incriminates Schultz on the conspiracy charge. If Schultz argued that he did not beat Castillo either because he was not present that day or because he did not participate in the forced cell move, Schultz would have to explain to the jury why his report on the incident indicated that he had participated in the forced cell move and had stated — contrary to Castillo's testimony — that no one beat Castillo. The government introduced at trial evidence that as part of the conspiracy, officers would file reports falsely claiming to have been present when an inmate was injured. For example, Lieutenant David Armstrong testified that Schultz asked him to file a false report claiming that he saw an inmate named Hron fall and cut his face to support Schultz's report that this was how the inmate had been injured. Trl. Tr. at 3750-3752 (LXIII).[10] Thus, even if Schultz adopted a new "defense" to the charge that

[10] This incident with Hron was charged as overt acts "s," "t," and "u" in the conspiracy count. The government's opening brief in the direct appeal discusses in

he beat Castillo by adopting Castillo's testimony, this "defense" would implicate him in the conspiracy.

In summary, the district court did not abuse its discretion in finding Schultz had not shown that Castillo's testimony would probably have resulted in an acquittal.

As discussed above, Schultz (Br. 30-33) argues in support of his claim that he satisfied the *second element*, that the government knowingly or perhaps recklessly or negligently put on false testimony — that is, Mitchell's and Gutierrez's testimony regarding Schultz's involvement in beating Castillo. As discussed above, this Court in *Sinclair* noted that proof of such government misconduct *might* lower the defendant's burden of proof under the *fifth element*. As in *Sinclair*, this Court need not decide in this case whether that lower standard would be appropriate. The district court found that Schultz had failed to show the government knowingly, recklessly, or negligently presented false testimony. Order at 5-6. That finding is consistent with the evidence and was not clearly erroneous. Schultz's contrary arguments are unavailing.

Schultz argues (Br. 31) that Castillo testified that FBI agents showed him a photograph of Rod Schultz in 2000 when he was interviewed in prison in California. Castillo's testimony is less clear than Schultz asserts. After asking Castillo about being interviewed in California, Schultz's counsel asked Castillo if

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more detail the evidence relating to the Hron incident and other instances of the defendants' using false reports and fake injuries to cover-up the unlawful beatings.

the agents had shown him photographs. Castillo responded "Just this one." Tr., 10/4/04 Hr'g, at 38 (NT II). Schultz's counsel clarified that Castillo was indicating that he had been shown the photograph of Rod Schultz that *Schultz* had entered as an exhibit at the hearing. *Ibid*. Castillo certainly was shown photographs of Schultz in 2004 by the private investigator and by the federal investigators who interviewed him. But at the December 6, 2004, hearing, the FBI agents involved in the 2000 interviews testified that Castillo was not shown any photographs then. See, *e.g.*, Tr., 12/6/04 Hr'g, at 236, 242 (NT III). Indeed, the case agent testified that the agents in California who conducted the interview would not have had any photographs and that he did not send them any. Tr., 12/6/04 Hr'g, at 158 (NT III). Given the ambiguity of Castillo's statement, his lack of credibility, and the contrary testimony of the FBI agents, the district court did not clearly err by rejecting Schultz's version of events.

Schultz argues (Br. 31) in the alternative that even if Castillo's statement regarding being shown photographs relates to his 2004 interview, the government still recklessly or negligently presented false testimony because it did not show any photographs to Castillo in 2000. That assertion is meritless. The FBI agents explained at the December 6, 2004, hearing that the decision not to show photographs to Castillo for identification was consistent with FBI policy and a prudent investigative decision. See, *e.g.*, Tr., 12/6/04 Hr'g, at 200-201, 211-212, 229-233 (NT III). Schultz presented no evidence to counter their testimony. But even if the investigation had been incompetent, Schultz still cannot show that the

trial testimony was false. The district court found that Castillo's version of events, rather than Mitchell's and Gutierrez's, was unworthy of belief.

Schultz's argument that the government knowingly, recklessly, or negligently put on false testimony is therefore baseless.

II

THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT SCHULTZ WAS NOT ENTITLED TO A NEW TRIAL UNDER *BRADY* V. *MARYLAND*

A. Standard Of Review

This Court reviews *de novo* the denial of a new motion based on an alleged *Brady* violation. *United States* v. *Combs*, 267 F.3d 1167, 1172 (10th Cir. 2001). This Court will reverse the district court's denial of a new trial based on a *Brady* violation only where the violation deprived the defendant of a fair trial. *United States* v. *Lopez*, 372 F.3d 1207, 1210 (10th Cir. 2004).

B. Legal Standard

Under *Brady*, the government has an obligation to disclose to the defense exculpatory evidence in its possession. When a defendant bases a motion for a new trial on an alleged *Brady* violation, the defendant must show: "(1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material." *Combs*, 267 F.3d at 1172. Impeachment evidence can satisfy the second element. *Id.* at 1175. The third element "requires proof that the evidence was material either to guilt or punishment." *Ibid.* (internal quotation marks omitted). "Evidence is therefore material 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ibid*. (internal quotation marks omitted).

C. The District Court Did Not Err In Denying Schultz's Motion For A New Trial Based On the April 6, 1996, Videotape

The district court concluded that the April 6 videotape did not satisfy the standard under *Brady* for obtaining a new trial. Order at 8.[11] The government does not argue that the tape was not "suppressed" within the meaning of *Brady*.[12]

The district court found that the videotape was not favorable to Schultz nor was it material. Order at 8. Schultz argues (Br. 40) that the videotape is favorable to the defense because it would have impeached Mitchell's and Gutierrez's testimony of what occurred the previous day, April 5, 1996. Similarly, Schultz argues (Br. 42-43) that the videotape was material because it would have rebutted

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[11] The district court also concluded that the videotape did not satisfy the five-part test under Rule 33 for new trials based on newly discovered evidence. Order at 7. Schultz does not argue on appeal that the district court abused its discretion in denying his Rule 33 motion based on the videotape.

[12] The district court concluded that the government had searched for the tape when it was requested prior to trial but had not been able to find it until 2004, "through no fault of the Government." Order at 8. That finding is fully supported by the affidavits submitted by the government, and Schultz offered no counter-evidence. Although there is no finding of misconduct by the government, "suppression" under *Brady* can be satisfied even when no misconduct occurred. See *Brady* v. *Maryland*, 373 U.S. 87 (1963) (suppression inquiry does not depend on the good faith or bad faith of the prosecutor); *United States* v. *Hernandez-Muniz*, 170 F.3d 1007, 1010-1011 (10th Cir. 1999) (same) (quoting *Brady*).

the government's case.

Schultz argues (Br. 41-42) that because the videotape shows Castillo being compliant with Schultz on April 6, 1996, it demonstrates that Schultz could not have beaten Castillo on April 5, 1996. Schultz contends (Br. 42) that it "defies human nature" to believe that an inmate beaten on one day would be "cooperative, compliant, and nonchalant" the next day. But the government's theory of the case was that Schultz and LaVallee beat Castillo to teach him a lesson for previous misbehavior. That the plan to teach Castillo a lesson apparently worked is not inconsistent with the government's theory: It does not "def[y] human nature" to believe that an inmate beaten for misbehavior on one day is seen to be compliant the following day. As the district court concluded in rejecting Schultz's argument: "It is a fact of life that in a prison setting, prisoners are forced to interact on a daily basis with the correctional officers, even those officers that may have mistreated or abused the prisoners. The fact that Castillo did not visibly react to Rod Schultz on the videotape does not necessarily prove that Schultz was not involved in beating Castillo the day before." Order at 7.

Schultz also argues (Br. 40, 42) that because Castillo is seen on the April 6 videotape cutting himself, the tape supports the defense contention that officers moved Castillo out of his cell on April 5 because he was cutting himself. The government did not argue that Castillo never cut himself. To the contrary, the government's evidence established that Castillo was known as a self-mutilator, who cut himself when he was upset or wanted attention. It was the government's

theory that the defendants falsely claimed that Castillo had been cutting himself precisely because it was a plausible explanation. See Tr., 12/6/04 Hr'g, at 307 (district court rejects Schultz's argument because court recalled the evidence of self-mutilation at trial) (NT III). The videotape is consistent with the government's evidence.

Schultz also argues (Br. 41) that Castillo's movements seen on the videotape were inconsistent with his having been beaten the day before. The district court rejected that argument. The court stated that the bandage Castillo is wearing is consistent with the trial evidence that he had been beaten in the kidney area. Order at 7. Further, the court concluded that Castillo's movements were consistent with the evidence of the type of beating he received the previous day. Order at 7; see also Tr., 12/6/04 Hr'g, at 304 (same) (NT III).

Simply stated, the videotape is not favorable to the defense nor is it material to guilt because it does not counter the government's case against Schultz. Nothing on the tape is inconsistent with the evidence presented at trial regarding the beating of Castillo. This Court recently held that suppressed evidence that did not "affect" the government's evidence supporting the defendant's conviction was not "favorable" evidence under *Brady*. See *United States* v. *Summers*, 414 F.3d 1287, 1304 (10th Cir. 2005). Moreover, this Court has also held that impeachment evidence that "would not prove" the defendant was not involved in the crime is not material under *Brady*. *United States* v. *Combs*, 267 F.3d 1167, 1176 (10th Cir. 2001).

The district court did not err in denying Schultz's motion based on the suppressed videotape.

III

SCHULTZ'S CLAIMS REGARDING PROSECUTORIAL MISCONDUCT WERE NOT MADE BELOW AND ARE THEREFORE WAIVED

Schultz makes two lengthy arguments alleging prosecutorial misconduct. Both are based on Schultz's reading of Jenifer Grundy's affidavit describing her efforts to locate the April 5 and April 6, 1996, videotapes. First, Schultz argues (Br. 43-52) that the affidavit demonstrates that the prosecutors lied to the district court prior to trial and lied to the jury during the trial regarding who was responsible for the absence of the April 5, 1996, videotape. Second, Schultz argues (Br. 52-59) that the prosecution engaged in unethical and unprofessional conduct. The gravamen of this argument is not entirely clear, but Schultz seems to be arguing that the government intentionally destroyed the April 5, 1996, videotape because it was exculpatory.[13]

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[13] While Schultz argues that Grundy's affidavit proves that the government intentionally destroyed the April 5, 1996, videotape, Schultz mischaracterizes the affidavit. Grundy's affidavit states that "[b]y the time we were first asked to produce [the April 5 and April 6, 1996] videotapes, I was advised by [Special Investigative Services] staff that they were no longer located in the files, having been destroyed in the ordinary course of business." R. 1593 (Grundy Aff. ¶ 7) (NT I). Schultz does not acknowledge that Grundy's affidavit also states that after she was told they had been destroyed, she still asked her staff to search for them more than once, and was repeatedly told they did not exist. Grundy Aff. ¶ 8-10. In late 2002, in response to another request for the tapes, Grundy herself searched for the tapes but was unable to find them. Grundy Aff. ¶ 11-12. Obviously the statement

(continued...)

Neither of these arguments was made below in support of the new trial motion, so neither was addressed by the district court. Because Schultz failed to timely present these grounds for a new trial to the district court, they cannot be raised on appeal. See *United States* v. *Humphrey*, 208 F.3d 1190, 1200 (10th Cir. 2000) (issue waived on appeal where, although known to counsel, it was not presented to district court as basis for new trial until motion for reconsideration of denial of motion for new trial).

CONCLUSION

The district court's denial of Schultz's motion for new trial should be affirmed.

Respectfully submitted,

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[13](...continued)
that the April 6, 1996, videotape had been destroyed in the normal course of business was mistaken.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument could assist this Court in deciding these appeals and cross-appeals.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14 point Times New Roman font. The brief contains no more than 8,835 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). I relied on my word processor to count the words and it is WordPerfect 9 software.

KARL N. GELLERT
Attorney

DATED: September 14, 2005

CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that the digital version of the foregoing is an exact copy of what has been submitted to the court in written form. I further certify that this digital submission has been scanned with the most recent version of McAfee VirusScan Enterprise (ver. 8.0i) and is virus-free.

_____
KARL N. GELLERT
Attorney

DATED: September 14, 2005

CERTIFICATE OF SERVICE

On September 14, 2005, I served the foregoing BRIEF OF THE UNITED STATES AS APPELLEE by Federal Express next day delivery, as well as an electronic copy of the same, on:

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