App No. _____

In The

Supreme Court of the United States

JOSEPH ALLEN MALDONADO-PASSAGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari from the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether due process and this Court's precedents (*Napue v. Illinois*, *Giglio v. United States*, *Kyles v. Whitley*) require a federal trial court to hold an evidentiary hearing before denying a Rule 33 motion for new trial where multiple sworn post-trial recantations by accusing witnesses admit perjury and reveal undisclosed inducements, where the credibility of those witnesses was decisive at trial.

2. Whether a court of appeals violates *Kyles v. Whitley*, 514 U.S. 419 (1995), when it rejects a *Brady* claim by evaluating each suppressed item in isolation rather than cumulatively, particularly where suppressed impeachment evidence, corroborated recantations, and physical-evidence irregularities collectively undermine confidence in a criminal verdict.

3. Whether an appellate court may invoke the invited-error or waiver doctrine to bar review of the *legal standard* a district court applied in denying a Rule 33 new-trial motion when (a) the law in that circuit was unsettled, (b) the defendant advanced alternative standards below, and (c) the doctrine thus precludes review of whether the correct legal rule governed the outcome.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- The United States of America, Appellee and Respondent.

- Joseph Allen Maldonado-Passage, Appellant and Petitioner.

LIST OF PROCEEDINGS

United States District Court for the Western District of Oklahoma Case No. 18-cr-227-SLP: *The United States of America vs. Joseph Allen Maldonado*

Judgment was entered on November 21, 2023.

United States Court of Appeals for the 10th Circuit, Case No. 23-6207: *United States of America vs. Joseph Allen Maldonado*

Judgment was entered on July 9, 2025.

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The following orders are all unpublished:

The district court's order denying petitioner's motion for new trial (W.D. Okla. No. 5:18-cr-00227, June 2023).

The judgment of the United States Court of Appeals for the Tenth Circuit (No. 23-6207, July 9, 2025).

The Tenth Circuit's order denying rehearing en banc (Aug. 28, 2025).

JURISDICTION

Judgment was entered July 9, 2025. A timely petition for rehearing en banc was filed August 4 and denied October 1, 2025. This petition filed a motion for enlargement of time within ninety days of that denial. On December 30, 2025 Justice Gorsuch extended time until January 29, 2026. Jurisdiction lies under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. amend. V – "No person shall … be deprived of life, liberty, or property, without due process of law."

2. Fed. R. Crim. P. 33(a) – "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."

3. 16 U.S.C. § 1538(a)(1)(B) – It is unlawful for any person subject to U.S. jurisdiction to "take" an endangered species within the United States.

STATEMENT OF THE CASE AND FACTS

A. Overview

This case arises from one of the nation's most publicized prosecutions, the case of Joseph Allen Maldonado-Passage ("Maldonado")—widely known as "Joe Exotic" from the documentary series *Tiger King*. Maldonado was convicted in the Western District of Oklahoma of two counts of using interstate facilities in a murder-for-hire scheme, 18 U.S.C. § 1958(a), nine counts under the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B), and eight counts of violating the Lacy Act by various wildlife paperwork violations.

The Rivalry between Maldonado and Carole Baskin

This case arose from an intense personal, litigation, operational, and even political, rivalry between two of America's two largest big cat exhibitors. Joe Exotic's Greater Wynnewood Exotic Animal Park in Oklahoma was the largest private tiger zoo in the Western Hemisphere, with over 200 big cats. Maldonado, the colorful showman and "Tiger King," was a Libertarian candidate for office, and an active traveling exhibitor and breeder of tigers, lions, and liligers. Meanwhile Baskin, the proprietor of a rival tiger facility in Florida, billed herself as one of America's chief animal rights advocates. Beginning around 2010, Baskin had been the leader in a political movement to ban private

sales and exhibitions of big cats. Baskin had lodged numerous complaints against Maldonado for 'animal abuse' and had enlisted teams of investigators to monitor Maldonado's exhibitions.

This rivalry culminated in several lawsuits, a $1 million judgment against Maldonado, and weekly broadcasts by Maldonado excoriating Baskin.[1] In September 2018, Maldonado was indicted for two counts of allegedly plotting to kill Carole Baskin. Maldonado was ordered detained without bail. Soon more criminal counts were added, including alleged violations of the Endangered Species Act.

B. The Trial Proceedings

At trial, the government's case portrayed petitioner as orchestrating a murder-for-hire plot against Carole Baskin. The prosecution's narrative depended almost entirely on three cooperating witnesses:

- **Allen Glover**, a zoo employee alleged to have agreed to kill Baskin for money;

[1] At trial the district court forbade Petitioner from illuminating certain particular foundations for Maldonado's investigation of Baskin, such as Maldonado's interest in exposing Baskin as a likely suspect in Baskin's former husband's disappearance. Though of little relevance here, the question of Baskin's involvement in her prior husband's disappearance was the subject of an entire episode of the Tiger King Netflix series, and was developed further in Tiger King II. At trial, the jury was treated only to evidence that Maldonado collected vast papers and files on Baskin—which supported the prosecution's murder-for-hire theory; while the jury was kept in the dark regarding the basis of Maldonado's investigation into Baskin.

- **James Garretson**, a confidential informant who recorded conversations; and
- **Jeff and Lauren Lowe**, business associates who cooperated with federal authorities. Lauren was an actual trial witness; Jeff was not.

No physical evidence established any completed murder plot or travel in interstate commerce to effect it. The government instead relied on the testimony of these cooperators and brief video or text snippets recorded under government direction. These witnesses' credibility therefore formed the linchpin of the case.

On the Endangered Species Act counts, the government charged petitioner under § 1538 for euthanizing five elderly tigers at his zoo, contending that the killings were intentional "takes" unrelated to veterinary necessity. Petitioner testified in his own defense that the tigers were euthanized humanely due to age and illness—an act permitted under veterinary exception principles—and that the government distorted both scientific and factual context. At the time of trial there was no corroborating physical evidence to support Maldonado's testimony.

The jury returned guilty verdicts on all 19 counts. The court imposed a combined 22-year sentence, later modified to 21 years on remand after a limited resentencing appeal.

C. Post-Trial Revelations and Recantations

After trial and during Maldonado's sentencing appeal, multiple government witnesses came forward admitting that they had testified falsely at Maldonado's trial. Several witnesses executed sworn affidavits acknowledging undisclosed government favors and inducements (which the witnesses had denied at trial), and recanting material portions of their testimony. Maldonado moved for a new trial under Rule 33, submitting the recantations and documentary proof—including text messages, phone records, and veterinary evidence which corroborated the recantations:

- **Allen Glover** , the supposed "hired hitman," averred that government agents and Jeff Lowe coached Glover's entire trial testimony. Moreover, Glover swore that he was promised non-prosecution so long as he said what investigators wanted. Glover detailed extensive post-trial regret and provided corroborating communications which substantiated his recanted statements rather than his trial testimony.
- **James Garretson** confirmed that he was promised immunity for his own federal criminal violations so long as he said what the government wanted—in contrast to Garretson's trial testimony, where Garretson had said he had no immunity deal. Garretson's text messages—undisclosed ate the time of trial—confirmed Garretson's recantations; not his trial testimony.

- **Lauren Lowe** stated that she and her husband, Jeff Lowe, misrepresented events under pressure from the government and that they were assured protection from prosecution in exchange for cooperation. Other zoo staff provided statements corroborating these inducements.
- Veterinary and necropsy evidence emerged indicating the five tigers suffered advanced illness and pain, in contradiction to trial testimony. This newly discovered evidence supported Maldonado's defense and trial testimony that euthanasia was medically motivated. Significantly, newly discovered text messages revealed that Special Agent Briant of the U.S. Fish & Wildlife Service had *deliberately* kept carcasses of the five deceased tigers out of evidence to keep Maldonado from being able to have them examined.
- Collectively, this evidence suggested pervasive governmental shaping of false testimony and nondisclosure of inducements—matters requiring reversal under *Brady*, *Giglio*, and *Napue*.

D. The Rule 33 Motion for New Trial

In 2023, petitioner moved for a new trial under Rule 33(a), attaching sworn recantations, veterinary records, and corroborating texts. He argued:

- The government knowingly relied on perjured testimony or failed to correct it, violating *Napue v. Illinois*, 360 U.S. 264 (1959);

- It suppressed impeachment material regarding witness deals and protections, violating *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); and
- The new veterinary evidence undermined the ESA convictions and should have been considered newly discovered scientific proof.

Petitioner requested an evidentiary hearing under *Tenth Circuit* precedent (*United States v. Page*, 828 F.2d 1476 (10th Cir. 1987); *United States v. Ramsey*, 726 F.2d 601 (10th Cir. 1984)).

E. District Court Denial

The district court denied relief without a hearing. Applying the five-factor *Berry v. State* test, 10 Ga. 457 (1851), as adopted in *United States v. Jackson*, 579 F.2d 553 (10th Cir. 1978), it found that petitioner failed to show the evidence would "probably" produce acquittal. It also ruled that the recantations were unreliable because they contradicted trial testimony (which the district court pronounced more credible) and that the ESA evidence was not "newly discovered." The court declined to hold a hearing, reasoning that credibility could be judged on the written record.

F. The Tenth Circuit Affirmance

On July 9, 2025, the Tenth Circuit affirmed. App. 1a–38a.

- The panel held that petitioner had waived most of his arguments by "invited error," by citing the *Berry* test

below and thus could not complain of its use on appeal. (App. 10a–12a.)

- The panel found no abuse of discretion in denying a hearing, concluding that the district judge's familiarity with trial testimony sufficed. (App. 16a–22a.)
- The panel rejected *Brady* claims by examining each alleged nondisclosure in isolation, determining that none was individually material. (App. 23a–31a.)
- The panel also dismissed challenges to the ESA counts, holding that veterinary records were discoverable earlier and that euthanizing endangered animals remains unlawful regardless of motive.

G. Rehearing En Banc

Petitioner sought rehearing en banc, asserting that:

- the invited-error bar improperly foreclosed appellate review of an unsettled legal question;
- the denial of an evidentiary hearing conflicted with circuit and Supreme Court precedent; and
- the panel's *Brady* analysis violated *Kyles*' cumulative-materiality mandate.

The court denied rehearing on October 1, 2025. App. 79a–92a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The District Court's Denial of an Evidentiary Hearing Here is Peculiarly Unjustifiable Here, Where No Fewer Than Three Important Accusing Witnesses Recanted Their Trial Testimony and Now Admit to Giving False Testimony at Maldonado's Trial.

Maldonado's motion for a new trial presented bountiful newly-discovered evidence, concealed from the defense, which thoroughly undermined the legitimacy of the verdict. Trial testimony had been false regarding the most essential elements of the government's case. And, most significantly, this new evidence was supported by corroborating evidence such as contemporaneous text messages while the relevant government testimony at trial was uncorroborated.

But the district court and the Tenth Circuit shrugged off these startling, verdict-undermining, revelations by concluding that the district court was the best judge of the credibility of witnesses, and that the district court assessed the recanters' *original* testimony to be more credible. This was despite newly discovered evidence which corroborated the recantations. The district court referenced the *Berry* test repeatedly, for the proposition that a new trial

may only be granted where recantations would probably result in acquittal.

On Appeal the 10th Circuit Relied on the "Invited Error Doctrine" to Deny the Appeal.

On appeal Maldonado pointed out that the district court overemphasized the *Berry* "probable acquittal" standard for granting new trials based on newly discovered evidence. That standard, argued Maldonado, is controversial among the circuits, and even the 10th Circuit's jurisprudence was not settled on the question. Many federal courts applied "possible acquittal" or "possibly different result" standards. The *Berry* "probable acquittal" test (derived from a 1851 Georgia case), had never been adopted by the Supreme Court.

To this, the United States pointed out that Maldonado's own prior counsel had cited the *Berry* standard in his own initial motion for new trial. The Tenth Circuit Court of Appeals adopted this point, calling Maldonado's own invocation of the *Berry* standard in Maldonado's original motion an "invited error" and holding that Maldonado had waived the issue.

II. THE DISTRICT COURT'S REFUSAL TO HOLD AN EVIDENTIARY HEARING ON SWORN RECANTATIONS OF THE MOST DAMNING TESTIMONY CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENT REQUIRING A HEARING WHEN CREDIBILITY IS IN GENUINE DISPUTE.

a. This Court has long held that convictions resting on false or misleading testimony offend the Fifth Amendment.

Since *Mooney v. Holohan*, 294 U.S. 103 (1935), this Court has condemned the use of false or deceptive evidence by the State as "inconsistent with the rudimentary demands of justice." *Mooney*, 294 U.S. at 112. That principle evolved through *Napue v. Illinois*, 360 U.S. 264 (1959), which declared that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Id. at 269.

In *Giglio v. United States*, 405 U.S. 150 (1972), the Court extended *Napue*: nondisclosure of promises or inducements to government witnesses is functionally equivalent to the knowing use of false testimony. The *Giglio* rule rests on a single constitutional premise—that due process requires the

jury to have a truthful and complete picture of a witness's motive to testify.

Where new evidence surfaces that material testimony was false or was procured by undisclosed (but falsely denied) favors, the "interest of justice" compels judicial inquiry. The refusal to hear that evidence undercuts the most basic guarantee that guilt not rest on perjury. *United States v. Agurs*, 427 U.S. 97, 103 (1976) ("The heart of the holding in *Napue* is the principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction.").

b. Rule 33 and the Due-Process Clause both require that post-trial recantations be tested through live testimony when credibility is disputed.

Federal Rule of Criminal Procedure 33(a) empowers a court to grant a new trial "if the interest of justice so requires." When the new evidence concerns perjury, courts cannot fairly evaluate credibility from paper alone; demeanor, tone, and cross-examination are essential.

The Tenth Circuit itself has recognized this principle repeatedly:
In *United States v. Page*, 828 F.2d 1476 (10th Cir. 1987), the court held that "where the credibility of newly discovered evidence is challenged, a hearing is ordinarily required." Id. at 1478.

United States v. Ramsey, 726 F.2d 601 (10th Cir. 1984), required a hearing so that the judge could "see and hear" the witness who had allegedly recanted. Id. at 604.
United States v. Pearson, 203 F.3d 1243 (10th Cir. 2000), reaffirmed that a district court must develop a factual record sufficient for appellate review when a recantation is plausibly credible.

Other circuits uniformly follow the same rule:
Fourth Circuit — *United States v. Wallace*, 528 F.2d 863 (4th Cir. 1976) (reversal where trial court denied hearing despite sworn recantation).
Seventh Circuit — *United States v. Johnson*, 327 F.3d 554 (7th Cir. 2003) (same).
Ninth Circuit — *United States v. Berry*, 624 F.2d 1031 (9th Cir. 1980) (hearing required when new affidavits "raise substantial questions of veracity").

The decision below departed from this settled law by upholding the denial of an evidentiary hearing despite multiple sworn recantations corroborated by physical evidence. That holding creates a square conflict and erodes uniform federal practice.

c. Paper review of credibility contravenes this Court's guidance in *Townsend v. Sain* and undermines confidence in verdicts.

In *Townsend v. Sain*, 372 U.S. 293 (1963), this Court held that federal courts must conduct

evidentiary hearings when material factual disputes turn on credibility. Although *Townsend* arose in the habeas context, its rationale applies equally here: "where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court." *Id.* at 312. The same logic governs a Rule 33 motion. A judge reading affidavits cannot reliably assess whether a witness has lied, repented, or been coerced. Demeanor evidence, tone, and cross-examination remain the touchstones of credibility. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). As *Townsend* recognized, paper credibility findings are "frail reeds upon which to rest a finding of fact." *Id.* at 322.

Here, the district court relied on its memory of trial testimony to declare that the witnesses' recantations were incredible. But the entire purpose of the new evidence was to show that those same witnesses lied under oath in that very trial. Allowing a judge to reaffirm earlier impressions without testing the new statements transforms the Rule 33 process into a perfunctory endorsement of the status quo.

d. The government's justifications for denying a hearing are incompatible with due process.

The government argued that the trial judge "observed the witnesses" and therefore could decide credibility without further evidence. But observation years earlier under adversarial conditions cannot substitute for live examination when the testimony has changed. Indeed, this Court in *Napue* emphasized that even a small falsehood about a witness's motive to lie is material when credibility was central. 360 U.S. at 269–70.

Nor can the government rely on a generalized interest in finality. "Finality is not a moral absolute," *Schlup v. Delo*, 513 U.S. 298, 322 (1995); it must yield when "the conviction may well be the result of perjured testimony." *United States v. Connelly*, 504 F.3d 206, 212 (1st Cir. 2007). The *interest of justice* standard in Rule 33 is the antithesis of rigid finality—it is designed to reopen cases when credible new evidence casts doubt on the verdict's integrity.

e. The lower courts' failure to hold a hearing had concrete, prejudicial effects in this case.

The sworn recantations of Glover, Garretson, and the Lowes directly contradict the trial narrative that petitioner hired a "hitman" and paid him to

travel interstate. Each recantation, standing alone, undermines the element of intent; together, they eviscerate the government's theory.

Corroborating text messages and phone records support these recantations, yet the district court dismissed them as "not credible"—without allowing any examination, cross-examination or expert authentication. This deprived the appellate court of a developed record, leaving mere speculation in place of fact-finding. The denial of a hearing therefore prevented petitioner from establishing falsity, government inducement, and material prejudice—all questions that can only be resolved through testimony.

The same error infected the Endangered-Species-Act counts. Veterinary affidavits explaining that the tigers were euthanized to prevent suffering were summarily rejected as "immaterial." Had the court heard expert or live testimony, it could have determined that humane euthanasia falls outside the intended reach of 16 U.S.C. § 1538(a)(1)(B). Instead, the court's paper dismissal ignored both scientific context and statutory purpose.

f. The decision below deepens an acknowledged circuit conflict over when hearings are required.

Most circuits hold that a district court abuses its discretion by denying a hearing when the new

evidence is sworn, material, and not facially impossible. E.g., *United States v. Valera*, 845 F.2d 923, 928 (11th Cir. 1988); *United States v. Owen*, 500 F.3d 83, 90 (2d Cir. 2007); *United States v. Quinones*, 313 F.3d 49, 67 (2d Cir. 2002).

The Tenth Circuit, however, affirmed denial of a hearing even where the affidavits of recantation were numerous, sworn, and corroborated—placing it squarely at odds with its sister circuits and with *Page* and *Ramsey* within its own precedent.

Supreme Court Rule 10(a) is satisfied: the question whether a district court may summarily dismiss credible recantations without an evidentiary hearing has produced inconsistent outcomes among courts of appeals and implicates fundamental due-process concerns.

g. This Court's review is necessary to preserve confidence in federal verdicts.

The criminal justice system depends on the popular belief that verdicts rest on truth. When sworn witnesses later admit perjury and there is no forum to test those admissions, public faith erodes. As Justice Jackson cautioned, "the appearance of justice must be satisfied." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Requiring live hearings in such circumstances does not invite endless relitigation; it ensures that when the extraordinary event of a recantation occurs,

the judicial process is equipped to distinguish genuine contrition from fabrication. That minimal safeguard is essential to the integrity of criminal adjudication and to the "due process of law" promised by the Fifth Amendment.

h. The Tenth Circuit misapplied the 'invited error' doctrine.

The Tenth Circuit treated petitioner's citation to the *Berry* standard in petitioner's motion for a new trial as an "invitation" that forever barred appellate review. App. 10a–12a. But Maldonado's appeal had challenged the district court's overuse of the *Berry* standard as a "battering ram" to dismiss Maldonado's newly discovered evidence. In holding that Maldonado waived the issue of what test to apply, the Tenth Circuit misapprehended *United States v. Olano*, 507 U.S. 725 (1993). A party cannot be said to invite error when the very question presented is which standard applies.

The invited-error doctrine serves to prevent sandbagging—deliberate attempts to induce reversible error—not to punish good-faith reliance on uncertain law. See *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) ("A defendant who asserts alternative theories does not waive later review merely by referencing one of them.").

The panel's approach also conflicts with decisions holding that the selection of an incorrect

legal standard is reviewable *de novo* despite a party's acquiescence below. E.g., *United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016) ("Whether the district court applied the correct legal test is a question of law we review de novo."); *United States v. Vasquez*, 674 F.3d 680, 684 (7th Cir. 2012) (similar).

i. The circuits are divided over which standard governs new-trial motions based on recanted testimony.

Rule 33 authorizes a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). This Court has never articulated a single standard for assessing recantation claims, leaving lower courts to diverge sharply.

The *Larrison* approach (Seventh and Eighth Circuits).
Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), holds that a new trial is warranted if (1) the court is reasonably well satisfied the testimony was false; (2) without it, the jury *might* have reached a different verdict; and (3) the defendant was surprised or lacked prior knowledge of the falsity. Id. at 87. The Eighth Circuit adopted *Larrison* in *United States v. Runge*, 593 F.2d 66 (8th Cir. 1979), emphasizing that recantations are unique because "credibility, not discoverability, lies at the heart of the matter." Id. at 73.

The *Berry* probability test (Fifth, and Eleventh Circuits).
These courts require proof that the new evidence "would probably produce an acquittal." See *United States v. Jackson*, 579 F.2d 553, 558 (10th Cir. 1978) (adopting *Berry v. State*, 10 Ga. 457 (1851)); *United States v. Jernigan*, 341 F.3d 1273, 1287 (11th Cir. 2003). This stricter standard, devised for newly discovered physical evidence, imposes an almost insurmountable burden in perjury cases, where credibility rather than tangible proof is dispositive.

Hybrid or flexible approaches (Second, Fourth, and Ninth Circuits).
The Second Circuit recognizes that when the new evidence shows a government witness committed perjury, the "interest of justice" may demand a new trial if the false testimony *could* in any reasonable likelihood have affected the verdict. *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991). The Ninth Circuit applies a similar standard tempered by due-process concerns. *United States v. Hinkson*, 585 F.3d 1247, 1264 (9th Cir. 2009) (en banc).

This three-way split has persisted for decades. See 3 Charles Alan Wright & Sarah N. Welling, **Federal Practice and Procedure** § 557 (5th ed. 2024) ("Circuits remain divided over whether a 'might have' or 'would probably' standard governs recantation claims."). The question satisfies Rule

10(a) because it involves an expressly acknowledged conflict among courts of appeals on a recurring federal issue.

III. The Tenth Circuit's use of invited error entrenches its minority rule and prevents any appellate correction of an erroneous legal standard.

By treating petitioner's reference to *Berry* as an irrevocable concession, the panel foreclosed review of whether *Berry* should apply at all. This doctrinal move transforms a procedural doctrine into a substantive shield against uniform federal law.

Other circuits reject such rigidity. See *United States v. Luepke*, 495 F.3d 443, 449 (7th Cir. 2007) ("We will not invoke invited error to bar review of a purely legal issue not yet settled."); *United States v. Haynes*, 729 F.3d 178, 190 (2d Cir. 2013) (same). The Tenth Circuit's contrary stance ensures its restrictive *Berry* rule remains insulated from reconsideration—an outcome directly conflicting with *Olano*'s caution that waiver doctrine must not extinguish substantive rights through inadvertence. 507 U.S. at 733–34.

Moreover, the panel's rule threatens the integrity of post-conviction review. If any citation to existing precedent is deemed an "invitation," defendants cannot challenge outdated or incorrect rules without risking forfeiture. That approach undermines both this Court's supervisory role and the

evolutionary development of federal criminal procedure.

a. This case is an ideal vehicle for resolving the conflict.

The record cleanly presents the question. Petitioner raised below the precise legal issue—what standard governs recantation-based Rule 33 motions—before the panel invoked invited error to avoid it. No factual dispute or alternative ground complicates review.

Moreover, the stakes are profound. Recantations alleging prosecutorial coercion and undisclosed inducements strike at the core of due process. Yet under the Tenth Circuit's approach, even a confession of perjury, corroborated by documents, cannot secure review if a defendant once cited an older test. That outcome is incompatible with the "interest of justice" language Congress embedded in Rule 33 and with this Court's longstanding insistence that criminal procedure promote fairness over technical form. See *Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair.").

b. The error was outcome-determinative here.

Had the court applied a standard more consistent with *Larrison* or *Wallach*—asking whether the false testimony *might* have affected the verdict—the sworn recantations and undisclosed inducements would easily have warranted a new trial. The government's case depended entirely on the credibility of its cooperators; the new evidence obliterates that credibility. The Tenth Circuit's doctrinal misstep therefore altered the result and merits correction by this Court.

IV. THE TENTH CIRCUIT'S FRAGMENTED BRADY ANALYSIS IN THIS CASE CONFLICTS WITH SUPREME COURT PRECEDENT REQUIRING CUMULATIVE ASSESSMENT OF SUPPRESSED EVIDENCE.

a. This Court's decisions in *Brady*, *Bagley*, and *Kyles* require courts to evaluate suppressed evidence cumulatively, not item by item.

For more than sixty years, this Court has held that due process is violated when the prosecution suppresses evidence favorable to the accused that is

material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). *United States v. Bagley*, 473 U.S. 667 (1985), refined the test: evidence is "material" if there is a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* at 682.

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court made explicit what *Brady* already implied: "the prosecutor's obligation is not measured by the materiality of individual pieces of information, but by the cumulative effect of all such evidence suppressed by the government." *Id.* at 436. *Kyles* thus imposes a holistic inquiry—whether the totality of the suppressed or undisclosed evidence "undermines confidence in the verdict." *Id.* at 434. The Court reaffirmed that rule in *Wearry v. Cain*, 577 U.S. 385 (2016), and *Banks v. Dretke*, 540 U.S. 668 (2004), rejecting lower-court efforts to atomize evidence into harmless fragments.

The Tenth Circuit's decision below flatly disregarded that command. By dissecting petitioner's showing into discrete categories—recantations, undisclosed inducements, and corroborating records—and dismissing each as independently insufficient, the court engaged in precisely the "item-by-item" analysis *Kyles* forbids.

b. The undisclosed, newly discovered evidence and recantations here, considered cumulatively, would have transformed the jury's view of every central witness.

The government's case rested almost entirely on the testimony of cooperating witnesses Glover, Garretson and Lowe. Each of those witnesses later admitted that his or her testimony was false or incomplete, and that undisclosed promises or inducements influenced it.

Undisclosed inducements.

Garretson and *Glover* attested that prosecutors and federal agents assured them they would not face charges if they testified in a manner favorable to the government. Such promises are quintessential *Giglio* material. *Giglio*, 405 U.S. at 154–55.

Recantations and corroboration.

Sworn statements reveal that the supposed "murder-for-hire" agreement never existed and that the government was aware of these inconsistencies before trial. Contemporaneous phone and text records corroborate that narrative.

Scientific and veterinary proof.

Newly produced veterinary records show that the tigers at issue were euthanized for humane reasons—directly contradicting the prosecution's theory that petitioner killed healthy animals for space or profit. That evidence not only impeaches the government's experts but also diminishes the credibility of cooperating witnesses who described the killings as malicious.

Viewed cumulatively, the recantations, inducements, and scientific data recast the entire evidentiary landscape of Petitioner's trial. Under *Kyles*, the question is not whether any single item would likely produce acquittal but whether the suppression of this ensemble of evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435. The answer here is plainly yes.

c. The panel's segmented approach mirrors the very error condemned in *Kyles*, *Wearry*, and *Banks*.

In *Wearry*, this Court reversed a state court judgment that had considered each piece of impeachment evidence separately. 577 U.S. at 392. The Court stressed that even if each item appeared minor, their "collective force" revealed that the prosecution's case "rested largely on the testimony of

two men whose credibility would have been thoroughly undermined." *Id*. That description applies word for word to this case.

Likewise, *Banks* condemned a lower court's refusal to cumulate multiple strands of withheld evidence—an informant relationship, undisclosed benefits, and inconsistent statements. 540 U.S. at 701. Yet the Tenth Circuit in this case repeated that precise mistake. It declared each affidavit or record "immaterial" in isolation, never analyzing how the aggregation demolished the government's theory.

By declining to aggregate, the panel insulated misconduct that was significant precisely because it was cumulative: each new piece of impeachment evidence reinforced the others. *Kyles* makes clear that courts must not "determine materiality item by item" because "each piece of undisclosed evidence may gain significance when viewed with the rest." 514 U.S. at 436. The Tenth Circuit's contrary ruling cannot coexist with *Kyles* and warrants correction by this Court.

d. The same due-process error tainted the Endangered Species Act convictions.

The ESA counts depended on testimony that petitioner shot five tigers for space or profit. The government introduced no autopsy evidence; instead, it relied on the recollections of cooperating witnesses who painted a sordid tale of Petitioner as a cruel,

money-hungry, tiger breeder seeking to clear out space for new breeding tigers. These were the same cooperating witnesses who now renounce their trial testimony.

Moreover, the withheld veterinary reports and photographs show that the animals were geriatric, diseased, and euthanized humanely under veterinary supervision. That evidence goes not merely to sentencing mitigation but to the very question of guilt. Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), prohibits an unlawful "take," not a medically necessary euthanasia consistent with accepted veterinary practice. See *Animal Welfare Inst. v. Behrens*, No. 21-cv-1437, 2022 WL 17821284 (D.D.C. Dec. 20, 2022) (recognizing humane euthanasia as outside the scope of an unlawful take).

Had the jury known that federal agents suppressed evidence confirming veterinary necessity—and that the witnesses describing the killings had recanted—the jury's view of petitioner's character and motive would have been transformed. The failure to disclose therefore infected the ESA convictions as well as the criminal ones.

e. The conflict among the circuits on cumulative-materiality review is mature and entrenched.

Although *Kyles* is unambiguous, circuits have diverged in its application.

The **Third, Fifth, Sixth, and Ninth Circuits** rigorously apply cumulative review, reversing when the government or lower courts evaluate evidence piecemeal. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 313 (3d Cir. 2016) (en banc); *United States v. Sipe*, 388 F.3d 471, 479 (5th Cir. 2004); *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013); *United States v. Price*, 566 F.3d 900, 913 (9th Cir. 2009). The **Tenth Circuit**, however, continues to fragment *Brady* evidence into separate strands. See *United States v. Velarde*, 485 F.3d 553 (10th Cir. 2007). The decision here perpetuates that approach, deepening an acknowledged split over whether cumulative or itemized review governs.

This conflict meets Rule 10(a) criteria and invites this Court's supervisory intervention to restore uniform application of *Kyles*' cumulative-materiality rule.

f. The Tenth Circuit's error undermines the integrity of the federal criminal process.

When appellate courts disregard *Kyles*, they license prosecutors to withhold multiple "minor" pieces of impeachment evidence so long as each can later be labeled individually immaterial. That practice corrodes public confidence in fairness and contradicts this Court's observation that "a prosecutor anxious about tacking too close to the wind will

disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439.

The error here is not academic. The withheld and recanted evidence dismantles the government's central witnesses, leaving no independent proof of intent or malice. Under *Kyles*, such an omission "undermines confidence in the verdict" and compels a new trial. *Id*. at 434.

g. Only this Court can restore the uniform, cumulative standard required by due process.

The Tenth Circuit's approach not only conflicts with *Kyles* but also nullifies the *Brady* doctrine's core purpose—to protect the reliability of verdicts by ensuring full disclosure of favorable evidence. *Strickler v. Greene*, 527 U.S. 263, 289–90 (1999). Left uncorrected, that approach will encourage lower courts to continue treating each suppressed fact as harmless in isolation, even when the totality reveals a fundamentally compromised prosecution.

This case squarely presents the issue, free of factual complication, and illustrates its constitutional significance across both traditional criminal and wildlife-protection contexts. Review is warranted to reaffirm that due process demands cumulative evaluation of all suppressed and recanted evidence.

CONCLUSION

This case presents recurring and nationally significant questions concerning the integrity of the federal criminal process.

The Tenth Circuit's decision conflicts with this Court's precedent and with the decisions of numerous sister circuits on three fundamental points of law:

Due Process and Evidentiary Hearings — The refusal to hold a hearing on sworn recantations contradicts *Napue*, *Giglio*, and *Townsend* and diverges from established circuit practice requiring live testimony where credibility is in dispute. Without such hearings, defendants are denied a meaningful opportunity to prove that their convictions rest on perjury.

Invited-Error and Rule 33 Standards — By deeming citation of existing precedent a waiver of review, the Tenth Circuit insulated its restrictive *Berry* standard from correction, in direct conflict with *United States v. Olano* and with other circuits that treat legal-standard errors as reviewable de novo. Uniformity and fairness demand this Court's intervention.

***Brady/Kyles* Cumulative Materiality** — The Tenth Circuit's fragmented analysis of suppressed evidence

directly contravenes *Kyles v. Whitley* and deepens a split among the courts of appeals concerning cumulative review. The panel's approach not only undermines the criminal counts but also distorts application of the Endangered Species Act.

These errors did not occur in a vacuum. They affected a case of extraordinary public visibility, in which petitioner's guilt or innocence turned entirely on witness credibility. Sworn recantations, corroborating records, and suppressed inducements collectively destroy confidence in the verdict. By denying any hearing and by refusing to evaluate the evidence as a whole, the lower courts departed from principles that safeguard every criminal prosecution in the Nation.

For these reasons, the Court should grant the petition for a writ of certiorari, or, in the alternative, grant the petition, vacate the judgment below, and remand with instructions to apply the correct legal standards and to conduct a full evidentiary hearing consistent with *Kyles*, *Napue*, *Giglio*, and *Olano*.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-18-227-SLP
	)	
JOSEPH ALLEN MALDONADO,	)	
	)	
Defendant.	)	

O R D E R

Before the Court is Defendant Joseph Allen Maldonado's Motion for New Trial [Doc. No. 232]. The Government has responded, *see* [Doc. No. 237], and Defendant has replied, *see* [Doc. No. 240]. Despite Defendant's request, the Court finds a hearing is not necessary to resolve the Motion. For the following reasons, the Motion is DENIED.

I. Introduction

Prior to his arrest, Defendant owned and operated the Greater Wynnewood Exotic Animal Park, a roadside zoo that was home to dozens of big cats and other exotic animals. The events leading up to Defendant's arrest have been well documented, so the Court need not recite them in detail here. *See, e.g.*, *United States v. Maldonado-Passage*, 4 F.4th 1097, 1099 (10th Cir. 2021). On September 5, 2018, a federal grand jury returned an indictment against Defendant, charging him with two counts of using interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958(a). *See* Indictment [Doc. No. 1]. About two months later, the grand jury returned a 21-count superseding indictment [Doc. No. 24], which—on top of the two

murder-for-hire counts—charged Defendant with five counts of illegal taking in violation of the Endangered Species Act, one count of illegal offering in violation of the Endangered Species Act, three counts of illegal sale in violation of the Endangered Species Act, and ten counts of false labeling in violation of the Lacey Act. The Government dismissed two of the false labeling counts at trial. *See* Tr. at 854:2–12.

Defendant's seven-day jury trial commenced on March 25, 2019. During its case-in-chief, the Government called nineteen witnesses, including Allen Glover, the would-be hitman who occasionally worked at the zoo,[1] and confidential informant James Garretson. The defense called four witnesses, including Defendant. After brief deliberations, the jury found Defendant guilty on all nineteen remaining counts.

The Court originally sentenced Defendant to 264 months of incarceration. *See* Judgment [Doc. No. 134]. Defendant appealed, and the United States Court of Appeals for the Tenth Circuit affirmed his conviction but vacated his sentence. *See Maldonado-Passage*, 4 F.4th at 1108. On remand, the Court resentenced Defendant to 252 months of incarceration. *See* Am. Judgment [Doc. No. 209]. Defendant appealed this sentence on grounds unrelated to the instant Motion, but the Tenth Circuit rejected his arguments. *See United States v. Maldonado-Passage*, 56 F.4th 830, 834–35 (10th Cir. 2022). Around the time he filed his second appeal, Defendant also moved for a new trial.[2]

[1] At trial, Defendant testified that Mr. Glover "made it very clear he wasn't [Defendant's] employee." Tr. at 953:22–954:4.

[2] Defendant initially sought leave to file a 250-page motion. *See* [Doc. No. 211]. The Court denied the request, finding Defendant did not provide adequate justification for such extensive briefing. *See* [Doc. No. 213]. Defendant timely re-urged his request and attached his 202-page

II. Governing Standard

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The rule provides two different time limits. A defendant has three years to bring a "motion for a new trial grounded on newly discovered evidence," but a motion seeking a new trial for any other reason "must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim.

proposed brief. *See* [Doc. No. 214]. The following day—before the Court ruled on his motion—Defendant filed a 28-page motion for new trial that purported to "incorporate[] and adopt[] all factual and legal arguments" from the 202-page attachment. [Doc. No. 215] at 5. The Court struck the new trial motion, recognizing it as an attempt to circumvent the page limit by incorporation. *See* [Doc. No. 221]. Instead, the Court ordered the Government to respond to Defendant's motion to file an oversized brief. *See* [Doc. No. 222]. The Government proposed a 50-page limit, but the Court ultimately allowed Defendant to file a 65-page brief. *See* [Docs. No. 224, 231]. Although he now laments he "cannot possibly outline the significance of every piece of new evidence . . . within the page limit," Defendant's Motion clocks in at just over 61 pages (excluding his cover page, table of contents, table of authorities, signature block, certificate of service, and exhibits). Mot. [Doc. No. 232] at 7. It is worth noting that Defendant consistently omits pinpoint citations to his exhibits—a simple addition that would have streamlined the Court's task, clarified his arguments, and complied with his 65-page limit. For example, a single page of the Motion cites, without particularity: "Exhibits 22, 29, 49, 52, 55, 56, 57, 66, 67, 73, and 80 . . . Exhibits 21, 25-28, 32, 36, 39-42, 45-48, 50, 58, 60, 63, 72, 82, 94, and 95 . . . [and] Exhibits 14, 20, 30, 37, 38, 54, 59, 61, 70, 74, 81, 84, 91 and 169." *Id.* at 7. To be clear, a higher page count does correlate with better legal analysis, and the Court is thoroughly unconvinced that the page limit is to blame for the Motion's lack of coherent legal arguments. For example, most Defendant's arguments are governed by one of two legal standards (*Berry* and *Brady/Giglio*), and many of his claims rely on the same evidence and facts. Rather than analyzing that evidence within the applicable legal framework, however, Defendant chose to present a jumbled and repetitive series of conclusory statements. Similarly, this tactic—articulating the legal standard and presenting a deluge of exhibits, but providing no discussion of how the cited exhibits *satisfy* those standards—does not warrant an evidentiary hearing. Defendant is not entitled to a second opportunity to meet his legal burden simply because he squandered the first.

P. 33(b). Time limits under Rule 33 are "strictly construed."[3] *Herrera v. Collins*, 506 U.S. 390, 409 (1993).

The jury returned its verdict on April 2, 2019, and Defendant filed his Motion on April 1, 2022. *See* [Docs. No. 113, 232]. Accordingly, his "new trial request may be granted only on the basis of newly discovered evidence." *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999). Defendant's newly discovered evidence takes several forms, including recordings and documents, recantation, government misconduct, and violations of *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *Napue v. Illinois*, 360 U.S. 264 (1959). Although newly discovered evidence may be used to establish violations of *Brady/Giglio* and *Napue*, those claims are subject to different standards that the remainder of Defendant's evidence, as detailed below.

III. Discussion

Defendant proffers a litany of evidence to support his new trial motion. The Court takes each category in turn.

A. Newly Discovered Evidence

A defendant seeking a new trial on the basis of newly discovered evidence faces an uphill battle. Such motions are "not favorably regarded and should be granted only with great caution." *United States v. Jordan*, 806 F.3d 1244, 1252 (10th Cir. 2015)

[3] While the Court was finalizing this Order, Defendant filed a Second Motion for New Trial [Doc. No. 246]. This second motion also purports to seek relief under Federal Rule of Criminal Procedure 33, although it was filed nearly 18 months after the deadline set forth in Rule 33(b)(1). Defendant makes no attempt to explain why the Court has authority to consider his untimely second Motion, so the Court DENIES it without further comment.

(quoting *United States v. McCullough*, 457 F.3d 1150, 1167 (10th Cir. 2006)). In conducting its analysis, the Court begins with "the presumption that the verdict against the defendant is valid." *United States v. Velarde*, 860 F. App'x 132, 137 (10th Cir. 2021) (quoting 3 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 581 (4th ed., Oct. 2020 update)).

When a new trial motion relies on newly discovered evidence, the Court applies "the so-called *Berry* rule, derived from *Berry v. Georgia*, 10 Ga. 511 (1851)." *United States v. Jackson*, 579 F.2d 553, 557 (10th Cir. 1978). Under this five-part test, a defendant has the burden to prove:

> (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 issues involved, and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal.

Jordan, 806 F.3d at 1252 (alteration in original) (quoting *McCullough*, 457 F.3d at 1167). A defendant's proffered evidence must also be admissible. *United States v. Hill*, 737 F.3d 683, 687 (10th Cir. 2013).

Although Defendant faces a substantial hurdle to show that newly discovered evidence entitles him to a new trial, he makes only a perfunctory attempt to satisfy his burden. For the most part, Defendant's Motion does not engage with the five *Berry* elements, cite exhibits with particularity, identify which of the nineteen counts (or their elements) are implicated by each piece of newly discovered evidence, or highlight trial

testimony or evidence which is undermined by his newly discovered evidence.[4] Accordingly, none of his allegations, whether taken individually or collectively, warrant a new trial.

1. James Garretson's Undisclosed Recordings[5]

During the criminal investigation into Defendant, Mr. Garretson acted as a cooperating individual for the U.S. Fish and Wildlife Service ("USFWS"). *See* Def.'s Ex. 7 [Doc. No. 232-7].[6] In this capacity, he worked closely with USFWS Agent Matthew Bryant. Agent Bryant gave Mr. Garretson a recording device so he could capture phone calls with Defendant, Jeff Lowe, and anyone else who may be relevant to the investigation. *See* Tr. at 552:16–25. Mr. Garretson also used "an app on his phone" to record calls. *Id.* at 553:8–18. When asked at trial whether he gave Agent Bryant "all the conversations that [he] w[as] able to record," Mr. Garretson testified that he had. *Id.* at 553:23–25.

But an investigation by Defendant's post-conviction counsel revealed that Mr. Garretson recorded a plethora of calls that he kept to himself.[7] Defendant has attached

[4] When this is not the case, the Court specifically identifies as much.

[5] Because the Court addresses the alleged *Brady* violations related to the recordings below, those arguments are not included here.

[6] Defendant filed some of his exhibits conventionally, so his exhibit numbers do not always match the CM/ECF numbering. For clarity, the Court provides both citations.

[7] Defendant contends his post-conviction counsel "discovered four hundred and seventeen (417) previously undisclosed recordings of phone calls . . . [and] two hundred and sixty-six calls which contained zero (0) data." Mot. [Doc. No. 232] at 10.

transcripts of nearly 100 calls to his Motion.[8] These transcripts reflect calls that Mr. Garretson recorded between February 2, 2019 and April 3, 2019, none of which were previously provided to Defendant's trial counsel. With respect to these transcripts, Defendant contends:

> Each of the calls presented within this motion document different aspects of misconduct. A single recording may have several issues that warrant investigation. The undersigned cannot lay out the importance of each call due to page constraints, but they are attached hereto and must be viewed in their entirety.

Mot. [Doc. No. 232] at 9 n.1.[9] To the extent Defendant asks the Court to comb the record and craft arguments he did not make, the request is improper. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."), *cited with approval in United States v. Griebel*, 312 F. App'x. 93, 97 (10th Cir. 2008). Similarly, in reply, Defendant insists "[t]he Court must listen to the recordings and/or read the transcripts to understand the materiality of the information contained therein." Reply [Doc. No. 240] at 2–3. But the burden to prove materiality belongs squarely to the Defendant, and any attempt to shift this burden is improper. The Court will therefore consider *only* the arguments identified and presented in the briefing.

Similarly, several arguments that implicate the recordings are too vague and conclusory for the Court to meaningfully analyze. For example, the Motion contains the following verbatim arguments, which include neither pinpoint citations to exhibits nor further legal analysis:

[8] Not all of the transcripts are cited or discussed in the Motion.

[9] Citations to the parties' briefs and exhibits reflect the CM/ECF pagination.

- [T]he **content** of the recordings demonstrates that during the criminal investigation and trial 1) Garretson lied to government agents regarding aspects of the criminal investigation (*See Exhibits 15, 23, and 59.*); 2) Garretson conspired with the federal government to lie about aspects of the criminal investigation (*See Exhibits 17, 24, and 27.*); 3) Garretson conspired with the federal government to intentionally suppress relevant and exculpatory recordings (*See Exhibits 15-19.*); 4) Garretson conspired with agents for the government to "twist" testimony (*See Exhibit 19 and 31.*); 5) Garretson conspired with law enforcement to fabricate evidence (*See Exhibits 15-19.*); 6) Garretson conspired to murder Lowe (*See Exhibits 14 and 144.*); 7) Garretson engaged in crimes involving identity theft (*See Exhibits 90, 96, 98, 99, and 100.*); 8) Garretson planned to use recordings captured during the investigation to discredit a potential defense witness (*See Exhibits 25, 26, and 32.*); and 9) Garretson planned to lie during the criminal trial. (*See Exhibits 21, 40, 43, 48, 60, 68 and 69.*)[10]

- The recordings demonstrate 1) the federal government, including Bryant, knew undisclosed recordings and messages existed (*See Exhibits 15-19, 26, and 50.*); 2) how Bryant circumvented due process by instructing a confidential informant and other witnesses for the government to lie about aspects of the criminal investigation (*See Exhibits 24 and 37.*); 3) how Bryant willfully refused to collect relevant evidence (*See Exhibits 15-19.*);
4) how Bryant instructed a witness to fabricate evidence (*See Exhibits 15-19.*); and 5) how Bryant used one of the undisclosed recordings as a weapon to exclude a potential defense witness. (*See Exhibits 14-19.*)

  • The recordings of Goode[11] (hereafter "Goode") were directly relevant to the issues of the criminal investigation into [Defendant], acts of perjury, trial strategy and collusion of witnesses. Specifically, how Garretson, Lowe, Lauren Lowe and others conspired to set up [Defendant]. (*See Exhibits 22, 29, 49, 52, 55, 56, 57, 66, 67, 73, and 80.*)

  • The recordings of Malagerio[12] were directly relevant to the issues of the criminal investigation into [Defendant]. Malagerio was an unofficial cooperating witness for the government under the direction of Bryant. (*See*

[10] This paragraph alone cites 27 exhibits spanning 352 pages without pinpoint citations or highlights.

[11] Eric Goode is a *Tiger King* producer. *See* Def.'s Ex. 162 [Doc. No. 232-159] at 31.

[12] Paul Malagerio is an exotic animal keeper and associate of Mr. Garretson. *See* Def.'s Ex. 28 [Doc. No. 232-128] at 1–2.

> *Exhibit 28*.) The discussions captured in the calls between Malagerio and Garretson were centered around the criminal investigation of [Defendant] and life after. Specifically, perjury, manipulation and fabrication of evidence, witness threats, trial strategy, and other exonerating information. (*See Exhibits 21, 25-28, 32, 36, 39-42, 45-48, 50, 58, 60, 63, 72, 82, 94, and 95*.)
>
> • Garretson's own admissions captured on these recordings regarding twisting testimony and planning testimony with the intent to misrepresent the facts are material and relevant to the criminal case, specifically [Defendant]'s innocence. (*See Exhibits 17, 19, 31, 37, 43, 48, 715, 78, 79, and 87*.) Had the jury known of this, Garretson's credibility would have been destroyed and the true motive for Glover's fake ID would have been called into question, directly undermining the verdict.

[Doc. No. 232] at 10–12, 16 (all emphasis in original). Defendant makes no attempt to demonstrate how any of this information could be used for anything other than its impeachment value. Nor does he detail how the "evidence is material to the principal issues involved." *Jordan*, 806 F.3d at 1252. He does not identify a specific count—let alone a particular element—to which any of this evidence would pertain. Finally, he makes no credible argument that the evidence "would probably produce an acquittal." *Id.* Defendant's inattention to every element of the relevant legal analysis necessarily means he has not satisfied his burden under the five-part test. Accordingly, he is not entitled to a new trial on the above points.

But Defendant presents a handful of arguments about the recordings that warrant further discussion. First, he claims Agent Bryant "attempt[ed] to have [Jeff] Johnson, an exculpatory witness, excluded from testifying at trial."[13] Mot. [Doc. No. 232] at 12. As

[13] Defendant references Mr. Johnson's purported exclusion several times throughout his Motion. *See* Mot. [Doc. No. 232] at 11–12, 14–15, 30, 32, 61, 63. Because this claim lacks credibility, the Court disposes of the argument summarily.

an initial matter, there is no evidence in the record that the defense intended to call Mr. Johnson as a witness, or that the prosecution attempted to exclude him.[14] The prosecution never moved to exclude Mr. Johnson, nor—contrary to Defendant's assertions—did the Court bar Mr. Johnson's testimony. *See* Mot. [Doc. No. 232] at 63 (referencing "the [C]ourt's decision to exclude Johnson as a witness"). And even if there was some indicia of truth to Defendant's accusation, he provides no analysis under the applicable legal standard. Defendant does not even specify what Mr. Johnson would have testified about, let alone how his testimony would have satisfied any of the *Berry* elements.

Defendant next cites a flurry of exhibits "that demonstrate Garretson was actively involved in identity theft crimes during the criminal investigation" into Defendant. Mot. [Doc. No. 232] at 16 (citing Def.'s Exs. 3, 51, 54, 90–91, 96, 98–100, 161). Again, Defendant does not analyze this evidence within the five-step framework governing newly discovered evidence. At best, he argues this evidence would have "destroyed" Mr. Garretson's credibility and "call[ed] into question" the "true motive for Glover's fake ID." *Id.* But evidence which is offered for its impeachment value is insufficient to warrant the relief Defendant seeks. *See Jordan*, 806 F.3d at 1252.

Mr. Garretson also claims that prosecutors "used a confidential informant to covertly obtain information regarding trial defense counsel's planned defense strategy." Mot. [Doc. No. 232] at 15. But the cited recording shows that the prosecution "didn't get

[14] To the contrary, Mr. Johnson claimed defense counsel told him "they didn't think that [he] would need to testify." Def.'s Ex. 20 [Doc. No. 232-20] at 2; *see also* Def.'s Ex. 21 [Doc. No. 232-21] ("So Jeff Johnson is not testifying for Joe. His lawyers don't want him to.").

anything really good" from this tactic because Mr. Johnson "didn't know anything that's really pertinent for them." Def.'s Ex. 21 [Doc. No. 232-21] at 2. Accordingly, it is unclear how this evidence entitles Defendant to a new trial under the applicable legal test.

In addition to the deficiencies with respect to the *Berry* analysis, the Government argues the transcripts are inadmissible hearsay. *See* Resp. [Doc. No. 237] at 27–28 (citing Fed. R. Evid. 801(c)). In reply, Defendant counters that the recordings are not hearsay because "[t]hey are Mr. Garretson's own statements recorded on his own phone from which authenticity has not been called into question by the government." Reply [Doc. No. 240] at 2. Hearsay, as defined by Federal Rule of Evidence 801(c), is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Mr. Garretson's recordings obviously contain out-of-court statements. It is impossible to analyze the statements under Rule 801(c)'s second prong, however, because Defendant does not identify any statement with particularity or specify the purpose for which it would be offered. Accordingly, Defendant has failed to carry his burden to prove that the recordings entitle him to relief under the *Berry* test.

2. Mr. Garretson's Perjury

Defendant proffers several pieces of evidence that purportedly show Mr. Garretson committed perjury.[15] First, he claims that Mr. Garretson testified that he cooperated with

[15] Although the Government analyzed each of these allegations as *Napue* claims, the Court finds it unnecessary to do so where Defendant has not alleged one of the essential elements of *Napue* claims—that "the prosecution knew the testimony to be false." *United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015). Instead, the Court analyzes the perjury accusations as newly

the investigation because it was "[j]ust the right thing to do at the time." Tr. at 552:14–15. Defendant now claims his newly discovered evidence shows Mr. Garretson's true motivations were "money, revenge and a hatred of [Defendant]'s sexuality." Mot. [Doc. No. 232] at 17. But he provides no analysis on how this evidence would be more than merely impeaching, which is insufficient to warrant a new trial.

Next, he claims Mr. Garretson perjured himself with respect to his relationship with Carole Baskin—the target of the two murder-for-hire plots. At trial, he testified that he never met Mrs. Baskin and was unsure if she had ever complained about his facility. Tr. at 530:4–11. But Defendant claims newly discovered evidence reveals he "had a hatred for Baskin" because she played a role in having his USDA license revoked, and that his hatred "carries on to present." Mot. [Doc. No. 232] at 18. Beyond the bare assertion that "Garretson's relationship with the victim, Carole Baskin, is relevant to the principal issues of the criminal case," Defendant makes no attempt to analyze this new evidence in the *Berry* framework. In particular, Defendant fails to establish how this evidence would be anything more than impeaching.

At trial, Mr. Garretson testified about an August 2017 conversation that took place in the zoo's office, which Defendant refers to as the "bike path" conversation. *See* Tr. at 547:20–549:3; Mot. [Doc. No. 232] at 18–19. Mr. Garretson testified that he, Defendant, and former zoo owner Jeff Lowe were present for the conversation. Defendant has now presented evidence that Mr. Garretson's girlfriend, Brittany Medina, was also there.

discovered evidence, which is how Defendant characterizes them. In three instances, Defendant specifically claims that the Government knew about Mr. Garretson's perjured testimony and let it stand uncorrected. The Court considers each of those *Napue* claims below.

Because Defendant claims the Government knowingly allowed Mr. Garretson to present false testimony, the Court analyzes this evidence as a *Napue* claim below.

Defendant then argues that Mr. Garretson's testimony "about why [Defendant] would think he knew where to get a fake ID" was false. *Id.* at 20. Mr. Garretson's testimony on direct examination was:

> Q. And finally, did Mr. Passage at the time—in the fall of 2017, did he know that you had owned strip clubs in Dallas, or a strip club in Dallas?
>
> A. I assume, yes.
>
> Q. And did he know that you had owned bars in Dallas?
>
> A. Yes.
>
> Q. And to your understanding, is that why Mr. Passage thought you might know where to get a fake ID?
>
> A. Correct.

Tr. at 608:6–14. Citing several exhibits, Defendant now accuses Mr. Garretson of "actively engag[ing] in identity theft crimes" throughout the investigation. Mot. [Doc. No. 232] at 20. As an initial matter, Mr. Garretson did not perjure himself when he was asked about why he thought *Defendant* believed "[Mr. Garretson] might know where to get a fake ID." Tr. at 608:6–14. There is no indication that Defendant knew about any of Mr. Garretson's purported identity theft during the investigation, so the newly discovered evidence would not change the answer to this question. More importantly, however, Defendant provides no analysis under the *Berry* elements. He relies on the conclusory statement that "[t]he government used testimony regarding the fake ID together with testimony regarding the mailing of the cell phone to 'establish the elements needed to

prove the use of interstate commerce in the commission of a murder for hire.'"[16] Mot. [Doc. No. 232] at 20. He also believes the evidence "connects Garretson to Lowe and confirms their co-participation in fraudulent credit card schemes." *Id.* But Defendant does not explain why this evidence would have probably produced an acquittal had it been introduced at trial. First, the jury knew that Mr. Garretson had connections to obtain a fake ID, so the impact of additional evidence of identity theft is unclear.[17] Second, Defendant alleges that Mr. Garretson used one of his aliases to rent Mr. Lowe's Las Vegas residence. *See* Def.'s Ex. 64 [Doc. No. 232-64]. The rental agreement is dated several months before Mr. Garretson began cooperating with the Government, however. *See* Def.'s Ex. 7 [Doc. No. 232-7] at 3. Defendant has not explained how this fact would have impacted any of the evidence at trial, and the Court declines to speculate.

At trial, Mr. Garretson also testified that between December 2017 and January 2018, "there [we]re some calls [with Mr. Lowe] that were not recorded due to problems [Mr. Garretson] was having with the phone." *Id.* at 21. Defendant now points to a post-conviction interview in which Mr. Garretson said he "deleted a lot of Jeff's calls and stuff where we're talking about liquidation loads" and that he deleted calls that he "didn't think [] w[ere] relevant." Def.'s Ex. 9 [Doc. No. 232-9] at 3. First, the Court is not convinced that Mr. Garretson's new statement is perjurious, as both statements could be

[16] Although Defendant cites Exhibit 107, the quoted material in the previous sentence—"establish the elements needed to prove the use of interstate commerce in the commission of a murder for hire"—appears nowhere in the 106-page exhibit. The Court admonishes Defendant that his use of the "*see*" citation before this quote is at best confusing, and at worst misleading.

[17] Additionally, Defendant could not rely on this evidence for its impeachment value alone.

true. Again, Defendant offers no analysis as to why he is entitled to a new trial on this basis. To the extent he would rely on this evidence for its impeachment value, that approach would fail under *Berry*.

Mr. Garretson also testified about purchasing four tiger cubs from Defendant. At trial, he claimed to believe the purchases were legal because they were conducted in-state. *See* Tr. at 533:2–536:9. Defendant now claims Mr. Garretson committed perjury, but none of the evidence he cites indicates that Mr. Garretson's trial testimony was false. Indeed, Defendant's evidence appears to corroborate Mr. Garretson's testimony. *See* Def.'s Ex. 110 [Doc. No. 232-110] at 13 ("Terry's Taxidermy stuffed and displayed these two tigers. The owner, Terry Mayberry, says he acquired them from an Oklahoma animal park. Because both businesses are in the same state—and the animals were not transported across state lines—this exchange was not prohibited by the Endangered Species Act."). Although Defendant lobs multiple accusations at Ringling Animal Care, Mr. Garretson's former cub-petting operation, none of that evidence pertains to the four cub sales that were the subject of Mr. Garretson's testimony.

Mr. Garretson also testified that in the fall of 2017, no one outside of law enforcement knew about his cooperation with the Government. *See* Tr. at 556:19–25. Defendant has now presented evidence that several other people knew about Mr. Garretson's involvement, and that the "government knew this statement made under oath was false." Mot. [Doc. No. 232] at 21. Because this is a *Napue* claim, the Court addresses it below.

Finally, Defendant makes two conclusory statements that merit little attention from the Court. At trial, Mr. Garretson testified that he "provided some credit for dental work" to former zoo employee Dylan West, and that the credit was legal. Tr. at 599:9–21. Defendant now claims this testimony is "false" in light of the "evidence of on-going participation in criminal identity theft described above together with testimony provided by Reinke regarding Garretson's fraudulent use of medical credit." Mot. [Doc. No. 232] at 20–21. Defendant also claims Mr. "Garretson testified he did not have a financial interest in getting rid of [Defendant]," but newly discovered evidence "exposed Garretson's plans to corner the cub petting market once [Defendant] was safely behind bars." *Id.* at 22. Defendant offers no further detail or analysis related to either of these contentions, so it is unnecessary for the Court to address them further.

Defendant ends this section of his Motion with a description of Mr. Garretson's testimony in the context of the entire trial, claiming:

> Garretson provided uncorroborated eye-witness testimony regarding alleged crimes associated with Counts 1 and 2 of the Superseding Indictment. Garretson's testimony provided context to the recordings of [Defendant] and Glover. Some of the recordings he provided, had no mention of names, dates, places or even what the speaker was talking about. Garretson's testimony filled in those blanks. Garretson has admitted that he could have been planning his own murder for hire. *(See Exhibit 9 and 49.)*

Id. Similarly, he argues Mr. Garretson provided necessary context to the second murder-for-hire plot when he testified about references to the undercover FBI agent. *See id.* at 22. Defendant appears to be arguing that the cumulative effect of his perjury allegations is so damaging that the Court must disregard Mr. Garretson's testimony entirely and,

therefore, order a new trial. But this argument is not procedurally proper, because newly discovered evidence under Rule 33(b) cannot be "merely impeaching." *Jordan*, 806 F.3d at 1252. And even if this were not the case, most of Defendant's perjury accusations lack merit when the trial testimony and evidence are viewed side-by-side, as detailed above.

3. Recanted Testimony

Defendant claims that two Government witnesses have recanted their trial testimony. Although this is still newly discovered evidence, its consideration requires a slightly different approach. First, "recantation of prior trial testimony 'is not looked upon with favor,' but rather with 'downright suspicion.'" *United States v. Jones*, 315 F. App'x 714, 716 (10th Cir. 2009) (quoting *United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980)). Second, "[w]hen the motion is based on recanted testimony, the trial court must first be satisfied that the challenged testimony was actually false." *United States v. Bradshaw*, 787 F.2d 1385, 1391 (10th Cir. 1986). To make this determination, the Court "ordinarily must conduct an evidentiary hearing to evaluate both the credibility and the impact of a recantation." *United States v. Page*, 828 F.2d 1476, 1478 (10th Cir. 1987). This is not always the case, however. If the "written record allows a district court judge to make credibility findings (and for [the Tenth Circuit] to evaluate such findings), no evidentiary hearing is necessary." *Jones*, 315 F. App'x at 716 (citing *United States v. Pearson*, 203 F.3d 1243, 1274–75 (10th Cir. 2000)). Upon careful consideration of both the affidavits and the trial record, the Court concludes no evidentiary hearing is warranted in this case. Instead, the trial record provides a sufficient basis to reject Defendant's recantation arguments.

a. Allen Glover

First, Defendant contends Mr. Glover, who testified extensively about the first murder-for-hire plot, has recanted his trial testimony. Defendant proffers four instances of recantation. *See* Mot. [Doc. No. 232] at 24–25. First, Mr. Glover testified at trial that Defendant offered to pay him in exchange for killing Mrs. Baskin. *See* Tr. at 623:20–24. He now claims that he "stole $3,000 from [Defendant]."[18] Def.'s Ex. 112 [Doc. No. 232-112] ¶ 21. First, it is not clear that Mr. Glover has recanted his trial testimony. Throughout trial, he consistently maintained that he took the money with no intention actually killing Mrs. Baskin. For example, on direct examination, Mr. Glover testified:

> Q. So over the course of those conversations, did you tell Mr. Passage that you would murder Carole Baskin if he paid you to do it?
>
> A. Yes, ma'am, I did.
>
> Q. At the time that you told him that, did you intend to actually go kill Carole Baskin?
>
> A. No, ma'am.
>
> Q. What did you actually intend to do?
>
> A. Take his money and run.
>
> Q. Okay. And why would you want to take his money and run?
>
> A. Because the way he treated me and the employees and the way he acted, I was ready to get away from there . . . .

Tr. at 626:8–19. Indeed, on cross-examination, he testified that he stole the money. *See id.* at 694:2 ("I didn't realize I made a mistake on stealing that money."). Mr. Glover has

[18] As set forth in his affidavit, Mr. Glover now claims: "I testified at trial that this $3,000 came from the cub sale on November 24, 2017. This is not accurate as I have no knowledge of the park finances and have no knowledge of where the $3,000 came from that I stole." Def.'s Ex. 112 [Doc. No. 232-112] ¶ 22.

continued to aver that he took the money without any intention to follow through on the murder. *See, e.g.*, Def.'s Ex. 112 [Doc. No. 232-112] ¶ 25; Def.'s Ex. 123 [Doc. No. 232-123] at 2; Govt.'s Ex. 28 [Doc. No. 237-28] at 43–44. But even reading this statement in the way Defendant does, the Court is not convinced Mr. Glover's trial testimony is false. There is overwhelming corroborating evidence in the record that Defendant paid Mr. Glover $3,000—particularly, his own words. For example, he testified at trial that he gave Mr. Glover $3,000 from the night deposits at Mr. Lowe's direction. Tr. at 1004:3–14. On a recorded phone call, Defendant told Mr. Garretson that he was "waiting on this lady to get this money for these liligers cause that is what [he is] paying for it with." Govt.'s Ex. 2 [Doc. No. 237-2] at 1. Ten days later, Mr. Garretson asked Defendant: "You gonna ever send that guy today or is he ever gonna go down there or you just gotta wait for money?" Govt.'s Ex. 5 [Doc. No. 237-5] at 1. Defendant responds: "I'm figuring that money'll come in today. Then he's gone." *Id.* Accordingly, to the extent that Mr. Glover has recanted his trial testimony, the evidence already in the record permits the Court to conclude that the recantation is not credible.

Second, Defendant claims Mr. Glover recanted trial testimony that the $3,000 payment came from a November 24, 2017 cub sale. Although the Government claims Mr. Glover never directly made this claim, the Government is mistaken. On direct examination, Mr. Glover testified:

> Q. Okay. So you testified that he did eventually give you some money. Where did Joe get the money?
>
> A. From selling that liliger.

Q. Were you there when he sold the liliger?

A. Yes, ma'am. I'm—I was the one who went to the play area to get it.

Q. And did you physically pick up the animal?

A. Yes, ma'am, I did.

Q. And what did you do with it?

A. Took it out to the back parking lot so the deal could be done.

Q. Did you put the cub in the car?

A. Yeah. I handed it to the man and pretty—yeah, pretty much put it in the car.

Q. Did you see the person who was leaving with the cub?

A. Yes, ma'am. I didn't meet him, but I saw him.

Tr. at 637:4–19. At trial, Mr. Glover identified Robert Engesser as the man who picked up the cub in question. *See id.* at 684:3–685:6; 882:11–13. The existing record again permits the Court to make a credibility determination with respect to this recantation, but this time the Court draws the opposite conclusion. There is strong, consistent evidence in the record that the money at issue did not come from the cub sale that Mr. Glover described. At trial, Agent Bryant expressed doubts that the money came from Mr. Engesser purchasing a cub. *See id.* at 909:4–9. And in private, Agent Bryant told the Lowes that he "d[idn't] believe it was Engesser" who "showed up that day" and "got that liger." Def.'s Ex. 128 [Doc. No. 232-128] at 14–15. Indeed, Mr. Engesser himself provided credible testimony that he was not in Wynnewood at any time in November 2017. Tr. at 883:20–22.

Nevertheless, this recantation does not warrant the relief Defendant seeks. First, Defendant does not explain why the jury would have probably acquitted had they known a cub sale to Mr. Engesser was not the source of the $3,000. Indeed, the jury heard much of this evidence at trial and still convicted. Most importantly, however, Defendant makes no attempt to explain how Mr. Glover's recantation, *when viewed in conjunction with Defendant's own statements*, would have probably changed the outcome of his trial.[19] Accordingly, this recantation does not entitle Defendant to a new trial.

The third recantation involves Mr. Glover's personal cell phone. At trial, he testified that Defendant asked Mr. Glover for his personal cell phone at the same time the $3,000 changed hands. Tr. at 641:22–642:6. In his affidavit, Mr. Glover now claims that "Jeff Lowe instructed [Mr. Glover] to give [his] phone to [Defendant] and ask him to mail it to Jeff's Las Vegas address." Def.'s Ex. 112 [Doc. No. 232-112] ¶ 28. Again, Mr. Glover has not clearly recanted his testimony because both his trial testimony and his new assertion could be—and likely are—true. On a recorded phone call, Defendant told Mr. Garretson:

> Yeah, what I am doing is having him buy a go-phone down there and Jeff is buying a go-phone so they can communicate and then throw them away. And we are going to over-night his phone to Vegas and Jeff is gonna text pictures every once in a while back to the staff so that way his phone registers in Vegas.

Govt.'s Ex. 2 [Doc. No. 237-2] at 1. This statement provides credible evidence that Defendant and Mr. Lowe had planned for Mr. Glover to leave his phone in Wynnewood

[19] In analyzing the *Giglio* claim related to Mr. Glover, discussed *infra*, the Court details how Defendant's own testimony provides overwhelming evidence of his guilt with respect to each element of the first murder-for-hire count.

before he headed east. His trial testimony (that Defendant asked for his phone) and his new assertions (that Mr. Lowe told Mr. Glover to leave his phone) are both entirely consistent with the evidence in the record.[20] Accordingly, the new statement does not provide the foundation for a new trial.[21]

The final recantation involves the "pizza phone" that Mr. Glover took with him after he left the zoo.[22] At trial, he testified that Defendant *gave* him "a pizza restaurant phone" that "belonged to the park." Tr. at 642:16–18. Mr. Glover has now recanted that testimony, claiming that he actually *stole* the pizza phone. As set forth in his affidavit, Mr. Glover asserts: "[Defendant] did not give me the phone assigned to the Pizzeria. I took the phone from a recently fired employee named AJ." Def.'s Ex. 112 [Doc. No. 232-112] ¶ 27. Upon review of the evidence in the record, the Court finds the recantation to be credible. First, Mr. Lowe sent a text message to Defendant on December 5, 2017 that said: "Fucking Allen [Glover] stole the pizza phone." Def.'s Ex. 114 [Doc. No. 232-114] at 2. One day later, Mr. Glover texted zoo employee Kelci Saffrey[23] from the pizza

[20] Nobody disputes the fact that Mr. Glover left his phone at the zoo before he left. Indeed, Defendant testified that "after [he] gave Alan the money . . . [Mr. Glover] walk[ed] over into the office and he la[id] his cell phone on the desk . . . [a]nd he sa[id], here, we're supposed to mail this to Jeff." Tr. at 1005:5–12

[21] Additionally, Defendant makes no attempt to explain why the statement probably would have compelled a different outcome. Indeed, the Court is confident that the new statement would not probably have resulted in an acquittal because it is entirely consistent with the evidence already in the record.

[22] The Court, like the attorneys at trial, refers to this device as the "pizza phone."

[23] Although the contact is labeled as "newest best friend," both parties appear to agree that the text was sent to Kelci Saffrey. *See* Mot. [Doc. No. 232] at 24; Resp. [Doc. No. 237] at 38.

phone: "The phone I got AJ said it was hers that's the f****** pizza restaurant phone Joe called me today asking who is this how's the f*** is Alan he's just a pizza restaurant on telephone s*** I got to phone damn."[24] Def.'s Ex. 115 [Doc. No. 232-115] (spelling and punctuation in original). That same day, Mr. Glover received a text from Cheryl Ann Maldonado, which read, "I know who's phone you found. . . . I do believe it is AJ's. . . . Heard Joe telling to someone bout it today. . . . Joe told [AJ] someone who used to live there took it." *Id.* (spelling and punctuation in original). All three of these messages provide credible, contemporaneous evidence that Mr. Glover *stole* the pizza phone, and not—as he testified at trial—that Defendant *gave* him the phone.

Nevertheless, this recantation does not entitle Defendant to a new trial because it would not probably produce an acquittal. To convict on the first murder-for-hire count, the jury had to find beyond a reasonable doubt that, *inter alia*, Defendant "either (i) traveled in or caused another person to travel in interstate commerce or (ii) used or caused another person to use the mail or any facility of interstate commerce." Jury Instructions [Doc. No. 114] at 31. The jury was further instructed that "a cellular telephone is a 'facility of interstate commerce.'" *Id.* Defendant does not address Mr. Glover's unchallenged testimony that Defendant used the pizza phone—a facility of interstate commerce—to take photos of Mrs. Baskin, which he had pulled up on his computer "so [Mr. Glover] wouldn't kill the wrong person." Tr. at 642:21–643:5. Nor does the recanted testimony impact Defendant's statement that he and Mr. Lowe planned

[24] As discussed during the trial, Mr. Glover sends most of his text messages using "dictation software on his phone" because his "ability to read is very limited." Tr. at 612:18–19.

to mail Mr. Glover's phone to Las Vegas, despite the fact that this act would also satisfy the interstate commerce element. *See* Govt.'s Ex. 2 [Doc. No. 237-2] at 1. And Defendant does not even attempt to explain how the testimony would probably produce an acquittal in light of the extensive, credible evidence that Defendant caused Mr. Finlay, Mr. Glover, and Mr. Garretson to travel to Dallas to obtain a fake ID.[25] Accordingly, this recantation does not entitle Defendant to a new trial.

b. Lauren Lowe

Defendant next claims that Jeff Lowe's wife, Lauren, recanted two statements she made at trial. Both recantations involve Mrs. Lowe's testimony that she received a package in the mail shortly after Thanksgiving 2017. Tr. at 712:15–24. She testified that the package, which was sent from the zoo and addressed to Jeff Lowe, contained a cell phone and a charger.[26] *Id.* at 712:25–713:14. On cross-examination, Mrs. Lowe testified that the package included a phone, a charger, and nothing else. *Id.* at 723:15–22.

First, Mrs. Lowe now claims she "can not say for certain that the package . . . contained Frank Allen Glover's phone." Def.'s Ex. 133 [Doc. No. 232-132] ¶¶ 15–16. The evidence in the record permits the Court to conclude that Mrs. Lowe's trial testimony about the inclusion of the phone is not false. Her contention that she cannot *now* be certain that the package contained Mr. Glover's phone does not actually conflict with her

[25] This evidence, which is pertinent to one of Defendant's *Giglio* claims, is discussed in detail below.

[26] As discussed below, other evidence at trial indicated this phone belonged to Mr. Glover.

trial testimony.[27] *Cf. United States v. DiPaolo*, 659 F. Supp. 120, 122 (W.D.N.Y. Apr. 17, 1987), *aff'd*, 835 F.2d 46 (2d Cir. 1987) ("The 'recantation' is not in fact a recantation but a statement of lack of present recollection."). Additionally, Defendant's own trial testimony supports Mrs. Lowe's original account. When asked what his "participation was with respect to this cell phone allegedly being mailed to Mr. Lowe," Defendant answered:

> After — after I gave Alan the money, a couple hours later he walks over into the office and he lays his cell phone on the desk, and to this day I swear it didn't have a charger. It was just a cell phone. And he says, here, we're supposed to mail this to Jeff. And I carried it in, and I give it to Brenda because I didn't have his address. And I said, Brenda, Jeff wants you to mail this cell phone to him. And that was the end of it.

Tr. at 1005:2–12. Because the Court is satisfied that Mrs. Lowe's trial testimony is truthful, her affidavit does not entitle Defendant to a new trial.

Second, Mrs. Lowe has recanted her trial testimony that the package she received included a phone, a charger, *and nothing else*. *Id.* at 723:15–22. As set forth in her affidavit, she now claims the envelope "contained a summons from PETA regarding Tim Stark." Def.'s Ex. 133 [Doc. No. 232-132] ¶ 15. This assertion is supported by a text exchange with her husband the day after the package arrived. She texted him: "Hey, that package arrived today. I [sic] had a Peta summons to produce evidence re: Tim Stark. . . ." Def.'s Ex. 136 [Doc. No. 232-135]. Mr. Lowe replied, "peta knows my

[27] As the Government points out, Mrs. Lowe would be "unavailable" under Federal Rule of Evidence 804(a)(3) because she now claims she does not remember whether the envelope contained the phone. Accordingly, her earlier statement about Mr. Glover's phone could be introduced to prove the truth of the matter asserted because it was testimony she gave "as a witness at a trial." Fed. R. Evid. 804(b)(1)(A).

address in vegas. Wonder why they sent it to the park." *Id.* Mrs. Lowe told her husband the summons "came in a certified envelope, so someone there must have signed for it." *Id.* Similarly, Postal Inspector Brian Hess testified that the package scheduled for delivery to the Lowes on November 27, 2018 weighed 4 pounds, 14 ounces, corroborating her assertion that the package contained another item. Tr. at 731:19–732:7. Accordingly, the recantation is credible with respect to Mrs. Lowe's testimony that the envelope contained nothing other than the phone and charger. Nevertheless, this recantation does not warrant a new trial under the five-part *Berry* test. Defendant makes no argument as to why the presence of the summons was "material to the principal issues involved," or why its presence in the envelope "would probably produce an acquittal." *Jordan*, 806 F.3d at 1252 (quoting *McCullough*, 457 F.3d at 1167).

4. Allen Glover's Affidavit

Defendant next claims he is entitled to a new trial based on several other statements included in Mr. Glover's affidavit. First, he alleges Mr. Glover "worked with [Jeff] Lowe to fabricate text messages and script[] recorded calls with the intent of falsely implicating [Defendant] in a murder-for-hire that was actually attributed to Lowe." Mot. [Doc. No. 232] at 23. Defendant cites to Mr. Glover's affidavit, in which he claims that "Jeff Lowe created the entire murder for hire plot from start to finish." Def.'s Ex. 112 [Doc. No. 232-112] ¶ 17. He does not, however, cite to any text messages or phone calls with particularity—let alone any communications that were introduced at trial. Thus, it is entirely unclear how Mr. Glover's allegation would have probably resulted in an

acquittal. Indeed, Defendant makes no attempt to argue that these allegations satisfy the *Berry* test.

Similarly, he claims Mr. Lowe "worked with . . . [A]gent Bryant to create, direct and coerce the murder for hire plot." *Id.* ¶ 11. Although he cites to the Lowes' affidavits and a recorded phone call between Mr. Garretson and Mr. Johnson, he provides no detail about how any of these exhibits support his claim. Nor does he analyze his entitlement to relief under *Berry*. Upon review, no apparent basis for a new trial is clear to the Court.

5. Allen Glover's Relationship with Ashley Webster

Ashley Webster, a former zoo employee, was deposed shortly before trial. None of that deposition testimony was introduced at trial, nor did she testify live. Nevertheless, Defendant seeks a new trial based on Mr. Glover's post-conviction admission that "he had a sexual relationship with Ashley Webster while she was living and working at the zoo."[28] Mot. [Doc. No. 232] at 21. But because Defendant does not engage with any of the five *Berry* factors, he has failed to satisfy his burden with respect to this evidence. *See United States v. Cordova*, 25 F.4th 817, 828 (10th Cir. 2022) (affirming denial of new trial motion "because [defendant] failed to meet his burden on the fifth prong of the test for procuring a new trial based on newly discovered evidence"). The Court will not speculate how Mr. Glover's admission is more than "merely impeaching," why it is "material to the principal issues involved," or why it "would probably produce an acquittal." *Jordan*, 806 F.3d at 1252 (quoting *McCullough*, 457 F.3d at 1167).

[28] Defendant also argues Agent Bryant failed to disclose the relationship between Mr. Glover and Ms. Webster, even though Lauren Lowe "made [him] aware of" it. Mot. [Doc. No. 232] at 26. The Court addresses this *Brady* claim below.

6. Jeff Lowe Affidavit

Defendant's counsel interviewed former park owner Jeff Lowe four times between May and August of 2021. Mr. Lowe executed an affidavit following the final interview. *See* Def.'s Ex. 125 [Doc. No. 232-125.] Defendant contends Mr. Lowe fabricated evidence by scripting phone calls and text messages with Mr. Glover. Defendant then declares, without a citation, that "[t]hese manipulated recordings and text message exchanges were introduced as evidence [at] trial and used in securing the indictment and verdict." Mot. [Doc. No. 232] at 27. In his affidavit, Mr. Lowe claims he "created . . . and staged" a "February 26, 2018 conversation between [him]self and Alan [sic] Glover regarding the murder for hire of Carole Baskin." Def.'s Ex. 125 [Doc. No. 232-125] ¶ 11. The Court has reviewed the trial transcript, and the only February 26 communication discussed at trial involves text messages between *Defendant* and Mr. Glover. *See* Tr. at 472:9–474:3; 691:12–693:25; 1073:6–13. Although the defense attempted to introduce "a conversation between Mr. Lowe and Mr. Glover" at trial, the Court sustained the Government's hearsay objection. *Id.* at 696:8–699:19. Because Defendant has not identified any other "manipulated" testimony which the Court can analyze under the *Berry* test, he is not entitled to a new trial on this basis.

Finally, Defendant alleges Mr. "Lowe knew Garretson was working as a confidential informant since the beginning, which was not disclosed to trial defense counsel." Mot. [Doc. No. 232] at 27. Defendant provides no analysis about the importance of this information, and the Court declines to speculate.

7. Jeff Lowe Recordings and Electronics[29]

Defendant next references a "phone call between Lowe and a *Netflix* producer wherein Lowe admits to the manipulation and fabrication of evidence to secure the conviction." Mot. [Doc. No. 232] at 28. As an initial matter, Defendant's citation does not support this contention. The statement—that "it was coached and this thing was set up"—came from the producer, not Mr. Lowe. *See* Def.'s Ex. 159 [Doc. No. 232-156] at 1. Regardless of who made the statement, Defendant fails to discuss the five-part *Berry* test, which governs his entitlement to relief.

Defendant also references a February 13, 2019 phone call between Agent Bryant and the Lowes. *See* Def.'s Ex. 128 [Doc. No. 232-128]. Again, he makes no attempt to explain how the call satisfies any part of the *Berry* test.[30] Nor does the substance of the call support Defendant's characterization that Agent Bryant "interfered and obstructed another federal agency's (USDA) investigation of Lowe" and "asked a government witness to lie about aspects of the criminal investigation." Mot. [Doc. No. 232] at 28. In the cited transcript, Agent Bryant gives the Lowes advice about an inspection by the USDA. Although he characterizes the investigation as "a fishing trip," Agent Bryant suggests the Lowes act in a manner that is "non-threatening, and very cooperative

[29] In this section, Defendant also argues that the Government allowed Agent Bryant to present false testimony about a cub transaction. As this is an alleged *Napue* violation, the Court addresses that argument below.

[30] He contends that Agent "Bryant demonstrated an awareness that his actions were wrong," suggesting the impeachment value of this evidence. Mot. [Doc. No. 232] at 28. But, as previously articulated, the evidence must be more than "merely impeaching" to warrant a new trial. *Jordan*, 806 F.3d at 1252.

without doing [an] affidavit." Def.'s Ex. 128 [Doc. No. 232-128] at 5. He elaborates: "Even when it's aggravating, be like, 'Okay, I'm not going to roll over and play dead, but I'm going to be very nice and very cooperative through the process.'" *Id.* Defendant makes no attempt to explain why Agent Bryant's advice to the Lowes warrants a new trial.

8. Extortion

Next, Defendant argues that his post-conviction counsel has "discovered extortion on behalf of the cooperating government witnesses throughout this case." Mot. [Doc. No. 232] at 29. He first claims, without citation or further explanation, that "[Jeff] Lowe used undisclosed evidence and his authority as employer and landlord to threaten and intimate [sic] witnesses into testifying on behalf of the prosecution." *Id.* This bare accusation is insufficient to show his entitlement to a new trial.

The remainder of the section focuses on John Finlay, Defendant's former partner and an ex-zoo employee. Defendant references a "a compromising video depicting Finlay in a compromising way," which he claims Agent Bryant, Mr. Lowe, and Mr. Johnson then used as "as a means to threaten Finlay into testifying against [Defendant]." *Id.* The Government contends this evidence is not newly discovered because the video was produced before trial. *See* Resp. [Doc. No. 237] at 42. But Defendant's argument does not implicate the video itself; rather, it relies on the communications that (in his view) demonstrate Agent Bryant used the video to coerce Mr. Finlay into testifying. Nevertheless, Defendant provides neither details about the alleged coercion, nor analysis

under the applicable legal framework. He is therefore not entitled to a new trial on this claim.[31]

Defendant also cites, without discussion, Exhibit 157, which is a video that was filed conventionally. Upon review, the Court cannot determine who all of the people in the video are, where it was filmed, the context of the discussion, or the relevance of the video under the applicable legal framework. Defendant also cites two letters that his post-conviction counsel sent to the United States Attorney's office. *See* Def.'s Ex. 161 [Doc. No. 232-158]; Def.'s Ex. 162 [Doc. No. 232-159]. The Government asks the Court to disregard these letters as "an attempt to avoid [Defendant's] page limit." Resp. [Doc. No. 237] at 42 n.11. The letters elaborate on what Defendant describes as the "suspected criminal activity" by Mr. Lowe and Mr. Garretson, and each letter is roughly 30 pages long. Def.'s Ex. 161 [Doc. No. 232-158] at 1; Def.'s Ex. 162 [Doc. No. 232-159] at 1. The Court agrees the letters are an improper attempt to shoehorn nearly 60 additional pages into the briefing and, upon review, they appear to have very little relevance to the legal framework governing new trials. Accordingly, the Court disregards these exhibits.

Finally, Defendant claims that Jeff Lowe "offer[ed] a reward for someone to infiltrate" the volunteer program at Carole Baskin's rescue in August of 2017. Mot.

[31] Additionally, the Court has reviewed the relevant exhibits and finds no evidence of actual coercion. At best, Mr. Garretson paraphrases Mr. Johnson's claim that he "ha[d] texts from Matt [Bryant] saying to get the Finlay video so you can dangle it over his head,' or something like that." Def.'s Ex. 19 [Doc. No. 232-19] at 2. There is no additional detail or context provided about *how* Agent Bryant purportedly "dangle[d]" the video over Mr. Finlay's head. *Id.* Defendant also provides messages between "B" and "J," where B (presumably Agent Bryant) claims he "[k]now[s] a lot about Finlay so be careful trusting him." Def.'s Ex. 163 [Doc. No. 232-160]. Such a vague reference to Mr. Finlay is wholly insufficient to warrant the relief Defendant seeks here.

[Doc. No. 232] at 30. In support, Defendant cites the 32-page letter that his post-conviction counsel sent to the United States Attorney's office. *See* Def.'s Ex. 162 [Doc. No. 232-159]. As previously stated, the Court declines to consider legal arguments developed in this attachment. Regardless, Defendant provides no analysis of why Mr. Lowe's alleged activities justify a new trial. The Court is unwilling to speculate about, for example, the materiality of this evidence.

9. Lauren Lowe Affidavit

Defendant then turns to an affidavit that Lauren Lowe executed after trial. *See* Def.'s Ex. 133 [Doc. No. 232-132]. He first raises the recantation issue, which the Court has disposed of above. He then makes the blanket statement that the affidavit "consists of statements regarding the fabrication of evidence in an effort to falsely implicate [Defendant] in the crimes charged and statements regarding Bryant illegally breaking into [Defendant's] personal residence and removing evidence." Mot. [Doc. No. 232] at 30. Defendant does not further develop this argument or engage with its merits under the *Berry* test. This bare assertion, without more, is insufficient to warrant relief.

10. Lauren Lowe Text Messages

Relatedly, Defendant claims that a search of Mrs. Lowe's phone revealed undisclosed text messages. First, Mrs. Lowe texted Agent Bryant (1) photos of Ashley Webster's personnel file; (2) screenshots of social media posts made by Ms. Webster, Defendant, Jeff Johnson, and two other women with no apparent connection to the investigation or trial; and (3) information that Ms. Webster and Mr. Glover had a sexual relationship. *See* Mot. [Doc. No. 232] at 31 (citing Def.'s Exs. 133 [Doc. No. 232-132];

138 [Doc. No. 232-137]). The photos of Ms. Webster's personnel file were disclosed before trial, so they are not newly discovered evidence. *See* Govt.'s Ex. 18 [Doc. No. 237-18]. Similarly, Defendant does not explain why he could not have discovered the social media posts (including some from his own account) before trial. Finally, Defendant provides no explanation as to why the text message about the sexual relationship is sufficient under the *Berry* test.[32] As previously noted, Ms. Webster did not testify at trial, nor was her deposition testimony or voicemail presented to the jury. Accordingly, these messages do not entitle Defendant to relief.

Finally, Defendant points to a series of messages between Mrs. Lowe and Chealsi Putman, Defendant's niece.[33] In one message, Ms. Putman admits she "ha[d] been trying to get [Defendant] in trouble for years and years." Def.'s Ex. 134 [Doc. No. 232-133]. Another text from Ms. Putman reads: "Who pissed off Jeff Johnson matt just told me yesterday that he has to keep him from telling all he might just mess this entire thing up for us all." *Id.* (punctuation and capitalization in original). In her affidavit, Mrs. Lowe claims: "Chealsi Putnam [sic] told me that she was in regular communication with Agent Bryant and would exchange information with him. She also indicated to me that she would disclose the information she learned about the case to the attorney for Carole Baskin." Def.'s Ex. 133 [Doc. No. 232-132] ¶ 18. Again, however, Defendant provides no analysis as to how any of these claims entitle him to a new trial under *Berry*.

[32] Defendant also claims the failure to produce the message constitutes a *Brady* violation. The Court addresses this argument below.

[33] The parties use "Putman" and "Putnam" interchangeably. The correct spelling appears to be "Putman." *See* Govt.'s Ex. 23 [Doc. No. 237-23].

11. Lauren Lowe Perjury

Defendant next contends that Mrs. Lowe perjured herself when testifying about Beth Corley, one of Defendant's former employees. Ms. Corley possessed a USDA exhibitor's license, and she testified that Defendant maintained her license after she left the park to keep the animals "protect[ed]" from his lawsuit with Mrs. Baskin. Tr. at 289:12–291:13. For her part, Mrs. Lowe testified that she had "never met" Ms. Corley. *Id.* at 711:10–16. Defendant has now produced a transcript of a phone call between the Lowes and Agent Bryant, in which Mrs. Lowe says: "I actually gave Beth Corely her . . . Well, I gave it to one of her staff members to give to her, as to what her inventory was, and she's like, 'Holy Shit.' She's like, 'I had no idea this was all my inventory.'" Def.'s Ex. 126 [Doc. No. 232-126] at 6 (alteration in original). As an initial matter, this statement does not clearly conflict with Mrs. Lowe's trial testimony. To be sure, the statement is ambiguous when viewed in isolation. In the same call, however, Mrs. Lowe tells Agent Bryant she has "never met [Ms. Corley], but all her staff say really positive things about her." *Id.* at 2. Nevertheless, Defendant makes no attempt to explain how evidence that Mrs. Lowe had previously met Ms. Corley would have probably produced an acquittal.

12. Yarri Schreibvogel Interview

Next, Defendant cites a transcript between his estranged brother, Yarri Schreibvogel,[34] and his post-conviction counsel. Defendant identifies several statements

[34] Although the Motion refers to Mr. Schreibvogel as "Yurri," it appears the proper spelling of his name is "Yarri." *See* Govt.'s Ex. 19 [Doc. No. 237-19].

made by Mr. Schreibvogel, including his belief that Carole's husband "Howard [Baskin] was behind it from day one," that he "had been in it with Howard [Baskin] since day one," and that "Chealsi [Putman] set [Defendant's] ass up." [Doc. No. 232] at 33 (quoting, approximately, Def.'s Ex. 135 [Doc. No. 232-134] at 4–6). Defendant makes no attempt to explain how Mr. Schreibvogel's testimony would be admissible, material, or "of such a nature that in a new trial it would probably produce an acquittal." *Jordan*, 806 F.3d at 1252. Accordingly, it moves him no closer to a new trial.[35]

13. John Reinke

Defendant's post-conviction counsel also interviewed former park manager John Reinke, who completed an affidavit following the conversation. *See* Def.'s Ex. 113 [Doc. No. 232-113]. Defendant claims Mr. "Reinke's statements regarding the age and health of the five tigers euthanized by [Defendant] contradict testimony by Eric Cowie and Dylan West." Mot. [Doc. No. 232] at 33. But this evidence fails the *Berry* test because Defendant's trial counsel interviewed Mr. Reinke prior to trial. *See* Def.'s Ex. 113 [Doc. No. 232-113] ¶¶ 4, 62. Defendant makes no attempt to explain why the failure to learn about Mr. Reinke's claims was "not caused by [his] own lack of diligence." *Jordan*, 806 F.3d at 1252; *see also United States v. Vigil*, 506 F. Supp. 2d 571, 579 (D.N.M. 2007)

[35] Defendant also claims that Mr. Schreibvogel "had a multiple hour meeting with the U.S. Attorneys and Bryant, which was never made available to trial defense counsel." Mot. [Doc. No. 232] at 33; *see also* Def.'s Ex. 135 [Doc. No. 232-134] at 6. But, as the Government points out, a draft report of this phone call was included in the pretrial discovery. *See* Govt.'s Ex. 19 [Doc. No. 237-19].

("Any failure to ascertain the allegedly new evidence is a result of [defendant's trial counsel's] failure to ask ").

Similarly, Defendant claims the "USFWS Report prepared by Special Agent Bryant after Reinke's interview on February 6, 2019" contained "misleading and false information." Mot. [Doc. No. 232] at 34. But again, Defendant fails to show that such inconsistencies could not have been discovered before trial with reasonable diligence.[36] He has therefore failed to establish that this report and any purported inconsistencies it contains are newly discovered evidence under *Berry*.

14. The Tigers

The jury found Defendant guilty of unlawfully shooting and killing five tigers. *See* Superseding Indictment [Doc. No. 24] at 7–8; Jury Verdict [Doc. No. 113] at 2–3. At trial, former zoo employee Erik Cowie testified Defendant killed the tigers to "make cage space" by shooting "cats who weren't producing any cubs." Tr. at 45:3–9. Defendant now claims that "two of the tigers allegedly shot and killed by [Defendant] survived his conviction." Mot. [Doc. No. 232] at 34. The Motion baldly asserts that "Lauren Lowe and her veterinarian have evidence showing the tiger Delilah died after Joe was convicted and that Delilah died with evidence of being able to breed in her body." *Id.* Defendant cites to no exhibit to support this contention, nor does he elaborate on the alleged evidence, making it impossible to apply the relevant legal framework.

[36] He does not contend the report was withheld from his trial counsel.

Next, he provides a link to a website which he claims allowed the public to donate to "Samson"—one of the euthanized tigers—until at least December 2021.[37] *See id.* Beyond the name of the tiger, however, he provides no evidence that the "Samson" on the website is the same tiger killed at the park. Indeed, Mr. Cowie testified that Samson was a "white Bengal[]," Tr. at 45:16–19, but the tiger on the website is orange, *see* [Doc. No. 237-20].[38] Accordingly, this evidence appears to be irrelevant.

15. National Geographic

Defendant next identifies a National Geographic article, alleging its author contacted Agent Bryant "and was specifically aware of the investigation of [Defendant] prior to the indictment." Mot. [Doc. No. 232] at 35. As set forth in the Motion, the article was published in December 2019—after Defendant was found guilty—so it is not evidence that could have been introduced at trial. *See United States v. Lafayette*, 983 F.2d 1102, 1105 (D.C. Cir. 1993) ("In general, to justify a new trial, 'newly discovered evidence' must have been in existence at the time of trial. Events and transactions occurring after the trial obviously could not have been the subject of testimony at the trial."). Similarly, he highlights an accompanying photo in the article but admits it was

[37] Mr. Reinke's affidavit also undercuts the assertion that two of the tigers were secretly alive during the trial. *See* Def.'s Ex. 113 [Doc. No. 232-113] ¶ 33 ("The five cats that were euthanized were Sampson, Delilah, Trinity, Lauren, and Cuddles ").

[38] The Court relies on the Government's exhibit because the link provided in the Motion is no longer active.

not taken until after the trial.[39] To be sure, the author of the photo emailed Agent Bryant before the trial, but these communications were produced in pretrial discovery. *See* Govt.'s Ex. 21 [Doc. No. 237-21]. None of this evidence, therefore, entitles Defendant to a new trial.

16. Tiger King

Defendant also relies on the option and purchase agreement that he entered with Royal Goodes LLC. *See* Def.'s Ex. 1 [Doc. No. 232-1]. This contract is dated November 28, 2017. *See id.* at 1. Defendant was therefore aware of the document nearly a year before he was indicted, so the contract itself cannot form the basis for the relief he seeks.

Nevertheless, he argues that producers used the contract "to keep proprietary interests in witness statements and interviews captured during the criminal investigation which included now known to be relevant evidence/information they are still holding inviolate to this day." Mot. [Doc. No. 232] at 36. He makes the blanket accusation that "the contract prevented his agents from investigating and denied [his] lawyers access to relevant evidence, including witness statements." *Id.* at 36–37. But he does not provide any support for this statement in the record, nor does he identify a single statement or piece of evidence that was withheld. Accordingly, the Court cannot even attempt to apply the *Berry* elements. While he cites an email from producer Rebecca Chaiklin that

[39] Although Defendant points out the photos and article were published "before [he] was sentenced," he does not explain the significance of this fact within the applicable *Berry* framework. Mot. [Doc. No. 232] at 35.

references "four transcripts," *see* Def.'s Ex. 149 [Doc. No. 232-147], the email was sent on February 10, 2022, so it could not have been introduced at trial.[40]

Lastly, he details an interview that a podcast host conducted with Mr. Lowe, in which Mr. Lowe harshly criticizes Mrs. Baskin. Defendant laments that "[t]he full context of this recording is needed by all of us." Mot. [Doc. No. 232] at 37. Because Defendant provides no analysis, however, the importance of the recording within the applicable legal framework appears to be entirely speculative.

17. Evidentiary Hearing

Finally, Defendant requests an evidentiary hearing. As an initial matter, Defendant is not entitled to a hearing to further develop legal arguments which were either not raised or only fleetingly addressed.[41] Evidentiary hearings provide the Court with an opportunity to resolve factual disputes; they do not provide counsel with a second chance to develop legal arguments. To hold otherwise would encourage advocates to pack their motions with barebones arguments and vague conspiracies as a placeholder for an eventual hearing. The Court has already explained why it is unnecessary to conduct an evidentiary hearing on the recantation claims. Defendant has provided no additional reasoning—nor is any apparent to the Court—why he is entitled to a hearing on the

[40] Additionally, it is entirely unclear what transcripts Ms. Chaiklin is referencing.

[41] The Court is not persuaded that the page limit can be blamed for the Motion's dearth of legal analysis. *See Jolly v. Hoegh Autoliners Shipping AS*, No. 3:20-CV-1150-J-34PDB, 2020 WL 6505037, at *1 (M.D. Fla. Nov. 5, 2020) ("Significantly, the page limit requirement is not designed to burden the parties, but to conserve judicial resources by focusing the parties' attention on the most pressing matters and winnowing the issues to be placed before the Court. . . . Defendants have done no winnowing and instead have engaged in a throw-the-spaghetti-and-see-what-sticks motion practice which leads to imprecise and inartful briefing." (cleaned up)).

remainder of the Motion. Accordingly, the request for an evidentiary hearing is DENIED.

B. *Brady/Giglio* Violations

Defendant next argues he is entitled to a new trial on the basis of improperly withheld evidence. When the prosecution suppresses material, exculpatory evidence, it commits a *Brady* violation. *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). Impeachment evidence, including immunity agreements, are considered exculpatory for *Brady* purposes. *Giglio*, 405 U.S. at 155.

In the context of a new trial motion, "*Brady* claims can be a subspecies of newly discovered evidence claims." *Quintanilla*, 193 F.3d at 1148 n.9. Unlike other newly discovered evidence, however, alleged *Brady*/*Giglio* violations are not subject to the five-part *Berry* test. Instead, "the less-demanding *Brady* standard" applies. *United States v. Torres*, 569 F.3d 1277, 1281–82 (10th Cir. 2009). This test requires a defendant to show, by a preponderance of the evidence, that "(1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material." *Cordova*, 25 F.4th at 826 (quoting *United States v. Ahrensfield*, 698 F.3d 1310, 1319 (10th Cir. 2012)). "The 'prosecution' includes 'not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, as well as . . . other arms of the state involved in investigative aspects of a particular criminal venture.'" *United States v. Holloway*, 939 F.3d 1088, 1105 (10th Cir. 2019) (quoting *Smith v. Sec'y of New Mexico Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995)).

Materiality in this context means that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cordova*, 25 F.4th at 826 (quoting *Smith v. Cain*, 565 U.S. 73, 75 (2012)). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Fontenot v. Crow*, 4 F.4th 982, 1080 (10th Cir. 2021) (quoting *Strickler v. Greene*, 527 U.S. 263, 290 (1999)), *cert. denied*, 142 S. Ct. 2777 (2022). The materiality of withheld evidence is evaluated "in light of the entire record in order to determine if 'the omitted evidence creates a reasonable doubt that did not otherwise exist.'" *Id.* at 1080–81. Although the Court analyzes the individual allegations below, it "do[es] not consider each piece of withheld evidence in isolation." *Id.* (quoting *Simpson v. Carpenter*, 912 F.3d 542, 572 (10th Cir. 2018)). Instead, it "review[s] the cumulative impact of the withheld evidence, its utility to the defense as well as its potentially damaging impact on the prosecution's case." *Id.* (quoting *Simpson*, 912 F.3d at 572). "Whether withheld evidence is material is not a sufficiency-of-the-evidence test." *United States v. Reese*, 745 F.3d 1075, 1084 n.6 (10th Cir. 2014); *see also Kyles v. Whitley*, 514 U.S. 419, 435 (1995) ("One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

1. Insufficiently Raised Claims

Although Defendant faces a less onerous burden to warrant a new trial under the *Brady/Giglio* standard than under the *Berry* test, the burden still belongs to him. Accordingly, the Court can quickly dispose of the claims that Defendant wholly fails to analyze. *See United States v. Moya*, 5 F.4th 1168, 1193 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 385 (2021) ("But to establish a *Brady* violation [defendant] must explain at a bare minimum *why* the requested evidence was favorable to him and demonstrate that it was material, i.e., that the result of the proceeding would have been different if the evidence had been given to the defense. Because [defendant] doesn't even attempt to establish those necessary criteria, his challenge fails." (citation omitted)).

On four occasions, Defendant identifies newly discovered evidence, claims it was not produced to defense counsel, and concludes with the phrase: "yet another *Brady* violation." *See* Mot. [Doc. No. 232] at 20 (regarding Mr. Garretson withholding a recording of the "bike path" conversation), 26, (regarding Mr. Glover's text messages to Agent Bryant about his roommate in South Carolina, and "101 text messages between Garretson and Glover"), 33 (regarding Mr. Schreibvogel's claim that "he had a multiple hour meeting with the U.S. Attorneys and Bryant"). The Court cannot assess the merits of these undeveloped claims because doing so would require it to improperly serve in a dual capacity as both advocate (crafting legal arguments on Defendant's behalf) and neutral arbiter (deciding the merits of the arguments it just created). *See United States v. Madrid*, No. CR 12-128 JB, 2016 WL 9778161, at *6 (D.N.M. Apr. 7, 2016), *report and recommendation adopted*, No. CIV 14-0801 JB/WPL, 2016 WL 4492182 (D.N.M. June

30, 2016) ("Courts do not act as advocates for pro se parties, let alone those represented by counsel." (quoting *In re Onyeabor*, 535 F. App'x. 725, 731 (10th Cir. 2013) (unpublished))). Accordingly, he is not entitled to a new trial on these grounds. *See Griebel*, 312 F. App'x at 97 ("We are not willing, nor are we obligated, to forgive [Defendant's] failure to support his assertions by simply indulging his request to assume away all three elements of our established test for evaluation of *Brady* claims.").

2. Mr. Garretson's Undisclosed Recordings

First, Defendant claims "[a]ll recordings from Garretson and Lowe were intentionally withheld or destroyed, despite the government's knowledge of the existence of these recordings." Mot. [Doc. No. 232] at 39. By his count, "[o]ver 389 recordings were withheld." *Id.* Without identifying a particular call, he asserts:

> The evidence contained in these recordings demonstrates the perjury committed at trial, the witnesses' true motivation in cooperating with the government, the misconduct of the lead investigators and AUSAs, efforts to gain information on trial defense counsel's strategy, promises of immunity and more. If this evidence was properly turned over to trial defense counsel, there is a reasonable probability the outcome would have been different.

Id. These conclusory statements, which treat 389 calls as a monolith, are insufficient to raise a *Brady* claim. Apart from the February 20 phone call discussed below, Defendant does not identify any particular call or explain its impact (e.g., by identifying which of the nineteen charges it pertains to or analyzing its favorability or materiality).

He next argues that Agent Bryant "conspired with Garretson to materially alter part of the evidence so that it became favorable to the prosecution." *Id.* The Court believes he is referencing the February 20, 2019 phone call between Mr. Johnson and Mr.

Garretson, which he describes as "two government witnesses conspiring to murder yet another government witness." *Id.* As the Government points out, many of the facts underlying the call were produced in pretrial discovery. Prosecutors provided a Garvin County sheriff's report from March 13, 2019. The report includes a summary of the call and mentions that Mr. Garretson's recordings "were preserved to a CD." *See* Govt.'s Ex. 22 [Doc. No. 237-22] at 3. In reply, Defendant argues that "[a] police report mentioning a recording does not equate to the proper pretrial production of a recording captured by a confidential informant during a criminal investigation." Reply [Doc. No. 240] at 3.

A defendant's knowledge does not negate a prosecutor's disclosure obligations under *Brady*. But that knowledge is certainly relevant to the materiality analysis. *Fontenot*, 4 F.4th at 1066 ("[I]f the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material.'" (quoting *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995)). Defendant provides no analysis on the materiality of the call, particularly in light of the information contained in the sheriff's report. Similarly, Defendant does not attempt to analyze the favorability of the call. He instead makes the general statement that "[c]riminal activity that did not involve [Defendant] would have been helpful in [Defendant's] defense." Mot. [Doc. No. 232] at 40.[42]

[42] Defendant again suggests the call was the basis for excluding Mr. Johnson's testimony. But, as explained above, he provides no evidence that Mr. Johnson's testimony was actually excluded.

3. Mr. Garretson's Recording Device

Next, Defendant claims Mr. Garretson maintained possession of his government-issued recording device "up to and during the trial." *Id.* According to Defendant, "The possibility of recordings on this device that would exonerate [Defendant] or helped his defense would have affected the outcome of the trial." *Id.* But Defendant concedes "we will never know" whether the recordings would be favorable because Garretson destroyed the device. *Id.* He makes no argument that the recorder *itself* was exculpatory evidence. Instead, his argument centers on the unknown contents of the recorder. But "[s]peculation is insufficient to establish favorability under *Brady*." *Holloway*, 939 F.3d at 1105.

4. Brittany Medina

Next, Defendant contends that "Brittany Medina was an undisclosed exculpatory witness for the defendant," and that she "was involved with the federal investigation since Garretson's initial interview with law enforcement on September 14, 2017." Mot. [Doc. No. 232] at 40. He claims Ms. Medina could have "refute[d] the AUSAs['] theory that [Defendant] was involved in this first murder for hire plot." *Id.* at 41.

At trial, Mr. Garretson testified about an August 2017 conversation that took place at the zoo. When asked who was present, Mr. Garretson testified, "It was me, Jeff Lowe and Joe Passage." Tr. at 548:1–2. During a post-conviction interview with Mr. Garretson and a *Tiger King* producer, Ms. Medina claimed she was also in the office during the conversation. For the most part, her account of the conversation matches Mr. Garretson's recollection at trial. Both Mr. Garretson and Ms. Medina claimed that

Defendant was in the back part of the office while Mr. Lowe pulled up maps of Mrs. Baskin's property—including the bike path she took to work—on his computer and discussed ways to kill her. *See id.* at 548:4–549:3; Def.'s Ex. 104 [Doc. No. 232-104] at 10–11.

The Government concedes the accounts differ in one respect, however. At trial, Mr. Garretson testified that when the conversation turned to the fact that "[Defendant] knew everything about Ms. Baskin," Defendant "br[ought] over a big stack of manila folders" that contained "everything about [Mrs. Baskin]." Tr. at 548:4–10. He testified to his belief that the folders came from "somebody in the inside of her organization." *Id.* at 548:11–15. Ms. Medina's account did not include this detail.[43] The Government questions the materiality of this difference because evidence FBI Special Agent Mark Williams also testified about Defendant's trove of documents. At trial, the Government played a recording of a December 8, 2017 meeting between Defendant, Special Agent Williams, and Mr. Garretson. During the conversation, which took place in an office at the zoo, Special Agent Williams and Defendant had the following exchange:

> [Special Agent Williams]: Yeah, yeah I just need to know, you know, where she lives, where, I mean if y'all have that. Any, any information you got on her so I can make sure…
>
> [Defendant]: [Laughs] How much you need?
>
> [Special Agent Williams]: Holy shit.

[43] She maintains that Defendant was "in his little cubicle area, making phone calls, barely having an input in the conversation unless Jeff was asking him questions, or you know when someone jokes and laughs about what they're talking about and then it's like, 'Oh, what do you think, Joe?'" Def.'s Ex. 104 [Doc. No. 232-104] at 11.

[Defendant]: I got this all outta her office.

Govt.'s Ex. 9 [Doc. No. 237-9] at 19. At trial, Special Agent Williams testified that Defendant "provided [him] with a number of documents related to [Mrs. Baskin]" at this point in the conversation. Tr. at 790:3–15. Accordingly, the materiality of Ms. Medina's omitted testimony appears low, given its cumulative nature.

5. Ashley Webster

Defendant attempts to raise two *Brady* claims related to Ms. Webster. First, he claims the prosecution failed to disclose that Ashley Webster "was actually working for the government and was not, as portrayed, an independent person working at the zoo." Mot. [Doc. No. 232] at 41. For support, he cites a 20-second video of a woman who says: "Joe gave me a certificate—this was after I left. I went back down again, and I went to gather more information [to] send it to the FBI, right." Def.'s Ex. 141 (filed conventionally). The Government claims that Ms. Webster "never worked for the government," and she did not claim that the prosecution sent her to gather evidence. Resp. [Doc. No. 237] at 50. Upon review, the video is certainly not sufficient to establish a relationship between Ms. Webster and the FBI. Nevertheless, he provides no analysis about the materiality of this evidence.

Next, Defendant claims that the prosecution failed to disclose text messages about Ms. Webster pertaining to (1) her personnel file, and (2) information about her relationship with Mr. Glover. Defendant first cites a string of text messages that include photos of Ms. Webster's personnel file, but these photos were all produced in pretrial discovery. *Compare* Def.'s Ex. 139 [Doc. No. 232-138], *with* Govt.'s Ex. 18 [Doc. No.

237-18]. But Mrs. Lowe also sent Agent Bryant a text message that said: "OH MY GOD!!! ALLEN HAD SEX WITH ASHLEY WEBSTER!!! SHE LIVED IN HIS TRAILER!!!" Def.'s Ex. 139 [Doc. No. 232-138] at 4 (capitalization and punctuation in original). Assuming this message was suppressed, Defendant has not attempted to explain either its favorability or materiality.[44]

6. Chealsi Putman

Similarly, Defendant alleges the prosecution did not disclose the cooperation of Ms. Putman, whom he describes as "[Defendant's] niece and a personal friend of the Baskins." Mot. [Doc. No. 232] at 42. He alleges Ms. Putman worked closely with Agent Bryant during the investigation and "relayed any information she learned directly to the Baskins." *Id.* As an initial matter, Defendant's claim that "[n]o evidence of Putman's involvement was turned over to trial defense counsel" is inaccurate. Mot. [Doc. No. 232] at 42. The prosecution produced both a letter from Ms. Putman and several pages of text messages with Agent Bryant. *See* Govt.'s Ex. 23 [Doc. No. 237-23]; Govt.'s Ex. 24 [Doc. No. 237-24].[45] Defendant relies on a string of text messages between Ms. Putman and Mrs. Lowe "referenc[ing] her cooperation with the federal agent throughout the

[44] As the Government points out, "Ms. Webster did not testify and neither her voicemail nor her deposition were admitted into evidence." Resp. [Doc. No. 237] at 50.

[45] The Government and Defendant cite to the same text message thread between Agent Bryant and a contact named "Chelsea," although the texter appears to be Ms. Putman's husband. *See* Def.'s Ex. 142 [Doc. No. 232-140]; Govt.'s Ex. 24 [Doc. No. 237-24]. The contact is labeled as "Chelsea," but Agent Bryant's first message addresses "Travis." Several of the messages to Agent Bryant include the phrase "my wife and I." *See, e.g.*, Govt.'s Ex. 24 [Doc. No. 237-24] at 6, 10, 12, 20, 23, 42. Agent Bryant later instructs the texter to "[h]ave Chelsea call [him]." *Id.* at 40. Finally, the texter says "[C]healsi and I haven't decided if we are coming." *Id.* at 45. Nevertheless, both exhibits are Bates-stamped, indicating they were produced in pretrial discovery.

investigation." *See* Def.'s Ex. 134 [Doc. No. 232-133]. Even assuming the Government suppressed the level of Ms. Putman's purported involvement with the investigation, Defendant makes no attempt to explain the materiality of this evidence.

7. Agent Bryant's Communications

Next, Defendant alleges several *Brady* violations related to Agent Bryant's communications. First, he claims Agent Bryant "read Garretson messages he received from Johnson," but that those messages were not produced in pretrial discovery. Mot. [Doc. No. 232] at 42. Defendant does not cite any of the six supporting exhibits with particularity, but the Court presumes he is referencing (1) a message in which Mr. Johnson asks Agent Bryant "to ask Lowe to meet [Mr. Johnson] in a public place right now," Def.'s Ex. 15 [Doc. No. 232-15] at 5; *see also* Def.'s Ex. 18 [Doc. No. 232-18] at 1; (2) a message in which Mr. Johnson asked to meet with Agent Bryant, but Agent Bryant responded that he was "too busy," Def.'s Ex. 16 [Doc. No. 232-16] at 2; and (3) Mr. Garretson's admission that he recorded the February 20 phone call with Mr. Johnson, *see* Def.'s Ex. 17 [Doc. No. 232-17] at 1; Def.'s Ex. 19 [Doc. No. 232-19] at 1–2. But, as the Government points out, Defendant "again offers virtually nothing to satisfy his burden" with respect to favorability or materiality. Resp. [Doc. No. 237] at 50.

Next, he claims "Bryant failed to produce text messages from the Lowe's [sic] regarding Ashley Webster." Mot. [Doc. No. 232] at 42. Although he does not cite an exhibit or provide analysis, the Court presumes he is referencing the message about Ms. Webster's sexual relationship with Mr. Glover. *See* Def.'s Ex. 139 [Doc. No. 232-138] at

4. The Court has already addressed the insufficiency of that claim above, and Defendant offers no more context here to satisfy his burden under any of the three *Brady* elements.

Defendant next claims Agent Bryant "failed to report on calls and produce messages exchanged with Glover regarding potential witnesses and Glover's pending court cases." Mot. [Doc. No. 232] at 42. He cites four exhibits in support with no further comment or analysis. *See id.* (citing Def.'s Ex. 62 [Doc. No. 232-62]; Def.'s Ex. 133 [Doc. No. 232-132]; Def.'s Ex. 138 [Doc. No. 232-137]; Def.'s Ex. 139 [Doc. No. 232-138]). Defendant's Exhibits 62 and 138 have no apparent relevance to Mr. Glover. Defendant also cites Lauren Lowe's affidavit, in which she claims, "Agent Bryant met with Jeff Lowe and together they called Frank Allen Glover to record a conversation regarding the murder for hire," Def.'s Ex. 133 [Doc. No. 232-132] ¶ 13. But Defendant provides no further information or context about this call, making it impossible for the Court to assess its materiality under *Brady*. Defendant again cites Mrs. Lowe's message to Agent Bryant about Ms. Webster and Mr. Glover's sexual relationship, but still provides no analysis under *Brady*. *See* Def.'s Ex. 139 [Doc. No. 232-138] at 4.

Defendant next claims Agent Bryant "failed to produce recordings that showed [Defendant] had no interest in committing crimes, which Bryant specifically request Lowe to try and obtain." Mot. [Doc. No. 232] at 42–43. The exhibit contains a recorded phone call between Mr. Lowe and Defendant, although there is no indication that Agent

Bryant orchestrated the recording. *See* Def.'s Ex. 156 [Doc. No. 232-154]. Nor does Defendant analyze the content of the call under *Brady*.[46]

Defendant next notes that Agent Bryant gave Mr. Garretson his personal phone number—a fact which is corroborated by an exhibit produced in pretrial discovery. *See* Def.'s Ex. 143 [Doc. No. 232-141] (bearing Bates numbers). Defendant now contends that "nothing from Bryant's personal phone was ever turned over." Mot. [Doc. No. 232] at 43. He does not identify any specific messages that were withheld, however, but appears to suggest that some unknown messages could be favorable and material. But such speculation is insufficient. *See United States v. Garcia-Martinez*, 730 F. App'x 665, 673 (10th Cir. 2018) ("In order to prevail on his or her *Brady* claim, a defendant must marshal arguments that are more than 'merely speculative' that demonstrate by a preponderance of the evidence that the three *Brady* criteria are satisfied . . . ." (quoting *Sandoval v. Ulibarri*, 548 F.3d 902, 915 (10th Cir. 2008)).

Finally, Defendant notes that some of the screenshots of Agent Bryant's text messages "appear[] to be edited or altered in some way." Mot. [Doc. No. 232] at 43. He claims Agent Bryant intentionally altered the messages, and that "the substance of Bryant's text messages are material based on his unethical behavior throughout the entire investigation in concealing, manipulating and fabricating evidence in an effort to secure a conviction against [Defendant]." *Id.* But the fact that the messages were altered was not

[46] Upon review, the call does not appear to support Defendant's contention that he "had no interest in committing crimes." Mot. [Doc. No. 232] at 43.

suppressed, as the messages Defendant cites were produced in pretrial discovery.[47] *Compare* Def.'s Ex. 144 [Doc. No. 232-142] at 5, *with* Govt.'s Ex. 25 [Doc. No. 237-25] at 5.

8. The Tiger Excavation[48]

During the investigation, the USFWS came to suspect that Defendant unlawfully euthanized tigers and buried them at the zoo. After conducting a dig operation, USFWS agents collected five tiger skulls, which were sent for testing and ultimately used to secure Defendant's conviction on the five illegal taking charges. *See* Superseding Indictment [Doc. No. 24] at 7–8. Defendant now claims "newly discovered photographs" show that a sixth skull was excavated. Mot. [Doc. No. 232] at 44. As the Government points out, however, one of the cited photographs was not only produced in pretrial discovery but was also introduced at trial. *See* Def.'s Ex. 166 [Doc. No. 232-163]; Tr. at 106:3–13. Defendant does not adequately demonstrate that this evidence was suppressed.

[47] Defendant makes no argument that the substance of any individual message (i.e., the words that were altered) forms the basis of a *Brady* violation.

[48] This portion of Defendant's Motion also claims that joinder of the two murder-for-hire counts with the remaining counts was an effort "to inappropriately influence the outcome of the criminal trial." Mot. [Doc. No. 232] at 45. He cites to a phone call between Mr. Lowe and Agent Bryant that occurred after this Court denied Defendant's motion to sever. *See* Def.'s Ex. 128 [Doc. No. 232-128]. During this discussion, Agent Bryant says: "And I don't know. I think what they were thinking is that we get some jurors' heartstrings bleeding on shooting those cats and showing pictures of the tiger dig and all that. And they might be prejudicial where we're weak on the murder for hire." *Id.* at 9. Defendant is apparently attempting to use *Brady* to challenge the Court's Order on the Motion to Sever, *see* [Doc. No. 55]. Even assuming this is procedurally proper—a highly dubious prospect—Defendant does not explain how Agent Bryant's unsworn statements about the prosecutors' litigation strategy would have been material to either the Court's decision or the outcome of trial. Additionally, Defendant provides no evidence that the call was suppressed. Indeed, it seems unlikely that Agent Bryant would have spoken so candidly had he suspected Mr. Lowe was recording him.

Additionally, it is not clear to the Court how evidence of a sixth dead tiger would have been favorable to the Defendant. Nor is it clear how this evidence is material, since Defendant was not charged for killing the sixth tiger. *See* Resp. [Doc. No. 237] at 51 & n.40.

Next, he argues investigators suppressed evidence by separating the tigers' heads from their bodies and taking only the skulls. He claims that "the government intentionally left the tiger bodies in the ground in an attempt to prevent [Defendant] from having the ability to prove the animals were euthanized because of illness." Mot. [Doc. No. 232] at 44. The argument that the tigers' bodies would reveal evidence of infirmity or illness is entirely speculative and, therefore, insufficient to support a *Brady* claim.[49]

9. Allen Glover

Defendant presents two purported *Giglio* violations related to Allen Glover. First, he contends Agent Bryant agreed to "handle[]" Mr. Glover's DUI to protect his credibility at trial. Mot. [Doc. No. 232] at 56. Defendant cites to Mr. Lowe's affidavit, in which Mr. Lowe claims Agent Bryant told him "that a conviction could impugn the credibility of [Mr. Glover's] statements to the government." Def.'s Ex. 125 [Doc. No. 232-125] ¶ 33. As an initial matter, the Court is highly skeptical that any such agreement

[49] Additionally, Defendant makes no attempt to explain why evidence of arthritis, if it existed, would be material. The trial testimony establishes that the tigers were euthanized outside of the confines of the provision of care established with Dr. Green. *See* Tr. at 181:22–187:2 (explaining that amended vet protocol permitted Defendant to euthanize an animal only in case of an extreme emergency); *see also* 16 U.S.C. § 1539(a)(1)(A) (permitting takings that "enhance the propagation or survival" of the tiger species); 50 C.F.R. § 17.3 (defining "enhance the propagation or survival" to include, inter alia, takings that are part of a "[p]rovision of health care").

existed. *Cf. Baker v. United States*, No. CR H-96-187-2, 2002 WL 35634847, at *5 (S.D. Tex. Mar. 1, 2002), *aff'd,* 801 F. App'x 309 (5th Cir. 2020) (rejecting *Giglio* claim because "no credible evidence support[ed] [defendant's] claim that the United States concealed the existence of a non-prosecution agreement"). Mr. Glover entered a nolo contendere plea and was convicted on one misdemeanor DUI count on February 28, 2019—about one month before trial commenced. *See* Govt.'s Ex. 27 [Doc. No. 232-27]. And, as the Government points out, the purported deal is dubious because Federal Rule of Evidence 609(a) would have barred the use of a misdemeanor DUI conviction to impeach Mr. Glover. *See* Resp. [Doc. No. 237] at 54.

Similarly, Defendant claims that "three government representatives, AUSA Green, Bryant, and AUSA Green's supervisor" told Mr. Glover that if he cooperated, "no charges would be brought against [him] now or in the future." Mot. [Doc. No. 232] at 56 (quoting Def.'s Ex. 112 [Doc. No. 232-112] ¶ 40). But, again, the Court doubts the veracity of Mr. Glover's affidavit based on the other evidence in the record. First, Agent Bryant has submitted a competing affidavit in which he claims that "[t]o his knowledge, no immunity or promise of immunity was offered" to Mr. Glover. Govt.'s Ex. 23 [Doc. No. 237-29] ¶ 3. Similarly, Mr. Glover testified at trial that he did not receive an offer of immunity. Tr. at 650:1–7; *see also United States v. Weeks*, 653 F.3d 1188, 1205 (10th Cir. 2011) ("Solemn declarations in open court carry a strong presumption of verity."). Finally, a recorded phone call between the Lowes and Agent Bryant lends credence to Mr. Glover's trial testimony. Following the conclusion of Defendant's trial, Mr. Lowe joked that Agent Bryant "ought to go down there, scare the shit out of [Mr. Glover]."

Def.'s Ex. 119 [Doc. No. 232-119] at 6. Agent Bryant replied, "That poor man. I got to like him throughout the case [crosstalk 00:08:20] and it would scare him to death if I was to go down there and go, well, I tried, buddy. I tried to keep you out of trouble." *Id.* Based on Agent Bryant's candid statement, it appears Mr. Glover still feared prosecution. Additionally, the Government explained that its "decision not to prosecute Mr. Glover resulted from the limited scope of federal law and the evidence that it possessed, not a promise of immunity," a contention which the Court finds credible. Resp. [Doc. No. 237] at 54 n.16. Because the evidence at trial consistently showed that Mr. Glover "did not intend to kill Mrs. Baskin," the Government argues, he "did not use any facilities of interstate commerce to facilitate a murder for hire." *Id.* In reply, Defendant claims that this decision "defies logic," because "[i]f [Defendant] is the Ying [sic] of the murder-for-hire, Mr. Glover was the Yang." Reply [Doc. No. 240] at 6. But Defendant does not engage with the consistent evidence that Mr. Glover never intended to murder Mrs. Baskin. Nevertheless, the Court considers the materiality of the purported immunity agreements below.

10. JoAnne Green

Defendant next alleges a *Giglio* violation with respect to the zoo's veterinarian, Dr. JoAnne Green. He claims the Government threatened Dr. Green with arrest if she did not testify. He cites a recording between Mr. Garretson and an unidentified caller. In this call, Mr. Garretson said: "But see, [Dr. Green] told the government she's not going to go, and the government was like, cause I was there . . . they called her and said if you don't go, you're going to get arrested." Def.'s Ex. 43 [Doc. No. 232-43] at 5. At its core,

Defendant's argument appears to be that the Government violated *Giglio* by subpoenaing Dr. Green's testimony. He has provided no analysis showing that fact of Dr. Green's subpoena satisfies any part of the *Brady*/*Giglio* analysis.

11. James Garretson

Defendant next claims the Government failed to disclose its purported immunity agreement with Mr. Garretson. He cites only one conversation with particularity—Mr. Garretson's post-conviction interview with the FBI.[50] In that interview, he claims that former AUSA "Amanda Green told [him] that [he] wouldn't be charged for this lemur." Def.'s Ex. 152 [Doc. No. 232-150] at 6. But in this same interview, he also states he "was never given immunity," and that he "was told until the day [he] was going to court that [he] could still be charged for the lemur." *Id.* at 6, 24. The Government cites to five other instances where Mr. Garretson denied receiving immunity.[51] Mr. Garretson testified at trial that he did not receive immunity, *see* Tr. at 579:19–23, even for the lemur, *see id.* at 580:7–23. Accordingly, the Court finds the contention that Mr.

[50] Defendant describes this call as taking place on "December 2, 2021." Mot. [Doc. No. 232] at 57. In the cited exhibit, however, the FBI agent states, "The time is 1:36 on Friday, January 7th [inaudible 00:00:27]." Def.'s Ex. 152 [Doc. No. 232-150] at 1. Regardless, it is clear the interview took place after Defendant's trial. *See, e.g.*, *id.* at 24 (referencing the "resentencing on [January] 28th[, 2022]").

[51] *See* Def.'s Ex. 8 [Doc. No. 232-8] at 46 (telling Defendant's post-conviction counsel: "I never had any immunity agreement or nothing. I have no immunity."); Def.'s Ex. 9 [Doc. No. 232-9] at 2, 43 (telling Defendant's post-conviction counsel: "I never had immunity They'd bring up the lemur all the time, 'Well, we can still charge you for the lemur, we can charge you.' And then up until the Saturday before trial when we were at the trial prep I was told I could still be charged. . . . I was nervous at the fact that I don't have immunity."); Def.'s Ex. 30 [Doc. No. 232-30] at 1 ("I have no immunity."); Def.'s Ex. 91 [Doc. No. 232-91] at 5 ("I didn't even get fucking immunity."); Def.'s Ex. 105 [Doc. No. 232-105] at 4 ("[T]he government gave me no immunity. I was granted no protection from the government.").

Garretson *did* receive immunity to be wholly incredible. Additionally, Mr. Garretson's statement to the FBI is cumulative, and therefore its impeachment value is slight. At trial, defense counsel cross-examined Mr. Garretson about the fact that he had not been prosecuted for the illegal lemur purchase. *Id.* at 580:7–23.

12. John Finlay

As previously discussed, Defendant claims Agent Bryant coerced Mr. Finlay into testifying. The *Brady* section of the Motion includes the following argument, without further analysis or elaboration: "During trial, John Finley [sic] was never asked if he was provided immunity, nor was it questioned on cross examination by trial defense counsel. However, newly discovered evidence indicates Finlay was coerced into testifying. (Exhibits 21, 153, 163 and 171.)." Mot. [Doc. No. 232] at 57. Defendant has not addressed any of the three *Brady*/*Giglio* elements and has therefore not shown his entitlement to relief.

13. Jeff and Lauren Lowe

Finally, Defendant urges the Court to find a *Giglio* violation on the basis that the Government did not identify its immunity agreements with the Lowes. Neither the prosecution nor the defense called Mr. Lowe to testify at trial, so the materiality of his purported immunity agreement is unclear (nor does Defendant attempt to elucidate it).

Defendant also claims that Mrs. Lowe, who testified during the Government's case-in-chief, had an immunity agreement. His sole piece of support is a phone call between Mrs. Lowe and Agent Bryant, although the transcript appears to omit the

beginning of the exchange.[52] *See* Def.'s Ex. 137 [Doc. No. 232-136]. The transcript begins with Agent Bryant saying:

> But no don't read into all that crap. There's nothing. Mark's deal was his boss' [sic] just wanted to know, the city council just wanted to know, what his status was. He had a subpoena and Jeff and I talked last night and Jeff may still get one, but they're waiting to see this kind of a chess game. They're just waiting to see what the defense does, Jeff and I talked that out for quite a while last night, so y'all are in good shape.

Id. at 1. Later he tells Mrs. Lowe, "Don't freak out because there's, y'all are in good shape," and "Let it go because that deal yesterday. It all worked out. . . . So don't read into anything if you didn't hear it from me, it ain't right so." *Id.* at 1–2. Defendant provides no additional context to the recording, which does not by itself establish the existence of an immunity agreement. Nor does he engage with the applicable legal analysis.

14. Cumulative Effect

Finally, the Court considers the cumulative impact of Defendant's *Brady*/*Giglio* claims in light of the entire record. As articulated above, Defendant must establish the three *Brady/Giglio* elements by a preponderance of the evidence. For most of his claims, he makes no attempt to address the elements and has therefore not established a *Brady*/*Giglio* violation. *See Moya*, 5 F.4th at 1193. Similarly, several of the claims rely on speculation or cite to evidence that was in fact disclosed. But even upon review of his more detailed claims, it is clear Defendant's "trial result[ed] in a verdict worthy of confidence." *Fontenot*, 4 F.4th at 1080 (quoting *Strickler*, 527 U.S. at 290); *see also*

[52] Defendant cites to Exhibit 126, but he quotes from Exhibit 137.

United States v. Agurs, 427 U.S. 97, 112–13 (1976) ("If there is no reasonable doubt about guilt whether or not the additional [evidence] is considered, there is no justification for a new trial."). For example, evidence about Ms. Medina's recollection of the "bike path" conversation and Mr. Glover's purported immunity agreement are relevant to the two murder-for-hire counts. But Defendant has failed to show that this evidence is material—i.e., that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cordova*, 25 F.4th at 826 (quoting *Cain*, 565 U.S. 73, 75 (2012).

To find the Defendant guilty of murder-for-hire, the jury had to find beyond a reasonable doubt that Defendant: (1) "either (i) traveled in or caused another person to travel in interstate commerce or (ii) used or caused another person to use the mail or any facility of interstate commerce"; (2) "did so with the intent that a murder be committed in violation of the laws of any State or of the United States; and"; (3) intended the murder "be committed either (i) as consideration for the receipt of anything of pecuniary value or (ii) as consideration for a promise or agreement to pay anything of pecuniary value." Jury Instructions [Doc. No. 114] at 31.

Defendant claims "the first murder for hire count depended almost entirely on Glover's testimony; without it there could have been no indictment and no evidence to carry the case to the jury." Mot. [Doc. No. 232] at 56. But this argument ignores the strongest, most credible evidence against Defendant—his own words. Even assuming the jury discounted Mr. Glover's credibility, the Court's confidence in the outcome of the

trial is not undermined because Defendant's statements provide overwhelming, powerful evidence of his guilt.

To be sure, several aspects of Mr. Glover's testimony implicated the first element—that Defendant "traveled in or caused another person to travel in interstate commerce," or that he "used or caused another person to use the mail or any facility of interstate commerce." Jury Instructions [Doc. No. 114] at 31. For example, Mr. Glover testified that he gave his personal phone to Defendant. Additional testimony from Inspector Hess and Mrs. Lowe confirm that his phone was then mailed to Las Vegas as part of the scheme Defendant told Mr. Garretson about. Mr. Glover also testified that Defendant used the pizza phone to take photos of Mrs. Baskin to ensure that he killed the right person. While his testimony would have been sufficient to satisfy the first element, it was not necessary.

Instead, it was enough for the jury to believe that Defendant "caused another person to travel in interstate commerce." Jury Instructions [Doc. No. 114] at 31. And the most credible evidence presented at trial with regard to the first element was on this point. Mr. Finlay testified that he took Mr. Glover from Oklahoma to Dallas to get a fake ID at a sign shop. When asked about the purpose of this trip, Mr. Finlay said Defendant directed him to "tak[e] Alan [Glover] down there to get a fake ID so he could go take care of Carole." Tr. at 758:14–17. Special Agent Markley visited the same shop a few days later, *id.* at 11:19—113:10, and the prosecution introduced evidence of Mr. Glover's ID photo from the sign shop, *see* Govt.'s Ex. 15 [Doc. No. 232-15]. The jury also heard a surreptitiously recorded a conversation from November 7, 2017, in which Mr. Garretson

asked Defendant whether Mr. Finlay could be trusted to be "pretty quiet about everything." Govt.'s Ex. 2 [Doc. No. 237-2] at 1. Defendant answered, "Yeah, he damn sure don't want to be implicated in it, you know somebody that drove to go get the fake ID for it." *Id.* Finally, Defendant called Mr. Finlay from federal prison after his arrest. That recorded call included the following exchange:

> MALDONADO: And just so you, know Jeff is coming after you too.
> FINLAY: For what?
> MALDONADO: For taking Alan to get that ID in Texas.
> FINLAY: I already, I've already explained all that.
> MALDONADO: To who?
> FINLAY: To the FBI.
> MALDONADO: And what did ya explain.
> FINLAY: Just what went on.
> MALDONADO: That he…he needed it to go to Florida?
> FINLAY: Yeah.
> MALDONADO: Oh, so, so you hung me out to dry? …… Huh?
> FINLAY: No I told the fucking truth, and
> MALDONADO: Well what…
> FINLAY: …and fucking Jeff was in, in my explanation too.
> MALDONADO: Well why am I the one in trouble?

Govt.'s Ex. 14 [Doc. No. 237-14] at 2–3 (alterations in original). Defendant makes no attempt to explain the materiality of Mr. Glover's testimony in light of his own words.

Second, the Government had to prove beyond a reasonable doubt that Defendant's actions in the first element—traveling or causing someone "to travel in interstate commerce," or using or causing someone "to use the mail or any facility of interstate commerce"—were done "with the intent that a murder be committed." Jury Instructions [Doc. No. 114] at 31. Ms. Medina's testimony would have been relevant to the issue of intent. But her account, which is largely consistent with Mr. Garretson's trial testimony, would have been primarily cumulative. And to the extent it omitted a detail that Mr.

Garretson's account included, there was other evidence in the record corroborating Mr. Garretson's testimony. Mr. Glover's testimony was also relevant to the issue of Defendant's intent. For example, he testified that Defendant asked him whether he could "get it done," Tr. at 622:4–9, claimed that he and Defendant discussed different ways of killing Mrs. Baskin, *id.* at 624:14–23, and showed him the paths where she walked "that would probably be a good place to do it," *id.* at 625:22–626:1.

But again, the most credible and damning evidence of Defendant's intent was his own words. In addition to the evidence recounted on the first element, Defendant also told Mr. Garretson:

> Yeah, what I am doing is having him buy a go-phone down there and Jeff is buying a go-phone so they can communicate and then throw them away. And we are going to over-night his phone to Vegas and Jeff is gonna text pictures every once in a while back to the staff so that way his phone registers in Vegas. As long as he don't get caught red-handed, I think, I think we got this. But if they bust him red-handed, me and Jeff are just, we got our story down to where we fired the motherfucker and he just went off the deep end.

Govt.'s Ex. 2 [Doc. No. 237-2] at 1–2. On a separate phone call on November 17, 2017, Mr. Garretson floats the idea of bringing in a different hitman. *See* Govt.'s Ex. 5 [Doc. No. 237-5] at 1. Defendant asks, "How much? How much does he want down?" *Id.* at 2. He then tells Mr. Garretson, "Oh yeah. Yeah. See, what I was gonna do is send him with four and then give him six when it was done. So if your guy wants to do . . ." *Id.* (ellipses in original). In a February 11, 2018 phone call between Defendant and Mr. Garretson, Defendant tells Mr. Garretson, "The last guy went to North Carolina [sic] and drank it

all." Govt.'s Ex. 11 [Doc. No. 237-11] at 1. And on March 3, 2018, Mr. Garretson recorded the following exchange with Defendant:

> GARRETSON: Yeah. Just whenever we get our head above water you know, we'll go down and take
>
> MALDONADO: Tell ya what…
>
> GARRETSON: He'll go take care of her.
>
> MALDONADO: You really think you can trust him?
>
> GARRETSON: Oh fucking 100%.
>
> MALDONADO: That one of Jeff's run off with my money and never heard from him again.

Govt.'s Ex. 12 [Doc. No. 232-12] at 1. Similarly, they had the following recorded exchange ten days later:

> GARRETSON: So I didn't know if we wanted to pursue with the Baskin shit.
>
> MALDONADO: …[inaudible]… He said he'd take care of Florida for 10 . . . .
>
> MALDONADO: How well you trust that guy?
>
> GARRETSON: I've done some shit with him. He's not like that other dipshit, he's . . .
>
> MALDONADO: He took four thousand bucks and never came back.

Govt.'s Ex. 13 [Doc. No. 237-13] at 1 (second alteration in original). Defendant again makes no attempt to explain the materiality of either Mr. Glover or Ms. Medina's testimony in the context of the entire trial record.

Finally, the prosecution had to prove Defendant intended the murder "be committed either (i) as consideration for the receipt of anything of pecuniary value or (ii)

as consideration for a promise or agreement to pay anything of pecuniary value." Jury Instructions [Doc. No. 114] at 31. At trial, Mr. Glover testified that Defendant paid him $3,000, which he received from selling a liliger.[53] Tr. at 637:4–6; 641:15–16. But, once again, Defendant's testimony is by far the strongest evidence that he paid Mr. Glover to carry out Mrs. Baskin's murder. In addition to the excerpts included above, Defendant had the following exchange with Mr. Garretson on November 7, 2017:

> GARRETSON: Damn, that's crazy. Ok, cool. Hey, did you get everything else handled? Everybody's gone away or you got all that handled?
>
> MALDONADO: I'm waiting on, ah. [inaudible]. Waiting on, waiting on this lady to get this money for these liligers cause that is what I am paying for it with. Supposed to be here either tonight or first thing here tonight or in the morning.
>
> GARRETSON: Gotcha.
>
> MALDONADO: And all of the bills came from Florida, so, as long as I don't touch them and he gets busted with it on when … I hope that they are all 100 dollar bills out of a bank in Florida.

Govt.'s Ex. 2 [Doc. No. 237-2] at 1.

Upon careful review of the entire trial record, the Court does not find the *Brady*/*Gilgio* evidence to be material. To be clear, this conclusion is not based on the fact that there was *sufficient* evidence in the record to convict Defendant. Instead, "no *Brady* violation occurred because there was sufficiently strong evidence on the counts of conviction to sustain our confidence in the jury's verdict despite the absence of the impeachment evidence" against Mr. Glover, and Ms. Medina's testimony about the bike path conversation. *Reese*, 745 F.3d at 1084 n.6. The fact that Defendant's Motion does

[53] As explained above, Mr. Glover has recanted this testimony.

not engage with the most damning evidence against him is telling. Contrary to Defendant's assertion, his conviction did not hinge on Mr. Glover's credibility. Nor did this case present a close call.[54] Defendant has not shown that the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Accordingly, it does not entitle him to a new trial.

C. *Napue* Violations

A conviction obtained through the prosecutor's knowing use of false testimony violates a defendant's due process rights. *Napue*, 360 U.S. at 269. To obtain a new trial based on a *Napue* violation, a defendant must establish that "(1) a government witness committed perjury, (2) the prosecution knew the testimony to be false, and (3) the testimony was material." *United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015). *Napue*'s materiality standard is less demanding than *Brady*'s: testimony is material "unless failure to disclose [the perjury] would be harmless beyond a reasonable doubt." *Id.* (alteration in original) (quoting *United States v. Bagley*, 473 U.S. 667, 680 (1985)). It is immaterial whether the perjured testimony "is relevant to substantive issues or to witness credibility only." *United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002).

[54] The jury returned a guilty verdict on all 19 counts after just a few hours of deliberation. *See* [Doc. No. 112].

1. James Garretson

Defendant claims that the Government knowingly failed to correct several instances of perjury with respect to James Garretson. First, when prosecutors asked Mr. Garretson whether he gave Agent Bryant "all the conversations that [he] w[as] able to record," Mr. Garretson responded, "Yes." Tr. at 553:23–25. Defendant contends that Agent "Bryant knew Garretson was lying and he failed to correct the untruthful testimony." Mot. [Doc. No. 232] at 59. He argues that Agent Bryant's knowledge is enough, relying on *United States v. Buchanan*, 891 F.2d 1436, 1442 (10th Cir. 1989). But *Buchanan* stands for the proposition that "[k]nowledge by police or investigators is therefore imputed to the prosecution under *Brady*." *Id.* This is not the case for *Napue* claims. *See Smith*, 50 F.3d at 831 (imputing detective's personal knowledge to prosecution for *Brady* purposes, but finding it insufficient for *Napue* claim). Assuming the testimony is false, Defendant presents no evidence that *the prosecution* knew of its falsity. Accordingly, he is not entitled to relief.

Next, Defendant alleges that Agent "Bryant was present in the court room when Garretson testified" that Mr. Lowe and Defendant were present for the "bike path" conversation, and that "Bryant knew this testimony to be untrue." Mot. [Doc. No. 232] at 19. But again, he fails to provide any indication that prosecutors knew about Ms. Medina's presence at the meeting. Accordingly, he has not established a *Napue* violation.

Finally, Defendant contends Mr. Garretson lied about other people's knowledge of his cooperation at trial. He testified:

> Q. (By Ms. Maxfield-Green) Okay. Mr. Garretson, we were talking about the fall of 2017 when you started recording conversations for the Government, correct?
>
> A. Correct.
>
> Q. And in the fall of 2017, did anybody outside of law enforcement know that you were cooperating with the Government?
>
> A. No.

Tr. at 556:19–25. Defendant now contends "that the government knew this statement made under oath was false," and that "Medina, Lowe, Lauren Lowe, Howard Baskin and Malagerio all knew Garretson was working with the Government" at this time. Mot. [Doc. No. 232] at 21–22. He then cites, without particularity, 293 pages of exhibits. Upon review, none of the evidence supports the contention that prosecutors knew that Mr. Garretson's trial testimony was false. At best, the evidence implicates *Agent Bryant's* knowledge which, again, is insufficient under *Napue*.

2. Lauren Lowe

Defendant claims that "[Agent] Bryant knew Lauren Lowe's testimony regarding Beth Corley was false, yet he let it stand uncorrected." Mot. [Doc. No. 232] at 32. Even making the generous assumption that this testimony would qualify as perjury, the *Napue* claim still fails. Defendant only contends that Agent Bryant knew about the purported falsity, and his knowledge is not sufficient to show a violation of *Napue*.

3. Allen Glover

Defendant next claims the prosecution "w[as] aware it was not Engesser who conducted the cub sale in order to have money exchanging hands." Mot. [Doc. No. 232] at 60. But again, the only cited exhibit to support this claim involves Agent Bryant

telling the Lowes he "do[esn't] believe it was Engesser" who purchased the cub. Def.'s Ex. 128 [Doc. No. 232-128] at 15. Agent Bryant's subjective belief is not sufficient to establish a *Napue* violation.

Defendant then states, in conclusory fashion, that the prosecution was "aware Lowe was manipulating calls and texts with Glover." Mot. [Doc. No. 232] at 60. His lone citation for this proposition is a call between Agent Bryant and the Lowes, in which Mrs. Lowe says Mr. Glover "will bend over backwards for us. . . . [H]e would do anything for us."[55] Def.'s Ex. 107 [Doc. No. 232-107] at 47–48. Defendant makes no attempt to satisfy any of the *Napue* elements, and his claim appears to be completely meritless. Accordingly, it warrants no further discussion.

D. Misconduct Allegations

Finally, Defendant raises two challenges involving the Government's conduct during the investigation.

1. Outrageous Government Conduct

First, he urges the Court to find that the prosecution's behavior was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[56] Mot. [Doc. No. 232] at 46 (quoting *United States v.*

[55] Defendant provides no pinpoint citation to this 106-page exhibit. Although his brief includes quoted language, the quote appears nowhere in the exhibit. The quote provided by the Court appears to be what Defendant is referencing.

[56] As an initial matter, the Court is skeptical that Defendant's argument is procedurally proper in the context of his Rule 33 motion. Because the outrageous government conduct defense "would absolutely bar the government from invoking judicial processes to obtain a conviction," *United States v. Russell*, 411 U.S. 423, 431–32 (1973), the typical remedy is dismissal of an indictment, *see, e.g.*, *United States v. Varnell*, No. 20-6040, 2021 WL 5875718 (10th Cir. Dec. 13, 2021), at

Russell, 411 U.S. 423, 431–32 (1973)). "When the government's conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct because [doing so] would offend the Due Process Clause of the Fifth Amendment." *United States v. Wagner*, 951 F.3d 1232, 1253 (10th Cir. 2020) (alteration in original) (quoting *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994)). But "[t]he outrageous conduct defense . . . is an extraordinary defense that will only be applied in the most egregious circumstances." *Pedraza*, 27 F.3d at 1521. Indeed, its viability has been called into question, and it "has never been applied by [the Tenth Circuit] to strike down a conviction." *United States v. Varnell*, No. 20-6040, 2021 WL 5875718, at *3 (10th Cir. Dec. 13, 2021). "To prove outrageous government conduct, the defendant must show 'either (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime.'" *Wagner*, 951 F.3d at 1253 (quoting *United States v. Dyke*, 718 F.3d 1282, 1288 (10th Cir. 2013)).

Pursuant to Rule 33(b), Defendant is only entitled to relief on the basis of newly discovered evidence. While that evidence may take different forms—e.g., a recantation, *Brady* violation, or *Napue* violation—it must still form the basis for relief under the rule.

*3 (reviewing denial of motion to dismiss indictment); *United States v. Wagner*, 951 F.3d 1232, 1254 (10th Cir. 2020) (same); *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994) (same); *see also United States v. Harris*, 997 F.2d 812, 816 (10th Cir. 1993) ("[D]istrict courts have only utilized the defense a handful of times to dismiss charges." (emphasis added)); *United States v. Lacey*, 86 F.3d 956, 963 (10th Cir. 1996) (recognizing the defense "generally prevents the government from prosecuting a crime developed through egregious investigatory tactics," but that it may also "warrant a downward departure from the sentencing guidelines"). In contrast, Defendant invokes the defense as a mechanism for a new trial. This relief, as the Government points out, "is fundamentally irreconcilable" with the assertion that the government is barred from invoking the judicial process. Resp. [Doc. No. 237] at 58.

But most of Defendant's arguments have no connection to newly discovered evidence. For example, he argues that his statements were exaggerations, and that he "made no serious expression of an intent to commit an act of unlawful violence to Ms. Baskin prior to government involvement." Mot. [Doc. No. 232] at 48–49. Similarly, he claims that the December 5, 2017 phone call played at trial was insufficient to satisfy "the interstate nexus required for jurisdiction." *Id.* at 51. Neither of these arguments rely on new evidence, so neither is properly considered in the instant Motion.

Finally, the arguments which are based on newly discovered evidence are underdeveloped and merit little discussion. *See, e.g.*, Mot [Doc. No. 232] at 52 (including quotes with only a citation to "Exhibit xx"). The Motion focuses on the conduct of third parties and includes conspiratorial accusations without supporting exhibits. *See, e.g.*, *id.* ("It is no mere coincidence that Jeff Lowe gets arrested in Las Vegas, and upon return home to Oklahoma immediately starts working with federal agents to set [Defendant] up."); *cf. Varnell*, 2021 WL 5875718, at *5 ("[W]e must examine the government's conduct, not [a paid informant's] conduct." (citing *United States v. Doe*, 698 F.3d 1284, 1293 (10th Cir. 2012))). Thus, assuming the outrageous conduct defense is viable and is properly included in the instant Motion, Defendant has not shown that it is applicable to the facts of this case.

2. Prosecutorial Misconduct

Relatedly, Defendant argues he is entitled to a new trial on the basis of prosecutorial misconduct. But all four of the cases he cites involve litigants challenging the constitutionality of their state convictions under 28 U.S.C. § 2254, not pursuing new

trial motions under Rule 33. *See* Mot. [Doc. No. 232] at 55–56 (citing *Matthews v. Workman*, 577 F.3d 1175 (10th Cir. 2009); *Dodd v. Trammell*, 753 F.3d 971 (10th Cir. 2013); *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003); *Fontenot v. Allbaugh*, 402 F. Supp. 3d 1110 (E.D. Okla. 2019)). Accordingly, these cases are inapposite, and the Court considers only whether Defendant has shown entitlement to a new trial on the basis of newly discovered evidence.[57] *See* Fed. R. Crim. P. 33(b). Defendant admits his arguments are grounded in newly discovered evidence. *See* Reply [Doc. No. 240] at 6 ("The bad faith of the AUSAs came to [Defendant]'s attention in June of 2021 when Mr. Garretson provided post-conviction counsel with the phones used during the investigation."). Nevertheless, he makes no attempt to analyze the newly discovered evidence within the applicable legal framework.

For example, he alleges that prosecutors twice presented false evidence to the grand jury.[58] Mot. [Doc. No. 232] at 61. As an initial matter, this claim of misconduct does not appear to be premised on newly discovered evidence. Defendant's trial counsel examined Agent Bryant about this exact issue, including the fact that prosecutors did not "ask[] [him] any questions in front of the grand jury to advise them that the previous information they received may have been erroneous." Tr. at 903:13–911:14. Regardless, Defendant makes no attempt to explain how this evidence satisfies the *Berry* test.

[57] Defendant has provided the Court with no authority or reason to depart from the confines of the five-part *Berry* test.

[58] Defendant also argues that the Government intentionally suppressed recordings and excluded Mr. Johnson, an exculpatory witness. Because the Court has already rejected those arguments, it omits them here.

Similarly, Defendant alleges the Government allowed Agent Bryant "to send personal emails to the CI regarding his initial interview." Mot. [Doc. No. 232] at 61. He provides no citation for this proposition, nor does he identify any emails that Agent Bryant send to Mr. Garretson. Because this evidence appears to entirely speculative, he cannot—nor does he attempt to—analyze it under *Berry*.

He next contends prosecutors "demand[ed] souvenirs be collected due to the defendant's notoriety," and kept "a bullseye with the Defendant's face on it in a government office." *Id.* Although each of these assertions is followed by a lone citation to an exhibit, he makes no effort to analyze *why* this evidence entitles him to relief under the applicable framework—particularly how it is "material to the principal issues involved" or "of such a nature that in a new trial it would probably produce an acquittal." *Jordan*, 806 F.3d at 1252. Conclusory statements like these are not sufficient to warrant a new trial.

Defendant also cites an affidavit sworn by former FBI Special Agent Doug Kouns. *See* Def.'s Ex. 144 [Doc. No. 232-142]. But this affidavit, dated February 10, 2022, did not exist at the time of the trial and is not itself newly discovered evidence.[59] To the extent Defendant seeks to treat the report as a vehicle to present additional claims for relief, the Court rejects the tactic as an improper attempt to exceed his page limit.

Finally, Defendant argues the Government improperly "stood by" the PSR at the January 28, 2022 resentencing despite the fact that Defendant's counsel provided

[59] Defendant notes that certain actions could constitute "potential OPR violation[s]" or violations of DOJ guidelines. Mot. [Doc. No. 232] at 63. It is unclear what relevance those allegations have in the context of the instant new trial motion.

undisclosed recordings and "the results of their investigation" on January 25 and 26. Mot. [Doc. No. 232] at 64. Defendant makes no attempt to explain how the Government's conduct at resentencing—nearly three years after his trial concluded—is relevant under Rule 33(b).

IV. Conclusion

After carefully reviewing each argument properly raised by Defendant, the Court is confident that the "interest[s] of justice" do not require a new trial. Fed. R. Crim. P. 33(a). Defendant's allegations, whether viewed individually or cumulatively, are incapable of overcoming the strong, credible evidence of guilt set forth in the record. Contrary to his assertions, Defendant received a fair trial, and the jury returned a reasonable and just verdict.

IT IS THEREFORE ORDERED that Defendant's Motion for New Trial [Doc. No. 232] is DENIED.

IT IS FURTHER ORDERED that Defendant's Second Motion for New Trial [Doc. No. 246] is DENIED.

IT IS SO ORDERED this 21st day of November, 2023.

SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

July 9, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH ALLEN MALDONADO,

Defendant - Appellant.

No. 23-6207
(D.C. No. 5:18-CR-00227-SLP-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **EID**, Circuit Judges.

This case is the fourth installment in a series of appeals involving Joseph Maldonado—also known as "Joe Exotic" or the "Tiger King." Among other things, Maldonado was convicted of two counts related to a murder-for-hire plot in which he attempted to hire two hitmen to kill his rival, Carole Baskin, and five counts of violating the Endangered Species Act for killing five of his own tigers. Following his convictions, Maldonado filed a motion for a new trial based on newly discovered

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

evidence purportedly showing that multiple witnesses recanted their trial testimony and that the government unlawfully concealed evidence related to witness immunity agreements and the tigers' health.

The district court denied Maldonado's motion, and this appeal followed. We hold that Maldonado has waived several of his arguments on appeal—specifically, Maldonado has waived his arguments that the district court applied the wrong standard to his motion and improperly disregarded some of his arguments as being overly conclusory, and that new evidence would support an entrapment defense. We also hold that the district court did not abuse its discretion or otherwise err by denying Maldonado's motion for a new trial. Accordingly, we affirm.

I.

Joseph Maldonado rose to fame through his central role in the drama-documentary *Tiger King: Murder, Mayhem and Madness*, a Netflix series that chronicled Maldonado's experiences as a private zookeeper and tiger owner. *See United States v. Maldonado-Passage*, 56 F.4th 830, 836 (10th Cir. 2022). Maldonado—the so-called "Tiger King," who also goes by "Joe Exotic"—opened an exotic-animal zoo in Wynnewood, Oklahoma, which he owned and operated for decades. As his moniker would suggest, Maldonado eventually became known for owning and exhibiting big cats—tigers, mainly, in addition to lions and cross-bred hybrids.

Maldonado has been embroiled in a bitter, years-long feud with Carole Baskin, an animal-rights activist who is outspoken "against the abuse of big cats in

captivity." Aple. App'x Vol. II at 5. As Maldonado's exotic-animal zoo rose to local fame, Baskin began to publicly condemn his practices, which she viewed as animal exploitation. Baskin contacted malls where Maldonado was scheduled to perform road shows with his tiger cubs, trying to dissuade the malls from hosting him; when Maldonado did perform, Baskin and her supporters would attend in protest. Baskin also publicly identified Maldonado on her advocacy website as someone she believed was exploiting animals.

Eventually, Maldonado responded by renaming his road shows so as to mimic Baskin's own organization name. Baskin then successfully sued Maldonado for copyright and trademark infringement, obtaining a $1 million judgment against him. That judgment drove Maldonado into bankruptcy, and so he transferred ownership of his zoo to Jeff Lowe—another locally famous owner and purveyor of tigers—who left Maldonado in charge of the zoo's day-to-day operations.

From there, the rivalry between Maldonado and Baskin escalated quickly. Irate at what he perceived as an attempt to drive him out of business, Maldonado began telling zoo employees that he would like to see Baskin dead. He spoke daily about wanting to have Baskin murdered, and he repeatedly tried to recruit people to kill her. Eventually, Maldonado found a potential hitman: zoo employee Allen Glover.

According to Glover, Maldonado first spoke with him about a potential murder-for-hire plot around October 2017. Maldonado offered to pay Glover $5,000 if he would kill Baskin, and the two men continually discussed different ways it

could be done. About a month later, in early November 2017, Maldonado arranged for Glover to travel to Texas to get a fake ID so that Glover could travel to Florida, where Baskin lived, without revealing his identity. Maldonado asked another man, John Finlay, to accompany Glover, paying Finlay for the cost of the gas to get to Texas and for the cost of the fake ID.

Before Glover left for Florida, Maldonado gave him an envelope stuffed with cash as his payment. Maldonado also took Glover's phone and shipped it overnight to Las Vegas, where Lowe received the phone and used it occasionally so that the phone's location would register there and cover up Glover's true location. Meanwhile, Maldonado had Glover buy a throwaway (or "burner") phone, which contained pictures of Baskin so that Glover "wouldn't kill the wrong person." *Id.* at 97–98.

For nearly two weeks, Glover delayed going to Florida. Eventually, though, he flew from Oklahoma to Savannah, Georgia, intending to stop in South Carolina before going to Florida to kill Baskin. Glover traveled to Florida a few weeks later, but he never followed through on the murder plan—instead, he wound up on a beach drunk and high, having spent all of the money Maldonado had paid him, and he then went back to South Carolina.

Left without a hitman, Maldonado started looking elsewhere. Maldonado discussed his options with his friend and fellow tiger owner, James Garretson—who, by that point, had long been involved in Maldonado's conversations about killing Baskin. In fact, around the time that Maldonado first hired Glover as his original

hitman, Maldonado spoke with Garretson about his plans to have Baskin killed. And in the months following, Maldonado continued to tell Garretson about the murder-for-hire plot, divulging to Garretson the details of his plans with Glover and, eventually, his need for a new hitman.

Unbeknownst to Maldonado, however, Garretson had become a government informant. Months earlier—after Maldonado first shared with Garretson his detailed plans to have Baskin killed—Garretson received a call from Agent Matthew Bryant, who worked for the U.S. Fish & Wildlife Service. In September 2017, Garretson met with Agent Bryant, admitted that he had heard Maldonado discuss plans to hire a hitman to kill Baskin, and agreed to become an informant in the government's investigation of Maldonado. Garretson agreed to record phone calls and in-person conversations with Maldonado, as well as conversations with Lowe, Glover, and "anybody else [he] encountered [who] seemed to have knowledge" about Maldonado's plot. *Id.* at 45–56. Garretson turned over these phone calls, along with several text messages, to the government.

For months, Garretson recorded conversations in which Maldonado explicitly described his desire to kill Baskin and the plans he was putting in place to do so. After Maldonado hired Glover as his hitman, Garretson also recorded conversations with Glover, in which Garretson asked Glover about his plans to carry out the murder. During those conversations, Glover repeatedly insisted that he was actually going to kill Baskin—although Glover later claimed he never intended to actually

follow through with the plan but wanted to convince Garretson otherwise so that Garretson would not take his place and take the money.

Eventually, when Glover delayed going to Florida, Garretson thought the murder-for-hire plot had been called off. Knowing that Maldonado viewed Glover as untrustworthy, Garretson began suggesting to Maldonado—at the government's direction—that Maldonado hire another hitman, whom Garretson had mentioned before as someone he knew. Maldonado expressed interest, asking "[h]ow much that dude [would] cost" and offering to give Garretson cash to pay his hitman. Aple. App'x Vol. I at 150–52.

That other hitman, it turned out, was an undercover FBI agent, referred to at trial as Special Agent Mark Williams. In December 2017, once Glover had abandoned his plans to kill Baskin, Garretson arranged for Maldonado to meet with Special Agent Williams as a new potential hitman. Maldonado gave Special Agent Williams several documents related to Baskin, which he claimed to have stolen from Baskin's office. Maldonado and Special Agent Williams concocted a plan for him to kill Baskin by following her into a parking lot, shooting her, and driving off.

Throughout the following months, Garretson continued recording conversations with Maldonado in which they discussed the plan to use Special Agent Williams as a hitman. Maldonado expressed some reservations, asking Garretson if they could trust Special Agent Williams.

Then, around March 2018, Maldonado cut off communication with Garretson. Garretson testified that he did not know why Maldonado stopped talking with him,

but that it was around the same time that Lowe had come back to Oklahoma from Las Vegas. Garretson then had a conversation with Lowe that led him to believe Lowe knew about Glover's involvement in the murder-for-hire plot. Garretson relayed that information to Agent Bryant and coordinated a meeting between him, Lowe, and Lowe's wife, Lauren, where the Lowes handed over Glover's personal phone that had been mailed to them in Las Vegas. After that, Garretson's involvement in the investigation ended.

In September 2018, a grand jury in the Western District of Oklahoma returned an indictment that charged Maldonado with two counts of using a facility of interstate commerce in the commission of a murder-for-hire plot, in violation of 18 U.S.C. § 1958(a). The two counts arose out of the two separate plots involving Glover and Special Agent Williams.

Months later, the grand jury returned a superseding indictment, adding several charges. As relevant here, Maldonado was charged with five additional counts for violations of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(F), based on Maldonado's shooting and killing of five tigers. Specifically, as Maldonado later testified, he decided to kill several tigers at his zoo one day after coming to realize he had "all these crippled animals" that he was "making suffer to be on display to suck donations out of people." Supp. Aple. App'x at 110–11. Maldonado therefore shot the five tigers, believing that doing so was better than following the euthanasia protocol he had established with his park veterinarian because it was cheaper and faster.

After trial, a jury convicted Maldonado on all counts. Maldonado was sentenced to 264 months' imprisonment; he later successfully appealed that sentence in this Court,[1] was then resentenced to 252 months' imprisonment, and unsuccessfully appealed that resentencing.[2] Two years after his conviction, and while his second appeal was pending, Maldonado filed a motion for a new trial.[3] In part, Maldonado's motion sought a new trial as to the two counts involving the murder-for-hire plot based on purportedly new evidence, which allegedly indicated that several witnesses—Glover, Garretson, and Jeff and Lauren Lowe—had lied during their trial testimony, recanted their testimony, or received offers of immunity in exchange for their testimony against Maldonado. Maldonado also sought a new trial as to the five counts related to the killing of his tigers, relying on evidence that Maldonado claims was uncovered after trial and that allegedly proved the tigers were ill at the time he killed them.

The district court denied Maldonado's motion. In its reasoning, the district court concluded that Maldonado's purportedly new evidence was insufficient to satisfy the requirements for a new trial, especially because the other evidence at

[1] *See United States v. Maldonado-Passage*, 4 F.4th 1097 (10th Cir. 2021).

[2] *See United States v. Maldonado-Passage*, 56 F.4th 830 (10th Cir. 2022).

[3] In the meantime, Maldonado also filed a third appeal in this Court, which entailed a habeas corpus proceeding challenging the denial of a motion Maldonado filed pursuant to 28 U.S.C. § 2255. *See United States v. Maldonado*, 2024 WL 5244829 (10th Cir. Dec. 30, 2024). The panel in that case denied a certificate of appealability and dismissed the matter. *Id.* at *5.

trial—including Maldonado's own testimony—provided "strong, credible evidence" of his guilt. Aplt. App'x at 240.

Maldonado appealed, arguing that the district court committed a number of errors in denying his motion for a new trial. Specifically, Maldonado argues that the district court (1) applied the wrong legal standard; (2) improperly disregarded some of his arguments as being overly conclusory; (3) improperly refused to hold an evidentiary hearing regarding the witnesses who allegedly lied during their testimony; (4) improperly denied his motion with respect to the counts involving the death of the tigers; (5) improperly rejected Maldonado's claims that the government failed to disclose immunity agreements with witnesses in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); and (6) should have granted a new trial based on a putative entrapment defense. We address each set of claims in turn.

II.

Before turning to the substance of Maldonado's claims, we first briefly describe the substantive standard for a motion for a new trial, and we set out the standards of review applicable to the denial of such a motion.

Following a guilty verdict, a criminal defendant may move the district court to vacate the judgment of conviction and grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). But we have previously expressed that "[a] motion for a new trial is not viewed with favor and should be treated with great

caution." *United States v. Chatman*, 994 F.2d 1510, 1518 (10th Cir. 1993); *see United States v. Perea*, 458 F.2d 535, 536 (10th Cir. 1972).

Where, as here, a motion for a new trial is based upon newly discovered evidence, the defendant must show that:

> (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 issues involved; and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal.

United States v. Jackson, 579 F.2d 553, 557 (10th Cir. 1978); *see Chatman*, 994 F.2d at 1518. The burden of satisfying each of those requirements rests at all times with the defendant. *See United States v. Sinclair*, 109 F.3d 1527, 1531 (10th Cir. 1997).

Ordinarily, "[t]he denial of a motion for a new trial based on newly discovered evidence is reviewed for abuse of discretion." *United States v. McCullough*, 457 F.3d 1150, 1167 (10th Cir. 2006). An abuse of discretion occurs if the district court's decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Herrera*, 481 F.3d 1266, 1270 (10th Cir. 2007) (quotation omitted). Additionally, "a district court necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Johnson v. Spencer*, 950 F.3d 680, 701 (10th Cir. 2020) (cleaned up). And "even in the context of the deferential abuse-of-discretion standard, we review subsidiary legal questions de novo." *Id.*

As with our review of the denial of a motion for a new trial based on newly discovered evidence, we likewise review the denial of an evidentiary hearing in relation to a motion for a new trial (based on evidence of a witness's perjury or

recantation of testimony) for abuse of discretion. *See Chatman*, 994 F.2d at 1518–19. But we review de novo the denial of a motion for a new trial based on a *Brady* or *Giglio* violation. *United States v. Cordova*, 25 F.4th 817, 826 (10th Cir. 2022).

III.

With those standards in mind, we begin with Maldonado's argument that the district court applied the incorrect legal standard in reviewing Maldonado's motion for a new trial based on newly discovered evidence that witnesses purportedly committed perjury or recanted their testimony after trial. Maldonado argues that the district court improperly applied a five-part test for evaluating such motions derived from *Berry v. Georgia*, 10 Ga. 511 (1851), which requires, among other things, a reasonable probability that the new evidence would have changed the jury's verdict. *See Sinclair*, 109 F.3d at 1531–32. Maldonado claims that our Circuit has never adopted the *Berry* test and insists that the district court should have instead applied a more lenient test requiring only a *possibility* that the jury would have reached a different verdict without considering the perjured or recanted testimony. *See Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928).

We conclude that Maldonado has waived this argument under the invited-error doctrine. Under the invited-error doctrine, we deem an issue waived and decline to review it—for plain error or otherwise—if a party "urged the district court to adopt" the very proposition that the party attacks on appeal. *United States v. McBride*, 94 F.4th 1036, 1042 (10th Cir. 2024) (quoting *United States v. DeBerry*, 430 F.3d 1294, 1302 (10th Cir. 2005)). In other words, "if a party affirmatively invites the

district court to take a certain action," then "we construe the party to have 'knowingly and intelligently relinquished' any claim of error; that is, we deem such a claim waived." *Id.* at 1051 (Eid, J., concurring in part and concurring in the judgment) (quotation omitted).[4]

At the district court, Maldonado not only failed to argue that the *Berry* test does not apply in our Circuit, but he also in fact invited the court to use that test as the governing standard. Indeed, Maldonado's motion for a new trial clearly set forth the five-part *Berry* standard—including its probability requirement—as the governing legal standard to use in evaluating a motion for a new trial.[5] But now, on appeal, Maldonado instead claims that the *Berry* standard should not apply after all. The invited-error doctrine prohibits Maldonado from changing course in this way. Because Maldonado "urged the district court to adopt" the very position he now attacks on appeal, he has waived this argument. *Id.* at 1042 (quoting *DeBerry*,

[4] Our Circuit has recognized an exception to the invited-error doctrine, called the "supervening-decision exception," which generally applies when (1) "the law of the Tenth Circuit was previously so well-settled it foreclosed any possibility of success" and (2) "the relevant law in this Circuit was changed by an intervening Supreme Court or Tenth Circuit decision." *McBride*, 94 F.4th at 1052 (Eid, J., concurring in part and concurring in the judgment). That exception does not apply here because Maldonado does "not argue on appeal that the law in this Circuit was settled." *Id.* To the contrary, Maldonado expressly argues that our Circuit's legal standards for analyzing a motion for a new trial are "unsettled." Supp. Aplt. Br. at 29.

[5] Although Maldonado's motion for a new trial did not explicitly cite *Berry*, the five-part standard he sets forth in his motion is identical to and ultimately derived from *Berry*. *See United States v. Stevens*, 978 F.2d 565, 570 (10th Cir. 1992); *see* also *United States v. Ramsey*, 726 F.2d 601, 605 & n.2 (10th Cir. 1985) (adopting *Berry* test and setting forth its five requirements).

430 F.3d at 130). We therefore deem Maldonado's argument waived and decline to address it.

IV.

Next, we address Maldonado's argument that the district court abused its discretion by disregarding some of the arguments Maldonado made in support of his motion for a new trial on the grounds that those arguments were too conclusory. In denying Maldonado's motion, the district court concluded that several of Maldonado's arguments were "too vague and conclusory for [it] to meaningfully analyze" because they lacked citations to any particular exhibits, portions of the trial record, or legal standards, and so the court stated that it would "consider *only* the arguments [actually] identified and presented in the briefing." Aplt. App'x at 174. On appeal, Maldonado challenges the district court's refusal to consider his arguments in more detail, seemingly arguing that the district court mischaracterized or exaggerated the conclusory nature of his arguments below.

We decline to reach the merits of this argument as well, but for a different reason than above: we conclude that Maldonado has waived this argument through inadequate briefing. Specifically, Maldonado's supplemental opening brief—where this issue is raised for the first time—states that the district court "erroneously construed" the "massive weight" of his evidence "as 'buried truffles.'" Supp. Aplt. Br. at 33. But nowhere in his brief does Maldonado actually identify or specify the district court's purported error. In fact, in the two-page section of Maldonado's brief dedicated to this argument, Maldonado extensively quotes from the district court's

order and describes the district court's reason for deeming his arguments conclusory. But Maldonado does not explain how the district court's reasoning could constitute an abuse of discretion, nor does he cite any cases or other authority to support that position. Instead, he supplies only one example of an exhibit that he referenced in his motion at the district court; he otherwise makes no attempt to support his conclusory assertion that his "citation strings of exhibits" in his motion were sufficiently detailed because they were "proffers of the *sheer weight* of newly discovered evidence." *Id.* at 34.

Maldonado's briefing on this issue does not satisfy the requirements of the Federal Rules of Appellate Procedure, which specify that an argument section must "contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." *MacArthur v. San Juan County*, 495 F.3d 1157, 1160 (10th Cir. 2007) (quoting Fed. R. App. P. 28(a)); *see Defs. of Wildlife v. U.S. Forest Serv.*, 94 F.4th 1210, 1227 n.10 (10th Cir. 2024). And without any citations to the record or to legal authorities, and without any meaningful explanation of his position, Maldonado's briefing fails to facilitate appellate review because it does not provide the government, nor us, a meaningful way to respond to his arguments.

In the face of inadequate briefing that fails to abide by the rules of appellate procedure, our Court may exercise discretion to dismiss the appeal, decline to address the issue, or proceed to the merits regardless. *MacArthur*, 495 F.3d at 1161. Because

Maldonado provides no meaningful argument or authority in support of his claim, we decline to address the issue and deem it waived.

V.

We next consider Maldonado's argument that the district court abused its discretion by declining to hold an evidentiary hearing before ruling on Maldonado's motion for a new trial. Specifically, and with respect to the portion of his motion based on the purported post-trial recantations of three witnesses, Maldonado argues that the district court should have held an evidentiary hearing before ruling on his motion in order to evaluate the credibility and impact of the witnesses' recantations.

A.

When a motion for a new trial is based on newly discovered evidence that a trial witness committed perjury or later recanted their testimony, a court may only grant the motion if it is "satisfied that the challenged testimony was actually false." *United States v. Bradshaw*, 787 F.2d 1385, 1391 (10th Cir. 1986). That is so because "recanted testimony is properly viewed with suspicion." *United States v. Ramsey*, 726 F.2d 601, 605 (10th Cir. 1985).

To determine whether the challenged testimony is actually false, "the trial court ordinarily must conduct an evidentiary hearing to evaluate both the credibility and impact of a recantation." *United States v. Page*, 828 F.2d 1476, 1478 (10th Cir. 1987); *United States v. Pearson*, 203 F.3d 1243, 1274 (10th Cir. 2000) ("We ordinarily require an evidentiary hearing so that the trial court may determine the credibility of the recantation and place its findings in the record to give the reviewing

court 'some basis for evaluating its conclusion.'" (quoting *Ramsey*, 726 F.2d at 605)). Although "[t]he determination of a witness's credibility is a matter for the trial court rather than the appellate court," we nevertheless "must be able to 'discern from the record whether or how the trial judge evaluated the credibility of [a witness's] recantation.'" *Chatman*, 994 F.2d at 1518 (quoting *Ramsey*, 726 F.2d at 605).

Nevertheless, an evidentiary hearing is not always required; "in some instances, the trial judge may be able to assess the credibility of the recantation without holding such a hearing." *Pearson*, 203 F.3d at 1274; *see Chatman*, 994 F.2d at 1519 (affirming denial of a motion for a new trial "even absent an evidentiary hearing" where "the record [was] adequate . . . to discern that the district court evaluated the credibility" of a witness's recantation). Thus, if the record is sufficient for the district court to independently determine the credibility of a witness's recantation, then the refusal to hold an evidentiary hearing is not an abuse of discretion. *Pearson*, 203 F.3d at 1275.

To that end, we have generally reversed a district court's refusal to hold an evidentiary hearing only where a district court fails to make any express findings of fact related to witness credibility. *See Ramsey*, 726 F.2d at 604. By contrast, we have affirmed the refusal to hold an evidentiary hearing where a witness's recantation of trial testimony is not made under oath or in a sworn affidavit. *Pearson*, 203 F.3d at 1275 (observing that "[s]worn trial testimony is generally not refuted by unsworn repudiation of that testimony"); *Bradshaw*, 787 F.2d at 1392 (affirming refusal to hold evidentiary hearing where district court found a recantation not credible because

the witness "never stated under oath that his trial testimony was false" and where related affidavits were conflicting).

Likewise, we have affirmed the refusal to hold an evidentiary hearing where the court "had several opportunities to assess the credibility" of the witness's challenged testimony, *Pearson*, 203 F.3d at 1275, including where "the district court judge who denied the motion for new trial was the same judge who presided over [the] trial" and where "other trial witnesses, also observed personally by the district judge, corroborated [the witness's] original trial testimony (and thus undercut his recantation)," *United States v. Jones*, 315 F. App'x 714, 716 (10th Cir. 2009) (Gorsuch, J.).

B.

Maldonado's argument regarding the denial of an evidentiary hearing focuses primarily on three purported post-trial recantations: (1) Glover's recantation of his statement at trial that he had not been offered immunity; (2) Garretson's recantation of his statement at trial that he had not been offered immunity; and (3) Lauren Lowe's post-trial affidavit stating that she could "not say for certain" whether her trial testimony was accurate. *See* Supp. Aplt. Br. at 34–40. We address each witness in turn.

First, Maldonado argues that he was entitled to an evidentiary hearing on his new-trial motion because Glover—Maldonado's first (and failed) hitman—recanted his trial testimony that the government had not offered or given him immunity from future prosecution. After trial, Glover backtracked on that claim, stating in an

affidavit that Agent Bryant "told [him] during trial prep that if [he] did what they asked[,] no charges would be brought against [him] now or in the future." Aplt. App'x at 158. And Maldonado claims, in turn, that because Glover eventually stated that he *had* in fact been offered immunity, but his immunity deal had not been disclosed at trial, then a *Giglio* violation occurred.

The district court found that Glover's purported recantation was not credible. Specifically, the district court discredited Glover's affidavit "based on other evidence in the record" that either corroborated Glover's original trial testimony or conflicted with or undermined Glover's recantation, or both. *Id.* at 221–22. For instance, the district court cited a "competing affidavit" submitted by Agent Bryant, in which Agent Bryant denied that any immunity or promise of immunity was offered to Glover. *Id.* The district court also cited a phone call between the Lowes and Agent Bryant, in which Agent Bryant made comments about Glover that suggested Glover "still feared prosecution" and could get in "trouble." *Id.* at 222. Additionally, the court cited evidence from the trial itself—including Glover's own testimony, as well as evidence that Glover never intended to kill Baskin and could not be convicted of the murder-for-hire plot—which, the court found, made it unlikely that Glover would have needed an offer of immunity at all.

The district court was entitled to rely on and weigh the conflicting affidavits and other trial evidence without the need for an evidentiary hearing. *Bradshaw*, 787 F.2d at 1392. And because all of that evidence provided the district court with "several opportunities to assess the credibility" of Glover's trial testimony and

recantation, the district court was within its discretion to find that Glover's recantation was not credible—even without an evidentiary hearing. *See Jones*, 315 F. App'x at 716 (Gorsuch, J.).

Similarly, Maldonado argues that he was entitled to an evidentiary hearing because Garretson, Maldonado's ex-friend who became a government informant, likewise recanted his trial testimony that the government had not offered or given him immunity from future prosecution.[6] But as with Glover, the district court did not abuse its discretion in finding that Garretson's purported recantation was not credible, even without an evidentiary hearing. As the district court noted, Garretson testified at trial that he did not receive immunity, and he denied having received any offer of immunity agreement in five other instances. The only instance in which he purportedly recanted that statement was in a post-conviction interview—not a sworn affidavit. Thus, the district court was within its discretion to reject Garretson's purported recantation without an evidentiary hearing. *See Pearson*, 203 F.3d at 1275 (observing that "[s]worn trial testimony is generally not refuted by unsworn repudiation of that testimony"); *Bradshaw*, 787 F.2d at 1392 (affirming refusal to

[6] Maldonado's argument with respect to Garretson is likely inadequately briefed. Maldonado's discussion of Garretson's purported recantation does not cite to any part of the appellate record, and he makes only a handful of conclusory assertions, such as that the district court "had a duty to preserve the integrity of the justice system" and that "Maldonado's newly discovered facts were sufficient to trigger a new trial in any jurisdiction in the United States." Supp. Aplt. Br. at 38. In any event, because Maldonado's argument is sufficient for us to conclude that it is meritless, we exercise our discretion to address it.

hold evidentiary hearing where district court found a recantation not credible because the witness "never stated under oath that his trial testimony was false").

Finally, Maldonado argues that he was entitled to an evidentiary hearing with respect to Lauren Lowe's post-trial affidavit, in which she stated that she did not remember whether Maldonado had sent her and Jeff Lowe a package containing Glover's personal phone. According to Maldonado, that statement constituted a recantation of Lowe's earlier trial testimony that she and Jeff Lowe had received a package containing Glover's phone—a statement that was used as evidence of Maldonado's original murder-for-hire plot. Maldonado claims that Lowe's recantation was credible because it was "corroborated by physical evidence," including postal records showing that the package weighed almost five pounds (which, Maldonado claims, shows that the package could not have contained a cell phone). Supp. Aplt. Br. at 40.

Maldonado fails, however, to explain how the two statements necessarily constitute a recantation. Instead, as the district court observed, Lowe's "contention that she cannot *now*" remember whether she received Glover's phone "does not actually conflict with her trial testimony." Aplt. App'x at 191. Moreover, the district court found that Lowe's testimony was credible because it was bolstered by Maldonado's own trial testimony, in which he stated that there were plans to mail Glover's phone to the Lowes.

Altogether, then, the district court properly based its credibility determinations on the facts in the record, so its refusal to hold an evidentiary hearing was not an

abuse of discretion. We therefore affirm the district court's denial of an evidentiary hearing with respect to Maldonado's motion for a new trial.

VI.

Maldonado next argues that the district court abused its discretion by denying his motion for a new trial specifically as to the counts involving his taking and killing of five tigers in violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1538(a)(1)(B), 1540(b)(1). Maldonado argues that he was entitled to a new trial on those counts because newly discovered evidence purportedly shows both that he only killed the tigers because they were sick, and that the prosecution deliberately and unlawfully concealed evidence of the tigers' ill health.

A.

Because Maldonado's argument turns on the substantive requirements of the ESA, we begin by briefly describing those requirements and addressing, as a threshold matter, whether Maldonado's conduct falls within the scope of the ESA.

The ESA makes it unlawful for any person to, among other things, "take" any "endangered species of fish or wildlife" within the United States. 16 U.S.C. § 1538(a)(1)(B). All species and subspecies of tigers have been deemed "endangered" under the ESA. *See* 50 C.F.R. § 17.11. Thus, the ESA protects tigers of all kinds—whether they are born in the wild or in captivity, and whether they are purebred or a cross-bred hybrid. *See* 81 Fed. Reg. 19923, 19923 (Apr. 6, 2016); 16 U.S.C. § 1538(b)(1).

The term "take," as it is used in the ESA, includes "harm[ing]," "shoot[ing]," and "kill[ing]." 16 U.S.C. § 1532(19). Nevertheless, the ESA provides an exception under which a "taking" may be permissible if it is done "to enhance the propagation or survival of the affected species," subject to certain regulations. *Id.* § 1539(a)(1)(A). One such regulation provides that certain actions that would otherwise constitute a taking may still be permissible under the ESA, so long as the action "enhance[s] the propagation or survival" of the species. 50 C.F.R. § 17.3. In particular, the regulation lists the "[p]rovision of healthcare" to a protected species, including by euthanasia, as a permissible action. *Id.*

In explaining how the evidence of his tigers' ill health is relevant to his new-trial motion, Maldonado asserts that he could only be convicted of killing the five tigers if the government proved that he "violated actual, written, regulations or protocols in euthanizing his exotic animals," which would require that "the five tigers were healthy" when they were killed. Supp. Aplt. Br. at 41. But the ESA requires neither of those things. As explained, Maldonado could be convicted of violating the ESA based on proof that he killed the tigers, *unless* he killed them by euthanasia as part of the "[p]rovision of healthcare." 50 C.F.R. § 17.3; 16 U.S.C. § 1539(a)(1)(A). In other words, if Maldonado's act of shooting the tigers constituted the "[p]rovision of healthcare," then his conduct would fall outside of the ESA; meanwhile, if Maldonado was *not* "providing healthcare" to the tigers, then his conduct is punishable under the ESA. 50 C.F.R. § 17.3.

Maldonado's own trial testimony establishes that he did not shoot and kill the tigers in order to "provide" them healthcare. Maldonado does not dispute that he shot the five tigers, and he testified that he did so solely because it was cheaper and faster than having his park-affiliated veterinarian administer euthanasia. Moreover, Maldonado admitted at trial that he "violate[d] [the] protocol" that he had developed with the park veterinarian pursuant to USDA regulations, which required the veterinarian to euthanize any animal that needed it. Supp. Aple. App'x at 113–14.[7] Thus, Maldonado's conduct falls within the scope of the ESA.

B.

Having determined that Maldonado's conduct falls within the scope of the ESA, we now address the substance of his arguments regarding his convictions on the counts for killing five tigers under the ESA. As explained, Maldonado argues that he is entitled to a new trial because newly discovered evidence purportedly shows that he only killed the tigers due to their ill health, and that the prosecution deliberately and unlawfully concealed evidence of the tigers' health issues. In support of this argument, Maldonado relies principally on two pieces of evidence: (1) an affidavit from John Reinke, a former park manager at the zoo, who stated that the tigers were

[7] Maldonado also suggests that his conduct falls outside of the ESA because the statute "was never intended to apply to zoo animals." Supp. Aplt. Br. at 40 & n.6. But Maldonado cites no legal authority to support that proposition, relying instead only on his own trial testimony opining on the scope of the ESA. Regardless, his argument is meritless: the ESA has expressly been made applicable to animals bred, born, or held in captivity. *See* 81 Fed. Reg. 19923, 19923 (Apr. 6, 2016); 16 U.S.C. § 1538(b)(1).

sick, old, and suffering from arthritis, and that Maldonado shot them because it was a quicker, more humane way to euthanize them; and (2) an excavation and autopsy of the tigers' skulls, but not their bodies, which was conducted as part of the government's investigation.[8]

Maldonado first argues that Reinke's affidavit constitutes newly discovered evidence entitling him to a new trial, because—he claims—it demonstrates that Maldonado's killing of the five tigers was a form of humane euthanization "authorized by the USDA" because the tigers were sick. Supp. Aplt. Br. at 42–43. But that argument fails for the simple reason that the purportedly newly discovered evidence contained in Reinke's affidavit was not newly discovered at all. As the district court noted, Maldonado's trial counsel interviewed Reinke before trial—and so, at that point, Maldonado could have discovered any of the facts that Reinke later testified to in his affidavit.

The fact that Maldonado could have discovered the facts contained in Reinke's affidavit before trial is fatal to Maldonado's claim. To prevail on a motion for a new

[8] Maldonado also seems to rely on a conversation between Jeff Lowe and Agent Bryant, in which Bryant allegedly admitted that the prosecution joined the murder-for-hire counts against Maldonado with the counts related to the tiger killings in order to "get some jurors' heartstrings bleeding." Supp. Aplt. Br. at 42. Maldonado claims this evidence shows that "the government brought the tiger-killing charges against Maldonado solely to smear Maldonado in the jury's eyes—so that the jury would overlook the weakness of the murder-for-hire case." *Id.* But even if that were true, nothing indicates that the evidence of this conversation was in fact newly discovered after trial—nor does Maldonado argue that it was. Moreover, Maldonado has made no effort to explain how these statements—which bear only on the prosecution's litigation strategy—would be material to the tiger-killing charges or would probably result in an acquittal.

trial that is based upon newly discovered evidence, a defendant must show, among other things, that "the evidence was discovered after trial" and that "the failure to learn of the evidence was not caused by [the defendant's] own lack of diligence." *Jackson*, 579 F.2d at 557. In other words, the evidence itself must actually be *new*—that is, the substance of the evidence must not have been known to the defendant before trial commenced. *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999); *United States v. Leyba*, 504 F.2d 441, 442–43 (10th Cir. 1974) ("It is too well settled for discussion that a new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at the trial.").

Nowhere in his motion for a new trial did Maldonado explain why he could not have learned the substance of Reinke's claims sooner—nor does he attempt to do so in his argument on appeal. In effect, then, Maldonado's reliance on Reinke's affidavit is nothing more than an attempt to "keep an evidentiary trump card" to set aside his conviction. *Quintanilla*, 193 F.3d at 1148. That he cannot do. Even if Reinke's affidavit could show that Maldonado killed the tigers in a merciful effort to euthanize them (a claim that itself is dubious, given that Maldonado shot the tigers), it would still not satisfy the requirements for a motion for a new trial, because Reinke's testimony is evidence that Maldonado, "with reasonable diligence, could have [ ] discovered and produced at the trial." *Leyba*, 504 F.2d at 442–43.

Relatedly, Maldonado also claims that he is entitled to a new trial because the prosecution unlawfully concealed the physical evidence of the tigers' bodies in violation of *Brady*, an argument that we have treated as "a subspecies of [a] newly

discovered evidence claim." *Quintanilla*, 193 F.3d at 1148 n.9. A *Brady* violation can constitute grounds for a new trial where "the *Brady* materials were in the government's possession, and unknown to [the] defendant at the time of trial." *Id.*

To prevail on a motion for a new trial based on an alleged *Brady* violation, the defendant "must show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material." *United States v. Torres*, 569 F.3d 1277, 1281 (10th Cir. 2009) (quotation omitted). Like the ordinary new-trial standard, materiality for *Brady* purposes requires "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *United States v. Cordova*, 25 F.4th 817, 826 (10th Cir. 2022) (quoting *Smith v. Cain*, 565 U.S. 73, 75 (2012)). The materiality of withheld evidence is evaluated "in light of the entire record in order to determine if 'the omitted evidence creates a reasonable doubt that did not otherwise exist.'" *Fontenot v. Crow*, 4 F.4th 982, 1080 (10th Cir. 2021) (quoting *Strickler v. Greene*, 527 U.S. 263, 290 (1999)); *see also Kyles v. Whitley*, 514 U.S. 419, 435 (1995) ("One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

To support his *Brady* argument, Maldonado attempts to link the statements in Reinke's affidavit (which suggested that Maldonado only killed the tigers because they were sick) to the fact that the government excavated and examined only the

tigers' heads—and not their bodies. According to Maldonado, Reinke's statements negated the prosecution's theory at trial that Maldonado wanted to kill the tigers because they were not profitable. And because the prosecution did not perform an autopsy on the tigers' bodies, Maldonado had no way to prove, as part of his defense, that the tigers were actually sick. The prosecution's failure to perform an autopsy, Maldonado claims, therefore must have been an attempt to deliberately conceal evidence, and its suppression of that evidence must have been material under *Brady*, because the evidence would have revealed that Maldonado only killed the tigers because they were ill.

There are several problems with Maldonado's argument. First, as the government points out, Maldonado's motion for a new trial did not attempt to make this same link between Reinke's affidavit and the government's failure to examine the tigers' bodies. Instead, Maldonado's motion simply claimed that recovering the tigers' bodies would reveal evidence of infirmity or illness, without explaining *how* it would do so. In other words, Maldonado used Reinke's affidavit only as a source of newly discovered evidence—not as a basis for a *Brady* violation.

Additionally, even if Reinke's affidavit or the recovery of the tigers' bodies would show that the tigers were sick, Maldonado has failed to explain how that fact would be material or would create a probability of a different outcome. As explained, Maldonado admitted that he deliberately disregarded his veterinarian's long-established euthanasia protocol, which suggests that he was not "providing

healthcare" to the tigers within the meaning of 50 C.F.R. § 17.3—even if the tigers *were* healthy.

Thus, the district court was within its discretion to determine that neither Reinke's affidavit nor the government's failure to examine the tigers' bodies constituted a material *Brady* violation or newly discovered evidence sufficient to justify a new trial. We therefore affirm the district court's denial of Maldonado's motion for a new trial with respect to the five counts of killing tigers in violation of the ESA.

VII.

Next, we address whether the district court erred by rejecting Maldonado's *Brady* and *Giglio* claims with respect to purported evidence that two witnesses received immunity for their testimony against Maldonado, a claim we review de novo. *Cordova*, 25 F.4th at 826.

As explained, a defendant may base a motion for a new trial on an alleged *Brady* violation as "a subspecies of [a] newly discovered evidence claim." *Quintanilla*, 193 F.3d at 1148 n.9. But unlike in the typical context of motions for a new trial, impeachment evidence (including immunity agreements) is considered exculpatory for *Brady* purposes. *See Giglio*, 405 U.S. at 154–55. Thus, when the government promises (whether explicitly or implicitly) a witness immunity from prosecution in exchange for their testimony, the government is required to disclose that promise to the defense. *Id.* Still, to show a *Brady* or *Giglio* violation, the defendant must prove by a preponderance of the evidence that an immunity

agreement actually existed. *See Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009). Moreover, the defendant must still show that the immunity agreement was material and noncumulative. *See id.* at 1174.

With respect to this issue—which concerns Maldonado's conviction on the two murder-for-hire counts—Maldonado argues that the government unlawfully concealed evidence of immunity agreements with Glover and Garretson. First, Maldonado argues that Glover was implicitly offered immunity by way of "undisclosed favors" that would ensure he did not face prosecution for either a pending state-law DUI charge or for his involvement in the murder-for-hire plot. Supp. Aplt. Br. at 48–50. Because Glover was a key trial witness against Maldonado, Maldonado argues that the nondisclosure of this purported immunity agreement violated *Brady* and *Giglio*, thereby entitling Maldonado to a new trial.

As to Glover's purported immunity deal for the DUI charge, Maldonado asserts that "the government made pretrial phone calls (undisclosed to the defense) to influence local state prosecutors to deaden Glover's pending state DUI charge." *Id.* at 48. But Maldonado's assertion overlooks substantial portions of the record. Contrary to Maldonado's claim, other evidence in the record—including a sworn affidavit from Agent Bryant—indicates that the government did not ever call in favors to local prosecutors, and that the government never had a reason to offer Glover immunity because he pleaded nolo contendere to the DUI charge before Maldonado's trial even began. In light of this evidence—and especially when considering the district court's factual determinations with respect to Glover's own

credibility—the district court did not err in concluding that Maldonado failed to show that Glover received an undisclosed immunity deal that violated *Brady* or *Giglio*.

Next, with respect to Glover's purported immunity deal for his involvement in the murder-for-hire plot, Maldonado claims that the district court erred by "discount[ing]" the government's decision not to prosecute Glover. *Id.* at 49. Unlike the purported DUI immunity, the district court did not expressly determine that Maldonado failed to show the existence of an immunity agreement regarding Glover's role as a hitman; instead, the district court concluded that even if such an immunity agreement existed, Maldonado failed to show materiality.

On appeal, Maldonado fails to challenge the district court's materiality conclusion, seemingly arguing instead that the district court erroneously found that no immunity agreement existed. Moreover, Maldonado does not attempt to fit the alleged immunity agreement into the *Brady* or *Giglio* framework to show how such an agreement would be material to, or affect the outcome of, his trial. Maldonado has therefore failed to demonstrate that the district court erred by rejecting his *Brady* and *Giglio* arguments with respect to Glover.

Similarly, Maldonado argues that the prosecution unlawfully failed to disclose an immunity agreement purportedly offered to Garretson for a variety of offenses he was allegedly involved in. As mentioned, Garretson denied at trial—and in five other instances after trial—that he ever received an offer of immunity. But in one unsworn post-trial interview, Garretson stated that he had in fact received immunity. The district court found that Garretson's recantation was not credible because it was

an unsworn statement directly contradicting his trial testimony. And, as explained, that credibility determination was properly within the court's discretion. *See Pearson*, 203 F.3d at 1275 ("Sworn trial testimony is generally not refuted by unsworn repudiation of that testimony."). With that factual finding in mind, Maldonado has failed to show that Garretson actually received an offer of immunity in exchange for his testimony. Absent such evidence, Maldonado's *Brady* and *Giglio* claim with respect to Garretson likewise fails. *See Douglas*, 560 F.3d at 1174.[9]

Because Maldonado failed to show the existence of an immunity agreement with Garretson—and because evidence of any such agreement would have been cumulative at best—the district court did not err in rejecting Maldonado's *Brady* and *Giglio* arguments with respect to Garretson. Thus, we affirm the district court's conclusion that Maldonado failed to show violations of *Brady* and *Giglio* with respect to alleged immunity agreements offered to Glover and Garretson.

VIII.

Finally, we address Maldonado's claim that he is entitled to a new trial based on an entrapment defense. Maldonado argues that the newly discovered evidence would have supported an entrapment defense at trial because the new evidence shows that he was not predisposed to harming either Baskin or his own tigers, and that his criminal conduct "was orchestrated by others[,] with [the] government as conductor."

[9] What's more, even if Garretson *had* received an immunity agreement, it would not satisfy the materiality requirement because the government's decision not to prosecute Garretson was presented to the jury at trial. Thus, any purported immunity agreement would have been cumulative. *See Douglas*, 560 F.3d at 1174.

Supp. Aplt. Br. at 63. But we decline to consider this argument because Maldonado failed to raise an entrapment defense at the district court and has failed to argue for plain error on appeal.

When a party fails to raise an argument below or otherwise preserve it for appeal, "we typically treat the argument as forfeited." *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). We review a forfeited argument for plain error, which requires the party raising the argument to show "that (1) an error occurred; (2) the error was plain; (3) the error affected his substantive rights; and (4) the error seriously affects the fairness, integrity, or reputation of judicial proceedings." *McBride*, 94 F.4th at 1040. If a party fails to argue plain error on appeal, "we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise." *Leffler*, 942 F.3d at 1196.

At no point in the district court proceedings did Maldonado raise an entrapment defense. Indeed, a search through the record reveals that the only time the word "entrap" appears is in the transcript of a conversation (in which Maldonado was not even involved)—not in his motion for a new trial or in any other motion or proceeding. *See* Aplt. App'x at 141. Instead, Maldonado's defense at trial revolved around his argument that it was Lowe—not Maldonado—who concocted the plan to kill Baskin. Thus, because Maldonado failed to raise an entrapment defense (or anything remotely similar) before the district court, and because he has failed to

argue plain error on appeal, he has waived his entrapment argument. *See Leffler*, 942 F.3d at 1196.

IX.

For the foregoing reasons, we AFFIRM.

Entered for the Court

Allison H. Eid
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 09, 2025

Roger Isaac Roots
770 5th Street NW, Apartment 1107
Washington, DC 20001

RE: 23-6207, United States v. Maldonado
Dist/Ag docket: 5:18-CR-00227-SLP-1

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Steven W. Creager

CMW/art

FILED
United States Court of Appeals
Tenth Circuit

October 1, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH ALLEN MALDONADO,

Defendant - Appellant.

No. 23-6207
(D.C. No. 5:18-CR-00227-SLP-1)
(W.D. Okla.)

ORDER

Before **TYMKOVICH**, **BALDOCK**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk