**I. Mr. Hark’s motion for a new trial should be granted pursuant Rule 33.**

"[T]o prevail on a Rule 33 motion for a new trial, the movant must satisfy a five-part test: (1) the evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal." United States v. Kulczyk, 931 F.2d 542, 548 (9th Cir. 1991). The five part test does not include any provisions for considering the cost of a new trial. United States v. Kulczyk, 931 F.2d 542, 548 (9th Cir. 1991).

Rule 33 motions are reviewed on an abuse of discretion standard. United States v. Hinkson, 585 F.3d 1247, 1259 (9th Cir. 2009). A lower court must make a decision by identifying and applying the correct legal rule for the relief sought. United States v. Hinkson, 585 F.3d 1247, 1259 (9th Cir. 2009). That decision will be an abuse of discretion if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record". United States v. Hinkson, 585 F.3d 1247, 1259 (9th Cir. 2009).

Evidence is considered **"newly discovered"** if it is "discovered after the trial." United States v. McKinney, 952 F.2d 333 (9th Cir. 1991) (citing Pitts v. United States, 263 F.2d 808, 810 (9th Cir. 1959), cert. denied, 360 U.S. 919 (1959)). This court will reject as not newly discovered any new testimony from known witnesses who had the opportunity to present it during the trial. See United States v. Reyes-Alvarado, 963 F.2d 1184 (9th Cir. 1992), as amended (June 15, 1992) (rejecting post-trial codefendant testimony because holding otherwise would encourage perjury); United States v. DePalma, 461 F.2d 240 (9th Cir. 1972) (rejecting testimony by a defense witness who was known to be out of the country because no request for a continuance was made at the time of trial).

The defendant is considered **"diligent"** if they "take advantage of reasonably available means to obtain known or suspected evidence." United States v. Brugnara, 856 F.3d 1198, 1206 (9th Cir. 2017). For example, defendants must notify the judge of difficulty in locating known witnesses. United States v. Kulczyk, 931 F.2d 542, 548-49 (9th Cir. 1991). They must request known documents from the organization that maintains those records. United States v. George, 420 F.3d 991, 1000–01 (9th Cir. 2005). And they must follow the appropriate procedure for appointing an expert witness at the court's recommendation for a known issue. United States v. Brugnara, 856 F.3d 1198, 1206 (9th Cir. 2017).

To be considered **"material"** to an issue at trial, evidence must "refute an essential element of the government's case." United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992), cert. denied, 506 U.S. 873 (1992). To do so, the evidence must establish more than a merely collateral point. See United States v. George, 420 F.3d 991, 1001 (9th Cir. 2005) (finding evidence about who actually prepared a fraudulent tax return is collateral to determining what advice was given about the declarations on the tax return). Furthermore, evidence that just attempts to cast doubt upon facts overwhelmingly supported by the evidence presented at trial will be held to be immaterial. United States v. Norman, 402 F.2d 73, 78 (9th Cir. 1968) (determining a phone listing held in someone else's name does not refute other substantial evidence that the defendant lived at the relevant address). Evidence can be "entirely too remote" to be material if it relates to a party who "was not a witness at the trial" and "had no connection with the prosecution." Henry v. United States, 12 F.2d 670, 671 (9th Cir. 1926).

Prong four -- that evidence must be more than **"merely cumulative"** and more than **"merely impeaching"** -- follows as a corollary of prong three -- that evidence must be material. United States v. Walgren, 885 F.2d 1417, 1428 (9th Cir. 1989). If the evidence's sole purpose is to corroborate testimony taken at trial, it will be rejected as "cumulative". Morgan v. United States, 301 F.2d 272, 275 (9th Cir. 1962). Similarly, if the evidence's sole purpose is to impeach testimony taken at trial, it will also be rejected. United States v. Kulczyk, 931 F.2d 542, 549 (9th Cir. 1991). But that is not to say corroborating or impeaching evidence cannot be material. For example, "[i]n some situations, ... if the witness' testimony were uncorroborated and provided the only evidence of an essential element of the government's case, the impeachment evidence would be 'material,'" and therefore more than \*merely\* impeaching. United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992), cert. denied, 506 U.S. 873 (1992). Therefore, the key analysis for this prong remains whether or not the evidence refutes an essential element of the government's case. United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992), cert. denied, 506 U.S. 873 (1992).

Finally, the evidence must **“probably result in acquittal.”** United States v. Kulczyk, 931 F.2d 542, 548 (9th Cir. 1991). To be so considered, the evidence must establish an element of the legal argument being raised. United States v. Joelson, 7 F.3d 174 (9th Cir. 1993) (determining an affidavit by a coconspirator's wife does not demonstrate the defendant satisfied the first and third elements of the duress defense). When conflicting evidence is newly presented, the court must determine whether there would still be "sufficient evidence to support" the conviction "even without" the challenged evidence. United States v. Berry, 624 F.3d 1031, 1043 (9th Cir. 2010). A lack of specificity in the testimony will negatively impact the probability of acquittal. United States v. Claiborne, 870 F.2d 1463 (9th Cir. 1989) (determining the testimony's lack of specificity about the date and contents of a secretary's delivery makes it "highly improbable that [the] testimony at trial would have changed anything").

**A. Dr. Rafael Diaz's affidavit reveals how Agent Lopez fraudulently revoked Mr. Hark's mother's health insurance to coerce him to follow along with Agent Lopez's plot.**

TODO: narrative explanation of what the affidavit says/means

**1. The affidavit is newly discovered.**

The affidavit is newly discovered because Dr. Diaz did not reach out until after reading about the verdict of the trial in the newspaper. Pitts v. United States, 263 F.2d 808, 810 (9th Cir. 1959), cert. denied, 360 U.S. 919 (1959). Dr. Diaz was not a “known” witness and was prevented from presenting this testimony at trial by Agent Lopez’s threat that “if [Dr. Diaz] disclosed [their] conversation to anyone, [he] would be charged with obstruction of justice.” R. at 83. The timeline of events, therefore, establishes this affidavit was newly discovered.

**2. The defense exhibited appropriate due diligence.**

Because the defense neither knew about nor suspected Agent Lopez’s threats against Mr. Hark’s mother’s doctor, there were no “reasonably available” means for them to obtain this testimony earlier. See United States v. Brugnara, 856 F.3d 1198, 1206 (9th Cir. 2017). Health insurance mishaps are characteristic of the US health care system, so there was no reason to suspect the revocation of Mrs. Hark’s health insurance to be fraudulent. Therefore, as the lower court acknowledges, the delay in obtaining this evidence was not the result of any lack of the defense’s due diligence. R. at 85.

**3. The affidavit is material to the issues at trial.**

Whether Mr. Hark was motivated by money or by the revocation of his mother’s health insurance constitutes more than a merely collateral point in the trial. See U.S. v. Martinez, 122 F.3d 1161, 1164 (9th Cir. 1997) (“whether the defendant engaged in the activity for profit” is the third prong in determining a defendant’s predisposition for entrapment defense purposes). This affidavit is not “too remote” to be considered material because Dr. Diaz refers directly to Agent Lopez, who was a government witness at trial. Henry v. United States, 12 F.2d 670, 671 (9th Cir. 1926). Since presenting this affidavit will refute an essential element of the government’s case—namely demonstrating that Mr. Hark was motivated by more than merely money—the affidavit is material to an issue at trial.

**4. The affidavit is neither merely impeaching nor merely cumulative.**

Although presenting this evidence will in fact impeach Agent Lopez’s credibility, that is far from the sole purpose of introducing the evidence. Instead, the purpose of Dr. Diaz’s testimony is to reveal a plot that explains the series of events that led up to Mr. Hark’s entrapment. By exposing how Agent Lopez orchestrated this plot to fraudulently revoke Mrs. Hark’s health insurance, this affidavit will render him “wholly incredible” as a trial witness rather than *merely* impeaching him. See United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992), cert. denied, 506 U.S. 873 (1992)­. Because Agent Lopez kept his scheme so secretive, there was no testimony produced at trial that Dr. Diaz’s affidavit could corroborate. See Morgan v. United States, 301 F.2d 272, 275 (9th Cir. 1962). Finally, as explained above, the evidence is material since it refutes the government’s allegation about Mr. Hark’s motivations, which necessarily implies it satisfies this prong. United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992), cert. denied, 506 U.S. 873 (1992).

**5. The affidavit would likely result in an acquittal**

Dr. Diaz’s affidavit establishes both legal elements of the entrapment defense. See United States v. Joelson, 7 F.3d 174 (9th Cir. 1993) (holding newly discovered evidence must establish a legal element of the issue raised), U.S. v. Martinez, 122 F.3d 1161, 1164 (9th Cir. 1997) (listing legal elements of the entrapment defense). The affidavit lends support to the lower court’s correct finding on the first prong that Mr. Hark “may very well have been induced by the government to commit this crime.” R. at 85. Furthermore, the affidavit establishes the third factor of the second prong which had originally troubled the lower court, R. at 85, by showing that rather than engaging in Agent Lopez’s plot for profit, Mr. Hark did so under threat of fraudulent revocation of his mother’s medical treatment. The remaining testimony after all the points of conflict between Agent Lopez and Dr. Diaz are excluded would not be sufficient evidence to support a conviction precisely because the legal elements of the entrapment defense would be satisfied. United States v. Berry, 624 F.3d 1031, 1043 (9th Cir. 2010). Finally, Dr. Diaz’s affidavit is sufficiently specific to probably result in an acquittal by providing the timeframe and contents of Agent Lopez’s communications. See United States v. Claiborne, 870 F.2d 1463 (9th Cir. 1989). Therefore, introducing Dr. Diaz’s affidavit will likely result in an acquittal.

Since the preceding inferences may be drawn from the facts in the record, Dr. Diaz’s newly discovered affidavit entitles Mr. Hark to a new trial. United States v. Hinkson, 585 F.3d 1247, 1259 (9th Cir. 2009).

**B. Merry Boak's affidavit reveals that Agent Lopez explicitly lied during cross examination to conceal Mr. Hark's reluctance about Agent Lopez's plot.**

TODO: narrative about what the affidavit says/means.

**1. The affidavit is newly discovered.**

Merry Boak made herself “known” to the defense by submitting her affidavit the day after the jury returned its verdict, which renders her affidavit newly discovered. R. at 66 (jury verdict timestamp), R. at 81 (affidavit timestamp); see United States v. McKinney, 952 F.2d 333, 335-36 (9th Cir. 1991) (evidence must be unknown until after the trial).

**2. The defense exhibited appropriate due diligence.**

The delay in discovering this evidence was not the result of a lack of appropriate due diligence by the defense. Langdell’s is a popular and bustling coffee shop, so there were no “reasonably available” means to determine who was in the shop at the time of Mr. Hark and Agent Lopez’s conversation. United States v. Brugnara, 856 F.3d 1198, 1206 (9th Cir. 2017). Neither of them had any reason to suspect anybody had overheard them, seeR. at 80, and in fact Ms. Boak only found their conversation noteworthy because of Agent Lopez’s earlier “unusual” behavior, R. at 79. Therefore, as the lower court noted, the defense exhibited appropriate due diligence. R. at 85.

**3. The affidavit is material to the issues at trial.**

**4. The affidavit is neither merely impeaching nor merely cumulative.**

**5. The affidavit would likely result in an acquittal**

**C. Sophia Brooks' affidavit ties the other two affidavits together by revealing that Agent Lopez went to such drastic lengths to coerce Hark because mere money failed to secure his cooperation.**

TODO: narrative about what the affidavit says/means.

**1. The affidavit is newly discovered.**

Ms. Brooks made herself “known” to the defense by submitting her affidavit the day after the jury returned its verdict, which renders her affidavit newly discovered. R. at 66 (jury verdict timestamp), R. at 78 (affidavit timestamp); see United States v. McKinney, 952 F.2d 333, 335-36 (9th Cir. 1991) (evidence must be unknown until after the trial).

**2. The defense exhibited appropriate due diligence.**

The defense availed themselves of the “reasonably available” means to secure witness statements from Mr. Hark’s and Agent Lopez’s classmates like Ms. Boak by coordinating with the Dean of Students office at Guam Tech. R. at 78 (indicating Dean of Students email was missed because it was marked as junk mail); see United States v. Brugnara, 856 F.3d 1198, 1206 (9th Cir. 2017) (establishing “reasonably available” standard). Therefore, as the lower court appreciates, the delay in discovering this evidence was not the result of a lack of appropriate due diligence by the defense. R. at 85-86.

**3. The affidavit is material to the issues at trial.**

**4. The affidavit is neither merely impeaching nor merely cumulative.**

**5. The affidavit would likely result in an acquittal**