**II. 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. *Id*.

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. *Id*. 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.” *Id*.

(1) 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)). 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) (rejecting post-trial codefendant testimony to avoid encouraging 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).

(2) 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).

(3) 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). 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).

(4) The evidence must be neither **“merely cumulative”** nor **“merely impeaching,”** which follows directly as a corollary from a finding of materiality in prong three. *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). 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).

(5) 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). 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 cumulative nor merely impeaching.**

Because Agent Lopez kept his scheme so secretive, there was no testimony produced at trial that Dr. Diaz’s affidavit could corroborate, so the affidavit is not merely cumulative. *See Morgan v. United States*, 301 F.2d 272, 275 (9th Cir. 1962). 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). 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).

**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. After excluding all the points of conflict between Agent Lopez and Dr. Diaz, the remaining evidence 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 because it provides 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 requires this court to grant Mr. Hark a new trial. *See 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, *see* R. 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.**

Whether Mr. Hark denied Agent Lopez’s invitation to join his plot constitutes more than a merely collateral point in the trial. *See U.S. v. Martinez*, 122 F.3d 1161, 1164 (9th Cir. 1997) (“the defendant's reluctance to be drawn into criminal conduct” is the fourth and most important prong in determining a defendant’s predisposition for entrapment defense purposes). At trial, the jury was forced to weigh Mr. Hark’s testimony, R. at 46, against Agent Lopez’s directly conflicting testimony, R. at 27. But now Ms. Boak has presented disinterested third-party testimony that reveals that Agent Lopez chose to lie when cross examined. See R. at 80.

Agent Lopez’s choice to answer a point-blank question untruthfully renders his testimony “wholly incredible.” *See Williams v. United States*, 500 F.2d 105 (9th Cir. 1974) (*citing Mesarosh v. United States*, 352 U.S. 1 (1956)) (an untrustworthy government agent’s testimony taints a conviction enough to entitle the defendant to a new trial); *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992) (“wholly incredible” standard). By refuting the essential reluctance element of the government’s case, therefore, this affidavit satisfies the materiality prong.

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

Newly discovered evidence will be rejected if its sole purpose is corroborating existing evidence or if its sole purpose is impeaching existing evidence. *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991). But this testimony serves the *dual* purpose of corroborating Mr. Hark's testimony while simultaneously impeaching Agent Lopez's testimony to resolve conflicting evidence in the trial record about whether or not Mr. Hark expressed reluctance in favor of his acquittal. *Compare* R. at 46 (corroborated by the affidavit), *with* R. at 27 (impeached by the affidavit). Therefore, Ms. Boak’s affidavit is neither merely cumulative nor merely impeaching.

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

As described above, Ms. Boak’s affidavit establishes Mr. Hark’s reluctance, which is the fourth element of the predisposition prong 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). Her affidavit lists the precise time (3 p.m.) and contents of Mr. Hark and Agent Lopez’s conversation, which makes it sufficiently specific to support an acquittal. *United States v. Claiborne*, 870 F.2d 1463 (9th Cir. 1989). Therefore, when Agent Lopez’s contested testimony about Hark’s reluctance is excluded, the government will no longer have sufficient evidence to support a conviction. *United States v. Berry*, 624 F.3d 1031, 1043 (9th Cir. 2010).

**C. Sophia Brooks' affidavit ties the other two affidavits together by revealing that Agent Lopez went to such drastic lengths to coerce Mr. 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 employed all “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. Although the email sent by the Dean of Students was marked as junk mail, R. at 78, the lower court correctly appreciates that 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.**

This affidavit ties together both legal elements of the entrapment defense by explaining how Mr. Hark’s reluctance prompted Agent Lopez’s inducement through coercion. *See U.S. v. Martinez*, 122 F.3d 1161, 1164 (9th Cir. 1997) (the legal elements of entrapment are inducement—which can be shown through coercive tactics—and predisposition—which can be shown through reluctance). By tying both legal elements together through disinterested third party testimony, this affidavit refutes the entirety of the government’s case, and is therefore considered “material.” *See United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992).

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

Because this newly discovered phone conversation between Agent Lopez and the Drug Enforcement Agency was neither known nor suspected until the time of this affidavit, no testimony about it was produced at trial. Therefore, this affidavit is not merely cumulative. *See Morgan v. United States*, 301 F.2d 272, 275 (9th Cir. 1962). The primary purpose of this affidavit is to bring to light how Mr. Hark’s refusal caused Agent Lopez to go to such drastic lengths. Therefore, although the affidavit will in fact impeach Agent Lopez’s credibility, that is not its sole purpose. Therefore, it is not merely impeaching. *See United States v. Kulczyk*, 931 F.2d 542, 549 (9th Cir. 1991).

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

The affidavit is sufficiently specific about Agent Lopez’s phone conversation, including a timestamp (7 a.m.) and direct quotations (“he wasn't biting last time, but I'm gonna try and turn up the volume later today ... I can play up the family angle. His mom is really sick.”). R. at 77 (affidavit contents); *see United States v. Claiborne*, 870 F.2d 1463 (9th Cir. 1989) (evidence must specify what happened and when to be specific enough to support an acquittal).After this affidavit forces the government is to concede Mr. Hark’s reluctance and Agent Lopez’s coercive inducement, they will no longer have sufficient evidence to support the conviction because both elements of the entrapment defense will be satisfied. *See United States v. Joelson*, 7 F.3d 174 (9th Cir. 1993).

Especially when taken together, all three affidavits—by Dr. Diaz, Ms. Boak, and Ms. Brooks—demonstrate that the lower court’s rejection of Mr. Hark’s motion for a new trial was without support in inferences that may be drawn from the record. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009). Therefore, the court’s implausible decision constitutes an abuse of discretion that must be rectified by this court. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009).

**III. Public policy demands an acquittal for Mr. Hark.**

**A. The entrapment defense disincentivizes the DEA from dealing drugs themselves.**

**B. Denying the interest of justice would be more costly than granting a new trial.**

“The government of strong and free nation does not need convictions based upon [tainted government agent] testimony. It cannot afford to abide with them.” Mesarosh v. United States, 352 U.S. 1, 14 (1956). A lower court must decide to grant or deny a new trial 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). The five-part test for granting or denying a new trial does not include any provisions for considering the cost of such a trial. *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991).

The lower court opinion stated they found the doctor’s affidavit about Agent Lopez’s deception and coercion “troubling,” but rejected it because of “acute[] concern[s] about the cost of a new trial.” R. at 86. Nominally, the lower court successfully identified the correct legal rule by selecting the five-part test. However, the court’s application of the rule was “illogical” insofar as it was applied as if the interest of justice permitted an additional sixth dispositive factor about price. Even if the interest of justice did permit weighing costs, it would be prohibitively expensive on the “fastidious regard for the honor of the administration of justice” to uphold Mr. Hark’s tainted trial. *Mesarosh v. United States*, 352 U.S. 1 (1956) (citing *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124). Therefore, formalistically as well as functionally, this court must reverse.