IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	**No. CR-18-227-SLP**
	)	
JOSEPH MALDONADO-PASSAGE	)	
a/k/a Joseph Allen Maldonado,	)	
a/k/a Joseph Allen Schreibvogel,	)	
a/k/a "Joe Exotic,"	)	
	)	
Defendant.	)	

UNITED STATES' RESPONSE IN OPPOSITION TO
JOSEPH MALDONADO-PASSAGE'S MOTION FOR NEW TRIAL

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On April 1, 2022, Joseph Maldonado-Passage filed a motion for new trial, raising claims of (1) newly discovered evidence, (2) violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), (3) outrageous government conduct, (4) violations of *Napue v. Illinois*, 360 U.S. 264 (1969), and (5) prosecutorial misconduct. Doc. 232 ("Mtn.").[1] For the reasons discussed below, relief is not warranted on any of these claims. Thus, this Court should deny his motion for new trial.

Facts

In 1999, Mr. Maldonado-Passage opened a zoo in Wynnewood, Oklahoma, Tr. at 928; later, he began performing road shows across the country, where he would allow people to play and take pictures with animals, usually baby tigers, *id.* at 286–87, 294. Carole Baskin, "an activist against the abuse of big cats in captivity," *id.* at 349, started a website identifying people she believed were "exploiting these animals in a bad way" and showing the public "what's going on behind the scenes, . . . how these cubs are being treated," *id.* at 353. She would contact malls, "send them a fact sheet about why this cub handling was such a horrible thing for the cubs," and send out alerts about upcoming cub petting events. *Id.* at 358. Occasionally, her fans would protest on the street corner. *Id.*

In the mid-2000s, Mrs. Baskin identified Mr. Maldonado-Passage on her website, including approximately 20 different aliases that he used. *Id.* at 357. In response, he

[1] Citations to Mr. Maldonado-Passage's motion are to the page number listed in the bottom-center of the page ("Mtn. at ___"). Where exhibits were included in the PACER filing, citations are to the page number assigned by PACER ("Doc. 232-___ at ___"). Exhibits that were only filed conventionally are cited by Exhibit Number ("Mtn., Ex. ___"). Citations to the trial transcript or to page number ("Tr. at ___"). Attachments to this response are cited by attachment and page number ("Attachment __ at __").

began using the name "Big Cat Rescue Entertainment" and the intellectual property of Mrs. Baskin's organization—Big Cat Rescue. *Id.* at 359–64, 372. In return, Mrs. Baskin sued Mr. Maldonado-Passage. *Id.* at 368–72. The lawsuits ended with approximately $1 million in judgments in favor of Mrs. Baskin and Big Cat Rescue. *Id.* at 376. When she attempted to collect on the judgments, Mr. Maldonado-Passage transferred ownership of his zoo to Jeff Lowe, who named it the Greater Wynnewood Exotic Animal Park (hereinafter, "the zoo" or "the park"). *Id.* at 709–10. Mr. Lowe left Mr. Maldonado-Passage in charge of the day-to-day operations of the zoo. *Id.* at 710.

During meetings, Mr. Maldonado-Passage told zoo employees that he would like to see Mrs. Baskin dead. Tr. at 51. He tried to recruit people to kill Mrs. Baskin several times. *E.g. id.* at 394–95, 545–47. And he even spoke daily about wanting to have Mrs. Baskin murdered. *Id.* at 619.

In February 2017, Mrs. Baskin received a voicemail warning her that Mr. Maldonado-Passage was trying to harm her. *Id.* at 395. She sent the message to her attorney, who forwarded it to the government, and the Federal Bureau of Investigation (FBI) started its investigation.[2] *Id.* at 395, 433.

In August 2017, James Garretson, Mr. Lowe, and Mr. Maldonado-Passage spoke about killing Mrs. Baskin, with Mr. Lowe pulling up maps of Mrs. Baskin's bike path, gift shop, and house. *Id.* at 547–48. During the conversations, Mr. Maldonado-Passage brought "over a big stack of manila folders" with information he had received from

[2] The United States Fish and Wildlife Service (FWS) was already investigating Mr. Maldonado-Passage regarding the illegal movement of wildlife at this point. Tr. at 891.

"somebody in the inside of [Mrs. Baskin's] organization." *Id.* He returned to his desk and partially engaged in the conversation, but mostly talked to himself. *Id.* at 548–49.

That same month, Mr. Lowe asked Mr. Garretson to contact Mrs. Baskin about the possibility of Mr. Lowe selling the zoo to her. *Id.* at 549–50. But when Mr. Garretson called, Mrs. Baskin did not answer. *Id.* at 550–51. Instead, Special Agent Matthew Bryant of the United States Fish and Wildlife Service (FWS) returned Mr. Garretson's call. *Id.* at 551. They met in-person in September of 2017. *Id.* After meeting with Special Agent Bryant and discussing Mr. Maldonado-Passage, Mr. Garretson agreed to become a confidential informant and agreed to record certain phone calls and turn them over to the government. *Id.* at 552–53.

On September 29, 2017, Mr. Garretson had his first recorded conversation with Mr. Maldonado-Passage about killing Mrs. Baskin. *See* Attachment 1. During the conversation, Mr. Garretson asked when Mrs. Baskin would stop suing Mr. Maldonado-Passage, and Mr. Maldonado-Passage responded: "She won't, until somebody shoots her." *Id.* at 1. Later, Mr. Garretson mentioned that "[o]ne of [his] guys just got out of jail recently," and they just needed to "get some cash together" and come up with a plan. *Id.* Mr. Maldonado-Passage responded: "I know where the cash is." *Id.* When Mr. Garretson mentioned his guy was "down there in Bushnell," Mr. Maldonado-Passage commented that was "[r]ight in her neighborhood." *Id.* Mr. Maldonado-Passage also suggested there was "ten thousand on her head." *Id.* When Mr. Garretson said that he was trying to get his guy "to come to Texas," Mr. Maldonado-Passage responded: "You don't want to talk about this sh*t over a phone or anything." *Id.* at 2. Mr. Garretson

broached the subject again, saying that he would talk to his guy and "probably . . . buy him a Greyhound ticket." *Id.* at 6. Mr. Maldonado-Passage noted in response that the "hurricane would have been the perfect time when the power was out" because "[t]hey had no street cameras or nothing." *Id.* at 6.

Mr. Maldonado-Passage also began having conversations about killing Mrs. Baskin with Alan Glover. The first conversation occurred about 11:00 p.m. or midnight sometime before October 6, 2017, on the front porch of the gift shop. *Id.* at 621–22. Mr. Maldonado-Passage asked Mr. Glover if he could "get it done," referring to killing Mrs. Baskin. *Id.* at 622.[3] When Mr. Glover said he could, Mr. Maldonado-Passage offered to pay Mr. Glover $5,000 and would take care of him once it was done. *Id.* at 623–24. They subsequently discussed how to kill Mrs. Baskin—with Mr. Maldonado-Passage preferring the use of either a gun or a crossbow but Mr. Glover not wanting to use a firearm from Oklahoma for fear that he would be stopped and searched while traveling to Florida, which would have resulted in him getting arrested for being a felon in possession of a firearm. *Id.* at 624–25. Mr. Glover proposed cutting off her head. *Id.* at 626.

On November 4, 2017, Mr. Maldonado-Passage asked Mr. Garretson if he knew a place to get a fake ID, and Mr. Garretson told him about a place in Dallas.[4] *Id.* at 558. Mr. Maldonado-Passage then asked John Finlay to take Mr. Glover to Dallas and paid for

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[3] Mr. Glover thought Mr. Maldonado-Passage asked him because he had a teardrop tattoo under his eye, which people often thought meant he killed someone. Tr. at 623.

[4] Prior to Mr. Maldonado-Passage contacting him, Mr. Lowe told Mr. Garretson that Alan Glover "was going to get an ID and get on a bus and go kill Carole." Tr. at 559.

the gas. *Id.* at 757–58. Once they were on the road, Mr. Maldonado-Passage told Mr. Finlay that Mr. Glover needed to go to Dallas "to get a fake ID so he could go take care of Carole [Baskin]." *Id.* at 758. According to Mr. Glover, Mr. Maldonado-Passage had the idea to get a fake ID for Mr. Glover so he would not leave a paper trail when he traveled "[t]o Florida to kill that lady." *Id.* at 627–28. Mr. Maldonado-Passage gave Mr. Finlay $200 to pay for Mr. Glover's fake ID. *Id.* at 629. He checked in with Mr. Finlay twice after they got Mr. Glover's ID, once to ask how the ID looked and the second time to have them take it to "James Garretson to fix it." *Id.* at 760. When Mr. Finlay and Mr. Glover arrived at Mr. Garretson's shop, Mr. Garretson scraped the words "entertainment purposes only" off the back of the fake ID. *Id.* at 561.

On November 7, 2017, Mr. Garretson spoke with both Mr. Lowe and Mr. Maldonado-Passage. *Id.* at 562. When Mr. Garretson asked Mr. Maldonado-Passage if he got "everything else handled," Mr. Maldonado-Passage responded that he was just "waiting on this lady to get this money for these liligers cause that is what [he was] paying for it with." Attachment 2 at 1. Mr. Maldonado-Passage also noted that "all of the bills came from Florida," which he thought was important because "as long as [he did not] touch them," he would not be implicated if Mr. Glover "gets busted with it." *Id.* When Mr. Garretson mentioned that "it's a tricky situation," Mr. Maldonado-Passage explained that Mr. Lowe had "100% confidence in [Mr. Glover] because he's done it before." *Id.* When asked if Mr. Finlay was "pretty quiet about everything," Mr. Maldonado-Passage responded, "Yeah, he d*mn sure don't want to be implicated in it, you know somebody that drove to go get the fake ID for it." *Id.* Mr. Maldonado-Passage

also explained that he was going to have Mr. Glover "buy a go-phone down there and Jeff [Lowe] is buying a go-phone so they can communicate and then throw them away." *Id.* He also explained, "we are going to over-night [Mr. Glover's] phone to Vegas and Jeff is going to text pictures every once in a while back to the staff so that [Mr. Glover's] phone registers in Vegas." *Id.* He concluded, "As long as he [Mr. Glover] 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 motherf*cker and he just went off the deep end." *Id.* at 2.

On November 8, 2017, Mr. Garretson went to the zoo at the government's request to get the name on Mr. Glover's fake ID. Tr. at 564. During this visit, he spoke with Mr. Glover, who tried to convince him (Mr. Garretson) that he (Mr. Glover) was going to go kill Mrs. Baskin.[5] *Id.* at 634. Mr. Garretson asked Mr. Glover when he was leaving. Attachment 3 at 1. Mr. Glover said, "[h]opefully soon," and explained that he was waiting on a woman to deliver some money. *Id.* When Mr. Garretson asked Mr. Glover how long he would be down in Florida, Mr. Glover responded, "As long as it takes. I'm not coming directly back here, you know that." *Id.* Mr. Garretson told Mr. Glover to "[m]ake sure [Mr. Maldonado-Passage] pays you real good," to which Mr. Glover said Mr. Maldonado-Passage "is gonna be in my pocket forever." *Id.* Mr. Glover also explained that his reason for doing it was not Mr. Maldonado-Passage or Mr. Lowe, but

[5] Mr. Glover testified that he never intended to kill Mrs. Baskin when he accepted Mr. Maldonado-Passage's offer to pay him to kill her. *Id.* at 626, 636. He explained that he tried to convince Mr. Garretson that he was going to kill Mrs. Baskin because he thought Mr. Garretson was going to try and take his place and take the money. *Id.* at 634.

for the animals. *Id.* at 1–2. Mr. Glover made clear that he had been hired to kill Mrs. Baskin: "I'm going to be there for a couple weeks, figure this sh*t out. I'm not just, I mean, I get lucky, I'll take her out the first few days. I got time, I got money." *Id.* at 3.

On November 16, 2017, Mr. Garretson asked Mr. Glover why he had not gone to Florida yet, and Mr. Glover explained, "[t]hings change." *Id.* at 567; Attachment 4 at 25 at 4. Mr. Garretson thought the plan was off and told federal agents. Tr. at 568.

On November 17, 2017, Mr. Garretson spoke with Mr. Maldonado-Passage. Tr. at 569; Attachment 5. During their conversation, Mr. Garretson asked if Mr. Maldonado-Passage was "gonna ever send that guy [Mr. Glover] today or is he ever gonna go down there [to Florida] or you just gotta wait for money?" Attachment 5 at 1. Mr. Maldonado-Passage replied, "I'm figuring that the money'll come in today. Then he's gone." *Id.* Mr. Garretson asked if Mr. Maldonado-Passage trusted Mr. Glover, and Mr. Maldonado-Passage responded, "Jeff does." *Id.* When Mr. Garretson questioned Mr. Lowe's judgment, Mr. Maldonado-Passage replied, "I don't trust him." *Id.* They both expressed concerns that Mr. Glover might talk about the plan because of his alcohol use. *Id.* at 2.

Given the uncertainty, Mr. Garretson suggested "bring[ing] that dude," referring to the undercover agent he mentioned on September 29. *Id.* at 1; *see* Attachment 1 at 1–2, 6. Mr. Maldonado-Passage asked, "How much [would] that dude cost us," and Mr. Garretson responded, "Probably seven to ten thousand maybe, but he'll do it." Attachment 5 at 1. Mr. Maldonado-Passage explained that he was sending Mr. Glover "with four [thousand] and then give him six [thousand] when it was done." *Id.* at 2. He then offered to give Mr. Garretson the money (less what Mr. Garretson owed) to pass on

to Mr. Garretson's person, have Mr. Garretson "show him online what she looks like [and] her address," and give the rest to Mr. Garretson "when he is done and back." *Id.* at 3. Mr. Garretson said he would bring "this guy" the Monday after Thanksgiving. *Id.*

On November 21, 2017, Mr. Glover told Mr. Garretson that he would be leaving on Friday (November 24, 2017) because he was tired of everything going on and Mr. Lowe had things for him to do in South Carolina. Attachment 4 at 4; Tr. at 568–69.

In the days before November 25, 2017, Mr. Maldonado-Passage sold a liliger. Tr. at 637. The transaction consisted of Mr. Glover placing a cub in the buyer's car and the buyer handing Mr. Maldonado-Passage an envelope stuffed with money, approximately a couple of inches thick. *Id.* at 637–39. On November 25, 2017, Mr. Maldonado-Passage gave Mr. Glover an envelope that was thinner than the envelope Mr. Maldonado-Passage received from the sale of the cub. *Id.* at 640–41. Despite being promised an initial payment of $5,000, there was only $3,000 in the envelope. *Id.* at 641.

When Mr. Maldonado-Passage gave Mr. Glover the envelope with money, he also asked Mr. Glover to hand over his (Mr. Glover's) cell phone. *Id.*; *see also* Attachment 4 at 3 (showing the last time the location on Mr. Glover's original HTC phone reported was November 25, 2017, at 2:59pm UTC or 8:59 a.m. CST). Mr. Maldonado-Passage then gave Mr. Glover the phone from the zoo's pizza restaurant ("the pizza phone"). Tr. at 641. On the pizza phone, Mr. Maldonado-Passage took several pictures of Mrs. Baskin that he pulled up on his computer and pictures of the address of Big Cat Rescue so Mr. Glover "wouldn't kill the wrong person." Tr. at 642–43; *see also* Attachment 6 at 3–6 (showing that photos of Mrs. Baskin and the address for Big Cat Rescue were created on

the ZTE pizza phone on November 25, 2017, at 3:05pm UTC or 9:05 a.m. CST). At 10:13 a.m., a package was sent from Wynnewood, Oklahoma to Las Vegas, Nevada, and the postage was paid using Mr. Lowe's signature stamp. Attachment 7 at 2. The Lowes, who were living in Las Vegas at this time, received that package from the zoo after Thanksgiving, which contained Mr. Glover's cellphone and a charger. Tr. at 712–13.

Mr. Glover booked a plane ticket from Oklahoma City to Savannah, Georgia. *Id.* at 639. He told Mr. Maldonado-Passage that he wanted to go to South Carolina before going to Florida, and Mr. Maldonado-Passage "didn't care, as long as [he] got to Florida." *Id.* Mr. Glover assured Mr. Maldonado-Passage that he would drive to Florida once his license was straightened out. *Id.* Mr. Glover flew from Oklahoma City to Savannah, arriving early in the morning of November 26. *Id.* at 476, 643–44. Once he arrived, his daughter picked him up and brought him to South Carolina. *Id.* He traveled to Florida a few weeks later, ultimately ending up on a beach drunk and high; having spent all his money, he went back to South Carolina. *Id.* at 644–47.

On December 5, 2017, Mr. Garretson informed Mr. Maldonado-Passage that his (Mr. Garretson's) guy—referring to the undercover agent—was in town to meet on Friday, December 8. *Id.* at 570; Attachment 8. Mr. Maldonado-Passage said that he would be in town "until about 3 o'clock," but to check that morning because "[a] whole lot can go on between now and then." Attachment 8.

On December 8, 2017, Mr. Maldonado-Passage met with Mr. Garretson and the undercover agent, referred to as Mark Williams (hereinafter, "Mark"). Tr. at 782. During the meeting, Mr. Garretson mentioned that Mark had "spent a lot of time in

Florida." Attachment 9 at 7. In response, Mr. Maldonado-Passage explained that Mrs. Baskin had cost him "almost three-quarters of a million dollars in lawyers already." *Id.* at 8. A few moments later, Mark brought up that Mr. Garretson had told him something about Mrs. Baskin, to which Mr. Maldonado-Passage replied that he did not "want anybody getting caught" and that they could blame it on a serial killer in Tampa, Florida, who had not been caught. *Id.* at 10. Mr. Maldonado-Passage asked Mark, "what's something like that run?" *Id.* at 11. Mark replied, "usually about 10[,000]." *Id.* Mr. Maldonado-Passage suggested that Mark could probably get 20,000. *Id.* He then asked, "What do you need down? 10?" Mark responded, "Man I'd like, I'd like half." *Id.* To which Mr. Maldonado-Passage replied, "10 down. . . . 10 when its on the noose? [Laughs] She's dead?" *Id.* Mark explained that he would need "enough to get me down there for a few days" so he could know "who she is . . . ." *Id.* at 12. Mr. Maldonado-Passage interjected, "what she looks like . . . [y]ou got to scope her out." *Id.* Mark responded, "Exactly," explaining that he did not "want to get caught." *Id.* at 13. Mr. Maldonado-Passage pointed out that Mrs. Baskin had posted the bike path that she rides to work on Facebook and explained that Mr. Lowe had a map of her house. *Id.*

When Mark told Mr. Maldonado-Passage to let him know if he was serious, Mr. Maldonado-Passage responded that they would get Mr. Garretson the money. *Id.* at 14. When Mark asked how much Mr. Maldonado-Passage could get up front, he responded, "we can get 5 easy," Mark replied, "That's perfect man. That'd be perfect." *Id.*

Mark told Mr. Maldonado-Passage that he needed to know where Mrs. Baskin lives and would like any information Mr. Maldonado-Passage had on her. *Id.* at 19. In

response, Mr. Maldonado-Passage provided several documents related to Mrs. Baskin that came from her office. *Id.*; Tr. at 790. He also provided the address of Big Cat Rescue. Attachment 9 at 22. They discussed getting burner phones so Mark could call Mr. Maldonado-Passage when the murder happened and then they would throw the phones in the river. *Id.* at 26–27. Mr. Maldonado-Passage suggested following Mrs. Baskin into a mall parking lot, shooting her, and driving off. *Id.* at 29. When Mark suggested that Mr. Maldonado-Passage could take his time coming up with the other half, Mr. Maldonado-Passage responded that he would "just sell a bunch of tigers." *Id.* at 36.

Mark also told Mr. Maldonado-Passage that he would knock some money off if Mr. Maldonado-Passage could get a clean pistol. *Id.* at 47. And Mr. Maldonado-Passage said he would "get a pistol at the flea market." *Id.* Finally, Mr. Maldonado-Passage suggested that Mark could just take pictures of the screen when they get burner phones rather than texting or printing the maps of Mrs. Baskin's house. *Id.* at 48–49.

On December 18, 2017, Mr. Garretson and Mr. Maldonado-Passage had a call, Tr. at 572–73, and Mr. Garretson brought up Mark. Attachment 10. Mr. Maldonado-Passage told Mr. Garretson he would have the money in the next week or two when a couple of litters of lions were due. *Id.*

On February 11, 2018, Mr. Garretson and Mr. Maldonado-Passage had another conversation. Tr. at 574; *see* Attachment 11. Mr. Garretson mentioned that when they got some money together, they would take care of "that sh*t down the road anyway." Attachment 11 at 1. Mr. Maldonado-Passage responded, "I hope," and noted that "[t]he last guy went down to North Carolina [sic] and drank it all" and that he never came back.

Id. When Mr. Garretson said, "we'll get Mark on it just whenever," Mr. Maldonado-Passage responded, "I know. Two more weeks of it, two more weeks of it." *Id.*

On February 18, 2018, Mr. Maldonado-Passage called Mr. Garretson and asked if Mark was still available. Tr. at 574–75. Mr. Garretson confirmed he was. *Id.* at 575.

On March 8, 2018, Mr. Maldonado-Passage asked Mr. Garretson if they could trust Mark, and Mr. Garretson responded, "100%." Attachment 12. Referring to Mr. Glover, Mr. Maldonado-Passage lamented about "[t]hat one of Jeff's run off with my money and never heard from him again." *Id.* Mr. Maldonado-Passage noted that he had "three bad*ss weekends coming," *id.*, because "it was near spring break and the zoo does really well financially," Tr. at 577.

On March 28, 2018, Mr. Garretson and Mr. Maldonado-Passage had another discussion, during which Mr. Garretson wondered if they still "wanted to pursue with the Baskin sh*t." Attachment 13 at 1. Mr. Maldonado-Passage responded that Mark said, "he'd take care of Florida for 10." *Id.* Mr. Maldonado-Passage also asked Mr. Garretson again if he trusted Mark, and Mr. Garretson responded, "I've done some sh*t with him. He's not like that other dipsh*t, he's . . . ," to which Mr. Maldonado-Passage interjected, "He took four thousand bucks and never came back." *Id.* Mr. Maldonado-Passage then asked Mr. Garretson how to "funnel the money," and Mr. Garretson responded, "You just . . . cash . . . cash, that's you just save up some 20s from various place and just f*cking give it to him and you're f*cking done." *Id.* To which Mr. Maldonado-Passage replied, "Cause you don't want to take it out of the bank do you?" *Id.* Mr. Maldonado-Passage explained, "I didn't know how many people we need to funnel it through," pondering if

he just needed to give Mr. Garretson the money to give to Mark. *Id.* at 2. He eventually explained that he did not "want to send [Mark] down to Florida unless he really thinks he can . . . ." *Id.* at 2.

Shortly after this conversation, Mr. Lowe returned to Oklahoma and Mr. Maldonado-Passage stopped talking to Mr. Garretson. Tr. at 578–79. In May 2018, Mr. Garretson spoke with Mr. Lowe and learned that he (Mr. Lowe) might have more information. *Id.* at 579. He arranged a meeting between Special Agent Bryant and the Lowes on June 5, 2018. *Id.* at 461, 579. At that meeting, the Lowes gave Mr. Glover's personal phone, which had been sent to them in Las Vegas from Wynnewood on November 25, 2017, to Special Agent Bryant. *Id.* at 462, 716.

In early-July 2018, Mr. Glover returned to Oklahoma at Mr. Lowe's request. *Id.* at 462, 649. Upon his return, Mr. Glover met with federal agents and gave them the pizza phone and a phone that he obtained while he was out-of-state. *Id.*

On September 5, 2018, a federal grand jury in the Western District of Oklahoma returned an indictment charging Mr. Maldonado-Passage with two counts of using a facility of interstate commerce in the commission of a murder-for-hire plot. Doc. 1. Mr. Maldonado-Passage was arrested on September 7, 2018. Doc. 6.

Sixteen days later, Mr. Maldonado-Passage called Mr. Finlay. Tr. at 762; *see* Attachment 14. During the call, Mr. Maldonado-Passage claimed that Mr. Lowe was "coming after [Mr. Finlay] too." Attachment 14 at 2. When Mr. Finlay asked, "For what," Mr. Maldonado-Passage told him, "For taking Alan to get that ID in Texas." *Id.* at 3. Mr. Finlay then told Mr. Maldonado-Passage that he had "already explained all

that." *Id.* When Mr. Maldonado-Passage asked, "To who," Mr. Finlay replied, "To the FBI." *Id.* Mr. Maldonado-Passage then asked Mr. Finlay what he explained, Mr. Finlay said, "[j]ust what went on." *Id.* Pushing further, Mr. Maldonado-Passage inquired: "That he . . . he needed it to go to Florida?" *Id.* When Mr. Finlay said, "Yeah," Mr. Maldonado-Passage asked, "Oh, so, so you hung me out to dry?" *Id.* But Mr. Finlay defended his actions, "No I told the f*cking truth, and . . . and f*cking Jeff was in, in my explanation too." *Id.* Mr. Maldonado-Passage did not try to deny culpability, but only asked, "Well why am I the one in trouble? . . . He is the one who organized it." *Id.*

On November 7, 2018, the grand jury returned a superseding indictment, which alleged—in addition to the counts in the original indictment—nine violations of the Endangered Species Act and ten violations of the Lacey Act. Doc. 24. Jury selection occurred on March 12, 2019, Doc. 93, and the presentation of evidence began on March 25, 2019, Doc. 105. At the close of the government's case, it announced that it would dismiss two of the Lacey Act counts (Count 13 and 14). Tr. at 827, 853–54. On April 2, 2019, the jury returned guilty verdicts on the remaining counts. Doc. 113.

On January 27, 2020, this Court sentenced Mr. Maldonado-Passage to 264 months' imprisonment. Doc. 134. Mr. Maldonado-Passage appealed, and the Tenth Circuit affirmed his convictions but remanded for resentencing so that Counts 1 and 2 could be grouped for purposes of calculating the guidelines range. *United States v. Maldonado-Passage*, 4 F.4th 1097 (10th Cir. 2021). On January 28, 2022, this Court resentenced Mr. Maldonado-Passage to 252 months' imprisonment. Doc. 209. Mr.

Maldonado-Passage appealed, Doc. 217, and his appeal is currently pending.[6] On April 1, 2022, Mr. Maldonado-Passage filed his present motion for new trial. Doc. 232.

Discussion

I. Mr. Maldonado-Passage has failed to show that a new trial is warranted based on newly discovered evidence.

Mr. Maldonado-Passage contends that a new trial is warranted based on 17 categories of newly discovered evidence. Mtn. at 3–32. The Federal Rules of Criminal Procedure permit a court to "vacate any judgment and grant a new trial if the interest of justice so requires," Fed. R. Crim. P. 33(a), and envisions motions based on "newly discovered evidence." *id.* 33(b)(1). But "'[a] motion for a new trial based on newly discovered evidence is not favorably regarded and should be granted with only great caution.'" *United States v. Jordan*, 806 F.3d 1244, 1252 (10th Cir. 2015) (quoting *United States v. McCullough*, 457 F.3d 1150, 1167 (10th Cir. 2006)). To prevail, Mr. Maldonado-Passage must satisfy a five-part test:

> (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.

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[6] Until Mr. Maldonado-Passage's appeal is resolved, this Court lacks jurisdiction to grant a motion for new trial. Fed. R. Crim. P. 33(b)(1). Nevertheless, it can still entertain the motion, *United States v. Chronic*, 466 U.S. 648, 667 n.42 (1984), and "(1) defer considering the motion; (2) deny the motion; or (3) state that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue," Fed. R. Crim. P. 37(a). For the reasons discussed below, this Court should deny the motion on the merits pursuant to Rule 37(a)(2).

Id. Additionally, the "newly discovered evidence" must be "admissible at trial." *United States v. Hill*, 737 F.3d 683, 687 (10th Cir. 2013).

A. Mr. Garretson's Recordings

The first category of newly discovered evidence Mr. Maldonado-Passage relies upon consists of 87 recordings Mr. Garretson made of his phone calls between February 2, 2019, and April 3, 2019. Mtn. at 4–12; *see* Mtn. Exs. 3-4, 14-27, 29-63, 65-100.[7] These calls do not support this claim because they would not be admissible at trial and Mr. Maldonado-Passage has failed to meet his burden regarding those calls.

1. The recordings are hearsay and, thus, inadmissible.

First, Mr. Garretson's recordings cannot support a motion for new trial based on newly discovered evidence because they are hearsay. *See* Fed. R. Evid. 801(c) (defining hearsay as "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"). And hearsay is generally inadmissible. Fed. R. Evid. 802. Any claim they are admissible because Mr. Garretson was a government informant, *see* Fed. R. Evid. 801(d)(2)(D), "grossly misses the mark." *Clark v. United States*, 365 F. Supp. 2d 553, 563–64 (S.D.N.Y. 2005); *see also United States v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004) ("[T]he out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 801(d)(2)(D) as admissions by the agent of a party opponent."). Similarly, statements made by Special Agent Bryant do not qualify under

[7] Notably, of the 87 recordings he attaches to his brief, Mr. Maldonado-Passage does not mention 12 of them in his motion—Exhibits 53, 65, 75–77, 85, 86, 88, 89, 92, 93, 97.

Rule 801(d)(2). *See United States v. Arroyo*, 406 F.3d 881, 888 (7th Cir. 2005) ("[G]overnment agents are not party-opponents for purposes of Rule 801(d)(2)."). Because the calls would not be admissible, they are not newly discovered evidence that that can be used to order a new trial. *See Hill*, 737 F.3d at 687.

2. Some of Mr. Maldonado-Passage's claims raise challenges that are addressed in a different section.

Mr. Maldonado-Passage alleges that Mr. Garretson lied about turning over all the recordings at trial and the prosecution knowingly failed to correct the perjury. Mtn. at 4–5. This is a *Napue* claim, which is addressed below. *See infra* at § IV.A.

Mr. Maldonado-Passage then claims that Mr. Garretson's recordings "should have been turned over." Mtn. 6–7. This *Brady* claim is addressed below. *See infra* at § II.A.

3. Other claims are conclusory and, thus, insufficient for Mr. Maldonado-Passage to carry his burden.

Mr. Maldonado-Passage raises 13 conclusory allegations across two paragraphs. *Id.* at 5–6. While each allegation is supported by a citation to multiple exhibits, he does not develop any argument why those assertions satisfy any part of the governing five-part test. Such conclusory assertions, especially where the defendant fails to engage with the evidence presented at trial, are insufficient for a defendant to carry his burden. *United States v. Cordova*, 25 F.4th 817, 827–28 (10th Cir. 2022).

Similarly, Mr. Maldonado-Passage identifies 11 calls between Mr. Garretson and Eric Goode, an Executive Producer of Tiger King, asserting the calls "were directly relevant to the issues of the criminal investigation into Maldonado, acts of perjury, trial strategy, and collusion of witnesses[;] [s]pecifically, how Garretson, Lowe, Lauren Lowe

and others conspired to set up Maldonado." *Id.* Such a conclusory assertion is not sufficient to carry Mr. Maldonado-Passage's burden. *See Cordova*, 25 F.4th at 827–28.

Likewise, regarding calls between Mr. Garretson and Paul Malagerio, Mr. Maldonado-Passage points to 23 calls and, in a conclusory manner without engaging with any trial evidence, claims the calls "were centered around the criminal investigation of Maldonado and life after[—s]pecifically, perjury, manipulation and fabrication of evidence, witness threats, trial strategy, and other exonerating information." Mtn. at 7. Again, this is insufficient to carry his burden. *See Cordova*, 25 F.4th at 827–28.

Mr. Maldonado-Passage also points to multiple exhibits, making the conclusory allegation that they show Mr. Garretson was "twisting testimony and planning testimony with the intent to misrepresent the facts," which he asserts is "material and relevant to the criminal case, specifically Mr. Maldonado-Passage's innocence." Mtn. at 11. Without engaging with the evidence presented at trial, these conclusory allegations are insufficient for Mr. Maldonado-Passage to carry his burden. *See Cordova*, 25 F.4th at 827–28. Moreover, he claims that the exhibits would have caused Mr. "Garretson's credibility [to] have been destroyed," Mtn. at 11, but the fact that evidence is merely impeaching is insufficient to warrant a new trial. *See Jordan*, 806 F.3d at 1252. This is especially true for someone like Mr. Garretson, whose testimony was largely corroborated by recordings and other exhibits admitted at trial.

4. The claims Mr. Maldonado-Passage developed are meritless.

a. Jeff Johnson was not excluded from testifying.

The first claim of newly discovered evidence that Mr. Maldonado-Passage develops is that the United States had Jeff "Johnson, an exculpatory witness, excluded from testifying at trial." Mtn. at 7–10. He is wrong. First, the record shows that Mr. Maldonado-Passage never intended to call Mr. Johnson as a witness. *See* Voir Dire Tr. at 29 (on March 12, 2019, the court listing potential witnesses for the jury, but not listing Jeff Johnson); Doc. 232-20 at 2 (Mr. Johnson saying that defense counsel "didn't think that I would need to testify"). Second, nothing in the record suggests the United States ever asked this Court to exclude Mr. Johnson from the trial or that Mr. Maldonado-Passage ever asked this Court to compel Mr. Johnson's attendance as a witness. It strains credulity to suggest that Mr. Maldonado-Passage's trial attorneys would not have sought relief from this Court if the government were preventing Mr. Johnson from testifying.

Third, even if Mr. Maldonado-Passage's allegations were true, there are still other hurdles. For example, an attempt to exclude Mr. Johnson is not "material to the principal issues involved" in the trial as it was neither relevant to Mr. Maldonado-Passage's guilt of the offenses alleged at trial or any possible defenses. *See United States v. Quintanilla*, 193 F.3d 1139, 1148 (10th Cir. 1999) ("Evidence, newly discovered or otherwise, which only touches on issues tangential to defendant's defense, cannot serve as an adequate foundation for granting a new trial."). Nor does Mr. Maldonado-Passage explain how Mr. Johnson's proposed testimony would have "probably produced an acquittal" or was admissible. Even if Mr. Johnson were available to testify, Mr. Maldonado-Passage

would have to show that his testimony was based on Mr. Johnson's personal knowledge, *see* Fed. R. Evid. 602, not hearsay, Fed. R. Evid. 802. To the extent Mr. Maldonado-Passage suggests the calls involving Mr. Johnson challenge the credibility of Mr. Garretson or Special Agent Bryant, they would not be admissible for that purpose, *see* Fed. R. Evid. 608(b), and any related testimony would be insufficient to warrant a new trial because it would be "merely impeaching." *See Jordan*, 806 F.3d at 1252.

b. Mr. Garretson's alleged identity theft does not warrant a new trial.

Mr. Maldonado-Passage also points to information he claims shows that Mr. Garretson committed identity theft. Mtn. at 11. But he does not explain how this information would be admissible or represents something more than mere impeachment.

To the extent that Mr. Maldonado-Passage thinks this information could have been used to impeach Mr. Garretson, he is mistaken. Extrinsic evidence is inadmissible to attack a witness's character for truthfulness. Fed. R. Evid. 608(b). While it may be permissible to have asked Mr. Garretson about this on cross-examination, *id.*, evidence that is merely impeaching does not warrant a new trial. *See Jordan*, 806 F.3d at 1252.

Beyond impeachment, the information regarding Mr. Garretson's alleged identity theft also would not "probably produce an acquittal." Mr. Maldonado-Passage points to two specific aspects of Mr. Garretson's alleged identity theft: (1) his involvement with the rental of Mr. Lowe's Las Vegas address under the name "Justin Chao"; and (2) his involvement in Mr. Glover obtaining a fake ID. Mtn. at 11.

On the first point, Mr. Garretson helping Mr. Lowe obtain a Las Vegas address under a different name—before his involvement with the government[8]—supports the government's case. Evidence showed that Mr. Maldonado-Passage and Mr. Lowe were attempting to cover their tracks by: (1) planning to pay Mr. Glover with money from Florida; (2) having Mr. Glover obtain a fake ID; (3) having Mr. Glover obtain a different phone; (4) sending Mr. Glover's phone to Mr. Lowe in Las Vegas so that it would register in Las Vegas while Mr. Glover was supposed to be killing Mrs. Baskin; and (5) planning a story in case Mr. Glover was caught. Attachment 2 at 1–2. Sending the phone to an alias used by Mr. Lowe is just another level of their attempt to cover their tracks.

As for the fake ID, the jury was already aware that Mr. Garretson suggested the location for obtaining it. Tr. at 558, 560. While Mr. Garretson revealed that he knew about the place because he "worked in the bar business" and "that's where everybody went to get IDs when they couldn't work," Tr. at 559, learning that Mr. Garretson was allegedly involved in identity theft and, thus, may have another reason for knowing about the place, does not undercut his testimony. Even if it did, several other people testified about Mr. Glover going down to Dallas to get the fake ID from a sign shop. *Id.* at 628–29 (Mr. Glover), 757–59 (Mr. Finlay), 999–1000 (Mr. Maldonado-Passage). Also, Special Agent Markley confirmed Mr. Glover recently obtained a fake ID at Smith Electric and Sign in Dallas three days later. Tr. at 112–15; Attachment 15.

[8] The rental application was submitted on either April 11, 2017, *see* Doc. 232-64 at 2, or May 11, 2017, *see id.* at 1. Mr. Garretson did not start working with the government until September 18, 2017. Doc. 232-7 at 3.

B. Alleged Perjury by Mr. Garretson[9]

Mr. Maldonado-Passage next alleges that Mr. Garretson committed perjury, Mtn. at 12–18, which are really *Napue* claims. As such, they will be addressed below in the section related to *Napue* claims. *See infra* at § IV.A.

C. Mr. Glover's Affidavit

Next, Mr. Maldonado-Passage points to an affidavit in which Mr. Glover allegedly admitted to working with Mr. Lowe "to fabricate text messages and script[] recorded calls with the intent of falsely implicating Maldonado in a murder-for-hire that was actually attributed to Lowe." Mtn. at 18. He also alleges that Mr. "Lowe[] 'created the entire murder-for-hire plot from start to finish[]' and that '[Lowe] worked with' Bryant, 'to create, direct and coerce the murder-for-hire plot.'" *Id.* (quoting Doc. 232-112 [at 2, 3]). Mr. Maldonado-Passage fails to carry his burden with this allegation because he provides no analysis of the required five-part test. *See Cordova*, 25 F.4th at 827–28.

Moreover, any argument would have failed even if he had made them. In the affidavit, Mr. Glover explains that the alleged fabrication occurred after he returned on July 6, 2018. Doc. 232-112 at 4. He also recounts a conversation that occurred on June 17, 2018, where Mr. Lowe allegedly told him to make sure Mr. Maldonado-Passage "took the fall for the murder for hire plot." *Id.* Mr. Maldonado-Passage still cannot show

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[9] Mr. Maldonado-Passage starts this section by quoting Mr. Garretson telling Tiger King producers: "You're not gonna show this to the defense attorney when I lay it out? [laughs] Don't . . . don't free that mother f*cker." Mtn. at 12 (citing Doc. 232-13). Mr. Maldonado-Passage miscites where that quote came from and ignores its context. Mr. Garretson made that statement in response to the question: "So how involved was *Jeff Lowe* in plotting this whole plan to kill Carole?" Attachment 16 at 12 (emphasis added).

that this information "would probably produce an acquittal" because by June 17, 2018, the proverbial die had already been cast by Mr. Maldonado-Passage's own words.

Setting aside Mr. Glover's testimony, Mr. Maldonado-Passage told Mr. Finlay on November 6, 2017, that Mr. Glover was going to Dallas "to get a fake ID so he could go take care of Carole [Baskin]." Tr. at 757–58. On November 7, 2017, he spoke freely with Mr. Garretson about the plan to have Mr. Glover kill Mrs. Baskin, Messrs. Glover and Finlay's trip to Dallas, and the contingency plan he had if Mr. Glover got caught "red-handed." Attachment 2. On December 8, 2017, Mr. Maldonado-Passage and Mark had an explicit negotiation about hiring Mark to kill Mrs. Baskin. Attachment 9 at 7–14, 19, 22, 26–27, 29, 36, 47–49. Then in a series of calls, Mr. Maldonado-Passage acknowledged that Mark was being hired to do what Mr. Glover had failed to do. *See* Attachment 11 at 1; Attachment 12; Attachment 13 at 1. Finally, on September 1, 2018, while Mr. Maldonado-Passage was in custody, Mr. Finlay told Mr. Maldonado-Passage that he had told the FBI about taking Mr. Glover to Texas to get an ID so he could go to Florida, and Mr. Maldonado-Passage said "Oh, so, so you hung me out to dry?" Attachment 14 at 2. Given Mr. Maldonado-Passage's own words, which were played for the jury, evidence that Mr. Glover and Mr. Lowe fabricated text messages or phone calls after everything transpired would ultimately have had no impact on Mr. Maldonado-Passage's conviction, especially where those communications were not admitted at trial.

As for Mr. Glover's assertion that Mr. Lowe created the first murder-for-hire plot, Mr. Lowe's involvement does not relieve Mr. Maldonado-Passage of culpability. The jury was aware of Mr. Lowe's alleged involvement in Count 1. *See* Tr. at 547–48 (Mr.

Lowe was involved in the conversation about killing Mrs. Baskin and pulled up maps of her bike path, gift shop, and house); Attachment 2 at 1 (Mr. Maldonado-Passage stating that Mr. Lowe had "100% confidence in [Mr. Glover killing Mrs. Baskin] because he's done it before" and explaining that Mr. Lowe and Mr. Glover would purchase go-phones to communicate and he would send Mr. Glover's phone to Las Vegas so Mr. Lowe could take pictures and it would register in Las Vegas); *id.* at 2 (explaining that he and Mr. Lowe "got our story down" if Mr. Glover was "bust[ed] . . . red-handed"); Attachment 5 at 1 (when Mr. Garretson asked Mr. Maldonado-Passage if he trusted Mr. Glover, Mr. Maldonado-Passage responded, "Jeff does"). Even if Mr. Glover testified that Mr. Lowe planned the first murder-for-hire plot, it does not preclude Mr. Maldonado-Passage's involvement in the plan, as demonstrated by his own words. *See infra* at § VI.

D. Mr. Glover's Alleged Recantation

Mr. Maldonado-Passage next claims Mr. Glover recanted his testimony. Mtn. at 19–20. In addition to the caution applicable to newly discovered evidence, *Jordan*, 806 F.3d at 1252, "recanted testimony is properly viewed with suspicion." *United States v. Ramsey*, 726 F.2d 601, 605 (10th Cir. 1984); *see also In re Barrett*, 840 F.3d 1223, 1229 (10th Cir. 2016) ("Postconviction recantations are to be viewed with extreme suspicion and have long been disfavored as the basis for a claim of innocence." (citation and alteration marks omitted)). When "new evidence is a recantation of trial testimony, the trial court must first be satisfied that the challenged testimony was actually false." *United States v. Pearson*, 203 F.3d 1243, 1274 (10th Cir. 2000).

The first alleged recantation Mr. Maldonado-Passage claims Mr. Glover made is that he "stole $3,000 from Joseph Maldonado-Passage." Mtn. at 19 (quoting Doc. 232-112 at 3). This was not a recantation; it is one way Mr. Glover characterized his actions during trial. *See* Tr. at 693–94 (discussing the $3,000, Mr. Glover testified on cross-examination: "I didn't realize I made a mistake on stealing that money."). He explained that "he considered that he had stolen the money from Joe Maldonado, as he never intended on killing Carole Baskin[] when he received the money from Joe Maldonado." Doc. 232-123 at 1–2; *see also* Attachment 28 at 43–44. This is consistent with his testimony that his plan was to "[t]ake [Mr. Maldonado-Passage's] money and run . . . [b]ecause the way he treated me and the employees and the way he acted." Tr. at 626.

The next alleged recantation involves Mr. Glover's belief that he "testified at trial that this $3,000 came from the cub sale on November 24, 2017." Mtn. at 19 (quoting Doc. 232-112 at 3). But he never testified on direct examination that the money he received was from a cub sale on November 24, 2017; he only testified that he received the money "the next day or so" after the cub sale, in a different envelope that was not as thick. Tr. at 640. On cross-examination, he came closer when he agreed that the money that he was waiting on was going to be from the purchase of a cat, but he clarified that he was waiting for Mr. Maldonado-Passage to get him the money and he did not know who Mr. Maldonado-Passage was getting the money from. *Id.* at 682–83. While Mr. Glover's testimony permits an inference that the money came from the cub sale—an inference supported by Mr. Maldonado-Passage's statement to Mr. Garretson that he was going to pay Mr. Glover with money from a cub sale that was coming from Florida, *see*

Attachment 2 at 1—Mr. Glover never testified that the money came from a cub sale. Thus, his trial testimony and affidavit are not inconsistent.

Next, Mr. Maldonado-Passage claims that Mr. "Glover admitted his testimony that Maldonado took his personal cell phone (HTC phone) was untrue." Mtn. at 11. But the only inconsistency with Mr. Glover's testimony is who asked him to give his phone to Mr. Maldonado-Passage. At trial, he said Mr. Maldonado-Passage asked him for the phone, Tr. at 641–42; in his affidavit, Mr. Glover said Mr. Lowe instructed him to give Mr. Maldonado-Passage his phone, Doc. 232-112 at 4. Either way, Mr. Maldonado-Passage had Mr. Glover's phone sent to Las Vegas, *see* Mtn. at 11; Tr. at 1005, to further the murder-for-hire plot. *See* Attachment 2 at 1.

The final alleged recantation by Mr. Glover to which Mr. Maldonado-Passage points is Mr. Glover's statement: "Joseph Maldonado-Passage did not give me the phone assigned to the Pizzeria. I took the phone from a recently fired employee named AJ." Doc. 232-112 at 4; *see* Mtn. at 19. This is an actual recantation because Mr. Glover explicitly testified that Mr. Maldonado-Passage gave him the pizza phone. Tr. at 642. This Court should reject Mr. Glover's recantation because his trial testimony is more credible than his recantation in light of the corroborating evidence presented at trial.

Mr. Glover's sworn testimony that Mr. Maldonado-Passage gave him the pizza phone when Mr. Glover gave Mr. Maldonado-Passage his personal phone is corroborated by the timing of events recorded by the two phones. The last time Mr. Glover's personal phone recorded its location was at 8:59 a.m. CST on November 25, 2017, at the zoo. Attachment 4 at 3. Six minutes later, pictures of Mrs. Baskin were taken on the pizza

phone. Attachment 6 at 3–6. This begs the question, who put the pictures of Mrs. Baskin on the pizza phone? Mr. Glover has always maintained that he never intended to kill Mrs. Baskin, *e.g.* Tr. at 626, 636; Doc. 232-112 at 4, so he had no reason to take pictures of her. Mr. Lowe was in Las Vegas, Tr. at 715, so he could not have taken the pictures. Mr. Maldonado-Passage was the one with the plan for the phones. Attachment 2 at 1. He also discussed using "throw away phones to just take pictures of the screen" when he was plotting Mrs. Baskin's murder with Mark. Attachment 9 at 49. Thus, Mr. Maldonado-Passage was the most likely person to put pictures of Mrs. Baskin on the pizza phone.

In support of Mr. Glover's recantation, Mr. Maldonado-Passage points to text exchanges between himself and Mr. Lowe, Doc. 232-114, Mr. Glover and Kelci Saffrey, Doc. 232-115, and Mr. Glover and Cheryl Ann Maldonado, Doc. 232-116.[10] The texts between Mr. Maldonado-Passage and Mr. Lowe simply further the plan Mr. Maldonado-Passage previously described, that if Mr. Glover was caught, he and Mr. Lowe "got our story down to where we fired the motherf*cker and he just went off the deep end." Attachment 2 at 2. As for the text with Kelci Saffrey, Mr. Glover did not say that AJ gave him the pizza phone but only that "AJ said it was hers." Doc. 232-115. In her text to Mr. Glover, Ms. Maldonado stated her belief that the pizza phone was AJ's phone but noted that Mr. Maldonado-Passage had the phone after AJ and before Mr. Glover. *See*

[10] Exhibits 114, 115, and 116 are not newly discovered evidence. Exhibit 114 was from Mr. Maldonado-Passage's phone and, thus, could have been discovered by exercising due diligence. Exhibits 115 and 116 were provided early on in discovery as indicated by the Bates Number in the lower right corner. *See* Attachment 23 at 3 (discovery receipt).

Doc. 232-116 ("Joe told [AJ] someone who used to live [at the zoo] took [the phone]... Before [Mr. Glover] even left (like when [Mr. Maldonado-Passage] still had it) lol.").

In the end, even if Mr. Glover's recantation regarding the pizza phone were heard by the jury, it is not the type of evidence that would "probably produce an acquittal," especially given Mr. Maldonado-Passage's statements detailing the plot to have Mr. Glover kill Mrs. Baskin. *See infra* § VI.A. Thus, a new trial is not warranted.

E. Mr. Glover's Cell Phones

Mr. Maldonado-Passage next argues that the government violated *Brady* by suppressing evidence from Mr. Glover's phones. Mtn. at 20–21. This will be addressed below in the section on alleged *Brady* violations. *See infra* at § II.H.

F. Mr. Glover's Alleged Relationship with Ashley Webster

Mr. Maldonado-Passage next claims that Mr. Glover and Ashley Webster had a relationship. Mtn. at 21. He offers no explanation how this alleged relationship is material to whether he committed the crimes charged or, if the jury had known about the allegation, that it would have probably produced an acquittal. Thus, he has failed to carry his burden. *Cordova*, 25 F.4th at 827–28.

G. Mr. Lowe's Affidavit

Next, Mr. Maldonado-Passage points to assertions in an affidavit signed by Mr. Lowe: (1) Mr. Lowe allegedly knew Mr. Garretson was working as an informant in September of 2017, Doc. 232-125 at 1; and (2) Mr. Lowe "staged" a conversation between himself and Mr. Glover on February 26, 2018, *id.* at 2. Mtn. at 22. Neither assertion warrants a new trial.

As to the first assertion, the United States doubts its accuracy; but more importantly, Mr. Maldonado-Passage does not explain how this claimed early knowledge that Mr. Garretson was an informant is material to whether Mr. Maldonado-Passage is guilty. Nor does he explain how it would have probably produced an acquittal. Thus, he fails to carry his burden. *Cordova*, 25 F.4th at 827–28.

As to the second assertion, Mr. Maldonado-Passage claims that the "manipulated recordings and text message exchanges were introduced as evidence at trial," Mtn. at 22, but he does not identify which exhibits. While none of the exhibits the United States admitted at trial included conversations between Mr. Lowe and Mr. Glover, it appears Mr. Maldonado-Passage attempted to admit such an exhibit, but this Court declined to admit the exhibit on hearsay grounds. Tr. at 696–700. Thus, not only does his claim that the evidence was admitted at trial appear to be mistaken, but Mr. Maldonado-Passage has provided no other explanation why Mr. Lowe's assertion that he staged a conversation with Mr. Glover on February 26, 2018, is material, how it would probably produce an acquittal, or how it would even be admissible. Thus, a new trial is not warranted on this basis. *Cordova*, 25 F.4th at 827–28.

H. Mr. Lowe's Recordings and Electronics

Mr. Maldonado-Passage contends Mr. Lowe asserted witnesses were "coached and this thing was set up and the murder for hire shouldn't stick." Mtn. at 23 (citing Doc. 232-156). But that statement was made by Jeremy McBride, who worked on Tiger King, not Mr. Lowe. *See* Doc. 232-156 at 1. Mr. Maldonado-Passage does not explain how

Mr. McBride's statement would be admissible at trial or how it meets any portion of the five-part test. Thus, a new trial is unwarranted. *Cordova*, 25 F.4th at 827–28.

Mr. Maldonado-Passage next points to a February 13, 2019 conversation between the Lowes and Special Agent Bryant. Mtn. at 23; *see* Doc. 232-128. But none of Mr. Maldonado-Passage's assertions about this conversation are borne out by the record.

First, he claims Special Agent Bryant "interfered and obstructed" a USDA investigation. Mtn. at 23. While Special Agent Bryant opined the investigation was "a fishing trip," he did not interfere, advising the Lowes "to be very nice and . . . cooperative through the process" but "not . . . to roll over and play dead." Doc. 232-128 at 5.

Second, he claims Special Agent Bryant presented false or misleading testimony about Robert Engesser. Mtn. at 23. At trial, Special Agent Bryant testified that the government originally believed that Mr. Engesser purchased a cub from Mr. Maldonado-Passage in late-November of 2017, but explained that after further investigation, "We do not know . . . [because] we have conflicting statements . . . [and] cannot verify the total truth of either." Tr. at 907–11. In private, Special Agent Bryant said that he did not believe Mr. Engesser purchased the liger cub in late November of 2017. Doc. 232-128 at 14–15. While there may be tension between those two statements, the tension is based on environment and circumstance. While a person may be willing to share a belief outside of court based on instinct, belief, or surmise, they may only testify to their personal knowledge in court, *see* Fed. R. Evid. 602.

I. Allegations of Extortion[11]

Mr. Maldonado-Passage contends a new trial is warranted based on Special Agent Bryant's alleged attempt to extort Mr. Finlay based on an alleged compromising video of Mr. Finlay. Mtn. at 24–25. Mr. Maldonado-Passage cannot carry his burden on this claim because he knew its factual underpinnings before trial. *See* Doc. 232-160; Attachment 17; *see also* Mtn. at 24 (conceding it was provided in pretrial discovery). Because Mr. Maldonado-Passage knew the information before trial, the evidence is not "newly discovered." *See Jordan*, 806 F.3d at 1252.

Mr. Maldonado-Passage also asserts that the government ignored that Mr. Lowe had tried infiltrating Mrs. Baskin's organization. But Mr. Maldonado-Passage was aware of the attempted (and apparently successful) infiltration of Mrs. Baskin's organization before trial. *See* Attachment 9 at 20–21 (Mr. Maldonado-Passage explaining that he had someone inside Big Cat Rescue). Thus, again, Mr. Maldonado-Passage fails to carry his burden on the first of the five-part test. *See Jordan*, 806 F.3d at 1252.

J. Mrs. Lowe's Affidavit

Next, Mr. Maldonado-Passage claims that Mrs. Lowe recanted her testimony that she received Mr. Glover's telephone on November 27, 2018. Mtn. at 26. But she did not

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[11] Mr. Maldonado-Passage prefaced this section with broad allegations of extortion. Mtn. at 24. For support, he cites to a video with no identifying information (Exhibit 157) and two letters that defense counsel wrote to the United States Attorney, *see* Doc. 232-158 (dated Mar. 23, 2022); Doc. 232-159 (dated Apr. 4, 2022, three days after he filed the motion). As for the video, the United States cannot respond where no argument or information about the video is provided. The two letters should be stricken because they are an attempt to avoid the page limit established by this Court, which was the reason this Court struck Mr. Maldonado-Passage's first motion for new trial. Doc. 221.

recant. In the affidavit, Mrs. Lowe claimed the package contained a summons in a certified envelope from PETA regarding Tim Stark and that she could "not say for certain that the package I opened on November 27, 2018[,] contained Frank Allen [sic] Glover's phone." Doc. 232-132 at 2–3. While Mrs. Lowe now claims a lack of certainty about the phone being in the package, claiming a diminished memory is not a recantation. To the contrary, in such a situation Mrs. Lowe's trial testimony would be admissible to prove the truth of the matter asserted.[12] *See* Fed. R. Evid. 804(a)(3); *id.* 804(b)(1)(A). As to other things also being in the package, that is not newly discovered evidence; evidence at trial showed the package weighed almost five pounds. Attachment 7. Thus, even if Mrs. Lowe made that statement at trial, it would not probably produce an acquittal. Thus, relief is not warranted. *See Jordan*, 806 F.3d at 1252.

K. Mrs. Lowe's Text Messages

Mr. Maldonado-Passage next points to text messages between Mrs. Lowe and Special Agent Bryant, claiming they contain "materially relevant information concerning Ashley Webster that was never provided to trial defense counsel." Mtn. at 26. But much of the information, largely consisting of what appears to be Ms. Webster's personnel file was personally handed over to defense counsel the following morning. *See* Attachment 18 (showing *Bates* numbers). The rest of the messages were either: (1) information Mr. Maldonado-Passage possessed before trial (i.e. the newsletter Mr. Maldonado-Passage

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[12] Whether Mr. Maldonado-Passage sent Mr. Glover's phone was not an issue that was disputed at trial. Mr. Maldonado-Passage testified at trial that he had Brenda (presumably, Vargas) mail Mr. Glover's phone to the Lowes. Tr. at 1005.

sent out); (2) information available through the exercise of due diligence (i.e. the Instagram posting to which Mr. Maldonado-Passage's account responded); or (3) pleasantries and scheduling information that are immaterial to the principal issue. Thus, Mr. Maldonado-Passage has failed to carry his burden. *See Jordan*, 806 F.3d at 1252.

The only other allegation is that Mrs. Webster had sex with Mr. Glover and lived in his trailer for a time that she was at the zoo. Doc. 232-137 at 6. This claim will be addressed below in the discussion on alleged *Brady* violations. *See infra* § II.D.

Mr. Maldonado-Passage also mentions that evidence exists that Chealsi Putman was trying to get Mr. Maldonado-Passage in trouble for years and that Ms. Putman was in contact with Special Agent Bryant. Mtn. at 26–27. Mr. Maldonado-Passage offers no explanation how this satisfies any of the five-part test for newly discovered evidence. Thus, relief is not warranted on this basis. *Cordova*, 25 F.4th at 827–28.

Finally, Mr. Maldonado-Passage raises the claim regarding Mr. Johnson again, this time pointing to his being referenced in a conversation between Ms. Putnam and Mrs. Lowe. Mtn. at 27. But again, defense counsel interviewed Mr. Johnson and declined to call him as a witness. Doc. 232-20 at 2. This is likely because Mr. "Johnson only ha[d] he said she said information," Doc. 232-133, which would be inadmissible hearsay. *See* Fed. R. Evid. 802. This is not sufficient to warrant a new trial. *Hill*, 737 F.3d at 687.

L. Alleged Perjury by Mrs. Lowe

At trial, Mrs. Lowe testified that she never met Beth Corley. Tr. at 711. Mr. Maldonado-Passage now claims she committed perjury based on a February 4, 2019 phone call. Mtn. at 27. He misrepresents what Mrs. Lowe said. During that call, she

initially states, "I actually gave Beth Corley 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 . . . ." Doc. 232-126 at 6 (first ellipses in original). While Mrs. Lowe's affidavit may be ambiguous as to whose reaction she was describing, two things clarify that she was speaking about Ms. Corley's staff member: (1) Mrs. Lowe corrected herself when recalling what transpired, saying she gave the information to the staff member rather than Ms. Corley; and (2) earlier in the conversation, Mrs. Lowe stated, consistent with her trial testimony, "I've never met her," referring to Ms. Corley. Doc. 232-126 at 2. Thus, Mrs. Lowe's statement on February 3, 2019, is consistent with her testimony at trial.

M. Yarri Schreibvogel's Interview

The next "newly discovered evidence" Mr. Maldonado-Passage references is defense counsel's interview of Yarri Schreibvogel; specifically, Mr. Schreibvogel's assertion that Mr. Baskin and Ms. Putnam set Mr. Maldonado-Passage up for the murder-for-hire. Mtn. at 27–28. But Mr. Maldonado-Passage does not explain how Mr. Schreibvogel's conjecture based on statements from others would be admissible at a new trial. It would likely be excluded as beyond Mr. Schreibvogel's personal knowledge, *see* Fed. R. Evid. 602, improper lay opinion, *see* Fed. R. Evid. 701, and hearsay, *see* Fed. R. Evid. 802. Because the testimony would not be admissible, it would not "probably produce an acquittal" and, thus, is not a basis for a new trial. *Hill*, 737 F.3d at 687.

Mr. Maldonado-Passage also claims that the United States did not disclose its interview with Mr. Schreibvogel. Mtn. at 28. He is mistaken, a draft report of that interview was provided in discovery. *See* Attachment 19.

N. John Reinke

Next, Mr. Maldonado-Passage points to an affidavit signed by John Reinke. Mtn. at 28–29. But Mr. Reinke was interviewed by defense counsel before trial. Doc. 232-113 at 1. Thus, Mr. Maldonado-Passage either had Mr. Reinke's proposed testimony or could have obtained it with due diligence, and it does not support Mr. Maldonado-Passage's bid for a new trial. *Jordan*, 806 F.3d at 1252.

O. The Tigers

Mr. Maldonado-Passage also claims—without providing any evidence to support that claim—that two of the tigers about which testimony was offered at trial are still alive. Mtn. at 29. This argument fails for at least three reasons. First, Mr. Maldonado-Passage cannot carry his burden of showing a new trial is warranted based on "newly discovered evidence" when he offers no actual evidence. Second, Mr. Maldonado-Passage fixates on the names "Samson and Delilah," while ignoring the description Mr. Cowie gave of those tigers at trial, "two white Bengals," Tr. at 45; the tiger at the hyperlink in the motion is an orange tiger. *See* Attachment 20. Third, Mr. Maldonado-Passage testified he euthanized five tigers in violation of the veterinary protocol he developed. Tr. at 991–93. This is not a basis for a new trial.

P. National Geographic

Mr. Maldonado-Passage next points to an article in National Geographic in December of 2019 and photographs posted in March of 2020. Mtn. at 29–31. Since this evidence did not exist at the time of trial, it cannot support a motion for new trial. *See United States v. Abello-Silva*, No. 96-5034, 1997 WL 72979, at *2 (10th Cir. Feb. 20,

1997) ("As a general rule, 'newly discovered evidence' must have been in existence at the time of trial." (citing *United States v. Lafayette*, 983 F.2d 1102, 1105 (D.C. Cir. 1993)); *United States v. Kaspereit*, No. CR-18-297-R, 2022 WL 49194, at *2 (W.D. Okla. Jan. 5, 2022).

The only fact in existence before trial were the emails between Special Agent Bryant and Sharon Guynup, the author of the article. Those emails were disclosed to defense counsel. *See* Attachment 21. Thus, they are not "newly discovered evidence" and do not warrant a new trial. *Jordan*, 806 F.3d at 1252.

Q. Tiger King

Finally, Mr. Maldonado-Passage laments his inability to get information from third parties. Mtn. at 31–32. The only basis for this claim is a contract he made with Royal Goodes LLC, Doc. 232-1, and an email written on May 28, 2021, Doc. 232-147. But Mr. Maldonado-Passage had the contract the day it was signed; thus, it is not newly discovered evidence. *Jordan*, 806 F.3d at 1252. And the email only existed after trial; thus, it is not newly discovered evidence. *Abello-Silva*, 1997 WL 72979, at *2.

II. Mr. Maldonado-Passage has not shown any *Brady*/*Giglio* violations.

In his motion, Mr. Maldonado-Passage alleges seven categories of *Brady* violations occurred in this case. Mtn. at 32–41. Relatedly, he alleges five categories of *Giglio* violations occurred, *id.* at 49–53, which are governed by the same standard, *see Cordova*, 25 F.4th at 826. To succeed on these claims, Mr. Maldonado-Passage must show by a preponderance of the evidence, "'[1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that

evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.'" *United States v. Durham*, 902 F.3d 1180, 1221 (10th Cir. 2018) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)).

A. Mr. Garretson's Recorded Calls

The first *Brady* violation Mr. Maldonado-Passage alleges is the suppression of all the recordings Mr. Garretson made of his phone calls. Mtn. at 34. With one possible exception discussed below, the government was not aware of the phone calls that Mr. Maldonado-Passage attaches as exhibits to his motion since Mr. Garretson told Special Agent Bryant that he no longer had the recording app on his phone on February 18, 2019. Doc. 232-23 at 1. Moreover, the prosecutors are not required to make *Brady* inquiries of informants as they must make of other state actors closely related to the prosecution. *See United States v. Geames*, 427 F.3d 1333, 1337 (10th Cir. 2005) (an informant's knowledge is not imputed to the government for purposes of *Brady*).

The one possible exception is the call between Mr. Garretson and Mr. Johnson on February 20, 2019, when Mr. Johnson told Mr. Garretson that he was going to kill Mr. Lowe. *See* Doc. 232-14. But information regarding the call was provided in discovery. *See* Attachment 22. Thus, it was not suppressed, and there is no *Brady* violation.

B. The Government Issued Recorder

Mr. Maldonado-Passage claims that a *Brady* violation exists based on "[t]he possibility of recordings on the [recording] device [issued to Mr. Garretson by the government] that would exonerate Maldonado or helped his defense [and] would have affected the outcome of trial." Mtn. at 35. This is not enough for Mr. Maldonado-

Passage to meet his burden. *United States v. Holloway*, 939 F.3d 1088, 1105 (10th Cir. 2019) ("A Brady claim fails if the existence of favorable evidence is merely suspected.").

C. Brittany Medina

The next alleged *Brady* violation Mr. Maldonado-Passage asserts is the failure to disclose Brittany Medina's presence at the meeting between Special Agent Bryant and Mr. Garretson on September 14, 2017. Mtn. at 35–36. Assuming that information was suppressed, suppression is only one requirement of a *Brady* claim. Mr. Maldonado-Passage claims Ms. Medina would have "refute[d] the AUSA[']s theory that Mr. Maldonado was involved in the first murder for hire plot." Mtn. at 36. But Ms. Medina's account of the conversation where Mr. Lowe was showing Mr. Garretson images of Mrs. Baskin's house and bike path was almost identical to the account Mr. Garretson gave to the jury. *Compare* Doc. 232-104 at 10–11 *with* Tr. at 548–49. To the extent Ms. Medina did not discuss Mr. Maldonado-Passage bringing over information regarding Mrs. Baskin that he received from insiders, it would not have had an impact on the outcome of the case because the jury was aware that he had this information when he revealed it to Mark. Attachment 9 at 19; Tr. at 790. Thus, Mr. Maldonado-Passage fails to show Ms. Medina's testimony would be either favorable or material as required by *Brady*.

D. Ashley Webster

Mr. Maldonado-Passage claims that the government violated *Brady* by failing to disclose that (1) Ms. Webster worked for the government and (2) she was involved in a sexual relationship with Mr. Glover. Mtn. at 36–37; *see also* Mtn. at 26. He is wrong.

The first assertion is untrue, Ms. Webster never worked for the government. The only support for this allegation is what appears to be a bootleg video with no context in which a woman (presumably Ms. Webster) says she "went back down [to the zoo] again, and I went to gather more information, [and] send it to the FBI, right." Mtn., Ex. 141. While she may have wanted to help the FBI, she did not claim the government sent her.

Assuming evidence of a relationship between Mr. Glover and Ms. Webster was suppressed, that is insufficient, and Mr. Maldonado-Passage offers no explanation how it meets the other requirements, especially since Ms. Webster did not testify and neither her voicemail nor her deposition were admitted into evidence. Thus, his *Brady* claim must fail. *See United States v. Moya*, 5 F.4th 1168, 1193 (10th Cir. 2021).

E. Chealsi Putman

Mr. Maldonado-Passage claims the government failed to disclose Ms. Putman's involvement with the government. Mtn. at 37. He is wrong. Her communications with the government were disclosed in discovery. *See* Attachment 23; Attachment 24. Moreover, Mr. Maldonado-Passage fails to show a *Brady* violation because he does not explain how that information would be helpful or material. *Moya*, 5 F.4th at 1193.

F. Special Agent Bryant's Communications

Next, Mr. Maldonado-Passage alleges the government violated *Brady* by failing to disclose a variety of categories of communications. Mtn. at 37–38. Even assuming that all the messages were suppressed, Mr. Maldonado-Passage again offers virtually nothing to satisfy his burden under the other two requirements of *Brady*. As a result, his *Brady* claim fails. *See Moya*, 5 F.4th at 1193.

Mr. Maldonado-Passage also claims that some of the text messages that Special Agent Bryant sent were altered or obstructed. Mtn. at 38. Assuming this constitutes suppression, Mr. Maldonado-Passage has failed to show how the *suppressed evidence* was either favorable or material. While he argues that the obstruction of the messages shows Special Agent Bryant's "unethical behavior throughout the entire investigation in concealing, manipulating[,] and fabricating evidence in an effort to secure a conviction against Maldonado," Mtn. at 38, the fact that the messages were obstructed was disclosed before trial. *See* Attachment 25. Mr. Maldonado-Passage's failure to explain how the contents of the obstructed messages themselves were either favorable or material puts an end to his *Brady* claim. *Moya*, 5 F.4th at 1193.

G. The Tiger Excavation

Mr. Maldonado-Passage alleges the government violated *Brady* by failing to disclose the presence of a sixth skull in photographs taken during an excavation. Mtn. at 39. It is questionable whether the sixth skull was suppressed at all; since it can be seen in a photograph turned over in discovery and admitted at trial. *See* Doc. 232-163. Even if it was suppressed, Mr. Maldonado-Passage fails to explain how the sixth skull was either material or favorable, especially since it did not give rise to any charges.[13] Doc. 232-149.

[13] The skull that was not included in the reports was the first skull recovered. *See* Attachment 29 at 2. It was buried alone. *Id.* Upon discovering no other tigers nearby, investigators realized they were digging in the wrong spot. *Id.* After being redirected, they discovered five tigers laid out one-by-one in a row, which lined up with the information they had received. *Id.* Because there was no information as to how the first tiger died and the area had been used as a burial ground for multiple animals, the first tiger skull was not recorded as evidence and was returned to where it was originally discovered. *Id.* at 2–3.

His failure to explain how the presence of the sixth skull is either favorable or material defeats his *Brady* claim. *Moya*, 5 F.4th at 1193.

Mr. Maldonado-Passage also contends the government violated *Brady* by failing to exhume the entire body of the five tigers rather than just the skulls. Mtn. at 39–40. His argument is based on speculation that a forensic examination would have produced favorable information if the bodies of the tigers had been exhumed. But such speculation is insufficient to support a *Brady* claim.[14] *Holloway*, 939 F.3d at 1105.

Even if Mr. Maldonado-Passage could show the exhumation would have produced favorable results, he cannot show the evidence would have been material. At trial, Mr. Maldonado-Passage testified he killed five tigers because, one day, he thought "what the hell am I doing because I have all these crippled animals that I am making suffer to be on display to suck donations out of people" and decided not to call the veterinarian because

[14] While discussing alleged *Brady* violations, Mr. Maldonado-Passage takes a detour to discuss his motion to sever Counts 1 and 2 from the other counts. Mtn. at 40 (citing Docs. 38, 44). In doing so, he claims Special Agent Bryant "admitted the government joined Counts 1 and 2 with 3–7, because they wanted to '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.* (quoting Doc. 232-128 at 9). Mr. Maldonado-Passage omits context from his quotation.

The full quote is: "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." Doc. 232-128 at 9. Right before this quote, he mentioned the motion to sever was denied and responded to Mr. Lowe asking what severance meant. *Id.* at 8–9. Given Mr. Maldonado-Passage sought severance based on "[t]he prejudicial effect of evidence relating to [the] alleged slaughter of beloved animals in a trial for a murder for hire plot is clear and substantial," Doc. 38 at 6, Special Agent Bryant was clearly referring to Mr. Maldonado-Passage and his defense counsel as "they" and the government as "we."

he "owed the vet so many thousand dollars already." Tr. at 991–92. He also admitted that he violated the veterinary care protocol that he had established with Dr. Green. *Id.* at 993; *see also id.* at 182, 186–87. Given his admission that his decision to euthanize the five tigers fell outside the provision of health care that he agreed with Dr. Green, he cannot show a reasonable probability of how exhumation of the bodies of those tigers would have resulted in a different outcome at trial, even if the results of the examination were that the tigers "were of old age, arthritic, and declawed."[15]

H. Allen Glover's Cell Phones

Mr. Maldonado-Passage also alleged that the government withheld text messages between Mr. Glover and Special Agent Bryant, which "tend to prove that Glover did not travel to Florida to kill Carole Baskin." Mtn. at 20–21. There is no *Brady* violation here because Mr. Glover testified that he never intended to kill Mrs. Baskin. Tr. at 626, 636.

Mr. Maldonado-Passage also argues that the government violated *Brady* because the extraction report it provided was incomplete. Mtn. at 21. While the report provided in discovery was not a full report, complete (logical) copies of all three phones were available for defense counsel to inspect before trial. *See* Attachment 26. Moreover, Mr. Maldonado-Passage offers no explanation how the full report would have been favorable or material. *See Moya*, 5 F.4th at 1193.

[15] The Endangered Species Act prohibits "tak[ing]" tigers within the United States. 16 U.S.C. § 1538(a)(1)(B). Generally, taking includes "shoot[ing]" and "kill[ing]." 16 U.S.C. § 1532(19). Taking is permissible if it is "to enhance the propagation or survival of the species," subject to certain regulations. 16 U.S.C. § 1539(a)(1)(A). Euthanasia of wildlife in captivity "[e]nhance[s] the propagation or survival" of the species if it is part of a "[p]rovision of health care." 50 C.F.R. § 17.3.

I. Alan Glover

Mr. Maldonado-Passage contends the government violated *Giglio* by failing to disclose that Special Agent Bryant allegedly "'made some calls' to get Glover's DUI[]s handled because 'a conviction could impugn the credibility' of Glover's statement." Mtn. at 51. But Special Agent Bryant made no such call. *See* Attachment 29 at 1. Contrary to the claim in Mr. Lowe's affidavit, *see* Doc. 232-125 at 6, no deal was made to keep the DUI off Mr. Glover's record; instead, he was convicted in the DUI cases on February 20, 2019, approximately one month before trial. *See* Attachment 27. Moreover, the claim makes no sense, misdemeanor DUI convictions cannot be used for impeachment purposes. *See United States v. Winman*, 77 F.3d 981, 986 (7th Cir. 1996) (finding no plain error in the conclusion that a DUI conviction is not admissible under Fed. R. Evid. 609(a)(2)). Thus, there was no *Giglio* violation.

Mr. Maldonado-Passage also claims that the government allegedly withheld that "three government representatives . . . informed [Mr. Glover] during his trial preparation that '[i]f [he] did what they asked then no charges would be brought against [him] now or in the future." Mtn. at 51. No such promise was ever made, *see* Tr. at 650; Attachment 29 at 1, and the affidavit signed by Mr. Glover is insufficient to overcome Mr. Glover's presumptively valid testimony to the contrary.[16] *See United States v. Weeks*, 653 F.3d

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[16] The United States' 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. Mr. Glover has always said that he did not intend to kill Mrs. Baskin; thus, if his consistent testimony is believed, he did not use any facilities of interstate commerce to facilitate a murder for hire. At most, he might be guilty of some type of fraud, but without a link to interstate commerce to perpetuate that fraud, the United States lacks jurisdiction to

1188, 1205 (10th Cir. 2011) ("'Solemn declarations in open court carry a strong presumption of verity.'" (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1997)). Three things suggest that Mr. Glover's affidavit is not credible. First, when questioned on this issue by Rebecca Chaiklin on April 20, 2021,[17] Mr. Glover repeatedly denied that he was threatened with imprisonment if he did not cooperate. *See* Attachment 28 at 59. Second, Mr. Glover only signed the affidavit containing the allegation after three days of interviews with defense counsel, Mtn. at 18, recordings of which Mr. Maldonado-Passage has chosen not to provide, despite providing recordings of interviews of at least one other witness, *see* Doc. 232-9.[18] Third, when Mr. Lowe suggested that Special Agent Bryant should scare Mr. Glover two weeks after trial, he said "I couldn't do that to him," noting "it would scare [Mr. Glover] to death if I was to go down there and go, well, I tried, buddy. I tried to keep you out of trouble," *see* Doc. 232-119 at 6; this corroborates Mr. Glover's testimony that testifying without immunity scared him. Tr. at 650.

Even if immunity had been given, it would not have affected the outcome of the case. *See United States v. Bagley*, 473 U.S. 667, 676–78 (1985) (rejecting that the failure to disclose an alleged promise of leniency in exchange for testimony requires automatic

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prosecute. Unlike Mr. Glover, Mr. Maldonado-Passage provided ample evidence of his intent to have Mrs. Baskin killed and used facilities of interstate commerce (interstate roads, phones, and the mail) to further his plots to kill Mrs. Baskin.

[17] Ms. Chaiklin—one of the Executive Producers of the Tiger King series on Netflix—worked with defense counsel in interviewing witnesses. *See, e.g.*, Doc. 232-108.

[18] If this Court orders an evidentiary hearing, the United States requests any written or recorded statement made by Mr. Glover or any other witness who is called to testify by Mr. Maldonado-Passage. *See* Fed. R. Crim. P. 26.2.

reversal). Mr. Maldonado-Passage claims Count 1 "depended almost entirely on Glover's testimony" and "without it there could have been no indictment and no evidence to carry the case to the jury." Mtn. at 51–52. But he forgets the statements he made, which were played or otherwise recounted for the jury. Mr. Maldonado-Passage told Mr. Finlay to take Mr. Glover to Dallas "to get a fake ID so [Mr. Glover] could go take care of Carole [Baskin]," Tr. at 758, and when he learned that Mr. Finlay told the FBI about taking Mr. Glover to get the fake ID, he lamented that Mr. Finlay had "hung [him] out to dry," Attachment 14 at 2. He explained that if Mr. Glover was caught, he was going to claim Mr. Glover "just went off the deep end." Attachment 2 at 2. He recalled that Mr. Glover "run off with my money and [we] never heard from him again" when contemplating trusting Mark. Attachment 12; *see also* Attachment 13 at 1 (recounting that Mr. Glover "took four thousand bucks and never came back"). In the end, Mr. Maldonado-Passage's own words provided overwhelming corroboration of Mr. Glover's testimony and any alleged deal not to prosecute Mr. Glover would have made no difference to the jury. Thus, even if such an agreement existed and was suppressed, relief is not required because such an agreement would not have been material.

J. Dr. JoAnne Green

Mr. Maldonado-Passage also claims that the government violated *Giglio* by suppressing an alleged threat to Dr. Green that she would be arrested if she did not go to court. Mtn. at 52. This argument fails for two reasons. First, Mr. Maldonado-Passage has offered no explanation as to why such a statement would be favorable or material; thus, he has failed to carry his burden. *See Moya*, 5 F.4th at 1193. Second, Dr. Green

was subpoenaed to testify, the fact that she could be arrested if she failed to honor that subpoena and appear was either known or should have been known to defense counsel.

K. James Garretson

Mr. Maldonado-Passage contends that the government failed to disclose immunity allegedly offered to Mr. Garretson, violating *Giglio*. Mtn. at 52. But Mr. Garretson was not offered immunity for his testimony. *See* Doc. 232-8 at 46 (Mr. Garretson telling defense counsel "I never had an immunity agreement or nothing. I have no immunity."); Doc. 232-9 at 2, 43 (same); Doc. 232-30 at 1; Doc. 232-91 at 5; Doc. 232-105 at 4; Doc. 232-150 at 6; Attachment 29 at 1. While the government did not prosecute him for his involvement with obtaining a lemur, there was a good reason—the only information about Mr. Garretson's involvement in the lemur transaction came from Mr. Garretson. Doc. 232-16 at 2. "A criminal conviction cannot be sustained when the offense is proven solely by an uncorroborated extrajudicial confession." *United States v. Chimal*, 976 F.2d 608, 610 (10th Cir. 1992) (citing *Smith v. United States*, 348 U.S. 147, 152 (1954)). Even if an immunity agreement existed, Mr. Maldonado-Passage has not explained how it would have affected the outcome of the case, especially since he made sure the jury was aware the government had not prosecuted Mr. Garretson for the lemur. Tr. at 580. Thus, he has failed to satisfy his burden. *See Moya*, 5 F.4th at 1193.

L. John Finlay

Mr. Maldonado-Passage alleges in conclusory fashion that Mr. Finlay "was coerced into testifying." Mtn. at 52. This is insufficient for relief. *Moya*, 5 F.4th at 1193.

M. Jeff Lowe

Mr. Maldonado-Passage asserts a *Brady* violation occurred because Mr. and Mrs. Lowe received immunity and the United States did not disclose it. Mtn. at 53. The conversation he relies upon to support this claim begins in the middle and seems to focus on an issue dealing with Mark and the potential that Mr. Lowe might be subpoenaed. Doc. 232-103 at 1. That conversation does not show that either of the Lowes received immunity, which is unsurprising because they did not receive immunity. *See* Attachment 29 at 1. Even if they had received immunity, Mr. Maldonado-Passage has not explained how it would have been material, especially since Mr. Lowe did not testify. Thus, he has failed to satisfy his burden. *See Moya*, 5 F.4th at 1193.

III. A motion for new trial is not the proper vehicle to raise a claim of outrageous government conduct.

Next, Mr. Maldonado-Passage asks this Court to "absolutely bar the government from invoking the judicial process of this Court to obtain a conviction." Mtn. at 48; *see generally id.* at 41–49. But seeking an "absolute[] bar" is fundamentally irreconcilable with seeking a new trial. Because he seeks relief other than a new trial, a separate motion is required. LCrR12.1(e); *see* LCvR7.1(c) ("Each motion filed shall be a separate document, except where otherwise allowed by law, these rules, or court order.").[19]

Even if Mr. Maldonado-Passage's claim of outrageous government conduct were properly presented, this Court should reject it. First, a plurality of the Supreme Court

[19] To the extent Mr. Maldonado-Passage is seeking to reverse his conviction, he would need to raise this claim in a motion pursuant to 28 U.S.C. § 2255.

rejected the viability of such a claim three years after it had suggested the possibility of such a claim in dicta. *See United States v. Dyke*, 718 F.3d 1282, 1285 (10th Cir. 2013) (Gorsuch, J.) (citing *United States v. Payner*, 447 U.S. 727, 737 n.9 (1980); *Hampton v. United States*, 425 U.S. 484, 490 (1976) (plurality opinion)). While the Tenth Circuit has not formally buried the claim, "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) (unpublished).

Second, Mr. Maldonado-Passage's claims fail on the merits. Mr. Maldonado-Passage claims his case is unique because, "[w]hile Maldonado's threats to Carole Baskin may be unsettling to some, they must be interpreted with the commands of the First Amendment in mind." Mtn. at 43. But the Tenth Circuit recently rejected a very similar argument, holding that even if statements are not criminal and "are akin to puffery," they still allow the government to conduct an undercover operation. *See Varnell*, 2021 WL 5875718, at *4; *see also United States v. Cromitie*, 727 F.3d 194, 219–20 (2d Cir. 2013) ("[T]he FBI agents would have been derelict in their duties if they did not test how far [Defendant] would go to carry out his desires," who had said "he wanted 'to die like a shahid, a martyr' and . . . 'do something to America."). The government's conduct here was even less troublesome than its conduct in *Varnell* or *Cromitie*.[20] As a result, this Court should reject the claim of outrageous government conduct.

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[20] Mr. Maldonado-Passage relies on *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), but even the Third Circuit "has repeatedly distinguished, and even questioned, [*Twigg*'s] holding." *United States v. Fattah*, 858 F.3d 801, 813 (3d Cir. 2017).

IV. Mr. Maldonado-Passage has not shown a *Napue* violation.

Mr. Maldonado-Passage asserts two categories of *Napue* violations. Mtn. at 53–55. "A *Napue* violation occurs when (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). The defendant bears the burden of establishing a *Napue* violation. *United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002). "Perjury occurs when '[a] witness testifying under oath or affirmation . . . gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Flonnory,* 630 F.3d 1280, 1287 (10th Cir. 2011) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)). "[T]he movant does not sustain his burden of demonstrating perjury merely by proving that a government witness has testified falsely or has given testimony that conflicts with other statements." *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006). "Conclusory allegations to this effect are not sufficient." *McBride v. United States*, 446 F.2d 229, 232 (10th Cir. 1971).

A. James Garretson

Mr. Maldonado-Passage alleges Mr. Garretson committed perjury on several occasions and the government failed to correct it. Mtn. at 4–5, 12–18, 54–55. For the following reasons, these arguments do not warrant relief.

1. Turning Over All Recordings

Mr. Maldonado-Passage's first *Napue* claim is that Mr. Garretson committed perjury when he agreed that "all the conversations that [he was] able to record, . . . [he]

hand[ed] them all over to Special Agent Bryant." Mtn. at 4–5; *see id.* at 12; *see also* Tr. at 553. This claim fails for at least two reasons.

First, Mr. Maldonado-Passage fails to account for the context in which Mr. Garretson answered the question. He had just been asked about his agreement to record calls as part of his cooperation. *See* Tr. at 552–53. He later testified that introducing Mr. Lowe to Special Agent Bryant was "pretty much the last thing [he] did to assist the investigative phase of this matter." *Id.* at 579. Mr. Garretson may have understood the question as only referring to the timeframe when he was assisting the government with its investigation in this case, which would not include the calls Mr. Maldonado-Passage has attached to his motion. That Mr. Garretson may have understood the question differently than Mr. Maldonado-Passage interprets the question now does not suggest that Mr. Garretson committed perjury. *See Flonnory,* 630 F.3d at 1287. Such a high bar to finding perjury is consistent with the approach this Court has already taken in this case. *See* Doc. 144 at 28 (finding no perjury when Mr. Maldonado-Passage "relied on a variety of word games in his testimony, deflected blame, and attempted to create plausible deniability for his criminal conduct").

Second, even if Mr. Garretson's testimony was perjurious, Mr. Maldonado-Passage presents no evidence that the prosecution—i.e. the Assistant United States Attorneys (AUSAs)—were aware of the alleged perjury. He alleges that *Special Agent Bryant* was aware, Mtn. at 5, 54–55, and claims that is enough. *See id.* at 54 (citing *United States v. Buchanan*, 891 F.2d 1436, 1437 (10th Cir. 1989); Justice Manual § 9-5.001(B)(2)). But unlike a *Brady* violation, *Napue* requires the defendant to prove "the

prosecutor's knowledge of the falsity." *Garcia*, 793 F.3d at 1207–08 (emphasis added). This requires the prosecutor's personal knowledge, not knowledge by law enforcement agents that could be imputed to the prosecutors under *Brady*. *See Smith v. Sec. of N.M. Dept. of Corrs.*, 50 F.3d 801, 831 (10th Cir. 1995) (holding that a detective's knowledge could not be imputed to the prosecution under *Napue* but could be imputed under *Brady*). Because Mr. Maldonado-Passage has not presented any evidence the prosecutors knew of the alleged perjury, his *Napue* claim fails.

2. Mr. Garretson's Reason for Cooperating with the Government

Mr. Maldonado-Passage also claims that Mr. Garretson lied when he testified that he cooperated with the government because it was "[j]ust the right thing to do at the time." Tr. at 552; *see* Mtn. at 12. In a single sentence, Mr. Maldonado-Passage asserts calls show there were several other reasons. This conclusory allegation is not enough to show a *Napue* violation. *McBride*, 446 F.2d at 232.

3. Mr. Garretson's Prior Dealings with Mrs. Baskin

Mr. Maldonado-Passage contends Mr. Garretson lied about meeting Mrs. Baskin. Mtn. at 13; *see* Tr. at 530. Specifically, Mr. Garretson testified that he did not know if Mrs. Baskin ever made a complaint about his facility because "a lot of people make complaints" and that he had not met Mrs. Baskin in person. Tr. at 530. Mr. Maldonado-Passage claims these statements were false, pointing to an order by a Department of Agriculture Administrative Law Judge and what appears to be an unidentified screenshot. Mtn. at 13 (citing Doc. 232-6; Doc. 232-161). He also claims, in a conclusory fashion,

that Mr. Garretson had "a relationship with Howard and Carole Baskin that existed before, during and after the criminal investigation and trial." *Id.* His claim is meritless.

First, Mr. Garretson did not commit perjury. As to Mrs. Baskin's complaint, Mr. Garretson testified to a lack of memory. Tr. at 530. The inability to remember is not perjurious. *See Flonnory,* 630 F.3d at 1287. As to never having met Mrs. Baskin in person, it is consistent with the very evidence Mr. Maldonado-Passage uses to claim Mr. Garretson lied. *See* Doc. 232-27 at 7–8 (clarifying that when he said that he "met Carole at a meeting," they were in the same room, but they did not personally meet).

Second, even if Mr. Garretson's testimony were false, Mr. Maldonado-Passage has failed to show that the prosecutors knew about the alleged falsity. Thus, his *Napue* claim could be rejected on this basis alone. *See Smith*, 50 F.3d at 831.

5. Mr. Garretson's Omission of Brittany Medina

Mr. Maldonado-Passage contends the government violated *Napue* when Mr. Garretson omitted the fact that Ms. Medina was present when Mr. Lowe showed him different maps of places Mrs. Baskin frequented and Mr. Maldonado-Passage brought out files on Mrs. Baskin that he had been able to collect. Mtn. at 13 (citing Tr. at 547–48). This argument suffers from several problems.

First, Mr. Maldonado-Passage fails to show that this statement was perjurious. Testimony that is literally true but allegedly misleading by negative implication is not perjurious. *See United States v. Larranaga*, 787 F.2d 489, 497 (10th Cir. 1986) (quoting *Bronston v. United States*, 409 U.S. 352, 361–62 (1973)). Because Mr. Garretson was never asked if anyone else was present during that conversation, there was no perjury.

Second, Mr. Maldonado-Passage has not shown that the prosecutors knew about the alleged perjury. At most, Mr. Maldonado-Passage alleges that Special Agent Bryant knew that Ms. Medina had been present during the conversation. Mtn. at 14. But, as discussed earlier, it is insufficient to prove a *Napue* violation based on Special Agent Bryant's knowledge; Mr. Maldonado-Passage must also show that the prosecutors knew about the alleged perjury as well. *See Smith*, 50 F.3d at 831. His failure to make that showing ends his *Napue* claim.

6. How Mr. Garretson Knew Where to Get a Fake ID

Initially, Mr. Garretson claimed not to know why Mr. Maldonado-Passage thought he would know where to get a fake ID. Tr. at 599. He subsequently agreed that Mr. Maldonado-Passage may have thought that he knew where to get fake IDs because he owned bars and strip clubs in Dallas. Tr. at 608. Mr. Maldonado-Passage now claims that testimony was false because he claims that Mr. Garretson's knowledge of where to get a fake ID resulted from his commission of identity theft. Mtn. at 15. But Mr. Maldonado-Passage confuses (a) why Mr. Garretson allegedly knew where to get fake IDs (the point he argues in the motion) with (b) whether Mr. Garretson knew *why Mr. Maldonado-Passage thought* he would know (the question asked at trial). The answer to question (b) is that he did not know, *see* Tr. at 599, the answer to question (a) is irrelevant to whether Mr. Garretson committed perjury in his answer to question (b). But even if he committed perjury, Mr. Maldonado-Passage has failed to show that the prosecutors knew of the alleged falsity, which is also fatal to his claim. *See Smith*, 50 F.3d at 831.

7. Legality of Credit for Dental Work

On cross-examination, Mr. Garretson testified that it was legal for him to provide credit to assist someone with their dental work. Tr. at 599. Mr. Maldonado-Passage asserts the testimony was false. Mtn. at 15–16. But his conclusory assertion is insufficient to support a *Napue* claim. *McBride*, 446 F.2d at 232.

8. Deletion of Calls with Mr. Lowe

On cross-examination, Mr. Garretson testified that that calls he had with Mr. Lowe between November of 2017 and January of 2018 were not recorded "due to problems [he] was having with the phone." Tr. at 587. Mr. Maldonado-Passage claims that Mr. Garretson committed perjury, because he later "admitted he 'deleted a lot of Jeff's [Jeff Lowe] and Bryant calls.'" Mtn. at 16 (citing Doc. 232-9).[21] This argument does not support a *Napue* claim for a few reasons.

First, Mr. Maldonado-Passage has not shown perjury. Mr. Garretson's statements can comfortably co-exist—his phone may have malfunctioned between November, 2017, and January, 2018, (consistent with his trial testimony) and he could have "deleted a lot of" calls with Mr. Lowe that occurred after that date (consistent with what he told defense counsel). In fact, the earliest files reported by Mr. Maldonado-Passage occurred in November of *2018*, *see* Doc. 232-11, several months after the subject of Mr. Garretson's testimony.

[21] Mr. Maldonado-Passage misquotes Mr. Garretson, who actually said: "I deleted a lot of Jeff's calls and stuff where we're talking about liquidation loads." Doc. 232-9 at 51.

Second, Mr. Maldonado-Passage has not shown that the prosecutors were aware of any alleged perjury. Because he has provided no evidence that the prosecutors knew about the alleged perjury, he has not shown a *Napue* violation. *See Smith*, 50 F.3d at 831.

9. Legality of Tiger Purchases

Mr. Maldonado-Passage asserts Mr. Garretson committed perjury by testifying that he lawfully purchased tigers. Mtn. at 16; *see* Tr. at 536. Even assuming Mr. Garretson was incorrect about the lawfulness of his actions, Mr. Maldonado-Passage has not shown that he committed perjury. To the contrary, Mr. Garretson explained why he thought his actions were lawful. Tr. at 536. It is not enough that Mr. Garretson was wrong; to show perjury, Mr. Maldonado-Passage must show that Mr. Garretson testified with the willful intent to provide false testimony. *Flonnory,* 630 F.3d at 1287. Additionally, Mr. Maldonado-Passage also makes no attempt to show that the prosecutors had knowledge of the alleged false testimony. *See Smith*, 50 F.3d at 831.

10. Others With Knowledge About Mr. Garretson's Cooperation

When asked on direct examination, "in the fall of 2017, did anybody outside law enforcement know that you were cooperating with the Government," Mr. Garretson responded, "no." Tr. at 556. Even assuming Mr. Garretson testified falsely in this regard, Mr. Maldonado-Passage has not shown that the testimony was on a material matter. So long as Mr. Maldonado-Passage did not know that Mr. Garretson was cooperating with the government, it ultimately did not matter who else knew, and Mr. Maldonado-Passage clearly did not know until he was indicted. *See* Attachment 14 at 3.

Moreover, Mr. Maldonado-Passage has not shown the prosecutors had knowledge of the allegedly false testimony, which is fatal to a *Napue* claim. *See Smith*, 50 F.3d at 831.

11. Mr. Garretson's Alleged Financial Interest

On cross-examination, defense counsel asked Mr. Garretson about Mr. Lowe's attempt to sell the zoo and Mr. Lowe's offer of $100,000 to Mr. Garretson if he arranged for Mrs. Baskin to buy it for $500,000. Tr. at 582. Ignoring the context of the testimony, Mr. Maldonado-Passage alleges Mr. Garretson committed perjury because he had "plans to corner the cub petting market once Mr. Maldonado was safely behind bars." Mtn. at 17. But Mr. Garretson was explaining that he would not financially benefit from "getting rid of Mr. Maldonado-Passage" because Mr. Lowe already owned the park. Tr. at 582. This is consistent with everyone who testified at trial, *see id.* at 189, 485, 550, 616, 839, even Mr. Maldonado-Passage, *id.* at 950–51. Thus, Mr. Maldonado-Passage has not shown that Mr. Garretson committed perjury or the existence of a *Napue* violation.

B. Alan Glover

Mr. Maldonado-Passage broadly asserts Mr. Glover committed perjury. Mtn. at 55. Such an assertion is conclusory and insufficient to show a *Napue* violation. *McBride*, 446 F.2d at 232. He asserts that the government was aware that "it was not Engesser who conducted the cub sale in order to have money exchanging hands." Mtn. at 55. But Mr. Maldonado-Passage does not point to where Mr. Glover testified at trial that Mr. Engesser was the person who purchased the cubs shortly before Mr. Maldonado-Passage paid him. Absent trial testimony, Mr. Maldonado-Passage cannot show perjury giving rise to a *Napue* violation.

V. Mr. Maldonado-Passage's claim of prosecutorial misconduct is untimely.

The final group of claims made by Mr. Maldonado-Passage are allegations of prosecutorial misconduct. Mtn. at 55–60. To the extent Mr. Maldonado-Passage seeks to avoid the five-part test for newly discovered evidence, his motion is untimely. *United States v. Johnson*, 821 F.3d 1194, 1199 (10th Cir. 2016); Fed. R. Crim. P. 33(b)(2). To the extent the five-part test applies, Mr. Maldonado-Passage has not met his burden.

First, Mr. Maldonado-Passage presents six conclusory allegations. Mtn. at 56. But conclusory allegations without discussing trial evidence are insufficient to satisfy all five parts of the test for newly discovered evidence. *Cordova*, 25 F.4th at 827–28.

Second, without any citations to the record or exhibits, Mr. Maldonado-Passage asserts that one of the prosecutors presented false evidence to both the grand jury and the petit jury. Mtn. at 56–57. Specifically, he points to "evidence that Mr. Maldonado conducted a cub sale and used those funds to pay Glover for the alleged murder for hire," and contends that he "has demonstrated that evidence was false." *Id.* at 56. But contrary to his claim, *id.* at 57, Mr. Maldonado-Passage explained that he obtained the money to pay Mr. Glover to kill Mrs. Baskin from the sale of a liliger. *See* Attachment 2 at 1.

Third, Mr. Maldonado-Passage restates in a conclusory fashion over two pages what J. Douglas Kouns developed in a twenty-page affidavit. Mtn. at 57–59 (citing Doc. 232-142). To the extent Mr. Maldonado-Passage seeks to incorporate Mr. Kouns's affidavit by reference, he knows that he cannot use exhibits to circumvent the page limit imposed by this Court. *See* Doc. 221 (striking Mr. Maldonado-Passage's first motion for new trial based on its attempt to incorporate a 202-page document by reference). In any

event, Mr. Maldonado-Passage has not made any attempt to explain how Mr. Kouns's affidavit or testimony would be admissible, much less why his affidavit would "probably produce an acquittal." *Jordan*, 806 F.3d at 1252; *Hill*, 737 F.3d at 687.

Fourth, Mr. Maldonado-Passage asserts that prosecutors engaged in prosecutorial misconduct at resentencing. Mtn. at 59–60. This allegation cannot satisfy the five-part test because the alleged misconduct occurred nearly three years after the jury returned its verdict. *See Abello-Silva*, 1997 WL 72979, at *2; *see also Lafayette*, 983 F.2d at 1105. Moreover, Mr. Maldonado-Passage's claim that the AUSAs who appeared at resentencing "'stood by' facts they knew to be false," Mtn. at 59, is itself false. The AUSAs who appeared at resentencing considered all the information they had at the time—information from the trial, from pre-trial and post-trial investigations, and from defense counsel—and determined that they believed the testimony at trial. Mr. Maldonado-Passage's current claims are only tenable if one rejects both the witness testimony as well as the exhibits and accepts a defense-friendly version of every exhibit submitted by Mr. Maldonado-Passage. For the reasons summarized in detail below, the United States continues to stand by Mr. Maldonado-Passage's convictions.

VI. Ultimately, the jury would not have reached a different result because Mr. Maldonado-Passage's own statements were the strongest evidence against him, evidence with which he does not engage.

Each category of alleged error requires proof of some type of prejudice or materiality. *See Jordan*, 806 F.3d at 1252 (for claims of newly discovered evidence, the defendant must show the newly discovered evidence would "probably produce an acquittal"); *Cordova*, 25 F.4th at 826 (for *Brady* and *Giglio* claims, a defendant must

"show by a preponderance of the evidence" that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"); *Garcia*, 793 F.3d at 1207 (a *Napue* violation requires a showing of materiality); *United States v. Christy*, 916 F.3d 814, 824 (10th Cir. 2019) (holding a claim of prosecutorial misconduct requires examining the alleged misconduct's "likely effect on the jury's verdict"). Mr. Maldonado-Passage's own words—which he has never disclaimed or explained—provide extremely solid support for Counts One and Two. Thus, even if a factfinder were loathe to give any credit to the testimony of witnesses like Mr. Garretson, Mr. Glover, or Mrs. Lowe, the trial would not have turned out differently.

A. Mr. Maldonado-Passage's Statements Regarding the Count 1 Plot

Mr. Maldonado-Passage explained why he wanted to kill Mrs. Baskin. She had cost him "almost three-quarters of a million dollars in lawyers already." Attachment 9 at 8. And he thought she would not stop "until somebody shoots her." Attachment 1 at 1.

Mr. Maldonado-Passage admitted to hiring Mr. Glover to kill Mrs. Baskin. *E.g.* Attachment 12 (remembering "[t]hat one of Jeff's run off with my money and never heard from him again," when discussing whether to trust Mark). Specifically, he admitted that he had Mr. Finlay take Mr. Glover down to Texas to get a fake ID. Tr. at 1002. While Mr. Maldonado-Passage testified that he only did so at Mr. Lowe's direction, *id.*, his statements immediately after Mr. Glover obtained the ID and after he was arrested show that Mr. Maldonado-Passage knew how serious obtaining the ID was. *See* Attachment 2 at 1 ("Yeah, [Mr. Finlay] d*mn sure don't want to be implicated in it, you know somebody that drove to get the fake ID for it."); Attachment 14 at 2–3 (when

Mr. Finlay admitted that he told the FBI that he took Mr. Glover to Texas to get the ID because Mr. Glover needed to go to Florida, Mr. Maldonado-Passage responded: "Oh, so, so you hung *me* out to dry?" while under arrest for murder-for-hire (emphasis added)).

Mr. Maldonado-Passage laid out the plan he had for Mr. Glover to kill Mrs. Baskin and how he intended to hide his connection. He admitted that he was "having him buy a go-phone down there and Jeff is buying a go-phone so they can communicate and then throw them away." Attachment 2 at 1. He explained that "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." *Id.* He detailed the contingencies "if they bust him red-handed," (1) "all of the bills came from Florida," and (2) "me and Jeff are just, we got our story down to where we fired the motherf*cker and just went off the deep end." *Id.* at 1–2. Finally, he laid out the payment details. Attachment 5 at 2 ("See, what I was gonna do is send him with four and then give him six when it was done."). At trial, Mr. Maldonado-Passage admitted to giving Mr. Glover $3,000. Tr. at 1004. As the months went by and Mrs. Baskin was still alive, Mr. Maldonado-Passage lamented that "[t]he last guy went down to North Carolina [sic] and drank it all" and never came back. Attachment 11 at 1; *see* Attachment 12 at 1 (when Mr. Garretson was responding to whether he trusted Mark by saying that Mark is "not like that other dipsh*t," Mr. Maldonado-Passage interrupts and says, "He took four thousand bucks and never came back"). These statements, by themselves, were sufficient for a jury to find Mr. Maldonado-Passage guilty on Count 1.

B. Mr. Maldonado-Passage's Statements Regarding the Count 2 Plot

Prior to Mr. Maldonado-Passage hiring Mr. Glover to kill Mrs. Baskin, Mr. Garretson twice mentioned that he knew of someone else who could be the hitman. Attachment 1 at 1; Attachment 5 at 1–3. Mr. Maldonado-Passage met with Mr. Garretson and Mark approximately two weeks after Mr. Glover left. *See generally* Attachment 9. When Mark brought up "what James [Garretson] was tellin me," Mr. Maldonado-Passage explained, "I don't want anybody getting caught" and suggested they could blame the hitman's actions on a serial killer. *Id.* at 10. Mr. Maldonado-Passage asked about the price, suggested 20 when Mark said 10, and suggested 10 down when Mark said he would like half down. *Id.* at 11. Mr. Maldonado-Passage confirmed the target was "Carole Baskin." *Id.* at 14. When Mark told Mr. Maldonado-Passage to let him know if he is serious, Mr. Maldonado-Passage responded, "We'll get James the money," and that he could get 5 upfront. *Id.* When Mark asked for "any information you got on her," Mr. Maldonado-Passage responded by pulling out a bunch of stuff from her office. *Id.* at 19–20. He also admitted that some of the information he gave Mark came from online. *Id.* at 20–21. He suggested that Mark kill her by "follow[ing] her . . . [i]nto a mall parking lot and just cap her and . . . [d]rive off." *Id.* at 29. Mr. Maldonado-Passage said that he would "put the money together" by "sell[ing] a bunch of tigers." *Id.* at 36. He also said he would "get a pistol at the flea market" for Mark. *Id.* at 47. Mr. Maldonado-Passage said he would have Mr. Lowe send Mark the maps of Mrs. Baskin's property. *Id.* at 48. Alternatively, he suggested they "just take pictures of the screen," *id.*

at 49, which is what happened with the "pizza phone" that Mr. Glover had in his possession when he left, Attachment 6 at 3–6.

Ultimately, it was Mr. Maldonado-Passage's own words that convicted him. While the testimony by Special Agent Markley, Special Agent Farabow, Mr. Garretson, Mr. Glover, Mrs. Lowe, Inspector Hess, Mr. Finlay, and Mark brought the connections between all of Mr. Maldonado-Passage's statements into focus and confirmed what he said on contemporaneously recorded conversations, impeaching the testimony of any or all of those witnesses does not call Mr. Maldonado-Passage's recorded statements into question. None of the "newly discovered evidence" presented by Mr. Maldonado-Passage call his statements in late-2017 and early-2018 into question nor do any of the alleged *Brady*, *Giglio*, or *Napue* violations. Simply put, even if the jury had been aware of all the information Mr. Maldonado-Passage presents in his motion as well as all the information presented at trial, there is no reasonable doubt that a jury following the law would still have convicted Mr. Maldonado-Passage. Therefore, Mr. Maldonado-Passage is not entitled to a new trial, and this Court should deny his motion.

VII. An evidentiary hearing is likely not warranted

Generally, "a district court is 'not required to hold' an evidentiary hearing before resolving a motion for a new trial." *United States v. Velarde*, 485 F.3d 553, 559 (10th Cir. 2007). Instead, an evidentiary hearing is only required to "resolve conflicting evidence." *Id.* (internal quotation marks omitted). Thus, the question depends on how this Court chooses to resolve the issues raised by Mr. Maldonado-Passage.

Many of Mr. Maldonado-Passage's claims can be resolved as a matter of law, without resolving any potential evidentiary conflict, because Mr. Maldonado-Passage did not attempt to carry his burden as to one or more elements of a claim or attempted to do so with only conclusory assertions; it is the deficiency of the argument, not the need to develop evidence, that cause these claims to fail. Thus, no purpose would be served by an evidentiary hearing on those claims. *See United States v. Harris*, 735 F.3d 1187, 1194 n.3 (10th Cir. 2013) ("[A] district court is not required to pursue process without purpose."). As to the claims that are developed, even if every person were to testify in line with their affidavits, Mr. Maldonado-Passage would still not be entitled to relief for the reasons discussed above. Thus, an evidentiary hearing is not warranted. *See Velarde*, 485 F.3d at 560 ("[T]he court is required to conduct the evidentiary hearing only if the admissible evidence presented by [the defendant], if accepted as true, would warrant relief as a matter of law.").

One exception to the general rule mentioned in *Velarde* exists for recantations. When a recantation of trial testimony occurs, "the trial court ordinarily must conduct an evidentiary hearing to evaluate both the credibility and the impact of a recantation." *Pearson*, 203 F.3d at 1274 (internal quotation marks omitted). "However, in some instances, the trial judge may be able to assess the credibility of the recantation without holding such a hearing." *Id.* For example, a district court has discretion to "decide[] that the contents of the affidavits were insufficient to overcome the witness' trial testimony" without holding an evidentiary hearing. *See United States v. Smith*, 997 F.2d 674, 682 (10th Cir. 1993). Alternatively, if the district court has had the opportunity to personally

observe the witness and their trial testimony is corroborated by other witnesses, an evidentiary hearing is unnecessary. *United States v. Jones*, 315 F. App'x 714, 716–17 (10th Cir. 2009). As explained above, even if the evidence regarding the recantation were to come in exactly as Mr. Maldonado-Passage believes, he still would not be entitled a new trial. As a result, no evidentiary hearing is warranted.

Conclusion

In the end, a "defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (internal quotation marks omitted). Mr. Maldonado-Passage received just that—a fair trial. Because Mr. Maldonado-Passage has not satisfied his burden of showing that a new trial is warranted, this Court should deny his motion.

Respectfully submitted,

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Certificate of Service

This is to certify that on May 19, 2022, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel of record.

s/ Steven W. Creager
Assistant U.S. Attorney