**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 23-CR-60170-KMW**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**ALEXANDRA ACOSTA,**

**Defendant.**
**_______________________________________/**

**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL BASED ON BRADY VIOLATION AND NEWLY DISCOVERED EVIDENCE**

The United States opposes Defendant Alexandra Acosta's Motion for New Trial Based on *Brady* Violation and Newly Discovered Evidence (the "Motion").[1] ECF No. 156. The Court should deny the Motion because the two documents on which it rests were never suppressed, are not material, and do not satisfy the test for newly discovered evidence under Fed. R. Crim. P. 33.

## INTRODUCTION

Acosta seeks a new trial on two documents. The first is the proffer of her co-defendant, Vilsaint St. Louis—a tax preparer who also assisted with loan applications during the relevant period. The government produced the notes from the proffer before trial, she served it with her Motion, and in it St. Louis described her as a knowing participant, adding only that she did not know he had attached false documents to her submissions.

[1] Citations to "GX" refer to the government's admitted trial exhibits, filed at ECF No. 81. Citations to the trial transcript are to the docketed volumes by ECF number and page. "Mot." refers to the Motion, ECF No. 156, by its internal page number, and "Mot. Ex." to the exhibits served with it.

The second is a file from the IRS's separate civil preparer-penalty examination of St. Louis (the "IRS File"). It concerns his preparation of tax returns for other clients in 2018 and 2019. No member of the prosecution team knew of its existence, and it became public only when St. Louis attached it to a Broward County civil complaint filed in 2024. Acosta's investigator found it ten months later. The prosecution team could not have obtained the IRS File on its own initiative. Returns and return information are confidential under 26 U.S.C. § 6103(a), and third-party return information in a criminal matter not involving tax administration is available to an investigating agency only through the procedures prescribed in § 6103(i).

Neither document supports relief. Neither document bears on what Acosta knew. Neither entitles her to a new trial as newly discovered evidence.

## SUMMARY OF FACTS PROVED AT TRIAL

After a three-day trial on June 3–5, 2024, a jury found Acosta guilty of four counts arising from the $20,180 Paycheck Protection Program ("PPP") loan she received in her name: count 1, Conspiracy to Defraud the United States (18 U.S.C. § 371); counts 2 and 3, False Statements to the Small Business Administration ("SBA") in the loan and forgiveness applications, respectively (15 U.S.C. § 645(a) and 18 U.S.C. § 2); and count 4, Wire Fraud (18 U.S.C. § 1343). ECF No. 23 (Superseding Indictment); ECF No. 70 (Jury Verdict). The Motion's description of counts 2 and 3 as charging 18 U.S.C. § 1001(a)(2) (Mot. at 5) is incorrect. The government's admitted exhibits are filed with the Court. ECF No. 81.

The government proved beyond a reasonable doubt that Acosta knowingly—and, as to wire fraud, with intent to defraud—submitted or caused to be submitted PPP loan and forgiveness applications containing false information about her 2019 gross income and her use of the loan proceeds. The defense's case consisted of Acosta's testimony that she had "no idea" what her coconspirator, Vilsaint St. Louis, had done. ECF No. 135 at 221 (Acosta); ECF No. 136 at 37 (Acosta). Twelve jurors did not believe her.

The evidence showed that Acosta was a full-time Broward County Deputy Sheriff (GX 300) who earned $13,904 as a real estate broker in 2019 (GXs 201, 400–01), nothing as a real estate broker in 2020 (GX 202; ECF No. 134 at 215 (Crevier)), and nothing in 2021 before the February 2021 loan application and April 2021 forgiveness application (ECF No. 134 at 216–17; GX 402). And although the Broward Sheriff's Office ("BSO") policy required annual approval for any off-duty employment, including self-employment, Acosta stopped submitting the forms after 2018. GXs 301–06; ECF No. 135 at 19–21 (Hely).

The IRS contacted Acosta in December 2020 about issues with her 2018 and 2019 tax returns and interviewed her by telephone on December 17, 2020. GXs 203a, 203b. Acosta told the examiner that she and St. Louis figured out her Schedule C figures together, that the figures were "pretty close to what she has in her head," and that St. Louis went over the returns with her each year—she did not leave it all to him. *Id.*

On January 21, 2021—about 11 days before the PPP loan application began—the IRS mailed Acosta and St. Louis an Examination Change Report reflecting $18,491.55 in taxes and penalties owed for overreported business expenses in 2018 and 2019. GX 203c–d. Throughout the audit, the IRS interacted with both Acosta and St. Louis, her limited power of attorney. GX 203a.

On February 1, 2021, Acosta and St. Louis jointly spoke to the examiner about those returns. GX 203a. That same day, at Victory Taxes, they created the online PPP loan application using Acosta's Gmail account, signed through a DocuSign link sent to that account. GXs 100, 601–05.

On February 3, 2021, they finalized the $20,180 sole-proprietor application using materially false statements about Acosta's average monthly payroll for real estate in 2019—$8,072 per month—and about the purposes of the loan (GXs 100, 604–05), supported by a false 2019 Form 1099-MISC and a false 2019 Schedule C each reporting $103,255 in income from Valordog, LLC. GXs 101, 400.

Copies of the loan application and promissory note containing the false statements went contemporaneously to Acosta's Gmail account (GX 604), and the SBA's approved lender funded the $20,180 forgivable loan.

The same day the money hit her bank account, Acosta tried to transfer $19,000 of the proceeds to her Robinhood trading account—a round number just above her outstanding $18,491.55 IRS liability. GXs 504–508. In the end, $10,000 cleared on February 10. She immediately used $8,000 of it to buy publicly traded stock, and the rest went to personal expenses, including credit card debt. GXs 500a, 506, 508.

Acosta herself linked the audit to the loan in a February 16, 2021 email to St. Louis: "St Louis, Please do not bring up anything about my IRS case or the loan to my wife. She does not know about it, and I don't want to stress her out. Thanks!" GX 608a. She sent that email the same day her wife was planning to, and ultimately did, see St. Louis about her own taxes. ECF No. 136 at 55–57 (Acosta).

The audit remained open, and Acosta kept working to lower her liability until March 29, 2021, when she switched her story and wrote the IRS, blaming St. Louis. GX 203g. That produced a corrected report, signed by Acosta on April 13, 2021, removing the penalties and finalizing the amount owed at $14,038.69. GX 203h. By then, Acosta had spent most of the PPP funds.

Yet on April 21, 2021—three weeks after telling the IRS that St. Louis had gone rogue on her prior returns (GX 203g)—Acosta gave him her personal Gmail credentials to apply for her PPP loan forgiveness (GX 611). The forgiveness application falsely stated that Acosta used the loan for eligible expenses (GX 150). On June 11, 2021, the SBA forgave the loan in full, including interest. GX 154.

**Acosta's Testimony**

Acosta testified that she did not know that her PPP loan application and accompanying documents contained false information. Her credibility did not survive cross-examination. Among other things, the jury heard (1) that she withheld the existence of the tax audit during her post-charging proffer with the United States and then testified that it was "completely separate" and not relevant, ECF No. 135 at 246–47 (Acosta); (2) that she maintained she had no reason not to trust St. Louis, despite an ongoing audit that was front and center in her life when she applied for the loan, *id.* at 202–03, 209; (3) that she compared withholding the audit and the PPP loan from her wife to not telling her "when I buy Red Bull at the grocery store," *id.* at 218; and (4) that, asked whether St. Louis "decided to commit a felony for you for free," she answered that it was "something you would have to ask him," ECF No. 136 at 86 (Acosta).

## PROCEDURAL HISTORY

On May 14, 2024, St. Louis pleaded guilty to count 1 of the Superseding Indictment, Conspiracy to Defraud the United States (18 U.S.C. § 371). ECF No. 46 (Paperless Minute Entry). In the factual proffer he signed with his plea, he admitted that he and Acosta "discussed filing a PPP loan application" using "an inflated Form Schedule C and Form 1099-MISC"; that he "did not want to apply for the PPP loan for Acosta because she didn't qualify"; that she was in his office when he began the application; and that she "asked St Louis whether he was sure they would not get caught before he submitted the PPP application for her." ECF No. 45 at 2–3 (Factual Proffer). On or about May 21, 2024, the government produced St. Louis's post-arrest proffer to the defense, which relied on it in a motion filed the next day, ECF No. 48 at 2–3 (Acosta Response), and then moved in limine to admit St. Louis's hearsay statements, including those from that proffer. ECF No. 52 (Acosta's Motion in Limine). At the May 28, 2024 hearing, Judge Scola granted the motion as to St. Louis's statements to Acosta, offered for her "state of mind regarding willfulness, intent, and good faith," ECF No. 58 ¶ 4(a) (Order), and told counsel that the route to admitting St. Louis's account was to call him: "You can call Mr. St Louis." ECF No. 132 at 28 (Motion Hearing Transcript). Neither the government nor the defense called him.

Following the jury's verdict, Acosta moved for a judgment of acquittal or, in the alternative, a new trial based on the sufficiency of the evidence. ECF Nos. 99, 100. After briefing and oral argument, the Court denied both motions. ECF No. 137 at 19–21 (Sentencing). Acosta appealed. The appeal remains pending and is stayed while this Motion is resolved.

## LEGAL STANDARD

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The decision whether to grant or deny a Rule 33 motion "is left to the sound discretion of the district court." *United States v. Johnson*, 713 F.2d 654, 661 (11th Cir. 1983). Motions for a new trial based on newly discovered evidence are "highly disfavored." *United States v. Scrushy*, 721 F.3d 1288, 1304–05 (11th Cir. 2013) (quoting *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006)). The defendant bears the burden of justifying a new trial. *Campa*, 459 F.3d at 1151. Because Acosta's direct appeal remains pending, this Court may deny the Motion on the merits but may grant it only after the appellate court remands. Fed. R. Crim. P. 33(b)(1); *see* Fed. R. Crim. P. 37(a).

Two further limits apply to this Motion. First, Rule 33 authorizes only one remedy: vacating the judgment and granting a new trial. Fed. R. Crim. P. 33(a). It does not authorize dismissal of the indictment or vacating a judgment without a retrial, both of which the Motion requests. Mot. at 32. Second, a motion for a new trial based on any reason other than newly discovered evidence must be filed within fourteen days of the June 5, 2024 verdict. Fed. R. Crim. P. 33(b)(2); *see United States v. Cain*, 688 F. App'x 725, 727 (11th Cir. 2017) (per curiam) (claim that the government presented false testimony was a separate ground for a new trial, properly denied as untimely when not filed within fourteen days). To the extent the Motion rests on material Acosta held before trial or could have obtained with reasonable diligence, it is not grounded in newly discovered evidence and is untimely by more than two years.[2]

Reassignment does not change the analysis. A successor judge may complete post-verdict duties, and every question the Motion raises is documentary. Fed. R. Crim. P. 25(b).

**ARGUMENT**

The Court should deny the Motion for three reasons. First, nothing was suppressed. The government produced St. Louis's proffer two weeks before trial, ECF No. 48 at 2–3 (Acosta's Response); the defense moved to admit statements from it, ECF No. 52 (Acosta Motion in Limine); and Judge Scola told counsel that to get the information before the jury was to call him, ECF No. 132 at 28. The IRS File was never in the prosecution team's possession; it became public only when St. Louis attached it to his own lawsuit. Mot. at 2, 28; Mot. Ex. A. Second, neither document is material. The jury convicted on direct proof of Acosta's own knowledge, GX 604, 611, 608a; ECF No. 136 at 55–57 (Acosta), and evidence that St. Louis cheated other clients behind their

[2] The Motion also omits the conferral certification required by Local Rule 88.9(a). The government and defense conferred prior to the filing of the Motion by email and telephone. The government does not seek denial on that ground.

backs does not explain a defendant who received every false document herself. Third, neither document meets Rule 33's test for newly discovered evidence. The proffer was in the defense's hands before trial, so it was not discovered afterward. The IRS File surfaced later, but Acosta waited sixteen months after finding it to file this Motion, Mot. at 5, 28, and the file is cumulative other-acts evidence unlikely to produce an acquittal. Any one of these grounds is sufficient, and none requires an evidentiary hearing.

**I. The St. Louis proffer is not *Brady* material and is not newly discovered evidence.**

*Brady* requires evidence that is favorable, suppressed, and material. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Acosta is correct that the Eleventh Circuit states the inquiry in four parts. Mot. at 22 (quoting *Riechmann v. Fla. Dep't of Corr.*, 940 F.3d 559, 580–81 (11th Cir. 2019)). But Acosta must show that the government possessed the evidence, and she must show that she could not have obtained it with reasonable diligence. *Riechmann*, 940 F.3d at 580–81. The proffer fails on each count.

*First*, the proffer was not suppressed. The government produced it two weeks before trial, ECF No. 48 at 2–3 (Acosta's Response), and Acosta served it with her Motion as Exhibit C and quoted from it. The Motion does not contend otherwise; its complaint is that the proffer was "never disclosed to the jury." Mot. at 25; *see also* Mot. at 5, 27, 28. *Brady* is a rule of disclosure to the defense, not a duty to place the defense's evidence before the jury. Furthermore, a defendant cannot ground a *Brady* claim on a document she possesses. *Maharaj v. Sec'y for the Dep't of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005). Imputing knowledge of the proffer to the prosecution team (Mot. at 25) changes nothing, because imputation concerns the duty to disclose evidence the defense lacks.

*Second*, the Motion's actual contention is that the government's trial presentation was "contrary to certain portions of the proffer testimony of St. Louis," Mot. at 27, and that presenting its case without "revealing to the jury certain favorable portions" of that statement violated *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995), and *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992). Mot. at 27–28. That is a theory under *Giglio v. United States*, 405 U.S. 150, 154–55 (1972), and it requires testimony the government knew to be false and failed to correct. *See Banks v. Dretke*, 540 U.S. 668, 694 (2004) (failure-to-correct holding turned on a paid informant who testified falsely while the prosecution "allowed his testimony to stand uncorrected"). St. Louis did not testify, no witness testified about the proffer, and no government witness testified falsely. *See infra* Part III.C. That the government's case was inconsistent with a co-defendant's out-of-court account does not make any trial testimony false. *Hays v. Alabama*, 85 F.3d 1492, 1499 (11th Cir. 1996). A prosecutor is not obliged to adopt a cooperator's minimization of his co-defendant, and the proffer letter committed the government to nothing as to the truth of St. Louis's statements. Mot. Ex. C, Proffer Letter ¶¶ 3, 6. The government's case was consistent, however, with St. Louis's factual proffer. ECF No. 45 (Factual Proffer).

*Third*, the favorable clause was admissible only through St. Louis's testimony, and the defense chose not to call him. St. Louis pleaded guilty, ECF No. 46 (Paperless Minute Entry), and was sentenced weeks before Acosta's trial, ECF No. 47 (Judgment). The defense moved before trial to admit the very proffer statements on which the Motion now relies, ECF No. 52 (Acosta's Motion in Limine); ECF No. 58 ¶ 4(a) (Order), and Judge Scola told counsel that to get the information before the jury was to call him, ECF No. 132 at 28 (Motion Hearing Transcript). The defense never called him, and the reason is not hard to figure out: any testimony that Acosta "did not know" would have been met with St. Louis's own signed admission that she did. ECF No. 45 at 2–3 (Factual Proffer).

A failure to exercise due diligence in securing a known witness before trial defeats the motion "[a]s a matter of law." *United States v. Hall*, 854 F.2d 1269, 1271 (11th Cir. 1988). A co-defendant's account that the defense could have elicited at trial is not newly discovered when it surfaces afterward: "[t]o the extent that [it] was unknown to [the defendant] until after his trial, it is because of his own 'lack of diligence.'" *United States v. Beasley*, 160 F.4th 1199, 1206 (11th Cir. 2025) (citation modified). The defense held the proffer, knew what St. Louis would say on cross, and apparently decided the jury was better off not hearing from him at all. As the Motion concedes, he "has no 5th Amendment right against self-incrimination now." Mot. at 15. A defendant cannot establish a *Brady* violation or obtain a new trial based on favorable testimony she was free to present and chose not to elicit. *See United States v. DiBernardo*, 880 F.2d 1216, 1224–25 (11th Cir. 1989) (co-defendant's newly available exculpatory testimony "cannot be deemed 'newly discovered evidence' within the meaning of Rule 33" where the defense was "well aware of [the] proposed testimony prior to trial" (citing *United States v. Metz*, 652 F.2d 478, 480–81 (5th Cir. Unit A Aug. 1981))). That the jury never heard the favorable clause is the result of that decision, and it is also the answer to the Motion's placement of the proffer on a cumulative scale under *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995). Mot. at 23. Evidence the defense held before trial and could have presented adds no weight to the materiality inquiry. *See infra* Part III.G. The Motion fails on this ground alone.

**II. The prosecution team never possessed the IRS File.**

A. The IRS File is from a public docket.

Acosta concedes how the IRS file surfaced: her investigator located St. Louis's June 4, 2024, Broward County civil complaint,[3] to which the IRS findings were attached. Mot. Ex. A; Mot. at 2, 5, 28. Evidence a defendant can obtain through reasonable diligence is not suppressed: "where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government." *Maharaj*, 432 F.3d at 1315 (quoting *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983)). The defense had that information well before trial. The Superseding Indictment named St. Louis as Acosta's co-defendant on March 14, 2024. The preparer penalties at issue had been proposed against him personally in November 2021. He pleaded guilty and was sentenced on May 14, 2024, weeks before trial, and he held no privilege he could invoke against the defense. By Acosta's own account, the defense had been asking him for PPP paperwork since October 2023. Mot. at 9. The question is possession, and the prosecution team never had the file. Infra Part II.B. Once St. Louis filed his complaint, the file sat on a public civil docket, where Acosta's investigator found it.

*United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) (Mot. at 19), and its caveat regarding information a defendant could not reasonably be expected to know, are misplaced. The withheld document in that case was a psychiatric evaluation of the defendant himself, conducted while he was in pretrial detention for that prosecution, and the government was already under standing discovery orders to produce it. *Id.* at 993–94. The IRS File concerns a third party, came from a civil IRS unit that took no part in this case, was not subject to a discovery order, and became part of a county civil docket through St. Louis's own filing.

[3] June 4, 2024, was also the second day of Acosta's trial.

*Banks* (Mot. at 23) condemns concealment coupled with false testimony that the prosecution allowed to stand uncorrected, 540 U.S. at 694, 696. It has nothing to do with a record the government never held and the defense retrieved on its own.

*United States v. Bueno-Sierra*, 99 F.3d 375, 379–80 (11th Cir. 1996) (Mot. at 21), concerned impeachment material produced on the seventh day of trial and held that no prejudice results where the defense can still use it. There was no late production here because there was no production, and nothing to produce.

*Pennsylvania v. Ritchie*, 480 U.S. 39, 57–58 (1987) (Mot. at 20), remanded for in camera review of confidential agency files the defense could not otherwise access. The IRS File was neither sealed nor privileged once St. Louis put it on a civil docket.

B. <u>The file was not in the prosecution team's possession.</u>

Under *Kyles*, the prosecution team's constructive knowledge extends only to those who acted on the government's behalf "in the case," not to every file held anywhere within a large federal agency. *Kyles*, 514 U.S. at 437. The IRS File stems from a separate civil examination of St. Louis under IRC §§ 6694, 6700, and 6701, opened on February 19, 2019, following a Form 14242 referral and directed at his preparation of other taxpayers' returns. Mot. Ex. A. The criminal investigation of Acosta arose from a Broward Sheriff's Office referral and relied on SBA loan data, the Cross River Bank loan file, and BSO employment records. The case agent is a Federal Reserve Board inspector general ("FRB-OIG") agent, not an IRS or SBA investigator, and no IRS or SBA agent attended either proffer. Mot. Exs. B, C at 1.[4]

[4] The Motion's single reference to the St. Louis proffer as Exhibit B, Mot. at 11, appears to be a mislabel; elsewhere the Motion cites his proffer as Exhibit C and Acosta's own as Exhibit B. Mot. at 3, 5, 17.

The case agent, FRB-OIG Special Agent Tonya Johnson, testified that at the relevant time she did not know whether St. Louis "was included in the investigation" and that he was not a target of hers. ECF No. 135 at 110, 114 (Johnson). The government told the jury the same in closing: "Vilsaint St. Louis was not part of the investigation. Agent Johnson testified about that." ECF No. 111 at 7 (Closings). That testimony and that statement address the FRB-OIG investigation that produced the original indictment. The team's later dealings with St. Louis focused on Acosta's loan rather than his preparer practice. No IRS agent served on the Acosta prosecution team.

That an IRS records custodian authenticated documents at trial does not make the IRS's separate civil preparer-penalty unit a member of the team. The Motion's premise that "two IRS witnesses" testified, Mot. at 13, is incorrect. One IRS employee, a records custodian, did no more than authenticate Acosta's own returns and audit file (ECF No. 135 at 33–34, 80 (Hernandez)), and nothing in that testimony linked her to the St. Louis examination. The other witness the Motion associates with the IRS is Special Agent Johnson, a former IRS employee now with FRB-OIG. *Infra* Part II.D.

*Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002), is directly on point: the prosecutor there called a Tennessee investigator as a witness at sentencing, and using him "as a witness to provide background information" was "insufficient to establish" him "as part of the Georgia 'prosecution team.'" *Id.*

Acosta's contrary argument is that because this was a tax-related prosecution, the IRS was "the primary repository" of information about St. Louis, so the preparer file was available to the team "through customary investigative channels." Mot. at 13. That conflates the subject matter of the charge with the membership of the prosecution team and conflates access with possession. *Kyles* fixes the team by who "act[ed] on the government's behalf in the case," not by which agency is expert in the subject matter. *Kyles*, 514 U.S. at 437. A defendant must show possession by "a district's prosecution team, which includes both investigative and prosecutorial personnel," meaning "the prosecutor or anyone over whom he has authority." *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (citation modified); *see Moon*, 285 F.3d at 1309.

On that test, *Meros* held that a federal prosecutor lacked information known to prosecutors in two other districts. *Meros*, 866 F.2d at 1309. If one United States Attorney's Office does not possess what another knows, the government here did not possess a civil examination file held by an IRS unit over which it had no authority. Courts have rejected the broader view because of where it leads: "the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." *Moon*, 285 F.3d at 1310 (quoting *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998)). *Brady* imposes no such duty.

Nor does the government's theoretical ability to request the file convert it into evidence the government possessed. The IRS File was unknown to everyone on the team. ECF No. 135 at 114 (Johnson). A file no team member knew existed, generated by a unit that performed no work on this case, is not in the government's constructive possession merely because the government could have asked for it.

The Motion's remaining authority does not extend beyond those who worked on this case. Acosta cites "*Stevens v. Hull*, 407 F 3rd 1195, 1204 (11th Cir. 2005)" for the proposition that a prosecutor must learn what is in the investigators' files, and adds that the IRS agents' knowledge is attributed to the United States Attorney's Office because that office "also represents the IRS." Mot. at 22. The decision is *Stephens v. Hall*, 407 F.3d 1195 (11th Cir. 2005), and it establishes neither proposition. The language she invokes is a quotation from *Kyles*, which the court applied to the file of the detective who investigated the case, whose suppressed warrants the prosecutor had discussed with him and whose entire file she had received. *Stephens*, 407 F.3d at 1204. That is a duty to learn what the investigators on the case know, which is the standard the government applies here. *Stephens* does not address canvassing an agency component that performed no work on the case. *Stephens* found that the prosecutor breached the duty to learn and still affirmed, because the defense already possessed the underlying witness statement and had used it to cross-examine the detective. *Id.* at 1204–05.

C. <u>Cross-agency cooperation does not impute the preparer-penalty file.</u>

Acosta separately contends that because several agencies—the IRS, the FBI, the FRB-OIG, the SBA[5], and the Broward Sheriff's Office—participated in her prosecution, knowledge of the IRS File must be imputed to all of them. Mot. at 16–17. She relies on *Hays v. Alabama*, 85 F.3d 1492 (11th Cir. 1996). Mot. at 21. The argument misreads *Hays* and misunderstands the principle.

*Hays* did not adopt the rule that Acosta attributes to it. The court's discussion of cross-sovereign imputation appears in a single footnote, addresses only whether knowledge held by the FBI could be imputed to state prosecutors who had partnered with it, and does not resolve the issue as a holding. The court wrote only that it "decline[d] to conclude that the district court erred . . . on the imputation issue." *Id.* at 1497 n.2. *Hays* went on to reject the *Brady* claim because the suppressed statements were immaterial and affirmed the denial of the writ. *Id.* at 1498–99, 1502. A footnote declining to find error does not establish a rule of universal imputation.

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[5] While the government called a witness from the SBA, the prosecution team did not include a criminal investigator from the SBA.

Whatever its source, the imputation principle applies only to those who participated in this case. It turns on participation in the investigation, not on agency affiliation. *Kyles*, 514 U.S. at 437; *supra* Part II.B. None of them opened, staffed, or touched the separate civil preparer examination of St. Louis. Multiplying the agencies that investigated Acosta does not sweep a file into the team that none of them ever held.

In *Moon*, a Georgia prosecutor did not possess what a Tennessee investigator knew because the two agencies had not jointly investigated the case, and imputation between government components turns on the extent of their interaction and cooperation. *Moon*, 285 F.3d at 1309–10. Imputation followed in *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979) only because the state and federal teams "pooled their investigative energies" in a joint task force. *Id.* at 1309–10 (discussing *Antone*, 603 F.2d at 569–70). No such pooling occurred here: the civil preparer examination shared no task force, meetings, or personnel with the government team investigating Acosta. *See also United States v. Locascio*, 6 F.3d 924, 948–49 (2d Cir. 1993) (no suppression of FBI reports prepared by agents in an unrelated investigation).

D. <u>The Motion's assertions about the investigation do not establish suppression.</u>

The Motion asserts that the prosecution team "utilized the investigative resources to obtain IRS records for Acosta, yet failed to request St. Louis's tax records." Mot. at 13. The prosecution team obtained Acosta's returns and audit file because they were evidence of the charged offense. It did not request St. Louis's returns or the IRS File. That is not suppression. *Brady* imposes a duty to disclose favorable evidence known to those acting on the government's behalf in the case. *Kyles*, 514 U.S. at 437. It does not impose a duty to investigate a co-defendant on the defendant's behalf, to canvass agency components that performed no work on the case, or to develop evidence that never entered the team's hands. A contention that the government should have looked harder is a complaint about investigative choices. The Supreme Court has said as much: there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *United States v. Agurs*, 427 U.S. 97, 109 (1976) (quoting *Moore v. Illinois*, 408 U.S. 786, 795 (1972)). The Motion also asserts that the findings "should have been turned over to Ms. Acosta's defense team during the Rule 16 Discovery process before trial." Mot. at 13. Six pages later, it concedes that *Brady* reaches favorable evidence "even though it is not subject to discovery under Rule 16(a)," and that "Ms. Acosta did not request the IRS investigation of St. Louis." Mot. at 19. The concession is correct. Rule 16(a)(1)(E) operates only "upon a defendant's request," reaches only items "within the government's possession, custody, or control," and requires a showing that the item is material to preparing the defense. Fed. R. Crim. P. 16(a)(1)(E). The Motion attempts none of the three.

Returns and return information are confidential. 26 U.S.C. § 6103(a). Return information includes whether a taxpayer's return "was, is being, or will be examined or subject to other investigation," as well as data collected regarding "the determination of the existence, or possible existence, of liability . . . for any . . . penalty." § 6103(b)(2)(A). St. Louis's returns and the IRS File concerning other taxpayers were third-party return information that the prosecution team could not lawfully obtain on its own initiative in a criminal matter not involving tax administration. Access required the procedures prescribed in § 6103(i): an ex parte order from a federal district judge or magistrate judge under § 6103(i)(1) for any return or return information, or, for return information other than what the taxpayer himself furnished, a written request from a specifically designated official under § 6103(i)(2). A file the team could reach only by invoking that process is not within the team's possession, custody, or control, and *Brady* does not oblige the government to invoke that process to develop evidence for the defense.

The prosecution team obtained Acosta's IRS file because it was direct evidence of her charged conduct. Conversely, the team could not lawfully browse St. Louis's third-party civil preparer files—which are strictly protected by 26 U.S.C. § 6103(a)—without prior knowledge of specific relevance to justify a § 6103(i) ex parte order. Brady does not require the government to pierce statutory privacy shields on a blind fishing expedition into a co-defendant's unrelated civil matters.

The Motion states that "one of the case agents was a former IRS agent." Mot. at 13. That is accurate. Regarding her former agency's files, a former employee is treated like any member of the public. Prior service confers no continuing right of access, and unauthorized inspection of return information by an officer or employee of the United States is itself a federal offense. 26 U.S.C. § 7213A(a)(1)(A). Brady possession attaches to the prosecution team as constituted for this case, not to an agent's employment history.

The Motion next reasons that the decision to supersede and add St. Louis as a co-defendant was a "charging decision [that] necessarily involved the evaluation of St. Louis' general practices and role, in preparing tax returns for his clients," so that the government's professed ignorance of the IRS examination "belies belief." Mot. at 12. The Superseding Indictment charged St. Louis with the conduct at issue in this case, namely the false PPP loan application and the forgiveness submissions. ECF No. 23. Charging a co-conspirator for that conduct required no inquiry into his civil preparer-penalty history with other clients, and the Motion identifies no record fact suggesting that any such inquiry occurred. An assertion that ignorance "belies belief" is not evidence of knowledge. The Motion's alternative framing does not help her either. If the government did not know of the examination, she says, that "puts the 'new' in 'newly-discovered evidence.'" Mot. at 12. It does not. The second Rule 33 element measures the defendant's diligence, not the government's knowledge, and the ten months Acosta let pass between the public filing of the Broward complaint on June 4, 2024, and her investigator's discovery of it on April 12, 2025, answers that element regardless of what anyone on the prosecution team knew. *See infra* Part III.A.

The Motion also lists St. Louis's guilty plea and the "Pre-Sentence Investigation Report process and sentencing" as interactions that supposedly gave the government opportunities to learn of his preparer history. Mot. at 17. There was no such process. St. Louis waived the pre-sentence investigation report and was sentenced the same day he pleaded guilty, May 14, 2024, to one year of probation and a $5,000 fine. ECF Nos. 46, 47. Probation prepared no report, so no report could have disclosed anything to anyone. The United States Probation Office conducts the presentence investigation as an arm of the court, not as a member of the prosecution team.

Finally, the Motion suggests that the nondisclosure may have resulted from "purposely withholding." Mot. at 16. It offers no supporting facts, and the record flatly refutes that suggestion. The government produced St. Louis's proffer on or about May 21, 2024, and Acosta relied on it the next day, arguing that the loan applications were "exclusively prepared and submitted" by St. Louis and that his own admissions substantiated her position. ECF No. 48 at 2–3 (Acosta's Response). No member of the prosecution team knew of the IRS File. An unsupported accusation of deliberate suppression does not carry Acosta's burden or convert a documentary dispute into one requiring testimony. *See infra* Part IV. Because the prosecution team never possessed the IRS File, there was no suppression, and the Motion fails on this independent ground as well.

**III. Neither document is material under *Brady* or Rule 33.**

Even if disclosure were required, there is no reasonable probability of a different outcome. *Riechmann*, 940 F.3d at 580–81; *United States v. Simms*, 385 F.3d 1347, 1357 (11th Cir. 2004). The materiality inquiry asks whether the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Riechmann*, 940 F.3d at 580 (citation modified). It does not, and "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial," does not establish prejudice. *United States v. Brester*, 786 F.3d 1335, 1339 (11th Cir. 2015) (quoting *Agurs*, 427 U.S. at 109–10). Acosta offers nothing more.

A. <u>The file is cumulative and impeaching.</u>

Newly discovered evidence warrants relief only if, among other things, it is "not merely cumulative or impeaching" and "of such a nature that a new trial would probably produce a different result." *United States v. Thompson*, 422 F.3d 1285, 1294 (11th Cir. 2005) (quoting *United States v. Starrett*, 55 F.3d 1525, 1554 (11th Cir. 1995)). The "failure to satisfy any one of these elements is fatal." *Id.* (quoting *United States v. Lee*, 68 F.3d 1267, 1274 (11th Cir. 1995)). The IRS File shows that St. Louis defrauded other clients. That is propensity and impeachment material directed at an absent declarant, and it would prove only a general willingness to defraud, not that this defendant lacked knowledge of her loan. The Motion's own label, "similar act evidence" under Rule 404 (Mot. at 16), exposes the defect: the evidence would prove St. Louis's method with other clients, not Acosta's state of mind, and that remains true even if it were offered for a non-propensity purpose under Rule 404(b)(2). Fed. R. Evid. 404(b). It falls within both excluded categories.

Rule 33 also requires that the evidence have been "discovered following trial" and that the movant "show due diligence to discover the evidence." *DiBernardo*, 880 F.2d at 1224 (citation modified). The proffer fails the first requirement outright: the defense had and relied on it before trial. ECF No. 48 at 2–3 (Acosta's Response); ECF No. 52 (Acosta's Motion in Limine).

The IRS File fails the diligence requirement. St. Louis filed the complaint, to which it was attached, as a public, Clerk-certified docket entry on June 4, 2024, and Acosta's investigator found it there on April 12, 2025. *Supra* Part II.A. Nothing prevented the defense from finding it during the ten months it sat there, and the failure of any one element is fatal. Thompson, 422 F.3d at 1294.

In *Thompson*, the movant knew of the witness and her involvement before trial but claimed not to know she had useful information. The Eleventh Circuit held that a defendant "does not demonstrate due diligence by showing that he failed to interview a potential witness because he or she lived in another state." *Thompson,* 422 F.3d at 1295. Here, Acosta knew before trial that St. Louis prepared her returns and, by her own account to the IRS in March 2021, that he had put figures on them she could not stand behind.

The Motion's reliance on *Scrushy* to support the proposition that newly discovered evidence "need not relate directly to the issue of guilt or innocence" and need only "afford reasonable grounds to question . . . the integrity of the verdict" (Mot. at 31) takes that language out of context. The phrase comes from *United States v. Williams*, 613 F.2d 573, 575 (5th Cir. 1980), and appears in *Scrushy*'s discussion of grounds directed at the integrity of the proceeding rather than at the evidence of guilt: selective prosecution, juror irregularities, and a recused United States Attorney. 721 F.3d at 1304–08. The court rejected each of them. *Id.* at 1305–08. On the same pages, *Scrushy* states the governing elements in substance. *Id.* at 1304–05. Acosta offers the IRS File as evidence bearing on guilt, and it satisfies neither element.

B. <u>Acosta's materiality theory collapses because St. Louis never testified.</u>

The decisions Acosta cites—*Wearry v. Cain*, 577 U.S. 385 (2016); *Banks*; *United States v. Arnold*, 117 F.3d 1308 (11th Cir. 1997); *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336 (11th Cir. 2011); *Alzate*; and *Jacobs*—share a feature this case lacks: each turned on a testifying witness whose credibility was central to the verdict, or on false testimony presented to the jury and left uncorrected. *See Wearry*, 577 U.S. at 392–94 (conviction was a "house of cards" built on the jury's crediting a single witness's account, with no physical evidence). *See also Guzman*, 663 F.3d at 1349 (key witness's false denial of a benefit went uncorrected); *Jacobs*, 952 F.2d at 1287–89, 1296 (State's "most important eyewitness" testified without disclosure of his contradictory prior statement). This case is the inverse. St. Louis did not testify, no witness's credibility was at issue, and the verdict rested on documentary and testimonial evidence of Acosta's own conduct.

C. *Alzate* and *Arnold* apply a materiality standard that has no application here.

Acosta invokes *Alzate* and *Arnold* to support the proposition that a conviction must be set aside if undisclosed information "could have" affected the jury. Mot. at 25–26. Whether materiality is framed as a reasonable probability or a reasonable likelihood, the IRS File fails for the reasons set forth in Parts III.D through III.G.

*Alzate* states that the reasonable-probability standard governs the "suppression of favorable evidence," while the lower standard applies "where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony." *Alzate*, 47 F.3d at 1109–10. *Alzate* extended that standard one step. The prosecutor there made false factual representations to the court and jury, learned before the close of evidence that they were false, declined to correct them, and built his closing on the falsehood. The court applied the lower standard on that basis. *Id.* at 1106–11.

*Arnold* followed the same pattern. The government there possessed transcripts of its own case agent's taped calls that contradicted its key witness's trial testimony, and conceded on appeal that it possessed them. In closing, the prosecutor stated that "there was not a woman in the world who was involved in this case," even though the IRS case agent whose taped calls were withheld was a woman. *Arnold*, 117 F.3d at 1317–18.

*Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986), cited for the same formulation (Mot. at 27), applied the lower standard because the case involved the knowing introduction of false testimony. *Id.* at 1464. In each of those cases, the lower standard is triggered by prosecutorial misconduct that corrupts the truth-seeking function. There is none here. No government witness testified falsely; the prosecutor made no representation he later learned was untrue; the IRS File was never in the prosecution team's possession; and St. Louis never testified at all.

*Agurs*, on which the Motion also relies (Mot. at 18), is misplaced twice over. Both passages Acosta quotes come from Justice Marshall's dissent. *Agurs*, 427 U.S. at 120–21 (Marshall, J., dissenting). The majority held the opposite. It confined the "reasonable likelihood" standard to cases in which undisclosed evidence shows "that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Id.* at 103. Under that standard, the Court reversed and found no denial of a fair trial, in part because the withheld record was largely cumulative. *Id.* at 113–14.

D. <u>The verdict rests on direct proof of Acosta's knowledge.</u>

The contested element at trial was knowledge, and the government proved it through Acosta's conduct: (i) a wet-ink taxpayer questionnaire that Acosta admitted signing in person on February 4, 2020, for the 2019 tax year—the very year underlying the fabricated income figure (ECF No. 111 at 5 (Closings); GX 203f); (ii) a fabricated Form 1099 attached to her application, supporting a $20,000 loan to which she was not entitled, based on roughly $13,000 of real 2019 income (ECF No. 111 at 11 (Closings); GXs 101, 400 (falsified 2019 Form 1099-MISC); *compare* GX 401–402); (iii) loan proceeds that went to a Robinhood brokerage account within days—"[n]ot

$1 of that money went to the IRS," as her own counsel told the jury—rather than to the IRS debt she now says motivated the loan (ECF No. 111 at 17 (Def. Closing); GXs 500–501, 504–506); and (iv) her own statement to the IRS examiner, read to the jury, that the figures "come from my head" and that she "sat with him" (ECF No. 111 at 5 (Closings); GX 203a).

Evidence that St. Louis falsified tax returns for strangers rebuts none of the documentary and testimonial proof of Acosta's knowledge of her own loan because, at most, it impeaches an absent declarant.

The IRS File's premise, in the Motion's own words, is that St. Louis added false Schedule C attachments to other clients' returns "on his own, without the taxpayer's knowledge or consent." Mot. at 10. Acosta's situation is the opposite. The false loan application, the fabricated Form 1099, the promissory note, and the forgiveness certification all passed through her Gmail account and returned to her (GX 604, 611). That St. Louis could deceive clients who never knew what he filed in their names tells the jury nothing about a defendant who held every false document herself. Nothing in the IRS findings concerns a PPP application, an SBA program, or a forgiveness certification.

The IRS File cuts against Acosta even under her own theory of the case. Her defense was that she had no knowledge of the fraud: the "blame the preparer" account that St. Louis acted without her knowledge. But her own audit had already told her St. Louis was not to be trusted because the IRS had flagged two years of overstated expenses on the returns he prepared for her, and by March 29, 2021, she was writing the IRS to say that St. Louis had included false information without her knowledge (GX 203g). A defendant who believed her preparer had added to her tax returns figures she could not stand behind, yet weeks later handed him her personal Gmail credentials to certify a $20,000 loan application and its forgiveness (GX 611), was not acting in good-faith ignorance. At a minimum, that is the deliberate avoidance the Court instructed the jury it could find. ECF No. 68 at 16 (Jury Instructions).

The Motion recites Judge Scola's remark at the August 27, 2024, hearing that this case presented "a very close question, legally." Mot. at 6. The remark accompanied the Rule 29 ruling. Reviewing "the evidence in the light most favorable to the Government," the court found that "a reasonable jury could have found the defendant guilty beyond a reasonable doubt as to each of the counts," denied acquittal and denied the first Rule 33 motion "as well." ECF No. 137 at 19–21. Closeness under that deferential sufficiency standard is neither Rule 33's probable-acquittal standard nor *Brady* materiality, and untested civil findings about other taxpayers' returns do not reopen a question already resolved on the full trial record. At sentencing, the court found that Acosta committed "perjury during her testimony during the trial." ECF No. 137 at 22, 57.

E. <u>The government's "common-sense" argument does not make the file material.</u>

The Motion points out that, in closing, the government urged the jury to find it implausible that St. Louis would commit a felony for Acosta's benefit without her knowledge. It did, as one argument among several. ECF No. 111 at 7, 10 (Closings). The same closing rested on Acosta's own conduct, the evidence set forth in Part III.D, and on the court's deliberate-ignorance instruction. ECF No. 111 at 11–12 (Closings); ECF No. 68 at 16 (Jury Instructions). The IRS File does not show that St. Louis acted without Acosta's knowledge here, and it cannot displace the direct proof that he did not. Compare *Alzate*, where the closing was decisive because the prosecutor relied on the tainted testimony "eight times in his closing argument." *Alzate*, 47 F.3d at 1110.

F. <u>The file would not have yielded material admissible evidence or leads.</u>

In *Bradley v. Nagle*, 212 F.3d 559 (11th Cir. 2000), the Eleventh Circuit assumed three withheld leads pointing to alternative suspects should have been disclosed, yet still found no materiality. Because the leads were inadmissible hearsay, the court explained, the defendant could establish prejudice only by showing they "would have led the defense to some admissible material exculpatory evidence." *Id.* at 567. The defendant's contention that he "might himself have uncovered evidence" by running down the leads was "only speculation," and the court held the verdict remained "worthy of confidence." *Id.* Acosta's theory is the same: an inadmissible file said to point away from her, plus speculation that pursuing it would have produced exculpatory witnesses. The IRS File is even weaker because it fails to identify any new individuals. The only "alternative perpetrator" Acosta offers is St. Louis acting alone.

Acosta's theory is not that the IRS File is itself admissible, but that its disclosure "would have led to" the victim-taxpayers identified in the file, former employee Medina, and former associate Augustin as defense witnesses. Mot. at 20. Inadmissible evidence can be material only if it "would have led to admissible evidence," and the defendant must do more than assert that it might. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) (citing *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994)).

The claim in *Wright* failed because the petitioner never called the witness, so "it is unknown exactly what she would say," and "a court cannot speculate as to what evidence the defense might have found." *Id.* (citing *Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam)). Acosta has proffered no affidavit or testimony from any of these witnesses about her loan; she offers only the IRS's findings about how St. Louis treated others. *See Maharaj*, 432 F.3d at 1315–16 (speculative third-party-guilt theory immaterial); *United States v. Morrison*, 218 F. App'x 933, 946 (11th Cir. 2007) (per curiam) (undisclosed information that a witness was under investigation for other crimes "would have led to no admissible evidence" and "was, thus, not material").

Acosta's casts Augustin as another victim but as a percipient witness who "has seen St. Louis prepare and file false tax returns and attach false documents to the returns without the taxpayers' knowledge or consent." Mot. at 29. She has offered no affidavit, declaration, or proffer from Augustin stating what he would say, least of all about her loan, so the claim remains the speculation *Wright* forecloses. Even fully credited, his anticipated testimony concerns St. Louis's method with other clients and does not tend to prove that this taxpayer lacked knowledge of her own loan. *Supra* Part III.D. Nor is Augustin a neutral witness. St. Louis's own civil complaint alleges that Augustin worked with him to prepare the false returns that generated the $110,000 in preparer penalties. Mot. at 20; Mot. Ex. A. An alleged participant in the fraud carries bias and an evident Fifth Amendment interest, and unlike St. Louis, who had pleaded guilty and been sentenced by the time of Acosta's trial, Augustin remains uncharged. That he would take the stand, testify favorably, and be believed is conjecture, not a reasonable probability of a different result. Medina adds nothing. Acosta has offered no affidavit or declaration from him either. The conduct she attributes to him is St. Louis's misuse of an employee's preparer tax identification number on other clients' returns, which concerns neither Acosta, nor her loan, nor her knowledge of it. *Supra* Part III.D.

One further point shows why none of these supposed witnesses matter. The IRS File is the product of a civil examination. It consists of agency summaries of unsworn taxpayer statements, never adjudicated and hearsay within hearsay. The Motion cannot even reconcile its own exhibit. The assertion that the findings would come in as business records under Fed. R. Evid. 803(6) (Mot. at 19) fails. An agency's investigative findings are not records of a regularly conducted business activity, and the taxpayer statements they summarize constitute a second level of hearsay that requires its own exception. Fed. R. Evid. 805. Even assuming the IRS findings were admitted as public records under Fed. R. Evid. 803(8)(A)(iii), they would establish only how St. Louis treated other unconnected clients. They would not provide admissible evidence regarding Acosta's loan, for which documentary evidence proves her direct, knowing involvement.

The IRS File is not substantive evidence that Acosta lacked knowledge of her loan. Its only function would be to bolster an account already available to the defense, the proffer it held before trial, and evidence that does no more than that cannot establish a reasonable probability of a different result.

G. <u>The lone favorable clause changes nothing.</u>

The government never argued that Acosta authored the Form 1099 or knew its line-item details. It argued and proved that she knew the loan and the applications were false. The charged falsity is not confined to the 1099. The Superseding Indictment alleges eight materially false statements, including the false Form 1099 reporting $103,255, a false Schedule C, a false average monthly payroll figure of $8,072, and false representations about the loan's purpose and the use of the proceeds, and Count 3 charges a separate false forgiveness application. ECF No. 23 (Superseding Indictment ¶¶ 25(a)–(h), 28).

Finally, the result is the same when the proffer and the file are considered together, as they must be. *See Kyles*, 514 U.S. at 436–37 & n.10 (materiality is defined "in terms of suppressed evidence considered collectively, not item by item"). Aggregating a net-inculpatory document the defense possessed before trial with the untested IRS File about other taxpayers' returns adds nothing to either. Together, they show, at most, that St. Louis defrauded other clients and fabricated one figure on Acosta's application, both of which are consistent with the government's case, and both of which St. Louis himself admitted in a signed factual proffer describing Acosta as his knowing co-conspirator. ECF No. 45 at 2–3 (Factual Proffer). Neither alone nor in combination could they put the whole case in a different light or undermine confidence in the verdict.

**IV. No evidentiary hearing is warranted.**

No evidentiary hearing is required where "the record contain[s] all the evidence needed to dispose of each of the grounds asserted as a basis for a new trial." *Scrushy*, 721 F.3d at 1305 n.30; *Beasley*, 160 F.4th at 1206 (a new trial motion "may ordinarily be decided upon affidavits without an evidentiary hearing," and no hearing was required there because the "purported new information was undisputed" (citation modified)); *see United States v. Schlei*, 122 F.3d 944, 994 (11th Cir. 1997) (affirming denial without a hearing where the proffered affidavit was cumulative and a different result was not probable). Hearings are reserved for "certain unique situations typically involving allegations of jury tampering, prosecutorial misconduct, or third-party confession." *Schlei*, 122 F.3d at 944 (quoting *United States v. Hamilton*, 559 F.2d 1370, 1373–74 (5th Cir. 1977)).

The Motion's suggestion of "purposely withholding" (Mot. at 16) is a label, not such an allegation: it identifies no act of concealment, no person who concealed anything, and no record fact suggesting that anyone on the prosecution team knew the IRS File existed. *Supra* Part II.D. Nothing material is disputed. The Motion's own exhibit establishes that the government produced the proffer, Acosta's own account establishes where the file came from, and the "new" evidence is a fixed documentary record.

*United States v. Culliver*, 17 F.3d 349 (11th Cir. 1994), and *United States v. Gates*, 10 F.3d 765 (11th Cir. 1993) (Mot. at 31), differ because each involved a post-trial sworn statement. A co-defendant's affidavit in *Gates*, *Gates*, 10 F.3d at 768, and a trial witness's apparent recantation in *Culliver*, whose credibility could not be assessed on paper. *Culliver*, 17 F.3d at 350–51. Acosta is correct that this Court may entertain the Motion while her appeal is pending. Mot. at 32. The Court may equally deny it, and an outright denial, rather than an indicative ruling under Rule 37(a)(3), is the appropriate disposition. Fed. R. Crim. P. 33(b)(1), 37(a)(2). *Brester* (Mot. at 32) affirmed exactly such a denial. 786 F.3d at 1338–39.

## CONCLUSION

The jury heard Acosta's explanation and rejected it. The evidence Acosta calls new was equally available to her, was never in the prosecution team's hands, and has no bearing on what she knew. That is neither a *Brady* violation nor a basis for a new trial on newly discovered evidence. For the foregoing reasons, the government respectfully requests that the Court deny the Motion and the accompanying request for an evidentiary hearing.

Respectfully submitted,

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Date: September 4, 2026

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 4, 2026, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send a notice of electronic filing to all counsel of record.

/s/ *Adam M. Love*
ADAM M. LOVE
Assistant United States Attorney