13-0443-cr(L),
14-0226-cr(CON)

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– v. –

MARCEL MALACHOWSKI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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United States of America,
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v.

Marcel Malachowski, a/k/a "Memo,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK (SYRACUSE)

SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal is from the Northern District of New York's denials of Malachowski's *pro se* submissions styled as motions for a new trial grounded upon newly discovered evidence pursuant to Federal Rule of Criminal Procedure 33 ("Rule 33 motion"). Subject matter jurisdiction in the district court was conferred by 18 U.S.C. § 3231, granting original and exclusive jurisdiction of all offenses against the United States, including Malachowski's offenses of conviction.

This is a consolidated appeal. This Court's docket number 13-443-cr is an appeal from the district court's January 18, 2013, denial, by decision and order, of Malachowski's first *pro se* Rule 33 motion grounded upon newly discovered evidence from which a timely notice of appeal was filed (A.

170). This Court's docket number 14-226-cr is an appeal from the district court's January 15, 2014, denial, by decision and order, of three *pro se* motions. The district court denied, without holding a hearing: Malachowski's second *pro se* Rule 33 motion grounded upon newly discovered evidence; his motion to compel discovery; his motion to amend the second *pro se* Rule 33 motion; and, his motion for, *inter alia* the appointment of a forensics expert to examine the tape recordings disclosed to Malachowski and presented as evidence at trial, which Malachowski asserted had been altered by the deletion of exculpatory material. Malachowski filed a timely notice of appeal from the district court's January 15, 2014, decision and order (A. 318).

The Hon. David N. Hurd presided over the district court proceedings. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1291, 2106.

ISSUES PRESENTED

1) Whether the trial court used an erroneous standard of review and erred in its determination that DEA, ICE and ATF reports submitted for *in camera* review constituted *Brady/Giglio* material, where the materials, which were discovered by Malachowski in June 2013, evidenced for the first time that: a) confidential informant Hank Cook, the main witness against Malachowski at trial, blatantly lied to the government on a crucial issue; b)

Cook was partnered with another confidential informant to attempt to nab Malachowski for over twenty-one months with several schemes, about which at least one of which, Cook lied to the government in terms of what Malachowski did and did not do; and, c) Cook had a million-dollar motive to ensnare Malachowski where Malachowski, from the outset, had made clear that his defense was entrapment.

2) Where the government endorsed and emphasized what it should have known was perjury by its witnesses in the grand jury and at trial, and the perjury affected the proceedings, whether Malachowski's convictions should be reversed and the indictment should be dismissed.

3) Alternatively, where the evidence is clear that the government tampered at least one audio recording, should an expert be appointed to determine the scope of the tampering upon remand.

4) Where Malachowski is an American Indian born in Canada with over fifty percent of blood of the Indian race, and 8 U.S.C. § 1359 indisputably precludes convictions of American Indians born in Canada under the Immigration Act, should his convictions under the Immigration Act be dismissed.

STATEMENT OF THE CASE

Grand Jury Testimony and Indictment[1]

On November 19, 2008, ATF Special Agent Melanie Kopf testified in the grand jury that Malachowski asked confidential informant Hank Cook "repeatedly" for a gun source to purchase a "large quantity of handguns" and machine guns over the course of years. In October 2008, Cook introduced Malachowski to an undercover agent, Agent Casanova, posing as a gun dealer. Kopf testified that Malachowski ordered a large quantity of firearms, machine guns with silencers and explosives from Casanova and that the price of $94,000 for the guns was "negotiated" (A. 29-35).

Kopf testified that on November 17, 2008, Cook and Malachowski met with Casanova at a storage unit in a storage facility in Canastota, New York. At the storage unit, agents had placed several duffel bags containing firearms. Kopf testified that Casanova opened several of the bags and Malachowski "took possession, and then either he would hand it back to [Casanova] to place it back within the bag, or he placed it himself." Kopf admitted to the grand jury that Malachowski did not bring money with him to pay for the guns (A. 35-39).

[1] Only those portions of grand jury testimony relevant to the issues raised on appeal are summarized herein.

Kopf falsely testified Malachowski was captured in a recording stating that he planned to sell the firearms he purchased from Casanova to "his Chinks in Montreal," referencing a Chinese organized crime syndicate in Montreal (A. 33-34). There was no recording ever provided to the defense to support this testimony.

After displaying photographs of the firearms to the grand jury, the government asked Kopf, "[a]fter taking possession of those weapons, was Malachowski arrested?" Kopf replied, "yes." The government then asked if the grand jurors had any questions. A juror asked, "Did he actually take possession at the storage facility that night?" Kopf replied, "He did. He physically took possession." The government asked, "Without payment?" And Kopf confirmed that Malachowski "took possession" of the guns without paying for them (A. 45-46).

Malachowski was indicted on six counts: possession of one or more machine guns in violation of 18 U.S.C. §§ 922(o) and 924(a)(2)(Count One); possession of one or more silencers in violation of 26 U.S.C. §§ 5845(a), and 5861(d)(Count Two); two counts of unlawful entry by an alien into the United States in violation of 8 U.S.C. § 1325(a)(Counts Three and Four); illegal reentry after deportation or removal in violation of 8 U.S.C. § 1326(a) (Count Five); and unlawful possession of firearms by an alien in violation of

18 U.S.C. § 922(g)(5)(A)(Count Six).

Pre-Trial Motion to Dismiss for Outrageous Government Conduct, Response and Denial.

On March 4, 2009, Malachowski, through counsel, moved to dismiss the indictment for outrageous government conduct. Malachowski alleged, in the motion, "[d]efendant must be clear to the Court in stating that he absolutely wanted no involvement in the crime at hand." "However, through a scheme that was comprised of tactics and manipulation" the confidential informant succeeded in entangling Malachowski in a government-fabricated gun deal. As evidence of his lack of intent, Malachowski alleged that on the date of the "purchase," of the government's firearms, recordings evidenced that he was "just [t]here to talk," and that there was "a misunderstanding." Malachowski brought no money to buy the guns, but once he saw the burly gun dealers who had arrived with the firearms, he feared what would happen to him if he took off, so he acted like he had money in Albany with which to make payment. However, Malachowski alleged, there was no money in Albany with which to pay for the guns (D.E. 25 pp. 10-11, 13-14).[2]

In opposition, the government argued that Malachowski's actions supported his guilt and that the government had taken no wrongful actions,

[2]Numerical references preceded by D.E. refer to the pages of the docket entries in the district court, N.D.N.Y. 08-cr-701.

which constituted outrageous government conduct (D.E. 28 pp. 1-5). The district court denied Malachowski's motion, without prejudice to renew, holding that it was premature as there had yet to be any evidence to support his claim that the government's conduct was unconstitutionally outrageous and that he was not predisposed to commit the charged crimes. The court denied the motion without prejudice to renew (D.E. 32 p. 6).

Government's *In Camera* Submission of Reports to the District Court and Determination that the Reports Were Properly Withheld from Malachowski.

On April 16, 2009, in response to defense requests for reports, the government submitted a letter to the district court, requesting that the court review ATF Reports *in camera* that were provided to Malachowski with information redacted, to determine whether the government was obligated to disclose to Malachowski redacted portions of the reports. The government asserted in the letter that the withheld material: 1) "pertained to unrelated crimes and ongoing investigations involving information provided by the cooperating source;" 2) contained "sensitive" information; 3) was "unrelated and irrelevant to [Malachowski's] gun and immigration charges," and, 4) was not exculpatory *Brady* material or "necessary for the defense of the gun and immigration charges pending against [Malachowski]." Reports that were provided to the district court in redacted form, as they were provided to

Malachowski, were identified as Exhibit 2. Reports that were provided in unredacted form were identified as Exhibit 1 (A. 60-61).[3]

On April 22, 2009, the government submitted ninety pages of ATF, DEA and ICE reports to the district court for *in camera* review that the government characterized as "unrelated," and were not disclosed to Malachowski in their entirety. The district court identified these reports as Exhibit 3 (A. 329). On April 23, 2009, the government submitted a letter to the district court with an attached report for *in camera* review. The government contended that the heavily redacted DEA report would "compromise sensitive and ongoing investigations." The government requested that the redacted and unredacted version of report be considered by the court as Exhibit 1 and 2 in addition to the materials the government provided by letter dated April 22, 2009 (A. 321).

The district court determined that there was no *Brady* material or other material required to be disclosed to Malachowski in Exhibit 1 or Exhibit 3 (A. 66-67).

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[3]By letter dated April 25, 2009, the government submitted that the reports that it submitted for *in camera* review, would "certainly end" other investigations "unnecessarily and prematurely," would compromise the safety of cooperators, would not "cast any substantial doubt upon the accuracy of the" government's evidence, "have a bearing on the admissibility of the prosecution's evidence;" or "create any inconsistency with any element of the crimes charged against [Malachowski];" or "establish any affirmative defense" (A. 62-63).

Trial

In Malachowski's opening statement, Counsel presented his entrapment defense, and argued that not only was he enticed to meet with the undercover officer, but also that his actions did not constitute the crimes with which he was charged. Malachowski contended that the evidence would show that 1) confidential informant Cook renewed his past friendship with Malachowski in order to lure Malachowski to commit a crime in the United States that Malachowski never would have committed without Cook's persuasion; 2) Malachowski had no intention of purchasing the guns provided by the undercover officer at the storage facility, showing up with no money; 3) the government wrongfully concocted a crime that would not have otherwise occurred; and, 4) Malachowski did not possess the guns, he only touched them (1: 41-47).[4]

The government was concerned about avoiding a successful entrapment defense. The undercover agent in the case, Angel Casanova, mentioned several times during his testimony that in his investigation of Malachowski, he sought to avoid any entrapment issue (3: 89, 153-154, 177, 209).

[4]Trial transcripts provided by the court reporter do not continuously paginate. Pagination ends at the end each day of trial. Thus, numerical references preceding the colon refer to the day of trial, numerical references following the colon refer to the page numbers.

On October 31, 2008, Malachowski was arrested after crossing into the United States from Canada while on the Mohawk Indian reservation. Border Patrol, after being advised that Malachowski was under investigation by ATF and that ATF preferred him to be released, discharged Malachowski pursuant to an expedited removal, which barred him from entering the United States for five years. Malachowski did not advise Border Patrol that he had the right to enter the United States as a Native American born in Canada pursuant to 18 U.S.C. § 1359 (1: 50, 52-54, 59, 71-72, 74, 76-77, 84-85, 94).

Agent Melanie Kopf testified she was the handler for Hank Cook. Kopf first met Cook in March 2008. Kopf's second meeting with Cook was in July, 2008. Prior to meeting with Cook, Kopf had not investigated Malachowski for firearms trafficking and there was no evidence presented at trial that Malachowski had ever been a firearms trafficker in the past. By August 20, 2008, Kopf decided to enter into an informant agreement with Cook and provide him with a recording device in order to collect evidence. At trial, Kopf repeatedly referred to Cook's provision of information to law enforcement as "reliable," "consistent," and "validated" by other law enforcement sources (1: 110-113, 2: 56-57, 107-108).

Cook,[5] a Native American, testified at trial that he met Malachowski in 2002 at a restaurant Cook was building in Cornwall, Ontario. In 2003, Cook claimed, Malachowski asked Cook if he could obtain guns for Malachowski to sell. According to Cook, he responded untruthfully, that he knew a man in Pennsylvania, with whom he had been involved in smuggling carpets who could obtain guns for him. Cook explained that he and Malachowski did not speak again until just before Christmas in 2005, when Malachowski called him at a time that Malachowski was intoxicated and asked Cook to obtain a gun for him. Malachowski explained to Cook that two guys had attacked him and his wife in Montreal. Cook testified that he made some phone calls, and that he did not recall how, but somehow, he arranged for his brother-in-law to obtain a gun. Cook's brother-in-law was stopped at Canadian customs and was arrested with the gun (2: 146, 158, 161-164, 3: 18).[6]

[5]In April 2006, Cook was indicted in the United States for smuggling 1000 kilograms of marijuana into the United States from Canada and faced a mandatory minimum term of ten-years' imprisonment and a maximum term of life imprisonment. Cook admitted that he was a manager and leader of the conspiracy and entered into a cooperation agreement with the government. (2: 150-153, 188).

[6]Cook lied to the government about this incident. However, the report evidencing Cook's lie was not disclosed to Malachowski until June 5, 2013, years after trial. *See* pp. 43-44, *infra.*

In 2007, Cook testified, Malachowski again asked Cook if he could obtain some guns, silencers, C4's and dynamite for Malachowski to sell. Cook told Kopf of Malachowski's alleged interest in guns and Kopf arranged for Cook to connect Malachowski with agent Casanova. Cook explained to Malachowski that Casanova was his connection from Pennsylvania he had told him about in the past. On September 16, 2008, Cook testified that he told Malachowski that he was trying to arrange a meeting with his gun supplier, but no one was returning his calls. On October 16, 2008, Malachowski spoke with Agent Casanova and asked him why he was "blowing off" Cook (2: 166, 169, 3: 39, 42). After requesting "nines," Malachowski accepted Casanova's offer to obtain Glocks, H & Ks, MPs, Uzis, Berettas, "Macks," and "AKs." Malachowski did not ask for prices. Casanova said, "You wanna know my prices?" To which Malachowski responded, "Give me a ballpark." Casanova told Malachowski prices for Glocks, MPs, Berettas with silencers and "Macks" with silencers. Malachowski explained to Casanova that he was having success in another business, and that "this [is] just some people, . . . some dear friends of mine . . . have been hunting around for a long time." Malachowski then vouched for Cook by saying that he was one of his best friends, that he had known Cook

for at least seven years. Malachowski then asked Casanova for "those things. . . people use on tree stumps" and "night vision glasses" (A. 89-96).

ATF Report 22, a report of a meeting with Cook, confidential informant Patrick Johnson, Agent Kopf, and ICE Agent Michael Ball on July 2, 2008, was 95% redacted when it was disclosed to Malachowski prior to his trial. The unredacted portion of the report that Malachowski received before his trial in 2009 reads, in pertinent part, as follows: 1) Cook met Malachowski in and around June, 2003; 2) in and around February 2008, Malachowski asked Cook if he had a gun "connect," to which Cook responded that he had a friend in Pennsylvania who might be able to supply Malachowski with firearms who would not travel beyond North Syracuse; 3) Malachowski told Cook that he would meet with the gun source in Mexico, New York; and, 4) three weeks later, Malachowski again requested "grenades, handguns and an M-16 machinegun" for resale in Montreal, Canada (A. 447-449).

The unredacted version of the report was provided to Malachowski in June 2013. In the full version of the report, Cook reported to agents several encounters with Malachowski in 2003. In the report, Cook does not mention that Malachowski asked him to get guns for him in 2003. And, since the report was approximately 95% redacted when Malachowski received it prior

to his trial, Malachowski could not have known that the report is, in fact, Cook's report of the chronology of his relationship with Malachowski, from the very beginning, with the alleged 2003, request for guns conspicuously absent (A. 428-430).

Almost a year later, however, days before Malachowski's trial, Cook reported to the government a new occurrence in 2003, to attempt to prove Malachowski's predisposition. In Report 58, which summarizes Cook's debriefing on April 17, 2009 and April 21, 2009, Cook stated that in 2003, Malachowski asked him to locate firearms for Malachowski to sell to his "Italian friends" in Montreal,[7] his girlfriend's father. Cook reported, "during this time, Malachowski would frequently and persistently ask Cook if his friend could get him guns" (A. 473-474). At trial, however, Cook testified that Malachowski asked him for guns once in 2003 (2: 158-161).

Cook described Malachowski's requests for guns as continuous and persistent, and testified at trial that Malachowski always asked for guns first (3: 60). However, in the recordings provided to the defense by the government, Malachowski initiated one conversation in which he asked if Cook had reached his "buddy" (the name used by Cook to refer to Casanova). Of the eight phone contacts relating to, or with Casanova,

[7]There was no evidence introduced at trial that Malachowski had any involvement with any organized crime at any time.

Malachowski initiated one call. And, it is clear from the context of that conversation that Cook prompted that call:

On August 25, 2008, Cook called Malachowski and told him that he needed to come see Malachowski about "[his] friend" from whom he "was waiting" to receive a phone call (A. 76; 30066).[8] This was the earliest recording the government provided.

On September 2, 2008, (30073), Cook wore a body wire to meet with Malachowski. Their conversation went on for over thirty minutes, before Cook says, unprompted by Malachowski, . . . "Buddy's comin' to town," . . . "I told him 100" (A. 79-86). This recording was not introduced into evidence at trial.

On September 16, 2008, Cook testified that he met with Malachowski and told him that he was trying to arrange a meeting [with Casanova], but no one was returning his calls (3: 39). In a recording of that date, admitted into evidence without a transcript, Malachowski asked Cook if he had reached his "Buddy." (30006).

The next recording is a month later. On October 16, 2008, Cook called Casanova and asked him to call back. Cook then put Malachowski on

[8]Numerical references refer to the file number of the recordings introduced into evidence by the government at trial or provided in discovery and are contained on disc in the Appendix.

the phone to speak with Casanova (A. 87). Malachowski asked Casanova why he was "blowing off" and ignoring Cook. Cook had told Malachowski that Casanova was not returning his calls (3: 42). But, the government provided the defense with no recordings of the conversations in which Cook told Malachowski that Casanova was ignoring him during that month-long period.

On October 30, 2008, Cook wore a body wire while with Malachowski. Cook, unprompted by Malachowski, stated, "our Buddy wants us to call him on Sunday." Malachowski said, "Okay." Cook reiterated, "Give me a call, you and Buddy, on Sunday" (30015). This recording not played for jury, or transcribed, but Cook admitted on cross-examination that he told Malachowski that their "Buddy" wanted them to call him (3: 41).

On November 3, 2008, Casanova called Malachowski after Malachowski had not returned his calls (A. 103, 30009). On November 9, 2008, Casanova again called Malachowski (A. 109; 3: 100; 30019). On November 10, 2008 (30022), Malachowski called Casanova after Cook prompted Malachowski to call Casanova:

MM: Alright. Our friend's right beside us as well.

UC: Oh. okay cool.

MM: Okay, so you had a little chat with him earlier?

UC: Yeah, yeah, I gave him a buzz, yeah yeah.

(A. 115; 3: 104; 30022). There is no recording of what Cook said to Malachowski to prompt him to call Casanova that was disclosed to Malachowski.

On the government's redirect of Cook, its final questions were as follows:

Q. Did you ever bring up the subject of getting guns with the defendant, of you getting them?

A. No.

Q. He always asked you first?

A. Yes.

(3: 60).

On November 17, 2008, Malachowski, Cook, and another individual, Owen Peters, drove to the Boxing Hall of Fame in New York to meet with Casanova. (2: 179-180). On the way to the Boxing Hall of Fame, Cook told Malachowski to call Casanova to let him know their location (30018). From the recording of the conversation at that meeting at the Boxing Hall of Fame, it is clear that Malachowski believed the purpose of the meeting was just to meet, and not to take possession of any firearms. He did not bring any

money with him. He did not have any vehicles in which to transport a large number of firearms. Casanova was angry that Malachowski did not bring any money. Malachowski told Casanova, "Your exact words were 'we'll talk first'" (3: 116; Recordings of November 17, 2008, on disc).

Casanova then got in his car and stated to his fellow agents listening on the wire that Malachowski did not have the money, and he asked how they were going to attach the firearms to him (A. 70-73).

Cook, Malachowski, and Owen Peters, then followed Casanova's vehicle to the storage unit to look at the firearms. The surveillance video reveals that during the meeting, Malachowski stated, "I was under the understanding that we were talking. . . the last thing I heard was 'we'll talk first.'" Casanova responded, "Nah, well that was, yeah well, we would talk now and then do the deal with money on delivery, but, hey. . ." (Recordings of November 17, 2008 on disc in Appendix).

While at the storage unit, Casanova showed Malachowski several firearms (3: 125-132). With the exception of the Glock firearm, Casanova had to show Malachowski how the guns worked. Malachowski briefly handled and looked at approximately seven firearms. Immediately after Casanova showed the sample firearms to Malachowski, Malachowski was arrested.

Malachowski never made payment for the guns, telling Casanova that he had money in Albany, New York. Cook alleged that Malachowski had money in Albany with which to pay for the guns (3: 55). However, there was no evidence presented at trial to connect Malachowski to any available source of $94,000 in Albany at that time.

At the time of his testimony in Malachowski's case, Cook testified that he owned a factory that manufactured cigarettes on the Akwesasne Mohawk Indian reservation in Canada. Cook testified that he kept his cigarette profits at the factory (2: 151; 3: 11-12). It was not revealed at trial that Malachowski and Cook were partners with two other individuals in the cigarette manufacturing business.

Summations

The government argued that Malachowski ordered a cache of firearms from Casanova, and agreed to prices. Malachowski then showed up at the Boxing Hall of Fame, went to Canastota Storage, went inside the unit, and touched "each one of the weapons," because "this was his deal." Cook, the government argued, was a reliable witness whose testimony was corroborated by recordings (4: 15-22, 23-25, 28, 30).

The government argued that Malachowski's attempts to persuade Casanova to make delivery in Albany did not evidence a lack of intent, but

rather that Malachowski was orchestrating the deal. Thus, Malachowski was not induced to negotiate with Casanova, the government contended. In any event, the government argued, Malachowski was predisposed to commit the crime (4: 34-37, 76).

Malachowski's summation attacked the credibility of Cook by characterizing him as a liar who would do whatever he could to help himself. Malachowski argued that Cook, who was facing life in prison for marijuana trafficking, concocted this gun case to help himself. Counsel argued that Cook was acting completely unsupervised by government agents. Counsel argued that Cook told Malachowski that he was trying to get some guns, but that his gun source was not calling him back. Counsel continued to argue that Cook set up the entire gun deal, seeking Malachowski's "help," to see it through. Counsel argued that Malachowski's lack of intent was evidenced by the fact that although Casanova called, texted and called Malachowski, Malachowski returned only one phone call. Counsel argued that Malachowski was merely repeating Cook's order for guns, that Cook's voice could be heard on the recording confirming that Malachowski ordered all the guns that Cook wanted (4: 56-58).

Further evidence of Malachowski's lack of intent, counsel argued, was that he showed up to purchase $94,000 worth of guns with $2,000. Counsel

argued that Malachowski, when confronted by Casanova and the other gun dealers, played a role. He feared for his life showing up at a gun deal with no money, so he made up a story that money awaited delivery of the guns in Albany. Casanova planned to accept Malachowski's payment for the guns, and then arrest Malachowski. But was taken aback when there was no payment, and the officer wondered how to "attach" the guns to Malachowski (4: 59-62).

Counsel argued that the video demonstrated Malachowski's ignorance of gun types and function because he not only lacked knowledge of the type of firearms he was shown, but he also did not know what a magazine was. Counsel attacked the government's predisposition case, arguing that it was weak because asking for a gun after being beat up and seeing your wife threatened with a gun in no way predisposed a person to purchasing the cache of guns brought to the storage facility by Casanova (4: 62-64).

Counsel argued that during the four-hour ride to the meeting, Cook was telling Malachowski how the deal was going to be done. "This is Cook's deal. He gets to control when conversations are taped and when they are not." Counsel argued that a convicted felon should not be trusted to orchestrate a crime in this manner (4: 66-67).

On rebuttal summation, the government argued that Malachowski's arguments were distractions from the video and phone calls. The government again argued that Malachowski's money to close the gun deal was in Albany (4: 72-73, 76).

Jury Charge and Verdict

The district court charged the jury on the defense of entrapment. The jury found Malachowski guilty of all six counts of the indictment. Following the guilty verdict rendered on April 30, 2009, but before sentence, Malachowski, on May 22, 2009, filed his first motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure (hereinafter "Rule 33 motion").[10]

[10]In Malachowski's first Rule 33 motion, he claimed that a juror told defense counsel that he had visited a gun shop approximately two to three weeks before the trial and asked to see a particular gun; that the juror was denied the chance to hold the gun on the ground that he did not have a gun permit on his person. The juror did some further "research" with respect to the incident at some unspecified later date; and that the juror had shared this experience with the full jury. Malachowski claimed that this information influenced the jury to erroneously conclude that simply holding a firearm constitutes possessing it, for which, assuming the gun is lawful, a permit is required. This conclusion would wrongfully support a guilty verdict on the firearms possessions counts.

The district court held an evidentiary hearing on the claim during which the juror testified under oath that the incident occurred two to three years before the trial, and that, to the extent he had conducted research thereafter, he had not shared any of that research with his fellow jurors during the trial. The district court concluded that no misconduct had occurred.

On December 24, 2009, Malachowski was sentenced to concurrent sentences of seventy-eight months imprisonment on each Counts One, Two and Six; twenty-four months' imprisonment on Counts Four and Five; and six months' imprisonment on Count Three.

Direct Appeal

On direct appeal, Malachowski argued that the district court erred by: 1) denying his motions: to dismiss multiplicitous counts; to dismiss for outrageous governmental conduct, and for a new trial grounded upon juror misconduct; or alternatively, not conducting an examination of additional jurors; 2) refusing to dismiss the firearms possession charge; admitting prejudicial evidence; precluding his affirmative defense that he was a Canadian Indian permitted to enter the United States; miscalculating the Guideline Offense Level; and refusing to downwardly depart grounded upon outrageous governmental conduct. Further, Malachowski alleged that the verdict convicting him of possession was against the weight of the evidence.

On March 23, 2011, this Court issued a summary order affirming Malachowski's conviction. The mandate was issued on April 13, 2011.

Pro Se Rule 33 Motions

On January 17, 2013, Malachowski, *pro se,* filed his first Rule 33 motion for a new trial grounded upon newly discovered evidence.

Malachowski alleged in the motion, *inter alia*, that he had obtained newly discovered evidence that the government had withheld exculpatory recordings, of which he had reviewed summaries, which would have affected the outcome at trial. Rather than attaching the relevant summaries to his motion, Malachowski described the recordings and alleged that the recordings were a part of the record in indictment 09-cr-0125 (LEK). Malachowski alleged that the government failed to disclose a recording of two witnesses discussing the fact that there was no money in Albany with which to consummate the gun deal. Construed liberally, Malachowski's submission argued that the recording should have been disclosed as relevant to the case and his defense that lacked both the intent and means to complete the gun deal with Casanova (A. 132, 137-139).[11]

Malachowski further alleged in the motion that he, Hank Cook and Michael Cook were in the process of starting a new cigarette manufacturing business and that Hank Cook promised to help Malachowski obtain two cigarette machines to get the new business going. This assertion is

[11] Malachowski alleged in his June 27, 2013, motion for a new trial that he received the recordings and reports evidencing that he had no money in Albany, New York on June 5, 2013. At trial, the government presented the testimony of three government witnesses: Casanova, Cook and Kopf, who claimed that Malachowski intended to purchase the guns by having them delivered to Albany and making payment for them there despite the fact recordings proved otherwise (A. 175-177, 189-190).

supported by the October 30, 2008, recording (30015). According to Malachowski, "in effect, what [Cook] did was use the promise of the old business and new cigarette business as leverage in order to lure him into the meeting" with Casanova (A. 139-140).

Malachowski alleged in the motion that he made exculpatory statements both on the way to the Boxing Hall of Fame and on the way to the storage facility meeting with Casanova that "made it clear" that he had not made any arrangements to complete any firearms purchase. These exculpatory statements were not included in the recordings disclosed by the government, Malachowski alleged (A. 142-147).

Malachowski further alleged in the January 17, 2013, motion that the government withheld information that Malachowski was an American Indian with the right to pass the borders of the United States, which would have affected the finding of guilt on the alien-related charges (A. 147-148). 8 U.S.C. § 1359.

The day after Malachowski's January 17, 2013, motion for a new trial pursuant to Rule 33, was filed, the district court, on January 18, 2013, denied the motion on the grounds that the motion was untimely, and in any event, the facts alleged were unlikely to result in an acquittal (A. 168-169).

On June 27, 2013, Malachowski, filed his second *pro se* motion for a new trial pursuant to Rule 33. Malachowski alleged in the motion that on June 5, 2013,[12] previously withheld reports were disclosed to him, which showed that Cook, "had used coercive tactics to ensnare [Malachowski] in something he would not have otherwise been involved in" (A. 176-178). The previously withheld reports were the reports that had been disclosed to the district court *in camera*. *See* pp. 7-8*, supra.*

Malachowski described the content of each report and alleged why each newly provided report should have been disclosed. For example, Malachowski correctly alleged that in Report 50, Cook completely lied to the government about his involvement in attempting to get Malachowski a gun in 2005 (A. 182, 415).

In his motion to amend the July 27, 2013, motion, Malachowski alleged that Cook not only told scores of lies to government agents about him, but also enticed him with many unlawful money making deals over a long period of time, for twenty-one months, in order to get him arrested. Malachowski described four of the schemes, in one of which, Cook involved government agents (A. 209-210).

[12] The government conceded in the district court that the withheld reports were provided to Malachowski on June 5, 2013 (A. 238).

First, Malachowski alleged, in winter, 2007, Cook attempted to arrange for Malachowski to intercept a load of contraband belonging to confidential informant Patrick Johnson. Second, in the winter of 2008, Cook attempted to involve Malachowski in establishing an unlawful business in California by offering Malachowki $300,000 to get the business started. As further enticement, Cook offered to fly appellant to California in a private jet in order to establish the business (A. 209-210).

Malachowski learned in June 2013, when he received the previously withheld reports, that Cook was operating with government agents to attempt to nab him in California. ICE Report 1, created on March 17, 2008, documents that Cook told agents that Malachowski had requested that Cook invest in his narcotics smuggling operation in California, but that Cook had told Malachowski that he wanted to see the operation firsthand before investing, so Malachowski suggested that they rent a private jet to fly to "an unknown location in California." Cook's story was that it was Cook himself who was to arrange the jet to fly to California from Syracuse, New York. Agents secured air transportation for Cook and Malachowski to make the trip, and Cook gave agents $13,500 that he claimed had come from Malachowski towards the cost of the jet. The report states that, "efforts are

ongoing to orchestrate the trip from Syracuse to California" (A. 373-374).[13]

Malachowski alleged that he never gave Cook money towards the cost of the jet and that Cook must have used his own money to attempt to prove to agents that Malachowski was trying to hire the jet (A. 209-210).

The third scheme with which Cook attempted to entice Malachowski occurred in the Summer of 2008. Cook tried to convince Malachowski to steal $800,000 belonging to a native on the reservation. Cook attempted to convince Malachowski that the target had stolen Malachowski's boat. Finally, Malachowski alleged that again in 2008, Cook had tried to convince him to steal contraband that Cook had in storage for another individual (A. 210).

Malachowski explained that Report 13 was previously disclosed to him in redacted form. However, when Malachowski received the unredacted copy of the report, he learned for the first time that not only was his former business partner Cook working to ensnare him, but that he was working alongside their former business partner, Patrick Johnson. Malachowski learned for the first time that his two former business partners had been working as a team to attempt to involve him in criminal activity. (A. 187).

[13]Malachowski was never indicted for any unlawful activity in California.

Report 13 summarizes a meeting between government agents and confidential informant Cook. At this meeting, Cook does not reveal Malachowski's 25% partnership interest in MHP, their multi-million dollar cigarette manufacturing business. All information in the report regarding the cigarette manufacturing business in which Malachowski, Cook and Johnson were partners was redacted. Cook reported in the meeting with government agents that Malachowski owed him $30,000 for cigarettes. In truth, Malachowski alleged, rather than him owing money to Cook, Cook and Patrick Johnson, because of Malachowski's new criminal conviction, sold Malachowski's $800,000 interest in the cigarette manufacturing business out from under him. As a result, it was Cook and Johnson who owed Malachowski $800,000 (A. 178, 187, 426-427).

Similarly, in Report 22, previously redacted portions revealed more detail about the MHP cigarette manufacturing partnership agreement. According to the report, the agreement between Malachowski, Cook and Patrick Johnson was that Malachowski would pay $1 million for 25% of the profits. According to Cook, Malachowski's payments never came close to the full million. Rather, Malachowski was four months behind in his payments, although he had made an initial payment of $75,000 and at least four additional payments of $30,000 to $40,000 (A. 428-430). In contrast, in

Report 21, previously completely withheld from Malachowski, Patrick Johnson describes that beginning in about September, 2005, Malachowski invested $630,000 in MHP, plus provided Johnson with a thirty-five foot boat in lieu of $180,000 (A. 385-386).

Report 47, also completely withheld from Malachowski, detailed the events of Malachowski's arrest, and then states that Cook's recording device had "reached its memory storage capacity and turned off automatically prior to meeting with" Casanova (A. 409-410). Malachowski alleged that Kopf had originally provided a different explanation for the recording ending abruptly (A. 184).

Report 50, also completely withheld from Malachowski, revealed that in or around October, 2006, Malachowski contacted Johnson and demanded $800,000 as repayment for his investment in MHP. Malachowski alleged that defense counsel was not provided with information that the cigarette factory was still operating even after Cook and Johnson had been arrested, and admitted their guilt, in violation of Tribal regulations governing cigarette factories on Indian reservations (A. 182, 414-415).

Malachowski made clear that the withheld and redacted reports supported his entrapment defense. Malachowski alleged that Report 50

demonstrated that Cook and Johnson "effectively held the defendant's interest hostage while misleading the defendant for over two years" (A. 182)

According to Malachowski: his driver, Owen Peters, was present for the initial meeting with Casanova and would have testified to exculpatory statements made by Malachowski that were not otherwise disclosed, and, he had information that Peters made statements to Agent Kopf that were not disclosed to the defense that supported Malachowski's defense that he had no intention of going through with the gun deal. Malachowski contended that throughout the pre-trial proceedings, the government informed defense counsel that it would be calling Peters as a cooperating witness. Until, just before trial, it was revealed that the government would not call Peters to the witness stand. Newly discovered reports demonstrated that Peters had lost contact with the government (A. 420). Malachowski alleged that this bait and switch tactic made it impossible for him to locate Peters in time for trial (A. 184, 190, 195).

On August 19, 2013, Malachowski filed a motion for an order granting him permission to amend his motion for a new trial. Malachowski sought an order appointing him the assistance of an expert in computer forensics to analyze the recordings of November 17, 2008. In support of the motion, Malachowski alleged that he learned for the first time in 2013 that

Kopf claimed in Report 47 that the body wire recording of the events leading up to the meeting with Casanova in the storage facility had reached its capacity and turned off automatically as her explanation as to why the recording of the conversations in Malachowski's car prior to the meeting with Casanova were not disclosed to him. Malachowski alleged that based upon 1) the time stamp, the file of the recording itself indicated that further recordings had been made beyond the point that Kopf claimed the device had powered off as a result of reaching its capacity; 2) the typical storage capacity of digital recording devices in use at that time, significantly more recording time would have been available on the device; and 3) the deletion of Casanova's question, "How do we attach the guns to him?" from the recording of Casanova's body wire following the pre-meet, there was sufficient cause to appoint a computer forensics expert. An expert, Malachowski contended, was necessary to assess whether exculpatory statements made before Malachowski met with Casanova were destroyed. Malachowski alleged that he made exculpatory statements on the drive and before he went into the storage unit, which were not disclosed. For example, he said to his driver, Owen Peters, "something is [messed] up. I just have to look at something for two minutes, then we'll hit the road and go to dinner. Do not get out of the vehicle" (A. 203-206).

Malachowski further argued in this motion that Kopf improperly told the grand jury that Malachowski "took possession of the guns" (A. 211-212, 214-218).

Government's Response

On December 13, 2013, the government filed its response to Malachowski's motions for a new trial. The government argued that the reports and redacted material that were not made available to Malachowski at his trial in 2009 would have only served to impeach a government witness and did not contain material information that would have resulted in an acquittal. The government alleged that there was no *Brady* violation because the information contained in the reports was "not material," had "no bearing on the charges" in the gun case, "and was at most cumulative." The government contended that the evidence not turned over until June 2013 was not "newly discovered" because Malachowski did not challenge the district court's determination that the evidence the court reviewed *in camera* was not *Brady* material (A. 238-243, 255-256).

Motion to Amend

In Malachowski's motion to amend the Rule 33 motion, he conducted a detailed analysis of two important recordings: The drive to the pre-meet from Canada to Calistoga, New York (30018) and Casanova's body recoding

from the day of the arrest. Malachowski emphasized that recording number 30018 must have been tampered with because over two hours of recordings had not been accounted for. Malachowski further alleged that Casanova's body wire had been tampered with and that two minutes of recordings had been deleted (A. 296-301). Casanova admitted at trial that he stated on the recording speaking to his fellow agents, "How do we attach the guns to him?" when Casanova was surprised by Malachowski showing up to the meting without any money to purchase the guns. But, Casanova's statement "How do we attach the guns to him?" was missing from the recording presented into evidence at trial (3:118, Recordings from November 17, 2008 on disc).

Decision and Order

In its four-page decision and order, the district court held that Malachowski's June 27, 2013, motion for a new trial was untimely because it was not made within three years of the jury's April 30, 2009, guilty verdict. In any event, held the district court, the "evidence that the government allegedly withheld was cumulative to the impeachment evidence available at trial and was not likely to have caused a different verdict." And, the court held that the reports the defendant received in June 2013 had previously been disclosed to him at the time of trial, "albeit with redactions to protect

sensitive information regarding an ongoing investigation involving a confidential informant." The redacted versions of these reports were reviewed by the district court and deemed to be unrelated to the charges against Malachowski. The district court held that Malachowski's allegation that the government knowingly used perjured testimony at trial "is similarly unpersuasive" and was unsupported by any evidence in the record (A. 316).

The district court also denied Malachowski's motion to compel discovery, on the ground that "defendant merely seek[s] documents and information that purportedly support the allegations in his motion for a new trial. The district court denied Malachowski's motion to amend his motion for a new trial on the ground that he did not "identify additional newly discovered evidence" and that his allegations of governmental wrongdoing were "conclusory" (A. 316-317).

On March 18, 2014, this district court granted Malachowski's motion to include Trial Exhibits One (redacted reports as they were provided to Malachowski), Two (unredacted version), and Three (reports completely withheld) as part of the record on appeal (A. 320).

SUMMARY OF ARGUMENT

The trial court used an erroneous standard of review and erred in its determination that DEA, ATF and ICE reports submitted by the prosecution

for *in camera* review constituted *Brady/Giglio* material. The trial court held that Malachowski failed to prove that the withheld reports were not likely to have caused a different verdict. However, this Court, has long held that in the determination of whether information withheld from a defendant is material, the question is whether in the absence of the withheld material, the defendant "*received a fair trial, understood as a trial resulting in a verdict worthy of confidence*," not whether he would have been acquitted if the materials had been disclosed. *Poventud v. City of New York*, 750 F.3d 121, 133 (2d Cir. 2014)(quoting *Leka v. Portunado*, 257 F.3d 89, 104 (2d Cir. 2001); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). On this basis alone, Malachowski is entitled to remand for the district court to assess the withheld materials under the correct standard.

The *Brady/Giglio* materials, which were disclosed to Malachowski in June 2013: a) evidenced, among other contradictions, that the confidential informant, Cook, the main witness against Malachowski, blatantly lied to the government on the crucial issue of predisposition; b) evidenced that Cook was partnered with another confidential informant to attempt to nab Malachowski for over twenty-one months with several schemes about which Cook lied to the government in terms of what Malachowski did and did not do; and, c) demonstrated a million-dollar motive for the confidential

informant to ensnare Malachowski where Malachowski, from the outset, had made clear that his defense would be entrapment.

The government endorsed and emphasized what it should have known was perjury by its witnesses in the grand jury and at trial on issues pivotal to the indictment in the grand jury, and central to rebut Malachowski's entrapment defense at trial.

Malachowski is an American Indian with over fifty percent of blood of the Indian race. 8 U.S.C. § 1359 indisputably precludes convictions under the Immigration Act. As a result, his convictions under the Immigration Act should be dismissed.

ARGUMENT

POINT I

CRUCIAL BRADY/GIGLIO MATERIAL, WHICH SUPPORTED MALACHOWSKI'S ENTRAPMENT DEFENSE AND CONTAINED VITAL IMPEACHMENT EVIDENCE, WAS WITHHELD FROM MALACHOWSKI.

Prior to trial, following defense demands for missing reports, the government submitted scores of ATF, ICE and DEA reports to the district court for *in camera* review, falsely claiming that the reports did not contain *Brady/Giglio* materials. The submissions contained 1) ninety-one pages of reports that the government withheld from Malachowski in their entirety

(Trial Exhibit 3), and 2) over twenty-five pages of reports from which the government had redacted information (Trial Exhibits 1 and 2).[14] On the first day of trial, the district court clearly committed error by determining that the reports neither contained *Brady/Giglio* materials, nor were otherwise discoverable.

Malachowski did not discover the content of the withheld reports until June 2013, when the reports were disclosed to him in anticipation of his trial in a marijuana distribution case. Upon his discovery of the *Brady/Giglio* materials, Malachowski filed several *pro se* motions styled as Rule 33 motions for a new trial grounded on newly discovered evidence. The district court, using the wrong standard of review, erroneously determined that the withheld materials were cumulative to the impeachment evidence available at trial, were not likely to have caused a different verdict, and involved sensitive information regarding an ongoing investigation involving a confidential informant (A. 315-316).[15] Contrary to the district court's conclusion, the information contained within the withheld and redacted reports undermined confidence in the verdict. The reports contained

[14]Trial Exhibit 1 was the unredacted series of reports, and Trial Exhibit 2 was the redacted series of reports (A. 421-422).

[15]The undersigned could find no support for the proposition that there is an exception to *Brady/Giglio* requirements where the government alleges that the information would compromise an ongoing investigation.

inconsistent statements, and plenty of information and allegations that were crucial for either impeachment purposes, and/or supported Malachowski's entrapment defense. Consequently, the case should be: remanded and the district court instructed that the materials were clearly discoverable under *Brady/Giglio*, and, Malachowski must be retried. Alternatively, the case must be remanded for the district court to analyze Malachowski's claims under the correct standard of review. *Strickler v. Greene,* 527 U.S. 263, 280 (1999); *United States v. Bagley*, 473 U.S. 667, 676, 682 (1985); *Untied States v. Agurs*, 427 U.S. 97, 107 (1976); *Brady v. Maryland,* 373 U.S. 83, 87 (1963). *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014); *United States v. Rivas*, 377 F.3d 195, 199 (2d Cir. 2004); *Leka v. Portunado*, 257 F.3d 89, 104 (2d Cir. 2001); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

a. The District Court Applied the Wrong Standard of Review and Committed Clear Error in its Determination that the Withheld and Redacted Reports Did Not Contain Material Exculpatory and Impeachment Evidence.

Exculpatory and impeachment evidence, whether or not requested by the defense, must be disclosed to a defendant, where the evidence is material either to guilt or punishment. *Strickler,* 527 U.S. at 280; *Bagley*, 473 U.S. at 676, 682; *Agurs*, 427 U.S. at 107; *Brady,* 373 U.S. at 87. Materiality in this context is "a mixed question of law and fact." *United States v. Rivalta*, 925 F.2d 596, 598 (2d Cir. 1991). While the trial judge's factual conclusions as

to the effect of nondisclosure are ordinarily "entitled to great weight," this Court conducts its own "independent examination" of the record in determining whether the suppressed evidence is material. *United States v. Sessa*, 711 F.3d 316 (2d Cir. 2013)(citing *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995).

There are three components of a *Brady* violation: The evidence at issue must be favorable to the defendant, either because it is exculpatory, or because it is impeaching; evidence must have been suppressed by the government, either willfully or inadvertently; and prejudice must have ensued. *Poventud*, 750 F.3d at 133 (citations omitted). To establish prejudice, a defendant must show materiality. A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. "The touchstone of materiality is a reasonable probability of a different result." *Id.* The question is whether in the absence of the withheld material, the defendant "*received a fair trial, understood as a trial resulting in a verdict worthy of confidence*." *Id.* (citations omitted). The "question is *not* whether the defendant would more likely than not have received a different verdict with the evidence." *Id.* (citations omitted)(emphasis supplied).

Both of the district court's denials of Malachowski's motions employed the wrong standard of review. In the January 18, 2013, decision, the court erroneously found that Malachowski was required to show that the newly discovered evidence would have been "likely to result in an acquittal." In the January 15, 2014, decision, the district court erroneously ruled that Malachowski was required to show that the newly discovered materials were "likely to have caused a different verdict." Malachowski is entitled to remand solely on this basis. *Poventud*, 750 F.3d at 133*; Leka*, 257 F.3d at 104 (citations omitted).

"While *Brady* ensures a fair trial, a defendant's right to pre-trial disclosure under *Brady* is not conditioned on his ability to demonstrate that he *would* or even *probably would* prevail at trial if the evidence were disclosed," much less that he is in fact innocent. *Poventud*, at 133 (citations omitted). The remedy for a *Brady* claim is therefore a new trial, as proof of the constitutional violation need not be at odds with his guilt. *Id.* Further, when evaluating a *Brady* claim, a court must consider the *cumulative* effect of all the material withheld by the Government. *See Kyles*, 514 U.S. at 421, 436-37.

In Malachowski's case, the materiality of the withheld reports and redacted information must be assessed in relation to Malachowski's

entrapment defense. Entrapment is an affirmative defense that a defendant must show by a preponderance of the evidence. *See United States v. Williams*, 23 F.3d 629, 635 (2d Cir. 1994). The defense has two elements: "(1) government inducement of the crime, and (2) lack of predisposition on the defendant's part." *Mathews v. United States,* 485 U.S. 58, 63 (1988); *United States v. Kopstein*, 2014 U.S. App. LEXIS 13869 (2d Cir. July 21, 2014); *United States v. Salerno*, 66 F.3d 544, 547 (2d Cir. 1995). If a defendant presents credible evidence of government inducement, then the prosecutor must show predisposition beyond a reasonable doubt. *United States v. Al-Moayad,* 545 F.3d 139, 153 (2d Cir. 2008). "A defendant is predisposed to commit a crime if he is ready and willing, without persuasion, to commit the crime charged and awaiting any propitious opportunity to do so." *Id.* at 154 (citations and internal quotation marks omitted).

Predisposition may be shown by evidence of a defendant's: (1) involvement in an existing course of criminal conduct similar to the crime for which he is charged; (2) already formed design; or (3) willingness to commit the crime as evidenced by a ready response to the inducement. *United States v. Brunshtein,* 344 F.3d 91, 101-102 (2d Cir. 2003)(citation omitted). Further, the government must prove that any "predisposition was

independent and not the product of the attention that the [g]overnment had directed at" the defendant. *Jacobson v. United States*, 503 U.S. 540, 549-550 (1992)(holding that no predisposition could be shown because "[b]y the time petitioner finally placed his order [for child pornography], he had already been the target of twenty-six months of repeated mailings and communications from government agents and fictitious organizations).

b. Crucial Reports Were Erroneously Withheld From Malachowski.

i. Report Evidencing that Cook, the Government's Main Witness, Indisputably Lied to Agents in Relation to a Crucial Aspect of the Government's Predisposition Case.

Report 50 was completely withheld from Malachowski. In that report, Cook, the government's only witness in its predisposition case, blatantly lied about his involvement in getting Malachowski a gun following the Christmas, 2005, attack on Malachowski and his wife. Cook stated in the withheld report that Malachowski, without explanation, told him that a gun would be delivered to Cook for Malachowski. According to Cook's statement to agent Kopf in the withheld report, Cook knew nothing about the planned delivery of the gun, wanted nothing to do with it, and avoided Malachowski (A. 415). The indisputable truth, as evidenced by telephone recordings entered into evidence at trial, was that Cook responded readily to Malachowski's request to obtain a single firearm for him. Cook made

several phone calls, found a gun, and arranged for Cook's brother-in-law deliver the gun to him. Despite this documented unquestionable lie, the government repeatedly and falsely represented to the district court that the material contained in the reports the district court reviewed *in camera* contained no *Brady/Giglio* materials. In the very letter attached to Report 50, the government wrote to the district court that the withheld report was "unrelated" (A. 329). In another letter, the government unfathomably asserted that the withheld and redacted reports would not "cast any substantial doubt upon the accuracy of the" government's evidence, "have a bearing on the admissibility of the prosecution's evidence;" or "create any inconsistency with any element of the crimes charged against [Malachowski] (A. 62-63).

The district court's determination that Cook's lie to agents regarding the 2005 incident was not relevant to his case is clearly erroneous. *Mui v. United States,* 614 F.3d 50, 53 (2d Cir. 2010)(citing *Rega v. United States*, 263 F.3d 18, 21 (2d Cir. 2001)(this Court reviews a district court's findings of fact for clear error and its denial of a motion pursuant to 28 U.S.C. § 2255 *de novo*).

ii. Evidence that Cook Targeted Malachowski for Twenty-One Months and Had Previously Attempted to Ensnare Malachowski in Another Elaborate Unlawful Scheme.

ICE Report 1, also withheld from Malachowski, documented Cook's March 2008 failed attempt to nab Malachowski in California and should have been disclosed to the defense. Malachowski explained in his motion for a new trial that Cook attempted to entrap him in three other schemes prior to the firearms scheme. One of those schemes was documented in the withheld reports.

According to Malachowski's submission, Cook attempted to entice him into establishing an unlawful business in California by offering him $300,000 to get the business started. As further enticement, Cook offered to fly appellant to California in a private jet in order to establish the business.

Malachowski learned in June 2013, when he received the previously withheld reports, that Cook was operating with government agents to attempt to nab him in California nine months prior to the gun deal. ICE Report 1 summarizes Cook's report to agents that in late 2007 to early 2008, Malachowski had requested that Cook invest in Malachowski's [non-existent] narcotics smuggling operation in California, but that Cook had told Malachowski that he wanted to see the operation firsthand before investing,

so Malachowski suggested that they rent a private jet to fly to "an unknown location in California." Cook's story to agents was patently dubious because he claimed that even though Malachowski was attempting to persuade him to invest in a narcotics smuggling operation in California, and offered to fly Cook there, it was Cook who was to arrange the jet to fly to California from Syracuse, New York. Nevertheless, government agents secured air transportation for Cook and Malachowski to make the trip, and Cook gave agents $13,500 that he claimed had come from Malachowski towards the cost of the jet. The ICE report states, "efforts are ongoing to orchestrate the trip from Syracuse to California" (A. 374-375). There is no evidence that this scheme ever came to fruition.

Malachowski alleged in his motion for a new trial that he never gave Cook money towards the cost of the jet and that Cook must have used his own money to attempt to prove to agents that Malachowski was trying to hire the jet. Malachowski further argued to the district court that the withheld materials evidenced that Cook, and his cousin, Patrick Johnson, had been attempting to target him in involvement with criminal activity for twenty-one months before the gun sale set up. Malachowski had no idea until nearly four years after trial that government efforts to ensnare him had been ongoing for nearly two years because the reports evidencing that Cook

had been involved with the government as an informant attempting to nab him since 2007 were withheld. The district court's determination that Cook's long-term prior failed attempts to ensnare Malachowski were not relevant to his case is clearly erroneous, necessitating retrial. *Mui,* 614 F.3d at 53 (citation omitted).[16]

iii. Cook's Million-Dollar Motive to Land Malachowski in Jail.

Malachowski provided yet a third justification for the finding of a *Brady/Giglio* violation: the withheld reports provided evidence that Cook and his cousin, Patrick Johnson, had a million-dollar motive to nab him. Malachowski explained in his motions that he, Cook, Johnson and another individual, David Humphries, were partners in a multi-million dollar cigarette-manufacturing venture, MHP manufacturing. Malachowski and Humphries were silent partners who agreed to invest $1,000,000 each in

[16]As Malachowski argued in his submissions, the government violated its obligations under *Brady/Giglio* by failing to disclose recordings that he could have used to discredit the government's repeated reliance at trial on the baseless theory that he had funds in Albany with which to close the gun deal. The recordings were not disclosed to Malachowski until 2013. Despite its constant surveillance of Malachowski and his associates at the time of the government-set-up-firearms-sale, the government has never provided any support for its theory that Malachowski actually had a source of funding with which to make payment for the firearms throughout the Rule 33 proceedings, even though one of Malachowski's major contentions was that the government had heavily relied upon the false theory that he had money in Albany with which to pay for the guns.

exchange for twenty-five percent of the profits. Cook and Johnson were the managing partners. Malachowski's investment was to be paid in installments.

Cook reported to the government in the redacted portions of Report 22 that Malachowski was behind in his payments, having made an initial payment of $75,000 and further payments of approximately $120,000 to $160,000. In contrast, in Report 21, previously completely withheld from Malachowski, Johnson describes that Malachowski paid $810,000 towards his million-dollar investment. The significant glaring contradiction between Cook and Johnson's stories regarding their business involvement with Malachowski to anyone reading Reports 21 and 22 was a clear indicator that the material should have been disclosed, despite the governments false representations to the district court to the contrary.

According to Malachowski, Johnson's report to agents that Malachowski was supposed to take over the record keeping following Johnson's arrest,[17] while another partner, Humphries, supplied the factory with tobacco was completely false. Johnson further falsely claimed,

[17]In April, 2006, Johnson was arraigned in N.D.N.Y. Docket 06-cr-87, in which he ultimately pleaded guilty to operating a multi-million dollar marijuana smuggling business with Hank Cook. In Johnson's plea agreement, he admitted that from 2003 through 2006, he and Cook together ran a marijuana distribution ring responsible for smuggling multi-hundred pound shipments of marijuana from Canada into the United States.

apparently to justify relieving himself and Cook of their verbal business agreement with Malachowski, that Malachowski did not show up on time and failed to accurately maintain the books. In truth, it was Malachowski who found Johnson's managerial skills lacking. In 2006, when Johnson showed no intention to change his ways, Malachowski, worried about his investment, requested his money back. Johnson and Cook agreed, but neither individual returned any portion of Malachowski's investment to him. Instead, Cook attempted to entice Malachowski with several schemes, over the course of nearly two years, including the purchase of firearms from Casanova to resell at a profit, in lieu of the return of his investment in the cigarette manufacturing business. *See* pp. 26-28, *supra.*

Malachowski knew at trial that Cook was motivated to serve a shorter sentence for his arrest. However, Malachowski did not know until 2013, when the withheld falsely reported information was disclosed to him, that Cook sought to enlist the government in his effort to relieve himself of his million-dollar debt to Malachowski by making false claims about his investment in MHP.[18]

[18]Malachowski further alleged that because these reports were withheld, he did not know that the Tribal Council had "suspended/revoked" MHP's Tribal Manufacturing license in April, 2006, two and one half years before the meeting at the storage facility (A. 183-184, 338). The report does explain that Cook contended that he was able to dissolve the business and reopen

Cook's scheme to ensnare Malachowski in wrongdoing spanned years, was multifaceted, and clever. Yet, evidence of Cook's long-term attempts to involve him in criminal behavior was withheld from him. Malachowski was out his $810,000 investment in the cigarette manufacturing business, so these offers were enticing, and clearly highly relevant to Malachowski's entrapament defense.

The district court's conclusion that the withheld reports evidencing Cook's million-dollar motive to involve Malachowski in the gun deal were not *Brady/Giglio* material was clearly erroneous, necessitating retrial. *Mui,* 614 F.3d at 53.[19]

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under a different name with Tribal approval. However, this information was intertwined with the million-dollar-motive reports, and should have been available to Malachowski for impeachment purposes and for him to investigate the truthfulness thereof.

[19]In Report 47, completely withheld in violation of *Brady/Giglio,* Kopf details recordings made by Cook on October 30, and November 17, 2008, Malachowski's arrest date. Upon review of this report, Malachowski learned for the first time that Kopf made the impossible (see, pp. 68-70, *infra*) claim that the recording device had "reached its memory storage capacity and turned off automatically prior to meeting with" Casanova (A. 410). Malachowski alleged in his motion that before he got out of the vehicle with Cook and his driver, Owen Peters, he said, in Cook's presence, "something is [messed] up. I just have to look at something for two minutes, then we'll hit the road and go to dinner. Do not get out of the vehicle," but that recording, and other exculpatory statements were not disclosed to the defense (A. 205-206). The district court clearly erred by determining that Kopf's claim that the recording device had reached its capacity and powered off was not discoverable.

iv. The Guilty Verdict in Malachowski's Case is Not Worthy of Confidence Because the District Court Denied Malachowski Access to the Bounty of Crucial Information Contained Within the Withheld Reports.

The withheld reports and redacted information, especially when viewed cumulatively, would have significantly impacted Malachowski's attack on the government's direct and predisposition case. However, the district court ruled that Malachowski's motion was untimely and, in any event, the withheld material was not material, because it was cumulative to the impeachment evidence available at trial and not likely to have caused a different verdict.

Employing the correct applicable standard of review: whether deprivation of the materials to Malachowski undermined confidence in the verdict, the district court's assessment of the newly discovered evidence was clearly erroneous. First, Cook's testimony was essential for the government's direct case and to rebut Malachowski's entrapment defense.[20] Because of the district court's clearly erroneous ruling that the reports were properly withheld, the government had the ability to falsely paint Cook's

[20]Cook also perjured himself regarding his alleged conversations with Malachowski in which Malachowski requested guns. *See* Point II, *infra*

reports about Malachowski as "reliable," "consistent," and "validated" by law enforcement (1: 110-112; 2: 107-108). If Malachowski had had access to Cook's 1) blatant lie to agents about the 2005 request for a single firearm; 2) concocted California story; and, 4) million dollar motive to ensnare him, counsel would have chipped away at the government's case. The district court's determination that the materials were properly withheld was clearly erroneous because it is obvious that the withheld information, especially when viewed cumulatively, was relevant, and vital for impeachment on crucial issues and supported Malachowski's entrapment defense. *Strickler,* 527 U.S. at 280-281; *Bagley*, 473 U.S. at 676; *Kyles*, 514 U.S. at 433; *Brady,* 373 U.S. at 87; *Agurs*, 427 U.S. at 107; *Poventud*, 750 F.3d at 133, 2014 WL 182313; *Rivas*, 377 F.3d at 199; *Leka*, 257 F.3d at 104.

c. The District Court Should Have Construed Malachowski's Submissions as a Motion Pursuant to 28 U.S.C. § 2255.

The content of the withheld and redacted reports was newly discovered to Malachowski. However, the crux of Malachowski's claim was that the district court erred by determining that the material was not *Brady* material. As a result, the district court, after obtaining Malachowski's informed consent, should have construed Malachowski's *pro se* Rule 33 motions and other submissions as a motion pursuant to 28 U.S.C. §

2255(hereinafter "2255"). *Castro v. United States,* 540 U.S. 375 (2003); *Adams v. United States*, 155 F.3d 582 (2d Cir. 1998)(informed consent should be obtained by the district court before converting submission to 2255 motion). *Pro se* submissions must be construed to raise the strongest arguments they suggest. *Thompson v. Choinski,* 525 F.3d 205, 209 (2d Cir. 2008); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006).

For a movant to prevail on a § 2255 claim, the error must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice, []or an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424 (1962). Malachowski's submissions, whether construed liberally or not, clearly alleged, *inter alia, Brady* violations under the due process clause of the Fifth Amendment.

Malachowski's § 2255 motion was timely because the information previously withheld from him was disclosed on June 5, 2013. Malachowski filed his motion for a new trial grounded upon withheld reports on June 27, 2013, well within the year of discovery of new evidence required by 28 U.S.C. § 2255(f)(4). *Rivas v. Fischer*, 687 F.3d 514, 534-535 (2d Cir. 2003).

d. In the Event this Court Finds that Malachowski's Motions Should not be Construed as a Submissions Pursuant to 28 U.S.C. § 2255, He is Entitled to Remand Because the District Court Failed to Consider Malachowski's Claim of Excusable Neglect.

In the event this Court determines that the district court was not required to construe Malachowski's Rule 33 motions as submissions pursuant to 28 U.S.C. § 2255, remand is necessary because the district court did not consider Malachowski's claim of excusable neglect in relation to the filing of his Rule 33 motions over three years after the guilty verdict on May 1, 2009. According to Rule 33, any motion for a new trial grounded on newly discovered evidence must be filed within three years after the verdict or finding of guilty. Fed. R. Crim. P. 33. However, the time-modification provisions of Rule 45 of the Federal Rules of Criminal Procedure apply. Under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for a new trial within the specified time, the district court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect. *United States v. Owen*, 559 F.3d 82, 83-84 (2d Cir. 2009).

In his reply to the government's response, filed on January 2, 2014, Malachowski argued that his failure to file his Rule 33 motion within three years of the guilty verdict in his case was the result of excusable neglect.

According to Malachowski, he provided attorney, Gaspar Castillo, with a completed Rule 33 motion for review and filing on April 17, 2012, with the understanding that Castillo would file the motion prior to April 30, 2012, within three years after the May 1, 2009, verdict. However, Malachowski alleged, while Castillo led Malachowski to believe that he filed the Rule 33 motion, he had in fact, not done so, which Malachowski discovered in October of 2012. Malachowski, in support of his claims, provided a copy of an incomplete Rule 33 motion dated April, 2012, as well as his complaint to the New York State Appellate Division, Third Department, Committee on Professional Standards, regarding Castillo's actions (A. 259-260, 274-279).

The time-modification provisions of Rule 45(b) apply here. As explained in the Advisory Committee Notes to Rule 33,

> Read in conjunction with . . . Rule 45(b), the defendant is . . . required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. . . . [However], under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for a new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

Owen, 559 F.3d at 83-84 (quoting Fed. R. Crim. P. 33 advisory committee's notes (2005 Amendments).

In its decision on Malachowski's motions on January 15, 2014, the district court did not consider Malachowski's claim of excusable neglect. As a result, in the event this Court determines that Malachowski's motions should not be construed as a submission pursuant to 28 U.S.C. § 2255, the Court must remand for the district court to consider Malachowski's claim that his failure to file within three years of his guilty verdict was the result of excusable neglect. *Id; Eberhart v. United States*, 546 U.S. 12, 13 (2005); *United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008); *United States v. Robinson*, 430 F.3d 537, 541 (2d Cir. 2005).

In *United States v. Hooper*, 9 F.3d 257, 258 (2d Cir. 1993), this Court remanded for district court to consider defendant's claim of excusable neglect in filing a late notice of appeal pursuant to Fed. R. App. P. 4(b), which permits the district court to extend the time to file a notice of appeal if the party shows excusable neglect or good cause. Fed. R. App. P. 4.

In *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, (1993), the Supreme Court concluded that an attorney's inadvertent failure to file a timely proof of claim constituted "excusable neglect" under Bankruptcy Rule 9006(b)(1). The "neglect," held the Court, encompasses "both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Id.* at 388. A determination of whether the neglect

was excusable "is at bottom an equitable one" that should be made by considering several factors: prejudice to the non-movant; the length of the delay and its potential impact upon judicial proceedings; the reason for the delay, including whether it was in the reasonable control of the movant; and, whether the movant acted in good faith. *Id.* at 395. The Court also concluded that by using the term "excusable neglect," "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388.[21]

The statute, the Supreme Court and this Court's precedent mandate remand as a result of the district court's failure to consider Malachowski's claim of excusable neglect. *Hooper*, 9 F.3d at 258; *see also Owen*, 559 F.3d at 84 (district court is in best position to assess whether or not defendant met timeliness requirements of Rule 33 and 45).

[21] Although the *Pioneer* Court's examination of "excusable neglect" arose in the context of a dispute over the proper interpretation of Bankruptcy Rule 9006(b)(1), which permits a bankruptcy court to allow late filings of proofs of claim where failure to comply with the bar date was the result of "excusable neglect," the Court's opinion is based on the term "excusable neglect" and draws upon the use of that term in other federal rules. *See Id*, at 387 n.3, 391-394 & nn. 5-12, and is applicable to Rules 33 and 45. *Hooper*, 9 F.3d at 259.

e. Upon Remand, the Case Should Be Reassigned.

Upon remand, the case should be reassigned to a different judge. For the reasons set forth above, Judge Hurd demonstrated partiality towards the government by blindly adopting the government's representations, apparently without carefully reading the ATF, ICE and DEA reports. There is simply no other explanation for the district court's findings. *United States v. DeMott*, 513 F.3d 55, 59 (2d Cir. 2008)(reassignment appropriate where "an objective observer might . . . question [the district judge's] impartiality"); *United States v. Robin*, 553 F.2d 8, 9-10 (2d Cir. 1977). The case should be assigned to Senior Judge McAvoy, who presided over Malachowski's marijuana distribution case and determined at sentence, that this case and the marijuana cases were related (A. 306-307).

In sum, the district court clearly erred by failing to construe Malachowski's submissions as a timely[22] 2255 motion for a new trial. *United States v. Bell*, 584 F.3d 478, 482-83 (2d Cir. 2009). The district court applied the wrong standard of review and clearly erred in its determination

[22]The record demonstrated that, at trial, counsel diligently demanded missing reports at trial, persuading the government to agree to present the reports to the district court for *in camera* review. Once the district court ruled that the reports were not relevant to Malachowski's case, Malachowski reasonably relied, or in any event, had no basis other than speculation, to contest the district court's determination that the reports were not relevant to his case. Thus, it can not be held that Malachowski did not act with due diligence.

that the reports were properly withheld. The withheld materials would have destroyed the government's direct and predisposition case and were not merely cumulative to the impeachment material available at the time of trial. Instead, the reports shed a completely new light on Cook's motives and credibility, and, without a doubt, undermined confidence in the verdict. An analysis of the withheld materials under the correct standard of review warrants a finding by this Court that disclosure should have been made under *Brady v. Maryland,* and its progeny, and a retrial should be ordered on Counts One, Two and Six. *Strickler,* 527 U.S. at 280-281; *Bagley*, 473 U.S. at 676; *Kyles*, 514 U.S. at 433; *Brady,* 373 U.S. at 87; *Agurs*, 427 U.S. at 107; *Poventud*, 750 F.3d at 133; *Rivas*, 377 F.3d at 199; *Leka*, 257 F.3d at 104. Alternatively, the case must be remanded[23] for the district court to consider the government's argument that the materials were properly withheld under the correct standard of review and consider Malachowski's claim of excusable neglect. *Gonzalez-Soberal v. United States,* 244 F.3d 273 (1st Cir. 2001).

[23]Malachowski did not contend in the district court that the withholding of most of Report 22 deprived him of the opportunity to cross-examine Cook on his failure to mention the alleged 2003 request for guns in the meeting with agents in which he describes a chronology of his relationship with Malachowski, beginning when Cook reported they met in 2003. *See* pp 13-14, *supra.* In the event this Court orders remand, he should be given the opportunity to amend his submission to include this issue.

POINT II

THE GOVERNMENT SUBORNED PERJURED AND MISLEADING TESTIMONY IN RELATION TO CRUCIAL ISSUES IN THE GRAND JURY AND AT TRIAL, MANDATING DISMISSAL OF THE INDICTMENT, OR ALTERNATIVELY, FURTHER DISCOVERY AND THE APPOINTMENT OF AN EXPERT.

a. Perjury and Misrepresentations in the Grand Jury

"Interposing a grand jury between the individual and the government serves the intended purpose of limiting indictments for higher crimes to those offenses charged by a group of one's fellow citizens acting independently of the prosecution and the court." *United States v. Hogan*, 712 F.2d 757, 759 (2d Cir. 1983)(citing *Stirone v. United States*, 361 U.S. 212, 218 (1960). A grand jury performs two equally important and distinct roles. It serves as an independent accuser sworn to investigate and present for trial persons who are suspected of wrongdoing. And, it functions as a shield, standing between the accuser and the accused, protecting the individual citizen against oppressive and unfounded government prosecution. *Id.* (citing *United States v. Calandra*, 414 U.S. 338, 342-43 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972).

"The law of this Circuit is that dismissal of an indictment is justified . . . pursuant to [the Court's] supervisory power, to prevent prosecutorial

impairment of the grand jury's independent role." *Hogan*, at 761. The Court's supervisory power can be exercised to impose an "*ad hoc* sanction" to enforce the appropriate performance of the government in presenting evidence to the grand jury. *United States v. Jacobs*, 547 F.2d 772, 778 (2d Cir. 1976); *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972). The exercise of the court's supervisory power can extend beyond the minimum requirements set by the Constitution to encourage fair and uniform procedures in the prosecution of criminal actions. *Jacobs*, 547 F.2d at 776.

A court has a variety of supervisory tools at its disposal. It can admonish a prosecutor -- although it has often been noted how fruitless this is. *See, e.g., Estepa*, 471 F.2d at 1137 ("We cannot . . . content ourselves with yet another admonition."). Under some circumstances, it may be appropriate to hold a prosecutor in contempt of court. *See* Fed. R. Crim. P. 42(a). Finally, under the proper circumstances, it is appropriate to dismiss the indictment, even (as was the case in *Hogan*) if a petit jury has already returned a conviction on the charges in the indictment. *Hogan*, at 757; *see also United States v. Bari*, 750 F.2d 1169, 1176 (2d Cir. 1984).

A supervisory dismissal is "warranted only where the prosecutor's conduct amounts to a . . . reckless misleading of the grand jury as to an essential fact." *United States v. Bari*, 750 F.2d 1169, 1176 (2d Cir. 1984). In

this case, the prosecutor and Agent Kopf together improperly delivered to the grand jury a neat package clearly and repeatedly marked "possession case," when it was the province of the grand jury to determine. Throughout the grand jury proceedings, the prosecutor and the case agent constantly referred to Malachowski's having "took physical possession of the guns, "misleading . . . the grand jury as to an essential fact." The prosecutor's and agent's relentless echo of a conclusion, in the guise of an alleged fact, unquestionably amounts to impermissible "prosecutorial impairment of the grand jury's independent role." *Hogan*, 712 F.2d at 761.

In Malachowski's case, not only did the prosecutor and the case agent repeatedly improperly characterize the alleged facts as constituting possession, when it was the function of the grand jury to determine whether or not the alleged facts established possession, in addition, Agent Kopf, with the government's assent, mischaracterized the evidence in several other important respects. First, Kopf testified that over the years, Malachowski "repeatedly" requested that the CI obtain guns for him. In the evidence's best light, at the time of Kopf's testimony in the grand jury, Malachowski asked about "Buddy" (the euphemism employed by Cook to refer to Casanova) once in 2008. And, there was one recording of Malachowski attempting to obtain a single gun from Cook after having been beat up in a

bar in 2005.[24] This is far from repeated conduct. Second, Kopf testified in the grand jury that there was a recording in which Malachowski claimed that he was going to sell the firearms that he bought from Casanova to his "Chinks in Montreal," referring to an organized crime syndicate. However, there was no recording to this effect (or if there was it was not disclosed to Malachowski). *See also* n. 7, supra.

A supervisory dismissal is warranted here even though Malachowski was convicted after trial. *Bari*, 750 F.2d at 1176. Following a guilty verdict, dismissal of the indictment can still be justified as a method of deterring prosecutorial misconduct. *Id.* The government's presentation of its case to the grand jury was a mockery. The questioning and answers repeatedly informed the jury that Malachowski "possessed" firearms, when that was a question for the jury to determine. Even when it was clear that at least one juror was confused by how a person could obtain possession of firearms he agreed to purchase for $94,000 without paying a single penny, the government did not clarify. Instead the government misled the jury by repeatedly insisting that Malachowski "took possession" (A. 38, 45-46).

[24] Cook's claim at trial that Malachowski requested guns from him for the first time in 2003 is highly dubious and it was not yet made at the time of Kopf's testimony. *See* pp. 13-14, *supra.*

These errors were far from harmless as they "substantially influenced the grand jury's decision to indict," and there is "grave doubt" that the decision to indict was free from the substantial influence of these violations. *Bank of N.S. v. United States*, 487 U.S. 250, 256-257 (1988)(citing, *United States* v. *Mechanik,* 475 U.S. 66, 78 (1986). As a result, Malachowski's convictions of Counts One, Two and Six must be reversed and dismissed.

b. The Government Blatantly Mischaracterized the Evidence at Trial.

In its response to Malachowski's motions for a new trial in the district court, the government painted a picture of Malachowski as an eager aspiring gun dealer repeatedly and continuously badgering Cook to connect him with a supplier. However, that picture did not represent the evidence presented at trial (A. 247-248).

Despite Cook's testimony at trial that Malachowski was always the first to bring up guns (3: 60), in the recordings disclosed by the government, Malachowski only asked Cook about his "buddy" (the euphemism employed by Cook to refer to Casanova) a single time. Of the eight phone contacts relating to, or, with Casanova, Malachowski initiated only one call. And, it is clear from the context of that conversation that Cook prompted that call. *See* pp 14-17, *supra*. Nevertheless, the government's summation emphasized

that Malachowski repeatedly sought out Cook to connect him with guns (4: 37).

The government orchestrated Cook's commission of perjury by asking Cook if Malachowski had initiated all the conversations leading to the gun deal on redirect as the last thing the jury heard from Cook (3: 60). Compacting the error, the government emphasized the lie on summation (4: 37). And, the government persisted in its claim that Malachowski initiated all gun inquiries with Cook in its response to Malachowski's motions for reversal in the district court (A. 248).

The Supreme Court has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Drake v. Portuondo*, 553 F.3d 230, 241 (2d Cir. 2009)(citing *Agurs*, 427 U.S. at 103 (footnote omitted); *see also Shih Wei Su v. Filion*, 335 F.3d 119, 129 (2003). The Court has made clear that prejudice is readily shown in such cases, and the conviction must be set aside unless there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Shih Wei Su,* at 126-27 (citing *Agurs*, 427 U.S. at 103; *Giglio v. United States*, 405 U.S. 97, 154 (1976); *see also United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991). This Court

has held that the Supreme Court cases on the issue of government-sanctioned perjury mean that "if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic" (quotation marks omitted). *Shih Wei Su*, at 126-27.

Since it is apparent from an examination of the recordings that Malachowski did not initiate all of the recorded conversations about guns, or even most of them, the government should have known that the testimony it elicited that Malachowski was always the first to ask about guns was false. And, there are several reasons why there is more than a "reasonable likelihood that [Cook's] false testimony could have affected the judgment of the jury." First, Cook was the centerpiece to the government's direct case, and crucial for it's predisposition case. Second, Cook had strong motives to entrap Malachowski that were hidden from the defense. *See* Point I(b)(iii). Third, where Cook was an admitted lifetime criminal, and the government permitted Cook to pick and choose which conversations between Malachowski and Cook were recorded and disclosed, the prosecution's proof was highly suspect. Fourth, Malachowski merely examined the firearms in the storage facility and did not show up to the meeting with money to purchase the firearms. Malachowski lacked dominion and control over the firearms and the government's possession case was weak. *Drake*, 553 F.3d at

241; *Agurs,* 427 U.S. at 103; *see also Shih Wei Su* at 129; *United States v. Nusraty*, 867 F.2d 759 (2d Cir. 1989)(where proof at trial did not establish that defendant "knowingly had the power and intention to exercise dominion and control over" heroin, possession charge must be reversed); *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973)(actual possession exists when a tangible object is in the immediate possession or control of the party). Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others. This case is a paradigm of lack of power to exercise control and dominion. *United States v. Quintanar*, 150 F.3d 902, 905 (8th Cir. 1998).

c. In the Event the Indictment is Not Dismissed, Upon Remand, Discovery and the Appointment of a Forensic Audio Expert Should be Ordered.

It is clear from the content and context of Cook's recorded conversations that Cook had additional conversations with Malachowski about the firearms deal that were either not recorded, or not disclosed. *See* pp 14-17, *supra*. Especially where the defense was entrapment, it is extremely problematic for the orchestrator of the criminal activity to have exclusive control over what portions of his conversations with his target are

documented. The fact that it is abundantly clear from the record that conversations were not recorded or disclosed,[26] begs this court, upon remand, to order the district court to grant Malachowski's motion for further discovery. Discovery is authorized in habeas corpus cases and Rule 33 motions. *See Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977), *citing* Rule 6 of the Rules Governing Habeas Corpus Cases. According to the Supreme Court, "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is" entitled to a new trial, discovery is mandated. *Id.*; *see also United States v. Wolfson*, 413 F.2d 804, 808 (2d Cir. 1969)(in dictum, suggesting that *Harris* applies to Rule 33 motions); 26 James Wm. Moore et al., Moore's Federal Practice § 633.21[3], at 633-50 (3d ed. 2006). *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007).

Malachowski argued, in support of his application for a computer forensics[27] expert that: 1) exculpatory statements were made on the date of his arrest that should have been recorded on Cook's body wire, but were not disclosed to the defense; 2) In June 2013, it was revealed for the first time to

[26]According to Malachowski, his driver, Owen Peters, was present for the initial meeting with Casanova. Malachowski alleged that he had information that Peters made exculpatory statements to Agent Kopf that were not disclosed to the defense (A. 190, 195).

[27] Upon information and belief, the appropriate field of expertise is "forensic audio."

Malachowski that Agent Kopf's explanation for the exculpatory statements not being disclosed to the defense was that the recording device had reached its capacity;[28] 3) Specifications relevant to the type of Sony recording device provided to Cook by Kopf clearly foreclosed the possibility that the device would have reached its capacity at the time Kopf claimed it did; 4) There was evidence of other tampering with recordings at trial as Casanova admitted on cross-examination at trial that he stated to fellow agents, when confronted with the fact that Malachowski had brought no money to the supposed gun sale, during the time he was wearing a body wire, "How do we attach the [guns] to him?" However, this recording was not contained in recordings provided to the defense on disc;[29] and 5) both Cook and Casanova both testified that they turned their recording devices over to Kopf. There was a sufficient basis to assign a computer forensics expert to examine whether the government had deleted material from the recordings. And, it is proper at this juncture because it was not until 2013 that

[28]See Report 47 (A. 409).

[29]Upon information and belief, the government, immediately following Malachowski's arrest, provided district court counsel Sal Strazzullo with copies of video and audio recordings via e-mail. One recording included Casanova's statement, "How do we attach the guns to him." Strazzullo gave a CD of these recordings to the district court as an exhibit with his motion for bail pending trial. Future discs the government provided to counsel containing recordings omitted Casanova's "How do we attach the guns to him" statement.

Malachowski discovered Kopf's faulty explanation for the missing recordings, for the first time evidencing malfeasance.

Malachowski correctly asserted that Casanova's recording from the day of his arrest revealed a glaring discrepancy warranting the appointment of an expert to determine the extent to which the recordings produced by the government were tampered with. In each of the recordings Casanova initiated with Malachowski, Casanova provided a lengthy introduction that included the date, time, and a summary of the status of the case as well as a closing comment by Casanova at the end of the recording with the time and date. These opening and closing comments are called, "slate." Giving the time at the beginning and end of a recording helps establish the absence of tampering and is necessary to authenticate a recording. However, on the day of Malachowski's arrest, Casanova's body wire recording, which according to Casanova, began at approximately 6:06 p.m., and ended at approximately 6:27 p.m., inexplicably, is divided into two recordings. The first recording includes Casanova's slate at the beginning but there is no slate at the end. The second recording begins with no slate at the beginning, but does contain slate at the end. Most likely, the first recording was tampered with to delete Casanova's statement, "How do we attach the guns to him," discussion about that and then split into two recordings. In the grand jury, Kopf admitted that

after learning that Malachowski had no money with him [which happened while Casanova was recording on November 17, 2008], there was a decision made to continue the operation, which must have been on Casanova's recording, but deleted (A. 39-40). Further, a comparison of the duration of the two recordings, with the time reported by Casanova ("u/c"), there are at least two minutes of missing recordings (Recordings are on disc in Appendix).

Recordings of Evening of November 17, 2008

[--- Duration is 10:17----------][----Duration is 8:45----------]				
[----*slate at 00:19*----------][----------*slate at 08:25*--------]				
:00	u/c says time is 6:06 p.m	ends/begins without slate	u/c says time is 6:27 p.m[30]	19:02

The duration of the two recordings together is 19:02. However, based upon Casanova's statement of the time at the beginning and end of the two recordings, there are at least 21 to 22 minutes of time from when Casanova began the first recording to when he ended the second recording. Then, since the recorder was recording for 19 seconds before Casanova said the

[30]At the end of the recording, Casanova says that the time was "approximately 6:23 p.m." There is a few seconds lapse, and he adds, correction, the time is approximately 6:27 p.m.," also supporting Malachowski's claim that not only was the recording tampered with, but Casanova planned to tamper with the recording.

time, and was recording 37 seconds at the end, after Casanova said the time, the total duration of the event was at least 21 minutes plus 58 [19 + 37] seconds, or nearly twenty-two minutes total. But, the recording provided by the government is only 19 minutes 2 seconds. There are at least 2 to 3 minutes missing from this recording. There is no question that the prosecution tampered with evidence.

In light of scope of misrepresentations made by the government in this case, it is essential that Malachowski, through the appointment of a forensic audio expert, be given the opportunity to examine all recordings to determine the extent to which, relevant material has been withheld or destroyed.

In sum, the district court erred in its determination that the government did not knowingly use perjured testimony at trial, and erred by implicitly rejecting Malachowski's claim that he was prejudiced by false testimony in the grand jury. As a result of perjury in the grand jury and perjury at trial on pivotal issues, which prejudiced Malachowski on the firearms charges, Malachowski's convictions on Counts One, Two and Six must be reversed and dismissed. *Drake*, 553 F.3d at 241; *Agurs*, 427 U.S. at 103; *Shih Wei Su*, 335 F.3d at 129. Or, alternatively, discovery must be granted and a forensic audio expert must be appointed.

POINT III

MALACHOWSKI, AN AMERICAN INDIAN BORN IN CANADA, CAN NOT, BY LAW, STAND CONVICTED OF COUNTS THREE, FOUR, FIVE AND SIX.

It is undisputed that if Malachowski is an American Indian born in Canada and possesses 50% of American Indian blood, then he is entitled to special privileges not afforded to other aliens. The right of the American Indians to move freely between Canada and the United States was first recognized in the Jay Treaty of 1794 and was reiterated in the Explanatory Article of 1796. *MacDonald v. United States*, 2011 U.S. Dist. LEXIS 148409, 7-10, 2011 WL 6783327 (S.D. Cal. Dec. 23, 2011)(citing Treaty of Amity, Commerce and Navigation, U.S. Great Britain, art. III, Nov. 19, 1794, 8 Stat. 116); Explanatory Article to Article 3 of the Jay Treaty, U.S. Great Britain, May 5, 1796, 8 Stat. 130. On June 12, 1812, the war between the United States and Great Britain was declared. The war was a direct threat to the rights and privileges established by the Jay Treaty, the parties to the treaty being at war. After the War of 1812, both parties ratified the Treaty of Peace and Amity, December 24, 1814, 8 Stat. 218 (1815)(commonly known as the Treaty of Ghent). In Article 9, the United States restored to the Indian Tribes and nations, which had been hostile to

the United States, all the possessions, rights and privileges to which the tribes and nations were entitled before the war. *Akins v. United States*, 551 F.2d 1222 (C.C.P.A. 1977).

In 1928, to secure this right of free passage, Congress enacted the Act of April 2, 1928, 45 Stat. 401, which provided that the Immigration Act of 1924 "shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States." Today, this provision is codified in 8 U.S.C. § 1359 and provides as follows:

> Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

8 U.S.C. § 1359. In *Matter of Yellowquill*, the BIA held that "American Indians born in Canada who are within the protection of section 289 of the Act are not subject to deportation on any ground." *Id.* at 578. *MacDonald v. United States*, 2011 U.S. Dist. LEXIS 148409, 7-10, 2011 WL 6783327 (S.D. Cal. Dec. 23, 2011). An American Indian born in Canada who possesses 50 per centum or more of the blood of the American Indian race is regarded as a lawful permanent resident of the United States. 8 C.F.R. 289, 289.2; *Perrault v. Larkin*, 2005 U.S. Dist. LEXIS 48705, 4-5, 2005 WL 2455351 (D. Kan. Oct. 5, 2005).

Defendant's Exhibit D-2 at trial was a letter from the Indian and Northern Affairs of Canada confirming that Malachowski was registered as an Indian and a member of the Kamloops Band (A. 68-69).[31] Further, Judge McAvoy stated at Malachowski's sentence in his marijuana case, that he was convinced appellant was an American Indian (A. 304-305). The PSR in appellant's marijuana case lists his race as American Indian. American Indians born in Canada are not aliens in the United States. As a result, Malachowski has been wrongfully convicted of four counts: two counts of improper entry by an alien under 8 U.S.C. § 1325(a)(Counts Three and Four); unlawful re-entry under 8 U.S.C. § 1326(a)(Count Five); and being an illegal alien in possession of a firearm under 18 U.S.C. § 922(g)(5)(A)(Count Six).[32] Malachowski's convictions of Counts Three,

[31]As a member of the Kamloops reservation, Malachowski is a Salish Indian. The Supreme Court has determined Salish Indians are Indians under the laws of the United States and entitled to exemptions from taxation. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

[32]Count Six should also be dismissed because the government never established that the firearms moved in interstate commerce beyond their movement from West Virginia to New York by ATF agents. As a result, it was government agents who manufactured federal jurisdiction. There was noting more to establish the interstate commerce element for Count Six than testimony that the firearms were manufactured outside of New York State and that ATF moved the firearms from the ATF facility in West Virginia to New York (2: 109, 113). *United States v. Archer,* 486 F.2d 670 (2d Cir. 1973).

Four, Five and Six must be reversed and dismissed. 8 U.S.C. § 1359; 8 C.F.R. 289.1; 8 C.F.R. 289.2. *Perrault v. Larkin*, 2005 U.S. Dist. LEXIS 48705, 4-5, 2005 WL 2455351 (D. Kan. Oct. 5, 2005). By virtue of the ethical rules under which the government operates, appellee should not oppose this application. Model Rule of Professional Conduct Rule 3.8 Special Responsibilities Of A Prosecutor mandates that "the prosecutor in a criminal case shall:

. . .

> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Model Rule of Professional Conduct Rule 3.8.

CONCLUSION

For the reasons set forth in Points I, II and III Malachowski's convictions on Counts One, Two, Three, Four, Five and Six must be reversed and dismissed. Alternatively, the case must be remanded for the district court to evaluate Malachowski's *Brady/Giglio* claims using the correct standard of review, to permit further discovery, and for the appointment of a forensic audio expert.

Dated: July 28, 2014
San Rafael, California

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

CERTIFICATE OF COMPLIANCE

v.

MARCEL MALACHOWSKI,

No. 13-443-cr

Appellant.

----------x

ROBIN C. SMITH, hereby declares the following under 28 U.S.C. § 1746:

This brief complies with the type-volume limitations of this Court as it contains 16,970 words. This Court granted Malachowski's motion to file an oversized brief on July 7, 2014, permitting up to 17,000 words for this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14 point Times New Roman font style.

Dated: San Rafael, California
July 28, 2014

Robin C. Smith, Esq.
Attorney for Appellant

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SPECIAL APPENDIX

Special Appendix Table of Contents

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-v- 5:08-CR-701

MARCEL MALACHOWSKI,

Defendant.

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DAVID N. HURD
United States District Judge

DECISION and ORDER

I. INTRODUCTION

On April 30, 2009, following a three-day trial, a jury found defendant Marcel Malachowski guilty on all six counts contained in the superseding indictment.[1] Defendant's counsel filed a motion for a new trial on May 22, 2009, alleging juror misconduct and that the verdict was against the weight of the evidence. That motion was denied on June 30, 2009.

[1] On April 1, 2009, a Memorandum–Decision and Order was issued resolving the parties' motions in limine. See United States v. Malachowski, 604 F. Supp. 2d 512 (N.D.N.Y. 2009).

ECF No. 72. On December 18, 2009, defendant was sentenced principally to a term of seventy-eight months incarceration.

Defense counsel filed a notice of appeal on Malachowski's behalf on December 30, 2009. The United States Court of Appeals for the Second Circuit affirmed the judgment on March 23, 2011. United States v. Malachowski, 415 F. App'x 307 (2d Cir. 2011) (summary order). The Mandate was filed in the Northern District of New York on April 20, 2011. ECF No. 100. On January 17, 2013, defendant filed a pro se motion for a new trial based on new evidence and alleged Brady violations. This motion was denied as untimely and unpersuasive.[2] ECF. No. 102. Defendant's subsequent motion for reconsideration was also denied.

On June 27, 2013, Malachowski, proceeding pro se, filed a third motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. On August 19, 2013, he filed a motion to compel discovery and a motion for omnibus relief. These three motions have been fully briefed and were considered on submit without oral argument. The parties' familiarity with the underlying factual and procedural history is assumed.

II. DISCUSSION

In his third motion for a new trial, Malachowski again claims there is newly discovered evidence; to wit, various reports of ATF Agents. He also alleges that the Government unconstitutionally suppressed material exculpatory evidence and knowingly used perjured testimony at trial.

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[2] Malachowski appealed that order on February 4, 2013. The Second Circuit granted his motion to stay further appellate proceedings pending the resolution of the third motion for a new trial filed in this case. Order, United States v. Malachowski, No. 13-443 (2d Cir. Oct. 24, 2013).

The Government correctly argues that this motion is untimely. Rule 33(b)(1) requires that a motion for a new trial based on newly discovered evidence be made "within 3 years after the verdict or finding of guilty." A motion grounded on any other reason must be filed within fourteen days after the verdict or guilty finding. FED. R. CRIM. P. 33(b)(2). As defendant was found guilty by a jury on April 30, 2009, his third motion for a new trial—filed on June 27, 2013—is untimely.

Moreover, the evidence that the Government allegedly withheld is cumulative to the impeachment evidence available at trial and is not likely to have caused a different verdict. Further, the reports that defendant received in June 2013 had previously been disclosed to him at the time of trial, albeit with redactions to protect sensitive information regarding an ongoing investigation involving a confidential informant. See Gov't Mem. Opp'n, Ex. G, ECF No. 128-7. The unredacted versions of these reports were reviewed by the Court and deemed unrelated to the charges against defendant in this case. Id.; Gov't Mem. Opp'n, Ex. D, ECF No. 128-4, 3:18–20[3] ("I have thoroughly reviewed [the unredacted reports], and I find that there is no Brady material or other material that needs to be submitted to the defendant . . . ."). Malachowski's allegation that the Government knowingly used perjured testimony at trial is similarly unpersuasive and unsupported by any evidence in the record.

Accordingly, defendant's third motion for a new trial will be denied. In his motion to compel discovery, defendant merely seek documents and information that purportedly support the allegations in his motion for a new trial. His motion for omnibus relief appears to be a motion to amend his motion for a new trial. However, defendant does not identify

[3] The pagination corresponds to the page number as assigned on CM/ECF.

additional newly discovered evidence and makes conclusory allegations of wrongdoing on the Government's part. Therefore, these motions will be denied for the same reasons outlined above.

III. CONCLUSION

Malachowski's third motion for a new trial is untimely. Even if it were timely, defendant fails to identify any new evidence of which he was unaware at the time of trial or that could have possibly changed the verdict. He similarly fails to establish any Brady violation by the Government or that the Government knowingly offered perjured testimony or engaged in egregious conduct justifying a new trial.

Therefore, it is

ORDERED that

1. Defendant's third motion for a new trial (ECF No. 110) is DENIED;

2. Defendant's motion to compel discovery (ECF No. 118) is DENIED; and

3. Defendant's motion for omnibus relief (ECF No. 119) is DENIED.

IT IS SO ORDERED.

United States District Judge

Dated: January 15, 2014
Utica, New York.