13-443(L)

14-226(Con) *To be Argued by:* PAUL D. SILVER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 13-443(L); 14-226(Con)

UNITED STATES OF AMERICA,
Appellee,
v.
MARCEL MALACHOWSKI,
Defendant-Appellant.

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

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court correctly determined that defendant's Rule 33 motions for a new trial alleging newly discovered evidence, and brought more than three years following the entry of the criminal judgment against him, should be dismissed as untimely.

2. Whether the district court applied the correct legal standard and correctly determined that defendant failed to establish that *Brady* or *Giglio* material was improperly withheld from him.

3. Whether the district court committed plain error by failing, *sua sponte*, to convert defendant's

Rule 33 motions to motions pursuant to 28 U.S.C. § 2255.

4. Whether defendant has established that the government presented perjurious testimony before the grand jury warranting dismissal of the indictment pursuant to the exercise of this Court's supervisory power.

5. Whether defendant has established plain error in the district court's failure to grant, *sua sponte*, a new trial based upon defendant's claim, raised for the first time on appeal, that the government mischaracterized the trial evidence in its response to defendant's motion for a new trial.

6. Whether the district court abused its discretion in failing to grant defendant's request for the appointment of a forensic audio expert.

7. Whether defendant has established that he is an American Indian within the meaning of 8 U.S.C. § 1359 or presented newly discovered evidence in support of this claim.

STATEMENT OF THE CASE

Introduction

Defendant-Appellant Marcel Malachowski appeals from the denial of two new trial motions brought pursuant to Fed. R. Crim. P. 33 in the

District Court for the Northern District of New York. The district court, Hon. David N. Hurd, denied both motions as untimely, and on the ground that Malachowski failed to demonstrate that *Brady* or *Giglio* material had been withheld from Malachowski.

Procedural History

On January 14, 2009, a grand jury in the Northern District of New York returned a 6-count superseding indictment against Marcel Malachowski. Docket No. 19; A. 8; GA. 1-4.[1] Count 1 charged Malachowski with possession of machine guns, in violation of 18 U.S.C. § 922(o). Count 2 charged Malachowski with possessing firearm silencers, in violation of 26 U.S.C. §§ 5845(a) and 5861(d). Count 3 charged Malachowski with entering the United States on October 31, 2008, at a place other than one designated by immigration officers, in violation of 8 U.S.C. § 1325(a). Count 4 charged Malachowski with committing the same offense in Count 3 after having committed it on the date specified in Count 3, also in violation of 8 U.S.C. § 1325(a). Count 5 charged Malachowski with being an alien who reentered the country after having been removed (on October 31, 2008) without the necessary permission,

[1] References to "A" are to the appendix filed by Malachowski. References to "GA" are to the appendix the government seeks permission to file with this brief.

in violation of 8 U.S.C. § 1326(a). Count 6 charged Malachowski with being an illegal alien in possession of firearms, in violation of 18 U.S.C. § 922(g)(5)(A).

On April 27, 2009, Malachowski proceeded to trial before David N. Hurd, *J*. Docket No. 49; A. 11. On April 30, 2009, the jury returned a verdict of guilty on all six counts in the indictment. Docket No. 56; A. 11.

On December 18, 2009, Malachowski was sentenced, principally, to concurrent 78-month terms of imprisonment on Counts 1, 2 and 6 (the machine gun, silencer and firearm counts), a concurrent term of 6-months imprisonment on count 3 (the unlawful entry count), and concurrent 24-month terms of imprisonment on counts 4 and 5 (the second unlawful entry and reentry after removal counts), for a total term of imprisonment of 78 months. Docket Nos. 78, 79; A. 14. Judgment entered on December 24, 2009. Docket No. 79; A. 14.

Malachowski filed a timely notice of appeal on December 30, 2009. Docket No. 80; A 14. This Court affirmed Malachowski's judgment of conviction in a summary order. *United States v. Malachowski*, 415 F. App'x 307 (2d Cir. 2011).

On January 17, 2013, Malachowski, acting *pro se*, filed a new trial motion pursuant to Fed. R. Crim. P.

33. A. 131. The district court denied that motion the following day. A. 168.

Malachowski filed a timely notice of appeal from the January 18, 2013 denial of his Rule 33 motion. A. 170.[2] That appeal was docketed under Docket No. 13-443.

On June 27, 2013, Malachowski filed a second new trial motion pursuant to Fed. R. Crim. P. 33. A. 172. He filed related motions to compel discovery and to amend his new trial motion on August 19, 2013. A. 196, 200. The district court denied Malachowski's motions on January 15, 2014. A. 314.

Malachowski filed a timely notice of appeal from the January 15, 2014 denial of his motions on January 27, 2014. A. 318. That appeal has been docketed under No. 14-226, and consolidated with Docket No. 13-443.

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[2] Malachowski was incarcerated at the time he filed his notice of appeal. The envelope forwarding the notice of appeal to the district court reflects that it was mailed on February 1, 2013, within the fourteen-day time prescribed for the filing of a notice of appeal. A. 171. The notice of appeal was docketed on February 4, 2013. Docket No. 13-443; A. 170-71.

STATEMENT OF FACTS

At the time Malachowski was under investigation by the Bureau of Alcohol, Tobacco and Firearms (ATF) for the firearms offenses resulting in his arrest in November 2008, and continuing through the time of his trial in 2009, he was a subject of ongoing investigations concerning unrelated criminal conduct involving trafficking in cigarettes and marijuana. As a result, investigative reports were being generated, principally by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the Drug Enforcement Administration (DEA), pertaining to that unrelated criminal conduct. A. 238, n. 3.

Because the information contained within the reports relating to other criminal conduct had the potential to constitute discoverable *Brady* or *Giglio* material, the government provided those reports to the district court for an *in camera* review in order to determine whether they should be provided to Malachowski during his firearms trial. A. 60, 62. After conducting its own review of the materials that had been redacted or withheld from Malachowski, the district court determined that none of those reports contained information subject to disclosure. A. 66-67.

In March of 2010, as a result of one of the other investigations into other criminal conduct, a federal grand jury in the Northern District of New York returned a 64-count indictment against Malachowski

and others. In that indictment, Malachowski was charged with a conspiracy to distribute more than 1000 kilograms of marijuana, in violation of 21 U.S.C. § 846, and related charges. GA. 5-51.[3] As part of discovery with respect to this marijuana-related prosecution, Malachowski was provided with the previously redacted and/or withheld investigative reports that were not provided to him at the time of his firearms trial.

Believing that these reports, or parts thereof, had improperly been withheld from him, Malchowski moved in the district court on two occasions for a new trial on the firearms and related offenses. The district court denied these motions, finding that they were untimely, were based upon information that would not have resulted in acquittal, or otherwise did not establish that the government improperly withheld the documents that originally were redacted or not disclosed.

[3] Malachowski entered a plea of guilty to all counts of the indictment against him in the marijuana trafficking prosecution. He has appealed his conviction in that case to this Court under Docket No. 14-203. It is respectfully suggested that this matter and Malachowski's appeal in Docket No. 14-203 be heard in tandem.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying Malachowski's motions for a new trial pursuant to Fed. R. Crim. P. 33. Both of the motions were untimely, having been filed more than three years after the trial verdict of guilty was entered against him.

Malachowski has not established excusable neglect for his failure to file his new trial motions in a timely fashion or that the information would not have been discovered with due diligence. Although Malachowski attempts to establish excusable neglect by alleging that his attorney failed to file at least one new trial motion at Malachowski's request, he does not provide any evidence of why his attorney did not file the motions in a timely manner.

In any event, the district court did not abuse its discretion in denying Malachowski's new trial motions on their respective merits. Malachowski alleged that the government improperly withheld exculpatory and impeachment materials from him in violation of *Brady* and *Giglio*. However, the district court properly determined that the withheld evidence was not material because the withheld materials would not have resulted in an acquittal. Likewise, much of the information withheld from Malachowski already was known to him.

Malachowski's claims that the government elicited perjurious testimony in the grand jury and during his trial are without merit. Malachowski failed to establish the first element of such a claim, i.e. that any witness committed perjury.

Malachowski's claim, raised for the first time on appeal, that the government mischaracterized the trial evidence when it opposed Malachowski's new trial motion, is not a ground for granting a new trial. In any event, this claim was not raised below, and must be reviewed for plain error only. Malachowski has not demonstrated any error in the district court's failure, *sua sponte*, to grant Malachowski a new trial on this basis.

Malachowski has not established plain error warranting this Court's review of the district court's failure to convert, *sua sponte*, his new trial motions to motions pursuant to 28 U.S.C. § 2255. Malachowski provides no support for the notion that the district court was obligated to make this conversion without Malachowski's request, especially because Malachowski's claims properly were brought pursuant to Rule 33.

Malachowski has not established any abuse of discretion by the district court in its failure to grant Malachowski's request for the appointment of a forensic audio expert. Even crediting, for the purpose of argument, Malachowski's claims that

audio tapes received in evidence had been tampered with, Malachowski has not established excusable neglect for his failure to examine the recordings at the time of trial.

Malachowski has not established that he is entitled to the benefits of 8 U.S.C. § 1359, which protects the right of persons with "50 per centum of blood of the American Indian" to cross the border between the United States and Canada. The document that Malachowski relies upon to establish his right to rely on the provisions of § 1359 does not establish his per centum of American Indian blood.

Malachowski has not offered any evidence in support of his claim that the government delayed his prosecution (with 24 other defendants) on charges relating to his marijuana trafficking in order to gain a tactical advantage in his prosecution for the unlawful possession of firearms and related offenses.

ARGUMENT

POINT I: The District Court Did Not Abuse Its Discretion In Denying Malachowski's Rule 33 Motions For A New Trial.

A. Governing Law

1. Rule 33

Fed. R. Crim. P. 33 provides, in part,

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. . . .
>
> (b) Time to File.
>
> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. . . .

The defendant bears the burden of establishing his right to a new trial pursuant to Rule 33. *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009). A new trial motion premised upon a claim of newly discovered evidence is "not favored." *United States v. Persico*, 645 F.3d 85, 109 (2d Cir. 2011)

(quoting *United States v. Gilbert*, 668 F.2d 94, 96 (2d Cir. 1981)).

In order to prevail on a motion for a new trial based upon a claim of newly discovered evidence, the defendant must establish that:

> (1) the evidence be newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence would likely result in acquittal.

United States v. Owen, 500 F.3d 83, 88 (2d Cir. 2007). The defendant must demonstrate that "letting [the] guilty verdict stand would be a manifest injustice . . . [and] that an innocent person may have been convicted." *United States v. Canova*, 412 F.3d 331, 349 (2d Cir. 2005). To satisfy the due diligence requirement, the defendant must demonstrate that even with due diligence, the evidence in question could not have been discovered before or during trial. *United States v. Owen*, 500 F.3d at 87.

This Court has said that "even where newly discovered evidence indicates perjury, motions for new trials 'should be granted only with great caution and in the most extraordinary circumstances.'" *United States v. Stewart*, 433 F.3d 273, 296 (2d Cir.

2006) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1975)). The threshold inquiry in resolving a new trial motion alleging perjury "is whether the evidence demonstrates that the witness in fact committed perjury." *Stewart*, 433 F.3d at 297 (quoting *United States v. White*, 972 F.2d 16, 20 (2d Cir. 1992).

"If the prosecution knew or should have known of the perjury prior to the conclusion of the trial, the conviction must be set aside where there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Stewart*, 433 F.3d at 297 (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)). "On the other hand, if the prosecution was unaware of the perjury, a defendant can obtain a new trial only where the false testimony leads to a 'firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'" *Stewart*, 433 F.3d at 297 (quoting *Wallach*, 935 F.2d at 456)).

A new trial pursuant to Rule 33 is a proper vehicle to raise a claim that the government has failed to disclose materials required to be produced in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963) or *Giglio v. United States*, 405 U.S. 150 (1972). To establish a violation, the defendant "must show (1) that the evidence is 'favorable to the accused, either because it is exculpatory, or because it is impeaching;' (2) the 'evidence must have been

suppressed by the State, either willfully or inadvertently;' and (3) 'prejudice must have ensued.'" *United States v. Paulino*, 445 F.3d 211, 224 (2d Cir. 2006) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

Undisclosed exculpatory or impeachment information "is deemed material so as to justify a retrial only 'if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different.'" *United States v. Spinelli*, 551 F.3d 159, 164-65 (2d Cir. 2008) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995)). "A reasonable probability of a different result is shown when the government's failure to disclose 'undermines confidence in the outcome of the trial.'" *Spinelli*, 551 F.3d at 165 (quoting *Kyles v. Whitley*, 514 U.S. at 434, quoting *United States v. Bagley*, 473 U.S. 667, 668 (1985)).

> Impeaching information is more likely to be deemed material if the witness whose testimony is attacked supplied the only evidence linking the defendant to the crime. Impeaching information is less likely to be considered material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. That is, if the information withheld is merely cumulative of equally impeaching evidence introduced at

> trial, so that it would not have materially increased the jury's likelihood of discrediting the witness, it is not material.

United States v. Spinelli, 551 F.3d at 165 (citations, internal quotation marks and brackets omitted).

Brady only requires disclosure of information known solely to the government. This Court has long made this clear.

> *Brady* does not require the government to turn over exculpatory evidence "if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence." The rationale for our rule is that *Brady* is designed to "assure that the defendant will not be denied access to exculpatory evidence *only known to the Government*." Accordingly, the government had a duty to disclose only "information which had been known to the prosecution but unknown to the defense."

United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988) (citations omitted) (emphasis added by *Grossman*); *see also United States. v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) (finding no *Brady* violation when the defendant "had sufficient knowledge concerning [an informant about whom the government failed to fully disclose information] to

allow him to take advantage of any potentially exculpatory evidence pertaining to [his] role as a confidential informant"); *United States v. Esposito*, 834 F.2d 272, 275 (2d Cir. 1987) ("evidence is not suppressed and *Brady* is not applicable where the defendant either knew or should have known the essential facts permitting him to take advantage of the evidence in question").

As such, a defendant's own statements do not constitute *Brady* material. *See, e.g., Boyd v. Comm'r, Alabama Dep't. of Corrections*, 697 F.3d 1320, 1335 (11th Cir. 2012) ("As for the [defendant's first Brady claim] – that Boyd's own statement to police was suppressed – this is not *Brady* material. Boyd was obviously present during this questioning and thus aware of anything he may have said."); *Henness v. Bagley*, 644 F.3d 308, 325 (6th Cir. 2011) ("Henness already knew of his own contact with the police at the time of trial, so the prosecution's failure to provide this information was not a *Brady* violation."); *Pondexter v. Quarterman*, 537 F.3d 511, 526 (5th Cir. 2008) (finding that state court's denial of *Brady* claim not unreasonable when "[a]s noted, Pondexter asserts only that the State suppressed statements he allegedly made to Kendricks while incarcerated with him" because "if Pondexter made these statements to Kendricks, Pondexter, of course, was fully aware both of having done so and of Kendricks' ability to verify they had been made."); *United States v. Faris*, 388 F.3d 452, 462 (4th Cir. 2004) ("Because the

contents of the FBI 302 [documenting the defendant's statement to the FBI] were already known to Faris, the failure to disclose this report did not violate *Brady*.").

2. Rule 45

Fed. R. Crim. P. 45 provides, in part,

> (b) Extending Time.
>
> (1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:
>
> * * *
>
> (B) after the time expires if the party failed to act because of excusable neglect.

"The term 'excusable neglect' appears frequently in the United States Code and Federal Rules as a basis for motions to extend time limitations." *Silivanchi v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 n.6 (2d Cir. 2003) (citing, *inter alia*, Fed. R. Crim. P. 45(b)). And, as this Court noted in *Silivanchi*, the Supreme Court, in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), analyzed the term excusable neglect "as it is used in a variety of federal rules . . . ." *Silivanchi*, 333 F.3d at 366. As such, this

Court will apply the definition of excusable neglect provided for in the *Pioneer* decision "beyond the bankruptcy context where it arose." *Silivanchi*, 333 F. 3d at 366.

In construing the term excusable neglect in the bankruptcy context at issue in *Pioneer*, the Court said that "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." *Pioneer*, 507 U.S. at 388.[4]

Having determined that excusable neglect includes circumstances that were not necessarily beyond a party's control, the Court said it was in "substantial agreement with the factors identified by

[4] When the Court later noted that "although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) [of the Federal Rules of Civil Procedure] is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant," it noted that this construction was consistent with the interpretation the Courts of Appeals generally applied to Fed. R. Crim. P. 45(b). *Pioneer*, 507 U.S. at 392 and n.9.

the Court of Appeals," including "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer*, 507 U.S at 395. The Court expressly rejected the lower court's determination that "it would be inappropriate to penalize [movants] for the omissions of their attorney." *Pioneer*, 507 U.S. at 396. Accordingly, in determining whether a party has established excusable neglect for its failure to comply with a filing deadline, "the proper focus is upon whether the neglect of [the movants] *and their counsel* was excusable." *Pioneer*, 507 U.S. at 397 (emphasis in original).

B. Standard of Review

> [This Court] review[s] the district court's decision to grant [or deny] a new trial for abuse of discretion. A district court abuses or exceeds the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision - though not necessarily the product of a legal error or a clearly erroneous factual finding - cannot be located within the range of permissible decisions.

United States v. Owen, 500 F.3d at 87 (citations and internal quotation marks omitted). The district court's "ruling is deferred to on appeal because, having presided over the trial, it is in a better position to decide what effect the newly discovered materials might have had on the jury." *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995).

Similarly, this Court reviews for abuse of discretion a district court's determination whether a party has established excusable neglect. *E.g., In re Johns Manville Corp. v. Travelers Indemnity Co.*, 476 F.3d 118, 124 (2d Cir. 2007) (reviewing district court determination whether party established excusable neglect for failing to file timely notice of appeal pursuant to Fed. R. App. P. 4(b)(5)).

C. Discussion

1. The District Court Did Not Abuse Its Discretion in Finding That Malachowski's New Trial Motions Were Untimely.

The guilty verdict against Malachowski was rendered on May 4, 2009. Docket No. 56; A 11. Malachowski's second and third new trial motions that are the subject of this appeal were made more than three years later, on January 17, 2013, and June 27, 2013, respectively. Docket Nos. 101, 110; A 21, 22. As such, they were untimely in accordance with the provisions of Fed. R. Crim. P. 33(b)(1) ("Any

motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty").

Malachowski argues here that the untimeliness of his motions was the result of excusable neglect because his trial attorney failed to file at least one such motion as Malachowski had requested. Br. at 54-57. And, Malachowski argues that in the event this Court does not find error in the district court's failure to convert his motion, *sua sponte*, to a proceeding pursuant to 28 U.S.C. § 2255, an issue discussed *infra*, the matter should be remanded to the district court for consideration of his excusable neglect claim. For the following reasons, Malachowski's claim should be rejected.

As discussed above, Malachowski cannot establish excusable neglect simply by claiming that his attorney failed to file a timely Rule 33 motion on his behalf. The neglect of Malachowski's attorney in failing to file the motion is as much a reason to deny it as would be Malachowski's own neglect. *Pioneer*, 507 U.S. at 397. And, Malachowski has offered no explanation for counsel's alleged failure to file the motion in a timely fashion.

Malachowski is correct in arguing that the Supreme Court, in *Pioneer*, found that an attorney's failure to file a timely proof of claim in a bankruptcy proceeding constituted excusable neglect. Br. 56.

The circumstances in *Pioneer*, however, are easily distinguished from the absence of any explanation here for Malachowski's attorney to have filed a timely Rule 33 motion. In *Pioneer*, the attorney's failure to file a timely notice of claim was the result of a "dramatic ambiguity" in the way counsel received notification of the date on which such notice was required to be filed. *Pioneer*, 507 U.S. at 398 ("we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, 'excusable'").

Here, Malachowski has not offered any explanation for his counsel's failure to file a timely new trial motion. As such, he has not met his burden of demonstrating that the district court abused its discretion in not finding excusable neglect.

2. The District Court Did Not Err In Denying Malachowski's New Trial Motions on Their Merits.

a. The District Court Applied the Correct Standard In Determining that the Information Malachowski Claims Was Improperly Withheld from Him Was Not Material.

When the district court denied Malachowski's January 17 new trial motion, it determined that the information withheld from Malachowski "is not

likely to lead to an acquittal." A. 168. When the court denied Malachowski's June 27 new trial motion, it determined, *inter alia*, that the withheld information "is not likely to have caused a different verdict." A. 316. Relying on this Court's decision in *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) (*en banc*), Malachowski now argues that the district court employed the wrong standard. This claim should be rejected.

As discussed above, undisclosed exculpatory or impeachment information "is deemed material so as to justify a retrial only 'if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different.'" *United States v. Spinelli*, 551 F.3d 159, 164-65 (2d Cir. 2008) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995)). "A reasonable probability of a different result is shown when the government's failure to disclose 'undermines confidence in the outcome of the trial.'" *Spinelli*, 551 F.3d at 165 (quoting *Kyles v. Whitley*, 514 U.S. at 434, quoting *United States v. Bagley*, 473 U.S. 667, 668 (1985)). In other words, for undisclosed information to be deemed material, it must be of such a nature that if it had been disclosed, there is a "reasonable probability" that there would have been a verdict of not guilty. *Poventud*, upon which Malachowski relies, is not to the contrary.

The question of whether exculpatory information is material within the meaning of *Brady*, was not at issue in *Poventud*. Rather, the issue before the *Poventud* court was

> whether the rule of *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), which prohibits a criminal defendant from obtaining damages for wrongful prosecution, conviction or imprisonment until and unless the conviction he complains of has been overturned, prevents the plaintiff Marcos Poventud from suing the defendants for, as he alleges, obtaining a conviction against him that led to his incarceration for almost nine years by deliberately suppressing evidence that cast doubt on the critical identification testimony of the victim.

Poventud, 750 F.3d at 138-39 (Lynch, *C.J.* concurring) (parallel citation and footnote omitted).

In any event, materiality requires a reasonable probability that the result of the proceeding would be different, i.e., there would have been an acquittal rather than a conviction. Likewise, the failure to provide the alleged *Brady* information must undermine confidence in the outcome of the trial, i.e, undermine confidence in the trial verdict. When this Court noted that the "question is not whether the defendant would *more likely than not* have received a

different verdict with the evidence," *Poventud*, 750 F.3d at 133 (emphasis added) (citation omitted), the Court was acknowledging there is no requirement that the defendant establish by a *preponderance of evidence* that the result would have been different.

Here, the district court applied the correct standard of materiality when it determined that the information Malachowski claimed was improperly withheld from him was not "likely" to have resulted in acquittal. A. 168, 316.[5]

b. Malachowski Has Not Established that *Brady* or *Giglio* Material Was Withheld From Him Warranting a New Trial.

Malachowski claims that statements made by Hank Cook, a government trial witness, to an ATF Special Agent prior to trial were inconsistent with Cook's trial testimony and should have been disclosed. Br. 43-44. The agent's report summarizes statements by Cook relating to an incident in which Malachowski asked Cook to obtain a firearm for him. A. 415. According to the report, Cook "did not know where the gun was coming from or from whom he . .

[5] Moreover, in denying Malachowski's final Rule 33 motion, the district court said that Malachowski "fails to identify any new evidence . . . *that could have possibly changed the verdict*." (emphasis added). A. 317.

. was supposed to receive delivery. [Cook] was not interested and avoided Malachowski." A 415.

By contrast, at trial, Cook testified that he successfully made an attempt to locate a gun for Malachowski. GA. 65. Cook also testified that his brother-in-law was bringing the gun across the Canadian border [from the United States]. GA. 66. Cook's trial testimony was consistent with recordings of his phone calls with Malachowski obtained as a result of a Canadian wiretap. GA. 67.

Although Cook's trial testimony might have been subject to impeachment with his earlier more limited comments to the ATF agent, in light of the impeachment of Cook's testimony that did occur at Malachowski's trial, GA. 69-145, the potential additional impeachment that might have resulted from establishing that Cook did not provide complete information when he was interviewed earlier does not amount to a constitutional deprivation warranting a new trial.

Malachowski also claims that he should have been provided a report that reflects that Hank Cook had been involved in an attempt to inculpate Malachowski in connection with Malachowski's marijuana smuggling operation. Br. 45-47. The report in question details how Malachowski invited Cook to invest in Malachowski's drug smuggling operation. A. 374. Cook responded that he needed to

see the operation, based in California, before making an investment. A. 374-75. According to Cook, Malachowski wanted to rent a jet to fly him and Cook to California for Cook to observe the "operation." A. 375.

The report reflects also that Cook, at law enforcement's direction, told Malachowski that he could provide such transportation. Cook later reported that Malachowski provided Cook with $13,500.00 towards the cost of the transportation. A. 375. The report does not reflect whether the two traveled to California as had been discussed.

Malachowski now claims that this report should have been provided to him because it supports his claim that he was entrapped by the government through Cook.[6] The report does not, however, support Malachowski's claim of entrapment.

First of all, any effort by Cook that is reflected in this report does not speak to Malachowski's predisposition to engage in firearms trafficking. It relates solely to Malachowski's involvement in the marijuana trade.

Secondly, according to the report, it was Malachowski who initiated the conversation

[6] Malachowski reiterates this claim in his supplemental brief. S.B. 18-20.

regarding Cook investing in Malachowski's smuggling operation. As such, even if the subject matter being discussed was related to firearms, the report undercuts, rather than supports, Malachowski's entrapment claim. For these reasons, Malachowski has not established that the information in this report would have undermined confidence in the verdict against him in the firearms trial.

Malachowski claims that he should have been provided reports relating to Hank Cook's "million-dollar" motive to inculpate Malachowski. Br. 47-50. The reports in question, A. 383-86, 428-30, detail Malachowski's involvement with Cook and others, including Patrick Johnson,[7] in MHP, a cigarette manufacturing business. According to Malachowski, Cook stood to gain substantial funds invested by Malachowski in that business if Malachowski was convicted and sentenced to a term of imprisonment, providing an incentive for Cook to cooperate against Malachowski that should have been disclosed.

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[77] In his *pro se* supplemental brief, Malachowski claims that Patrick Johnson's cooperation should have been made known to him prior to his firearms trial. S.B. 9-11. However, although Patrick Johnson provided information to law enforcement about the cigarette business he had, and with which Malachowski was involved, there is no indication that Johnson was involved in the investigation into Malachowski's gun trafficking.

The failure to provide these reports to Malachowski cannot constitute a *Brady* or *Giglio* violation, since Malachowski was aware of the circumstances reflected in those reports. Malachowski learned, before trial, that Cook was cooperating against him. And, he necessarily knew the extent of his financial interest in MHP. Because this information was fully known to Malachowski, the government's failure to provide him with these reports was not improper.

Likewise, in his *pro se* supplemental brief, Malachowski claims that he should have been provided with reports detailing statements by Owen Peters. S.B. 11-13. This claim is without merit. Owen Peters did not cooperate in the investigation of Malachowski. In fact, it was Peters who drove Malachowski to the meeting with undercover Special Agent Angel Casanova. It was not until after that meeting that Peters was interviewed by law enforcement officials and provided information about Malachowski's marijuana trafficking. That information was not relevant to Malachowski's gun trafficking prosecution, and was disclosed prior to Malachowski's marijuana trafficking guilty plea.

To the extent Malachowski complains in his *pro se* supplemental brief, S.B. 11-13, that the government misled him into believing that Peters would be called as a government witness, this claim

is without merit as well. As the government explained below, Malachowski knew well in advance of trial that Peters was not on the government's witness list. A. 253-54.

In his supplemental *pro se* brief, Malachowski appears to claim that certain unspecified undisclosed reports require the trial evidence to be viewed "under new light." S.B. 16. In large measure, Malachowski discusses his statements to the undercover agent, Angel Casanova, as demonstrating his lack of intent to commit the firearms offenses of which he was convicted. S.B. 17. Malachowski does not mention that juxtaposed to the statements he now claims demonstrate his lack of intent, is his statement to Agent Casanova "I'll give it to you, pay you, and that's it." A. 120. Needless to say, Malachowski has not demonstrated any abuse by the district court in denying his new trial motion based upon this rehash of the evidence.

Also, in his supplemental brief, Malachowski complains that he learned of the use of a GPS device based upon previously withheld reports. S.B. 18. Malachowski's reference is likely to the use of a GPS device by a different confidential informant, in the informant's car, when meeting with an individual unrelated to Malachowski's firearms offense. A. 394.

In his supplemental *pro se* brief, Malachowski claims that there are one or more recorded conversations establishing that he did not have money in Albany to pay for the firearms that he was convicted of possessing. S.B. 20-23. These conversations are said to have occurred on the day of his arrest between two of Malachowski's marijuana coconspirators. Malachowski has not identified the specific conversation or conversations he is relying upon.

In any event, Malachowski told Agent Casanova that the money for the guns was in Albany. Whether he did so truthfully or because of some ruse, is of no moment. The government was entitled to rely on Malachowski's representation that the money was in Albany. And, Malachowski was aware of the identities of his marijuana coconspirators who he now claims could have established that the money was not available as Malachowski had stated.

POINT II: The District Court Did Not Commit Plain Error By Failing, Sua Sponte, To Convert Defendant's Rule 33 Motions To Motions Pursuant To 28 U.S.C. § 2255.

A. Governing Law

In *United States v. Adams*, 155 F.3d 582 (2d Cir. 1998), this Court determined that there are circumstances under which it would be improper for

a district court to convert a movant's claim for relief to a motion pursuant to 28 U.S.C. § 2255. The Court said that

> [a]t least until it is decided whether such a conversion or recharacterization can affect the movant's right to bring a future habeas petition, district courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized.

Adams, 155 F.3d at 584. This Court's view later was adopted by the Supreme Court in *Castro v. United States*, 540 U.S. 375, 383 (2003).

B. Standard of Review

Under the plain error standard of review, the Court may, in its discretion, correct an error not raised below only when the defendant has shown that

> (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected [his] substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

United States v. Marcus, 560 U.S. 258, 262 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

C. Discussion

Malachowski claims that in the event it is determined that his Rule 33 motions were untimely, the district court erred in failing, *sua sponte*, to convert those motions to motions pursuant to 28 U.S.C. § 2255. Br. 52-53. Malachowski has not cited, nor is the government aware of, any case from this Court imposing an obligation on the district court to effect such a conversion. To the contrary, as discussed above, the Court only has directed that in the event such a conversion is contemplated by the district court, the movant must be alerted to the consequences that will follow.

Moreover, here, the claims raised by Malachowski were properly included in his new trial motions. And, in addition to the district court's determination that the motions were untimely, the district court

determined that the motions should be denied on their merits. Under these circumstances, it cannot be said that there was error, let alone plain error, in the district court's failure, *sua sponte*, to make the conversion that Malachowski now asks for for the first time on appeal.

POINT III: Malachowski Has Not Established that the Government Presented Perjurious Testimony Before the Grand Jury Warranting Dismissal of the Indictment Pursuant to the Exercise of this Court's Supervisory Power.

A. Governing Law

> [T]he supervisory power [of the federal courts] can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions[.]

United States v. Williams, 504 U.S. 36, 46 (1992) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in judgment)) (internal quotation marks and footnote omitted). Subornation of perjury is a matter that could be

remedied through an exercise of the courts' supervisory power. *Williams*, 504 U.S. at 46 n.6.

B. Discussion

Malachowski complains that during the grand jury testimony of ATF Special Agent Kopf, the government and Agent Kopf "repeatedly improperly characterize[d] the alleged facts as constituting possession." Br. 62. A. 27-47, 48-58. Malachowski's suggestion that this constituted perjury, or some other form of misconduct, should be summarily rejected in light of this Court's decision affirming Malachowski's conviction on direct appeal, and rejecting Malachowski's claim that the evidence of possession was insufficient. *United States v. Malachowski*, 415 F. App'x 307, 310-11 (2d Cir. 2011) ("Here, the evidence viewed in the light most favorable to the government established that Malachowski actually held at least seven of the weapons—including one machine gun and one silencer—in his hand in the context of negotiating a purchase of the weapons. Our law makes clear that this fact alone was sufficient to allow a jury to find actual possession, however briefly it occurred.") (internal quotation marks, brackets and citations omitted).

Likewise, although Malachowski claims that Agent Kopf was untruthful when she stated that Malachowski "repeatedly" asked the confidential informant to obtain guns for him, he has not

established that this testimony was, in fact, false. Br. 62. A. 31. At trial, Hank Cook testified that Malachowski had more than one conversation with Cook about guns. GA-61-62. Cook testified that the first of these conversations occurred in 2003, when Malachowski asked him if he could "get some guns." GA-62. Cook said that Malachowski told him at that time that Malachowski could sell or "move" some guns. GA-63-64.

Likewise, as discussed above, in 2005, Malachowski asked Cook if he could obtain a single gun.[8] GA-64. Cook testified that in November 2007, Malachowski again asked Cook if he could obtain guns. GA-68. Cook said that Malachowski asked him to order 100 guns. GA-128.

In light of Cook's trial testimony, there is no basis upon which to say that Agent Kopf provided false testimony in the grand jury.

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[8] In his *pro se* supplemental brief, Malachowski complains that the Canadian wiretap recordings of this 2005 event should not have been admitted in evidence and that he had insufficient time at trial to challenge this evidence. This evidence was admitted to show Malachowski's predisposition, and he could have requested more time, if necessary to challenge the evidence at trial. These claims do not demonstrate any abuse of discretion by the district court in denying Malachowski's Rule 33 motions.

Malachowski alleges that Agent Kopf testified in the grand jury "that there was a recording in which Malachowski claimed he was going to sell the firearms that he bought from [Agent] Casanova to his 'Chinks in Montreal.'" Br. 63. According to Malachowski, this testimony must have been false, since no such recording ever was produced in discovery.

In fact, however, Agent Kopf did not testify that this statement by Malachowski was recorded. A. 44. It does appear, however, that Agent Kopf misspoke in light of the question asked of her in the grand jury. She was asked whether Malachowski ever told the "undercover" to whom the guns already had been sold. A. 44. And, Agent Kopf responded that he did, and the guns were already sold to the "Chinks." A. 44.

Agent Kopf's report, however, indicates that Malachowski made this statement to the confidential informant, not to the undercover agent. A. 434. ("On November 10, 2008, [the confidential informant] reported the following information after meeting with Malachowski. Malachowski was going to sell the firearms he ordered from [the undercover agent] to 'my Chinks' in Montreal, Canada"). Other information in Agent Kopf's report lends support for this allegation. A. 434. ("On November 13, 2008, RCMP Corporal Rejean Richard confirmed to SA

Kopf that an Asian criminal organization (his "chinks") based in Montreal Canada supplies Malachowski with marijuana").

There is, therefore, no basis upon which to conclude that Agent Kopf provided perjurious testimony in the grand jury. At worst, there is a basis upon which to conclude that she either misinterpreted the question asked of her, or she misstated the individual to whom Malachowski made the challenged statement. In any case, Agent Kopf's reports make clear that she was advised that Malachowski had made the statement.[9]

[9] In his *pro se* supplemental brief, Malachowski alleges that because Agent Kopf testified in the grand jury that Malachowski directed the driver to follow undercover Agent Casanova to the storage facility, this information must have been obtained from listening to the recording, which Malachowski claims was tampered with. S.B. 15-16. This claim is without merit, since Agent Kopf's statement during her testimony is not attributed to any such recording. Indeed, her own observations, or statements by others involved in the transaction easily could have provided the basis for this testimony.

POINT IV: Malachowski Has Not Established Plain Error In the District Court's Failure, *Sua Sponte*, to Grant A New Trial Based Upon the Government's Response to Malachowski's Motion for a New Trial.

Discussion

In his brief before this Court, Malachowski, for the first time, alleges that "[i]n 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." Br. 64. Malachowski then marshals the evidence to demonstrate his contention that this characterization of the evidence is ill-founded. Br. 64-66.

Malachowski's claim is without merit, and provides no basis for the grant of a new trial motion.

Malachowski claims that Cook's testimony that Malachowski always was first to raise the issue of guns is belied by the recordings received in evidence. Br. 64. Malachowski takes too restrictive a view of Cook's testimony. That testimony reasonably can be understood to mean that Cook's agreement to find a gun or guns for Malachowski always followed a request by Malachowski for Cook to obtain guns.

How Cook went about making the arrangements to meet Malachowski's request is, in relevant measure, beside the point.

POINT V: The District Court Did Not Abuse Its Discretion in Denying Malachowski's Request for the Appointment of a Forensic Audio Expert.

A. Governing Law

Acting *pro se*, Malachowski sought, and was denied, the appointment of a forensic expert to examine two audio recordings. In the analogous circumstance where appointed counsel seeks the appointment of an expert pursuant to the Criminal Justice Act of 1964, the court may appoint such expert if such services are necessary for adequate representation. *United States v. Sanchez*, 912 F.2d 18, 21 (2d Cir. 1990). Ordinarily,

> [i]n deciding whether to authorize investigative services, most courts rely on the judgment of the defense attorney if he makes a reasonable request in circumstances in which he would independently engage such services if his client was able to pay for them. Although the legislative history of § 3006A supports a liberal attitude toward these indigent requests, a judge is still obligated to exercise her discretion in determining whether such

> services are necessary. Thus, while a trial court need not authorize an expenditure under § 3006A(e) for a mere fishing expedition, it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge. Furthermore, the need for investigative services is heightened when the request relates to pivotal evidence . . . .

Sanchez, 912 F.2d at 21-22 (citations, brackets and internal quotation marks omitted).

B. Standard of Review

In the analogous situation of a district court's determination whether to expend funds pursuant to the Criminal Justice Act of 1964, this Court reviews such determinations for an abuse of discretion. *United States v. Bryser*, 95 F.3d 182, 185 (2d Cir. 1996).

C. Discussion

Malachowski makes two claims concerning audio recordings made in the course of the investigation leading to his arrest and indictment. Br. 67-72. First, he claims that he made exculpatory statements while traveling with Hank Cook on the day of his arrest, and that Hank Cook was wearing a "body wire" at the time. According to Malachowski, these

statements were not disclosed to him, presumably implying that they were not present on the recording made that day. Br. 68-69. Malachowski continues that he later learned the ATF case agent explained the absence of these statements by concluding the recording device had reached its capacity. *Id*.

Malchowski also alleges that the recording made on a body wire worn by the undercover agent on the day of Malachowksi's arrest does not include a statement made by the undercover agent, which omission suggests that the government tampered with this recording. Br. 69-72. Malachowski asserts that this statement was included on a prior copy of the recording provided to trial counsel, which Malachowski claims exists but which cannot be located, but is not included on later copies.[10]

Based upon these alleged irregularities, Malachowski claims that the district court erred in failing to provide him with a forensic expert to examine the recordings. This claim is without merit.

Malachowski does not dispute that he was provided these recordings prior to the time of his trial in 2009. He has offered no explanation for not

[10] Presently pending before this Court is Malachowski's motion to compel his trial attorney to permit a forensic examination of his computer in an attempt to locate the allegedly missing statement.

having sought a forensic examination of these recordings at that time.

To the extent that Malachowski complains that exculpatory statements were not included on Cook's body wire on the day of his arrest, Malachowski necessarily knew this when he reviewed the body wire recording at the time of his trial. Malachowski was with Cook while the recording was made during their trip from Canada to the United States on the day of Malachowski's arrest. Malachowski alleges no basis for a finding of having exercised due diligence to ascertain the cause of this omission.

To excuse his failure to investigate this alleged irregularity, Malachowski claims that it was not until June 2013 when he learned that the ATF case agent explained that the recording device had reached its capacity. But, this claim misses the point. Whatever the reason is (or was) for the absence of these statements being included on the recording, Malachowski was aware when he received the recording that it was, according to him, incomplete. Having failed to demonstrate excusable neglect for failing to raise this issue earlier, or due diligence notwithstanding that failure, there is no abuse of discretion in the district court's denial of Malachowski's request for the appointment, at this time, of a forensic expert.

Likewise, Malachowski has not demonstrated any basis for his failure to raise his claim of evidence tampering with respect to the body wire worn by the undercover agent. Agent Casanova was asked at the time of trial about the statement he is said to have made regarding how to "attach" the guns to Malachwoski. A 70-73. As such, Malachowski's attorney knew to ask this question because he somehow was made aware of the statement. Accepting Malachowski's assertion, for purposes of argument, that this statement was on the recording made by Agent Casanova, his attorney had it, and utilized it at the time of trial. Even assuming, therefore, that later versions of the recording did not include this statement, Malachowski cannot claim that the omission somehow deprived him of a fair trial.[11]

In any event, as with the Hank Cook body wire, Malachowski has not demonstrated any effort, let alone due diligence, in his failure to seek the services of a forensic examiner before, during or near the time of trial. The district court was right to deny Malachowski's belated request.

[11] The government does not concede that this statement ever was recorded as Malachowski asserts.

POINT VI: Malachowski Has Not Established That He Is An American Indian Within the Meaning of 8 U.S.C. § 1359 Or Presented Newly Discovered Evidence In Support of this Claim.

A. Governing Law

Title 8, United States Code, Section 1359, provides:

> Nothing in this subchapter [subchapter II] 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.

The scope of this statutory provision was examined in *United States v. Curnew*, 788 F.2d 1335 (8th Cir. 1986). There, the defendant was charged with being an alien who illegally reentered the country without first obtaining the approval of the Attorney General, after having been previously deported, in violation of 8 U.S.C. § 1326. *Id.* at 1337.

Before trial, Curnew proffered the expert testimony of a cultural anthropologist in an effort to establish his defense, which was premised upon § 1359. Following a pretrial hearing to determine the

admissibility of the expert's opinion, the district court ruled that the expert would be permitted to opine that Curnew "did possess some amount of Indian blood," but would not be permitted to testify that Curnew "possessed 50 per centum or more American Indian blood," since that opinion "would be entirely uncertain and speculative." *Id*. at 1337.

Following the district court's ruling with respect to the admissibility of the expert's opinion, Curnew entered a conditional plea of guilty. In his subsequent appeal, notwithstanding the plain language of § 1359, Curnew challenged the district court's determination that the statute actually required him to show 50 per centum American Indian blood. *Id*. at 1337-1338.

The Court of Appeals, in a 2 to 1 decision, affirmed Curnew's conviction. *Id*. at 1339. In so doing, the court concluded that "only those individuals who possess at least 50 per centum American Indian blood will be protected from prosecution under 8 U.S.C. § 1326. Whether in addition the individual identifies himself as or is viewed as an Indian by others is not determinative." *Id*. at 1338. As a result, in order

> to establish a defense under section 1359, an individual must present some combination of evidence from which the finder of fact can reasonably conclude that the individual in fact

> possesses 50 per centum or more American Indian blood. Proof only that an individual possess some unidentifiable degree of Indian blood without more will be insufficient.

Id.

B. Discussion

Malachowski alleges that he was wrongly convicted of the immigration offenses and the unlawful possession of firearms by an illegal alien offense in the indictment because he is entitled to the protection provided for in § 1359.[12] This claim is without merit.

During Malachowski's trial, he never presented evidence that he possessed 50 per centum American Indian blood, and never requested a jury instruction regarding the affirmative defense set forth in § 1359. Moreover, Border Patrol agent Witkop testified that during his interaction with Malachowski following Malachowski's arrest on October 31, 2008, for unlawful entry into the United States, Malachowski claimed to be a Canadian citizen with no legal status in the United States. GA. 52, 53-55.

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[12] Malachowski reiterates his claim to American Indian status in his supplemental *pro se* brief as well. S.B. 25-26.

Similarly, ATF Special Agent Kopf testified that Malachowski claimed to be a Canadian citizen. GA 56-57. She likewise testified that her investigation never disclosed that Malachowski was an American Indian. GA. 58-59, 60.

Immigration Officer Denise Land testified that she had reviewed Malachowski's immigration file and determined there was no indication that Malachowski had ever claimed status as an American Indian. GA. 146-47.

Although Malachowski may view himself as an American Indian, this record is not sufficient to establish that Malachowki falls within the purview of § 1359. That defense is premised only on evidence that a defendant possesses at least 50 per centum American Indian blood. Here, the record remains devoid of any reference to Malachowski satisfying this requirement.[13]

[13] Malachowski now adds that during his marijuana trafficking prosecution, United States District Judge Thomas J. McAvoy said that he had "no doubt that [Malachowski is] a Native American or Indian . . . ." Br. 75; A. 305. Again, Judge McAvoy made no determination that Malachowski possesses 50 per centum American Indian blood, as the statute requires. And, Malachowski fails to mention that Judge McAvoy said he could not make a

After the government rested, but outside the presence of the jury, Malachowski offered in evidence an October 21, 2008 letter from "Indian and Northern Affairs Canada" to Malachowski confirming that Malachowski had been registered "as an Indian and as a member of the Kamloops Band, in accordance with" Canadian law. This is the same document that Malachowski relies upon here in renewing his claim that he was entitled to the protections of 8 U.S.C. § 1359. A. 68-69.

Malachowski's reliance is misplaced. The letter only advises Malachowski how to obtain his "Certificate of Indian Status." A. 68-69. Such a certificate, let alone correspondence referencing such a certificate, is not evidence of the per centum of American Indian blood Malachowski possessed. "Since the Canadian Government's Certificate of Indian Status (Form IA-1395) is based on the Indian Act which does not require a certain quantum of Indian blood for registered Indian status, immigration inspectors may not accept Form IA-1395, without other evidence of at least 50 percent Indian blood, as valid for purposes of admitting a Canadian-born American Indian into the United States under 8 U.S.C. § 1359." *Legal Opinion: Validity of Canadian Certificate of Indian Status (Form IA-*

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finding whether Malachowski "can be deported." A. 305.

1395) for Admission of "American Indians born in Canada" under 8 U.S.C. Sec. 1359, Genco. Op. 93-65, 1993 WL 1504012 (INS).

Malachowski has not offered any newly discovered evidence in support of his claim that he is entitled to the protections of 8 U.S.C. § 1359. As such, his claim based upon such entitlement should be rejected.[14]

[14] Malachowski ends his supplemental brief with a claim that the government initially delayed his prosecution on the marijuana trafficking charge in order to gain a tactical advantage by delaying exculpatory information relating to his firearms prosecution. S.B. 26-27. He has not offered any evidence in support of this claim, and it is devoid of merit.

CONCLUSION

The district court's denial of Malachowski's Rule 33 new trial motions should be affirmed in all respects.

Dated: Albany, New York
January 15, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellant Procedure, the undersigned counsel for the United States hereby certifies that this brief complies with the type volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are approximately 9,804 words in the brief.

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