CASE NO. 12-3114

IN THE UNITED STATES COURT Of APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

-vs-

VERA DEMJANJUK, as Executrix of the
ESTATE OF JOHN DEMJANJUK, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Rules

Miscellaneous

ARGUMENT IN REPLY

Vera Demjanjuk, as Executrix of the Estate of John Demjanjuk and as the substituted party as appellant in light of the recent death of Mr. Demjanjuk, submits this reply brief to respond to the government's opposition to this appeal and in further support of the request to vacate the lower court's order. Mrs. Demjanjuk reiterates the request for oral argument.

1. The court below and the government wrongly discredit the FBI's work, which resulted in exculpatory and material documents.

This appeal deals in part with a most remarkable contention. Once the government is satisfied it has focused this Court's attention on only two withheld FBI-authored documents (Govt. Opp. Br. at 24-25), it proceeds to characterize them as something more akin to the work of the Keystone Kops rather than our country's leading law enforcement agency.

In the government's view, these two FBI documents are "so lacking in foundation that the memos were not favorable in any meaningful sense of the word." (Govt. Opp. Br. at 48 n.9.) They are of "utter implausibility" (*id*., at 63) containing "groundless and erroneously premised speculation" (*id*., at 65-66). They are so devoid of materiality, according to the government, that they give license to announce new law: the exculpatory ***and*** material elements of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), are indistinguishable and should be merged into an inquiry about

materiality only. (Govt. Opp. Br. at 48 n.9.) *But see Caldwell v. Bell*, 9 Fed. Appx. 472, 481 (6th Cir. 2001) ("in order to fall within the scope of the *Brady* rule, the evidence must be both exculpatory and material") (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The district court was similarly uncharitable. It first described the FBI's work as containing "nothing more than the conjecture of an FBI agent, unsupported by investigation, that would have made no difference in refuting or undermining the Government's overwhelming evidence at the 2001 denaturalization trial." *United States v. Demjanjuk*, No. 1:99CV1193, 2011 WL 6371801, at *1-2 (Dec. 20, 2011). The court below then found that the two documents "contain the speculation of an FBI agent in 1985, premised upon erroneous assumptions and mistaken beliefs, and made without any investigation whatsoever." *Id.* at *11. The district court never did explain why the submitted materials were not exculpatory.

Fact is, these documents question the authenticity of the Trawniki card — what the government's own witness previously acknowledged to be key. They were requested by the FBI Director himself. (Aff. of Thomas Martin, ¶ 10, pp. 4-5, R. 229-1.) They were not authored by a low-level rookie agent but by the Supervisory Special Agent in charge of the Foreign Counterintelligence and Domestic and Foreign Counterterrorism squad and the Special Agent in Charge of the FBI Cleveland office who worked just a few blocks away from the courthouse where Mr. Demjanjuk was

stripped of his citizenship. (*Id*., ¶ 1, pp. 1-2.) The documents were classified as "secret," and addressed to the FBI Director himself. Perhaps most importantly, these two documents do not stand alone, but are a part of hundreds of files potentially at issue. (*See* Appellant Br. at 11-12.) Ever since this Rule 60 litigation began last summer, the government has produced hundreds of pages of relevant, responsive documents that would have merited investigation by the defense had they been produced years earlier.

More remarkable still, the district court's opinion and now the government's brief are finalized and filed without even one question having been directed to the author of these two documents or any other documents for that matter, without any opportunity for cross-examination, without any examination of statements to the contrary SAC Martin and his fellow DOJ employees made in other documents, without any inquiry whatsoever by the defense. Such blind, unquestioned faith in one man's affidavit alone creates a probability "sufficient to undermine confidence in the outcome." *United States v. Bagley*, *supra*, 473 U.S. at 682; *Montgomery v. Bobby*, 654 F.3d 668, 679 (6th Cir. 2011).

The two documents on which the government focuses and the many others recently declassified, uncovered at NARA's facility in College Park, Maryland, or turned over just last year by the government are both exculpatory and material. They bring into question the entire denaturalization proceeding, and at a minimum would

have provided a basis for new avenues of impeaching the government's witnesses that were otherwise unknown and unavailable because they were based on then classified information. The court below and the government forgot that the materiality standard is not a heavy one, and the hurdle it presents is not a high one. *See United States v. Safavian*, 233 F.R.D. 12, 15-16 (D.D.C. 2005) (citing and quoting *United States v. Lloyd* 992 F.2d 348, 351 (D.C. Cir. 1993); *United States v. George*, 786 F. Supp. 11, 13 (D.D.C. 1991)).

> Under *Brady*, the prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf, including the police, *Kyles v. Whitley*, 514 U.S. 419, 437 . . . (1995), and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government "closely aligned with the prosecution." *United States v. Brooks*, 966 F.2d [1500] at 1503 [D.C. Cir. 1992] ("affirmative duty of inquiry"). *See United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("[i]nformation possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case" for *Brady* purposes); *United States v. Jennings*, 960 F.2d [1488] at 1490 [9th Cir. 1992] ("[t]his personal responsibility cannot be evaded by claiming lack of control over the files . . . of other executive branch agencies").

Safavian, *supra*, 233 F.R.D. at 17. OSI, of course, knew all of this already, because this Court underscored this same law.

> Because the OSI attorneys consistently followed an unjustifiedly narrow view of the scope of their duty to

> disclose, and compartmentalized their information in a way that resulted in no investigation of apparently contradictory evidence, Demjanjuk and the court were deprived of information and materials that were critical to building the defense.

Demjanjuk v. Petrovsky, 10 F.3d at 342. "The [Supreme] Court has also made plain that the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information." *Id*., 10 F.3d at 353 (discussing *Giglio v. United States*, 405 U.S. 150 (1972)).

2. <u>This appeal is not moot.</u>

John Demjanjuk's death neither makes this case moot nor denies this Court the power to do justice. The government concedes Mrs. Demjanjuk and her family have a cognizable interest in the outcome. In our opening brief, we noted that Mrs. Demjanjuk would now appear as executrix of John Demjanjuk's estate, based on our understanding that vacatur of the challenged denaturalization judgment would entitle Mr. Demjanjuk's estate to payment of withheld social security benefits.

The government challenges this assertion, but only by saying that the benefit payments would be made to the spouse and children in their individual capacities. (Govt. Opp. Br. at 35-37 and n.6.) Thus, there is agreement that the United States would owe something to Mrs. Demjanjuk. This is enough to sustain the Court's power. At this procedural hour, it is not necessary for the Court to decide in what

capacity Mrs. Demjanjuk would receive funds wrongfully withheld, nor even to say with certainty that she would receive them. The realistic possibility that this Court's action would have a financial impact is enough.

In the leading case of *Honig v. Doe*, 484 U.S. 305 (1988), two special education students were wrongly expelled from school. While their appeals were pending, one child became too old for future participation in the educational program. As to him the case was moot. The other child remained age-eligible, however, and the Supreme Court, in an opinion by Justice Brennan, found that it was likely he would present the same issues in the future. This prospect that the Court's decision would have a future impact on the parties' interests and on the state's conduct was enough to say that the case was not moot.

Chief Justice Rehnquist concurred, reasoning that the mootness doctrine should be construed even more narrowly than the majority advocated. He found no constitutional basis for the mootness doctrine, and cited the "capable of repetition, yet evading review" cases as examples.

The Supreme Court applied the *Honig* rationale in *Church of Scientology v. United States*, 506 U.S. 9 (1992). Under two provisions of the Internal Revenue Code, the district court ordered a state court official to comply with an IRS summons for production of tape recordings containing attorney-client conversations. The church, as holder of the privilege, appealed, but was unable to obtain a stay of the

summons enforcement order. Copies of the tapes were delivered to the IRS while the appeal was pending. The Court of Appeals granted the IRS's motion to dismiss the appeal as moot, holding that no controversy existed because the tapes already had been turned over to the IRS.

The Supreme Court reversed, holding that compliance with the summons enforcement order did not moot the appeal. Of course, it was too late to provide a full remedy for the alleged infringement of the church's interest that had occurred when the tapes were turned over. A court, however, could still order the tapes returned and all copies destroyed. It could also take steps to prevent IRS use of the information in the tapes and any leads derived from the tapes. The Court further held that there was appellate jurisdiction to review allegedly unlawful IRS summons enforcement orders, noting that similar orders by other agencies are routinely held reviewable and that a line of authority precluding review of summonses by the IRS was not defensible on statutory or decisional grounds. That is, it was not possible to remedy all the indignities to which the church had been unlawfully subjected, but some palliative measures could be taken and lessons taught for the future.

By similar reasoning, an in rem action to recover property wrongfully seized is not mooted when the government conveys the property in dispute, provided only that a court could make orders at some future time that put the property in the hands of those to whom it rightly belonged. *Republic National Bank of Miami v. United*

States, 506 U.S. 80 (1992). *See also Powell v. McCormack*, 395 U.S. 486 (1969) (congressman's suit to challenge exclusion from 90th Congress not mooted by Congress's adjournment, as he would be entitled to pursue claim for unpaid salary in the 91st Congress).

Indeed, even a criminal appeal may not be mooted by the defendant's death, if the challenged criminal judgment includes a restitution obligation that the defendant's heirs must pay. *United States v. Mmahat*, 106 F.3d 89 (5th Cir. 1997). This is the obverse of the present case, for here it is the government who remains liable after Mr. Demjanjuk's death.

This is certainly among the most iconic of cases involving denaturalization for alleged conduct during World War II. It has lasted for over three decades. The judgments have come only after the expenditure of considerable public and private resources. This Court and other courts both within and beyond our country's borders have expended enormous judicial energy on the important legal issues this case presents. This case has challenged the practices and procedures of the former Office of Special Investigations, one of the most important and controversial units in the Department of Justice. And well that challenge should be made, as citizenship is a precious right in this country. *Fedorenko v. United States*, 449 U.S. 490, 505 (1981). The government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." *Costello v. United States*, 365 U.S. 265, 269

(1961). Denaturalization cases are rightly subject to special procedures, such as the requirement of a pre-filing affidavit stating the basis of the government's claim. In this case, the evidence shows the affidavit itself as well as the government's litigation conduct were fraudulent.

There is substantial evidence that the government's wrongful conduct was not only "capable of repetition," but was in fact repeated, and that the government did not learn its lesson. Indeed, the root issue here — failure to disclose exculpatory material developed and maintained by the FBI for decades — rests on the same willful governmental blindness this Court criticized in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom. Rison v. Demjanjuk*, 513 U.S. 914 (1994).

In that episode, the government had failed to produce exculpatory material in foreign archives to which it had exclusive access. The withheld protocols were hearsay statements taken decades ago by Soviet investigators, and therefore presented all the dangers of inaccuracy that are inherent in such documents. Yet this Court found the government's action in withholding them to be a serious ethical violation amounting to fraud.

No such complications exist here, as the failure was to produce material in the files of an agency within the same United States governmental department. The district judge's characterization of the two documents included in the materials subject to this litigation contradicts the basic theme of *Demjanjuk v. Petrovsky*, and stands

the government ethical obligation on its head. That duty is to produce all the relevant documents, and to tell the truth about what it possesses and does not possess. When the government fraudulently fails in that duty, the judgment must be set aside. Even if the burden of showing a potential impact on the outcome rests with the defrauded party, the court below and the government are still in error. The weight of evidence at any procedural stage must be judged under fair procedures and not on summary affidavits which have never been subject to cross-examination.

The government's failure to produce exculpatory, material, and relevant evidence calls to mind another early episode in this litigation. One key document during the first denaturalization proceeding was a memorandum prepared by OSI attorney George Parker. The government had repeatedly denied that the document existed. Parker had kept a copy, and the special master found it to be authentic. "The Special Master found that the Parker memorandum is 'authentic.' S.M. Report at 100-01. This was an issue, because no one in OSI could locate it; Parker produced a copy of the memorandum and cover letter on October 8, 1992, in proceedings before the master." *Id.*, 10 F.3d at 347. The habit of denying that key documents exist has unfortunate consequences for the cause of justice.

This Court has recognized that accountability for World War II-era conduct must be double-edged. Those culpable must be pursued. The pursuers dishonor their own activity, however, if they fail to observe fundamental rights and values. The

former head of the OSI publicly proclaimed the importance of these considerations.

> The Holocaust, the Shoah, is a catastrophe too great even to be absorbed, much less comprehended. At the Office of Special Investigations (OSI) we have to deal with the reality of the acts which accomplished the near-total destruction of European Jewry.

E. Rosenbaum, *Prosecuting Nazi War Criminals.* The American-Israeli Cooperative Enterprise (2000).[1] OSI had "the highest rate of successful litigation" of any component within the Department of Justice's Criminal Division. *Id*. "In a very real sense, in these cases, some of them are actually easier to prosecute now than they were a few years ago for the reason that we now have better access to the documents of the Holocaust." *Id.*

These comments taken together underline the importance of *fairly* resolving the issues in this case. The Shoah is about remembrance. The distortion of its history is a disservice to the very process OSI was charged with protecting.

For such a case as this was fashioned the "capable of repetition, yet evading review" doctrine. The Supreme Court articulated this doctrine in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911). There, the ICC had issued an order that expired during the judicial process. The Court held that the case was not moot. The orders in question raised important public issues about

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[1] *See* http://www.jewishvirtuallibrary.org/jsource/Holocaust/rosenbaum.html.

ICC power affecting not only Southern Pacific but others subject to ICC power. It was important to devise and announce rules that would have future application. *Id*., 219 U.S. at 515. That is, so long as there is a genuine adversary proceeding in which the issues of public and lasting import may fairly be raised, there is judicial power — and duty.

This Court recently applied the "capable of repetition" rationale in *Carey v. Wolnitzek*, 614 F.3d 189, 196-97 (6th Cir. 2010). Kentucky's judicial ethics provisions imposed limits on judicial candidate speech and association. The election at issue, however, had come and gone. This Court nevertheless held that candidates and the state needed clarification of the rules for future elections; therefore, the case was not moot. *Carey* is particularly significant because it expressly based its no-mootness holding on the potential interests of not only Carey but "all candidates for judicial office in Kentucky." *Id*., 614 F.3d at 197. That is, the challenged conduct was justiciable as applied to a larger group than the initial litigant.

3. Particularly in cases as this one dealing with a litigant's misconduct, mootness is not an issue.

Many issues survive termination of the underlying action. Litigant misconduct is one. For example, a court can set aside a judgment for fraud on the court without respect to time limits. Fed. R. Civ. P. 60(b)(3). This rule embodies the principle the Supreme Court announced in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S.

238 (1944). The Court later expanded this principle in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), when addressing a court's power to act on allegations of fraud. Fraud on the court is so serious a wrong — to litigants and the system itself — that it may be addressed even years after the underlying judgment.

"It is well established that a federal court may consider collateral issues after an action is no longer pending. . . . [An] imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and if so, what sanction would be appropriate. Such a determination may be made after the principle suit has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990). *See also Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) (holding that even when a court no longer has subject matter jurisdiction, it retains jurisdiction to sanction under Rule 11).

This power is not limited to Rule 11 sanctions. For example, in *Matos v. Richard A. Nellis, Inc.*, 101 F.3d 1193 (7th Cir. 1996), a party challenged the imposition of 28 U.S.C. §1927 sanctions after the main case was concluded. Judge Easterbrook noted:

> It certainly is (and was) not "moot"; misconduct in federal litigation may lead to sanctions even if the court lacked subject-matter jurisdiction . . . . A party need not prevail on the merits to be entitled to compensation for excess expenses created by obfuscation and dissimulation. Evasion

> of service, failure to obey court orders, production of forged documents, and obstinate refusal to pay a debt created by a judicial order cannot be tolerated.

101 F.3d at 1196 (citations omitted).

This appeal illustrates these principles. This Court acted on its own motion in 1993 to address allegations of fraud that had arisen. It appointed counsel and ordered hearings. *Demjanjuk v. Petrovsky*, *supra,* 10 F.3d at 340. After lengthy proceedings before a special master (Judge Thomas A. Wiseman, Jr. of the United States District Court for the Middle District of Tennessee) and renewed consideration, this Court held that it had power to act, and made clear the basis for doing so. *Id.,* 10 F.3d at 356. Significantly, this power extended to a reexamination of this Court's own extradition order, which it concluded had been improvidently issued. *Id.*, Appendix 1, 10 F.3d at 356-57. This Court reached that conclusion even though the order had been fully complied with. The Court acted to vindicate its own authority.

Judge Polster recognized those same interests are stake when he reappointed the Office of the Federal Public Defender for this case. "It is the responsibility of the Court to insure the integrity of court proceedings. There has already been one confirmed instance of fraud against the court in the first denaturalization trial." (Memo. of Opinion and Order of May 10, 2011, at 3, R. 215.)

Notwithstanding the fact that the court below overruled the government's objection to the reappointment of the FPD to represent Mr. Demjanjuk, the

government appears to renew its objection. (Govt. Opp. Br. at 32 n.5.) The statutory basis that answers the government's objection is 18 U.S.C. § 3006A(c): "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings." Similar authority is found in this Court's local rules. "Trial counsel in criminal cases, whether retained or appointed by the district court, is responsible for the continued representation of the client on appeal until specifically relieved by this court." 6 Cir. R. 101.

This Court previously held that its decision to reopen *sua sponte* this litigation was designed to mitigate, to the extent possible, the collateral consequences of its earlier orders, specifically the extradition order. *Demjanjuk v. Petrovsky*, *supra*, 10 F.3d at 355-56. The stain of those collateral consequences persuaded this Court, with considerable supporting jurisprudence from the Supreme Court, to conclude that Mr. Demjanjuk's claims in the early 1990s were not moot even though the Supreme Court of Israel had acquitted him and ordered him released by the time this Court adjudicated those claims. *Id*., 10 F.3d at 355. *Accord Ginsberg v. New York.*, 390 U.S. 629 (1968) (appeal not moot where certain disabilities flowed from conviction even though the statutory time frame for punishment had expired); *Pollard v. United States*, 352 U.S. 354 (1957) (defendant's release from prison when challenging the sentence, not the determination of guilt, did not moot the proceeding); *Fiswick v*

United States, 329 U.S. 211 (1946) (appeal not moot even though defendant had completed his prison sentence before the appeal reached the Supreme Court); *York v. Tate*, 858 F.2d 322 (6th Cir. 1988) (prisoner's release did not moot habeas corpus petition).

We have shown above that similar collateral consequences for both the family and the judicial system are again present. Far from being moot, this appeal now touches upon the very bedrock principles of fairness in one of the most public and protracted pieces of international litigation during the past half-century. But even if mootness were a serious consideration, the correct response would still be to vacate the underlying denaturalization judgment and leave the family free to litigate the issues before the Social Security Administration, rather than being burdened by the judgment that is under attack here. The government clearly wants it both ways: to dismiss this proceeding, and to render useless all the judicial and lawyer energy expended on it, but still remain free to invoke the denaturalization judgment to deny the Demjanjuk family the right to social security benefits.

In cases like this where wrongful conduct by a litigant undermines confidence in the outcome, any remedy must put the parties where they would have been — in this instance to vacate the lower court's judgment by which Mr. Demjanjuk was denaturalized a second time. The seriousness of the government's failure here warrants this remedy. As noted in the opening brief and not challenged by the

government, addressing serious failures with serious remedies is justified and appropriate. *See, e.g., D'Ambrosio v. Bagley,* 688 F. Supp. 2d 709 (N.D. Ohio 2010), *aff'd*, 656 F.3d 379 (6th Cir. 2011), *cert. denied sub nom. Bobby v. D'Ambrosio*, ___ U.S. ___, 132 S. Ct. 1150 (2012) (remedy for discovery violations ultimately returned death row inmate to freedom). *See also Keenan v. Bagley*, Case No. 1:01CV2139, slip op. 2012 WL 1424751 (N.D. Ohio Apr. 24, 2012) (requiring retrial for co-defendant on death row). Vacating the lower court's judgment is well within this law.

Notwithstanding the well-founded allegations of fraud, the government asks this Court to halt all judicial review because of Mr. Demjanjuk's death. Such a step, though, would itself create an unacceptable injustice. When a dispute cannot be fully adjudicated, it is unfair to allow only one side to have its day in court. The remedy is to put the parties where they were before the initial suit was filed. *General Dynamics Corp. v. United States*, ___ U.S. ___, 131 S. Ct. 1900 (2011). The proper result must be that "the rights of all parties are preserved." *United States v. Munsingwear*, 340 U.S. 36, 40 (1950).

Appointment of a special master to conduct further hearings is another alternative step towards resolving this litigation. We raise this option here for the first time in light of the government's opposition to this appeal. Its appellate brief — a continuing refrain about the immateriality of two documents and a steadfast refusal to examine practically anything else raised in the Rule 60 motion — mirrors the

government's position over *Brady* and other discovery violations that led to the post-conviction dismissal of all criminal charges in *United States v. Theodore F. Stevens*, Case No. 1:08-cr-00231 (D.D.C.). *See id*., 2009 WL 6525926 (Apr. 7, 2009) (dismissing charges). The violations also led to the appointment of a special master. *See id*., Order of Apr. 8, 2009 (Dkt. 375). *See also In re Special Proceedings*, Case No. 1:09-mc-00198 (D.D.C.). Two and a half months ago, the special master found intentional misconduct, including willful nondisclosure, by government prosecutors. *See In re Special Proceedings, supra,* Report of Investigation Conducted Pursuant to Court's Order, Mar. 15, 2012 (Dkt. 84), at 513. After concluding its own investigation a week ago, the DOJ found reckless misconduct.[2] Similar to the instant case, those proceedings addressed government misconduct in discovery after conviction even though over three years have passed since the dismissal of the charges against Senator Stevens and almost two years since his tragic accidental death. Mootness was not an obstacle to addressing the litigant's misconduct.

On August 17, 1992, this Court took the same step of appointing a special master. It took that step pursuant to Fed. R. Civ. P. 53(c). It would also be consistent with current FRAP 48 ("[a] court of appeals may appoint a special master to hold

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[2] *See* http://www.washingtonpost.com/politics/justice-dept-finds-2-prosecutors-engaged-in-reckless-professional-misconduct-in-stevens-case/2012/05/24/gJQAC4XcnU_story.html.

hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court"). *See Demjanjuk v. Petrovsky*, *supra*, 10 F.3d at 339.

As the government's position here is similar to the one it took in *United States v. Stevens*, so, too, is the defense response. That there may have been other seemingly incriminating evidence admitted at Mr. Demjanjuk's second denaturalization hearing does not render the government's misconduct immaterial. "Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of suppressed evidence would have resulted ultimately in the defendant's acquittal whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

Engaging in revisionist history does not help the government's cause. Towards the end of its brief, the government returns to the statement by Special Agent Martin that he had informed one of Mr. Demjanjuk's attorneys about his concern that the Soviets might have fabricated the Trawniki card. (Govt. Opp. Br. at 60.) This statement and the conclusion the government draws from it ("[n]evertheless, Demjanjuk was unable to produce any significant evidentiary support for the Soviet-forgery theory at the second denaturalization trial in 2001," *id*.) are both odd. The

document disclosed to date that most fully summarized Special Agent Martin's views was not declassified in its entirety until last year. The government was holding in its files that very "significant evidentiary support," and had given it further protection by classifying it as "secret." The suggestion that Special Agent Martin's purported conversation with one of the defense lawyers somehow absolved the government of its discovery obligations shows why the defense should have been afforded the opportunity to cross-examine Special Agent Martin. If such a conversation took place, it is hard to understand how the contents of a classified document could have been divulged without a criminal law violation. *See* 18 U.S.C. § 798 (criminalizing the disclosure of classified information). If no statute was violated, why then was the memorandum classified?

CONCLUSION

What was said in the opening brief bears repeating. This Court's finding that OSI committed fraud on the court resulted in the first denaturalization order against Mr. Demjanjuk being vacated. This Court's message to OSI could not have been any clearer. Yet even as this Court was issuing its opinion, individuals in the largest investigative arm of our Department of Justice had in their file cabinets classified and non-classified documents which were and remain relevant, exculpatory, and material to the case against John Demjanjuk. Those documents reflected federal agents' questions concerning the very item of evidence which was the subject of this Court's hearings and opinions. And yet no one from the government shared that evidence with anyone on the defense team or on this Bench. Those documents were not even divulged when the case returned to the district court to be readjudicated. Notwithstanding promises to the contrary, the government was not listening.

The government's opposition reflects an instinctual reflex. It asks: Why engage in this litigation now that Mr. Demjanjuk is deceased? Fact is, it was in the government's power to avoid this last leg of decades-long litigation. It could have done so if OSI had simply followed the law as made clear by this Court and if it had followed the accepted rule that discovery obligations of the United States as a party litigant extend to the DOJ as a whole (including the FBI) — indeed to the government as a whole. The government took a short-cut federal law prohibits. This Court

warned against this short-cut. The government did not heed the warning.

This litigation continues also because of the law of the case. The lower court's and now government's remarkably narrow views of what is material or exculpatory or relevant directly conflict with Judge Matia's order of February 20, 1998, *United States v. Demjanjuk*, Case No. C77-923, slip op. 1998 U.S. Dist. LEXIS 4047 (N.D. Ohio Feb. 20, 1998). In that order, which is the law of the case, the district court found fraud in an additional sense by warning the government that withholding even the name of a potential witness — Jacob Reimer — was fraudulent, despite the government's by-now-familiar excuse that the withheld evidence was not "useful." If, in the government's view, the witness had no information useful to it, "should not Demjanjuk's attorneys have been given the chance to assess whether [the witness] had any information useful to their client?" *Id*. at *12-13. *See also Dennis v. United States*, 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

Accordingly, for the reasons set forth above and in the opening brief, the appellant requests this Court to vacate the final judgment by which John Demjanjuk was denaturalized a second time, and to order that his citizenship be restored posthumously. The undersigned express their ongoing willingness to participate in further proceedings before a special master as roughly outlined above if this Court

should deem that step again appropriate.

Respectfully submitted,

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June 1, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that the above brief, excluding the cover page, table of contents, the table of authorities, the certificate of service, and the certificate of compliance, is comprised of 5,426 words and 437 proportionally spaced lines, and, therefore, complies with Fed R. App. P. 32(a)(7)(B).

/s/ Dennis G. Terez
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Office of the Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that the Brief of Appellant was filed on this 1st day of June, 2012 using the Court's ECF system, which will send a notice of this filing to all counsel of record indicated on the electronic receipt.

/s/ Dennis G. Terez
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