No. 12-3114

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VERA DEMJANJUK, as Executrix of the Estate of John Demjanjuk,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, No. 1:99-cv-1193
The Honorable Dan Aaron Polster, United States District Judge

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STATEMENT REGARDING ORAL ARGUMENT

Because the Court can resolve all issues presented by this appeal based on the record and well-settled legal principles, the government respectfully submits that oral argument is unnecessary.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-3114

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VERA DEMJANJUK, as Executrix of the Estate of John Demjanjuk,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

This is an appeal from the denial of a motion under Federal Rule of Civil Procedure 60 for relief from a judgment of denaturalization entered under 8 U.S.C. § 1451 against John Demjanjuk. Demjanjuk died on March 17, 2012, while this case was pending on appeal, and his wife, Vera Demjanjuk, has been substituted as a party in her capacity as executrix of Demjanjuk's estate. *See* Demjanjuk Opening Br. 1; No. 12-3114, Order

Granting Mot. to Substitute Party (6th Cir. Apr. 13, 2012).

Because the denaturalization proceeding against Demjanjuk was commenced by the United States, the district court had jurisdiction over that proceeding and Demjanjuk's motion for Rule 60 relief under 28 U.S.C. § 1345. The district court entered an order denying Demjanjuk's Rule 60 motion on December 20, 2011. Record Entry No. (R.) 237, Mem. of Opinion & Order. On January 5, 2012, Demjanjuk filed a motion for reconsideration, which the district court denied on January 20, 2012. R. 238, Mot. for Reconsideration; R. 241, Mem. of Opinion & Order. On January 23, 2012, Demjanjuk filed a timely notice of appeal from the district court's denial of his Rule 60 motion and his motion for reconsideration. R. 242, Notice of Appeal; *see also* Fed. R. App. P. 4(a)(1)(B)(i).

Ordinarily, this Court would have jurisdiction over this appeal under 28 U.S.C. § 1291. As explained in Part I of the Argument section below, however, John Demjanjuk's death renders this appeal moot, and Vera Demjanjuk lacks standing to pursue the appeal in her capacity as executrix of Demjanjuk's estate. Thus, this appeal should be dismissed for

lack of jurisdiction. Along with this brief, the government today has filed an appropriate motion requesting dismissal.

STATEMENT OF THE ISSUES

1) Whether this appeal should be dismissed for lack of jurisdiction in light of John Demjanjuk's death.

2) Whether the district court abused its discretion in denying Demjanjuk's motion for relief from his denaturalization judgment under Federal Rule of Civil Procedure 60.

3) Whether the district court abused its discretion in ruling on Demjanjuk's Rule 60 motion without holding a hearing or providing Demjanjuk an opportunity for additional discovery.

STATEMENT OF THE CASE

After a bench trial, the United States District Court for the Northern District of Ohio entered a judgment on February 21, 2002, revoking John Demjanjuk's citizenship under 8 U.S.C. § 1451. R. 170, Judgment. This Court affirmed that judgment on April 30, 2004. *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir. 2004). A petition for rehearing was denied on June 28, 2004, *id.*, and the Supreme Court denied Demjanjuk's

petition for a writ of certiorari on November 1, 2004, *Demjanjuk v. United States*, 543 U.S. 970 (2004).

On July 19, 2011, Demjanjuk filed a motion for relief from judgment under Federal Rule of Civil Procedure 60 in which he argued that his judgment of denaturalization should be vacated because, he claimed, the government had failed to disclose information that, according to Demjanjuk, cast doubt on the authenticity of one piece of evidence that the government had introduced at his denaturalization trial. R. 219, Mot. of John Demjanjuk Pursuant to Fed. R. Civ. P. 60. The district court denied Demjanjuk's motion on December 20, 2011, and it denied a subsequent motion for reconsideration on January 20, 2012. R. 237, Mem. of Opinion & Order; R. 241, Mem. of Opinion & Order.

STATEMENT OF FACTS

This case's factual background and procedural history are recounted in a number of district court and court of appeals decisions.[1]

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[1] *See, e.g.*, *United States v. Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801 (N.D. Ohio Dec. 20, 2011) (decision challenged in this appeal); *United States v. Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622 (N.D. Ohio) (findings of fact and conclusions of law following second denaturalization trial), *opinion supplemented by* 2002 WL 544623 (N.D. Ohio Feb. 21, 2002), *aff'd*, 367 F.3d 623 (6th Cir.), *cert. denied*, 543 U.S.

A. Demjanjuk's Service as an SS Guard and Admission to U.S. Citizenship

John Demjanjuk was born on April 3, 1920, in Ukraine. *United States v. Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *1 (N.D. Ohio Feb. 21, 2002). From the time of his birth until his naturalization as a U.S. citizen in 1958, Demjanjuk went by the name "Iwan Demjanjuk." *Id.*

Drafted into the Soviet Army in 1940, Demjanjuk received a shrapnel wound in 1941 that left a scar on his back. *United States v. Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *1 (N.D. Ohio Dec. 20, 2011). He was captured by German soldiers in May 1942 during the Battle of Kerch in the Crimea and was then transported to a POW camp in Rovno, Ukraine.

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970 (2004); *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio) (denying Demjanjuk's petition for a writ of habeas corpus challenging the district court's prior certification that Demjanjuk could be extradited to Israel), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *judgment vacated for fraud on the court by* 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom. Rison v. Demjanjuk*, 513 U.S. 914 (1994); *In re Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985) (concluding that Demjanjuk could be extradited to Israel); *United States v. Demjanjuk*, 103 F.R.D. 1 (N.D. Ohio 1983) (denying Rule 60 motion to vacate first denaturalization judgment); *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981) (district court findings of fact and conclusions of law following first denaturalization trial), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982), *judgment vacated for fraud on the court by* 1998 U.S. Dist. LEXIS 4047 (N.D. Ohio Feb. 20, 1998).

Demjanjuk, 1:99-cv-1193, 2002 WL 544622, at *4.

At the time of Demjanjuk's capture, "the Nazis had initiated 'Operation Reinhard,' a program for the systematic extermination of Jews in Poland." *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *1. The German Schutzstaffel (SS) recruited Soviet war prisoners from the Rovno camp to assist in carrying out the program. *Demjanjuk*, 1:99-cv-1193, 2002 WL 544622, at *4-*5. "These recruits were taken to Trawniki, an SS camp where they were trained to implement the program, were given uniforms, and took an oath to serve the SS." *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *1.

Nazi-era documents from archives in four different countries (including the former West Germany) demonstrate that Demjanjuk served at Trawniki and then worked as a guard at the Flossenbürg concentration camp in Germany and at the Majdanek concentration camp and the Sobibor extermination camp in Nazi-occupied Poland. *Id.* at *6; *see also Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *1-*11. At these camps, thousands of Jews and other perceived asocials were confined, persecuted, and murdered. *See Demjanjuk*, No. 1:99-cv-1193, 2002 WL

544622, at *5-*11. After Germany's surrender in 1945, "Demjanjuk was taken by American forces to several displaced persons camps, eventually arriving in Regensburg, Germany, where he drove a truck in an American army motor pool from 1947 to 1949." *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *1.

In 1948, Demjanjuk began taking steps to immigrate to the United States under the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, *amended by* Act of June 16, 1950, ch. 262, 64 Stat. 219, which Congress enacted "to enable European refugees driven from their homelands by [World War II] to emigrate to the United States without regard to traditional immigration quotas." *Fedorenko v. United States*, 449 U.S. 490, 495 (1981). To enter the United States under the DPA, an individual had to be a "concern of the International Refugee Organization" (IRO), the agency created by the United Nations after World War II to assist displaced persons. DPA § 2(b), 62 Stat. at 1009. Annex I of the IRO's constitution provided that the organization was not concerned with, and thus would not provide assistance to, individuals who "assisted the enemy in persecuting civil populations of countries, Members of the United

Nations," or who had "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." Constitution of the IRO annex I, pt. II, § 2, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 3051-52, 18 U.N.T.S. 3, 20. In addition, section 13 of the version of the DPA in effect when Demjanjuk applied for a visa under the Act specifically provided that such visas could not be issued "to any person who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States, or to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin." DPA § 13, 64 Stat. at 227. The DPA "placed the burden of proving eligibility under the Act on the person seeking admission," and it "provided that '[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.'" *Fedorenko*, 449 U.S. at 495 (quoting DPA § 10, 62 Stat. at 1013; alteration in original).

An applicant, such as Demjanjuk, who had served as an armed guard

at the Majdanek and Flossenbürg concentration camps and the Sobibor extermination camp would not have been "of concern" to the IRO and thus would not have been eligible for entry into the United States under the DPA. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *16; *see also Fedorenko*, 449 U.S. at 512-13 (holding that individuals who served as armed guards at Nazi concentration camps were not "of concern" to the IRO and were thus ineligible for DPA visas). Furthermore, such an individual would have been ineligible for a visa under section 13 of the amended DPA. *See Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *26-*29. Nevertheless, Demjanjuk succeeded in obtaining IRO assistance and, subsequently, a U.S. visa by misrepresenting his wartime employment and residences, thereby concealing his service as an SS guard. *Id.* at *17-*20.

Demjanjuk immigrated to the United States in 1952 and settled in Cleveland, Ohio. *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *2. In 1958, he applied for naturalization. *Id.* On his citizenship application, "Demjanjuk denied having ever given false testimony for the purpose of obtaining any benefits under the immigration and naturalization laws." *Id.*

Demjanjuk was naturalized on November 14, 1958, "at which time he changed his first name from Iwan to John." *Id.*

B. The First Denaturalization Proceeding

In 1977, the United States initiated denaturalization proceedings against Demjanjuk under 8 U.S.C. § 1451(a), which provides that an individual's citizenship can be revoked if it was "illegally procured" or was "procured by concealment of a material fact or by willful misrepresentation." *See United States v. Demjanjuk*, No. C77-923 (N.D. Ohio). The government alleged that Demjanjuk served at the Trawniki SS training camp and then served the SS at Sobibor and another extermination camp located in Treblinka, Poland. *See United States v. Demjanjuk*, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981). Because of this alleged service, and Demjanjuk's efforts to conceal it in applying for admission into the United States and U.S. citizenship, the government contended that Demjanjuk's citizenship was "illegally procured" and obtained "by concealment of a material fact or by willful misrepresentation." *Id.*

At the 1981 trial, the government presented a German wartime

document issued at the Trawniki camp and identifying an "Iwan Demjanjuk" as an SS guard. *Id.* at 1365-69. This document, which has come to be known as "the Trawniki card," was held at the Vinnytsya Oblast State Archive in Ukraine, which at the time of Demjanjuk's first denaturalization trial was part of the Soviet Union. *Id.* at 1365-66; *see also Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *3. In addition to containing John Demjanjuk's former name, the card also included his birth date, father's name, birthplace, and nationality, along with a photograph that the district court found "clearly reflect[ed] [Demjanjuk's] facial features." *Demjanjuk*, 518 F. Supp. at 1368. Furthermore, the card noted that, like John Demjanjuk, the individual to whom it was issued had a scar on his back. *Id.* The card reflected that its recipient had been issued a service identification number of "1393." *Id.* at 1366; *see also* Exh. 33 to Gov't Opp'n to Demjanjuk's Rule 60 Mot. (Gov't Opp'n) (R. 229) (photographic reproduction and translation of the Trawniki card).

Although the government initially introduced certified photographic copies of the front and back sides of the Trawniki card, Soviet authorities made the original document available during trial for examination by the

court, the government, and the defense team. *Id.* at 1366-68 & n.13. Despite his contention that the card was not authentic and was possibly forged, *id.* at 1366, Demjanjuk chose not to conduct any expert forensic analysis on the card when the original was made available to him, *id.* at 1368 n.13. The government, in contrast, presented expert testimony indicating that the Trawniki card was an authentic German wartime document and not a forgery. *Id.* at 1367-68. Based on the card and the government's uncontradicted expert testimony proving its authenticity, the district court concluded that Demjanjuk had served at the Trawniki SS training camp. *Id.* at 1368.

The court also found that Demjanjuk had served at the Treblinka extermination camp. *Id.* at 1376. Unlike the district court's finding that Demjanjuk had served at the Trawniki camp, which was based on documentary evidence, the court's Treblinka finding rested on the testimony of six eyewitnesses who identified Demjanjuk from photographs as "Ivan the Terrible," a Treblinka gas-chamber operator notorious for his savage treatment of Jewish prisoners.[2] *Id.* at 1369-76. Having found that

[2] "Ivan" is the Russian analogue of "Iwan." *Demjanjuk*, 518 F. Supp. at 1369 n.14.

Demjanjuk had served the SS at both Trawniki and Treblinka, the district court determined that it had no need to decide whether Demjanjuk also served at the Sobibor extermination camp, although the court observed that the Trawniki card noted Demjanjuk's transfer to Sobibor on March 27, 1943. *Id.* at 1376 n.31.

Testifying in his defense, Demjanjuk denied having served as an SS guard. *Id.* at 1376. Instead, he testified that after his capture at the Battle of Kerch, he was held as a prisoner of war until he joined the Ukrainian National Army, which was "organized by the Germans for later service against the Russians." *Id.* at 1376-77. He also testified that the Germans later placed him in a Russian National Army unit assigned to guard a captured Russian general. *Id.* at 1377.

The district court found that Demjanjuk's explanation of his wartime activities was not credible. *Id.* Furthermore, it observed that at least one portion of Demjanjuk's testimony bolstered the government's claim that Demjanjuk had served as an SS guard. Demjanjuk admitted receiving a tattoo of his blood type on the inside of his upper left arm after his capture by the Germans. *Id.* "Only persons affiliated with the German SS were

given such tattoos," the court explained, "and it is unlikely that ordinary Russian POWs would be so marked." *Id.*

Based on the evidence presented at trial, the district court concluded that Demjanjuk's citizenship was "illegally procured" because Demjanjuk obtained it after entering the United States on a DPA visa that he secured by concealing his SS service at Trawniki and Treblinka. *See id.* at 1380-82. The court also concluded that Demjanjuk obtained his citizenship by "concealment of a material fact or by willful misrepresentation" because he had falsely denied in his citizenship application that he had "given false testimony for the purpose of obtaining any benefits under the immigration and nationality laws." *Id.* at 1382-83 (internal quotation marks omitted). The court thus revoked Demjanjuk's citizenship in accordance with 8 U.S.C. § 1451(a). *See id.* at 1386-87. This Court affirmed. *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982) (per curiam).

C. Demjanjuk's Extradition to Israel and the Fraud on the Court Proceedings

After Demjanjuk's citizenship was revoked, the United States extradited him to Israel, where he was convicted of charges premised on the accusation that he was Treblinka's Ivan the Terrible. *Demjanjuk*, No.

1:99-cv-1193, 2011 WL 6371801, at *4. After Demjanjuk's conviction, doubts began to arise regarding eyewitnesses' identifications of Demjanjuk. *Id.* In July 1993, the Israeli Supreme Court set aside Demjanjuk's conviction "based largely on statements of Ukrainian guards at Treblinka who identified a man named Ivan Marchenko as Ivan the Terrible." *Id.*

Meanwhile, this Court on its own initiative reopened the case in which it had affirmed the district court's denial of Demjanjuk's request for habeas relief from his extradition order. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 339 (6th Cir. 1993). The Court appointed a federal district court judge as special master to take testimony and prepare a report on whether government attorneys had committed fraud on the court by failing to disclose exculpatory evidence to Demjanjuk. *Id.* After "extensive hearings," *id.*, the special master found that the government attorneys had acted in good faith and had not acted recklessly, *id.* at 349.

Following its receipt of the special master's report, this Court, while not overturning the special master's finding that the government attorneys had acted in good faith, concluded that they had "acted with reckless

disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly," *id.* at 349, 354. In reaching this conclusion, the Court extended the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), to civil denaturalization and extradition proceedings, holding that the *Brady* obligation to disclose material, exculpatory evidence applies to "denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against." *Id.* at 353. Having determined that the government recklessly violated that duty in Demjanjuk's case, the Court vacated both its judgment and the district court's judgment that Demjanjuk was not entitled to habeas relief from the order certifying that he could be extradited to Israel. *Id.* at 356.

After this Court vacated the judgments in the extradition proceeding, the district court granted Demjanjuk's motion to set aside its denaturalization judgment for fraud on the court, thus restoring Demjanjuk's citizenship. *United States v. Demjanjuk*, No. C77-923, 1998 U.S. Dist. LEXIS 4047 (N.D. Ohio Feb. 20, 1998). The court dismissed the

government's denaturalization action without prejudice to its right to renew its claims against Demjanjuk in a separate proceeding. *Id.* at *18-*20.

D. The Second Denaturalization Proceeding

In May 1999, a new team of government attorneys initiated a second denaturalization action against Demjanjuk. *See United States v. Demjanjuk*, No. 1:99-cv-1193 (N.D. Ohio). The government again alleged that Demjanjuk had received training at Trawniki and had served as a guard at the Sobibor extermination camp. R. 1, Complaint ¶¶ 10-17, 25-30; Appendix 34-37. The government's complaint also included new allegations that Demjanjuk had worked as a guard at the Majdanek and Flossenbürg concentration camps. *Id.* ¶¶ 20-24, 31-34; Appendix 35-37. The complaint did not allege that Demjanjuk had served as a guard at Treblinka. *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *5.

At the 2001 trial, the government presented the Trawniki card as Government Exhibit 3. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *1-*4. It also introduced six other wartime documents that identified Demjanjuk and demonstrated that he had served as an SS guard. Those

documents—which were discovered after Demjanjuk's first denaturalization trial, *see* Neal M. Sher Aff. ¶ 8, Exh. 26 to Gov't Opp'n—are described below:

1) Government Exhibit 4: A disciplinary report, dated January 20, 1943, noting the apprehension and punishment of four guards for violating a quarantine at the Majdanek concentration camp. The name of one of the punished guards is recorded as "Deminjuk." Next to this name appears the identification number 1393, which is the same identification number found on the Trawniki card. The disciplinary report was found in a Lithuanian archive. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *5-*6; *see also* Exh. 8 to Gov't Opp'n.

2) Government Exhibit 5: A transfer roster showing the transfer of eighty men from Trawniki to the Sobibor extermination camp on March 26, 1943. One of the men listed on the roster is "Iwan Demianiuk." Next to this name appears the identification number 1393, and the man is listed as having the same birth date and birthplace as John Demjanjuk. The transfer roster was found in the archives of the former KGB in Moscow, Russia. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *7-*8; *see also*

Exh. 4 to Gov't Opp'n.

3) Government Exhibit 6: A transfer roster dated October 1, 1943, documenting the transfer of 140 men from Trawniki to the Flossenbürg concentration camp. The document contains the name "Iwan Demianjuk" and the identification number 1393, along with John Demjanjuk's birth date and birthplace. This transfer roster was also found in the former KGB's Moscow archives. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *9-*10; *see also* Exh. 9 to Gov't Opp'n.

4) Government Exhibit 7: A Flossenbürg weapons log, dated April 1, 1944, documenting that a guard named "Demianiuk" received a rifle and bayonet on October 8, 1943, one week after the date on the transfer roster recording "Iwan Demianjuk's" transfer to Flossenbürg. The weapons log was found in the German Federal Archives in Berlin, Germany. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *9-*10; *see also* Exh. 10 to Gov't Opp'n.

5) Government Exhibit 8: A Flossenbürg daily duty roster "indicating that on October 4, 1944, 'Demenjuk 1393,' was assigned to guard the Bunker Construction Detail at the camp while armed with a rifle."

Demjanjuk, No. 1:99-cv-1193, 2002 WL 544622, at *9; *see also* Exh. 11 to Gov't Opp'n. This document was also found in the German Federal Archives in Berlin. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *10.

6) Government Exhibit 9: An undated Flossenbürg roster listing 117 guards, including a "Demenjuk" with identification number 1393. Like Exhibits 7 and 8, this document was found in the German Federal Archives in Berlin. *Id.* at *9-*10; *see also* Exh. 12 to Gov't Opp'n.

Based largely on these documents, which the district court found were authentic and identified John Demjanjuk, the court concluded that Demjanjuk did indeed serve at the Trawniki training camp and also worked as an SS guard at the Majdanek, Sobibor, and Flossenbürg camps. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *1-*11. As a result, the district court concluded that Demjanjuk was ineligible to enter the United States under section 13 of the amended DPA, which, as explained above, prohibited the issuance of visas to individuals who participated in movements hostile to the United States or who assisted in the persecution of others on account of their race, religion, or national origin. *Id.* at *28-*29; *see also supra* p. 8. Furthermore, the court concluded that

Demjanjuk was ineligible to enter the United States because he made willful misrepresentations for the purpose of obtaining a DPA visa. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *29-*31 (citing DPA § 10, 62 Stat. at 1013). Because Demjanjuk was not lawfully admitted into the United States for permanent residence, he was ineligible for citizenship under 8 U.S.C. § 1427(a)(1). His citizenship was thus "illegally procured" within the meaning of 8 U.S.C. § 1451(a). *Id.* at *25-*31. Accordingly, the court revoked Demjanjuk's citizenship for a second time.

In doing so, the court emphasized that its decision primarily relied on "documentary evidence, not eyewitness testimony." *United States v. Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1 (N.D. Ohio Feb. 21, 2002). The court noted that the government had "arranged for the defense team and forensic experts to examine the originals of Government Exhibits 3 through 9." *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *12. Although Demjanjuk had "attacked the authenticity of the[se] documents on various grounds," the court explained that "the expert testimony of the [government's] document examiners [was] devastating to [Demjanjuk's] contentions." *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1.

Elaborating on this point, the court stated:

> The paper, inks, and typewriters used to create the documents were all in use in Europe on the dates shown on the various documents. The defects in the rubber stamps and typewriters are consistent from document to document, and the alignment of the stamp on the photograph and paper of the [Trawniki card] shows that the photograph was indeed the one that was originally affixed to the [card]. The randomness and relative rarity of the documents actually supports their authenticity; if the Soviets had set out to create false documents, they would not have allowed the omissions and minor inaccuracies that occur in the trail of documents in this case. The location of these documents in the archives of several different countries also buttresses their authenticity, as their dispersal at the chaotic end of World War II does not seem at all unusual. The various spellings of [Demjanjuk's] last name in the documents actually lends further credence to them, since the conversion from the Cyrillic alphabet to the western alphabet produces such variations and a counterfeiter would probably have used one spelling consistently.

Id.

The court also observed that Demjanjuk, who elected not to testify at the second denaturalization proceeding, had failed to provide "any credible evidence of where he was during most of World War II after the prisoner-of-war camp at Rovno." *Id.* at *4. The court noted that Demjanjuk's testimony on prior occasions had been vague and had changed over time. *Id.*

E. Demjanjuk's Removal to Germany and the Rule 60 Motion

After this court affirmed the second denaturalization judgment, *see United States v. Demjanjuk*, 367 F.3d 623 (6th Cir. 2004), the government initiated removal proceedings against Demjanjuk, *see Demjanjuk v. Mukasey*, 514 F.3d 616, 618 (6th Cir. 2008). On May 11, 2009, Demjanjuk was removed to Germany, where he stood trial on 28,060 counts of being an accessory to murder as a guard at the Sobibor extermination camp. *See Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *6. In the midst of closing arguments, the Associated Press (AP) published an article claiming that a recently declassified and previously undisclosed 1985 report from the FBI field office in Cleveland raised doubts about the Trawniki card's authenticity. *Id.* The German court denied Demjanjuk's request to stay proceedings in light of the article, and on May 12, 2011, it convicted Demjanjuk of the accessory-to-murder charges and sentenced him to five years in prison, with credit for time served of approximately two years. *Id.* at *7. Demjanjuk was released from custody pending further proceedings, *id.*, and he died while his case was on appeal.

Shortly before the German trial court issued its verdict, the Federal

Public Defender's Office, which this Court had previously appointed to represent Demjanjuk in connection with its fraud-on-the-court proceedings, moved on April 29, 2011, for reappointment as Demjanjuk's counsel so that it could assist him in challenging his denaturalization judgment based on the evidence discussed in the AP article. R. 212, Mot. for Reappointment of Counsel. The district court granted that motion on May 10, 2011. R. 215, Mem. of Opinion & Order. Then, on July 19, 2011, the Federal Public Defender's Office and co-counsel Michael Tigar, who represented Demjanjuk during the second denaturalization trial, filed a motion on Demjanjuk's behalf requesting that his denaturalization judgment be set aside under Federal Rule of Civil Procedure 60(b)(6), 60(d)(1), or 60(d)(3). R. 219, Mot. of John Demjanjuk Pursuant to Fed. R. Civ. P. 60.

The motion centered on the allegation that the government had failed to disclose two documents that, according to Demjanjuk, support his contention that the Trawniki card might have been a Soviet forgery. The documents are a cover memo (also known as an "airtel") and an attached memorandum (also known as a "letterhead memorandum," or "LHM"),

both dated March 4, 1985. *See* Exhs. 21 & 22 to Gov't Opp'n; *see also* Thomas Martin Aff. ¶ 10, Exh. 1 to Gov't Opp'n. The documents were written by Special Agent Thomas Martin of the FBI's Cleveland field office, Martin Aff. ¶ 10, and they were addressed to the FBI Director and to the "attention" of Storm Watkins, Chief of the FBI's Executive Agencies Unit, the FBI unit responsible for responding to requests for information from other agencies, state governments, and Congress, Exh. 21 to Gov't Opp'n; Storm Watkins Aff. ¶ 2, Exh. 24 to Gov't Opp'n.

In the memos, Martin suggested that Soviet authorities might have fabricated the Trawniki card in response to Demjanjuk's supposed criticism of the Soviet regime. *See Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *6-*7; *see also* Exhs. 21 & 22 to Gov't Opp'n. This suggestion was premised on the erroneous assumptions that Demjanjuk had "a reputation" as "an outspoken dissident" and that the Soviets did not permit anyone in the United States to examine the Trawniki card to determine its authenticity. Exh. 22 to Gov't Opp'n. In reality, Demjanjuk, by his own admission, was not an outspoken activist against the Soviet Union, *see Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *11 (citing

Gov't Opp'n at 47 n.32), and during Demjanjuk's first denaturalization trial in 1981, the original of the Trawniki card had been made available to the court, the government, and the defense team and was subjected to forensic analysis, *see Demjanjuk*, 518 F. Supp. at 1366-68 & n.13.

In its opposition to Demjanjuk's Rule 60 motion, the government described at length the circumstances under which the Martin memos were written and the process by which they came to the attention of the Demjanjuk litigation team after the second denaturalization judgment was entered.[3] Gov't Opp'n at 18-33. Along with its opposition, the government

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[3] Because the Office of Special Investigations (OSI), the Department of Justice component responsible for overseeing proceedings against participants in Nazi persecution, brought civil denaturalization and removal actions, not criminal prosecutions, the FBI was not part of the office's litigation team in Demjanjuk's case or any other OSI litigation. Jonathan C. Drimmer Aff. ¶ 5, Exh. 25 to Gov't Opp'n; Neal M. Sher Aff. ¶ 6, Exh. 26 to Gov't Opp'n; Eli M. Rosenbaum Aff. ¶ 3, Exh. 27 to Gov't Opp'n. In accordance with its standard practice, OSI asked the FBI and other U.S. agencies for any records pertaining to Demjanjuk in August 1979, prior to the start of Demjanjuk's first denaturalization trial. Drimmer Aff. ¶ 4; Sher Aff. ¶¶ 4-5. The FBI responded that it had no records on Demjanjuk. Drimmer Aff. ¶ 4; Sher Aff. ¶ 5. Knowing that it had not subsequently partnered with the FBI on the case, the Demjanjuk litigation team did not repeat its records request to the FBI before initiating the second denaturalization proceeding. Drimmer Aff. ¶ 5. The FBI did not provide Martin's March 4, 1985, memos to OSI; thus, the investigators and attorneys working on Demjanjuk's case were unaware of those memos at the time of Demjanjuk's second denaturalization trial.

filed an affidavit from Special Agent Martin. In the affidavit, Martin explained that at the time he wrote the March 4, 1985, memos, he was a counterintelligence agent at the FBI's Cleveland field office. Martin Aff. ¶ 1. According to Martin, he was not involved in any investigation of "Demjanjuk's activities during World War II, his immigration to the United States, or his naturalization as a United States citizen." *Id.* ¶ 5. Instead, Martin "became aware of the Demjanjuk case through media coverage." *Id.* ¶ 4. Martin stated that he had "never seen the original Trawniki card" and verified that his "speculation" in the letterhead memorandum was "not base[d] . . . on any investigatory activity." *Id.* ¶¶ 8, 11. Although neither Martin nor anyone else at the FBI shared Martin's memos with the attorneys and investigators working on Demjanjuk's case, *see supra* note 3, Martin remembers discussing his "concerns regarding possible KGB forgery of the Trawniki identity card" in a telephone call with one of Demjanjuk's attorneys around the time that Martin wrote the memos, Martin Aff. ¶¶ 18-20 (explaining that Martin "expressed to this attorney the substance of what [he] wrote in the Airtel and LHM").

Martin Aff. ¶ 7; Watkins Aff. ¶¶ 3, 5; Drimmer Aff. ¶¶ 5-10; Sher Aff. ¶¶ 6, 11-15; Rosenbaum Aff. ¶¶ 3, 16, 20.

Demjanjuk has not disputed Martin's sworn statement that such a telephone call occurred.

In opposing Demjanjuk's Rule 60 motion, the government argued that it had not violated its obligation under *Petrovsky*, 10 F.3d at 353, to disclose *Brady* material because (1) Martin informed Demjanjuk's attorney of the substance of his memos, (2) the team involved in the investigation and litigation of Demjanjuk's case was unaware of those memos, and (3) it was not reasonably probable that disclosure of the memos before Demjanjuk's second denaturalization trial would have produced a different result in that proceeding. Gov't Opp'n at 33-48. The district court found it unnecessary to address the government's first two arguments because the court agreed with the government that the Martin memos were "neither exculpatory nor material."[4] *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *10. The court explained that "Martin's theory about a possible Soviet scheme targeting anti-Soviet dissidents [was] no match, quantitatively or qualitatively, for the considerable documentary evidence

[4] Because the district court declined to make any findings with respect to the government's other arguments, this brief focuses on the question whether the district court erred in deciding that the Martin memos were not exculpatory or material.

presented by the Government and supported by expert authentication in the [second denaturalization] trial, which evidence placed Demjanjuk in numerous concentration camps during the war." *Id.* at *13. The court also stated that Martin's memos were "distinct from the substance and mass of hard evidence the prosecution eventually admitted withholding in the first denaturalization proceeding, which evidence supported Demjanjuk's misidentification defense and sufficiently undermined confidence in the outcome of that proceeding." *Id.* Because Martin's memos merely contained "speculation . . . premised upon erroneous assumptions and mistaken beliefs, and made without any investigation whatsoever," *id.* at *11, the district court denied Demjanjuk's motion for Rule 60 relief, *id.* at *14. It also denied Demjanjuk's subsequent motion for reconsideration. *Id.*

SUMMARY OF ARGUMENT

Demjanjuk's death renders this appeal moot, thus depriving this Court of jurisdiction. Although Vera Demjanjuk has sought to pursue the appeal in her capacity as executrix of Demjanjuk's estate based on the estate's purported interest in withheld social security benefits, it is unclear whether those benefits would be repaid if Demjanjuk's denaturalization

judgment were vacated after his death. Furthermore, even if the Social Security Administration would repay the withheld benefits, Demjanjuk's estate would have no claim to the benefits because they would be repaid to Demjanjuk's wife or children *in their personal capacities*. As a result, no live case or controversy exists between the parties to this appeal. Although a court might have inherent authority to determine whether one of its prior judgments was procured by fraud even after the case in which the judgment was entered has become moot, there is no reason to engage in such an inquiry here because Demjanjuk's claim of fraud on the court is patently meritless.

Even if this appeal is not moot, the district court did not abuse its discretion in denying Demjanjuk's Rule 60 motion because the Martin memos were not material and thus did not need to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). Martin's speculation that the Soviets might have fabricated the Trawniki card was not supported by any investigation and was premised on the erroneous assumptions that Demjanjuk was a prominent anti-Soviet dissident and that the Soviets had not permitted the government, the court, or the defense team to examine

the Trawniki card to determine its authenticity. The Soviet-forgery theory was also thoroughly discredited by the mass of forensic and documentary evidence that the government presented at Demjanjuk's second denaturalization trial. No reasonable probability exists that disclosure of Martin's unfounded speculation would have resulted in a different outcome in that proceeding. Indeed, Demjanjuk has not disputed Martin's sworn statement that Martin communicated his concerns about the Trawniki card's authenticity to one of Demjanjuk's attorneys around the time that Martin wrote his March 4, 1985, memos. Nevertheless, Demjanjuk failed to produce any significant support for the Soviet-forgery theory at his second denaturalization trial in 2001.

The district court also did not abuse its discretion by denying Demjanjuk's Rule 60 motion without holding a hearing and without allowing the parties to conduct discovery. Over the course of more than three decades, Demjanjuk has repeatedly attempted to challenge the Trawniki card's authenticity, and each time, his challenges have been rejected. Premised on flawed assumptions and lacking any investigatory basis, the Martin memos provide no cause for doubting the propriety of

those prior decisions. The theory, presented in Martin's memos, that the Trawniki card might have been a Soviet forgery was resoundingly refuted by the evidence presented at Demjanjuk's second denaturalization trial. There is no reason to believe that further hearings or discovery would unearth evidence supporting that theory. As a result, the district court did not abuse its discretion in determining that Demjanjuk's motion did not warrant a hearing or the reopening of discovery.

ARGUMENT

I. DEMJANJUK'S DEATH DEPRIVES THIS COURT OF JURISDICTION OVER THIS APPEAL.

Given Demjanjuk's death, this appeal should be dismissed as moot.[5]

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[5] The government also fails to see any statutory basis for the continued participation of the Federal Public Defender's Office in this case after Demjanjuk's death. This Court originally appointed the Federal Public Defender under 18 U.S.C. § 3006A to represent Demjanjuk in connection with the fraud on the court proceedings in the case in which Demjanjuk's request for habeas relief from his extradition to Israel was denied. *See* Order at 2, *Demjanjuk v. Petrovsky*, No. 85-3435 (6th Cir. June 5, 1992). Assuming that the Federal Public Defender's reappointment to assist Demjanjuk with his Rule 60 motion in the second denaturalization proceeding was appropriate, *but see* R. 213, Gov't Response to Mot. for Appointment of Counsel, it is difficult to comprehend how section 3006A provides any basis for the Federal Public Defender's continued participation in this case now that the "person" it was appointed to represent has died. 18 U.S.C. § 3006A(a) (providing for the appointment of attorneys for "financially eligible person[s]" in certain classes of cases).

As this Court has recognized, an "appeal must be dismissed as moot" when "events occur . . . that make it 'impossible for the court to grant any effectual relief whatever to a prevailing party.'" *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 713 (6th Cir. 2011) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). Because Demjanjuk can no longer benefit from the relief sought in this appeal—the vacatur of the district court's judgment of denaturalization and the restoration of his citizenship—no live "case[] or controvers[y]" exists between the parties, thus depriving this Court of jurisdiction. *Id.* (citing U.S. Const. art. III, § 2, cl. 1).

Vera Demjanjuk, in her capacity as executrix of John Demjanjuk's estate, contends that this appeal is not moot for two reasons. First, she claims that the government would pay withheld "social security benefits and similar benefits" if the district court's denaturalization judgment were vacated. Demjanjuk Opening Br. 1. Second, she argues that this Court has jurisdiction over this appeal because "it raises a violation of this Court's

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Certainly, there is no readily apparent statutory basis for the Federal Public Defender's assistance with the estate's purported efforts to recover government benefits. *See* Demjanjuk Opening Br. 1.

specific instructions to the government defining its obligations in this and similar cases." *Id.*

Contrary to Vera Demjanjuk's contention, John Demjanjuk's estate does not have a "legally cognizable interest" in his withheld social security benefits. *Id.* The Social Security Administration (SSA) terminated payments to Demjanjuk in accordance with 42 U.S.C. § 402(n), which prohibits the SSA from paying social security benefits to individuals, such as Demjanjuk, who have been removed from the country under 8 U.S.C. § 1227(a) or 1182(a)(6)(A). *See* 20 C.F.R. § 404.464(a)(1) (regulation implementing 42 U.S.C. § 402(n)). The SSA cannot recommence payments until the individual is "lawfully admitted to the United States for permanent residence." 42 U.S.C. § 402(n)(1)(A); *see also* 20 C.F.R. § 404.464(a)(2). An individual is "considered lawfully admitted for permanent residence as of the month [he] enter[s] the United States with permission to reside here permanently." 20 C.F.R. § 404.464(a)(2). The SSA properly stopped payments to John Demjanjuk after being notified that he was to be removed to Germany, and Demjanjuk's death forecloses the possibility that social security payments might recommence upon his

entry into the United States "with permission to reside here permanently." Thus, even though the SSA made a lump-sum repayment of withheld social security benefits following the vacatur of Demjanjuk's first denaturalization judgment, *see* Demjanjuk Opening Br. 1, there is no guarantee that the SSA would follow the same course if the second denaturalization judgment were now vacated after Demjanjuk's death. Indeed, the plain language of 42 U.S.C. § 402(n) and 20 C.F.R. § 404.464(a) militate against any such repayment.

Even if the SSA would repay the withheld amounts if the district court's denaturalization judgment were vacated, however, Vera Demjanjuk would lack standing to pursue this appeal in her capacity as the executrix of Demjanjuk's estate. Although the Social Security Act provides for the restitution of underpayments even after a beneficiary's death, 42 U.S.C. § 404(a)(1)(B)(i); *see also* 20 C.F.R. § 404.503(b), such restitution is to be made to the beneficiary's surviving spouse, children, or parents *in their personal capacities*, 42 U.S.C. § 404(d); *see also* 20 C.F.R. § 404.503(b). Payment is made to "the legal representative of the estate" of the beneficiary only if payment cannot be made to any of these individuals. 42

U.S.C. § 404(d)(7); *see also* 20 C.F.R. § 404.503(b)-(c). Because Demjanjuk's wife, Vera Demjanjuk, and his children are still living, Demjanjuk's estate would have no claim to any withheld social security benefits. Therefore, Vera Demjanjuk cannot, as she has attempted, prosecute this appeal as executrix of Demjanjuk's estate based on the estate's purported interest in withheld social security benefits. As for the conclusory reference in Demjanjuk's opening brief to other, "similar benefits," Br. 1, the brief does not specify what those benefits are, much less explain the legal basis for their restitution to Demjanjuk's estate in the event that the district court's denaturalization judgment were vacated. Because Vera Demjanjuk has not established that the denaturalization judgment invades any "legally protected interest" of Demjanjuk's estate, she lacks standing to pursue this appeal in her capacity as the estate's executrix. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Although no such argument has yet been made, Vera Demjanjuk or Demjanjuk's children might contend that they should be substituted as parties and permitted to pursue this appeal in their personal capacities. It is doubtful, however, that such substitution would be proper under

Federal Rule of Appellate Procedure 43(a)(1), which calls for the substitution of "the decedent's personal representative" when a party dies while an appeal is pending. The Seventh Circuit has explained that the term "personal representative" in Rule 43(a)(1) generally "refers to an individual recognized by state law, such as an executor."[6] *Bennett v. Tucker*, 827 F.2d 63, 68 (7th Cir. 1987); *see also Black's Law Dictionary* 1416 (9th ed. 2009) (defining "personal representative" as "[a] person who manages the legal affairs of another because of incapacity or death, such as the executor of an estate").

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[6] Although this Court considered the interaction between the social security laws and Rule 43(a)(1) in *Cunningham v. Astrue*, 360 Fed. Appx. 606, 611-12 (6th Cir. 2010), that case provides little guidance here because it was clear in the case that any restitution of social security benefits would be made to the "legal representative" of the decedent's estate under 42 U.S.C. § 404(d)(7) and 20 C.F.R. § 404.503(b)(7), and the Court appears to have determined that the decedent's surviving brothers and sisters, who were substituted as parties, could qualify as the "legal representative[s]" of the decedent's unadministered estate under SSA regulations, *Cunningham*, 360 Fed. Appx. at 611 (quoting 20 C.F.R. § 404.503(d)-(e)). It is one thing to say, as this Court did in *Cunningham*, that a party assumed to qualify as a "legal representative" under agency regulations is a "personal representative" for purposes of Rule 43(a)(1). It is quite another thing to say that a party clearly proceeding in her personal capacity is nonetheless a "personal representative" of a deceased party to an appeal. In any event, *Cunningham* is an unpublished decision and thus is "not binding precedent on subsequent panels." *Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011).

Even if (1) Vera Demjanjuk or Demjanjuk's children could be substituted as parties in their personal capacities under Rule 43(a)(1), and (2) the SSA would repay withheld social security benefits if Demjanjuk's denaturalization judgment were vacated, it does not follow that mootness would be avoided. In *Figueroa v. Rivera*, 147 F.3d 77, 81-82 (1st Cir. 1998), for example, the First Circuit determined that a criminal defendant's family members would lack standing to pursue a collateral challenge to his conviction after his death, even though the court had held that obtaining the vacatur of that conviction was a prerequisite to the family members' action for damages under 42 U.S.C. § 1983.[7] As the First Circuit explained, the defendant's "death during the pendency of his habeas petition rendered that action moot, and no earthly circumstance [could] revive it." *Id.* at 82. Similarly, Demjanjuk's death has rendered his post-judgment

[7] This Court in *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592, 602-03 (6th Cir. 2007), disagreed with *Figueroa*'s holding that "annulment of the underlying conviction" is an indispensable "element of a section 1983 'unconstitutional conviction' claim," *Figueroa*, 147 F.3d at 81. In *Powers*, however, the Court did not decide whether, if *Figueroa*'s holding on that issue were correct, the beneficiaries of a deceased prisoner's estate could pursue a habeas action after the prisoner's death in order to provide a basis for a later damages action under section 1983.

challenge to his denaturalization moot, and his family members should not be permitted to pursue that challenge in Demjanjuk's stead based on their purported interest in recouping withheld social security benefits.

The government acknowledges that the Ninth Circuit held in *Magnuson v. Baker*, 911 F.2d 330, 332 n.4 (9th Cir. 1990), that an appeal regarding the revocation of an individual's passport, which established the individual's citizenship, was not mooted by the individual's death because the individual's citizenship status would have tax consequences for his estate and would affect his children's claim to derivative citizenship. Those particular consequences of the revocation of U.S. citizenship are not alleged here, and regardless, the Ninth Circuit's decision in *Magnuson* is not binding on this Court.

Demjanjuk's opening brief (Br. 1) also contends that this Court has jurisdiction "to hear this appeal given that it raises a violation of this Court's specific instructions to the government defining its obligations in this and similar cases." Following this sentence, Demjanjuk provides citations to three cases that provide little support for his jurisdictional arguments. The first case, *Republic National Bank of Miami v. United*

States, 506 U.S. 80 (1992), dealt with the clearly inapposite issue of whether a court loses authority to hear an appeal in an in rem proceeding when the res is transferred outside of its territorial jurisdiction. The second case, *Christian Knights of the Ku Klux Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992), addressed the "capable of repetition, yet evading review" exception to mootness, which cannot apply here because Demjanjuk's death ensures that he will never again be subjected to the discovery violations alleged in his Rule 60 motion, *see id.* at 370 (explaining that "capable of repetition" means "a reasonable expectation that the *same complaining party* would be subjected to the same action again" (emphasis added; quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)); *see also McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (same). The third case, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98 (1990), held that a district court may impose sanctions under Federal Rule of Civil Procedure 11 on a plaintiff who has voluntarily dismissed his complaint; that issue is not raised here.

Nevertheless, the government recognizes that there is authority for

the proposition that courts have inherent power to inquire whether their judgments have been procured by fraud, even if no live case or controversy continues to exist between the parties to the litigation. *See* Fed. R. Civ. P. 60(d)(3) (noting that Fed. R. Civ. P. 60 "does not limit a court's power to . . . set aside a judgment for fraud on the court"); *see also Root Ref. Co. v. Universal Oil Products Co.*, 169 F.2d 514, 521-22 (3d Cir. 1948) (concluding in patent dispute that court of appeals had inherent authority to inquire whether its prior judgment was tainted by fraud even if a live controversy no longer existed between the parties); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2870, at 411-12 (2d ed. 1995) ("The fact that there are no adversary parties on the claim of fraud on the court does not deprive the court of jurisdiction. Since the original judgment, by hypothesis, must have been given in a 'case or controversy,' the court continues to have ancillary jurisdiction to determine whether it has been the victim of a fraud."). Because Demjanjuk's estate has no cognizable interest in having Demjanjuk's denaturalization judgment set aside, it has no standing to insist that this Court vacate that judgment on grounds of fraud on the court. In light of the authorities

indicating that this Court may have inherent power to reach that issue on its own initiative, however, the government will address the merits of the arguments set forth in Demjanjuk's opening brief. In doing so, the government in no way concedes that Vera Demjanjuk has standing to pursue this appeal in her capacity as executrix of Demjanjuk's estate. Instead, it seeks to demonstrate that there is no cause in this case for the Court to invoke whatever inherent authority it might possess to protect its judgments from fraud.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEMJANJUK'S RULE 60 MOTION.

A. Standard of Review

Demjanjuk's opening brief argues (Br. 17-53) that the district court should have granted his motion for relief from his denaturalization judgment under Federal Rule of Civil Procedure 60(b)(6), 60(d)(1), or 60(d)(3), or, alternatively, should not have ruled on that motion without permitting additional discovery and holding a hearing. As explained above, *see supra* pp. 34-42, Vera Demjanjuk lacks standing to raise these arguments in her capacity as executrix of Demjanjuk's estate. If she did have standing, however, this Court's review would be for abuse of

discretion. *See Gen. Medicine, P.C. v. Horizon/CMS Health Care Corp.*, Nos. 10-1315, 10-1397, 2012 WL 1181486, at *4-*5 (6th Cir. Apr. 10, 2012) (holding that a district court's ruling under Rule 60(d)(3) regarding an allegation of fraud on the court is reviewed for abuse of discretion); *Mitchell v. Rees*, 651 F.3d 593, 595 (6th Cir. 2011) (abuse of discretion standard applies to district court decision in an independent action contemplated by Rule 60(d)(1)); *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 453-54 (6th Cir. 2008) ("We review a district court's denial of a Rule 60(b) motion for abuse of discretion."); *see also Buck v. U.S. Dep't of Agric., Farmers Home Admin.*, 960 F.2d 603, 609 (6th Cir. 1992) (holding that district court did not abuse its discretion in denying a Rule 60(b) motion without conducting an oral hearing); *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) (holding that a district court's denial of further discovery in connection with a Rule 60 motion is reviewed for abuse of discretion). "A court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *In re Ferro Corp. Derivative Litig.*, 511

F.3d 611, 623 (6th Cir. 2008).

B. The district court properly denied Demjanjuk's Rule 60 motion because there is no reasonable probability that disclosure of the Martin memos would have produced a different result in the second denaturalization proceeding.

1) The government's failure to disclose immaterial evidence would not provide grounds for relief under Rule 60(b)(6), 60(d)(1), or 60(d)(3).

Federal Rule of Civil Procedure 60(b) allows "a party or its legal representative" to move for relief from a final judgment on various grounds. Relief under Rule 60(b), however, "is 'circumscribed by public policy favoring finality of judgments and termination of litigation.'" *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)). Accordingly, motions under the first three subsections of Rule 60(b), which cover, among other things, instances of excusable neglect, newly discovered evidence, and fraud, must be filed within one year of the entry of judgment. Fed. R. Civ. P. 60(b)(1)-(3), (c)(1). This one-year deadline does not apply to motions under Rule 60(b)(6)'s catchall provision, which permits a court to grant relief from a judgment in situations not covered by the other numbered clauses of the rule. *Blue*

Diamond, 249 F.3d at 524. Relief, however, may be granted under Rule 60(b)(6) "only in exceptional or extraordinary circumstances." *Id.* (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)).

Rules 60(d)(1) and 60(d)(3) are saving clauses. Rule 60(d)(1) provides that nothing in Rule 60 limits a court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding." The elements of an independent action are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Mitchell, 651 F.3d at 595 (quoting *Barrett v. Sec'y of Health & Human Servs.*, 840 F.2d 1259, 1263 (6th Cir. 1987)). In addition, "an independent action is available only to prevent a grave miscarriage of justice," which is a "stringent and demanding standard." *Id.* (internal quotation marks omitted). Where no prejudice to the adverse party results, "an independent action for relief may be treated as a 60(b) motion, and conversely, a 60(b) motion may be treated as the institution of an independent action." *Id.*

(internal quotation marks omitted).

Rule 60(d)(3) reaffirms a court's inherent power to "set aside a judgment for fraud on the court." Fraud on the court consists of conduct:

> 1) on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court.

Johnson v. Bell, 605 F.3d 333, 339 (6th Cir. 2010) (quoting *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009)). Given society's interest in the "finality of court judgments," a judgment should be disturbed for fraud on the court only if officers of the court, such as attorneys, have engaged in conduct sufficiently egregious that it "actually subvert[s] the judicial process." *Petrovsky*, 10 F.3d at 352. An allegation of fraud on the court must be proven by "clear and convincing evidence." *Johnson*, 605 F.3d at 339.

Although Demjanjuk's opening brief (Br. 17-48) argues that he was entitled to relief from his denaturalization judgment under Rule 60(b)(6), 60(d)(1), and 60(d)(3), there is no need for the Court to engage in separate inquiries under each of these provisions. As the district court found, and

Demjanjuk does not contest, his claims for relief under these provisions all hinge "upon his contention that the Government's failure to disclose the [Martin memos] violated *Brady v. Maryland*, 373 U.S. 83 (1963)."[8] *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *9.

A *Brady* violation occurs when the prosecution fails to disclose material evidence favorable to the accused. *See Kyles v. Whitley*, 514 U.S. 419, 432-40 (1995). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 433 (internal quotation

[8] Demjanjuk contends (Br. 18-28) that *Petrovsky*'s extension of *Brady* to the realm of civil denaturalization proceedings is the "law of the case." *See Petrovsky*, 10 F.3d at 353. Technically, that is incorrect. The law-of-the-case doctrine applies only to prior decisions in the "same case." *United States v. Rayborn*, 495 F.3d 328, 337 (6th Cir. 2007) (internal quotation marks omitted). Thus, the doctrine is inapplicable here because the habeas proceeding at issue in *Petrovsky* and the second denaturalization proceeding at issue here are separate actions. *See Rodriguez v. Passinault*, 637 F.3d 675, 689 n.6 (6th Cir. 2011); *Farina v. Nokia Inc.*, 625 F.3d 97, 117 n.21 (3d Cir. 2010). Nevertheless, *Petrovsky* is binding precedent at this stage of the appellate process. *See, e.g.*, *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000) (noting that a decision of one panel of this Court is binding on future panels unless it is overruled by the Court en banc or by the Supreme Court). Thus, the government will assume for purposes of this brief that *Petrovsky*'s extension of *Brady* was valid and that the *Brady* standard governed the government's discovery obligations in Demjanjuk's second denaturalization proceeding.

marks omitted). Certainly, if it is not reasonably probable that the evidence that Demjanjuk has accused the government of suppressing would have made a difference in his second denaturalization trial, the government's failure to disclose that evidence would not constitute an "exceptional or extraordinary circumstance[]" (as required for Rule 60(b)(6) relief, *see Blue Diamond*, 249 F.3d at 524 (internal quotation marks omitted)), a "grave miscarriage of justice" (as required for relief in an independent action under Rule 60(d)(1), *see Mitchell*, 651 F.3d at 595 (internal quotation marks omitted)), or a "fraud on the court" (as contemplated by Rule 60(d)(3)). Therefore, if the district court was correct in holding that the Martin memos were immaterial under *Brady*, its denial of Rule 60 relief must be affirmed.[9]

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[9] Demjanjuk contends that it is undisputed that the Martin memos were "favorable" to him, and his brief claims that the "district court did not even discuss" that issue. Demjanjuk Opening Br. 17. Contrary to Demjanjuk's contention, however, the district court expressly held that the memos were "*neither* exculpatory *nor* material." *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *10 (emphasis added). The argument that the memos were not favorable to Demjanjuk (i.e., that the speculation contained in the memos was so lacking in foundation that the memos were not favorable in any meaningful sense of the word) overlaps with the inquiry into whether the memos were material under *Brady*. The government thus does not distinguish between the two inquiries for purposes of this brief.

2) The evidence that Demjanjuk has accused the government of failing to disclose was not material.

There is no reasonable probability that the government's disclosure of the Martin memos before Demjanjuk's second denaturalization trial would have produced a different result in that proceeding.[10] As this Court has explained, the *Brady* standard of materiality is "difficult" to satisfy. *Montgomery v. Bobby*, 654 F.3d 668, 678 (6th Cir. 2011) (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 679 (internal quotation marks omitted). In determining whether a defendant has met this standard, a reviewing court must "consider the totality of the evidence" presented at trial, "not merely the exculpatory facts in isolation."

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[10] Although Demjanjuk's opening brief (Br. 12, 51) refers to "hundreds of pages" of previously undisclosed documents, including some that the district court "did not even see" (presumably because Demjanjuk decided that it was not worthwhile to bring the documents to the district court's attention in his filings), Demjanjuk's *Brady* argument focuses on the Martin memos (Br. 28-36). The government thus focuses on those memos as well. Demjanjuk also complains (Br. 32-33) about the redaction of classified information from government documents. The two examples of redacted documents cited in his brief, however, were produced without redactions before the district court entered its order denying Demjanjuk's Rule 60 motion. *See* Demjanjuk Opening Br. 33 (citing Exhs. D & Q to Demjanjuk's Mem. in Support of Rule 60 Mot. (R. 222)); *see also* Exhs. 15 & 22 to Gov't Opp'n.

Id.; *see also United States v. Warshak*, 631 F.3d 266, 300 (6th Cir. 2010) (explaining that the defendant bears the burden of establishing a *Brady* violation).

The Martin memos do not undermine confidence in the district court's finding that Demjanjuk trained at Trawniki and served at the Majdanek, Sobibor, and Flossenbürg concentration and extermination camps. Martin's "speculation" that the Soviets might have forged the Trawniki card was primarily based on "press accounts of the trial" and his general training and experience as a counterintelligence agent. Martin Aff. ¶¶ 9, 11-12. Martin's memos were not supported by "any investigatory activity," and Martin admits that he has not even "seen the original Trawniki card." *Id.* ¶¶ 8, 11.

Furthermore, Martin's Soviet-forgery theory was founded on at least two erroneous assumptions. First, the letterhead memo asserts that Demjanjuk "has a reputation for being anti-Soviet and an outspoken dissident." Exh. 22 to Gov't Opp'n at 1. In reality, "Demjanjuk was not an outspoken dissident against the Soviet Union," as Demjanjuk himself has

acknowledged.[11] *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *11. Second, Martin assumed that Soviet authorities had not permitted anyone in the United States to examine the Trawniki card to determine its authenticity. Exh. 22 to Gov't Opp'n at 3. The Soviets, however, made the original of the Trawniki card available to the government, the court, and the defense team during Demjanjuk's first denaturalization trial. *Demjanjuk*, 518 F. Supp. at 1366-68 & n.13. The government's forensic analyst examined the original card, but Demjanjuk elected to forgo the opportunity to have his own forensics expert analyze the original. *Id.* at 1367-68 & n.13.

For these reasons, the district court properly found that Martin's memos merely contained "speculation . . . premised upon erroneous

[11] At his Israeli trial, Demjanjuk admitted that while in the United States, he "didn't say anything against" Soviet authorities and thus had no reason to fear them. July 30, 1987, Isr. Trial Tr. 7260, Exh. 34 to Gov't Opp'n. Furthermore, Demjanjuk testified in a deposition in his first denaturalization case that he had never belonged to any anti-Communist or Ukrainian nationalist organizations in the United States. Feb. 20, 1980, Demjanjuk Depo. 84, Exh. 35 to Gov't Opp'n. When asked in the deposition why the Soviets would have publicized the fact that he had served as an SS guard, Demjanjuk simply responded, "The Soviets paid my mother a pension and told her that I had died and when my wife went to the Soviet Union it all started." *Id.* at 85. He did not claim that the Soviets were attempting to retaliate against him for engaging in dissident activities.

assumptions and mistaken beliefs, and made without any investigation whatsoever." *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *11. The government had no obligation under *Brady* to disclose such groundless speculation, uninformed by any investigation and contradicted by other evidence in the government's possession. *See United States v. Agurs*, 427 U.S. 97, 109 n.16 (1976) (noting that the government has no obligation under *Brady* "to communicate preliminary, challenged, or speculative information" (quoting *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in judgment))); *Moore v. Illinois*, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.").

Despite the Martin memos' obvious flaws, Demjanjuk contends (Br. 44) that his defense in the second denaturalization trial "would have been more persuasive, more powerful, and more pointed" if the documents had been available to him. Even assuming for purposes of argument that the memos themselves would have been admissible at trial, *see* Demjanjuk Opening Br. 12, 43, they would have been no match for the mountain of

evidence establishing the Trawniki card's authenticity and Demjanjuk's service as an SS guard. That evidence included the following:

* The Trawniki card contains a wealth of identifying information, including Demjanjuk's former name, birth date, father's name, birthplace, nationality, and photograph, along with a notation that Demjanjuk has a scar on his back. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *1-*2.

* Government document examiners testified that (1) the signatures of two Nazi officials on the Trawniki card are consistent with similar signatures on other wartime documents; (2) defects in the stamps on the Trawniki card are consistent with the defects in similar stamps on other documents from the Nazi era; and (3) the paper, typewriting, and inks on the Trawniki card are consistent with those in use in Europe in the early 1940s. *Id.* at *3-*4; *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1. The district court explained that this expert testimony was "devastating" to Demjanjuk's contention that the Trawniki card was a Soviet forgery. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1.

* Demjanjuk claims that he was captured by the Germans in the Battle of Kerch in May 1942 and was then transferred to a POW camp at

Rovno, Ukraine. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *4. Many men captured in the Battle of Kerch "were sent from Rovno to Trawniki in June and July 1942 to enter German service." *Id.* This time line is consistent with the signature of SS *Corporal* Ernst Teufel on the Trawniki card, as Teufel was promoted from the rank of corporal to sergeant on July 19, 1942. *Id.*

* Soviet security officials relied on the Trawniki card in creating "top secret" wanted lists in 1948 and 1952 that contained Demjanjuk's name. *Id.* at *14-*15. Demjanjuk did not immigrate to the United States until February 9, 1952, *id.* at *20, and there is no evidence that "the Soviets were aware that [Demjanjuk] was alive or living in the United States before 1956," *id.* at *15. Thus, to accept the theory that the Soviets fabricated the Trawniki card to retaliate against Demjanjuk for his dissident activities in the United States, one must believe that (1) the Soviets relied on forged documents to support their own internal, "top secret" wanted lists, and (2) as early as 1948, the Soviets had the foresight that Demjanjuk might one day move to the United States and engage in dissident activities there, in which case it might be helpful to have a forged

document at the ready to discredit him.

* Six other Nazi-era documents—the Majdanek disciplinary report (Government Exhibit (GX) 4), the Sobibor transfer roster (GX 5), and the Flossenbürg transfer roster, weapons log, daily duty roster, and undated roster (GX 6-9)—contain some version of Demjanjuk's name.[12] *See supra* pp. 18-20. Five of the documents (all but the Flossenbürg weapons log, GX 7) contain the same service number, 1393, as appears on the Trawniki card. The Sobibor and Flossenbürg transfer rosters (GX 5-6) also contain Demjanjuk's birth date and birthplace. These documents were found in the archives of three different countries: Lithuania, Russia, and Germany. The Trawniki card (GX 3) was held in yet another archive in Soviet-controlled Ukraine. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *3; *Demjanjuk*, 518 F. Supp. at 1365-66. Importantly, the Flossenbürg weapons log, daily duty roster, and undated roster (GX 7-9) are all housed in the German Federal Archives, *located in the former West Germany*.

[12] As the district court found, the different spellings of Demjanjuk's name in these documents "actually lends further credence to them, since the conversion from the Cyrillic alphabet to the western alphabet produces such variations and a counterfeiter would probably have used one spelling consistently." *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1.

Demjanjuk, No. 1:99-cv-1193, 2002 WL 544622, at *10-*11. It is highly unlikely, to put it mildly, that the Soviets would have fabricated all of these documents and then dispersed them to archives in four different countries, including one country, West Germany, that fell outside the Iron Curtain and thus beyond Soviet control. *See Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1 ("The location of these documents in the archives of several different countries . . . buttresses their authenticity, as their dispersal at the chaotic end of World War II does not seem at all unusual."). Furthermore, with the exception of the Trawniki card, all of these documents were discovered after the collapse of the Soviet Union. *See* Sher Aff. ¶ 8. Surely, if the Soviets had fabricated all of the documents to retaliate against Demjanjuk, they would not have produced only one, the Trawniki card, while leaving the others hidden in archives, some of which were located in the Soviet bloc and thus were not readily accessible to Western researchers and investigators. *See Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *15 ("[Demjanjuk] has offered no evidence to show why the Soviets made no use of their purported forgeries until the 1970s when [the Trawniki card] was first disclosed, while keeping

additional evidence against him secret until after their regime had collapsed.").[13]

* In post-war interviews conducted by Soviet authorities, Trawniki-trained guard Ignat Danilchenko stated that Demjanjuk had served with him as a guard at Sobibor and Flossenbürg. *Id.* at *12. Similarly, when shown Demjanjuk's photo by Soviet authorities, Trawniki-trained guard Ivan Ivchenko identified it as the photo "of a Trawniki-trained guard whose face he knew but whose name and details of service he could no longer remember." *Id.*

* Demjanjuk admits that after he was captured by the Germans, he received a tattoo of his blood type. *Id.* at *11. As the district court explained, the SS gave such tattoos to members of the battalion

[13] Other courts have similarly rejected Soviet-forgery claims raised by individuals accused of assisting in Nazi persecution. *See, e.g.*, *United States v. Stelmokas*, 100 F.3d 302, 313 (3d Cir. 1996) ("If anyone created the documents to injure Stelmokas, the fabricator most peculiarly placed the bulk of the documents in a location where they were not accessible to the public and from which, in fact, they were not released for decades."); *United States v. Lileikis*, 929 F. Supp. 31, 38 (D. Mass. 1996) ("[W]hy would even the KGB go to the trouble of forging documents implicating Lileikis in war crimes, and then bar all access to its handiwork for some fifty years, while awaiting the collapse of the government whose evil intentions towards Lileikis it presumably sought to serve?").

responsible for guarding the Flossenbürg concentration camp. *Id.*

* In applying for IRO assistance and for a DPA visa, Demjanjuk listed Sobibor, Poland, as one of his wartime residences. *Id.* at *17, *19-*20. As the district court found, Sobibor "was an obscure village, with roughly 1,000 occupants during World War II." *Id.* at *8. The district court found that Demjanjuk's "various and inconsistent explanations" for listing this little-known village as one of his residences were "not credible." *Id.* at *17; *see also Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010) (noting "the well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt").

The theory that the Soviets might have fabricated evidence against Demjanjuk is not new to this case. Demjanjuk raised that defense in his first denaturalization proceeding, where it was soundly rejected. *See Demjanjuk*, 518 F. Supp. at 1366. He renewed the defense at his second denaturalization proceeding, where it was again rejected in light of the mass of evidence discussed above. *See Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1. Given the overwhelming evidence demonstrating the authenticity of both the Trawniki card and the other Nazi-era documents

identifying Demjanjuk as an SS guard, it is not reasonably probable that the admission of the Martin memos at Demjanjuk's second denaturalization trial would have produced a different outcome.[14]

In addition to arguing that the Martin memos could have been introduced into evidence at his trial or used in cross-examining witnesses (Br. 12, 43), Demjanjuk also contends that disclosure of the memos might have enabled him to seek further discovery and call additional witnesses in support of his defense (Br. 31-32). There is no reason to believe, however, that disclosure of the Martin memos would have led to the discovery of other evidence providing material support for Demjanjuk's Soviet-forgery theory, especially given the wealth of evidence demonstrating the authenticity of the Nazi-era documents presented at Demjanjuk's second denaturalization trial. Certainly, Demjanjuk's speculation about the mere possibility of discovering such evidence does

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[14] Contrary to Demjanjuk's contention (Br. 40-42, 44-45), the government's alleged failure to disclose the immaterial Martin memos bears no resemblance to the facts of *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709, 727-28 (N.D. Ohio 2010), *aff'd*, 656 F.3d 379 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1150 (2012), in which a district court barred Ohio from reprosecuting a victorious habeas petitioner because an "extraordinary" mixture of prosecutorial delay and misconduct had undermined the petitioner's ability to defend himself at a retrial.

not satisfy his burden of establishing that it is reasonably probable that disclosure of the Martin memos would have produced a different outcome in his denaturalization proceeding. Indeed, Demjanjuk has not disputed Martin's sworn statement that around the time that Martin wrote the March 4, 1985, memos, he informed one of Demjanjuk's attorneys about his concern that the Soviets might have fabricated the Trawniki card. Martin Aff. ¶¶ 18-20. Nevertheless, Demjanjuk was unable to produce any significant evidentiary support for the Soviet-forgery theory at the second denaturalization trial in 2001.

The Martin memos are immaterial for an additional reason: the district court determined that Demjanjuk's citizenship was subject to revocation even if his version of his activities during World War II were true. *See Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *31. Demjanjuk had testified in previous proceedings that after his capture by the Germans, he became part of a pro-German army unit organized to fight against the Soviets. *Id.* at *15; *see also Demjanjuk*, 518 F. Supp. at 1377. Demjanjuk, however, did not report this service on his application for a DPA visa. *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *20.

Instead, Demjanjuk admits that he lied on the application "about his residences and occupations from 1942 to 1945." *Id.* The district court found in the second denaturalization proceeding that if Demjanjuk had informed the U.S. vice consul who interviewed him in connection with his DPA-visa application about this misrepresentation, the vice consul would not have approved Demjanjuk's visa. *Id.* at *20, *31. Therefore, even under Demjanjuk's version of events, his entry into the United States was unlawful, and thus his citizenship was "illegally procured," because he willfully misrepresented material facts to secure a DPA visa. *Id.* at *31. The Martin memos in no way undermine the district court's determination that Demjanjuk was subject to denaturalization on this ground alone.

At Demjanjuk's second denaturalization trial, the government, as required, presented "clear, unequivocal, and convincing" proof that Demjanjuk's citizenship was illegally procured and thus subject to revocation. *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (internal quotation marks omitted); *see also Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544622, at *21-*31. The Martin memos' speculative assertions, unsupported by any investigation into the circumstances of Demjanjuk's

case, do not undermine confidence in the propriety of the district court's denaturalization judgment. As a result, no *Brady* violation occurred, and the district court did not abuse its discretion by denying Demjanjuk's Rule 60 motion.

C. The district court did not commit procedural error in ruling on Demjanjuk's Rule 60 motion.

Demjanjuk's opening brief contends (Br. 49) that the district court committed procedural error by denying Demjanjuk's Rule 60 motion "without holding oral argument, without conducting an evidentiary hearing, and without allowing further discovery." For the reasons explained above, *see supra* pp. 34-42, Vera Demjanjuk lacks standing to raise this argument in her capacity as executrix of Demjanjuk's estate.

Even if standing existed, however, Demjanjuk concedes (Br. 49) that this Court would review this issue only for abuse of discretion. Neither the Federal Rules of Civil Procedure nor the local rules of the United States District Court for the Northern District of Ohio require that district court judges hold oral argument or evidentiary hearings on Rule 60 motions or permit post-judgment discovery. *See Buck*, 960 F.2d at 609 ("[N]either the local rules of the United States District Court for the Southern District of

Ohio nor the Federal Rules of Civil Procedure provides for a hearing on a Rule 60(b) motion."); *H.K. Porter Co.*, 536 F.2d at 1126 ("Rule 60(b) says nothing about discovery . . . ."). Judges thus have "substantial discretion" in determining what procedures to adopt in ruling on such motions. *United States v. 8136 S. Dobson St., Chicago, Ill.*, 125 F.3d 1076, 1086 (7th Cir. 1997).

Given the utter implausibility of the Martin memos' theory that the Soviets might have fabricated the Trawniki card, the district court hardly abused its discretion in deciding that the memos did not warrant further hearings or discovery. Demjanjuk, however, complains (Br. 50) that the district court improperly relied on Special Agent Martin's affidavit even though Demjanjuk had not had an opportunity to cross-examine Martin. The content of that affidavit is discussed in a single paragraph of the district court's opinion. *See Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *11. Although Demjanjuk does not specify which portion of that paragraph he finds objectionable, the only plausible candidate is the district court's citation of the affidavit in support of the proposition that Martin's memos were not premised on any "independent investigation"

into the circumstances of Demjanjuk's case. *Id.* Martin's admission that he did not base his memos "on any investigatory activity," however, is borne out by the plain language of the memos themselves. Martin Aff. ¶ 11. The memos' Soviet-forgery theory was founded on the erroneous assumptions that Demjanjuk was an outspoken, anti-Soviet dissident and that the Soviets had not permitted the government, the court, or the defense to examine the original Trawniki card to determine its authenticity. *See* Exh. 22 to Gov't Opp'n. As the district court found, if Martin had conducted even a "cursory investigation," he quickly would have learned that these assumptions were false. *Demjanjuk*, No. 1:99-cv-1193, 2011 WL 6371801, at *11. Because Demjanjuk provided the district court with no grounds to question Martin's sworn statement that his memos were not founded on any independent investigation into the facts of Demjanjuk's case, and because that statement found support in the memos themselves, the district court did not abuse its discretion by discussing Martin's affidavit in its opinion even though Demjanjuk lacked an opportunity to cross-examine Martin. *See Johnson*, 605 F.3d at 339 (relying on affidavits in rejecting death-row inmate's Rule 60 claim that state committed fraud on

the court in federal habeas proceedings by concealing an alleged deal between the prosecution and its key witness); *Atkinson v. Prudential Prop. Co.*, 43 F.3d 367, 372-74 (8th Cir. 1994) (relying on "unrebutted affidavits" in affirming district court's denial of Rule 60(b) motion, and holding that district court did not abuse its discretion by failing to hold a hearing on the motion).

Nor did the district court abuse its discretion by ruling on Demjanjuk's motion "without allowing further discovery" regarding the Soviet-forgery theory set forth in Martin's memos. Demjanjuk Opening Br. 49. This Court has made clear that a party alleging that a judgment was procured by fraud is not automatically entitled to obtain discovery regarding its claim. Instead, a district court has "discretion to require the moving party to make a showing in support of its allegations before requiring the prevailing party to submit a second time to extensive discovery to protect his judgment." *H.K. Porter Co.*, 536 F.2d at 1119; *see also Jones v. Ill. Cent. R.R. Co.*, 617 F.3d 843, 853 (6th Cir. 2010).

Here, Demjanjuk failed to make an adequate showing of fraud because the Martin memos' groundless and erroneously premised

speculation, on which Demjanjuk's claim of fraud was founded, was clearly immaterial for the reasons discussed above, *see supra* pp. 49-62. Moreover, there is no reason to believe that further discovery would provide any meaningful support for the thoroughly discredited theory that the numerous captured Nazi documents identifying Demjanjuk were Soviet forgeries. Since his first denaturalization trial, Demjanjuk has argued that the Soviets fabricated evidence against him, but over the course of more than three decades, he has been unable to produce any material support for that claim. *See, e.g.*, *Demjanjuk*, No. 1:99-cv-1193, 2002 WL 544623, at *1; *Demjanjuk*, 518 F. Supp. at 1366. Demjanjuk has provided no basis for believing that yet another round of discovery would prove more fruitful than those preceding it. The district court did not abuse its discretion in refusing to grant Demjanjuk's unfounded request to engage in a post-judgment fishing expedition. *Cf. H.K. Porter Co.*, 536 F.2d at 1118 (holding that litigant was not entitled to post-judgment discovery "so that it [could] fish for other documents" that might support its claim of fraud on the court).

CONCLUSION

This appeal should be dismissed as moot, or, in the alternative, the district court's denial of Demjanjuk's Rule 60 motion should be affirmed.

Respectfully submitted,

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May 15, 2012

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in a 14-point, proportionally spaced, font (Century Schoolbook) using WordPerfect X4, that the brief contains 13,879 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and therefore, that the brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 15, 2012, I electronically filed the foregoing Brief for the United States with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I further certify that appellant's counsel, Michael Tigar, Dennis G. Terez, and Vicki Werneke, are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(b), the United States designates the following relevant district court documents, in addition to those designated by appellant:

Record Entry Number	Document Description
1	Complaint
214	Reply in Support of Motion to Reappoint Counsel

Because the complaint (R. 1) is not part of the district court's electronic record, it is included in an appendix pursuant to 6th Cir. R. 30(a)(1), (c)(2), and (f)(1).