IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL L. BROWN,

Defendant.

ORDER

01-CR-0032-C-01

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Defendant Michael L. Brown has moved for a new trial pursuant to Fed. R. Crim. P. 33(b)(1). He contends that he has a possibility of obtaining new evidence and that the deadline for finding a new trial on the basis of newly discovered evidence is approaching rapidly.

Defendant was convicted in this court on March 15, 2002 on nine counts of bank robbery and use of a firearm in connection with a crime of violence. He appealed from the judgment of conviction. After his appeal was denied, he filed for a writ of certiorari, which was denied on December 1, 2003. On November 11, 2004, he filed a timely motion for collateral relief pursuant to 28 U.S.C. § 2255, which was denied on January 4, 2005.

Although defendant styles his present motion as one for a new trial, it falls within the

category of motions for collateral relief unless it is "a genuine claim of newly discovered evidence tending to show innocence." United States v. Evans, 224 F.3d 670, 672 (7th Cir. 2000). In this instance, it is difficult to tell whether defendant's motion comes within the "actual innocence" exception. Defendant does not describe any evidence that he has in his possession. Rather, he contends that the FBI has a practice of withholding exculpatory evidence on the "I-drive system" that the bureau maintains. Defendant says that he has requested copies of the documents on this drive but has been denied them and that he has appealed from the decision but is still waiting for the appeal to be heard.

Defendant asserts that the drive holds evidence that has not been "approved" by a supervisory agent so as to be included in a case file and he asserts that the evidence is exculpatory because it would show that other persons were the actual perpetrators and conspirators of the armed robbery scheme for which he was sentenced. This assertion is not supported by any information that would tend to support his claim that the allegedly withheld information is exculpatory.

Defendant's motion is premature. If and when he obtains evidence from the FBI culled from the I-drive or receives a final decision on his appeal from the bureau's refusal to release information to him, he may come back to court. If the bureau decides to release the evidence and it is exculpatory, as he believes, he may have a basis both for filing a motion for new trial and for relief from the 3-year filing deadline set out in Rule 33. If the final

decision is to continue to withhold the information, defendant may file a Freedom of Information Act request and secure a determination of the validity of the bureau's decision not to release the information to him.

At the end of his motion, defendant alleges that the Bureau of Prisons has retaliated against him for seeking information from the FBI. If he believes that he has a valid case of unconstitutional retaliation, he may have a constitutional claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 399 U.S. 863 (1970), that he could pursue in the district in which he is confined.

Defendant has asked for the appointment of counsel to help him with the prosecution of this motion. That request will be denied as moot.

ORDER

IT IS ORDERED that defendant Michael L. Brown's motion for a new trial pursuant to Rule 33(b)(1) is DENIED as premature. His request for the appointment of counsel is DENIED as moot.

Entered this 14th day of November, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge