UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v. Criminal No. 07-181 (EGS)

ZHENLI YE GON

BRIEF OF THE PUBLIC DEFENDER SERVICE AND THE FEDERAL DEFENDER AS AMICI CURIAE

This Court invited the Public Defender Service for the District of Columbia and the Federal Public Defender for the District of Columbia to file an amicus brief to address issues raised by the parties and the Court related to the government's motion to dismiss this case. This brief begins with a discussion of Federal Rule of Criminal Procedure 48(a), for the government's motion is made pursuant to this rule. It then addresses the scope of the government's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and the remedies available for *Brady* violations. It also addresses some of the Court's more specific concerns such as the relevance of the government's *Brady* policy as formally set forth in the United States Attorneys' Manual, and whether it is the practice of the United States to dismiss cases to avoid *Brady* sanctions.

Summary of argument

This Court has the authority not only to grant the government's motion to dismiss, but also to dismiss with prejudice over the government's objection, and the exceptional circumstances in this case warrant the exercise of that authority. Even taking the government's reason to dismiss at face value – Mexico's superior interest in prosecuting the case – the fact that dismissal is sought after nearly two years of litigation, during

which the defendant has been in custody, in segregation, with his speedy trial rights repeatedly tolled at the government's request, trenches on the core concern of Rule 48(a), which is to "protect[] a defendant from harassment, through a prosecutor's charging, dismissing without having placed a defendant in jeopardy, and commencing another prosecution at a different time or place deemed more favorable to the prosecution." *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973) (footnote omitted). But this Court need not take the government's explanation at face value. It may conclude that the government's true interest in dismissing the indictment at this late stage in the prosecution is to avoid further judicial inquiry and possible serious sanction for the manner in which the government treats its *Brady* obligations. Such a conclusion warrants dismissal with prejudice not only to protect Mr.Ye Gon from the harassment of dismissal of the indictment, extradition to Mexico where he faces trial on related charges, and then compelled return to the United States to begin this prosecution anew, but also to protect the public's interest in the fair administration of justice and to sanction the government for its improper conduct.

Second, although this Court need not conclude that a *Brady* violation has already occurred in light of the government's decision to dismiss this case, it is more than justified in concluding that the government's view of its *Brady* obligations is unduly constricted and incompatible with its obligation to "do justice." The Court may find that a spirit of gamesmanship, of seeking a tactical advantage over the defense, and of lack of candor is a pervasive and corrosive aspect of the government's attitude towards its *Brady* obligations. It may conclude that the government's failure to live up to its *Brady* policy, set forth in the United States Attorneys' Manual, in this and other cases, together with its

dismissive treatment of that formal policy as if it were of no consequence, represents a systemic failure of the Department of Justice that demands reproach.

I. Dismissal with prejudice versus dismissal without prejudice

A. The legal principles

The principal question before the Court is whether to grant the government's motion to dismiss the superceding indictment and related forfeiture allegation without prejudice, as the government requests, or with prejudice, as the defense urges. All parties agree that the Court has the authority to dismiss the indictment with prejudice. The authority derives from Rule 48(a) itself or, more generally, from the court's supervisory powers. Rule 48(a) provides, in pertinent part, "The government may, *with leave of the court*, dismiss an indictment, information or complaint." The requirement that the government obtain leave of the court was added to the Rule in 1944 by the Supreme Court.[1] This addition alters the common law practice that permitted the prosecution to enter a *nolle prosequi* at its discretion, without any action by the court.[2] Now, the government must seek, and the court must determine whether to grant (or deny), leave to dismiss an indictment, information or complaint. As this Circuit stated in *Ammidown*, the "requirement of judicial leave . . . gives the court a role in dismissal following indictment." 497 F.2d at 620 (footnote omitted). *See Rinaldi v. United States*, 434 U.S. 22, 30 n.15 (1977) (*per curiam*) ("The words 'leave of court'. . . obviously vest some discretion in the court.").

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[1] Advisory Comm. Note to Subdivision (a) § 1 (1944).

[2] *Id.*

By vesting in the court authority to approve a motion to dismiss, the rule also vests in the court the terms under which it will grant leave to dismiss, including whether the dismissal is with prejudice. Such is Judge Greene's persuasive analysis in *United States v. Poindexter,* where he wrote:

> Historically, the prosecutor had unrestricted authority to enter a nolle prosequi at any time before the empaneling of the jury, *see United States v. Salinas,* 693 F.2d 348, 350 (5th Cir. 1982); *United States v. Weber,* 721 F.2d 266, 268 (9th Cir. 1983); *United States v. Ammidown,* 497 F.2d 615, 620 (D.C.Cir. 1973), and as such a dismissal was unencumbered by any restriction.
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> However, Rule 48(a), Fed.R.Crim.P., now requires leave of the court for such a dismissal. While a court is still not free to substitute its judgment for that of the prosecutor, whose decision is deemed valid, the Rule has the effect of granting authority to the court in exceptional cases to reject dismissal without prejudice – which would allow re-prosecution – if this would result in harassment of the defendant or would otherwise be contrary to the manifest public interest. The Court would then instead order dismissal with prejudice.

719 F. Supp. 6, 10 (D.D.C. 1989).[3] Other courts also recognize the right of the court to grant a Rule 48(a) motion with prejudice. *See, e.g., United States v. Derr,* 726 F.2d 627 (10th Cir.1984); *United States v. Rossoff,* 806 F. Supp. 200 (C.D. Ill.1992); *United States v. Knox,* 2004 WL 433868 (W.D.Va. 2004) (unreported). And the general rule that in the

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[3] Oddly, the government states that Rule 48(a) is "consistent with the common law practice that permitted a second prosecution after the government entered a *nolle prosequi* in a criminal case," citing this passage in *Poindexter* as support. Second Supplement to the Government's Motion to Dismiss at 2 (ECF 186). Perhaps the government simply means that most dismissals are without prejudice, in which case the government retains its discretion to determine whether to re-charge. It surely cannot mean that *Poindexter* lends support for the notion that 48(a) does not constrain the government's previously unfettered discretion to dismiss a case, nor that *Poindexter* does not stand for the proposition that the court can also constrain the government's common law right to rebring a case, for that is precisely what *Poindexter* did by granting the

absence of an express statement to the contrary, the dismissal of an indictment pretrial is presumed to be without prejudice, necessarily assumes a power in the court to dismiss with prejudice when it so announces. *See United States v. Ortega-Alvarez,* 506 F.2d 455, 458 (2d Cir. 1974). But it should be noted that one court has expressed doubt that a court may order a dismissal with prejudice under Rule 48(a). *United States v. Flemmi,* 283 F. Supp. 2d. 400, 408 (D. Mass. 2003).

The alternate or complementary source of the Court's power to require that the dismissal be with prejudice is the Court's supervisory power. It has long been recognized that federal courts possess certain applied or inherent powers that "are necessary to the exercise of all others." *United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34 (1812); *see Ex Parte Robinson,* 86 U.S. 505, 510 (1873) ("The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of [certain inherent] power."). In *Hastings v. United States,* 461 U.S. 499 (1983), the Court stated, "[G]uided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *Id.* at 505 (internal quotation marks and citation omitted, alteration in original). It set forth the three purposes underlying the use of supervisory powers: "to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy to deter illegal conduct." *Id.* (citations omitted). *See also Chambers v. NASCO, Inc.,* 501 U.S. 32, 44 (1991) (federal courts have the inherent authority to sanction a party and lawyer

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government's motion *with prejudice*.

appearing before the court). Thus, even if the Court's authority to require that the government's motion to dismiss be granted with prejudice were not implicit in the changed language of Rule 48(a), it is within the Court's inherent power to afford a remedy to Mr. Ye Gon, to preserve the integrity of this Court's processes, and to deter misconduct.

It is true, as both parties state, that most reported cases construing Rule 48(a) arise from a district court's refusal to grant leave of court to dismiss a case. Such was the circumstance in *Rinaldi,* the Supreme Court's only decision on the subject, as well as the sole reported decision in this Circuit in *Ammidown*. Fewer cases, by far, concern the decision whether to grant an uncontested motion to dismiss, but to do so with prejudice. But the interests identified in considering the more common scenario equally inform the decision before this Court. Indeed, they apply with much greater ease since the Court's discretion is less constrained by significant separation of powers issues at play when the government is in effect ordered to maintain a prosecution it wishes to abandon. *See United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) (discussing separation of powers and concluding the Rule was intended as a judicial "check on the abuse of Executive prerogatives" to be exercised when the government's motion to dismiss is "clearly contrary to manifest public interest.").

It is beyond dispute that the primary purpose of the leave of court requirement of Rule 48(a) is to protect the defendant. In *Ammidown,* this Circuit described the interest as follows: "[P]rotecting a defendant from harassment, through a prosecutor's charging, dismissing without having placed a defendant in jeopardy, and commencing another prosecution at a different time or place deemed more favorable to the prosecution." 497

F.2d at 620 (footnote omitted). *See also Rinaldi*, 434 U.S. 22, 29 n 15; *United States v. Derr*, 726 F.2d 617, 619 (10th Cir. 1984).

A second purpose of the leave of court requirement is to protect the public interest. *Ammidown*, 497 F.2d at 620. Rule 48(a) permits courts faced with dismissal motions to "consider the public interest in the fair administration of criminal justice and the need to preserve the integrity of the courts." *United States v. Carrigan*, 778 F.2d 1454, 1463 (10th Cir. 1985). *See Cowan*, 524 F.2d at 512 (Rule 48(a) gives federal courts "discretion broad enough to protect the public interest in the fair administration of criminal justice."); *United States v. Strayer*, 846 F.2d 1262, 1266 (10th Cir. 1988).

In order to carry out its role, the court must require of the government its reasons for seeking a dismissal and satisfy itself that the reasons are proper and true. "Thus, to honor the purpose of the rule, the trial court at the very least must know the prosecutor's reasons for seeking to dismiss the indictment and the facts underlying the prosecutor's decision." *United States v. Derr*, 726 F.2d at 619. Conclusory statements are insufficient. *Ammidown*, 497 F.2d at 620 ("[I]n the exercise of its responsibility the court will not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest, but will require a statement of reasons and underlying factual basis."). This Court must be satisfied that the assigned reasons for dismissal are substantial and "the real grounds upon which the application is based." *United States v. Greater Blouse, Skirt & Neckware Contractors Ass'n,* 228 F. Supp. 483, 489 (S.D.N.Y. 1964) (cited with approval in *Ammidown*, 497 F.2d at 620 n.7 & n.11).

The focus of the inquiry is on the motivation of the government in seeking the dismissal. *Rinaldi*, 434 U.S. at 85 ("The salient issue, however, is not whether the

decision to maintain the federal prosecution was made in bad faith but rather whether the Government's later effort to terminate the prosecution were similarly tainted by impropriety."); *United States v. Salinas*, 693 F.2d 348, 351 (5th Cir. 1983) ("The key factor in a determination of prosecutorial harassment is the propriety or impropriety of the Government's efforts to terminate the prosecution – the good faith or lack of good faith of the Government in moving to dismiss."). Although the presumption is that the government acts in good faith, judicial inquiry may dispel that presumption.

Examples from this District exemplify the analysis. In *Poindexter,* the court evaluated the reasons given by the independent prosecutor for seeking leave of the court to dismiss some of the counts of the indictment in light of the prejudice to the defendant.[4] "The question is the effect on the defendant of dismissal of charges followed by their reinstitution at a later date. To put it more concretely, does it objectively amount to harassment, is it contrary to the public interest, to allow the prosecutor to dismiss the charges but nevertheless keep them in abeyance . . . ?" 719 F. Supp. at 11. Relying on *Ammidown* and *Salinas,* the court reasoned that "the government could not validly use Rule 48(a) to gain a position of advantage, or to escape from a position of less advantage in which it found itself as a result of its own election." *Id.* Judge Greene concluded:

> The Court can well appreciate the prosecutor's desire to preserve the best possible case against the defendant for use at a time when, possibly, the tactical situation is more advantageous. Yet that kind of strategy is precisely what such cases as *Salinas* and *Ammidown* condemn. In the end, when a choice must be made, it is the Court's duty to

[4] The reasons were described by the court as "somewhat murky" but they included that the Independent Counsel's investigation was not yet complete and that witnesses who "are now protected by the privilege against self-incrimination may become available to testify." 719 F.Supp at 11.

> protect the defendant from the consequence of "another prosecution at a different time … deemed more favorable to the prosecution" even if this could have the effect of conceivably hampering the government's plans down the road.

Id. at 12 (footnotes omitted, ellipsis in original).

In *United States v. James*, 861 F. Supp.151 (D.D.C. 1994), although the indictment was dismissed with prejudice for violation of the Speedy Trial Act, the reason was that the government had run afoul of Rule 48(a) by failing to seek leave of the court when it dismissed the complaint. Instead, the government had simply filed a notice of dismissal with the clerk's office. Judge Richey held that the notice was ineffective because it precluded the court from performing its important role in protecting defendants against the abuse of prosecutorial discretion. *Id.* at 155 (relying on *Rinaldi* and *Ammidown*). The failure to follow Rule 48(a) also precluded the court from considering the "public interest, fair administration of criminal justice and preservation of judicial integrity." *Id., quoting United States v. Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988). The court wrote:

> To advance these broader goals, a district court may act where a prosecutor acts in bad faith, or where the prosecution's motion is prompted by considerations clearly contrary to the public interest. . . .[N]ot only did the Government's improper filing prevent the Court from protecting against prosecutorial harassment, but it also undercuts the Court's broader responsibility of overseeing the entire criminal justice system and acting in the public interest.

Id. at 155-56 (internal quotation marks omitted). *See also United States v. Fields*, 475 F. Supp. 903 (D.D.C. 1979) (observing that "[g]ood faith, like intent or state of mind, can generally only be established circumstantially," and providing two grounds for dismissing the indictment with prejudice – that the original case had been brought in bad

faith, and that, more relevant here, "the government is not free to indict, dismiss, and reindict solely to achieve a more favorable prosecutorial posture").

B. Application to this case

How, then, to apply these principles to this case? This Court must determine whether dismissal with prejudice should be granted to protect Mr. Ye Gon from the "prosecutorial harassment" of indictment, dismissal, and reindictment in the circumstances of this case. It may also consider whether it serves the public interest in the fair administration of justice and the integrity of the judicial process. It should begin with a determination of whether the government's stated reasons for its dismissal are "the real grounds upon the dismissal is based," *Greater Blouse,* 228 F. Supp. at 489, or whether, instead, they mask an improper motive to avoid further judicial inquiry and possible sanction from this Court for its *Brady* conduct.

On June 22, 2009, the government moved to dismiss the indictment. To say that the government's motion to dismiss was unexpected is, perhaps, an understatement. At the quickly assembled status hearing held on the very afternoon the government's motion to dismiss was filed Mr. Balarezo spoke of the government's motion to dismiss as the "sudden development[] of today." Tr. 6/22/09 at 3. Preparations were underway for the start of trial on September 14, 2009, the third, and presumably final, trial date. As this Court had said at the hearing on June 2, 2009, "[W]e're at the point now of giving Mr. Ye Gon his fair day in court on a trial date that's been fairly set. It's not going to change unless there's some compelling reason." Tr. 6/2/09 at 13. The Court had ordered all discovery complete. The government had filed its lengthy exhibit list and had been directed to have its exhibits marked and its exhibit list refined so that the case could

"proceed to trial in a very orderly fashion, in a very fair fashion." Tr. 6/2/09 at 13. Motions were due on June 22, 2009, the very date on which the government filed its motion to dismiss. A motions hearing date had been set.

The government's asserted reason for so precipitously seeking a dismissal was its deference to Mexico's interest in prosecuting Mr. Ye Gon. "The government believes the interests of justice and the United States' ongoing collaborative efforts with the Government of Mexico to combat international drug trafficking are best served by giving precedence to the Mexican prosecution." Motion to Dismiss at 4 (ECF 176). The government also provided a second reason, although it gave it far less prominence. In a single sentence, it stated: "In addition, as to the criminal case in the United States, with one key witness in the criminal case having stated that previous statements made about the defendant were untrue and another key witness in the criminal case having expressed an unwillingness to testify, the United States has evidentiary concerns in light of these changed circumstances." *Id.*

In its Motion to Dismiss the government acknowledged that both the United States and Mexico "have significant and separate interests in prosecuting the defendant." *Id.* at 3. But it then attempted to show why Mexico's interest is superior to our own:

> The prosecution of this case in Mexico is of considerable public interest and is important to Mexico's counter-narcotics policy. The case has been cited by Mexican President Felipe Calderon as a major development in Mexico's war on drug traffickers. It is among the most significant cases that Mexico has brought as part of its strong enforcement actions against the illicit importation and manufacture of methamphetamine precursor chemicals.
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> The government of Mexico has filed an ample and well documented request for the defendant's extradition which

> is currently before U.S. Magistrate Judge John M. Facciola. The extradition request reflects the compelling and strong nature of the evidence in the Mexican case. If the U.S. trial goes forward, there would be, in all likelihood, a significant delay before all extradition litigation could be concluded and the fugitive surrendered in the Mexican case.

Id. at 4. In its first supplemental pleading the government further asserts that the Mexican case "has the personal attention of the Mexican Attorney General." Supplement to Government's Motion to Dismiss at 1 (ECF 178) (hereinafter "Supplement").

The problem with the government's explanation is that the facts upon which it relies were always present in this case. The government has pointed to nothing that changed between June 2, 2009, when the government appeared to be actively preparing for trial, and June 22, 2009, when the government suddenly, and without warning, concluded that Mexico's interest in prosecuting Mr. Ye Gon, repeatedly asserted to be secondary (at least as to the order of the prosecutions) came to triumph over the United States' interest.

As the defense comprehensively sets forth, without contradiction by the government, Mexico has long had a keen interest in prosecuting Mr. Ye Gon – indeed its interest predated his arrest in the United States. Defendant's Response to Government's Motion to Dismiss at 13-14 (ECF 181). Mexico executed an arrest warrant on his Mexico City home in March 2007. It expressed its interest in extradition of Mr. Ye Gon in June 2008. And it formerly initiated extradition proceedings in this Court on September 15, 2008, a matter borne out by the docket entries in *In re: In the Matter of Extradition of Zhenly Ye Gon,* 1:08-mc-00596 (JMF).

As for the government's assertion that prosecution of Ye Gon is a matter of importance at the highest levels of the Mexican government, our review of the Mexican

press and official announcements reveals that this has also always been the case. Mr. Ye Gon was arrested in the United States on July 24, 2007. On the same date, President Calderon announced that the United States arrested Ye Gon on Calderon's orders.[5] The Attorney General of Mexico held a press conference on the same day in which he announced that Mexico would file for Ye Gon's extradition, but acknowledged that the United States would try Ye Gon first. An article available on the internet site of the Mexican television station, *Noticieros Televiso*, entitled "Attorney General Medina Mora says that Ye Gon's prosecution will take place in sequence, he will first face charges in the United States, and then he will be extradited to Mexico," and dated July 24, 2007, begins:

> The Attorney General of the Republic, Eduardo Medina Mora, denied today that the decision of the American government to file charges against Chinese born businessman Ye Gon will weaken the extradition case filed by the Mexican government.
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> Medina Mora said in a press conference at the Mexican embassy that the goal is to prosecute the presumed drug trafficker in an expedited and forceful manner, whether in the United States or in Mexico.
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> "It doesn't weaken our case," said the Attorney General, who added that the Mexican government is ready to comply with its bilateral treaty with the United States.

On December 21, 2008, the Mexican press reported on this Court's bond hearing, and on the Attorney General's earlier formal request for extradition, in an article entitled "Ye Gon denied bail; petition for extradition is made official." Importantly, on December 22, 2007, the Mexican Attorney General's office issued an official press

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[5] Copies of the original Spanish language versions of the articles we cite are attached to this brief together with translations prepared by the Public Defender Service. (Attachment 1).

release, entitled "The Mexican government reiterates its interest in Ye Gon's extradition to the United States." The press release describes the serious nature of the allegations against Ye Gon and the fact that the investigation had been conducted by the Office of the Attorney General of the Republic, and concludes with the following paragraph:

> With these actions, the Mexican government affirms its commitment to the enforcement of the law. It will utilize all national and international methods of coordination and collaboration in order to prevent criminals from evading justice by simply crossing borders.

It may be, of course, that the Mexican government more recently, or privately, expressed an unwillingness to allow the United States' prosecution to take precedence over the Mexican prosecution, and that our government had a change of heart unrelated to the events of June 2, 2009, which we discuss below, and determined that it would yield to Mexico's demand. Suffice it to say that the government has not demonstrated that this is so, and in the absence of that demonstration, the June 2, 2009, hearing at which serious concerns about the government's compliance with its *Brady* obligations were aired raises serious questions about the government's true motives.

On May 18, 2009, the government delivered to defense counsel (but did not file) its Notice of Brady and Giglio Materials (hereinafter "Notice"). It included the following exceedingly terse representation regarding Escando Paz: "Escandon Paz confessed at the time of his arrest in Mexico that he acquired large quantities of ephedrine from the defendant and sold them on behalf of the defendant. His statement had been previously provided. *He has recanted his statement*." Notice at 3 (emphasis added), attached to Motion to Compel *Brady* Evidence, filed on June 1, 2009 (ECF 166) (hereinafter "Motion to Compel"). The Notice also described an unnamed potential government witness who "may testify that the witness purchased large quantities of ephedrine from

defendant's associate, Escandon Paz." According to the notice, this witness, who had formally told law enforcement that she had met Ye Gon, and purchased drugs directly from him, "now stated that the witness did not personally meet the defendant, did not personally acquire ephedrine from the defendant, and did not personally take money to the defendant." Notice at 2. Defense counsel filed its Motion to Compel focusing particularly on the revelation that Escandon Paz had recanted, although he made clear at the hearing that the government had also provided cursory notice of other *Brady* information.[6] Counsel cited the government's representation in its Bill of Particulars that made it appear both that Escandon Paz was central to the government's case, and that the defense should continue to rely on the (now recanted) statement. Motion to Compel at 2.

This Court's colloquy with government counsel regarding its *Brady* obligations at the June 2, 2009, hearing, called in response to the defense Motion to Compel, merits close consideration for the light it sheds on whether the government's later claims that (1) the government never intended to call Escandon Paz at trial;[7] (2) the reason why the government did not provide defense counsel with timely notice that Escandon Paz had

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[6] Mr. Retureta explained:

> The notice that the government provided us spoke of Escandon Paz, but there are two other *Brady* notices that were provided. One involved Michelle Wong. We're aware of Michelle Wong. There's another *Brady* notice in there that we have not brought to Mr. Laymon's attention or have not confronted him because we were so struck and shocked by what we heard about Escandon Paz. I would ask the Court that, as it signs our proposed order today, that that order be modified to encompass all of the *Brady* notices that were provided.

Tr. 6/2/09 at 66.

[7] Second Supplement to the Government's Motion to Dismiss at 9 (ECF 186) (hereinafter "Second Supplement").

recanted was because it believed defense counsel already knew;[8] and (3) the government was not motivated to dismiss the case because it had been remiss in its *Brady* disclosures or feared further inquiry or sanction from the court. The colloquy is as follows:

> THE COURT: *Brady*. [What] I am concerned about is this recanting witness. I agree with defense counsel that the circumstances regarding how he recanted, who was present, et cetera, and the proposed order are appropriate. I'm prepared to sign that order. Why is it that defense counsel is just learning about the recanting witness at this time? It appears that the recanting testimony occurred some time ago.
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> MR. LAYMON: It did.
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> THE COURT: So, why are they just learning about this now?
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> MR. LAYMON: Well –
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> THE COURT: When did he recant?
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> MR. LAYMON: I don't recall, Judge. It's been many months ago because it was during the time that I interviewed him. So, I don't recall if it was – I have my interview notes, and I can certainly figure out the date. I just don't recall specifically when it was.
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> THE COURT: The government is under an obligation to produce *Brady* material, and that is certainly *Brady* material when it occurs, when it's aware that it has information that's favorable, and certainly a recanting witness – all right. I'm concerned about that, but I'm going to issue an order, a very straightforward order that directs the government to produce any and all *Brady* material. And if the government has any questions about what its *Brady* obligations are, you can ask the Court and I'll be happy to spend whatever time is necessary telling the government what its *Brady* obligations are. But I don't think that, you know – this is something that judges shouldn't have to do on a case-by-case-by-case basis. But I will issue an order, and I will stand by that order, requiring the government to produce – search its records and discharge its *Brady* obligations consistent with *Brady* and it's progeny by no []later than the 9th, and that's all *Brady*

[8] *Id.* at 11.

material that's not heretofore been produced. I can't make it any clearer than that.

Mr. Laymon, you've been practicing for a long – many years. You don't have any questions about the government's *Brady* obligations.

MR. LAYMON: No, I don't. I understand what you're saying.

THE COURT: I know you don't, and I accept your representations. I'm concerned, though, why – I need to get an answer, though. Why didn't that information – why wasn't that information revealed to defense counsel? You realized it was *Brady* at the time that he recanted. That's powerful. This is a principal government witness.

MR. LAYMON: Um, if – if he were the [sic] testify, he would be a principal government witness.

THE COURT: Right. Well, now he's damaged goods, but that's favorable to them, though.

MR. LAYMON: Why didn't we disclose that fact, Judge? And, of course, your question is, why didn't we disclose it earlier?

THE COURT: Right.

MR. LAYMON: Well—

THE COURT: Be careful. I have a high regard for you, but I need to get an answer to that question, though.

MR. LAYMON: You know, I think the answer to that question, Judge, is that at the time – I know that when I interviewed this particular witness – When I say he recanted, he didn't entirely repudiate his testimony, so I don't want to make this into a black and white situation. He repudiated some of his testimony.

THE COURT: He's no longer a principal government witness.

MR. LAYMON: No, he could still be. No, he still could be.

THE COURT: But you agree there's some impeachable material there.

MR. LAYMON: Most definitely, most definitely.

THE COURT: All right.

MR. LAYMON: And it's like every situation with a witness, Judge. It's not, as I say, it's not entirely black and white. He did repudiate some –

THE COURT: That was a big *Stevens* issue. You know that.

MR. LAYMON: I do know that, right.

THE COURT: Yeah. You know what, it just boggles the mind why the government doesn't discharge its obligations in a timely manner. A witness changes his testimony, even slightly, where the government recognizes that it's material, even material – putting aside materiality – that's favorable to the defendant, why don't prosecutors just pick the phone up and say, look, I've got an obligation to tell you something? Is it because it hurts or something? What is it?

MR. LAYMON: Well, for myself, I think the situation is that, with this particular witness, Escandon, it was clear to me why he was repudiating some of his testimony, and that was because he was in trial or he was soon to be in trial in Mexico, and he had to repudiate it because he had given a full and detailed confession to the Mexican authorities which was reduced to writing. It was, I don't know, eight or ten pages.

THE COURT: Which cast aspersions on his expected testimony in this case?

MR. LAYMON: Well, no. In his initial confession, of course, he implicated the defendant and himself in the conspiracy that is charged here. Later when we interviewed him, he did – I would fairly say he repudiated the essence of what he had to say.

THE COURT: With respect to Mr. Ye Gon.

MR. LAYMON: He talked openly with me about his knowledge and relationship with the defendant, but he, in essence, repudiated his role in the wrongdoing that he had earlier confessed to. So –

THE COURT: It's like, where does the truth lie, then, but that's favorable to the defendant. All right. Judges don't get any pleasure in imposing sanctions, and I'm not going to say anything more about *Brady* other than the government is on notice that whatever *Brady* information that's not been heretofore disclosed, it has to do so by the 9th, a week from today.

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THE COURT: . . . I want full compliance with Rule 16. And, you know, I'm not going to play games with this. If the government doesn't comply with the Court's directive,

> then the government won't try this case with experts. And if the government doesn't abide by its *Brady* obligations, I can tell you the sanctions will be severe.

Tr. 6/2/09 at 62-66 & 70-71.

From this colloquy it is clear that the government still considered Escandon Paz a potential principal witness for the prosecution (Q: "He's no longer a principal government witness?" A: "No, he still could be. No, he still could be."). It is also clear that the government had no real answer to the question why the government had not disclosed Escandon Paz's "recantation" other than that the government had not believed him.

On June 4, 2009, as required by this Court's order dated June 3, 2009, the government filed its Response to Motion and Order Concerning Witness Statements (ECF 172) (hereinafter "Response"), in which it made clear that Escandon Paz's recantation had been made in the presence of Department of Justice prosecutors Paul Laymon and Robert Stapleton as well as three DEA agents on August 27, 2007. *Id.* at 1-2. Further, the government also disclosed that Mr. Escandon Paz had refused to ratify his signed confession before a Mexican judge in September 2007. *Id.* at 2.

What, then, was the true motivation for the government's motion to dismiss? Was it Mexico's interest in the case? Or was it a desire to avoid further scrutiny of its fulfillment of its *Brady* obligations and to avoid sanctions that this Court forewarned would be severe if it concluded that the government had violated *Brady*? The facts appear to speak for themselves.

Allowing the government the dismissal that it requests, without a bar on a renewed prosecution of the defendant for the same charge at some future date, prejudices Mr. Ye Gon in the manner that the cases condemn by requiring him to live with the

continued uncertainty of an American reprosecution after two years of litigation during which he was held under what has been described as near solitary confinement. It also allows the government to "escape from a position of less advantage in which it f[inds] itself as a result of its own election." *Poindexter*, 719 F. Supp at 11, citing *Ammidown*, 693 F.2d at 353. Moreover, it fails to deter the conduct the government engaged in here, and instead sends a message that the government may avoid a day of reckoning by dismissing the prosecution, while reserving the right to rebring the case at a later date with a clean slate.

In *Rinaldi*, the Court considered the message that the district court's ruling on a motion to dismiss under Rule 48(a) sends to prosecutors – that is, whether it deters or encourages future misconduct. Assuming that deterrence is an appropriate consideration, the Court concluded that the lower court had misapplied its deterrent power by denying the motion to dismiss the conviction secured by a trial prosecutor in violation of the Attorney General's *Petite* policy which bars federal prosecution for conduct that had already resulted in a state court conviction: "[W]e fail to see how rewarding those responsible with a conviction serves to deter prosecutorial misconduct. Indeed, a result which leaves intact a conviction obtained through a prosecution tainted by bad faith may encourage repetition of the impropriety disclosed by the record in this case." *Rinaldi*, 434 U.S. at 32 n.17. *See Salinas*, 693 F.2d at 353 (reversing conviction where the record showed that the prosecutor's reasons for dismissing the earlier indictment were not his true reasons, and that he had been motivated in bad faith to seek a more favorable jury); ("For this Court to condone such conduct would invite future misconduct by the Government and open the door to the possibility of grave abuses.") (footnotes and

internal quotation marks omitted).

The government relies on *United States v. Ferguson*, 565 F. Supp. 2d 32 (D.D.C. 2008), for the proposition that "a dismissal without prejudice is not a toothless sanction." Motion to Dismiss at 3 & 4. But *Ferguson* does not involve the government's motion for a dismissal under Rule 48(a). Instead, it involves a defense motion to dismiss for violation of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, a motion that was granted over the government's opposition, and after Judge Kessler's careful consideration of the factors the statute lists to guide the exercise of her discretion. *Ferguson*, 565 F. Supp. 2d at 46-49. Here, in contrast, where the government itself seeks a voluntary dismissal, granting the motion to dismiss without prejudice is no sanction at all. Instead, it is giving the government exactly what it asks for.

II. The government's *Brady* obligations and remedies for *Brady* violations

As an initial matter, it is important to note that there is no requirement that this court find that the government violated the Constitution in order to dismiss with prejudice. Rather, as has been described in the previous section, the circumstances of this case provide ample grounds for this Court to exercise its discretion under Rule 48(a) and the Court's supervisory powers to grant the government's motion to dismiss, but to do so with prejudice. Therefore, while the question whether the government violated its constitutional obligations under *Brady v. Maryland*, and its progeny, is unquestionably germane to the Court's consideration whether to dismiss with prejudice, the decision does not hinge on the answer. That is to say, this Court may, but need not, find that there has already been prejudice sufficient to warrant a finding that there has been a Constitutional

violation notwithstanding that the case will not go to trial.

A. The government has a general obligation to make timely *Brady* disclosures prior to trial

It is well settled that the government has a "broad duty" to disclose information favorable to the defense in a timely manner prior to trial even though "not every violation of that duty necessarily establishes that the outcome was unjust." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *Brady* does not simply guarantee some pro forma transfer of information. *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978) ("*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation."). Rather, to satisfy due process and "to ensure that a miscarriage of justice does not occur," *Brady* imposes upon the prosecutor an obligation, at least with respect to favorable information, "to assist the defense in making its case." *United States v. Bagley*, 473 U.S. 667, 675 & n.6 (1985).

It follows then that the government must disclose *Brady* information at such a time that the defense can make meaningful use of it in the "preparation" as well as the "presentation" of its case. *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976). In *Pollack*, the Circuit observed that timely disclosure must allow effective use, "even if satisfaction of this criterion requires pre-trial disclosure." *Id.* at 973. The Court also noted that "[t]he trial judge must be given a wide measure of discretion to ensure satisfaction of this standard." *Id.* And it expressed concern about "situations in which late disclosure would emasculate the effects of *Brady*." *Id.* As demonstrated by the decisions from this and other circuits discussed below, the collective wisdom that has evolved in the thirty years since *Pollack* is that pre-trial disclosure of *Brady* information is necessary to ensure due process and the government's assertion that there is uniform

agreement to the contrary is simply incorrect.

Timely pretrial disclosure of *Brady* is required because "the opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought." *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001).[9] In *United States v. Snell*, 899 F. Supp. 17 (D. Mass. 1995), the court explained:

> Exculpatory information affects the defense investigation, how it will allocate its resources, the voir dire questions the defense will seek, the framing of opening statements, the nature of the pre-trial research on evidentiary issues and jury instructions, in short, all of the strategic decisions which must be made long in advance of trial.

Id. at 20. *See also United States v. Burke*, __ F.3d __, 2009 WL 1926850, at *4 (10th Cir. July 7, 2009) (*Brady* information can "meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on.").

Accordingly, the government's observation that "both the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2, contemplate that the government will provide certain types of witness statements to the defense only *after* the witness testifies on direct," Second Supplement at 7, is unenlightening, as neither the statute nor the rule govern the disclosure of information to which the defense is constitutionally entitled. Instead, as this Circuit has made clear, in a contest between the timing mandated by the Jencks Act and by the due process clause, the government's due process obligations under *Brady* are

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[9] While the Court in *Leka* determined that pretrial disclosure of *Brady* information is not "mandated," it indicated that it would likely be required de facto since "the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use." 257 F.3d at 100.

controlling. *United States v. Tarantino* 846 F.2d 1384, 1415 n.11 (D.C. Cir. 1988) ("Of course under *Brady v. Maryland*, . . . the government has additional obligations deriving from the Fifth Amendment to disclose exculpatory material, and the limitations on discovery contained in the Jencks Act do not lessen those obligations.").

That the government has an obligation to disclose *Brady* information timely prior to trial has been repeatedly reaffirmed by this Circuit, as even the cases cited by the government reflect. Supplement at 2, 4-5. *See, e.g., United States v. Andrews,* 532 F.3d 900, 907 (D.C. Cir. 2008) (acknowledging that a defendant may have a viable *Brady* claim where a "disclosure is *made but made late*") (emphasis added); *United States v. Bowie,* 198 F.3d 905, 909 (D.C. Cir. 1999) ("The government's nonfeasance is clear enough. *The prosecution had a duty, under Brady, to provide defense counsel with the evidence . . . before trial and it failed to carry out its duty*.") (emphasis added); *United States v. Tarantino,* 846 F.2d at 1417 (belated disclosure may constitute a *Brady* violation where defendant shows prejudice from delay); *United States v. Paxson*, 861 F.2d 730, 737 (D.C. Cir. 1988) (same).[10] Indeed in *Paxson,* the Court of Appeals chided

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[10] This Circuit's recognition that belated *Brady* disclosures may violate due process is the majority rule, *see Burke,* 2009 WL 1926850 at *6 (citing cases), and an examination of authority the government cites for the proposition that "[o]ther circuits agree that *Brady* does not require pretrial disclosure . . . ," Supplement at 5 n. 2, reveals that the courts actually found that disclosure of *Brady* information at or on the eve of trial was "late" "tardily disclosed" "delayed" or not "timely" – again affirming that the government had an obligation to disclose the *Brady* information earlier and prior to trial. *See United States v. Mangual-Garcia*, 505 F.3d 1, 6 (1st Cir. 2007) ("delayed"); *United States v. Williams*, 132 F.3d 1055, 1060 (5th Cir. 1998) ("tardily disclosed"); *United States v. Woodley*, 9 F.3d 774, 776 (9th Cir. 1993) ("late");*United States v. Kubiak,* 704 F.2d 1545, 1550 (11th 1983) ("untimely" and "troubling"); *see also United States v. Smith,* 534 F.3d 1211, 1223 (10th Cir. 2008) (government "violated the first two prongs of *Brady* by suppressing evidence favorable to Ms. Smith" until trial); *United States v. Almendares,* 397 F.3d 653, 664 (8th Cir. 2005) (*Brady* "should have been disclosed"

government counsel for its delayed disclosure of *Brady* information noting with disfavor its "niggling excuses" and observing that "nowhere have they offered any convincing reason why they did not simply make disclosure of what they knew of this potentially impeaching evidence of their principal witness." *Id*. Even as the court determined that the trial judge had not erred in denying the defense motion to dismiss because of the lack of prejudice, it refused "to commend the prosecutor's apparent disregard of the *Brady* rights of appellant." *Id*.

This Circuit's commitment to timely pretrial production of *Brady* information is further evident from *United States v. Dean*, 55 F.3d 640 (D.C. Cir. 1995), a case to which the government does not cite. In *Dean*, the trial court had ordered *Brady* production more than a year in advance of trial, reasoning that "*Brady* material . . . ought to be turned over because the prosecutor has an obligation to lean backwards on *Brady*, not to lean forward . . . ."[11] Despite this order, "the government did not provide [the defendant] with three potentially exculpatory statements from interviews until . . . less than two weeks before jury selection." 55 F.3d at 663. Although the Court of Appeals declined to reverse in the absence of the requisite showing of prejudice, the Court condemned the government's "dereliction," noting that it "deplore[d] the government's tardiness in producing the statements." *Id*. at 665.[12]

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prior to trial).

[11] *United States v. Deborah Gore Dean*, Cr. No. 92-181 (TFH), Defendant's Motion to Dismiss at 1 (August 26, 1993) (Docket #112) (on file with Clerk of the United States District Court for the District of Columbia).

[12] The distinct but related issue whether the government has an obligation to disclose *Brady* information at "pre-trial proceedings" such as a suppression hearing, is not at issue, and has yet to be resolved in this Circuit, *see United States v. Bowie*, 198 F.3d at 165 (declining to decide whether *Brady* information must be disclosed prior to a

To the extent that the Supreme Court's decision in *United States v. Ruiz,* 536 U.S. 622 (2002), is at all relevant, as the government contends, *see* Supplement at 3, 4, it reinforces the government's obligation to disclose *Brady* information prior to trial. The Court in *Ruiz* did not take issue with the Ninth Circuit's holding that "the Constitution requires prosecutors to make certain impeachment information available to the defendant *before trial*." 536 U.S. at 626 (emphasis added); *id.* at 629 (acknowledging that "impeachment information is special in relation to the *fairness of a trial*"); *id*. at 631 (noting that *Brady* is a "trial related" right).[13] Instead, the Court only addressed whether, in order to execute a voluntary, knowing and intelligent "fast track" guilty plea, a defendant is entitled to the disclosure of impeachment information. *Id.* at 625 ("In this case we primarily consider whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses." (internal quotations and citation omitted). Although the Court in *Ruiz* held that the disclosure of impeachment information prior to the fast-track guilty plea was not constitutionally compelled, undersigned counsel has been unable to find a single federal case that has applied this holding to restrict or delay *Brady* disclosures prior to trial. *Ruiz*

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suppression hearing where defendant failed to properly raise the issue on appeal). Other Circuits, however, have held that the government is so obligated. *See United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990), *vacated on other grounds*, 503 U.S. 930 (1992). It is therefore not accurate to state, as the government does, that courts "have uniformly rejected the notion that *Brady* disclosures need to be made in pretrial proceedings." Supplement at 2.

[13] *See* Transcript of Supreme Court Oral Argument, *United States v. Ruiz*, 2002 WL 858930 at *22 (Apr. 24, 2002) (In response to a question regarding pretrial access to information, Solicitor General acknowledges that if a defendant "wishes to go to trial, there's-- the *Brady* rights do kick in at an appropriate time to allow the defendant to

certainly does not toll the government's obligation to disclose *Brady* information when the parties are pursuing parallel tracks of trial preparation and plea negotiations.

Turning then to the government's disclosures in this case, it cannot be said that its *Brady* obligations were satisfied on May 22, 2009, with its Notice, nor even on June 4, 2009, with its court-ordered Response. As this Court has recognized, *Brady* information must be disclosed "in a useable format." *United States v. Stevens*, Docket No. 08-231, Tr. 4/7/09 at 8. Specifically, *Brady* disclosures must be "sufficiently specific and complete" so as to permit meaningful use. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007); *see also Leka*, 257 F.3d at 103 (finding *Brady* violation where the government did not disclose sufficient details of a potential witness's knowledge to permit the defense to make an intelligent determination about how to "deploy scarce trial resources"). Often this will mean that the government must disclose the transcripts or recordings of statements containing *Brady* information, or if such recordings do not exist, the contemporaneous notes of any such statements. *Cf. Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995) (noting that the force of the "many inconsistencies and variations among Beanie's [undisclosed] statements" and that Kyles had been prejudiced because he had been precluded from "expos[ing the jury] to Beanie's own words."); *Eastridge v. United States*, 372 F. Supp.2d 26, 60 (D.D.C. 2005) (production of favorable grand jury transcripts to the defense was a "constitutional necessity").

The government's May 22, 2009 Notice gave the defense only the most cursory description of the information in the government's possession, prompting defense counsel to file the Motion to Compel to obtain the essential details. Even now the precise

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prepare for trial.").

parameters of what Escandon Paz said or did not say are murky. It does not help the government that it initially represented that he had "recanted," then represented at the June 2, 2009, hearing before the Court both that "he didn't entirely repudiate his testimony. . . [h]e repudiated some of his testimony," and that "he repudiated the essence of what he had to say," Tr. 6/2/09 at 64, 65, and in its most recent filing says that "he never specifically recanted the admissions in his earlier statement." Second Supplement at 9.

Nor is it fair to characterize the disclosures at issue here as merely impeaching, and therefore arguably subject to later disclosure. *See United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001). These statements made by close associates of the defendant concerning what they knew about his business activities – the central issue in the case – and how they knew it, were evidence that did "not fit into the [government's] narrative, or which contradict[ed] the evidence used to support that narrative, or which may [have] diminish[ed] the credibility of the evidence relied on to tell the story." *United States v. McVeigh*, 954 F. Supp. 1441, 1449 (D. Colo. 1997). As such, these statements struck at the heart of the government's case and were exculpatory. *United States v. Starsuko*, 729 F.2d 256, 260 (3d Cir. 1984) (where witness was so critical to the government's case evidence impeaching his credibility "would clearly be exculpatory").

By the same token, the fact that the prosecutors may not have believed the "recantations" is no justification for withholding them. Presumably all prosecutors operate under the belief that the defendants they seek to convict are guilty – otherwise they could not in good conscience prosecute the case. But unless *Brady* is an empty right, this does not excuse the government from disclosing objectively material, favorable

information in its possession. *See Kyles* 514 U.S. at 439-440 (*Brady* disclosures "preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"); *United States v. Rittweger*, 524 F.3d 171, 181 (2d Cir. 2008) ("the fact that the government may have some evidence that a particular defendant is guilty does not negate the exculpatory nature of the testimony of a witness with knowledge that the defendant did not commit the crime as charged").[14]

As the government notes, the initial burden is on the defendant to demonstrate that the government's delayed production prejudiced his preparation for trial, Second Supplement at 6, but the burden is not high. The defense need only make "a prima facie showing of a plausible strategic option which delay foreclosed." *United States v. Lemmerer*, 277 F.3d 579, 588 (1st Cir. 2002) (internal quotation and citation omitted). Here, the defense makes a compelling argument that there was insufficient time to make adequate use of the material at a September 14, 2009 trial due to the enormous difficulties involved in this transnational case. Of course, the government has now short-circuited the case by moving to dismiss. But it may very well be that constitutional prejudice to the defense was inevitable had the case gone to trial as scheduled.

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[14] Precisely because of the government's inherent tendency to determine that no evidence is sufficiently material to warrant disclosure, a growing number of courts have instructed prosecutors to disclose favorable information regardless of its perceived materiality. *See United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005); *United States v. Acosta*, 357 F.Supp.2d 1228, 1232 (D. Nev. 2005); *United States v. Carter*, 313 F. Supp.2d 921, 924-25 (E.D. Wis. 2004); *United States v. Peitz*, 2002 WL 226865, at * 3 (N.D. Ill. 2002) (unreported); *United States v. Sudikoff*, 36 F. Supp.2d 1196, 1198-1201 (C.D. Cal. 1999). As Judge Friedman explained in *Safavian*, "most prosecutors are neither neutral . . . nor prescient, and any such judgment [of materiality] necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins." 233 F.R.D. at 16

B. The Court has the power to dismiss an indictment to sanction a failure to disclose *Brady* information

The Court has broad discretion to sanction the government for *Brady* violations, *Burke*, 2009 WL 1926850, at *4, and, in a typical case the court would have a menu of options at its disposal including granting a continuance, striking testimony, crafting a remedial jury instruction, and granting a mistrial. But this not the typical case. Because the government has moved to dismiss the indictment, there will be no trial, and the only sanction available to the Court is dismissal with prejudice.

The government argues that the only "proper remedy" for a *Brady* violation "is a mistrial, rather than dismissal." Second Supplement at 2-3. But the footnote discussing remedies for *Brady* violations from *United States v. Evans*, 888 F.2d 891, 200 n.5 (D.C. Cir. 1989) on which the government relies is pure dicta. The defendant in *Evans* failed to preserve his *Brady* claim, *id.* at 200, and the court found that, even if it were to reach the merits, there was no *Brady* violation. *Id.*

In fact a number of courts have either dismissed cases with prejudice for *Brady* violations, or recognized that they have the power to do so. *See United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (affirming dismissal with prejudice post-midtrial mistrial); *Gov't of the Virgin Islands v. Fahie*, 419 F.3d 249, 254-55 (3d Cir. 2005) (acknowledging that dismissal with prejudice is permitted for *Brady* violations); *United States v. Fitzgerald*, 615 F. Supp. 2d 1156, 1160 (S.D. Cal. 2009) (dismissing with prejudice pre-retrial); *United States v. Lyons*, 352 F. Supp.2d 1231, 1252 (M.D. Fla. 2004) (dismissing with prejudice post-remand); *United States v. Diabate*, 90 F. Supp. 2d 140, 141 (D. Mass. 2000) (dismissing pretrial without prejudice but noting that dismissal with prejudice might have sent a "stronger message"); *United States v. Dollar*, 25 F.

Supp. 2d 1320, 1332 (N.D. Ala. 1998) (dismissing with prejudice post-trial). Thus, dismissal with prejudice is well within this Court's power to consider, should the Court determine that the government violated its obligation to timely disclose *Brady* information to Mr. Ye Gon.

III. The U.S. Attorneys' Manual and systemic *Brady* problems

Among the questions proposed by this Court at the hearing on June 30, 2009, were two that were specifically directed toward the systemic nature of the government's failure to live up to its *Brady* obligations. This Court observed that this was the second time in fewer than three months in a high profile case that the Department of Justice has come before it with the request to dismiss an indictment after allegations that *Brady* and *Giglio* material was not timely produced. Tr. 6/30/09 at 16. It posed two questions to the government, one with respect to the relevance of the Department of Justice's stated policy with regard to *Brady*, and the second with respect to the Department's apparent practice of withholding *Brady*, and dismissing the case if its misconduct comes to light. *Id.*

The Court observed that the United States Attorneys' Manual, which is available online and is "designed as a quick and ready reference for Department of Justice attorneys responsible for the violations of federal law," has a section entitled "Policy Regarding Disclosure of Exculpatory and Impeachment Information." Tr. 6/30/09 at 15. (referring to USAM § 9-5.001). The policy provides that "prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence," and that "exculpatory information must be disclosed reasonably promptly after it is discovered." *Id.* The Court posed the following question: "How does

what the government did in this case comport with the Manual or with Attorney General Holder's repeated statements that "the prosecutors' job is not to win cases, their job ultimately is to do justice?" *Id.*

The second question posed by this Court concerned not the government's asserted policy of "exceeding its Constitutional obligations," *see* USAM § 9-5.001 (E), but its actual practice: "Is the government's approach, withhold information favorable to the defense and, if caught, or the case [does] not result in a plea, in which case the withheld favorable information will never be revealed, then the government dismisses the case?" If true, the Court said, "[t]hat would be shocking." Tr. 6/30/09 at 16.

The government's answer to this Court's questions was to dodge the first and ignore the second. Rather than admit that its conduct did not live up to the Department's stated policy, the government responded that the "query cannot affect the outcome of this case." Second Supplement at 12. "[T]he manual is strictly a matter of Department of Justice policy, and any possible failure to comply with it is therefore a matter of internal concerns." *Id.* at 11-12.

The ease with which the government disavows the relevance of its *Brady* policy is perhaps unsurprising given the policy's genesis. The policy change did not spring from a true commitment to reform; to the contrary, its purpose was to forestall it. As this Court well knows,[15] a very serious movement to codify the government's *Brady* obligation by amending Rule 16 to eliminate materiality as an issue in pretrial *Brady* disclosures, and

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[15] On April 28, 2009, this Court wrote to the Honorable Richard C. Tallman, Chair of the Judicial Conference Advisory Committee on the Rules of Criminal Procedure, "to urge the Advisory Committee . . . to once again propose an amendment to Federal Rule of Criminal Procedure 16 requiring the disclosure of all exculpatory information to the

make all favorable information known to the government producible "upon request" was defeated due, in large measure, to the vehement opposition of the Department of Justice. Deputy Attorney General McNulty, urging defeat of the amendment, argued that "the significant revisions just made to the U.S. Attorneys' Manual should be given time to work." *Report of the Committee on Rule of Practice and Procedure* at 34-35, 37 (June 11-12, 2007). The concern of the proponents of the rule change was that the government's revision of the Manual would not result in any enforceable rights. One member of the standing committee, expressing skepticism, stated, "For decades . . . the Department of Justice has insisted that the manual is not binding, but it is now characterizing the recent changes on *Brady* materials as crucial." *Id.* at 37.

The United States Attorney for the District of Columbia championed the Manual revision in a letter to the Chief Judge of this Court and to the Chief Judge of the Superior Court, with copies to the Director of the Public Defender Service and the Federal Public Defender, claiming that the policy "reflects the existing practice of this Office of requiring prosecutors to go beyond the minimum obligations required by the Constitution under *Brady v. Maryland* and its progeny."[16] Mr. Taylor made clear that Assistant United States Attorneys in his office were *required* to follow the policy. Presumably, the same message was sent by other components of the Department of Justice.

As this Court so aptly observed in its letter to Judge Tallman, "it has now been nearly three years since the United States Attorneys' Manual was modified . . . [and] it is uncontroverted that *Brady* violations nevertheless occur." A summary of recent cases in

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defense."

[16] Letter from United States Attorney Jeffrey A. Taylor to the Honorable Thomas F.

which courts have at least raised serious questions regarding whether Department of Justice attorneys been remiss in discharging their *Brady* obligations is attached to this Brief. (Attachment 2). The list is merely illustrative. Neither time, nor the fact that many such cases are resolved without formal opinion, permits a comprehensive list. As noted, in many of these cases the trial took place after the revision to the U.S. Attorneys' Manual. This case is but another example.

The issue is not whether the Manual creates substantive rights of the defendant, but whether counsel may rely on it as setting a standard of conduct which prosecutors are bound to follow. [17] The government's dismissive treatment of the relevance of its formal *Brady* policy is troubling, to say the least. Often, prosecutors rebuff further inquiry into their compliance with their *Brady* obligations with the assurance that they are well aware of what is called for. In this case, in August 2008, the government wrote, "[t]he U.S. recognizes its obligations under *Brady* and *Giglio*, and has attempted to uncover all relevant evidence that relates to the case, not just evidence that incriminates the

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Hogan and the Honorable Rufus G. King, III (Dec. 6, 2006).

[17] It is true that the Manual is generally regarded as creating no enforceable rights, although the First Circuit provides this caveat: "Th[at] is not to say that a finding of systemic violation of the Manual or of prosecutorial misconduct in failure to abide by the Manual could never give rise to any sanction." *United States v. Lopez-Matias*, 522 F.3d 150, 156 (1st Cir. 2008). Courts have, however, frequently stated the prosecutors must adhere to the Manual. *See, e.g., United States v. Murillo*, 288 F.3d 1126, 1131 (9th Cir. 2002) (stating because the United States Attorney's Office is "required" to follow USAM policy, a continuance to allow prosecutor to clear death penalty issues with the Department of Justice did not violate defendant's right to a speedy trial); *United States v. Jackson*, 544 F.3d 1176, 1184 n.9 (11th Cir. 2008) ("United States Attorneys' Manual requires the Assistant United States Attorney to seek approval if the Assistant United States Attorney is not filing the enhancement."); *United States v. Hawthorne*, 235 F.3d 400, 404 (8th Cir. 2000) (stating that AUSA "must" follow USAM guidelines with regard to filing of enhancement information); *Doe v. United States*, 372 F.3d 1347, 1363 (Fed. Cir. 2004) ("[The Manual] is binding on Assistant United States Attorneys as well as all

defendant." Government's Response to Mr. Ye Gon's Motion to Compel Discovery at 8 (ECF 103). In light of the Government's formal *Brady* policy as set forth in the revision to its Manual, it was fair to assume that any such evidence that the government "uncover[ed]" would be promptly turned over to the defense. That assumption has proven to be entirely wrong.

Finally, with respect to the question whether the United States dismisses cases to avoid judicial inquiry into it *Brady* practices, our experience is "yes."[18] There have been numerous instances where our clients have been the beneficiaries of these expedient dismissals and we do not view them as inappropriate. What is troubling, however, is that the government never, or almost never (*Stevens* may be the exception), acknowledges that it committed any wrongdoing.

The cases involving former Assistant United States Attorney G. Paul Howes may be this District's most notorious example, but, except with respect to the scale of the misconduct, are far from unique. To resolve the new trial motions in cases prosecuted by Howes which alleged egregious *Brady* and *Giglio* violations, the United States vacated first-degree murder convictions, and reduced the sentences of at least nine defendants in three cases, including several sentences of life without parole, but refused to ever state that it believed that Howes had committed misconduct.[19] One consequence of the

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attorneys in the DOJ's litigation division . . . .").

[18] We cannot comment on whether there is a deliberate approach to violate *Brady*, except to fervently hope that there is not.

[19] *United States v. Mark Hoyle, John W. McCollough, Anthony Goldstone, & Mario B. Harris*, Cr. No. 92-284-01-04 (CKK); *United States v. William Hoyle & Donnie Strothers*, Cr. No. 92-285-08 (CKK); and *United States v. Javier Card, Jerome Edwards & Antoine Rice*, Crim. Nos. F-7682-91, F-4437-92 & F-6601-92 (Superior Court).

government's failure to acknowledge wrongdoing at the same time it avoids a judicial determination of whether there had, in fact, been a violation of the due process clause, is that it perpetrates the misimpression that *Brady* violations are rare. Our experience shows that they are not.

Respectfully submitted,

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