

§ 1028A(a)(1) and (c)(1), as well as aiding and abetting that offense in violation of 18 U.S.C. § 2.

The superseding indictment accused Rosario and Nunez of participating in a scheme to obtain United States Treasury tax refund checks and third party refund checks using the stolen Social Security numbers of United States citizens, including residents of Puerto Rico. The defendants, along with several alleged co-conspirators, allegedly collected those checks from addresses in the Philadelphia area, deposited the checks into various bank accounts under their control, and converted the money from those accounts to their own use.

Following the filing of the superseding indictment, the court delayed the trial date several times because the Government failed timely to produce discovery. It also delayed the trial by one week when counsel for Rosario underwent an emergency dental procedure.

The trial began with jury selection on March 13, 2017. The following day, the court was closed due to snow. On March 15, 2017, the parties made opening statements and the Government began its case. On March 22, 2017, the sixth day of the Government's case, the court granted the oral motion of the defendants for a new trial on the ground that the Government had violated its constitutional obligations under Brady and Giglio. The defendants also moved for dismissal of the superseding

indictment with prejudice. The court denied that motion without prejudice, allowing the parties to refile that motion along with supporting and opposing briefs.

I.

On March 31, 2016, one week before the defendants were indicted, Jerry Villahermosa testified before the grand jury. He told the grand jury that he had collected checks at the instruction of Maribel Nunez from mailboxes on Meadow Street in Philadelphia, where he was living at the time. He also described an occasion when Madeline Rosario drove him to North Philadelphia to collect from a series of row houses United States Treasury checks issued to names that had been supplied by Rosario. He told the grand jury that Rosario had driven him to those addresses, parked the car in front of the buildings, and waited in the car while he collected the Treasury checks from the mailboxes. Finally, he testified that both Nunez and Rosario instructed him to open a business bank account in the name of "Villa Electronics" at Citizens Bank. Rosario then gave him two checks to deposit into his business account, totaling approximately \$15,000. After depositing the first check, he withdrew the proceeds and gave them to Rosario. However, he lost the proceeds of the second check because Citizens Bank closed his account after he deposited the check.

This grand jury testimony was thereafter transcribed by a court reporter, and the Government produced this transcript to the defendants on May 13, 2016.

During discovery, the Government also produced four agent reports summarizing statements made to them by Villahermosa. Two of those statements were made prior to Villahermosa's March 31, 2016 grand jury testimony. The first interview took place on March 17, 2016. Villahermosa told agents that Nunez had asked him to pick up checks delivered to addresses on Meadow Street, the street where Villahermosa lived, as well as from other locations. Both Nunez and Rosario would come to his house to retrieve those checks from him. He also told agents that he opened the Villa Electronics bank account at Citizens Bank at the request of both Nunez and Rosario. While the report stated that Villahermosa was given checks to deposit into that account, the report did not identify the person or persons who provided those checks to him.

During the second interview, on March 28, 2016, Villahermosa told agents that both Rosario and Nunez asked him to pick up income tax refund checks from mailboxes. He also stated that both defendants came to his house to obtain those checks from him.

Immediately after testifying before the grand jury on March 31, 2016, Villahermosa traveled with federal agents to

Northeast Philadelphia to show them locations where he had collected checks on behalf of Nunez. During that trip, Villahermosa described a particular evening when he and Nunez had picked up tax refund checks from mailboxes. He said that Nunez directed him to the addresses and waited in the car in an apartment complex parking lot while he removed the checks from the mailboxes. He then gave the checks to Nunez.

On November 22, 2016, about eight months after his grand jury testimony, Villahermosa again met with Government agents and the Assistant United States Attorney who was to try the case. Although the Government produced to defense counsel a report from the November 2016 meeting, the report omitted Villahermosa's statements identifying two portions of the grand jury transcript that he believed had been transcribed in error. First, he claimed that with regard to his testimony describing a trip to North Philadelphia, he had actually named Maribel Nunez even though the transcript identified Madeline Rosario as the person directing him. Second, he explained that Maribel Nunez, not Madeline Rosario as indicated in the transcript, had provided him with two tax refund checks totaling \$15,000 to deposit into the Villa Electronics bank account. It was Villahermosa's position that the court reporter must have inaccurately recorded this portion of his testimony.

In February 2017, apparently in response to Villahermosa's November 2016 conversation with the Government, the Assistant United States Attorney wrote a letter to the court reporter, as follows:

In reviewing the above-captioned transcript, I write to advise the following corrections:

Page 27, line 14, the word should be "Maribel" not "Madeline."

Page 27, line 15, the word should be "Maribel" not "Madeline."

Page 28, line 9, the word should be "Maribel" not "Madeline."

Page 28, line 10, the word should be "Maribel" not "Madeline."

We are scheduled for trial in this matter on **March 5, 2017**. I truly appreciate any assistance in updating this transcript prior to that date.

(Bolded in original). The court reporter thereafter listened to the audio recording of the grand jury testimony and determined that the transcript was accurate as she had transcribed it. She reported her finding to the Assistant United States Attorney. The court reporter confirmed that Villahermosa had testified that he and Madeline Rosario, not Maribel Nunez, collected United States Treasury checks from row houses in North Philadelphia. Villahermosa also had testified that Rosario, not Nunez, gave him two checks to deposit into the Villa Electronics bank account.

Prior to trial, the Government did not disclose to defense counsel Villahermosa's November 2016 statements that he believed that his grand jury testimony was in error. The Government also did not inform defense counsel that it had instructed the court reporter to change the transcript or that the court reporter had refused to do so because the transcript was in fact correct. The Government did not request a copy of the audio recording of Villahermosa's grand jury testimony from the court reporter until March 27, 2017, after the court had granted a mistrial. Thus, the audio recording was not produced to defense counsel in advance of trial.

On March 21, 2017, the Government called Villahermosa to testify at the trial. During direct examination, he stated that it was Nunez, rather than Rosario, who had asked him to pick up the checks and gave him the names and addresses so that he could collect those checks. He said that he drove Nunez, rather than Rosario, to each of those addresses in North Philadelphia, where he picked up the checks. He testified that only Nunez, not Rosario, asked him to collect checks. When he was asked "Did Madeline [Rosario] ever ask you about checks?", he replied "No, never did." This testimony contradicted what he had told the grand jury but was consistent with what he had told the agents and the Assistant United States Attorney in November 2016.

This was the first time that defense counsel learned that Villahermosa believed that it was Nunez, rather than Rosario, that had instructed him to participate in this illegal activity.

In addition, Villahermosa testified at the trial on direct examination that Nunez, rather than Rosario, provided him with two checks, which had been printed by Rosario, to deposit into the Villa Electronics bank account. This was likewise the first time defense counsel came to know that, according to Villahermosa, Nunez rather than Rosario provided these checks to him.

On cross-examination, counsel for defendant Nunez confronted Villahermosa with the grand jury transcript, which implicated Rosario and was inconsistent with his testimony at trial implicating Nunez. Despite this inconsistency, Villahermosa stood by his trial testimony that Nunez, not Rosario, had participated in the activities that he described. He testified that "it was only Maribel Nunez that had [him] get checks from the mailboxes." Recognizing that the grand jury transcript stated otherwise, he declared upon further questioning by counsel for Nunez that the court reporter who had prepared the grand jury transcript must have inaccurately inserted Rosario's first name, Madeline, when he said Maribel, the first name of Nunez. He added that months before the trial

he had informed the Assistant United States Attorney and the Government agents that he believed the grand jury transcript had been transcribed in error. Villahermosa's testimony on cross-examination at trial was the first time that defense counsel learned that Villahermosa doubted the accuracy of the transcription of his grand jury testimony.

The following day, on March 22, 2017, the court met with defense counsel and the Assistant United States Attorney in chambers before trial resumed for the day. Defense counsel indicated that they intended to call one of the Government agents to inquire whether Villahermosa had previously told that agent that Villahermosa believed the grand jury transcript was inaccurate as Villahermosa had testified at trial the day before. The Assistant United States Attorney informed the court and counsel that she had no objection to this line of questioning proposed by defense counsel and that she would call the agent before resting the Government's case. Surprisingly, she did not disclose to defense counsel or the court that in November 2016 Villahermosa had told her and the Government agents that, in his view, the grand jury transcript was in error. She also did not disclose that she had asked the court reporter to alter the transcript and that the court reporter had declined to do so because the transcript was in fact accurate.

After the conference, trial resumed and the Government called one of the Government agents. On direct examination, the Government asked the agent nothing about Villahermosa's November 2016 statements to the Government implicating Nunez instead of Rosario. On cross-examination, in response to an inquiry by defense counsel, the agent admitted that Villahermosa had told the Government in November 2016 that Nunez, not Rosario, was the person with whom Villahermosa was dealing and that Villahermosa believed his grand jury testimony to the contrary was transcribed in error.

At side bar, counsel for the defendants moved for a mistrial and dismissal of the superseding indictment with prejudice in light of this new information. The Assistant United States Attorney admitted to the court that she had not disclosed to defense counsel Villahermosa's pretrial statements that he believed that the transcript of the grand jury proceeding was inaccurate. The Government's failure to disclose occurred in spite of the fact that the Government knew in advance that, upon taking the stand, Villahermosa's testimony would conflict with his grand jury testimony.

The court determined that Villahermosa's testimony at trial contradicted his testimony before the grand jury and was exculpatory of Rosario. Villahermosa told the grand jury that Rosario had asked him to pick up checks, supplied him with names

and addresses for those checks, and drove him to those addresses in North Philadelphia so that he could collect the checks. At trial, he testified that it was Nunez, not Rosario, who had participated in these activities. The Government knew in advance about Villahermosa's change in testimony but never disclosed it to the defendants. In granting a mistrial, the court found that the Government had violated its affirmative duty to produce exculpatory and impeachment evidence to the defendants. See Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154-55. The court denied without prejudice the motion to dismiss the superseding indictment and informed the parties that it would consider the motion to dismiss after the parties briefed the issues.

After the trial, Government agents produced a new report of the November 2016 interview with Villahermosa. It detailed the statements made by Villahermosa to them and the Assistant United States Attorney about the grand jury transcript. In the new report, the Government also disclosed to defense counsel for the first time that in November 2016 Villahermosa had told the Government that he believed the transcript of his grand jury testimony improperly named Rosario, rather than Nunez, as the individual who had supplied him with two checks to deposit into the Villa Electronics bank account. At trial, Villahermosa had testified that only Nunez gave him

checks to deposit into the Villa Electronics account. Although defense counsel cross-examined Villahermosa regarding the apparent inconsistencies between his grand jury testimony implicating Rosario and his trial testimony implicating Nunez, defense counsel was unaware at trial and at the time of filing their opening brief in support of the pending motion that Villahermosa had told Government agents in November 2016 that, in his view, portions of the grand jury transcript were in error.

II.

As noted above, the court has granted the defendants' motion for a new trial. The defendants now seek dismissal of the superseding indictment with prejudice on the ground that the Government's failure to produce Villahermosa's statements containing both exculpatory and impeachment material was a willful violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). In response, the Government contends that it did not violate Brady, that any violation was not willful, and that the defendants were not prejudiced by any violation.

It is well established that the Government has a duty to disclose exculpatory and impeachment evidence to the defendants. See Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154-55. In Brady, the United States Supreme Court held that

"suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See Brady, 373 U.S. at 87. The prosecutor may not withhold exculpatory evidence from the defendant, as doing so "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." See id. at 88. Similarly, "under Giglio, the government must disclose materials that go to the question of guilt or innocence as well as materials that might affect the jury's judgment of the credibility of a crucial prosecution witness." United States v. Friedman, 658 F.3d 342, 357 (3d Cir. 2011) (citing Giglio, 405 U.S. at 154-55; United States v. Bagley, 473 U.S. 667, 676-77 (1985)). As the Supreme Court stated in Brady, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87.

Ordinarily, a new trial is the appropriate remedy for a Brady violation. See Gov't of the Virgin Islands v. Fahie, 419 F.3d 249, 252 (3d Cir. 2005). However, under certain circumstances, the Government's conduct may warrant dismissal of the indictment with prejudice. See id. at 253 (citing United States v. Morrison, 449 U.S. 361, 365 (1981)). "While retrial

is normally the most severe sanction available for a Brady violation, where a defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper.” Id. at 255 (emphasis added). Dismissal of the indictment remedies the harm to the defendant, punishes improper behavior by the Government, and deters future misconduct. See id. at 254-55.

III.

The first prong of this analysis requires the defendant to prove that the Government engaged in willful misconduct. As our Court of Appeals explained in Fahie, a Brady violation amounts to willful misconduct if the Government knew that it was required to disclose the Brady material but intentionally withheld it or acted with “reckless disregard for a defendant’s constitutional rights.” See id. at 255-56. The defendant may show willful misconduct by pointing to a pattern of constitutional violations by the Government. See id. at 256. “Deliberate misconduct is targeted for extra deterrence because we expect willful misbehavior to be the most effectively deterred by enhanced penalties.” Id.

We begin with the Government’s contention that the November 2016 statements of Villahermosa to Government agents and the Assistant United States Attorney were not Brady material. “A defendant must prove three elements for a Brady violation: (1) ‘the evidence at issue must be favorable to the

defendant;' (2) 'it must be material;' and (3) 'it must have been suppressed by the prosecution.'" See Friedman, 658 F.3d at 357 (quoting United States v. Reyerros, 537 F.3d 270, 281 (3d Cir. 2008)). The Government does not challenge the materiality of Villahermosa's statements, and it admits that it knew about the statements and did not provide them to the defendants in advance of trial. Yet, while purporting not to dispute the court's decision to grant a mistrial, the Government asserts that its failure to disclose Villahermosa's November 2016 statements did not amount to a Brady violation because those statements were only "minimally" exculpatory as to Rosario. The Government claims that these were mere "inconsistent statements, but no Brady violation, given that everything pertinent was disclosed before trial."

The Government is wrong. Villahermosa's November 2016 statements were exculpatory of Rosario, who was no longer implicated by this portion of Villahermosa's grand jury testimony. Although Villahermosa had testified to the grand jury that Rosario participated in certain illegal activity, he now claims that it was actually Nunez instead. In addition, Villahermosa's November 2016 statements were impeachment material because they were inconsistent with his testimony under oath before the grand jury. Thus, they could be used by counsel for both defendants to undermine Villahermosa's credibility at

trial. The Government could not withhold this material based on its own assessment that it was only "minimally" exculpatory. Brady explicitly rejects "cast[ing] the prosecutor in the role of an architect of a proceeding" because doing so "does not comport with standards of justice." See Brady, 373 U.S. at 88. We are quite troubled by the Government's failure to comprehend these fundamental principles concerning its constitutional obligations.

Not only did the Government fail to disclose this Brady material, but it also did not inform defense counsel that, prompted by Villahermosa's statements, it had instructed the court reporter to alter the transcript. The Government would not have done so if it had simply failed to grasp the significance of Villahermosa's statements regarding the accuracy of the grand jury transcript.

The Government's disregard for its obligations did not end there. At numerous points during trial, the Government could have informed defense counsel or the court about Villahermosa's November 2016 statements. On direct examination, Villahermosa implicated Nunez. Yet, the Government did not ask him about his contradictory grand jury testimony which casts doubt on whether Nunez committed the activities discussed during his direct examination. When defense counsel confronted him with the grand jury testimony on cross-examination, Villahermosa

testified that the grand jury transcript was prepared in error and that he had alerted the Government about the supposed error in the transcript months ago. The Government did not take this opportunity to inform the court or defense counsel that Villahermosa had in fact said as much to the agents and the Assistant United States Attorney in November 2016. The Government also did not disclose that its conversations with the court reporter confirmed that the transcript was in fact correct. Instead, the Government allowed Villahermosa to express doubt to the jury about the accuracy of the grand jury transcript, all the while knowing that the transcript was accurate.

The morning of the day following Villahermosa's testimony, the court held a conference in chambers. The Government did not disclose Villahermosa's November 2016 statements during that conference. When trial resumed after the conference, the Government called one of the Government agents, who was present at the November 2016 interview with Villahermosa and had prepared the deficient report of that interview. During its direct examination of the agent, the Government did not inquire about the November 2016 statements concerning the accuracy of the grand jury transcript. This exculpatory information only came to light during cross-examination when

defense counsel asked the agent if Villahermosa had informed the Government about the alleged inaccuracy.

The Government's misconduct certainly amounts to more than mere negligence. The Government did not simply forget about the statements or overlook their significance. The Government had numerous opportunities to disclose the November 2016 statements to defense counsel and the court before and during trial. Nevertheless, it kept the statements to itself. It went so far as to allow a Government witness to testify that the grand jury transcript was inaccurate, despite its knowledge that the grand jury transcript was correct. The Government's conduct, in our view, constitutes, at the very least, reckless disregard or deliberate indifference concerning its constitutional obligations. See Fahie, 419 F.3d at 256.

IV.

The defendants must also establish, as noted above, that they suffered prejudice as a result of the Government's willful misconduct in order to obtain dismissal with prejudice of the superseding indictment. As stated in Fahie, "[a]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." See id. at 253 (quoting Morrison, 449 U.S. at 365).

Although Fahie did not apply the prejudice prong because it determined that the Government had not engaged in willful misconduct, other courts have found that a defendant would be prejudiced by a new trial. In United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008), for example, the Court of Appeals for the Ninth Circuit found that a new trial would prejudice the defendant because the Government had presented a weak case at the first trial and "the mistrial remedy would advantage the government, probably allowing it to salvage what the district court viewed as a poorly conducted prosecution." See id. at 1087.

Prejudice may also exist if key witnesses are unavailable for the new trial. For example, in a case in this district court, the judge found that the defendant would suffer prejudice at a retrial because a Government witness had already received a sentencing reduction for his testimony, making it difficult for the jury to understand defense arguments about the witness's self-interest in testifying against the defendant. See United States v. Lashley, 2011 WL 5237291, at *5-6 (E.D. Pa. Nov. 3, 2011), aff'd, 524 F. App'x 843, 846 (3d Cir. 2013). The court nevertheless declined to dismiss the indictment because the defendant had not shown that the Government's disorganization and carelessness amounted to willful misconduct. See id. In United States v. Fitzgerald, 615 F. Supp. 2d 1156

(S.D. Cal. 2009), the District Court for the Southern District of California dismissed the indictment because, at a new trial made necessary by the Government's willful misconduct, the defendant would be unable to confront a now-deceased Government witness with the late-produced evidence. See id. at 1161.

Here, the defendants do not have the compelling reasons set forth above for dismissal of the superseding indictment. They simply contend that they are financially and emotionally unable to "endure the harassment and spectacle of a second trial." Of course, every defendant facing the prospect of a new trial has financial, emotional, and other personal reasons to avoid retrial. But dismissal of the superseding indictment, which has been described by our Court of Appeals as "the most severe sanction available," is not available in every case even where a willful Brady violation occurs. See Fahie, 419 F.3d at 255. Unlike Chapman, the defendants do not contend that the Government presented a weak case or a poorly conducted prosecution at the first trial. See Chapman, 524 F.3d at 1087. The defendants also do not claim that their access to witnesses or evidence has been undermined by the retrial. In contrast to Lashley, where a Government witness had already received a sentencing reduction as a result of his cooperation, here none of the cooperating witnesses has been sentenced. See Lashley, 2011 WL 5237291, at *7.

The defendants also note that they have lost support from members of their community and that Nunez faces deportation as a result of her uncertain immigration status. The defendants do not explain how these facts prejudice them at a new trial. Without further explanation, it is unclear how the defendants' lack of community support or Nunez's immigration status prejudices the defendants at a second trial.

Finally, the defendants state that "Defendant Rosario, secured private counsel and can not [sic] afford to retain counsel for a second trial." We remind counsel for Rosario that under our local criminal rules, he was on notice from the beginning that he is obligated to remain as counsel in this case "until final disposition of the case in this Court." See United States v. Fattah, 159 F. Supp. 3d 545, 547, 549-50 (E.D. Pa. 2016) (quoting E.D. Pa. Crim. R. 44.1). He entered his appearance knowing that a second trial is always possible. With regard to Nunez, who has retained court-appointed counsel, the defendants state that counsel has spent a year preparing for the first trial. It is unclear how this year of trial preparation, for which court-appointed counsel has received interim payments, prejudices Nunez.

The defendants have not met their burden to show that they suffered demonstrable prejudice in this case.

V.

The defendants further claim that the double jeopardy clause of the Fifth Amendment to the United States Constitution bars a retrial in this case. See U.S. Const. amend V. The Fifth Amendment provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." See id. Although "[t]he Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense," it does not preclude retrial under all circumstances. Oregon v. Kennedy, 456 U.S. 667, 671 (1982). If the defendant requests a mistrial because of government misconduct, the double jeopardy clause "does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." See id. at 676. The Supreme Court has explained that "only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Id.; see also United States v. Dinitz, 424 U.S. 600, 611 (1976). Our Court of Appeals "has consistently emphasized that application of the double jeopardy bar is dependent on a showing of the prosecutor's subjective intent to cause a

mistrial in order to retry the case.” United States v. Williams, 472 F.3d 81, 85-86 (3d Cir. 2007).

The defendants assert that the Assistant United States Attorney goaded them into moving for a mistrial. Although the Government acted with a reckless disregard or deliberate indifference concerning its constitutional obligations, we cannot conclude that the Assistant United States Attorney intentionally failed to disclose the Brady and Giglio material with the subjective intent to force the defendants to move for a mistrial in order to retry the case.¹ To the contrary, the Government vigorously opposed the court’s decision to grant a mistrial and sought to remedy the Brady and Giglio violations through curative instructions or reexamination of witnesses.

VI.

Accordingly, the motion of defendants Madeline Rosario and Maribel Nunez for dismissal of the superseding indictment with prejudice will be denied.

1. The same is true with respect to the other misconduct that the defendants attribute to the Government, including the Government’s introduction of statements made by Nunez during a proffer session, the subornation of perjury in allowing Villahermosa to testify, and the Government’s attempt to exclude members of the jury pool based on their race. Even assuming that this misconduct occurred, we do not find that the Government committed any of these actions with intent to goad the defendants into requesting a mistrial.

