IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

v. **Case No.: 5:20cr28-MW/MJF**

MARGO DEAL ANDERSON et al.,

***Defendants*.**
_____/

ORDER DENYING DEFENDANT FINCH'S MOTION FOR ORDER TO SHOW CAUSE AND THIRD MOTION TO COMPEL

This Court has considered Defendant James David Finch's Amended Motion for Order to Show Cause and Third Motion to Compel. ECF No. 381. The Government filed a response in opposition, ECF No. 395. This Court then held a hearing on the matter on December 12–13, 2022, during which Defendant Margo Deal Anderson joined the motion. *See* ECF No. 418 at 1. At this Court's direction, Defendants filed supplemental briefing, ECF Nos. 418 & 419. The Government filed a response to the supplemental briefing, ECF No. 421, to which Defendant Finch filed a reply, ECF No. 424. Finch's motion is now under submission and ripe for disposition. For the reasons set out below, Finch's Amended Motion for Order to Show Cause and Third Motion to Compel, ECF No. 381, is **DENIED**.

I

The parties are familiar with the procedural history of the case, so this Court will only recite the portions relevant to the present motion. The third superseding indictment in this case charges Defendants with various crimes concerning public corruption. This Court previously afforded Defendants access to materials and transcripts presented to the first, second, and third grand juries following a showing of particularized need to prepare a motion to dismiss the indictment for government misconduct.[1] ECF No. 256. Citing these materials, as well as the Government's subsequent conduct during its investigation and litigation of this case, Defendants filed the present motion seeking dismissal of the operative indictment or a variety of lesser sanctions. ECF No. 381. Defendants raise two arguments in favor of dismissal: the Government (1) violated *Brady* and this Court's orders on several occasions, meriting sanctions under this Court's supervisory authority; and (2) violated the vindictive prosecution doctrine. *See id.* at 1.

Defendants also seek to compel the Government to produce materials from a search warrant served on GAC Contractors, Inc. on *Brady* grounds. *Id.* at 20. The Government argues that both of Defendants' arguments for dismissal or other sanctions lack merit and that, as to the motion to compel production of the GAC

[1] This Court denied Defendants' first attempt to dismiss the charges against them for Government misconduct, finding that many of their grievances were either meritless or insufficient to necessitate dismissal. *See* ECF No. 312.

materials, Defendants have already been provided with access beyond what the law requires. ECF No. 395 at 1–5. This Court will address each argument in turn.

II

First, Defendants' argument for dismissal due to chronic government misconduct. Specifically, Defendants claim that the Government's "flagrant, repeat violations of this Court's orders and intentional suppression of *Brady* information" merit dismissal under "this Court's supervisory authority." ECF No. 381 at 20. Defendants recite many of the same alleged instances of misconduct that they raised in their first motion to dismiss for government misconduct. *Compare, e.g.*, ECF No. 228 at 12–13 *with* ECF No. 381 at 4–6. Defendants also allege several new instances of misconduct, ranging from the Government's suppression of material seized pursuant to the GAC search warrant to its decision to file a third superseding indictment with a different theory of liability after gaining insight into Defendants' strategy by way of their timely filed motions in limine. *See* ECF No. 381 at 12–18. Finally, at the evidentiary hearing, Defendants elicited testimony showing what they claim are multiple instances of the Government seeking or presenting inculpatory information while ignoring or disregarding exculpatory information. *See also* ECF No. 419.

The Government disagrees, arguing that it has met its discovery obligations and is "acting in good faith to resolve the case on its merits and fairly resolve

discovery issues." ECF No. 395 at 5. Further, the Government insists that many of Defendants' allegations of misconduct are unfounded, ECF No. 421 at 2–3, and that the proper remedy for many their grievances is cross-examination of witnesses at trial, *id.* at 19.

Federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Williams*, 504 U.S. 36, 45 (1992) (quoting *United States v. Hasting,* 461 U.S. 499, 505 (1983)). These supervisory powers "deal strictly with the courts' power to control their *own* procedures . . . to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules . . . ." *Williams*, 504 U.S. at 45. The District Court in *United States v. Noriega* summarized the law governing this doctrine:

> [S]upervisory authority is in essence a judicial vehicle to deter conduct and correct injustices which are neither constitutional nor statutory violations, but which the court nonetheless finds repugnant to fairness and justice and is loathe to tolerate. *United States v. Leslie,* 783 F.2d 541, 569 (5th Cir. 1986) (Williams, Circuit Judge, dissenting) (citing *United States v. Hasting,* 461 U.S. 499, 505 (1983), and *McNabb v. United States,* 318 U.S. 332, 340 (1943)), *vacated,* 479 U.S. 1074 (1987). As invocation of supervisory power to dismiss an indictment is a harsh remedy, it is reserved only for flagrant or repeated abuses which are outrageous or shock the conscience. *Omni Int'l Corp., supra;* *1536 *United States v. Baskes,* 433 F. Supp. 799, 806 (N.D. Ill. 1977) (quoting *Rochin v. California,* 342 U.S. at 172). It is certainly not to be applied as a remedy for mere technical illegalities or inadvertent violations, as "[t]hese powers should not permit the criminal to go free because the constable blundered." *Baskes, supra* (citing *People v. Defore,* 150 N.E. 585, 587 (1926)). Thus, a higher threshold of government misconduct

> is imposed for invocation of the supervisory power than that required to state a constitutional or statutory violation.

United States v. Noriega, 746 F. Supp. 1506, 1535–36 (S.D. Fla. 1990) (citations cleaned up), *aff'd* 117 F.3d 1206 (11th Cir. 1997).

As with Defendants' previous motions to dismiss for government misconduct, this Court does not discuss every allegation regarding misconduct set out in the hundreds of pages of briefing and the hours of testimony presented at the hearing. However, this Court *has* scrutinized every allegation in the filings as well as those presented at the hearing. But, as explained in greater detail below, this Court declines to exercise its discretion to dismiss an indictment pursuant to its supervisory authority.[2]

Defendants fall short of demonstrating outrageous or conscience-shocking government misconduct necessary to persuade this Court to exercise its supervisory authority to dismiss the indictment. This Court previously addressed some the conduct that Defendants cite, like the Government's actions before the first three grand juries and discovery shortcomings, and declined to find that it warranted dismissal of the indictment. *See* ECF No. 312. For example, Defendants claim that

[2] Unlike Defendants' previous motions to dismiss the indictment for government misconduct, the parties do not invoke Federal Rule of Criminal Procedure 16(d)(2). *See* ECF No. 312. Instead, the parties rely solely on dismissal pursuant to this Court's supervisory authority. *See* ECF Nos. 381, 418, 419, & 424. While this Court's ultimate conclusion would be the same under either analysis, it will only address the arguments raised by Defendants in the present motion.

the Government repeatedly presented misleading or false information to the grand juries while deliberately failing to present readily available exculpatory information. As this Court previously explained, the alleged wrongdoing consisted either of non-issues or conduct that did not merit dismissal. *Id.* at 13–38. While this Court acknowledged that cumulative misconduct from the Government may merit dismissal even where isolated incidents do not, *see id.* at 43–44, this Court declines to find that this conduct merits dismissal now, either on its own or when considered cumulatively with Defendants' new allegations.[3]

As for new alleged wrongdoing, Defendants also fail to show that the Government's conduct merits dismissal. For example, Defendants point to the Government's filing of several flawed indictments as evidence of its knowing violation of this Court's "orders and various rules of law." ECF No. 419 at 3. While this Court has previously cautioned the Government about continuing to submit faulty indictments, ECF No. 312 at 45, the Government's most recent flawed indictment does not evidence the Government's bad faith. Instead, the third

[3] At the hearing on this motion, this Court entertained argument on whether the Government's alleged misconduct had a material effect on the various grand juries' decision to return an indictment, and whether the alleged misconduct is effectively "cleansed" by a new grand jury returning the operative indictment. This legal standard comes from a claim to dismiss an indictment due to government misconduct in front of a grand jury, *see United States v. Cavallo*, 790 F.3d 1202, 1219 (11th Cir. 2015), which the parties raised in their first motions to dismiss the indictment for Government misconduct, *see* ECF Nos. 228 & 237. Defendants do not, however, raise this argument here. Instead, they seek to dismiss the indictment for Government misconduct generally pursuant to this Court's supervisory authority, *see* ECF No. 381 at 1, which is guided by a different standard, *see supra*.

superseding indictment suffered from a different type of duplicity than the first three indictments and, given the simplified nature of the charges relative to previous indictments in this case, the defect can be remedied with a jury instruction. *See* ECF Nos. 430 & 431. Further, Defendants' grievances with the Government's handling of the GAC material, as explained infra, are unfounded.

This Court also finds that Defendants' alternative remedies, *see* ECF Nos. 412 & 418, are not warranted. The bulk of Defendants' grievances concern the Government's allegedly shoddy investigation and its selective presentation of allegedly exculpatory information.[4] *See, e.g.*, ECF No. 418. Defendants' cross-examination of the Government's witnesses will be sufficient to assuage their concerns. Accordingly, this Court declines to exercise its discretion to use its supervisory authority to sanction the Government for misconduct.

[4] Defendants also cite the Government's alleged violation of the Sixth Amendment by having an informant contact them and discuss case-related issues as cause to dismiss the indictment. ECF No. 419 at 10. However, as this Court explained, "the vast majority of conduct Defendants complain of did not violate the Sixth Amendment," although "some conduct" was a closer call. ECF No. 312 at 43. However, "because the appropriate remedy for such a violation would be to suppress the Government's ill-gotten evidence" and Defendants sought only dismissal, this Court declined to "determine whether a violation occurred." *Id.* This Court reaffirms its prior finding that, while it is a close call as to whether the alleged misconduct is a violation of the Sixth Amendment, it does not merit dismissal either on its own or when considered cumulatively. *See id.* And while Defendants seek dismissal or other lesser remedies in their present motion, they still do not specifically seek to suppress the fruits of the Government's alleged misconduct. *See* ECF No. 419 at 18–19. Accordingly, even assuming that the Government committed a limited violation of the Sixth Amendment, this Court again declines to impose any sanction for the alleged misconduct.

III

Next, Defendants' vindictive prosecution claim. Citing examples of the Government's conduct ranging from its "refusal to discuss voluntary surrender" before indicting Finch to its "repeat attempts to manufacture a conflict of interest," Defendants claim they have submitted evidence of actual vindictiveness. ECF No. 30–31. Having shown the Government acted with actual vindictiveness, Defendants argue, this Court must dismiss the operative indictment. *Id.* Defendants also contend that if they fall short of showing the Government acted with actual vindictiveness, they are "entitled to a presumption of vindictiveness at the pretrial stage" which the Government has failed to rebut *Id.* at 3. The Government argues that Defendants fail to demonstrate actual vindictiveness or present sufficient evidence to entitle them to a presumption of vindictiveness.

Deciding whether to dismiss an indictment for prosecutorial vindictiveness rests in the discretion of the district court. *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006). "A prosecutor may seek a superseding indictment at any time prior to a trial on the merits so long as the purpose is not to harass the defendant." *Id.* "As a general rule, as long as the prosecutor has probable cause to believe the accused has committed a crime, the courts have no authority to interfere with a prosecutor's decision to prosecute." *Id.* "However, a superseding indictment adding new charges that increase the potential penalty would violate due process if the

prosecutor obtained the new charges out of vindictiveness." *Id.*

Defendants have two paths to prove a prosecutorial vindictiveness claim. They can either (1) put forth direct evidence of actual prosecutorial vindictiveness, *see United States v. Goodwin*, 457 U.S. 368, 384 (1982), or (2) benefit from a presumption of vindictiveness where the facts show a realistic probability of vindictiveness, *see Barner*, 441 F.3d at 1318.[5] In determining whether a presumption of vindictiveness should apply, a court "must first determine whether [the defendant's exercise of pre-trial rights was followed by charges of increased severity." *Id.* at 1318–19. Where a defendant shows "nothing more than his assertion of rights through pre-trial motions, followed by augmentation of the charges against him, there are no compelling factors which would justify invoking the presumption of prosecutorial vindictiveness." *Id.* at 1321.

Defendants' prosecutorial vindictiveness claim fails because they fall short of showing actual vindictiveness or a realistic probability of vindictiveness. None of Defendants' factual allegations rise to the level of actual vindictiveness. *Compare* ECF No. 381 at 30–31 *with, e.g.*, *United States v. Johnson*, 221 F.3d 83, 94 (2d Cir. 2000) (noting that "actual vindictiveness requires 'direct' evidence, such as evidence

[5] This Court notes that in *Barner*, the Eleventh Circuit declined to expressly hold that a presumption of vindictiveness "can ever arise" in the pretrial setting. *See* 441 F.3d at 1318. Instead, the Eleventh Circuit found that if the presumption could apply in the pretrial setting, the defendant there failed to show a realistic probability of vindictiveness that would be required for such a presumption. *Id.*

of a statement by the prosecutor, which is available 'only in a rare case.' " (quoting *United States v. Johnson*, 171 F.3d 139, 140–41 (2d Cir. 1999)). This Court already addressed much of this alleged misconduct in a previous order in which it found that dismissal was not merited. *See* ECF No. 312. Also, many of the new allegations of misconduct are non-issues. For example, Defendants claim that the Government repeatedly attempted to "manufacture a conflict of interest to seek the disqualification of Anderson's counsel." ECF No. 381 at 30. This allegation, however, distorts what actually happened. Shortly after Finch was indicted, the Government filed a motion noting that Finch appeared to be paying for Anderson's counsel. ECF No. 78. Citing its duty—as well as this Court's duty—to ensure Anderson received conflict-free representation as guaranteed by the Sixth Amendment, the Government requested a hearing to address a payment arrangement that presents a potentially serious conflict of interest. *See* ECF No. 78. This Court held a hearing on the matter, explaining the conflict to Anderson before she knowingly and voluntarily waived the conflict. *See* ECF No. 106.

This conduct fails to show actual vindictiveness by the Government. In fact, it shows the opposite. Rule 4-1.8(f) of the Florida Rules of Professional Conduct prohibits lawyers from accepting compensation from a third party unless the client gives informed consent, there is no interference with "the lawyer's independence of professional judgment or with the client-lawyer relationship," and confidential client

information is safeguarded. And where an alleged co-conspirator is the third party paying for an individual's legal fees, a potential conflict becomes glaring. *See Wood v. Georgia*, 450 U.S. 261, 268–69 (1981) (recognizing "the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise"). Here, the Government acted to safeguard Anderson's Sixth Amendment right to conflict-free representation, which is implicated by a co-defendant paying for her representation. At most, Defendants' allegations of actual vindictiveness are better characterized as "pre-trial skirmishes" with the Government, to which the doctrine of prosecutorial vindictiveness does not apply. *See Barner*, 441 F.3d at 1318.

As to Defendants' attempt to demonstrate entitlement to a presumption, they fail to show a realistic probability of vindictiveness entitling them to a presumption. First, this Court notes that Defendants fail to make any showing that they faced charges of increased severity following their invocation of a pretrial right. *Cf. Barner*, 441 F.3d at 1318–19. Second, their allegations of misconduct fail to show a realistic probability of vindictiveness because, as discussed above, this Court found that either the Government did not do anything wrong, the allegations amounted to sloppy conduct rather than misconduct, or the allegations demonstrated limited

misconduct that did not merit dismissal.[6] Accordingly, Defendants' prosecutorial vindictiveness claim fails.

IV

Finally, Defendants' motion to compel the Government to produce materials from the GAC search warrant. Defendants argue that the Government suppressed materials from the GAC search warrant that should have been disclosed pursuant to *Brady*, *Giglio*, and this Court's discovery order. *See* ECF No. 381 at 26. Because the Government failed to disclose this material to Defendants, they argue, this Court should dismiss the indictment with prejudice. *Id.* at 29. The Government argues that Defendants have failed to show any entitlement to the GAC material. ECF No. 395 at 13–14. Despite this, the Government notes, it has not "suppressed" information from the GAC search warrant because it made this material available to Defendants for inspection and copying. *Id.* at 23.

"At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1). When "a party fails to comply with" discovery orders, the Federal Rules of Criminal Procedure authorize this Court to compel disclosure, grant a continuance, prohibit

[6] Consider a final example: Defendants point to the Government's several failed attempts to plead a viable conspiracy count. ECF No. 381 at 32. This conduct, however, cannot support a presumption of vindictiveness because it represents the Government's efforts "to correct its earlier mistake and charge the conduct in a way that could support a conviction . . . ." *Barner*, 441 F.3d at 1319.

the offending party from introducing the evidence at trial, or "enter any other order that is just under the circumstances." Fed. R. Crim. P. 16(d)(2). As for the procedure in which the Government must make discovery available to criminal defendants, "the government must permit the defendant to inspect and to copy" documents "if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." Fed. R. Crim. P. 16(a)(1)(E). "[T]he government is not obligated to make copies" of discovery items. *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003). In fact, district courts abuse their discretion by ordering the Government to make copies of discovery "[w]here the defendant has in no way been prohibited from inspecting the particular documents and cannot demonstrate an undue hardship from this availability . . . especially where . . . the defendants are not indigent." *United States v. Freedman*, 688 F.2d 1364, 1366–67 (11th Cir. 1982). And finally, this Court must always keep in mind that its foremost function is "to hear all relevant evidence in an attempt to reach a truthful and reliable verdict." *United States v. Burkhalter*, 735 F.2d 1327, 1330 (11th Cir. 1984).

Defendants' motion to compel production of the GAC material (or, in the alternative, dismiss the indictment for the Government's failure to produce the GAC material) fails because the Government did not suppress the material. As Finch

acknowledges in his motion, the Government offered Defendants access to the GAC material at the FBI office in Panama City, where they could "copy any document you identify as relevant." ECF No. 381 at 21 n.19. Counsel for Finch rejected this offer due to "the cost and inconvenience of travelling hundreds of miles from their office" while working toward complying with other deadlines in this case. *Id.* at 21 n.19. In other words, Defendants are not alleging that the Government prevented them from having *any* access to the GAC material—they are alleging that the Government refused to provide them with copies of all material seized.

Defendants fail to show that the Government suppressed the GAC material where it offered sufficient access on Defendants' request. Neither this Court's local rules nor its discovery order in this case directs the Government to make copies for Defendants' use.[7] And as the Eleventh Circuit made clear in *Freedman*, the Government is not obligated to make copies for Defendants. 688 F.2d at 1366–67.

[7] This Court previously rejected Anderson's argument that the Government must identify all *Brady* material within a larger production of documents. *See* ECF No. 60. This Court noted that "[o]rdinarily, the Government need not go through its production and specifically identify all material that may be beneficial to the defendant." *Id.* at 20. However, this Court also noted that "the Government should not be permitted to circumvent its *Brady* obligations by burying exculpatory material in hundreds of thousands or millions of documents." *Id.* For this reason, this Court denied Anderson's request for the Government to identify specific *Brady* material within a larger production *without prejudice* to allow Anderson to make a showing that the produced discovery was "so voluminous" as to require identification. *See id.* at 20–21. Anderson did not attempt to renew that part of the motion or to make that showing here. Instead, Defendants seek an order directing the Government to identify *Brady* material in the GAC production as a sanction for misconduct, *see* ECF No. 419 at 19, which this Court declines to issue for the reasons set out above.

This is especially relevant where, like here, indigency is not an issue for either Defendant. *Id.* Both Anderson and Finch have retained counsel with offices some distance away from the site of this criminal investigation—which is their right. However, Defendants cannot hire out-of-town counsel and then complain about the need for them to travel to litigate this case.[8] Accordingly, Defendants' grievance with the Government refusing to make copies on their behalf does not merit dismissal, and this Court declines to exercise its discretion to order the Government to make copies for Defendants' benefit.

V

Defendants fail to show that dismissal of the indictment is merited for government misconduct, violation of this Court's orders, or vindictive prosecution. Defendants also fail to show that an order directing the Government to produce the GAC material to Defendants is merited because this material has already been made available for their inspection. Accordingly,

IT IS ORDERED:

1. Finch's Amended Motion for Order to Show Cause and Third Motion to Compel, ECF No. 381, is **DENIED**.

[8] The Government avers that it offered to make the GAC material available for Defendants to view in Tallahassee as well, ECF No. 395 at 26, which also happens to be where Anderson's counsel is located.

2. Anderson's supplemental filing and request for alternative relief, ECF No. 418, is **DENIED** to the extent it can be construed as a separate motion.

3. The Clerk is **DIRECTED** to **TERMINATE** Finch's redacted Amended Motion for Order to Show Cause and Third Motion to Compel, ECF No. 380.

SO ORDERED on February 2, 2023.

s/Mark E. Walker
Chief United States District Judge