

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH**

UNITED STATES OF AMERICA	)	Case No. 2026 CF2 10237
	)	
v.	)	Judge Todd E. Edelman
	)	
DAVID HEARN	)	Motion Hearing: September 4, 2026
	)	

**Government’s Reply to Defendant’s Response to
Government’s Motion to Dismiss the Indictment Without Prejudice**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby respectfully replies to the defendant’s response to the government’s motion to dismiss the indictment. For the reasons set forth below, in the government’s motion to dismiss, and for any reasons set forth at a hearing on the motion, the government’s motion should be granted, and this case should be dismissed without prejudice.

Background

At the outset it should be noted that the government sought this indictment in good faith after the Department of the Interior (“DOI”) provided evidence, albeit incomplete, that there was vandalism to the Reflecting Pool. However, based on newly received *Brady* materials from DOI, the government could not sustain its burden that the defendant’s actions caused further damage to the liner beyond the condition that Bay 4 was already in. Accordingly, consistent both with its evidence, its burden of proof, and its ethical obligations, the government was required to move to dismiss the case pursuant to Rule 48. This, however, does not suggest that there was no vandalism to other areas of the Reflecting Pool.

Argument

Rule 48(a)(2) of the Superior Court Rules of Criminal Procedure provides that the “government may, with leave of court, dismiss an indictment. Such a dismissal is without prejudice

unless otherwise stated.” “Ordinarily, the government can reindict the defendant after a dismissal without prejudice.” *Workman v. United States*, 255 A.3d 971, 975 (D.C. 2021). “The trial court has the responsibility, however, to prevent dismissals without prejudice and subsequent reindictments that constitute ‘harassment’ of a defendant.” *Id.* (quoting *United States v. Kennedy*, 220 A.2d 322, 323 (D.C. 1966)). The “principal purpose of the ‘leave of court’ requirement of Fed. R. Crim. P. 48(a) (the federal analog to our Superior Court rule) ‘is to protect a defendant from the government’s harassing him by repeatedly filing charges and dismissing them before they are adjudicated.’” *Ferrell v. United States*, 990 A.2d 1015, 1020 n.4 (D.C. 2010) (quoting *In re United States*, 345 F.3d 450, 452 (7th Cir. 2003)). However, the government is permitted to dismiss a case and then reindict it if it serves a tactical advantage to the prosecution. *See Workman*, 255 A.3d at 976 (“In sum, we hold that the second indictment in this case was not precluded simply because, at the time of the dismissal of the original indictment without prejudice, the United States hoped to prosecute Mr. Workman later under more favorable circumstances.”).

The defense repeatedly argues that dismissal with prejudice is warranted because the government sought an indictment in bad faith and in disregard of the available evidence. This is flatly wrong, as discussed below. But it also misconstrues the law. “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 efforts to terminate the prosecution were similarly tainted with impropriety.” *Rinaldi v. United States*, 434 U.S. 22, 30 (1977). *See also United States v. B. G. G.*, 53 F.4th 1353, 1363 (11th Cir. 2022) (reversing order dismissing indictment with prejudice where “the district court erred in focusing its rule 48(a) analysis on the government’s reasons for filing the information and not on its reasons for seeking the dismissal”). Here, the government’s request for leave of court to dismiss the indictment was very much made in good faith because it was based

on the government's conclusion that, although the defendant was observed putting his hands into the water of the reflecting pool and pulling on the liner, based on newly received documents from DOI, the government could not prove beyond a reasonable doubt that the defendant damaged the liner anymore than it was already damaged. Given these concerns about the strength of the evidence, as well as the late surprise production of *Brady* material by DOI, the government had no choice but to move to dismiss. *See, e.g.*, Justice Manual 9-27.220 (Comment)) (a criminal prosecution should only be maintained if the defendant "will more likely than not be found guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal"); D.C. R. Prof'l Resp. 3.8(c) ("The prosecutor in a criminal case shall not: (c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt").

Although this Court need not address the issue, the government's decision to seek an indictment from the grand jury was also made in good faith based upon the information given to prosecutors by DOI and its agents at the time the indictment was sought.¹ The government's investigation included interviews with two National Park Service ("NPS") employees, W-1 and W-2, who were working at the Reflecting Pool when the defendant approached the area where they

¹ The defendant asserts that the government secured the indictment "in apparent disregard for their special duties as prosecutors" (Def. Resp. at 2). Although *Rinaldi* and its progeny make clear that this contention is irrelevant to the merits of the Rule 48 motion here, it lacks merit in any event. The government reasonably relied on the witness reports from DOI personnel and adhered to standard practices by introducing hearsay evidence in the grand jury. *See Costello v. United States*, 350 U.S. 359, 363 (1956). Although the Department of Justice endeavors to present exculpatory evidence to the grand as a matter of policy, see Justice Manual § 9-11.233, the government is not required to present an exhaustive account of the alleged crime, let alone to detail exculpatory evidence, in the grand jury. *See United States v. Williams*, 504 U.S. 36, 53-54 (1992). Defendant also suggests that the "sprint to charge" him (Def. Resp. at 4) manifests bad faith. The Court should not draw that inference here, especially where a prompt indictment is intended to deter others who might be inclined to engage in the same conduct at the Reflecting Pool.

were working. W-1 stated they observed the defendant using his cellular telephone to take what the NPS employee believed to be video or a photograph(s) of the damage to the reflecting pool. However, the United States Park Police never took possession of the defendant's phone to verify if any additional damage was done. The NPS employee, W-1, stated that the defendant then knelt, placed both hands into the reflecting pool—below the surface of the water—and started to “violently” tug at a portion of the blue pool coating. At no time was the defendant seen removing anything from the pool. The NPS employee, W-1, asked the second NPS employee, W-2, to contact police and requested that the defendant not touch or rip at the coating. The defendant told W-1 that the NPS personnel were “awfully sensitive about the pool.”

The only question relevant to charges was the economic loss. This office was not even in receipt of a suggestion that there were construction problems with Bay 4 until the receipt of an unbeknown file of construction records from DOI. *See Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975) (“Where repairable damage or destruction is caused to a portion or portions of a greater whole, the value of the property damaged or destroyed is to be measured by the reasonable cost of the repairs necessitated by the malicious conduct.”). A National Park Service (“NPS”) estimate provided to USAO-DC on July 1, 2026, provided a portion of that answer. This document reflects that DOI attributed a total of \$6,817 in direct and indirect costs to repair this portion of the Reflecting Pool lining in Bay 4. However, it did not assess what if any economic loss was attendant to the defendant's actions when he pulled on the lining. That answer was provided by W-4, who testified in the grand jury that the damage attributed to the defendant “would definitely be \$1,000 or more.” Based on this information, the government then presented its theory to the grand jury—that the additional damage caused to the lining by the defendant would require more than \$1,000 to reasonably repair and that the defendant's conduct showed that he deliberately intended to

damage the pool lining when he pulled on it with both hands. The grand jury then returned a true bill charging the defendant with one count of felony destruction of property in violation of D.C. Code § 22-303.²

However, at the time the indictment was returned, the USAO-DC was not aware of or in possession of any of the extensive documentation of installation issues compiled by DOI from the start of the installation process, as detailed in the government’s motion to dismiss. Of particular note—and unbeknown to USAO-DC at the time—was the June 11, 2026, email from the NPS engineer documenting peeling of the lining within days after the completion of the installation.

² The defendant separately moved to dismiss the indictment in a publicly filed Motion and Supplement that cherry-picked references and direct quotations from grand jury transcripts. Defendant’s public filing sought to undermine the public’s confidence in the grand jury proceedings, while also capitalizing on the government’s limited ability to respond given the secrecy requirements imposed by Rule 6(e). The government is submitting its summation and instructions to the grand jury to the Court *ex parte* for its *in camera* review, which will confirm for the Court that there were no irregularities with the grand jury proceedings as the defendant claims.

Although the defendant correctly notes that Rule 6(e) does not apply to him, the defendant’s quoting of grand jury materials blatantly violated two of the protective orders entered in this case. Principally, throughout his opposition asserting that he has not violated the relevant protective orders, Defendant does not once quote paragraph 3 of the orders which stated the “defense team shall not disseminate [the covered] materials.” *See generally* Def.’s Opp. Defendant’s choice to skip the thrust of the protective orders is telling. Later in his argument, the defendant elides the start of paragraph 4: “Subject to the limitations contained in this Order.” Sensitive Materials Protective Order at ¶ 4; Grand Jury and Jencks Protective Order at ¶ 4. Instead, Defendant explains that “the defense team may use grand jury and Jencks materials solely in connection with this case” However, Defendant wholly ignores this Court’s prohibition on disseminating the materials covered by the protective orders. The defendant also deliberately omits a clause from the part of paragraph 11 that he quotes from the Grand Jury and Jencks protective order. Def.’s Opp. at 2-3. Defendant references “that: ‘This Order will not apply to grand jury or Jencks materials once those materials become part of the public record’” *see* Def.’s 7/28/2026 Opp. at 4 (citing paragraph 11 of the Grand Jury and Jencks protective order). However, the “public record” includes only “materials that have been received in evidence in this or other public trials or materials that are publicly released by the U.S. Attorney’s Office” In Defendant’s opposition to sealing his motion and supplement, he asserts that, by the government disclosing the materials to the defense before trial, the materials have become part of the public record. This tortured reading of the protective order cannot be sustained. Were the parties and the Court to understand that the protective order did not apply to anything the defense made public, there would be no purpose for the protective order whatsoever.

The engineer wrote “[o]nly the top layer of liner has peeled. This is very thin and will not impact the strength of the liner.” The email detailed that the “contractor stated that the peeled area was ‘overspray’ from spraying the perimeter joint with polyurea.” The engineer stated his “concern that this ‘overspray’ along the perimeter of the pool could lead to a 1’-2’ strip that is vulnerable to peeling.” The engineer also stated “[t]he polyurea liner that has peeled does not float in water, so should not be highly visible to visitors and can be vacuumed out along with sediment and algae during the normal cleaning process.” These statements cast significant doubt that the defendant caused damage to the lining. This information—that the piece of liner peeled by the defendant was overspray, of little or no value—was first furnished to the prosecutors weeks after the grand jury indicted the defendant.

Moreover, the late provided documents showing blistering and peeling, as noted by contractors, would sabotage the government’s ability to meet its burden of proof. Ironically, these documents support defense claims that extensive peeling had already occurred due to contractor error. Accordingly, consistent both with its evidence, its burden of proof, and its ethical obligations, the government was required to move to dismiss the case pursuant to Rule 48.

The defendant argues that dismissal with prejudice is necessary because “[a]llowing the government to dismiss the case without foreclosing future prosecution would leave Mr. Hearn exposed to continued harassment based on the same discredited allegations” Def.’s Resp. at 3. The defendant implies that he is entitled to wholesale immunity from prosecution, even if some additional evidence of guilt did materialize. Rule 48 does not go that far. Indeed, the caselaw makes clear that dismissal without prejudice is the default precisely because additional evidence of guilt could come to light before the statute of limitations expires. The mere potential that charges may be re-brought does not constitute the type of harassment for which a dismissal with prejudice is

appropriate. *See Workman*, 255 A.3d at 976-77 (“the second indictment in this case was not precluded simply because, at the time of the dismissal of the original indictment without prejudice, the United States hoped to prosecute Mr. Workman later under more favorable circumstances”). *See also id.* (citing, e.g., *United States v. Jones*, 664 F.3d 966, 973 (5th Cir. 2011) (trial court did not abuse its discretion by refusing to dismiss reindictment where United States dismissed original indictment without prejudice in order to add other defendants and charges, and to move prosecution to different division nearer to location of charged offenses); *United States v. Hayden*, 860 F.2d 1483, 1488 (9th Cir. 1988) (trial court did not abuse discretion in refusing to dismiss reindictment with prejudice where United States dismissed original indictment without prejudice in order to investigate additional information provided by cooperating witness and potentially bring additional charges against defendant); *United States v. Feldhacker*, 849 F.2d 293, 295 (8th Cir. 1988) (trial court did not abuse discretion in refusing to dismiss reindictment with prejudice where United States dismissed original indictment without prejudice after trial court suppressed evidence, weakening United States’s case); *United States v. Strayer*, 846 F.2d 1262, 1264-66 (10th Cir. 1988) (trial court did not abuse discretion in refusing to dismiss reindictment with prejudice where United States dismissed original indictment without prejudice in order to fix defects in indictment); *cf. United States v. Goodson*, 204 F.3d 508, 512-16 (4th Cir. 2000) (where United States was unprepared for trial due to absence of essential witness, trial court abused discretion by denying United States's motion to dismiss under Rule 48(a) and instead granting defendant’s motion to dismiss with prejudice; trial court was required to grant United States’s motion in absence of bad faith, which was not present)).

Should the case be re-presented to a new grand jury based on newly discovered evidence, any reindictment of the case would not constitute harassment. Rather, it would be a prosecution

supported by probable cause. Rule 48(a)'s concern lies not with another grand jury returning a second indictment, but with the repeated filing *and then dismissal* of charges "before they are adjudicated." *Ferrell*, 990 A.2d at 1020 n.4. Any such concern is entirely premature and speculative in this case and would only be ripe for decision by the court if the government sought and obtained another indictment and then moved to dismiss that second indictment prior to trial. *See Workman*, 255 A.3d at 976-77 (referencing dismissal of a second indictment); *Hayden*, 860 F.2d at 1483 (referencing dismissal of reindictment, not initial indictment); *Strayer*, 846 F.2d at 1264-66 (referencing dismissal of reindictment, not initial indictment).

Dismissal with prejudice is not necessary to protect the defendant from any future risk of prosecutorial overreach here. Should the case be re-presented, the grand-jury process provides extensive protection to the defendant. "[N]otwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges." *United States v. Mandujano*, 425 U.S. 564, 571 (1976). "Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." *Id.* The statute of limitations also provides a finite limit to a defendant's potential exposure to criminal charges. *See Brookens v. United States*, 182 A.3d 123 (D.C. 2018).

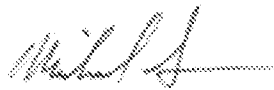
Defendant styles his case as "exceptional" and "extraordinary," but his case is not. Def.'s Resp. at 1, 2. It is not uncommon for the government to dismiss indictments, despite the defendant's efforts to sensationalize the process here. The Defendant says,

Its current effort to assign sole fault to DOI therefore confirms, rather than excuses, the government's bad faith: it relied on DOI to obtain the indictment, failed to investigate before charging, and now seeks to disclaim responsibility for information held by the very agencies on whose accusations and witnesses it relied.

Def.'s Resp. at 20. As the Court well knows, the government not infrequently relies on agencies and representatives in prosecuting criminal cases; every case has at least one witness to criminal conduct, though many cases have multiple witnesses. Moreover, the standard for indictment by the grand jury is probable cause, not proof beyond all doubt, as the defendant appears to insinuate. "It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge." *United States v. Williams*, 504 U.S. 36, 51 (1992). The government often dismisses indictments pursuant to Rule 48(a) without prejudice upon learning additional information after the grand jury indicts. Indeed, it is the government's responsibility to dismiss matters it can no longer prosecute in good faith when it learns more from the witness(es) and discovery between indictment and trial. That is exactly what the government did here.

For all of these reasons, this case should be dismissed without prejudice.

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	)	
DAVID HEARN	)	
	)	

ORDER

Upon consideration of the government’s motion to dismiss this case without prejudice, it is hereby **ORDERED** that this case is **DISMISSED WITHOUT PREJUDICE**.

Todd E. Edelman
Associate Judge

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