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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 * * * * *

15 UNITED STATES OF AMERICA,) CASE NO. 2:24-CR-00091-ODW
16)
17 Plaintiff,) **DEFENDANT’S NOTICE OF**
18) **MOTION AND MOTION TO DISMISS**
19 v.) **FOR DISCOVERY VIOLATION**
20)
21 ALEXANDER SMIRNOV,)
22)
23 Defendant,) **Honorable Otis D. Wright II**
24) **December 2, 2024 at 10:00 a.m.**

25 PLEASE TAKE NOTICE that on December 2, 2024, or as soon thereafter as
26 counsel may be heard, Defendant, ALEXANDER SMIRNOV (“Mr. Smirnov”), by
27 and through his attorneys, DAVID Z. CHESNOFF, ESQ., and RICHARD A.
28 SCHONFELD, ESQ., of the law firm of CHESNOFF & SCHONFELD, will ask this

1 Honorable Court to enter an Order Dismissing the Indictment Based on the
2 Government's Flagrant Discovery Violation.

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4 This Motion is made and based upon the attached Memorandum of Points and
5 Authorities, the papers and pleadings on file herein, and any argument that is heard.

6 Counsel for the government has stated that it will oppose this Motion.

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8 Dated this 4th day of November, 2024.

9 Respectfully Submitted:

10 CHESNOFF & SCHONFELD

11
12 /s/ David Z. Chesnoff

13 DAVID Z. CHESNOFF, ESQ.

14 *Pro Hac Vice*

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23 ALEXANDER SMIRNOV
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1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 A.

4 BACKGROUND AND RELEVANT FACTS

5 This Motion is based upon the government’s late disclosure (on October 25,
6 2024, and only able to be accessed by defense counsel as of October 29, 2024, as a
7 result of a problem with the government’s uploading of the material) of over 1,200
8 pages of Federal Bureau of Investigation CHS Reporting Documents (FD-1023) as
9 well as the Federal Bureau of Investigations Assessment (referenced in the
10 Indictment) that had all been requested on March 5, 2024. This newly produced
11 discovery, which was requested in writing almost 8 months prior to it being
12 produced, consists of over 400 reports. The government has provided no explanation
13 as to why this discovery was produced long after the Motion deadline in this case
14 and just prior to the Motion in Limine deadline.
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19 On September 26, 2024, Defendant filed an Ex Parte Motion to Continue the
20 trial in this matter based in large part on the volume of discovery in this matter. See
21 Dkt 131. On September 26, 2024, the government opposed the Motion. See Dkt
22 135. The government’s Opposition in large part argued that the Defendant has had
23 enough time to review the voluminous discovery and therefore did not establish good
24 cause for a continuance.
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1 Now, after the Defendant had requested this specific discovery on March 5,
2 2024, May 28, 2024, September 27, 2024, had to file a Motion to Compel Discovery
3 (Dkt 136, redacted version at 139), disclosed his expert witness which relates in part
4 to Defendant's historical cooperation and the handler's deficiencies and failure to
5 properly report, and had the government oppose a request for continuance, the
6 government has produced over 1,200 pages of FBI FD-1023 reports and the
7 Assessment all of which the Defendant expressly requested in writing 3 separate
8 times. This discovery is material, is Brady, supports the theory of defense in this
9 case, and the government has no excuse for the late disclosure.
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13 **B.**

14 **ARGUMENT**

15 **This Court Should Dismiss the Indictment Under Its Supervisory**
16 **Powers Due to Government Misconduct in Withholding Material,**
17 **Exculpatory Evidence Until Less Than One Month Before Trial**
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19 The Ninth Circuit has explained that, in addition to discovery violations that
20 rise to the level of a due process violations, a Court "may [also] dismiss an
21 indictment under its inherent supervisory powers '(1) to implement a remedy for the
22 violation of a recognized statutory or constitutional right; (2) to preserve judicial
23 integrity by ensuring that a conviction rests on appropriate considerations validly
24 before a jury; and (3) to deter future illegal conduct.'" *United States v. Bundy*, 968
25 F.3d 1019, 1030 (9th Cir. 2020) (quoting *United States v. Struckman*, 611 F.3d 560,
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1 574 (9th Cir. 2010) and *United States v. Hasting*, 461 U.S. 499, 505 (1983) (internal
2 citations and quotation marks omitted)).

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4 The court’s exercise of its supervisory powers protects the integrity of
5 the federal courts and prevents the courts from “making . . . themselves
6 accomplices in willful disobedience of law.” *McNabb v. United States*,
7 318 U.S. 332, 345 (1943). A district court can dismiss an indictment
8 under its supervisory powers even if “the conduct does not rise to the
9 level of a due process violation.” *United States v. Barrera-Moreno*, 951
10 F.2d 1089, 1091 (9th Cir. 1991). Because it is unnecessary to decide if
11 both standards are met here, we will only review whether the district
12 court properly dismissed the indictment under its supervisory powers.
13 *See United States v. Chapman*, 524 F.3d 1073, 1084 n.5 (9th Cir. 2008)
14 (“Because the district court did not abuse its discretion in dismissing
15 the indictment under its supervisory powers, we need not consider
16 whether the dismissal was also justified by the government’s violation
17 of Defendants’ due process rights.”).

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19 When considering an exercise of its supervisory powers, a district court
20 has various options The most drastic remedy is dismissal with
21 prejudice because this prevents the government from retrying the
22 defendants at all. *See Chapman*, 524 F.3d at 1085 (explaining that
23 improper dismissal of “an indictment with prejudice encroaches on the
24 prosecutor’s charging authority” (internal quotation marks omitted)) . .
25 . . Such dismissal exercised under the guise of ‘supervisory power’ is
26 impermissible absent ‘a clear basis in fact and law for doing so.’ ”).
27 Under its supervisory powers, a district court may dismiss an
28 indictment with prejudice for prosecutorial misconduct only if there is
“(1) flagrant misbehavior and (2) substantial prejudice.” *Kearns*, 5 F.3d
at 1253.

Bundy, 968 F.3d at 1030–31.

Dismissal of the indictment is warranted here. As set forth in greater detail in
Mr. Smirnov’s contemporaneously filed Second *Ex Parte* Motion to Continue the
Trial Date (which is fully incorporated into the present motion to dismiss), the

1 present motion is based upon the government’s late disclosure (on October 25, 2024,
2 but inaccessible for review until October 29, 2024, due to a problem with the
3 government’s uploading of the material) of over 1,200 pages of FBI CHS Reporting
4 Documents (FD-1023), as well as the FBI Assessment (referenced in the
5 Indictment), which had been requested as early as March 5, 2024. This newly
6 produced discovery—requested in writing *nearly eight months before it was*
7 *produced*—consists of over 400 reports. The government has provided no
8 explanation as to why this discovery was produced long after the Motion deadline
9 in this case and just prior to the *Motion in Limine* deadline.
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13 The Defendant, who is in custody and knows more about the details of his
14 cooperation than anybody else, will be deprived of a fair opportunity to review this
15 newly produced material—and to assist his defense counsel to prepare a cross-
16 examination that ensures and vindicates Mr. Smirnov’s constitutional rights. *See,*
17 *e.g., Turner v. State of La., 379 U.S. 466, 472–73 (1965)* (“In the constitutional
18 sense, trial by jury in a criminal case necessarily implies at the very least that the
19 ‘evidence developed’ against a defendant shall come from the witness stand in a
20 public courtroom where there is full judicial protection of the defendant’s right of
21 confrontation, of cross-examination, and of counsel.”); *see also Moore v.*
22 *Frauenheim*, No. 20-15578, 2022 WL 14423499, at *1 (9th Cir. Oct. 25, 2022)
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1 (quoting *Turner*). Additionally, Defendant’s expert was deprived of an opportunity
2 to review the material and consider them for his trial opinions.
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4 This motion is also related to the rapidly approaching trial date. On September
5 26, 2024, Defendant filed an *Ex Parte* Motion to Continue the trial based in large
6 part on the volume of discovery. *See* ECF No. 131. On September 26, 2024, the
7 government opposed the Motion. *See* ECF No. 135. The government’s Opposition
8 argued that the Defendant has had enough time to review the voluminous discovery.
9

10 But now, *after* the Defendant 1) requested this specific discovery three times
11 (on March 5, May 28, and September 27, 2024), 2) was forced to file a Motion to
12 Compel Discovery (ECF No. 136, redacted version at 139), 3) disclosed his expert
13 witness (which relates to Defendant’s cooperation and the handler’s deficiencies),
14 and 4) had the government oppose a request for continuance, the government has
15 finally produced over 1,200 pages of FBI FD-1023 reports and the Assessment, all
16 of which had been expressly requested in writing three separate times. This
17 discovery is material; qualifies as *Brady* evidence; and supports the theory of defense
18 in this case. The government has no excuse for the late disclosure. *See, e.g., United*
19 *States v. Bundy*, 968 F.3d 1019, 1031 (9th Cir. 2020) (“It is, of course, beyond
20 dispute that under *Brady* a defendant is entitled to evidence “both favorable to the
21 accused and ‘material either to guilt or to punishment.’” *United States v. Bagley*, 473
22 U.S. 667, 674 (1985) (quoting *Brady*, 373 U.S. at 87). “*Brady* evidence” can be
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1 favorable “either because it is exculpatory or impeaching.” *Milke v. Ryan*, 711 F.3d
2 998, 1012 (9th Cir. 2013)).

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4 The government’s conduct in this case thus constitutes “flagrant misbehavior”
5 which has caused (and, will continue to cause) “substantial prejudice” to Mr.
6 Smirnov, who has been locked up since February 2024 and thus deprived not only
7 of his freedom, but also of any real ability to assist his counsel. The government
8 knew—from the time of Mr. Smirnov’s first written request back in March 2024—
9 that it possessed material, exculpatory information that Mr. Smirnov (continuously
10 incarcerated since late February) needed to review *well before trial*. Rather than
11 produce what was in its possession, however, the government, over the months that
12 followed, sent Mr. Smirnov a false assurance to the effect that the government has,
13 and will continue, to comply with its discovery obligations.
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17 For example, as shown in Exhibits 4 and 5 to the contemporaneously filed
18 Second *Ex Parte* Motion to Continue, the government acknowledged receiving Mr.
19 Smirnov’s March 5, 2024, discovery request as of March 6, 2024. In response to the
20 numerous discovery requests contained in the March 5 request, the government
21 replied simply: “We have and will continue to comply with our discovery obligations
22 pursuant to Federal Rule of Criminal Procedure 16, 18 U.S.C. Section 3500 (the
23 “Jencks Act”), Federal Rule of Criminal Procedure 5(f) (see ECF No. 43) and Brady,
24 Giglio and related cases.”
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1 The government’s assurances—as we now see—were demonstrably not the
2 case, and Mr. Smirnov cannot possibly be expected, less than one month before trial,
3 to 1) review this last-minute dump of over 1,200 additional pages of exculpatory
4 discovery, and 2) meaningfully assist in the preparation of his own defense. This,
5 then, constitutes a rare instance where the “drastic” remedy of dismissal is
6 warranted. *See, e.g., Bundy*, 968 F.3d at 1038 (“[R]eckless disregard for the
7 prosecution’s constitutional obligations’ is sufficient to give rise to flagrant
8 misconduct.”) (quoting *Chapman*, 524 F.3d at 1085); *see also id.* at 1037 (“[W]e
9 agree with the district court that the defendants suffered not only prejudice, but
10 substantial prejudice . . . in [1] not being able to prepare their case fully, [2] refine
11 their *voir dire* strategy, and [3] make stronger opening statements.”). Accordingly,
12 this Court should dismiss the Indictment with prejudice.
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1 **C. CONCLUSION**

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3 For the foregoing reasons, Mr. Smirnov respectfully requests that this Court
4 grant this motion and enter an Order dismissing the Indictment, for the reasons set
5 forth above.

6
7 DATED this 4th day of November, 2024.

8 Respectfully Submitted:

9
10 CHESNOFF & SCHONFELD

11 /s/ David Z. Chesnoff

12 DAVID Z. CHESNOFF, ESQ.

13 *Pro Hac Vice*

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21 Attorneys for Defendant

22 ALEXANDER SMIRNOV
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2024, I caused the forgoing document to be filed electronically with the Clerk of the Court through the CM/ECF system for filing; and served on counsel of record via the Court’s CM/ECF system.

/s/ Camie Linnell

Employee of Chesnoff & Schonfeld

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