

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ZHENLI YE GON

Crim. Case No.: 07-181 (EGS)

DEFENDANT’S RESPONSE TO GOVERNMENT’S MOTION TO DISMISS

COMES NOW the Defendant, Zhenli Ye Gon (hereinafter referred to as “Mr. Ye Gon”), by and through undersigned counsel, and respectfully submits the following response to the government’s Motion to Dismiss [ECF Doc. No. 176] and its Supplement thereto [ECF Doc. No. 178]. Mr. Ye Gon does not oppose the dismissal of his case, but does oppose the government’s request to do so *without prejudice*.

Background

For approximately two years, Mr. Ye Gon has been incarcerated, essentially in solitary confinement, despite the fact that there is absolutely no allegation that he committed any violent acts.¹

Soon after his arrest, Mr. Ye Gon began requesting discovery from the government, including any and all *Brady* information. As recently as October of 2008, Mr. Ye Gon renewed his request for all *Brady* material in writing, whether such affected the issue of guilt or “the

¹ See Criminal Complaint [ECF Doc. 1]; Indictment [ECF Doc. No. 3]; Superseding Indictment [ECF Doc. No. 124]; Defendant’s Motion for an Order Transferring him to the General Population at the Correctional Treatment Facility [ECF Doc. No. 89]; Defendant’s Amended Motion [ECF Doc. No. 92]; and Defendant’s Surreply to Second Motion to Depose Witnesses, etc., [ECF Doc. No. 135].

credibility of the government's case."² In addition to *Brady* material, Mr. Ye Gon requested the disclosure of "the name of any witness who has made an *arguably* favorable statement" concerning him.³

As this Court is all too aware, discovery issues have been of paramount concern throughout the tenure of the instant matter, and a large percentage of the pleadings filed with the Court have related thereto. As recently as earlier this month, Mr. Ye Gon had yet to be provided discovery to which he was entitled, despite the case against him being nearly two years old. It would now appear that the government was less than candid when discussing discovery issues with both defense counsel and the Court. Although it provided volumes of discovery, the government's releases are notable for what they did not contain: favorable information about which they were aware approximately one year before December 3, 2008.

While the government has chosen to frame the issue before the Court as merely a discussion of *Brady*, Mr. Ye Gon submits that it encompasses far more than the government's obligations under *Brady* and its progeny. The government's failure to abide by its obligations does not only impact Mr. Ye Gon. The inherent fairness of our criminal justice system is implicated, which resonates through each and every criminal proceeding before the Court.

Argument

The ultimate aim of our criminal justice system is not only to secure convictions, but also to ensure that the rights of the accused are protected. *See Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002) (Luttig, J., *concurring*); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). So fundamental is that twofold aim that our forefathers drafted substantive and procedural due process

² October 15, 2008 letter to Paul Laymon, filed as an exhibit to Mr. Ye Gon's Notice of Filing [ECF Doc. No. 122] at ¶5.

³ October 15, 2008 letter to Paul Laymon at ¶14.

requirements into the language of the Fifth and Fourteenth Amendments to the Constitution, thereby mandating that prosecutions “comport with prevailing notions of fundamental fairness.” *California v. Tombetta*, 467 U.S. 479, 485 (1984). “Fundamental fairness” is not merely an academic ideal, but is, in fact, “essential to the very concept of justice.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

Although ours is an adversarial system, the government’s “chief business” in a criminal prosecution “is not to achieve victory, but to establish justice.” *See Brady*, 373 U.S. at n.2 (quoting, remarks of Solicitor General Sobeloff). While “there was a time when concealment and gamesmanship were accepted as part and parcel of the adversarial process of the criminal justice system” under common law, courts have “decidedly rejected this system long ago.” *Harvey, supra* at 317-318. In fact, the Supreme Court has long held that the government’s “overriding interest” in a prosecution is that “justice be done,” and, with that basic tenet in mind, the Court has recognized that a prosecutor serves the law above all else. *See United States v. Agurs*, 427 U.S. 97, 110-11 (1976) (internal citations omitted).

Obviously, the government has an obligation to prosecute its cases zealously, however its “primary obligation is to try each case fairly and with due regard for the accused’s rights.” *United States v. Carter*, 566 F.2d 1265, 1271 (5th Cir. 1978); *cert. denied*, 436 U.S. 956. When the government’s conduct violates notions of fundamental fairness and is “shocking to the universal sense of justice,” substantive due process is denied. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960).

The Supreme Court has “long interpreted this standard of fairness to require that defendants be afforded a meaningful opportunity to present a complete defense.” *Trombetta* at

485. “To safeguard that right...what might loosely be called the area of constitutionally guaranteed access to evidence” was developed. *Id.* (quoting *Valenzuela-Bernal, supra* at 867); *See also, Harvey, supra; United States v. Moussaoui*, 382 F.3d 453, 474 (4th Cir. 2004). “Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused,” thereby “ensuring the integrity of our criminal justice system.” *Trombetta, supra.*

Procedural due process demands that prosecutors produce to a criminal defendant all *potentially* exculpatory evidence, even in the absence of a specific request, in order to ensure that the defendant receives a fair trial. *See Harvey, supra* (citing *Albright v. Oliver*, 510 U.S. 266, 273 & n.6 (1994)) (Emphasis added.); *Augers, supra* at 112. When a prosecutor fails to provide favorable evidence that is “material to guilt or punishment, irrespective of good faith or bad faith,” it is commonly called a “*Brady* violation.” *Brady*, 373 U.S. at 87; *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). Evidence is considered “favorable” if it would exculpate the defendant or could be used to impeach a government witness. *United States v. Ellis*, 121 F.3d 908, 914 (4th Cir. 1997); *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985). A defendant’s constitutional right to due process is not violated where the favorable and material evidence is disclosed in time for its effective use at trial. *United States v. Andrews*, 532 F.3d 900, 907-908 (D.C. Cir. 2008); *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985) (citing *United States v. Higgs*, 713 F.2d 39 (3rd Cir. 1983)).

In addition to its constitutionally mandated *Brady* obligations, the prosecution has additional obligations to ensure that a defendant is afforded due process. In its Supplement, the government self-assuredly maintains that it has complied with each and every of its obligations to Mr. Ye Gon, as well as before this Court. Mr. Ye Gon humbly disagrees.

I. The Government Failed to Comply with its “*Brady*” Obligations, on Several Occasions.

Throughout its supplement, the government repeatedly states that it has complied with its *Brady* obligations because it disclosed information favorable to Mr. Ye Gon, arising from witnesses and events in a foreign country, to his defense counsel “four months” before the start of his trial.⁴ While it is true that the latest trial date set for Mr. Ye Gon was September 14, 2009, that was the third such trial date set by the Court. Mr. Ye Gon maintains that not only has the government violated its obligations under *Brady* and its progeny with regard to his most recently scheduled trial date, it has violated such obligations on at least two prior occasions when the expected start of his trial was imminent.

Mr. Ye Gon was first scheduled to stand trial beginning December 3, 2008. As late as mid- to late-November, all parties were preparing for that trial.⁵ Less than *two weeks* prior to that trial date, however, the Court granted the government’s motion for a continuance, in order to permit it to take depositions in The People’s Republic of China (hereinafter referred to as “China”) and The United States of Mexico (hereinafter referred to as “Mexico”).⁶ As a result, of the government’s eve-of-trial request for a continuance, Mr. Ye Gon’s trial was re-scheduled to June 22, 2009.⁷ Unfortunately, worldwide health concerns concerning the H1N1 flu epidemic and the status of discovery issues, including the government’s continued assertion that

⁴ Government’s Supplement [ECF Doc. No. 178] at 6. Mr. Ye Gon notes for the purposes of the record that May 22, 2009 (the date of the government’s initial, barebones disclosure) is less than four months prior to September 14, 2009 and that June 4, 2009 (the date of the government’s full disclosure) would be more accurately described as “approximately three months.”

⁵ See Mr. Ye Gon’s Opposition to Second Motion to Depose Witnesses Pursuant to Rule 15, Continue the Trial and Toll the Speedy Trial Act [ECF Doc. No. 127], filed November 12, 2008, and Mr. Ye Gon’s Surreply [ECF Doc. No. 135], filed November 18, 2008.

⁶ See Minute Entry for proceedings of November 20, 2008.

⁷ See Minute Entry for proceedings on January 13, 2009.

it would be taking depositions in China, resulted in that trial date also being re-set. On May 1, 2009, the Court vacated Mr. Ye Gon's June 22nd trial date and re-set it for September 14, 2009.⁸

The government has admitted that it was aware of the *Brady* material which it recently disclosed for almost a year prior to Mr. Ye Gon's *original* trial date of December 3, 2008.⁹ Although that trial was continued merely two weeks prior to its scheduled start, the government remained silent regarding the *Brady* material until months after that date had passed. It would appear, therefore, that the government intentionally violated its *Brady* obligations at least as early as November 2008.

Even had the government disclosed the *Brady* material to Mr. Ye Gon in November of 2008, however, such disclosure would have nevertheless violated *Brady*, as it would have been far too late for Mr. Ye Gon to make effective use of the material at his December 2008 trial. In its Supplement, the government cites several cases to support its proposition that *Brady* does not require pretrial disclosure. Each of those cases, however, pertain to disclosures relating to witnesses and events within the United States, and are, therefore, not controlling, as the vast majority of the government's disclosures in May and June of 2009 related to foreign witnesses and events. Clearly, the disclosure of evidence related to foreign witnesses and events requires that a defendant be afforded more time than that previously held to be permissible with regard to domestic evidence in order to make effective use of the foreign evidence at trial.

As the record reflects, throughout this case the government has made numerous requests for relief, citing the hardship it faced in obtaining evidence from foreign sources. If the government faced hardship, Mr. Ye Gon would have encountered insurmountable challenges in

⁸ See Minute Entry for proceedings of May 1, 2009.

⁹ See Government Response to Motion and Order Concerning Witness Statements, filed June 4, 2009, at 2 [ECF Doc. No. 172].

obtaining evidence from the same sources. Unlike the government, Mr. Ye Gon does not have the benefit of diplomatic channels and a history of cooperation among governments. It would have been necessary for him to attempt to verify the information and obtain additional evidence using Letters Rogatory and other methods on foreign soil, presumably without the benefit of the stature of the United States government behind him. As a result, he would require far more than three or four months, let alone two weeks, to make effective use of such information at trial.

The government failed to abide by its *Brady* obligations with regard to Mr. Ye Gon's June 22nd trial date as well. As the Court is well aware, both the government and Mr. Ye Gon were preparing for trial as late as May 1, 2009. In addition, it was expected that counsel for all parties would be traveling to China for at least one week in order to participate in depositions. Yet, despite an upcoming trial date and looming foreign depositions, the government, once again, failed to disclose the *Brady* information in its possession, thereby intentionally violating its obligations thereunder for a second time. As set forth above, Mr. Ye Gon maintains that even had the government made such disclosures as late as April 30, 2009, he would not have been able to make effective use of it at his scheduled June trial, given the obstacles he would have encountered in attempting to investigate those matters on foreign soil.

On May 12, 2009, in anticipation of Mr. Ye Gon's September trial, the Court ordered the government to provide to Mr. Ye Gon "all discoverable evidence" by ***Monday, May 18, 2009***.¹⁰ Although the government delivered approximately eight boxes of discovery on that date, it did not provide any *Brady* disclosure. Finally, on ***Friday, May 22, 2009*** the government forwarded its first, purported *Brady* disclosure to Mr. Ye Gon, which consisted of a barebones statement regarding evidence that we now know it had possessed for a lengthy period of time.

¹⁰ Order of the Court dated May 12, 2009 [ECF Doc. No. 157].

In fact, as it related to one individual, the government had possessed the evidence for more than approximately *fourteen to eighteen months*.¹¹ Included in the government's first *Brady* disclosure was information regarding Juan Escandon Paz, a witness that it had long maintained played a central role in its prosecution of Mr. Ye Gon and whose statement upon which it had relied in its Bill of Particulars.¹² One simple statement in that initial barebones disclosure with regard to Mr. Escandon Paz stood out: "**He has recanted that statement.**"¹³

Upon reviewing the government's "*Brady* disclosure", counsel for Mr. Ye Gon formally requested that the government provide, by "close of business" on May 29th, answers to specific requests regarding the circumstances surrounding Mr. Escandon Paz's recanting of his statement, as well as the circumstances surrounding the government being informed of such.¹⁴ When the government failed to respond as requested, Mr. Ye Gon filed his Motion to Compel *Brady* Evidence on June 1, 2009.¹⁵ Upon review of Mr. Ye Gon's motion, the Court conducted a hearing on June 2, 2009. At that hearing, the Court ordered Mr. Ye Gon to file a modified proposed order, and he complied.¹⁶ On June 3, 2009, the Court entered *two* orders requiring the government to provide all *Brady* material to Mr. Ye Gon, one requiring that it do so by noon on June 4, 2009.¹⁷ On that date, the government finally, and pursuant to the orders of the Court,

¹¹ See "Notice of *Brady* and *Giglio* Materials" attached as an exhibit to Mr. Ye Gon's Motion to Compel *Brady* Evidence, filed June 1, 2009 [ECF Doc. No. 166] and Response to Motion and Order Concerning Witness Statements, filed June 4, 2009 [ECF Doc. No. 172].

¹² As set forth more fully below, that Bill of Particulars was filed approximately one year after the government learned that Mr. Escandon Paz had recanted his statement.

¹³ Notice of *Brady* and *Giglio* Materials at 3.

¹⁴ See Letter to Paul Laymon dated May 28, 2009, attached as an exhibit to Mr. Ye Gon's Motion to Compel *Brady* Evidence, filed June 1, 2009 [ECF Doc. No. 166].

¹⁵ ECF Doc. No. 166.

¹⁶ Mr. Ye Gon's Supplement to his Motion to Compel *Brady* Evidence [ECF Doc. No. 167].

¹⁷ Order of the Court dated June 3, 2009 [ECF Doc. No. 168]; See also Order of the Court dated June 3, 2009 [ECF Doc. No. 169].

provided a more detailed *Brady* disclosure to Mr. Ye Gon.¹⁸ In that disclosure the government admitted that it had learned of Mr. Escandon Paz's recanting of his statement "*at some point in 2007 or 2008*, but cannot recall when."¹⁹

Clearly, the government made its *Brady* disclosure most reluctantly. Mr. Ye Gon believes that had the Court not ordered the government to provide all *Brady* material to him, he would not have received it even as of today. While Mr. Ye Gon did finally receive a full *Brady* disclosure a few weeks ago, the disclosure of such pivotal foreign-based evidence in May and June of this year in anticipation of a September trial also violated his constitutional rights to due process. As set forth above, given the foreign nature of the material provided, Mr. Ye Gon submits that it would have been nearly impossible for him to make effective use of it at his September trial.

The government appears to rest its assertion that it had not violated its *Brady* obligations with regard to Mr. Ye Gon's September trial date upon the fact that Mr. Ye Gon had not yet requested a continuance as a result of its disclosure.²⁰ Such an assertion is hollow, at best, given the government's propensity to request relief in this matter far sooner than three months prior to a scheduled event and the fact that it withheld any details regarding its disclosure until June 4, 2009.

At the time of the government's barebones disclosure on May 22, 2009, Mr. Ye Gon's defense counsel were actively preparing for the government's depositions in China, which the

¹⁸ Government's Response to Motion and Order Concerning Witness Statements at 2 [ECF Doc. No. 172].

¹⁹ *Id.* at 2. (Emphasis added.)

²⁰ Government's Supplement at 6.

Court had ordered be completed by June 8, 2009.²¹ Once the government suddenly cancelled its planned depositions in China, counsel for Mr. Ye Gon turned their attention to the *Brady* disclosure and requested that the government fully comply with its obligations. When it failed to do so, Mr. Ye Gon was forced to request that the full weight of the Court be brought to bare in order to ensure that he received the detailed information to which he was entitled. For a period of approximately two weeks, he waited for the government to fully comply with its duty. Finally, on June 4, 2009, the government, albeit reluctantly, provided a full *Brady* disclosure.

Following the government's full, court-ordered disclosure, counsel for Mr. Ye Gon were digesting the information provided by the government, discussing how to proceed with regard thereto, and researching and preparing the methods to be employed for investigation thereof. Given the fact that Mr. Ye Gon had been incarcerated for approximately two years under "special handling" conditions which resulted in him effectively being in solitary confinement, his counsel were attempting to do all within their power to lessen the possibility that he would require a continuance of his trial date. While they were fully prepared to request such if it appeared necessary, they felt that it was premature to make such a request without some additional investigation. Any discussion regarding a continuance was rendered moot, however, when within one month of the barebones disclosure and a little over two weeks after the government's full disclosure, the government filed its motion seeking to dismiss its case against Mr. Ye Gon, *without prejudice*.

²¹ As late as May 26, 2009, counsel for Mr. Ye Gon was peppering the government for information required for the visas required to travel to China. That evening, Mr. Ye Gon's defense counsel learned the government would not be deposing witnesses in China when each of them received an email from government counsel that simply stated, "Counsel: The government is no longer seeking depositions in China." See Mr. Ye Gon's Notice of Withdrawal of Motion, filed May 26, 2009 [ECF Doc. 159].

Clearly, the government violated its *Brady* obligations not once, but rather on several occasions when it withheld critical evidence from Mr. Ye Gon for the purposes of obtaining a tactical advantage. As a result, Mr. Ye Gon's constitutional rights to due process were violated. Mr. Ye Gon maintains, therefore, that the instant case against him must be dismissed *with prejudice*.

II. The Government Intentionally Misled Mr. Ye Gon and the Court.

As the government has repeatedly advised this Court, obtaining evidence from Mexico and China was a time-consuming and, at times, frustrating endeavor. At every turn, Mr. Ye Gon and this Court were led to believe that the government was complying with its obligations and providing all information within its custody and control, whether exculpatory or otherwise. It would now appear that what all concerned believed to be the government's candor was, in fact, gamesmanship.

For example, in August of 2008, in an attempt to assure the Court and Mr. Ye Gon that it was doing everything within its power to abide by its obligations, despite the difficulties it was encountering, the government averred:

...But the U.S. has worked hard to gather evidence in this case, whether that evidence is exculpatory or inculpatory. The 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 defendant.²²

The government took its gamesmanship one step further, however, when it intentionally misled Mr. Ye Gon and the Court in its court-ordered response to a Bill of Particulars by relying upon a statement that it knew had been recanted long before to support its prosecution of Mr. Ye

²² Government's Response to Mr. Ye Gon's Motion to Compel Discovery at 8 [ECF Doc. No. 103].

Gon.²³ In that **December 15, 2008** filing, the government stated that it was “seeking to inform” Mr. Ye Gon of the “nature of the charge with sufficient precision so that his key questions are answered.”²⁴ Elaborating, the government stated that the evidence against Mr. Ye Gon would “specifically” show:

...The defendant employed the services of...**Juan Escandon Paz**...in diverting [chemicals] into the black market. **Escandon** would secretly receive, from the defendant, large quantities of [drugs] at **Escandon’s** office...and from there **Escandon** would distribute it on behalf of the defendant. **Escandon** would receive payment...which **Escandon** delivered to the defendant...**The defense has previously been provided with a copy of Escandon’s statement which describes the dates and places he interacted with the defendant...**

(Emphasis added.)²⁵

While the government maintains that it has complied with all of its obligations to Mr. Ye Gon and this Court, it’s response in Bill of Particulars very clearly shows that it has not. Government counsel has admitted that it was aware of Mr. Escandon recanting his statement approximately one year before the government filed that pleading.²⁶ Fully cognizant of that fact, it intentionally misled not only Mr. Ye Gon, but also this Court, when it relied upon that very same statement in its “precise” description of what the evidence against him would “specifically” show.

As the government has intentionally misled both the Court and Mr. Ye Gon, in violation of its obligations, Mr. Ye Gon’s case must be dismissed *with prejudice*.

²³ Government’s Response to Defendant’s Motion for Bill of Particulars [ECF Doc. No. 140].

²⁴ *Id.* at 3-4.

²⁵ *Id.* 5, 7-8.

²⁶ Government Response to Motion and Order Concerning Witness Statements at 2. [ECF Doc. No. 172].

III. The Government has Failed to Adequately Explain the Timing of its Motion.

In its Motion to Dismiss, the government asserted that it was dismissing its case against Mr. Ye Gon in the interests of its relationship with Mexico and due to “evidentiary concerns.”²⁷ Upon the filing of the government’s motion, the Court, *sua sponte*, scheduled a status conference. At that hearing, the Court requested that the government explain why it was only moving to dismiss its case against Mr. Ye Gon after approximately two years of his, essentially, “solitary confinement.”²⁸ In both its pleadings and its appearance before the Court, the government has failed to provide an adequate response to the Court’s request for an explanation.

On March 15, 2007, Mexican law enforcement executed a search warrant at a residence in Mexico City that it alleged belonged to Mr. Ye Gon.²⁹ Mexican authorities claim to have seized at least \$207 million dollars in currency during that search, most of it in U.S. dollars. Mr. Ye Gon maintains that the government was fully aware of Mexico’s interest in prosecuting him as of at least March 15, 2007 and any assertion by the government to the contrary is disingenuous. For the purposes of argument, however, Mr. Ye Gon shall use the facts regarding the government’s diplomatic communications with Mexico as it has presented to the Court.

The instant case against Mr. Ye Gon was initiated, by criminal complaint, on June 15, 2007. Presumably, the government began the investigation giving rise thereto long before that date. Mr. Ye Gon was arrested on July 24, 2007, and has been incarcerated under severely restrictive conditions since that time.

According to the government, while its case against Mr. Ye Gon was proceeding, Mexico notified it of its interest in prosecuting him. That interest was formalized by a request for

²⁷ Government Motion to Dismiss at 4.

²⁸ Status Conference of June 22, 2009; Tr. at 5:20-6:24.

²⁹ Mr. Ye Gon denies all allegations against him in Mexico.

extradition approximately one year ago, in June of 2008. On the basis of that request, the government initiated extradition proceedings against Mr. Ye Gon in this Court on September 15, 2008.³⁰

Proceeding in parallel forums, the government continued its criminal case against Mr. Ye Gon, fully aware of Mexico's desire to obtain his extradition and in apparent disregard thereof. During the course of its case, and at least since 2007 or early 2008, the government became aware that there were "evidentiary concerns" with regard to its prosecution of Mr. Ye Gon. Over the last approximately eighteen months, and despite full knowledge of Mexico's desire to have Mr. Ye Gon extradited and its "evidentiary concerns," the government has continuously advised the Court and Mr. Ye Gon that it intended to continue its prosecution. In fact as late as May 26, 2009, it maintained that it would be conducting depositions in China during the first week of June, with the consent and assistance of the Chinese government.

Mr. Ye Gon maintains that the timing of the government's Motion to Dismiss is the result of its "evidentiary concerns," not its agreement to finally capitulate to the desires of Mexico in the interests of diplomatic relations. The government was aware of those evidentiary concerns approximately fourteen to eighteen months ago. As a result, the instant case against Mr. Ye Gon must be dismissed *with prejudice*.

Conclusion

For the foregoing reasons, Mr. Ye Gon respectfully maintains that the criminal case against him must be dismissed *with prejudice*.

³⁰ *In Re: In the Matter of the Extradition of Zhenly Ye Gon*, Case No. 08-596 (JMF).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June 2009, a copy of the foregoing pleading was transmitted to all parties via ECF.

_____/s/
Manuel J. Retureta, Esq.