No. 19A_____

In the Supreme Court of the United States

JOHN WAYNE SCANTLEBURY, ALSO KNOWN AS FREDERICK DAVIS, ALSO KNOWN AS JOHN WAYNE TROTMAN; AND SEAN GASKIN,
Applicants,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPLICATION TO EXTEND THE TIME TO FILE PETITION FOR A WRIT OF *CERTIORARI* TO THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

To the Honorable John G. Roberts, Jr., Chief Justice, as Circuit Justice for the District of Columbia Circuit:

Pursuant to this Court's Rules 13.5, 22.2, and 30.3, John Wayne Scantlebury and Sean Gaskin (collectively, "Applicants") – defendants-appellants in the underlying action – respectfully apply for a sixty-day extension of the time within which to petition this Court for a writ of *certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit. This application sets forth several factors that justify an extension. The Court of Appeals decided the case on April 16, 2019, and it denied a timely filed petition for rehearing on May 21, 2019. Without an extension, the petition for a writ of *certiorari* is currently due by August 19, 2019. With the requested extension, the petition for a writ of *certiorari* would be due by October 18, 2019. Applicants file this application more than ten days prior to the current deadline for the petition for a writ of *certiorari*.

BACKGROUND

1. This action commenced in 2004 with a criminal complaint and superseding indictment against five men – the two Applicants and Mr. Christopher Hawkesworth of Barbados and Messrs. Raphel Douglas and Terrence Sugrim of Guyana – under seal. The two-count indictment alleged a major drug-smuggling conspiracy at John F. Kennedy International Airport ("JFK") in Count I against all five men and a two-kilogram transaction with a Drug Enforcement Administration ("DEA") informant in Barbados in Count II against only Messrs. Hawkesworth and Douglas.

2. In Barbados, the case played out as the longest extradition proceeding

in Barbadian history, with Messrs. Gaskin, Hawkesworth, and Scantlebury released on bail pending extradition from 2004-05 through mid-2011, then incarcerated through their release in January 2014 when the charges were dismissed.

3. By contrast, Mr. Douglas was extradited to the United States in 2005 and released in 2008 for time served in a plea deal for a new count involving only him in a New York case to which he was transferred. In seeking approval of that plea deal, the Government admitted that the JFK-based case underlying Count I of the District of Columbia had cratered:

> The case boils down to the testimony of an informant, who can be skillfully impeached by the defense. At bottom, the case involves only two kilograms of cocaine. And though there were some hazy conversations between the [informant] and Hawkesworth about other deals, in the final analysis the case is about two kilograms of cocaine.

Gov't Br.in Regards to Plea and Sentencing, at 3, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Apr. 1, 2008). Because Applicants were not charged with Count II, the cratering of the case for Count I meant that there were no credible charges against Applicants under the just-quoted Government admission against interest. *See Lutwak v. U.S.*, 344 U.S. 604, 617-18 (1953) ("admissions … are admissible … under a standard exception to the hearsay rule applicable to the statements of a party").

4. As it happened, although the District of Columbia charged the five men with the JFK interdiction, the Eastern District of New York subsequently arrested and convicted twenty-five other, unrelated people of that enterprise. *U.S. v. Adams*, No. 1:03-mj-1753-JMA (E.D.N.Y. filed Nov. 25, 2003). The DEA agent in this case later testified in the Douglas proceedings that "I did find out that they made a …

mass arrest. It was an ongoing investigation, building the case. And eventually *they arrested everyone that was involved in that*." Hearing Tr., at 125, *U.S. v. Douglas*, No. 1:07-cr-0137-RJD (E.D.N.Y.) (Dec. 17, 2007) (emphasis added).

5. The New York proceedings against Mr. Douglas were not joined with the New York proceedings in Adams. Instead, the Government charged Messrs. Douglas, Sugrim, and Hawkesworth (*i.e.*, not Applicants) with largely the same crimes alleged in the District of Columbia indictment, plus some unrelated charges against only Mr. Douglas and dismissed the District of Columbia charges against Mr. Douglas, apparently to evade the district judge in the District of Columbia:

> I want to hear from [Government counsel who prepared extradition request] under oath why he made those misstatements and then we will deal with the appropriate sanction. … And I suggest he bring his attorney.

Hearing Tr., at 15, *U.S. v. Douglas*, No. 04-cr-0285-02-EGS (D.D.C.) (Feb. 13, 2007).

6. Although the United States was a party to the Barbados extradition proceedings, the United States' counsel never informed the Barbadian court of the post-indictment, post-extradition-request changes in facts revealed in the Douglas proceedings.

7. On June 9, 2011, the Barbadian courts revoked the three men's bail; on or about November 15, 2013, Mr. Gaskin waived opposition to extradition to allow him to come to Washington to face the charges against him.

8. A month and a half later, on December 24, 2013, the United States filed a sealed motion to dismiss the indictment against the three men, purportedly "in good faith, and based upon, among other factors, the age of the case, government resources,

and other factual and legal issues which indicate the case is no longer viable," Gov't's Sealed Motion to Dismiss Indictment, at 1 (ECF #78), without disclosing that one of the defendants had waived extradition, without disclosing that three defendants were currently incarcerated awaiting extradition, and without serving the defendants or their Barbados-based counsel with whom the United States were engaged in the Barbados-based extradition proceedings. *Id.*

9. More than two weeks later, the District Court granted the United States' motion, and the Order was entered on the docket on January 9, 2014. Order Dismissing Indictment without Prejudice (ECF #79).

10. Applicants and Mr. Hawkesworth filed a civil suit for malicious prosecution and false imprisonment in 2015, which occasioned the unsealing of the criminal case.

11. Applicants' counsel filed a limited-purpose appearance in the criminal action on January 20, 2016, and Applicants and Mr. Hawkesworth moved the District Court on February 6, 2016, to alter the judgment to dismissal with prejudice, based on the absence of probable cause and the lack of personal jurisdiction, based on the evidence revealed in the Douglas proceedings and on the movants' and third-party declarations.

12. Apparently because Applicants and Mr. Hawkesworth had challenged the form of dismissal in the underlying criminal action, the District Court stayed the civil-damages action on May 25, 2016.

13. On June 21, 2018, the District Court denied Applicants' motion to alter

the judgment, without holding a hearing, finding that probable cause was present up until the moment that the District Court granted the Government's motion to dismiss, in part because "the movants could not have been released until the Court granted the government's motion." Slip Op. 28 (Add. 28a). The Government did not make the argument – preposterous on its face – that the sovereign nation of Barbados could not dismiss its nationals from its prisons if the extraditing prosecutors had advised it – or the defendants – that the United States no longer was seeking to have the men extradited, whether or not an arrest warrant remained outstanding in a U.S. district court. Indeed, until the Barbadian courts exercised their discretion to revoke bail in 2011, the three men had been released for more than six years.

14. In the two-plus years while the motion to amend the judgment was pending in the District Court, Mr. Hawkesworth died, thus mooting as to him the type of dismissal in the underlying criminal proceeding. Applicants appealed the denial of the motion to amend.

15. In the appeal, Applicants based their standing on the sworn and undisputed reputational harms they have suffered in Barbados, as well as – with respect to Mr. Gaskin – the immigration implications of the false 2004 charges.

16. On April 16, 2019, the Court of Appeals dismissed the appeal for lack of an Article III case or controversy, based on an argument that the United States did not raise; in doing so, the Court of Appeals held that "Appellants have not argued that they have been affected similarly [to prevailing defendants who nonetheless had Article III standing to appeal] in this case, nor do they have any basis upon which to

do so." Slip Op. 12 (Add. 47a).

17. In addition to seeking to rebut the Court of Appeals' ruling on Article III standing, Applicants have two alternate theories under which they could establish standing to appeal: (a) obtain dismissal for lack of personal jurisdiction (*i.e.*, they were not involved with the alleged actions in the United States), which would redress their reputational harms; and (b) reverse or vacate the District Court's holding on probable cause to improve their ability to seek damages for false imprisonment or malicious prosecution.

18. Presumably based on Circuit precedent cited by Applicants, *U.S. v. v. Ali*, 718 F.3d 929, 943 (D.C. Cir. 2013), the Court of Appeals did not address Applicants' alternate personal-jurisdiction basis for dismissal of the underlying criminal charges (*i.e.*, that Applicants lacked minimum contacts with the United States because they were wholly uninvolved in the JFK interdiction, as the Government had admitted).

19. While it is true that Applicants did not press their tort claims as a basis for standing – largely because of the uncertainty surrounding immunity for a federal officer's cross-border torts, *see Hernandez v. Mesa*, No. 17-1678 (U.S.) (*cert.* granted May 28 2019) ("*Mesa II*") – the suggestion that Applicants lack a basis to challenge the District Court's nonsensical finding of probable cause is correctable on appeal: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. §1653.

20. On April 30, 2019, Applicants petitioned for panel and *en banc* rehearing

on the personal-jurisdiction and Article III issues; those petitioners were denied on May 21, 2019, making a petition for a writ of *certiorari* due August 19, 2019.

21. On May 28, 2019, this Court granted the writ of *certiorari* in the *Mesa II* cross-border tort case, and on June 21, 2019, this Court decided *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr.*, 139 S.Ct. 2213 (2019), on the issue of personal jurisdiction in taxation.

22. In addition to the issues discussed below with the cross-border and personal-jurisdiction issues, Applicants' counsel has unrelated matters that have kept him from finalizing a petition for a writ of *certiorari* in this matter, including two unexpected and all-consuming emergency appellate filings: an emergency motion for a stay between July 3 and 8 to address an unexpected district court order issued on July 3, as well as an appellate *amicus* brief in support of an emergency stay application between July 13 and 18 in this Court. He also has a previously planned family vacation with a scheduled college visit for his rising-senior child from July 22-24, a non-fixed obligation to file a motion for partial summary judgment in another matter in this Court in early August, an appellate reply brief in the D.C. Circuit by July 29, an opening brief in the D.C. Circuit due August 5, and two *amicus* briefs in the Ninth and Fifth due August 7 and 21, respectively.

ARGUMENT

With that background, Applicants respectfully submit that a 60-day extension is necessary and appropriate because Applicants need more time to evaluate and weigh competing issues that they might raise, including issues that are currently being briefed in this Court. Although the appellate panel did not expressly hold that

dismissal without prejudice is an appealable final order for purposes of 28 U.S.C. §1291 in a criminal matter – which would split with other circuits – the panel considered the issue to be presented well enough here for the Court to consider alternate bases for dismissal (namely, Article III). Applicants can use the concept of alternate grounds for dismissal to press their personal-jurisdiction argument, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), as well as their ability to supplement their jurisdictional claims regarding standing *vis-à-vis* their civil tort claims, 28 U.S.C. §1653, to press important issues of cross-border tort liability and personal jurisdiction from cases now or recently before this Court. Timing aside, then, the questions presented are not only important but also in flux in this Court.

First, the circuits are split on how the concept of personal jurisdiction applies to criminal matters. *Boyd v. Meachum*, 77 F.3d 60, 66 (2d Cir. 1996) ("federal constitutional requirements of personal jurisdiction in a civil setting are reasonably well-defined, this is not so in a criminal case"); *U.S. v. Rosenberg*, 195 F.2d 583, 603 (2d Cir. 1952) ("[p]ersonal jurisdiction can be waived in a criminal as well as a civil case"); *U.S. v. Rauscher*, 119 U.S. 407, 409-10 (1886) (the lower court "did not have jurisdiction of the person at that time, so as to subject him to trial"). This issue is particularly important for the District of Columbia Circuit because it serves as the default venue for criminal acts that occur abroad without a tie to a specific U.S. forum:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an

> indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or *if no such residence is known the indictment or information may be filed in the District of Columbia.*

18 U.S.C. § 3238 (emphasis added). Given the District of Columbia Circuit's ignoring the issue of personal jurisdiction in criminal matters, *Ali*, 718 F.3d at 943, this Court – or the District of Columbia Circuit on remand – should review personal jurisdiction for criminal matters in light of *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr.*, 139 S.Ct. 2213, 2220 (2019). That recent decision applied the minimum-contacts analysis of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), to the power to impose tax liability, which – Applicants respectfully submit – is more analogous to government's power to impose criminal liability than to the question of whether a civil defendant has sufficient contacts with a forum to comport civil litigation in that forum with "'traditional notions of fair play and substantial justice.'" *Id.* (quoting *International Shoe*, 326 U. S. at 316).

Second, the issue of cross-border torts by federal officers is an important issue that the *Mesa II*' litigation raises, but does not fully address because (a) the alleged tort occurred in a border zone, which the *Mesa II* plaintiffs and their *amici* claim does not involve extra-territorial application of the Constitution, and (b) Mexican law does not provide plaintiffs with a cause of action (*i.e.*, they cannot bring a diversity action in a U.S. court under Mexican law for the cross-border tort). By contrast, citizens and residents of Commonwealth nations – which like our legal tradition follow English common law – would readily be able to bring diversity actions in U.S. courts for similar torts. For example, a cross-border shooting case like *Mesa II* but at our

northern border could be resolved in U.S. courts under Canadian law without extending *Bivens* and without applying U.S. substantive law. The briefing in *Mesa II* is ongoing, with respondents' brief due September 23, 2019.

Third, Applicants' counsel needs additional time to analyze the foregoing issues and to present Applicants with an analysis suitable for their legal knowledge about why the foregoing two issues – which do not directly relate to the wrong done to Applicants – could be more effective *vis-à-vis* this Court's discretionary review than seeking review based on the factual record, with which Applicants are more familiar. *Cf. Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) ("we are not a court of error correction") (Alito, J., statement respecting denial of the petition for writ of *certiorari*). In particular, the extension will allow Applicants' counsel to review both sides of briefing in *Mesa II*, with the petitioners' *amicus* briefs due August 9, 2019, and respondents' *amicus* briefs due September 30, 2019.[1]

REQUESTED RELIEF

Applicants respectfully request a 60-day extension of the time within which to petition for a writ of *certiorari* for the dismissal of their appeal on April 16, 2019, and the denial of their petition for rehearing on May 21, 2019. The deadline currently is August 19, 2019, which Applicants ask the Circuit Justice to extend to October 18, 2019.

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[1] As in the earlier phase of the *Mesa II* litigation in this Court, the undersigned counsel intends to file an *amicus* brief in *Mesa II*.

CONCLUSION

For the foregoing reasons, Applicants respectfully submit that the time within which to file a petition for a writ of *certiorari* for the dismissal of their appeal on April 16, 2019, and the denial of their petition for rehearing on May 21, 2019, should be extended by 60 days, from the current deadline of August 19, 2019, to and including October 18, 2019.

Dated: August 8, 2019

Respectfully submitted,

/s/ Lawrence J. Joseph

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APPENDIX TO APPLICATION TO EXTEND THE TIME TO FILE PETITION FOR A WRIT OF *CERTIORARI* TO THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 04-285 (EGS)
FREDERICK HAWKESWORTH,	)	
JOHN WAYNE SCANTLEBURY,	)	
SEAN GASKIN	)	
Defendants.	)	

MEMORANDUM OPINION

On January 9, 2014, this Court granted the government's motion to dismiss without prejudice the indictment against Sean Peter Gaskin, John Wayne Scantlebury and Frederick Christopher Hawkesworth[1] (collectively, "movants"), pursuant to Federal Rule of Criminal Procedure 48(a). *See* Order Dismissing Indictment Without Prejudice ("Order"), ECF No. 79. Pending before the Court is movant's Motion to Alter Dismissal to Dismissal With

[1] The Motion to Alter Dismissal was filed prior to Mr. Hawkesworth's death. Given Mr. Hawkesworth's death in September 2016, *see* Notice of Death of Frederick C. Hawkesworth, Oct. 4, 2016, ECF No. 113, he cannot be re-prosecuted for his alleged crimes. As such, Mr. Hawkesworth's request for relief is moot. *United States v. Oberlin*, 718 F.2d 894, 894 (9th Cir. 1983)(*citing Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884)("It is a well-settled rule that actions upon penal statutes do not survive the death of the wrongdoer.")

Prejudice for Lack of Probable Cause of Criminal Conduct. Movants argue that the Court can grant the requested relief: (1) based on its inherent power; (2) to sanction conduct; and/or (3) pursuant to Federal Rule of Criminal Procedure 48(a). Also pending before the Court is movant's Motion to Bifurcate the Court's Consideration of the Pending Motion to Alter Judgment, which was filed following the death of Mr. Hawkesworth. Upon consideration of the two motions, the responses and replies thereto, the relevant law, and for the reasons discussed below, the Court **DENIES** the Motion to Alter Dismissal[2] and **DENIES** the Motion to Bifurcate.

[2] On January 29, 2018, this Court entered an order denying the pending motions without prejudice, noting that: (1) the Court of Appeals for the District of Columbia Circuit had not yet decided whether a dismissal without prejudice of a criminal case is appealable; and (2) to the extent movants sought reconsideration of the Court's dismissal without prejudice, the Court was without briefing on *United States v. Bagcho*, 227 F. Supp. 3d 28, 31 (D.D.C. 2017) and the relevant cases discussed therein. Movants moved for reconsideration of the Court's order on various grounds and convinced the Court to vacate its order. In so doing, movants argued that their reliance on the Court's authority to reconsider its dismissal order based on the Court's inherent equitable power "trumps" the authority the Court pointed to in the *Bagcho* line of cases, but that they nonetheless would meet any standard set forth in those cases. Mot. for Reconsideration of Order, ECF No. 122-2 at 8, 14-15. The government did not respond substantively to the Court's order nor the movants' motion and requested the opportunity to respond substantively if the Court vacated its Order. Because the Court has determined that it can reconsider its Order dismissing the case without prejudice *de novo* based on the fully-briefed motions, including the government's briefing on whether the Court should dismiss the complaint with prejudice

I. Background

On June 17, 2004, Mr. Hawkesworth, Raphel Douglas, Mr. Scantlebury, Mr. Gaskin and Terrence Sugrim were indicted on drug conspiracy and distribution charges. *See* Indictment, ECF No. 4. Count I charged all four defendants with conspiracy to manufacture and distribute five kilograms or more of a substance containing a detectable amount of cocaine, intending and knowing that it would be unlawfully imported into the United States. *Id.* at 2-6. The timeframe for this conspiracy was in or about January 1999 through at least May 27, 2004. *Id.* at 2. Among other overt acts in furtherance of this conspiracy, the Indictment charged that "[o]n or about September 20, 2003, Hawkesworth, Douglas, Scantlebury, Sugrim, and other co-conspirators shipped 184 kilograms of cocaine from Guyana to JFK airport in New York." *Id.* at 5.

Count II charged Mr. Hawkesworth and Mr. Douglas with distributing 500 grams or more of a substance containing a detectable amount of cocaine, intending and knowing that it would be unlawfully imported into the United States. *Id.* at 6-7.

over the government's objections pursuant to Federal Rule of Criminal Procedure 48(a), *see* Gov't Opp'n, ECF No. 109 at 9-17, the Court does not need additional briefing from the government, which the government could have provided in its February 7, 2018 response. *See* ECF No. 123.

A. Extradition Request for Mr. Hawkesworth, Mr. Scantlebury, and Mr. Sugrim

Movants were located in Barbados. The government's extradition request for the movants included, among other things: (1) Affidavit in support of request for extradition of Stephen May, a Senior Trial Attorney with the Department of Justice ("May Hawkesworth Affidavit") dated July 9, 2004; (2) Affidavit of Drug Enforcement Administration Special Agent Gordon Patten, Jr. ("Patten Hawkesworth Affidavit") dated July 9, 2004; and (3) Affidavit of the Confidential Source ("CS" or "informant") dated July 16, 2004. ECF No. 131-1 at 1, 13, 35.[3]

The May Hawkesworth Affidavit contains no specific information regarding the September 2003 shipment of 184 kilograms of cocaine from Guyana to JFK airport described in Count I of the Indictment. *See generally* May Hawkesworth Affidavit, ECF No. 131-1 at 1-12. With regard to Count I, the May Hawkesworth Affidavit states that the government's evidence consists of:

> the testimony of the Cooperating Source who dealt directly with each of the defendants, the testimony of DEA agents, recorded telephone conversations with HAWKES WORTH [sic], SCANTLEBURY and other co-conspirators, recorded meetings with each of the defendants, videotape recordings of meetings with each of the defendants, and corroborative evidence including photographs, telephone records,

[3] When citing electronic filings throughout this opinion, the Court cites to the ECF header page number, not the original page number of the filed document.

> hotel records, passport records, airline records, and physical evidence including the purchase and seizure of cocaine from this drug trafficking organization.

Id. at 7. The May Hawkesworth Affidavit contains no information regarding the reliability of the informant. *See generally id.* at 1-12.

With regard to the September 2003 shipment of 184 kilograms of cocaine from Guyana to JFK airport described in Count I, the Patten Hawkesworth Affidavit states as follows:

> Approximately October 16, 2003, the CS called me and reported that Scantlebury had told him that there had been a large seizure of the organization's cocaine at JFK airport in September in New York. He was told that nobody was arrested. Based on this information, I contacted DEA Special Agent Warren Franklin, who is assigned to the New York Airport Group at JFK, and requested that they review their seizures for the previous month. The only significant seizure was 184 kilograms of cocaine which occurred on September 20, 2003. The cocaine had arrived on a flight from Guyana, in a shipment of frozen sea food. Later that day, the CS met with Terrence SUGRIM and HAWKES WORTH and was informed that they had lost a load of 180 kilograms of cocaine, which had been shipped to JFK airport in New York, and seized by U.S. Customs.

Patten Hawkesworth Affidavit, ECF No. 131-1 at 18-19. The Patten Hawkesworth Affidavit provides the following information about the experience and reliability of the informant: "[t]his CS has worked with the DEA for approximately 5 years and has proven to be completely reliable." *Id.* at 15.

Movants were arrested on provisional arrest warrants from the United States in 2004. Motion to Alter Dismissal to Dismissal with Prejudice ("Mot."), ECF No. 106 at 21; Gov't Opp'n, ECF No. 109 at 3. Movants challenged their extradition and Mr. Hawkesworth and Mr. Scantlebury were released on bail in 2004, with Mr. Gaskin being released on bail in 2005. Mot., ECF No. 106 at 17; Gov't Opp'n, ECF No. 109 at 3. In 2011, movants' bail was revoked. Mot., ECF No. 106 at 27, Gov't Opp'n, ECF No. 109 at 3. In or around November 2013, Mr. Gaskin waived his objections to extradition. Mot., ECF No. 106 at 18; Gov't Opp'n, ECF No. 109 at 3. On January 9, 2014, this Court granted the government's motion to dismiss, and the movants were released from custody that same day. Order, ECF No. 79; Mot., ECF No. 106 at 18; Gov't Opp'n, ECF No. 109 at 7.

B. Mr. Douglas' Extradition and Appearance Before this Court

Mr. Douglas was extradited from Barbados in October, 2005, *see* Gov't Opp'n, ECF No. 109 at 15, based on the August 3, 2005 sworn statement of Mr. May ("May Douglas Statement"). *See* May Douglas Statement, ECF No. 128-2. Mr. May stated, among other things, that "[o]n September 20, 2003, agents from the United States Immigration and Customs Enforcement (ICE) seized 184 kilograms of cocaine in unmanifested boxes at JFK [airport]. No one was arrested in connection with that case." *Id.* ¶ 6.

Regarding the credibility of the informant who "dealt directly with each of the defendants" and would provide eyewitness testimony, Mr. May stated as follows:

> This CS has worked with DEA since 1999 on this and other cases. His prior cooperation with DEA, Bridgetown Country Office, Barbados, has resulted in six successful cases, several drug seizures, and the indictment and conviction of several major drug traffickers. He has testified at trial, sworn to affidavits before federal judges, appeared before federal grand juries and his success rate has been 100%. He has been found to be completely reliable by DEA and currently is "registered" as a CS with DEA.

Id. ¶¶ 25-26. Mr. Douglas' bench warrant was executed on October 17, 2005, *see* ECF No. 5, and his first appearance before this Court occurred on October 25, 2005. Minute Entry of October 25, 2005.

At a February 12, 2007 pretrial hearing before this Court, the government informed the Court that it would not pursue the portion of the indictment that alleged Mr. Douglas' connection to the 184 kilograms of cocaine that were seized at JFK airport, *see* Feb. 12, 2007 Hr'g Tr. 8:7-9, and that "this case really comes down to that two-kilogram deal" in Barbados. *Id.* 12:6-7. The government also acknowledged that "the core of the case is the testimony of the informant" and thus the credibility of the informant is significant." *Id.* 21:13-17. Finally, the government acknowledged "that the person we believe to be the informant in

this case was involved in drug trafficking from 1996 to 1998" and the government did not provide this information to Mr. Douglas' attorney. *Id.* 23:10-24:14.

When the hearing resumed the next day, the government informed the Court that it had learned from another prosecutor that the informant had been involved in criminal matters with a defendant in an unrelated case, but that if questioned, the informant would contradict that prosecutor. Feb. 13, 2007 Hr'g Tr. 3:4-23. The government also stated that in the May Douglas Statement there was one misstatement and one omission. The misstatement was about the informant's credibility since the government now knew that he would contradict the statement of a federal prosecutor. *Id.* 5:21-25. The omission was that no one else had been arrested in relation to the seizure of the 184 kilograms of cocaine at JFK airport. *Id.* 6:2-12. The Court requested that Mr. May attend a resumed hearing to explain the misstatement and omission in his affidavit, but when the Court later was informed that the government and defendant had reached a plea deal, the Court declined to question Mr. May. *Id.* 16:15-17:12, 23-25.

At a hearing on February 16, 2007, the government orally moved to dismiss, without prejudice, the charges against Mr. Douglas. Minute Entry of Feb. 16, 2007. The Court dismissed the

charges as to Mr. Douglas only on February 22, 2007. Order, ECF No. 64.

C. Eastern District of New York Case

On February 20, 2007, Mr. Douglas, Mr. Hawkesworth, and Mr. Sugrim were indicted in the Eastern District of New York. Counts One through Four charged two or more of the defendants with the manufacture/distribution, conspiracy to distribute, and importation of narcotics. *See United States v. Douglas,* Crim. Action No. 07-137, ECF No. 3, (E.D.N.Y.). In Counts Five and Six, Mr. Douglas was charged with the using a telephone to facilitate the commission of a felony. *Id.*

Mr. Douglas challenged his extradition and moved to dismiss the charges. At a December 17, 2007 hearing regarding that motion, the government acknowledged inaccuracies in the affidavit supporting the United States' request for Mr. Douglas' extradition. ECF No. 106-3 at 46-47. The transcript of that hearing is not available on the docket for that case, but it was provided by movants as an attachment to their motion. *See generally id.* The government stated that the May Douglas affidavit contained the following inaccuracies:

> (1) The statement at paragraph 6 that no one was arrested in connection with the seizure of 184 kilograms of cocaine at JFK airport because people had been arrested in connection with the case.

Id. at 48-49.

(2) Statements at paragraph 26 regarding the experience of the confidential source; specifically: (a) he had not worked on six successful cases in cooperation with the Drug Enforcement Agency's Bridgetown Country Office in Barbados, but on a fewer number; (b) he never testified at trial; (c) he never swore to affidavits before federal judges; and (d) he had appeared before one grand jury, not multiple grand juries.

Id. at 49-51.

(3) Statements at paragraphs 37 and 44 that telephone calls were recorded because they were not.

Id. at 51-52. The government also noted that the affidavit omitted mentioning that the informant: (1) had a prior felony conviction; (2) was a paid informant; and (3) the information learned from another prosecutor that the informant had been involved in criminal matters with a defendant in an unrelated case, but that if questioned, the informant would contradict that prosecutor. *Id.* at 53-54; 79-82.

Following the hearing, Judge Dearie denied the motion to dismiss the case. Mr. Douglas plead guilty to Count Five and was sentenced on April 14, 2008. *United States v. Douglas,* Crim. Action No. 07-137, ECF No. 35, (E.D.N.Y.). Thereafter, on May 12, 2015, the court granted the government's motion to dismiss the indictment against Mr. Hawkesworth and Mr. Sugrim. *Id.* at ECF No. 42. The next day, movant's counsel in the case before this Court sought leave to appear *pro hac vice* in that case. *Id.*

at ECF No. 42. Mr. Hawkesworth and Mr. Sugrim have not moved to alter the dismissal of that case to one with prejudice. *See generally* docket for *United States v. Douglas*, Crim. Action No. 07-137 (E.D.N.Y.).

D. Resolution of Case Against Movants

On December 24, 2013, the government moved to dismiss the indictment without prejudice against the movants here. Mot. to Dismiss, ECF No. 78. The motion was filed under seal and, according to the government, was not served on the defendants because "[t]hree of the defendants are in Barbados . . . and, to the government's knowledge, United States counsel has not been identified, retained, or appointed as counsel for service of process purposes." *Id.* at 3. The Court granted the government's motion on January 9, 2014. Order, ECF No. 79. Defendants were released from prison the same day that the Court granted the government's motion. Mot., ECF No. 106 at 28; Gov't Opp'n, ECF No. 109 at 7.

II. Analysis

A. The Court's Order Dismissing the Case without Prejudice was Likely Not Appealable

The government contends that movants seek to circumvent the appellate review process with the motion to alter judgment because "[w]hether this case should have been dismissed with or

without prejudice should have been addressed by the D.C. Circuit through a timely appeal" of the Court's Order. Gov't Opp'n, ECF No. 109 at 7. Pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A), a notice of appeal is due 14 days after the entry of the order being appealed. The government states that "on the same day [that the Court dismissed the case without prejudice] Barbadian officials released the Defendants, thereby putting them on notice of the Court's dismissal." *Id.* Thus, according to the government, movants' appeal was due on due on January 23, 2014, or in the alternative, if that deadline was tolled due to the defendants not having been served with the Order, on September 24, 2015, which was 14 days after the Court unsealed the case. *Id.* at 7-8.

The government relies on precedent in the civil context to argue that dismissal without prejudice is appealable. However, precedent in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is clear that this Circuit has not yet decided whether an order dismissing a criminal case without prejudice is appealable. *See United States v. Glover*, 377 F. App'x 20, 21 (D.C. Cir. 2010)(noting appellants' recognition that "this court has not decided whether [a dismissal of an indictment without prejudice for violation of the Speedy Trial Act] is immediately appealable"). Moreover, persuasive authority from other circuits that have considered the question have

determined that dismissal of an indictment without prejudice is not a final order for purposes of appeal. *See, e.g.*, *United States v. Bert*, 814 F.3d 70, 76 n.3 (2d Cir. 2016) ("[Defendant] could not have immediately appealed the dismissal of the indictment without prejudice because that judgment was neither a 'final order' within the meaning of 28 U.S.C. § 1291, nor a collateral order."); *United States v. Kuper*, 522 F.3d 302, 303 (3d Cir. 2008)("Every court of appeals that has considered the appealability of an order dismissing an indictment without prejudice has held such an order is not final and appealable under § 1291."); *United States v. Thompson*, 814 F.2d 1472, 1474 (10th Cir. 1987) ("[Defendant] was not injured by the dismissal of the information because the judgment was terminated in his favor, and only one who has been injured by a judgment may seek review on appeal."); *United States v. Martin*, 682 F.2d 506, 507 (5th Cir. 1982) ("The defendants appeal the district court's dismissal without prejudice of a nine count indictment charging them with mail fraud. They contend the dismissal should have been with prejudice. Because there has been no final decision within the meaning of 28 U.S.C. § 1291, we dismiss for lack of jurisdiction."); *United States v. Lanham*, 631 F.2d 356, 357 (4th Cir. 1980) ("We find that a dismissal without prejudice is not immediately reviewable and we therefore dismiss the appeals."); *see generally* 15B Wright & Miller Fed. Prac. & Proc. Juris. §

3918.3 (2d ed.) ("Grant of a government motion to dismiss without prejudice surely would seem a final order, supporting appeal by the defendant to argue that dismissal should have been with prejudice. It seems settled, however, that appeal cannot be taken.").

In view of this persuasive authority, it is not at all clear that the Court's Order would have been appealable, even if it had been served on movants at the time it was issued or timely appealed after the case was unsealed. Pursuant to this authority, because there has been no final decision in this case, the Court retains jurisdiction to consider this motion.

B. The Court Can Reconsider its Order Dismissing the Indictment Without Prejudice

The next question is whether this Court can reconsider its Order dismissing the case without prejudice. Although the Federal Rules of Criminal Procedure do not provide for motions for reconsideration, judges in this district have assumed, without deciding, that they may consider such motions. *United States v. Bagcho*, 227 F. Supp. 3d 28, 31 (D.D.C. 2017)(citing *United States* v. *Hong Vo*, 978 F.Supp.2d 41, 47 (D.D.C. 2013); *United States v. Cabrera*, 699 F.Supp.2d 35, 40 (D.D.C. 2010); *United States v. Cooper*, 947 F.Supp.2d 108, 109 (D.D.C. 2013)). The Court will do the same.

Various standards of review have been used when considering such motions in this context:

> In some cases, judges have adopted the "as justice requires" standard of Rule 54(b) of the Federal Rules of Civil Procedure, which permits reconsideration when a court has "patently misunderstood the parties, made a decision beyond the adversarial issues presented, [or] made an error in failing to consider controlling decisions or data, or [where] a controlling or significant change in the law has occurred." *Hong Vo*, 978 F.Supp.2d at 47-48 (quotation marks and citations omitted). In other cases, judges have adopted the standard from Rule 59(e) of the Federal Rules of Civil Procedure, under which a motion for reconsideration need not be granted unless there is an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Cabrera*, 699 F.Supp.2d at 40-41 (quotation marks and citations omitted). Rule 59(e) motions must be filed within 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). Finally, some judges have denied motions for reconsideration after considering the issues de novo, without deciding on a standard of review. *E.g.*, *Cooper*, 947 F.Supp.2d 108; *United States v. Thompson*, No. 07-153-08, 2007 WL 1954179 (D.D.C. July 5, 2007).

United States v. Bagcho, 227 F. Supp. 3d at 31.

Because this Court can consider and deny movant's "motion for reconsideration based on a *de novo* review, it is unnecessary to decide on the proper standard of review or the deadline for filing a motion for reconsideration." *Id.* A *de novo* review is appropriate because the movants, whose whereabouts were known to the government, were not served with the government's motion to

dismiss. *See* Mot. to Dismiss, ECF No. 78 at 3 ("Three of the defendants are in Barbados . . . and, to the government's knowledge, United States counsel has not been identified, retained, or appointed as counsel for service of process purposes.") At the time the motion was filed, the case was under seal. As movants correctly note, Federal Rule of Criminal Procedure 49(a),(b) requires "[a] party [to] serve on every other party any written motion" "in the manner provided for a civil action." Federal Rule of Civil Procedure 5(a) requires non-*ex parte* written motions to be served on every party. The government, in its certificate of service, does not contend that the motion was an *ex parte* motion, but states that it could not serve the movants because they were not represented. Since movants were not represented, they should have been served with a paper copy of the government's motion to dismiss per Local Civil Rule 5(d)(2)("A separate certificate of service or other proof of service showing that a paper copy was served on a party is required when that party does not receive electronic notification of filings"). Since movants were not served, they did not have the opportunity to oppose the motion prior to the Court's Order. Movants are now represented and contest the dismissal without prejudice. Therefore, the Court will reconsider its dismissal order based on a *de novo* review.

C. Federal Rule of Criminal Procedure 48(a)

Movants argue that Count I[4] should be dismissed with prejudice because: (1) they did not commit the acts alleged; (2) the government did not allege a crime against them because 25 other people were arrested and convicted for the 184 kilogram interdiction; and (3) the government has admitted that the case is only about the two kilograms of cocaine charged in Count II. Mot., ECF No. 106 at 31-33. Movants argue that the government's "admission" requires dismissing Count I on various substantive grounds: (1) it does not state an offense; (3) it resulted from grand jury proceeding error; (4) it lacks specificity; and (5) it lacks the agreement a conspiracy charge requires. *Id.* at 33.

Movants further argue that the Court should grant its motion to sanction the government because of its: (1) failure to correct information provided in the extradition affidavits; (2) deceit regarding movants' involvement with the JFK cocaine interdiction; (3) deceit regarding the informant's credibility; (4) bad-faith duplicative prosecution of Mr. Hawkesworth and Sugrim in New York; (5) failure to serve movants or their Barbadian counsel with the government's motion to dismiss; (6)

[4] Movants also request that Count II against Mr. Hawkesworth be dismissed with prejudice. In view of Mr. Hawkesworth's death, the relief sought is moot. *See infra* n.1. To the extent movants seek a holding from this court that Mr. Hawkesworth was charged without probable cause, the Court declines to so hold. *See supra* at 23-24.

keeping movants in prison when the government knew that prison was not justified; and (7) keeping movants in prison for two weeks longer than they should have been because the government's motion to dismiss did not convey any sense of urgency to Court. Mot., ECF No. 106 at 45-58.

Federal Rule of Criminal Procedure Rule 48(a) provides that at any time before trial "[t]he government may, with leave of court, dismiss an indictment." Fed.R.Crim.P. 48(a). "The discretion of whether to dismiss an indictment, and whether to dismiss it with or without prejudice, lies in the first instance with the prosecutor. Because that discretion implicates the constitutional doctrine of separation of powers, the district court's role in reviewing the prosecutor's exercise of its discretion is limited." *United States v. Florian*, 765 F. Supp. 2d 32, 34 (D.D.C. 2011)(citation omitted). "Generally speaking, there is a strong presumption in favor of dismissal without prejudice over one with prejudice." *Id.* (citation omitted). "Where [] the dismissal does not arise from a constitutional violation, dismissal is normally without prejudice." *Id.* (citing *United States v. Simmons,* 536 F.2d 827, 833 (9th Cir.), *cert. denied,* 429 U.S. 854 (1976)). "Nonetheless, in exceptional circumstances, the district court may deny the prosecutor leave to dismiss an indictment without prejudice. As the case law makes clear, this will rarely be appropriate." *Id.* (internal

citation omitted).

"When the prosecutor's discretion is challenged, the prosecutor has the initial burden of explaining that a dismissal without prejudice would be in the public interest. Once the prosecutor has discharged that threshold burden, its decision is presumptively valid and the district court may not substitute its judgment for that of the prosecutor even if it might have reached a different conclusion were it presented with the issue in the first instance." *Id.* at 35. That presumption can be "rebutted when the motion to dismiss contravenes public interest because it is not made in good faith." *Id.* (internal citations and quotations omitted).

"There does not appear to be a great deal of precedent elucidating what would and what would not call for a refusal to permit a prosecution to proceed at [a] subsequent time." *United States v. Karake*, Crim. Action No. 02-256, 2007 WL 8045732 at *1 (D.D.C. Feb. 27, 2007). "What precedent there is, however, suggests that the Court should consider three factors. First, leave to dismiss with prejudice is warranted when allowing re-prosecution "would result in harassment of the defendant or would otherwise be contrary to the manifest public interest." *Id.* "Second, in addition to considering whether the government is attempting to harass defendants or gain a tactical advantage, courts have considered whether dismissal without prejudice would

condone disregard for the Federal Rules of Criminal Procedure." *Id.* at *2. "Third, courts have granted leave to dismiss with prejudice when reprosecution would go 'against the concept of fundamental fairness.'" *Id.* at *3 (citation omitted). "Relevant considerations include 'the strain on the defendant, that prosecutorial discretion in choosing to indict and proceed has resulted in multiple mistrials, that retrials tend to be unsatisfactory, that witnesses are subjected to repeated inconveniences by retrials, ... the urgency of more significant court business,' whether prior trials have 'resulted in an indication of reasonable doubt in the minds of a substantial majority of the jury members,' and whether the rationale behind the government's Rule 48 motion is 'vague.'" *Id.*

On December 24, 2013, the government moved to dismiss the indictment without prejudice, stating that "[t]he request is made in good faith, and based upon, among other factors, the age of the case, government resources, and other factual and legal issues which indicate the case is no longer viable." Mot. to Dismiss, ECF No. 78 at 1. In addition to the reasons given in the government's original motion to dismiss, in its opposition briefing, the government notes one additional ground: "to avoid the potential of protracted litigation which could arise if all three defendants were not extradited together." Gov't Opp'n, ECF No. 109 at 17.

With regard to the first factor set forth in *Karake*, the government states that this case was prosecutable at the time it was dismissed and is prosecutable today. Gov't Opp'n, ECF No. 109 at 14. The government argues that the dismissal without prejudice did not result in the harassment of the defendants, nor was it contrary to the public interest because "there was no strategic maneuvering by the Government or a tactical decision to dismiss the case without prejudice while working to cure defects in the Government's case in order to re-prosecute Defendants." *Id.* With regard to the second *Karake* factor, the government asserts that neither its "earlier motion to dismiss, nor any other litigation tactics or pleadings, [] violate[d] the Federal Rules of Criminal Procedure." *Id.* With regard to the third *Karake* factor, the government asserts that "reprosecution of this case would not go against fundamental fairness. There have been no mistrials, let alone multiple mistrials; witnesses have not been subjected to any inconvenience by trials; and the Government has provided substantial basis for its prior motion to dismiss. . . Moreover, the charges in this case . . . are very serious charges involving a statutory maximum sentence of life imprisonment, which weighs in favor of dismissal without prejudice." *Id.* at 15.

Movants attempt to rebut the presumption that the motion to dismiss was made in good faith, arguing that that the government

acted in bad faith because: (1) it brought "substantially the same litigation in New York" against two of the movants here; and (2) the government's failure to correct the false statements made in support of extradition constitutes "deceit, malice, and bad faith." Reply, ECF No. 111 at 28. Movants argue that the prosecutorial misconduct that occurred in this case is itself exceptional. *Id.* at 29. Movants further argue that the Court does not need to find that a constitutional violation occurred in this case because "the government's misconduct provides the exceptional circumstances that obviate constitutional questions now, given the conduct described here and in Movants' memorandum." *Id.*

Movants argue that the charges are not grave because: (1) "Count I simply did not happen, and the government has admitted it" *Id.* at 30. Movants also argue that the government violated Federal Rule of Criminal Procedure 16 by withholding information, identifying the informant's affidavit as information that was withheld. *Id.* at 31. Movants further argue that the government violated various rules of professional conduct by failing to correct the information in the extradition affidavit, by maintaining a charge that is not supported by probable cause, and by filing the motion to dismiss the indictment on Christmas Eve, thereby preventing the movants from being able to be home for Christmas. *Id.* at 31-33.

Finally, movants argue that dismissal with prejudice is appropriate as a matter of fundamental fairness to "end not only the government's threats . . and misconduct . . . but also future litigation, with its resulting burdens on courts, witnesses in Barbados, and the Movants themselves." *Id.* at 34.

D. Dismissal with Prejudice is not Warranted

For the reasons explained below, the Court will deny the motion because the movants have failed to rebut the presumption that the government sought dismissal in good faith and because the circumstances here do not rise to the level of being exceptional, thereby warranting dismissal with prejudice. *See United States v. Florian*, 765 F. Supp. 2d at 34-35. Additionally, the *Karake* factors are inapplicable to the circumstances here. *See United States v. Karake*, 2007 WL 8045732 at *2-*3.

As an initial matter, movant's request that the Court dismiss the indictment with prejudice because there was a lack of probable cause of criminal conduct is squarely foreclosed by Supreme Court precedent. "The grand jury gets to say - without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Kaley v. United States*, 134 S.Ct. 1090, 1098 (2014).

Movants contend that dismissal with prejudice is warranted because they did not commit the acts alleged in Count I.

Movants' theory is that: (1) because 25 other people were charged in relation to the JFK interdiction, the government cannot claim movants had anything to do with it; and (2) the government made an "admission against interest" when it stated before this Court that the case is only about the two kilograms of cocaine charged in Count II. Movants' theory is unavailing for two reasons. First, the fact that 25 others were charged in relation to the JFK interdiction does not in and of itself mean that movants could not have been connected to that interdiction as part of the conspiracy. Second, the government's "admission against interest" was made in the context of the case against Mr. Douglas; not the movants here. In any event, the indictment against movants has been dismissed—there are no pending charges. Had this case gone to trial, the movants would have been able to present evidence in support of their assertions of innocence. This motion is not the venue for a determination of the movants' innocence of the charges.

To the extent movants contend that the government acted in bad faith by failing to inform Barbardian officials of misstatements in the affidavits in support of extradition, movants' are wrong about the facts supporting this argument. The statements about which they complain were made in the affidavits supporting the extradition of Mr. Douglas; not the affidavits supporting the extradition of movants. Specifically, the May

Hawkesworth Affidavit says nothing about the JFK seizure. *See generally* ECF No. 131-1 at 1-12. With regard to that seizure, the Patten Hawskesworth Affidavit states as follows: "Approximately October 16, 2003, the CS called me and reported that Scantlebury had told him that there had been a large seizure of the organization's cocaine at JFK airport in September in New York. He was told that nobody was arrested." *Id.* at 18-19. It is clear from this language that Special Agent Patten is not representing to Barbadian officials that nobody was arrested, but rather that either Scantlebury was told nobody was arrested or the infomant was told by Scantlebury that no one was arrested. Because the movants are wrong about the facts upon which this argument relies, the Court need not reach movants' legal arguments, *see* Mot., ECF No. 106 at 45-50, nor their arguments that the government violated various rules of professional conduct. *See* Reply, ECF No. 111 at 32. In sum, the Court cannot find that the government acted in bad faith by not correcting information that did not need to be corrected.

Similarly, the May Hawkesworth Affidvait says nothing about the reliability of the informant. *See generally* ECF No. 131-1 at 1-12. The only statement about the informant in the Patten Hawkesworth Affidavit is: "[t]his CS has worked with the DEA for approximately 5 years and has proven to be completely reliable." *Id.* at 15. Movants argue that the informant's reliability was

"falsely inflated" as part of the extradition process and that the government had an obligation to correct it. Mot., ECF No. 106 at 51. Movants point to *Florida v. Harris*, where the Supreme Court considered "how a court should determine if the 'alert' of a drug-detection dog during a traffic stop provides probable cause to search a vehicle." 568 U.S. 237, 240 (2013), which is clearly inapposite here. The Court is aware that in the Douglas matter, the government admitted that the affidavits omitted information about the informant's prior felony conviction, the fact that he was a paid informant, and his criminal activity in another case. The context for those omissions, however, was detailed information about the informant's credibility in the Douglas affidavits. Here, by contrast, there is one short statement regarding the informant's reliability.

The Court is troubled by the testimony of Mr. May and Special Agent Patten at the December 17, 2007 hearing in the New York case. ECF No. 106-3. That testimony clearly raises credibility issues with regard to the affiants as well as the credibility of the informant. That said, the fact that there are credibility issues, which could be addressed during pretrial proceedings or on cross examination, is not an "exceptional circumstance" warranting a dismissal with prejudice. *See United States v. Florian*, 765 F. Supp. 2d at 34.

Movants are also wrong on the facts relating to the informant's affidavit. Movants contend that the government violated Federal Rule of Criminal Procedure 16 by failing to disclose the informant's affidavit. The informant's affidavit was filed under seal on the docket in this case on July 16, 2004. On September 10, 2015, the Court ordered the unsealing of the case with the exception of certain filings, which were to be unsealed after the government made appropriate redactions. Minute Order of Sept. 10, 2015. According to a government notice filed on September 14, 2015, the Clerk of Court was unable to locate the sealed file containing the original paper filings of the documents to be redacted. Notice, ECF No. 97. On April 27, 2018, the parties were informed via a Minute Order that the sealed file had been located, and the government was directed to make proper redactions to the relevant documents. Minute Order of Apr. 27, 2018. On May 17, 2018, the redacted affidavit was filed on the docket. ECF No. 131. Consequently, there has been no withholding of the affidavit by the government. The informant's affidavit is on the public docket in this case. Therefore, movants' reliance on the second *Karake* factor—the violation of the Federal Rules of Criminal Procedure—in support of their motion is misplaced.

Movants also complain that the government acted cruelly and unethically by filing the motion to dismiss on December 24, 2013

without alerting the Court to the urgency of the motion. This Court has no patience for illegal incarceration. That said, since the movants could not have been released until the Court granted the government's motion, the Court cannot find that the government's failure to alert the Court to the urgency of the motion in and of itself constitutes an "exceptional circumstance" warranting a dismissal with prejudice. *See United States v. Florian*, 765 F. Supp. 2d at 34.

Regarding the remaining alleged prosecutorial misconduct, movants speculate that the government "[m]oved the prosecution of Mr. Douglas to New York to evade this Court's scrutiny and falsely designated the New York case as related to another case," that the government "appears to have handpicked the New York judge by misrepresenting the related-case status," and that the government "[f]ailed to disclose to this Court that the triggering event for the motion to dismiss was an imprisoned Movant's having waived extradition." Mot., ECF No. 106 at 44, 52. As an initial matter, this Court presided over the February 2007 hearings regarding Mr. Douglas, and did not find what it learned at that time to be a basis to dismiss the charges against Mr. Douglas with prejudice. Furthermore, movants' speculations about the government's motivations and actions neither rebut the presumption of good faith nor do those

speculations satisfy the exceptional circumstances standard. *See United States v. Florian*, 765 F. Supp. 2d at 34.

Movants also contend that the filing of duplicative charges is indicative of bad faith. Mot., ECF No. 106 at 34. However, the case cited in support, *United States v. Ammidown*, merely states that the primary purpose of Rule 48(a) is "protecting a defendant from harassment, through a prosecutor's charging, dismissing without having placed a defendant in jeopardy, and commencing another prosecution at a different time or place deemed more favorable to the prosecution." 497 F.2d 615, 620 (D.C. Cir. 1973). *Ammidown* is inapposite because at issue in that case was whether a trial judge exceeded his discretion when he rejected a plea bargain "on the ground that the public interest required that the defendant be tried on a greater charge" *id.* at 617, and not whether the filing of duplicative charges is indicative of bad faith.

United States v. Borges, 153 F. Supp. 3d 216 (D.D.C. 2015), provides a compelling example of circumstances requiring dismissal with prejudice over the objection of the government. There, one of the special agents who had assisted in the investigation had been suspended pending a criminal investigation of whether he had engaged in misconduct by tampering with evidence in other cases. *Id.* at 218. According to the government, the agent's involvement with defendants' case

"undermined the integrity of the prosecution" warranting dismissal. *Id.* at 219 (internal quotations omitted). When pressed to explain why the dismissal should be without prejudice, the government stated that defendants could hypothetically be reprosecuted if the agent affirmed that he had not tampered with any evidence in defendants' case. *Id.* at 220. Concluding that "the ongoing threat that the Government ***may*** change course at a later date [wa]s itself the very type of harassment that warrant[ed] a with prejudice dismissal," the court held that the government's conduct "objectively amount[ed] to harassment" requiring dismissal with prejudice. *Id.* at 221. Here, by contrast, movants do not claim that the government plans to commence another prosecution;[5] rather they state that converting the dismissal to one with prejudice would be helpful in the civil actions[6] they have filed. Mot., ECF No. 106 at 18. Therefore, movants cannot rely on the first *Karake* factor.

[5] Movants only statement in this regard is that since the government still views its claims against as viable, it could re-prosecute, assuming that challenging extradition tolls the statute of limitations, Mot., ECF No. 106 at 30-31

[6] In Gaskin, et. al v. US, Civil Action No. 15-23, Mr. Gaskin and Mr. Scantlebury bring claims for: (1) wrongful prosecution; (2) wrongful imprisonment; and (3) restrictions on the right to travel and to associate freely. In Gaskin et. al v. May et al., Mr. Gaskin, Mr. Scantlebury and Mr. Hawkesworth bring claims for: (1) denial of due process; (2) unlawful search and seizure; (3) deliberate indifference; (4) supervisory liability for deliberate indifference; (5) and (6) federal tort claims act violations.

Similarly, movants' reliance on the third *Karake* factor—fundamental fairness—is misplaced. Movants have never appeared before this Court, there have been no pretrial proceedings, and there has been no trial, much less multiple trials.

In sum, the Court finds that movants have failed to rebut the presumption that the government acted in good faith in moving to dismiss the indictment without prejudice. Furthermore, as the analysis above makes clear, the circumstances here are not exceptional, but rather are readily explainable. Finally, none of the factors set forth in *Karake* are applicable to the circumstances here.

Because the Court has assumed that it can reconsider its order pursuant to Rule 48 on a *de novo* basis, the Court need not consider whether it can reconsider its order based on its inherent power. *Shepherd v. ABC*, 62 F.3d 1469, 1475 (D.C.Cir. 1995)("When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap.")(citation omitted).

E. Personal Jurisdiction, Expungement, and Entrapment

Despite conceding D.C. Circuit precedent to the contrary, movants argue that the United States lacks personal jurisdiction over them to "preserve the issue for appeal because the circuits are split on it." Mot., ECF No. 106 at 59 (citing United States

v. Ali, 718 F.3d 929, 943 (D.C. Cir. 2013). Movants also request that if the Court denies the relief sought, that the order be "without prejudice to a future motion to expunge movants' arrest records for lack of probable cause, entrapment, and lack of personal jurisdiction." Mot., ECF No. 106 at 60. The government responds that "the law of the case doctrine should apply to any future motions addressing the same issue." Gov't Opp'n, ECF No. 109 at 30. Should movants seek additional relief following the Court's decision on the pending motions, the Court will address any such request consistent with applicable law.

F. Motion to Bifurcate

Following Mr. Hawkesworth's death, counsel moved to bifurcate consideration of Mr. Hawkesworth's claims because there are "additional claims of a monetary nature (e.g. the seizure of assets while Mr. Hawkesworth was wrongfully imprisoned) that . . . survive [his] death even if the other previously asserted claims have become moot with Mr. Hawkesworth's death." Mot. to Bifurcate, ECF No. 114-2 at 3. Counsel requests 30 days to "work through the documentary evidence with relevant third parties and prepare submission of relevant evidence." *Id.* at 4. The government responds that movant's motion "was untimely filed, and the court must therefore deny the motion with respect to all three movants" and that "any special concerns raised by defense counsel regarding

[Mr.] Hawkesworth are irrelevant to the untimeliness of [the] Motion to Alter Dismissal." Gov't Opp'n, ECF No. 120 at 3.

"[M]otions for bifurcation are addressed to the 'broad discretion' of the trial judge." *Parman v. United States*, 399 F.2d 559, 561 (D.C. Cir. 1968)(citation omitted). As an initial matter, the Court will disregard both parties essentially re-briefing and raising new arguments relevant to the movant's motion to alter judgment. *See* Gov't Opp'n, ECF No. 120 at 4-8, Reply, ECF No. 121 at 8-18. The Court has reconsidered its dismissal order *de novo*, and has determined that there are no grounds to change the order to a dismissal with prejudice. Mr. Hawkesworth's alleged monetary claims existed at the time the Motion to Alter was filed, and should have been asserted at that time. Mr. Hawkesworth's death does not change the fact that such claims were not asserted in the motion to alter. Counsel's statement that "Movants viewed these claims as more appropriately brought after the Court granted the motion to alter the judgment" is nonsensical because had the Court granted the motion to dismiss with prejudice, that would have been a final and appealable order. *See* 28 U.S.C. § 1291.

III. Conclusion

For the reasons set forth in this Memorandum Opinion, the Court **DENIES** the Motion to Alter Dismissal and **DENIES** the Motion to Bifurcate. A separate Order accompanies this Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
June 21, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 04-285 (EGS)
FREDERICK HAWKESWORTH,	)	
JOHN WAYNE SCANTLEBURY,	)	
SEAN GASKIN	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion issued this same day, it is hereby

ORDERED that the defendants' Motion to Alter Dismissal is **DENIED**; and it is further

ORDERED that defendants' Motion to Bifurcate is **DENIED.**

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
June 21, 2018

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 7, 2019 Decided April 16, 2019

No. 18-3043

UNITED STATES OF AMERICA,
APPELLEE

v.

JOHN WAYNE SCANTLEBURY, ALSO KNOWN AS FREDERICK DAVIS, ALSO KNOWN AS JOHN WAYNE TROTMAN,
APPELLANT

Consolidated with 18-3044

Appeals from the United States District Court
for the District of Columbia
(No. 1:04-cr-00285-3)
(No. 1:04-cr-00285-4)

Lawrence J. Joseph argued the cause and filed the briefs for appellants.

Vijay Shanker, Attorney, U.S. Department of Justice, argued the cause and filed the brief for appellee.

Before: PILLARD and KATSAS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: In 2004, Appellants, John Wayne Scantlebury ("Scantlebury") and Sean Gaskin ("Gaskin"), who are residents of Barbados, along with another Barbadian resident – Frederick Christopher Hawkesworth ("Hawkesworth") – and two Guyanese residents, were indicted by a grand jury in Washington, D.C., for conspiracy to traffic cocaine. Scantlebury, Gaskin, and Hawkesworth (who is now deceased) all challenged extradition to the United States. The disputes over extradition lasted for over nine years. Finally, in December 2013, the U.S. Government moved to dismiss the charges against Scantlebury, Gaskin, and Hawkesworth without prejudice, citing "the age of the case, government resources, and other factual and legal issues which indicate the case is no longer viable." Joint Appendix ("J.A.") 41. The District Court granted the Government's motion to dismiss on January 9, 2014.

Appellants argue that prosecutors in the United States knew for years, well before they moved to dismiss the charges, that the cases had "cratered" and that there was no probable cause to support the indictments. Appellants therefore assert that the District Court should have dismissed the indictments with prejudice. On appeal, Appellants seek a remand to the District Court with instructions to dismiss the charges with prejudice. The Government in turn contends that this court has no basis upon which to entertain this appeal. We agree with the Government.

First, we are bound by the Supreme Court's decision in *Parr v. United States*, 351 U.S. 513 (1956). In *Parr*, the Court held that, without more, a criminal defendant whose indictment is dismissed without prejudice is not aggrieved and, therefore,

has no standing to appeal. *Id.* at 516–17. Second, even assuming, *arguendo*, that the threat of subsequent prosecution might be sufficient in some cases to support an appeal of a dismissal without prejudice, the statute of limitations has run on the charges against Appellants, so the question is moot. Third, Appellants assert ongoing reputational injuries allegedly caused by their arrest and indictment records. But they lack standing to pursue these claims because dismissing the indictment with prejudice would not redress the alleged reputational harms. Finally, we hold that the court lacks jurisdiction to consider Appellants' request for declaratory relief.

I. BACKGROUND

The U.S. Government began investigating Hawkesworth for cocaine trafficking in 2000. The Government suspected that Raphel Douglas ("Douglas") and Terrence Sugrim ("Sugrim") were supplying cocaine from Guyana to Hawkesworth. And Appellants were suspected of assisting Hawkesworth in an international drug trafficking operation that distributed cocaine in Barbados and transported cocaine from Barbados and Guyana to the United States.

As part of its investigation, the Government worked with an unnamed confidential informant. The informant allegedly spoke with Appellants and Hawkesworth on several occasions and made plans to help them transport cocaine to the United States.

In 2004, a federal grand jury in Washington, D.C., returned a two-count indictment against Scantlebury, Gaskin, Hawkesworth, Douglas, and Sugrim. The first count alleged that all five defendants had conspired to distribute more than five kilograms of cocaine. The second count alleged that

Hawkesworth and Douglas distributed 500 grams or more of cocaine. With respect to Appellants specifically, the indictment alleged that they "obtained false identification cards and documents in order to travel to the United States to facilitate the importation of cocaine from Barbados, Guyana and elsewhere into the United States." J.A. 35. The indictment stated that Hawkesworth was the leader of the organization, which had allegedly shipped 184 kilograms of cocaine from Guyana to JFK Airport in New York City. The indictment also alleged that Scantlebury and Gaskin met with the informant to discuss whether contacts were in place for a test shipment of cocaine and that the informant provided Scantlebury and Gaskin with fake identification cards.

Following indictment, the Government sought extradition of Scantlebury, Gaskin, and Hawkesworth from Barbados and Douglas and Sugrim from Guyana. Douglas was extradited, but Sugrim was never taken into custody. The three Barbadian defendants were arrested by Barbadian law enforcement officials, but they challenged extradition and remained in Barbados. All three were released on bail in late 2004 or early 2005. Then, for reasons that are not indicated in the record, their bail was revoked and they returned to jail in Barbados in 2011. Scantlebury, Gaskin, and Hawkesworth remained incarcerated in Barbados from 2011 until the indictments were dismissed on January 9, 2014.

In support of its requests for extradition from Barbados, the U.S. Government submitted affidavits written by a Senior Trial Attorney in the Criminal Division of the Department of Justice ("Trial Attorney"), a Drug Enforcement Administration ("DEA") special agent, and the confidential informant. The Trial Attorney's affidavit stated that the evidence against the defendants included the testimony of the confidential informant and of DEA agents, audio and video recordings of

conversations, photographs, telephone records, passport records, airline records, and seized cocaine. The DEA special agent's affidavit stated that 184 kilograms of cocaine, packed in a shipment of frozen seafood, was seized at JFK Airport on September 20, 2003, and that, later that day, the confidential informant met with Sugrim and Hawkesworth, who said that they had lost a load of 180 kilograms of cocaine that had been shipped to JFK. The DEA affidavit also noted that the confidential informant "was told that nobody was arrested." J.A. 132. In addition, the DEA affidavit noted that the confidential informant had worked with the DEA for approximately five years and had proven to be "completely reliable." *Id.* at 129.

In support of its request for extradition of Douglas, U.S. Government officials made several additional statements attesting to the reliability of the confidential informant. *Id.* at 160. Douglas was extradited from Trinidad to the United States in October 2005. It was later determined, however, that several of the Government's claims made in support of the confidential informant's reliability were not true. *See id.* at 225–31. In February 2007, the U.S. Government moved to dismiss without prejudice the District of Columbia indictment against Douglas. The motion was granted by the District Court.

The Government subsequently filed a second indictment against Douglas, Hawkesworth, and Sugrim in the Eastern District of New York on narcotics and use of telephone charges. In the New York case, the Government acknowledged that there were inaccuracies in the materials that it had submitted supporting Douglas's extradition. Douglas ultimately pled guilty to a telephone charge and was sentenced to time served. *See id.* at 276.

In November 2013, Gaskin consented to extradition to the United States, but he was never extradited. Instead, on December 24, 2013, the U.S. Government filed a motion to dismiss without prejudice the District of Columbia indictment against Scantlebury, Gaskin, Hawkesworth, and Sugrim pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure ("Rule 48(a)"). The Government explained that its motion was made "in good faith" based on "the age of the case, government resources, and other factual and legal issues which indicate the case is no longer viable." *Id.* at 41. Approximately two weeks later, on January 9, 2014, the District Court granted the Government's motion and the defendants were released from Barbadian custody. *See id.* at 345.

In 2015, the Barbadian defendants filed civil actions against the United States and certain federal officers. *See* Complaint, Gaskin v. United States, No. 15-cv-23-EGS (D.D.C. Jan. 8, 2015); Complaint, Gaskin v. May, No. 15-cv-33-EGS (D.D.C. Jan. 9, 2015). The criminal case arising out of the District of Columbia indictment was subsequently unsealed in September 2015. *See* J.A. 20–21. In February 2016, the Barbadian defendants moved in the criminal case for alteration of the dismissal of the indictment from a dismissal without prejudice to a dismissal with prejudice. *See id.* at 46–92. The defendants argued that they were innocent of the charges in the indictment, that the charges harmed their reputations, and that the Government had committed prosecutorial misconduct by swearing to inaccurate statements and failing to timely notify the Barbadian government when the case against the defendants fell apart. *Id.* The motion did not request expungement of the records of arrest or indictment. Instead, the defendants merely sought to "reserve the right to seek the lesser relief" of expungement if the motion requesting dismissal with prejudice was denied. *Id.* at 90. Defendant Hawkesworth

passed away before the District Court ruled on the motion. *See id.* at 24.

The District Court denied the motion to alter the dismissal without prejudice to a dismissal with prejudice, concluding that dismissal with prejudice was not warranted because the defendants "failed to rebut the presumption that the government sought dismissal in good faith and because the circumstances here do not rise to the level of being exceptional." *Id.* at 357. The District Court acknowledged that the defendants had reserved the right to seek expungement and stated that it would "address any such request [for expungement]" if "movants [sought] additional relief following the Court's decision on the pending motions." *Id.* at 366. Appellants moved for reconsideration of the District Court's denial of their motion to alter the dismissal without prejudice to a dismissal with prejudice. Their request for reconsideration was denied. Appellants never filed a motion with the District Court seeking expungement. This appeal followed.

II. DISCUSSION

Appellants assert that this court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Appellants acknowledge that their standing to appeal is dubious under *Parr*, 351 U.S. at 516, and also *Lewis v. United States*, 216 U.S. 611, 612 (1910) (per curiam) (holding that when a criminal defendant is "discharged from custody he is not legally aggrieved and therefore cannot appeal"). *See* Appellants' Br. at 27. Appellants argue, however, that they have suffered "ongoing reputational injury from the indictment . . . and thus [have] standing to seek to convert the dismissal *without*

prejudice into a dismissal *with* prejudice that would exonerate them of wrongdoing and redress those ongoing injuries." *Id*. at 28–29.

The Government contends that "[t]his Court should dismiss the appeal for lack of appellate jurisdiction." Appellee's Br. at 13. In support of this position, the Government asserts, first, that "[t]he Supreme Court has squarely held that the dismissal of an indictment without prejudice is not an appealable order"; second, "[a] defendant whose indictment is dismissed is not injured by that ruling, even if he still faces potential prosecution, suffered reputational harm from the indictment, and was deprived of liberty as a result of the charges"; and, finally, that "[a] dismissal without prejudice [] is an interlocutory order" that is subject to review only "after trial on a new indictment, conviction, and sentencing." *Id*. at 13–14.

The matters at issue in this case concern the jurisdiction of the court. *Bender v. Williamsport Area Sch. Dist*., 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction.") (internal quotation marks omitted). Therefore, we address the issues *de novo*. *See Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1285 (D.C. Cir. 2016).

On the record before us, we hold that this court has no basis upon which to entertain this appeal. Appellants lack standing to appeal because they were not aggrieved by the dismissal without prejudice; the statute of limitations has run on the charges against Appellants, so the question regarding whether they face a threat of subsequent prosecution is moot; and they have asserted no viable grounds for redress of their alleged reputational injuries. In light of these holdings, we need

not decide whether the District Court's dismissal without prejudice was "final" for the purposes of § 1291.

A. Appellants Lack Standing to Appeal for Lack of Aggrievement

Federal courts may not adjudicate cases unless the parties have a personal stake in the suit, not only at the outset of the litigation but at each successive stage as well. *See Camreta v. Greene,* 563 U.S. 692, 701 (2011). One element of that inquiry is whether, at each stage of the litigation, the party seeking relief can establish the "invasion of a legally protected interest." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). In *Parr*, the Court held that a defendant whose indictment has been dismissed without prejudice is not aggrieved so as to support standing to appeal. 351 U.S. at 516–17.

The defendant-appellant in *Parr* obtained a transfer of the indictment against him to another division within the same district on grounds of local prejudice. *Id.* at 514. The Government then dismissed that indictment and filed a new indictment in another district. *Id.* at 515. Parr appealed the dismissal without prejudice, but the Supreme Court held that Parr could not appeal unless and until he was convicted and sentenced. *Id.* at 516–18.

Taking the initial, dismissed indictment in isolation, the Court held that Parr could not appeal the dismissal for want of standing:

> If the Corpus Christi indictment is viewed in isolation from the Austin indictment, an appeal from its dismissal will not lie because petitioner has not been aggrieved. Only one injured by the judgment sought

> to be reviewed can appeal, and, regarding the Corpus Christi proceeding as a separate prosecution, petitioner has not been injured by its termination in his favor. So far as petitioner's standing to appeal is concerned, it makes no difference whether the dismissal still leaves him open to further prosecution, or whether, as petitioner contends, it bars his prosecution elsewhere than in Laredo because the transfer order operated to give him a vested right to be tried only there. The testing of the effect of the dismissal order must abide petitioner's trial, and only then, if convicted, will he have been aggrieved.

Id. at 516–17 (citations omitted).

Thus, the Court's holding in *Parr* indicates that, as a general matter, a criminal defendant is not injured, and thus lacks standing to challenge a dismissal without prejudice, unless and until he is subsequently convicted. *See also United States v. Martin*, 682 F.2d 506, 507 (5th Cir. 1982) (per curiam) ("Any testing of the dismissal order must abide the outcome of a trial on the issue of guilt. Then, if convicted, the defendants may be aggrieved.").

Appellants argue that, since the decisions in *Lewis* and *Parr*, "federal courts have expanded their appreciation of what constitutes an Article III injury . . . so a century later 'an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement.'" Appellants' Br. at 28 (quoting *Camreta*, 563 U.S. at 702). Appellants' cited authority is inapposite to this case.

Camreta, for example, was a civil case involving qualified immunity. As the Court explained, "a state child protective services worker and a county deputy sheriff interviewed a girl

at her elementary school in Oregon about allegations that her father had sexually abused her. The girl's mother subsequently sued the government officials on the child's behalf for damages under Rev. Stat. § 1979, 42 U.S.C. § 1983, claiming that the interview infringed the Fourth Amendment." 563 U.S. at 697. The Court of Appeals ruled that the public officials had violated the Constitution, but that qualified immunity protected the officials from liability.

The Supreme Court held that the public officials in *Camreta* had standing to seek review because they retained a "necessary personal stake in the appeal," given that the ruling could still "have prospective effect on the parties." *Id.* at 702. The Court explained:

> [The] Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials' behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties. The court in such a case says: "Although this official is immune from damages today, what he did violates the Constitution and he or anyone else who does that thing again will be personally liable." If the official regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action.

563 U.S. at 702–03.

In *Camreta*, the defendants had the "necessary personal stake" in the outcome of the appeal because they would be compelled to alter their future conduct to comply with the judgment. Appellants have not argued that they have been affected similarly in this case, nor do they have any basis upon which to do so.

The Government also argues that Appellants cannot appeal the dismissal without prejudice because it does not constitute a final decision for the purposes of 28 U.S.C. § 1291. In *Parr*, the Court held that the appeal was premature because the subsequent indictment was still pending at the time of appeal. *See Parr*, 351 U.S. at 518–19. In so doing, the Court broadly stated that "[f]inal judgment in a criminal case means sentence." *Id*. at 518 (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

In this case, however, unlike *Parr*, no subsequent indictment was handed down. And the statute of limitations on the charge against Appellants expired before oral argument. At oral argument, counsel for the Government confirmed that the Government would not seek a further indictment. Therefore, the judgment in this case is as final as it will ever be. Under these circumstances, there is reason to doubt whether *Parr*'s finality holding is applicable.

The Supreme Court in *Parr* took pains to address the first and second indictments in that case independently, treating the first, dismissed indictment as unappealable for lack of injury, while separately holding that the subsequent indictment was not yet appealable for lack of finality. And at least one of our sister circuits has made the same distinction. *See United States v. Moller-Butcher*, 723 F.2d 189, 191 (1st Cir. 1983) ("If [the defendant] is not reindicted, it will never have suffered injury as a result of the dismissal. If, on the other hand, [the defendant]

is reindicted, then the dismissal is an intermediate step in the prosecution which may be reviewed only after final judgment in the case.").

It is unnecessary for us to decide whether *Parr*'s finality holding applies to this case. On the record before us, it is clear that, under *Parr*, Appellants were not aggrieved by their dismissals without prejudice. Therefore, they have no standing to pursue this appeal.

B. Appellants' Challenges to the Dismissals of Their Indictments Without Prejudice Are Moot

We also lack jurisdiction over this appeal because the claims raised by Appellants are moot. "When 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' we have no live controversy to review." *Camreta*, 563 U.S. at 711 (alteration in original) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)).

The parties agree that the statute of limitations has run on the drug trafficking charge pursuant to which Appellants were indicted. *See* Appellants' Br. at 28 n.8 (noting that, even if the statute of limitations was tolled pending extradition, the five-year statute of limitations expired on January 13, 2019). Therefore, there is no possibility that Appellants will be indicted for the same alleged offenses that gave rise to this case. The elimination of exposure to re-indictment moots Appellants' objections to the form of the dismissal. *See Lewis*, 216 U.S. at 613; *see also Parr*, 351 U.S. at 517 & n.8 (discussing the finding of mootness in *Lewis*).

C. Due to Lack of Redressability, Appellants Lack Standing to Support Their Claims of Reputational Injuries

Appellants argue that they have standing to pursue this appeal because of alleged "ongoing reputational injury from the indictment." Appellants' Br. at 28. In support of this assertion, Scantlebury and Gaskin submitted declarations to the court reciting reputational harms that continue to adversely affect their job opportunities, limit their abilities to secure bank loans, and make it difficult for them to visit the United States. Each Appellant claims that "[a]n order of this Court dismissing [his] indictment with prejudice – or less preferably, expunging [his] arrest record – would enable [him] to claim that the indictment was in error because [he] was not guilty of the charges and would remove an obstacle" to re-establishing his reputation or returning to the United States. J.A. 106, 109.

On the record before us, we hold that the reputational injuries alleged by Appellants do not give them standing to appeal. This is because the relief that Appellants seek – an alteration of the dismissals without prejudice to dismissals with prejudice – would not redress the injuries that Appellants have alleged.

In order to establish standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). Appellants argue that a favorable ruling from this court that "the United States charged them without probable cause would redeem their reputations" and that, with respect to Gaskin, "striking the arrest would prevent U.S. immigration officials from using the fact of the arrest against him in the discretionary processing of his planned application to apply to

return to the United States." Appellants' Br. at 29. These arguments are premised on a misunderstanding of Rule 48(a), which allows the prosecution to dismiss an indictment only "with leave of court." Fed. R. Crim. P. 48(a).

"[T]he 'leave of court' authority gives no power to a district court to deny a prosecutor's Rule 48(a) motion to dismiss charges based on a disagreement with the prosecution's exercise of charging authority." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016). Rather, a trial court "reviews the prosecution's motion under Rule 48(a) primarily to guard against the prospect that dismissal is part of a scheme of 'prosecutorial harassment' of the defendant through repeated efforts to bring—and then dismiss—charges." *Id.* (quoting *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977)). Therefore, a finding that the District Court erred in applying Rule 48(a) would not constitute a holding in Appellants' favor that the Government charged them without probable cause. Nor would a favorable holding have any impact on the records of Appellants' arrests and indictments.

The problem for Appellants is that their alleged reputational injuries stem from their arrests and indictments, not from the District Court's application of Rule 48(a). Neither the trial court nor this court may second-guess an indictment that is "'fair upon its face,' and returned by a 'properly constituted grand jury.'" *Kaley v. United States*, 571 U.S. 320, 328 (2014) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975)); *see also id.* ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime."). Therefore, absent a meritorious challenge to their indictments, we lack the authority to afford Appellants the relief that they seek.

Had Appellants sought expungement of their indictment and arrest records, rather than dismissal with prejudice, the redressability analysis might have been different. But Appellants did not move for expungement before the District Court and they have not requested it before this court.

The remedy of expungement is available only if "necessary to vindicate rights secured by the Constitution or by statute." *Abdelfattah v. DHS*, 787 F.3d 524, 536 (D.C. Cir. 2015) (quoting *Chastain v. Kelley*, 510 F.2d 1232, 1235 (D.C. Cir. 1975)); *see also id.* at 538 ("[We do not] recognize a nebulous *right* to expungement of government records that are inaccurate, were illegally obtained, or are 'prejudicial without serving any proper purpose;' instead expungement is a potentially available *remedy* for legally cognizable injuries."). Appellants have made no attempt to satisfy this standard.

In sum, the remedy sought by Appellants, if granted, would not redress their alleged reputational injuries. Therefore, Appellants lack standing to pursue these claims.

D. The Court Has No Jurisdiction to Consider Appellants' Claims Under the Declaratory Judgment Act

Finally, Appellants request declaratory relief from this court under the Declaratory Judgment Act, 28 U.S.C. § 2201. However, the Declaratory Judgment Act does not extend the jurisdiction of the federal courts. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("[The Declaratory Judgment Act] enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."). Having concluded that we lack jurisdiction over this appeal on injury, mootness, and redress grounds, we further conclude that we

lack jurisdiction to consider Appellants' request for declaratory relief.

III. CONCLUSION

For the reasons stated herein, these appeals are dismissed.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3043 **September Term, 2018**

1:04-cr-00285-3

Filed On: May 21, 2019

United States of America,

Appellee

v.

John Wayne Scantlebury, also known as Frederick Davis, also known as John Wayne Trotman,

Appellant

Consolidated with 18-3044

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Edwards, Senior Circuit Judge

O R D E R

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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John Wayne Scantlebury, also known as Frederick Davis, also known as John Wayne Trotman,

Appellant

Consolidated with 18-3044

BEFORE: Pillard and Katsas, Circuit Judges; Edwards, Senior Circuit Judge

O R D E R

Upon consideration of appellants' petition for panel rehearing filed on April 30, 2019, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 8th day of August 2019, a true and correct copy of the foregoing application and its appendix was served by first-class mail, postage prepaid, on the following counsel for the respondent:

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In addition, on the same day, the undersigned counsel also sent a PDF courtesy copy of the foregoing application and its appendix to the above-listed counsel at the email addresses indicated above.

The undersigned further certifies that, on this 8th day of August, 2019, the foregoing application and its appendix were electronically filed with the Court, and an original and two true and correct copies of the foregoing application and its appendix were lodged with the Clerk of the Court by messenger for filing.

Executed August 8, 2019,

/s/ Lawrence J. Joseph
Lawrence J. Joseph