

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA

v.

GHISLAINE MAXWELL,

Defendant.  
-----X

S2 20 Cr. 330 (AJN)

**OMNIBUS REPLY MEMORANDUM OF GHISLAINE MAXWELL  
IN SUPPORT OF HER SUPPLEMENTAL PRETRIAL MOTIONS  
RELATING TO THE S2 SUPERSEDING INDICTMENT**

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**TABLE OF CONTENTS**

	<b>Page</b>
ARGUMENT.....	3
I. The Court Should Not Apply the <i>Annabi</i> Rule and Instead Find that the NPA Bars Ms. Maxwell’s Prosecution on Counts One, Three, Five, and Six.....	3
II. Prosecuting Ms. Maxwell on Counts Five and Six Would Violate the Double Jeopardy Clause’s Protection Against Duplicative Punishments. ....	11
III. The Government Should Immediately Produce Accuser-4’s Prior Statements as <i>Brady</i> Material. ....	14
IV. The Court Should Grant Ms. Maxwell’s Other Requested Relief.....	16
CONCLUSION.....	17

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b><u>Cases</u></b>	
<i>Ex parte Lange</i> , 85 U.S. (18 Wall.) 163 (1873) .....	11
<i>Morris v. Reynolds</i> , 264 F.3d 38 (2d Cir. 2001).....	12
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969).....	11, 12, 13
<i>United States v. Annabi</i> , 771 F.2d 670 (2d Cir. 1985).....	<i>passim</i>
<i>United States v. Cambindo Valencia</i> , 609 F.2d 603 (2d Cir. 1979).....	13, 14
<i>United States v. Carter</i> , 454 F.2d 426 (4th Cir. 1972) .....	10
<i>United States v. Dionisio</i> , 503 F.3d 78 (2d Cir. 2007).....	12
<i>United States v. Gebbie</i> , 294 F.3d 540 (3d Cir. 2002).....	6, 7, 10
<i>United States v. Gonzalez</i> , 93 F. App'x 268 (2d Cir. 2004) .....	7
<i>United States v. Korfant</i> , 771 F.2d 660 (2d Cir.1985).....	9
<i>United States v. Laskow</i> , 688 F. Supp. 851 (E.D.N.Y. 1988) .....	8, 10
<i>United States v. Lopez</i> , 356 F.3d 463 (2d Cir. 2004).....	9, 11
<i>United States v. Prisco</i> , 391 F. App'x 920 (2d Cir. 2010) .....	7
<i>United States v. Rivera</i> , 844 F.2d 916 (2d Cir. 1988).....	9

*United States v. Salameh*,  
152 F.3d 88 (2d Cir. 1998).....7

*United States v. Torres*,  
719 F.2d 549 (2d Cir. 1983).....15

Ghislaine Maxwell respectfully submits this Omnibus Reply Memorandum in Support of her Supplemental Pretrial Motions Related to the S2 Superseding Indictment (“S2 Indictment”).

At its core, the prosecution of Ms. Maxwell is a stunning example of prosecutorial overreach. It is no mystery what happened here. The Palm Beach FBI and the U.S. Attorney’s Office for the Southern District of Florida (“USAO-SDFL”) conducted a thorough investigation of Jeffrey Epstein from 2006-2008 (the “Florida Investigation”), but decided not to prosecute him or his “potential co-conspirators” and abandoned any potential federal charges against them pursuant to the terms of the Epstein Non-Prosecution Agreement (“NPA”). Over a decade later, the U.S. Attorney’s Office for the Southern District of New York (“USAO-SDNY”) decided that it was not satisfied with this outcome and is now seeking a “do-over.” But Epstein died as a result of the government’s own negligence before he could be brought to trial. The government has now targeted Ms. Maxwell as the next best substitute for Epstein and is trying by any means necessary to blame her for his crimes because Epstein is no longer here to answer for them.

Consistent with this goal, the government is now trying to prosecute Ms. Maxwell for the exact same offenses that the Florida authorities investigated (but found no evidence of her involvement), and for which she received immunity under the NPA. The government concedes in its opposition (“Opp.”) that the NPA covers Counts Five and Six, the new offenses added to the S2 Indictment. (Opp. at 7 n.3 (“[T]he scope of the NPA’s coverage would appear to encompass Counts Five and Six.”)). The government does not contest that the NPA immunizes Ms. Maxwell for these offenses as a “potential co-conspirator” of Epstein; nor could it. The Court ruled unequivocally that the NPA’s co-conspirator provision covers “any involvement of [Ms.] Maxwell” in “the offenses covered by the NPA.” (Dkt. 207 at 7). And the government does not even attempt to dispute that Counts Five and Six are the same offenses, based on the

same allegations of Accuser-4,<sup>1</sup> that were already presented to the grand jury in the Southern District of Florida in connection with the Florida Investigation and then abandoned pursuant to the terms of the NPA.

The government offers only one argument for why it should be permitted to prosecute Ms. Maxwell for these offenses. Relying on the Court's prior ruling and the Second Circuit's decision in *United States v. Annabi*, 771 F.2d 670 (2d Cir. 1985) (*per curiam*), the government asserts that the NPA does not bind the U.S. Attorney's Office for the Southern District of New York ("USAO-SDNY") because it does not "affirmatively appear" to apply to this District. (Opp. at 2-7). But as we explained in our opening memorandum ("Mem."), *Annabi* is inapposite to the circumstances of this case. *Annabi* expressly stated that it was not addressing a situation, like the one here, where one federal district has agreed that "the United States" will not prosecute certain offenses as part of a negotiated agreement and then a second federal district later seeks to charge those *very same offenses* based on the *exact same conduct*. (Mem. at 11-17). Applying *Annabi* in this case would stretch *Annabi* too far and push it beyond the factual moorings that anchor its holding. It would also sanction a fundamentally unjust framework whereby any U.S. Attorney's Office with venue over a particular offense could re-prosecute a defendant for that same offense years later if it were unsatisfied with the plea bargain struck by a different office. The Court should not endorse this outcome and should instead hold the NPA binds the USAO-SDNY as to Counts Five and Six of the S2 Indictment and that prosecuting Ms. Maxwell for those offenses would violate the NPA and the Double Jeopardy Clause.

The overreach in this case is even more jarring when one considers the source of the new allegations. The government has added two new charges against Ms. Maxwell, and dramatically

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<sup>1</sup> Accuser-4 is identified in the S2 Indictment as Minor Victim-4.

expanded the scope of two existing charges, based on the testimony of a single witness who *never once mentioned* Ms. Maxwell when she first told her story to the FBI in 2007 in connection with the Florida Investigation. Indeed, Accuser-4 said it was someone else entirely—[REDACTED]—who performed the same functions in Epstein’s crimes that she now claims Ms. Maxwell performed. To add insult to this injury, the government further asserts that Accuser-4’s omission of Ms. Maxwell in her FBI interview is somehow not exculpatory *Brady* information, and therefore they do not need to produce her prior statements to the defense until much closer to trial. The government’s inability to recognize obvious *Brady* material, and identify it as such, reflects a persistent and troubling disregard for its obligations which the Court should not permit.

Accordingly, for these reasons set forth below and in our opening memorandum, the Court should (1) dismiss Counts One, Three, Five and Six of the S2 Indictment for breach of the NPA; (2) dismiss Counts Five and Six for violation of the Double Jeopardy Clause; (3) dismiss Counts Five and Six as time-barred under the statute of limitations; (4) dismiss Count Five and Either Count One or Count Three as multiplicitous; (5) dismiss the S2 Indictment for pre-indictment delay; (6) order a Bill of Particulars as to Counts Five and Six; and (7) order the government to produce Accuser-4’s prior statements as *Brady* material.

## ARGUMENT

### **I. The Court Should Not Apply the *Annabi* Rule and Instead Find that the NPA Bars Ms. Maxwell’s Prosecution on Counts One, Three, Five, and Six.**

The government concedes that if the NPA binds the USAO-SDNY, it cannot prosecute Ms. Maxwell for the offenses charged in Counts Five and Six of the S2 Indictment. The government instead relies on *Annabi* and its progeny to argue that the NPA does not bind the USAO-SDNY and that it is free to prosecute Ms. Maxwell for the same offenses for which she was immunized by the NPA. At its core, the government’s argument is that the “affirmative

appearance” rule of *Annabi* is an immutable “universal principle” governing the interpretation of plea agreements (Opp. at 3), which can be divorced from its underlying facts and which the Court must blindly follow even when the facts presented in this case are meaningfully different and the application of the *Annabi* rule would lead to an entirely unjust result. No circuit precedent requires such an outcome, especially when this case presents the exact set of circumstances that the Second Circuit said it was *not* addressing in *Annabi*: where one federal district has agreed that “the United States” will abandon certain offenses as part of a negotiated agreement and then a second federal district later seeks to charge identical offenses based on the exact same conduct. *See Annabi*, 771 F.2d at 672. *Annabi* has already been stretched to its limit by subsequent opinions that have simply reaffirmed and applied its broad default rule without careful analysis of the underlying facts. Applying the *Annabi* rule in this case, however, would extend it beyond its boundaries to a set of circumstances that *Annabi* expressly left for another case to decide. The Court, therefore, is not limited by its previous ruling concerning the S1 Indictment and should not apply the *Annabi* rule in this context. The Court should instead find that the NPA bars Ms. Maxwell’s prosecution on Counts Five and Six.

The government’s attempts to undercut Ms. Maxwell’s argument are unavailing. The government asserts that Ms. Maxwell inappropriately relies on a portion of *Annabi* in which the court addressed whether the charges previously dismissed against the defendants in the Eastern District of New York were “identical” to the charges later brought in the Southern District of New York. (Opp. at 3-5 (discussing *Annabi*, 771 F.2d at 672)). The government acknowledges the court considered whether the charges were identical, but claims that this discussion did not qualify the general rule that “[a] plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the

agreement contemplates a broader restriction,” and therefore has no bearing on the proper interpretation of the NPA. (*Id.* at 4; *Annabi*, 771 F.2d at 672). Instead, this portion of the opinion, according to the government, was “cabined to an analysis under the Double Jeopardy Clause” to rebut the *Annabi* defendants’ claim that the Clause precluded their prosecution on the Southern District charges. (*Opp.* at 4).

That is a misinterpretation of *Annabi*. The court stated at the beginning of its opinion that the defendants did not have a Double Jeopardy claim because they “were never in jeopardy with respect to the dismissed counts of the Eastern District indictment.” *Annabi*, 771 F.2d at 671. The court was clear that the defendants’ only claim on appeal was that the Southern District indictment “violate[d] the protection they allege they secured by virtue of the . . . plea agreement in the Eastern District.” (*Id.*). The *Annabi* defendants’ argument was not that the Double Jeopardy Clause precluded their prosecution on the Southern District charges. It was that their prior plea agreement with the Eastern District should afford them “the same protection accorded by that Clause” and preclude the Southern District from prosecuting them for the same charges that had been dismissed in the Eastern District. *Annabi*, 771 F.2d at 672. In other words, when one federal district agrees that “the Government” will dismiss certain charges as part of a plea agreement, another federal district should not be permitted to bring identical charges against the defendant at a later time. Accordingly, this portion of *Annabi* was not an analysis of a Double Jeopardy claim; it was an analysis of the preclusive effect of the plea agreement, which the defendants *analogized* to a Double Jeopardy claim. As such, this section of *Annabi* bears directly on whether the NPA precludes Ms. Maxwell’s prosecution for the charges in Counts Five and Six.

The court ultimately concluded that the Southern District charges were not identical to the dismissed charges in the Eastern District and, as a result, the new charges were “*sufficiently distinct* at least to warrant application of the ... rule concerning construction of plea agreements.” *Id.* (emphasis added). But the court left adjudicated whether it would be proper to apply the *Annabi* rule in a case exactly like this one, where the new charges are the *same* as the dismissed charges.<sup>2</sup> These exact circumstances are now before the Court with respect to Counts Five and Six. The Third Circuit directly addressed these same facts in *United States v. Gebbie*, 294 F.3d 540, 544-52 (3d Cir. 2002), holding that “when a United States Attorney negotiates and contracts on behalf of ‘the United States’ or ‘the Government’ in a plea agreement for specific crimes, that attorney speaks for and binds all of his or her fellow United States Attorneys with respect to those same crimes and those same defendants.” *Id.* at 550 (emphasis added). The Court should decline to apply *Annabi* in these circumstances and instead follow the Third Circuit’s reasoning in *Gebbie* to find that the NPA bars Ms. Maxwell’s prosecution on Counts Five and Six. (*See* Mem. 14-17).

As discussed in our opening memorandum, this result is consistent with the terms and the drafting history of the NPA. (*See* Mem. at 16). One of Epstein’s principal goals in negotiating the NPA was to “resolve globally his state and federal criminal liability.” (*Id.*, Ex. B at 2 of 7). Accordingly, Epstein sought the broadest possible protection for himself and his “potential co-conspirators.” The use of the phrase “the United States” in the co-conspirator immunity provision reflects Epstein’s desire to ensure that that he would not become embroiled in subsequent prosecutions of his “potential co-conspirators” in any other districts. (*Id.* at 16). Indeed, Epstein insisted on the inclusion of this language as a condition of signing the NPA, and

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<sup>2</sup> Indeed, it is telling that the government omits this final, critical sentence from the long block quote it cites in its opposition. (*See* Opp. at 4).

the USAO-SDFL agreed to it. (*See* Mem., Ex. A, OPR Report at 167) (Epstein wanted “to make sure that he’s the only one who takes the blame for what happened”).<sup>3</sup>

The government further asserts that Ms. Maxwell’s position is not supported by subsequent Second Circuit cases that apply *Annabi*. (Opp. 5-6). But this argument simply begs the question. Although courts in this Circuit have applied *Annabi* to evaluate whether one district is bound by a prior plea agreement with another district, none of these cases involved the same factual circumstances presented here, which were specifically carved out in *Annabi*. The cases that the government cites in its opposition highlight this point. Among other things, they involved plea agreements that explicitly stated the agreement applied only to the district that negotiated it and not to any other district. *See United States v. Prisco*, 391 F. App’x 920, 921 (2d Cir. 2010) (summary order) (plea agreement explicitly stated that “[the] agreement is limited to the United States Attorney’s Office for the District of New Jersey and cannot bind other federal, state, or local authorities”); *United States v. Gonzalez*, 93 F. App’x 268, 270 (2d Cir. 2004) (plea agreement explicitly stated that “the agreement binds only the United States Attorney’s Office for the District of New Mexico”); *United States v. Salameh*, 152 F.3d 88, 119 (2d Cir. 1998) (plea agreement explicitly stated “[t]his agreement is limited to the United States Attorney’s Office for the Eastern District of New York and cannot bind other federal, state or local prosecuting authorities”). *Gebbie*, itself, recognized that such “express contractual limitations” can limit the application of a plea agreement to the district that negotiated it, even when the agreement purports to make promises on behalf of the “the Government.” *Gebbie*, 294 F.3d at 550. But this limiting language does not appear anywhere in the NPA, although it could easily

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<sup>3</sup> Moreover, to the extent the phrase “the United States” in the co-conspirator immunity provision conflicts with the more restrictive language in Epstein’s immunity provision, which is limited to the Southern District of Florida, that discrepancy, at most, creates an ambiguity that must be construed “strictly against the government” under well-established principles of contract law and interpretation of plea agreements. *See* Dkt. 223 at 8-11; *accord Gebbie*, 294 F.3d at 551-52.

have been included if that had, in fact, been the intention of the parties. It was not. These cases are therefore inapposite.

Moreover, the other case cited by the government, *United States v. Laskow*, 688 F. Supp. 851 (E.D.N.Y. 1988), *aff'd*, 867 F.2d 1425 (2d Cir. 1988), affirmatively *supports* Ms. Maxwell's argument. In *Laskow*, the court conducted an analysis to determine whether the charges brought in the Eastern District of New York were "sufficiently distinct" from the charges previously dismissed pursuant to a plea agreement with the Central District of California to permit the Eastern District to prosecute the defendant on the new charges. *Laskow*, 688 F. Supp. at 855-56. The court ultimately concluded that the new charges were "sufficiently distinct" from the dismissed charges that it was "not a violation of the plea agreement to pursue prosecution" under *Annabi*. *Id.* at 855-56 (citing *Annabi*, 771 F.2d at 672).

The government asserts that this portion of *Laskow* was "unnecessary" to its holding because the court had already determined that the plea agreement did not apply to the Eastern District. (Opp. at 6 (citing *Laskow*, 688 F. Supp. at 853-56)). However, this was only because the defendants did not "specifically address" on appeal the issue of the similarity of the charges under *Annabi*; the court therefore considered it *sua sponte* after addressing the arguments the defendants did raise. *Laskow*, 688 F. Supp. at 855. The implication of the court's analysis is clear: if the charges in the Eastern District had been the same as the charges dismissed under the prior plea agreement—which prohibited "the government" from bringing additional charges related to the crimes charged in the Central District—the Eastern District would have been precluded from prosecuting the defendants on the new charges. *See id.* at 855-56 (it would be "a violation of the plea agreement" for the Eastern District to prosecute the defendants for "the

same crime as that for which the Central District granted defendants immunity”). The Court should apply the same analysis here.

The government also argues unpersuasively that the framework Ms. Maxwell proposes would create a “confusing” rule of interpretation that would be “complicated” to administer and which lacks “a mode of analysis” for the courts to evaluate the similarity of charges. (Opp. at 4-6 & n.1). Not so. Courts routinely evaluate the similarity of charged offenses when analyzing Double Jeopardy claims. For example, as discussed in our opening memorandum, courts in the Second Circuit assess whether successive conspiracy prosecutions are distinct from one another for Double Jeopardy purposes by evaluating the eight *Korfant* factors. *See United States v. Lopez*, 356 F.3d 463, 468 (2d Cir. 2004) (citing *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir.1985) (*per curiam*)); *see also* Mem. at 19. Courts can readily apply this same analysis to determine whether a newly charged conspiracy is “sufficiently distinct” from a conspiracy that was dismissed under a prior plea agreement to permit prosecution. Indeed, the Second Circuit has already applied this “mode of analysis” in this very context in a case that the government cites in its own opposition brief. *See United States v. Rivera*, 844 F.2d 916, 922-25 (2d Cir. 1988) (analyzing the *Korfant* factors to determine that a conspiracy charged in the Southern District of New York was “sufficiently distinct” from a conspiracy previously dismissed pursuant to a plea agreement with the same District that the prosecution was permissible under *Annabi*). Hence, contrary to the government’s assertion, the framework of analysis that Ms. Maxwell proposes is straightforward, easy to apply, and has already been adopted by the Second Circuit.

In this case, the government cannot argue that Counts Five and Six of the S2 Indictment are distinct from the offenses that were presented to the grand jury in the Southern District of

Florida and then abandoned pursuant to the NPA. Indeed, the government does not even attempt to do so. As we set forth extensively in our opening memorandum, the crimes alleged in Counts Five and Six are the same offenses based on the same allegations of Accuser-4. (See Mem. at 7-11). Accordingly, the NPA bars Ms. Maxwell's prosecution on Counts Five and Six.

This result is not only consistent with Second Circuit precedent because *Annabi* did not address the circumstances of this case; it is also consistent with fundamental fairness. As the Third Circuit cautioned in *Gebbie*, individual U.S. Attorney's Offices should not view themselves as "sovereigns of autonomous fiefdoms" with the ability to charge a defendant with the same crimes that another U.S. Attorney's Office had dismissed under a plea agreement, when the agreement promised that "the United States" would not prosecute the defendant further for those crimes. *Gebbie*, 294 F.3d at 550; see also *United States v. Carter*, 454 F.2d 426, 427-28 (4th Cir. 1972) (federally prosecuting defendant a second time for the same charges previously resolved by a plea agreement with a different federal district puts at stake "the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government").

This case perfectly illustrates the validity of that concern. This is not a case where the USAO-SDNY conducted an independent investigation at the same time as the Florida Investigation, and inadvertently charged Ms. Maxwell with some of the same crimes. See *Laskow*, 688 F. Supp. at 855 ("[I]n determining whether a criminal prosecution is precluded by a plea agreement in a sister district, the Second Circuit has also attached great significance to the degree of independence with which that prosecution has developed." (collecting cases)). On the contrary, the Florida Investigation preceded the Southern District investigation by over ten years and the USAO-SDNY knew full well what crimes the USAO-SDFL had considered charging,

but ultimately abandoned as part of the NPA. The USAO-SDNY has now charged Ms. Maxwell over a decade later with the same crimes for which she was immunized under the NPA for one simple reason: it did not like that result. The Court should not countenance this abuse of prosecutorial power, nor is it required to under the controlling case law.

For these reasons and the reasons stated in our opening memorandum, the NPA bars Ms. Maxwell's prosecution for the offenses charged in Counts Five and Six of the S2 Indictment. They must therefore be dismissed. And for the reasons stated in our opening memorandum, Counts One and Three must also be dismissed. (*See Mem.* at 17-18).

**II. Prosecuting Ms. Maxwell on Counts Five and Six Would Violate the Double Jeopardy Clause's Protection Against Duplicative Punishments.**

Prosecuting Ms. Maxwell on Counts Five and Six also violates her rights under the Double Jeopardy Clause. The government asserts that the Double Jeopardy Clause does not preclude Ms. Maxwell's prosecution on Counts Five and Six because she never pled guilty to those crimes (indeed, the USAO-SDFL never charged her or Epstein with those crimes) and the NPA did not include a factual adjudication of the merits of those offenses; jeopardy therefore never attached. (*Opp.* at 7-11). The government's argument misses the mark because it focuses on only one protection guaranteed by the Clause – the protection against “a second prosecution for the same offense after conviction.” *Lopez*, 356 F.3d at 467 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989)). Ms. Maxwell does not dispute that she and Epstein were never previously *convicted* of the crimes charged in Counts Five and Six. She invokes a different protection of the Double Jeopardy Clause and asserts that Epstein was already *punished* for those offenses and that she cannot be punished again for those same offenses. *See Pearce*, 395 U.S. at 717-18 (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873) (“[T]he Constitution was designed

as much to prevent the criminal *from being twice punished for the same offense* as from being twice tried for it.” (emphasis added)). The government does not contest that Epstein was punished for the offenses covered by the NPA; nor could it. Accordingly, the government cannot now seek duplicative punishment from Ms. Maxwell for those same offenses.

The government relies primarily on the Second Circuit’s opinion in *United States v. Dionisio*, 503 F.3d 78 (2d Cir. 2007), which addressed an issue of first impression for the Circuit under the Double Jeopardy Clause: “whether jeopardy attaches when a charge is dismissed with prejudice pursuant to a plea agreement.” *Dionisio*, 503 F.3d at 82. The court conducted a lengthy analysis of the controlling case law and concluded that the defendant needed to have faced “the risk of a determination of guilt”—*i.e.*, through a process by which there was “[an] adjudication of some facts that go to the *merits* of [the] charge”—for the protections of the Double Jeopardy Clause to apply. *Id.* at 83-84 (emphasis in original). But as the court’s analysis makes clear, *Dionisio* was focused on whether the defendant faced a “risk of conviction” for the dismissed charge that was sufficient to trigger the Clause’s protection against prosecuting a defendant twice for the same offense after conviction. *See id.* at 83. It did not address the Clause’s protection against duplicative punishments for the same offense, and is therefore inapposite.

This case presents circumstances different from those at issue in *Dionisio*. In the plea agreement context addressed in *Dionisio*, the defendant typically agrees to plead guilty to one or more charged offenses, while other offenses are dismissed. Jeopardy attaches to the charges to which the defendant pled guilty, *Morris v. Reynolds*, 264 F.3d 38, 49 (2d Cir. 2001), and to any dismissed charges for which there was a factual adjudication of the merits of the offense. *Dionisio*, 503 F.3d at 83-84. Here, by contrast, the USAO-SDFL never charged Epstein or Ms.

Maxwell with any offenses and there never was a plea agreement, nor any dismissed charges. Instead, the USAO-SDFL abandoned their anticipated charges prior to indictment pursuant to the NPA. Accordingly, there was no conviction or “risk of conviction” that would trigger the Double Jeopardy Clause.

However, there can be no serious dispute that Epstein was *punished* for the offenses covered by the NPA. As discussed in our opening memorandum, in order to “resolve globally his state and federal criminal liability” as to all crimes covered by the NPA, including the offenses based on the allegations of Accuser-4, Epstein was required to (1) plead guilty in Florida state court to one count of solicitation of prostitution and one count of solicitation of minors to engage in prostitution, (2) register as a sex offender, (3) pay for an attorney to represent his victims to sue him for personal injuries, and (4) waive his right to contest any damages awarded in those lawsuits up to an agreed-upon amount. (Mem. at 16, 18-19 & Ex. B at 2-5 of 7). Epstein fully performed these conditions and paid over \$12.5 million in settlements to multiple alleged victims, including \$446,000 to the person we believe to be Accuser-4 and her attorneys. (*Id.* at 19 & Exs. H, I). The government cannot now seek duplicative punishment for those same offenses almost fifteen years after they were resolved through the NPA.<sup>4</sup>

Accordingly, prosecuting Epstein for Counts Five and Six would violate the Double Jeopardy Clause. And as discussed in our opening memorandum, because Epstein negotiated immunity for Ms. Maxwell and any other “potential co-conspirators” as part of the terms of the NPA, Ms. Maxwell cannot be prosecuted for those crimes either. *See* Mem. at 20; *United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2d Cir. 1979) (“If [the defendant’s] earlier plea is

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<sup>4</sup> If that were permissible (and Epstein were still alive) the USAO-SDFL could theoretically prosecute Epstein for the offenses charged in Counts Five and Six without violating the Double Jeopardy Clause because, according to the government’s theory, jeopardy never attached to those charges. Such a prosecution would, no doubt, violate the terms of the NPA. But it would also violate the Double Jeopardy Clause’s protection against “multiple punishments for the same offense.” *See Pearce*, 395 U.S. at 717-18.

found to bar prosecution of him because of double jeopardy, since concededly the plea included an agreement to drop the charges against [his wife], the instant prosecution of [his wife] will also be barred.”)<sup>5</sup> Counts Five and Six of the S2 Indictment must therefore be dismissed.

**III. The Government Should Immediately Produce Accuser-4’s Prior Statements as Brady Material.**

The government’s assertion that it can withhold production of Accuser-4’s prior statements because they are merely impeachment material under *Giglio*, and do not rise to the level of exculpatory material under *Brady*, is unsupported and flatly incorrect. (Opp. 20-22). The government admits that Accuser-4 *never mentioned* Ms. Maxwell when she was first interviewed by the Palm Beach FBI in or around 2007 in connection with the Florida Investigation. (*Id.* at 21). But the government unilaterally characterizes this omission, without any supporting authority, as “classic impeachment material” under *Giglio*, and therefore contends that it is not obligated to produce Accuser-4’s statements to the defense until much closer to trial. (*Id.* at 20-21).

The government is completely off-base. This is not a situation where a government witness, for example, misremembered a particular detail of the alleged crime or confused the timeline of events. Accuser-4 is the single, key eye witness upon whom the government must rely to prove Counts Five and Six. Those counts are based on her allegations; hence, their viability rests almost entirely on the strength and accuracy of her testimony. The fact that Accuser-4 never mentioned Ms. Maxwell when she first gave an account of her alleged abuse to the FBI, at a time when the events were most fresh in her mind, is extraordinarily significant. It

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<sup>5</sup> The government argues that *Cambindo Valencia* is inapposite because it contends that the charges against the defendant’s wife were dismissed because her prosecution violated the defendant’s plea agreement, not the Double Jeopardy Clause. (Opp. at 10-11). This argument is unpersuasive. The defendant’s wife argued on appeal *both* that the Double Jeopardy Clause and the plea agreement precluded her prosecution. *Cambindo Valencia*, 609 F.2d at 637. The relevant language of the court’s opinion is not restricted to her plea agreement claim.

is significant not just because the omission calls into question the accuracy of her memory and may therefore be used to impeach her credibility. It is also significant because it strongly indicates that Ms. Maxwell was *not involved* in the crimes alleged in Counts Five and Six. In other words, it is *exculpatory* information under *Brady*. See, e.g., *United States v. Torres*, 719 F.2d 549, 550-51 (2d Cir. 1983) (eye witness’s inability to recognize defendant as a participant in bank robbery shortly after crime took place was exculpatory under *Brady*).

The government attempts to mitigate the exculpatory significance of these statements by noting two points: (1) the FBI did not ask Accuser-4 any questions about Ms. Maxwell during her 2007 interview, and (2) when Accuser-4 testified at a civil deposition sometime after her FBI interview, she referenced Ms. Maxwell. (Opp. at 21). The first point simply highlights the government’s persistent inability—or worse, stubborn unwillingness—to recognize and identify *Brady* material squarely in its possession. Presumably, under the government’s logic, it would only be obligated to disclose Accuser-4’s prior statements if the FBI had specifically asked her about Ms. Maxwell and she had denied that Ms. Maxwell played any role in her alleged abuse. The Court should not interpret the government’s *Brady* obligations so narrowly and the government has cited no case holding that it must.<sup>6</sup>

The second point does nothing to blunt the exculpatory significance of Accuser-4’s omission; in fact, it underscores it. It is clear from the grand jury testimony of Special Agent Kuyrkendall that the FBI specifically asked Accuser-4 who scheduled her massage appointments

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<sup>6</sup> The government has provided only two quasi-*Brady* disclosures in this case, although it made certain to point out in each case that it did not view the information as *Brady* material and the disclosure was only being made “in an abundance of caution.” On November 9, 2020, the government disclosed that a witness told the Palm Beach Police Department in 2005 that Epstein “likes girls that are between the ages of 18 and 20.” On February 26, 2021, the government disclosed that ██████████ told the FBI in 2006 that there was a “rumor is that [Epstein] is gay.” It is unfathomable that the government would view these disclosures as potential *Brady* material, but not the very first statement given by the critical eye witness at the center of Counts Five and Six, in which she never mentioned Ms. Maxwell.

and reviewed phone records with her to determine which people she had spoken to on the phone about those appointments. (*See* Mem. at 9-10 & Ex. C at 25:1-6, 56:20-25). At that time, Accuser-4 identified only [REDACTED] not Ms. Maxwell, as the person who scheduled her appointments. (*Id.*). Had Ms. Maxwell, in fact, scheduled massage appointments, Accuser-4 would certainly have mentioned that to the FBI even without being asked directly about Ms. Maxwell. Moreover, at the time of her later deposition, Accuser-4 was represented by an attorney who also represented several other alleged victims who were suing Epstein for money and actively seeking to implicate Ms. Maxwell and others to increase the damages. Hence, the fact that Accuser-4 suddenly remembered Ms. Maxwell some years later as someone who allegedly made some phone calls only bolsters the exculpatory nature of her original omission.

Accordingly, Accuser-4's prior statements to the FBI, and any other prior statements in which she did not mention Ms. Maxwell, are exculpatory *Brady* material that the government must immediately produce to the defense pursuant to the Court's prior order:

The Government must disclose to the defense all information 'favorable to an accused' that is 'material either to guilt or to punishment' and that is known to the Government. . . . The Government shall disclose such information to the defense *promptly after its existence becomes known to the Government* so that the defense may make effective use of the information in the preparation of its case.

(Dkt. 68 at 1) (emphasis added).

#### **IV. The Court Should Grant Ms. Maxwell's Other Requested Relief.**

With respect to the other relief requested in her supplemental pretrial motions, Ms. Maxwell relies on the arguments raised in her opening memorandum and her initial pretrial motions related to the S1 Indictment. For the reasons set forth in those submissions, the Court should (1) dismiss Counts Five and Six as time-barred, (2) dismiss Count Five and either Count

One or Count Three as multiplicitous, (3) dismiss the S2 Indictment for pre-indictment delay, and (4) order the government to file a Bill of Particulars as to Counts Five and Six.<sup>7</sup>

### CONCLUSION

For the foregoing reasons, Ms. Maxwell respectfully requests that the Court (1) dismiss Counts One, Three, Five, and Six of the S2 Indictment for breach of the NPA, (2) dismiss Counts Five and Six of the S2 Indictment for violation of Ms. Maxwell's rights under the Double Jeopardy Clause, (3) order the government to produce Accuser-4's prior statements as *Brady* material, and (4) grant her other requested relief.

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New York, New York

Respectfully submitted,

/s/ Christian R. Everdell

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<sup>7</sup> Ms. Maxwell notes that her request for a Bill of Particulars includes a request that the government identify the other unnamed co-conspirators who allegedly participated in the conspiracy charged in Count Five with Epstein and Ms. Maxwell. (Mem. at 23-24). Ms. Maxwell's initial pretrial motions included a similar request for the conspiracies charged in Counts One and Three. (Dkt. 148-1, Ex. A). For the reasons set forth in the May 21, 2021 joint letter to the Court, Ms. Maxwell requests that the government provide this information to the defense, along with any purported co-conspirator statements the government intends to offer at trial, at the same time the government produces Jencks Act/3500 material. (See Dkt. 291 at 10-12).

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 28, 2021, I served by email, pursuant Rule 2(B) of the Court's individual practices in criminal cases, the within memorandum upon the following:

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*/s/ Christian R. Everdell*  
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