

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,

v.

JORGE LORENZO-HERNANDEZ,

Defendant.

1:26-mj-0002-EAH

TO: Martin Forrest, IV, Esq., AUSA
Terry Frederick, Esq., AFPD

REPORT & RECOMMENDATION

THIS MATTER comes before the Court on the Government's Motion to Dismiss Complaint Without Prejudice, filed on March 30, 2026 by AUSA Martin J. Forrest, IV. Dkt. No. 20. Defendant Jorge Lorenzo-Hernandez, through AFPD Terry Frederick, filed a Response on March 31, 2026, noting that he had no objection to the dismissal but requested that the Court order dismissal with prejudice. Dkt. No. 22. The Government filed a Reply on April 6, 2026. Dkt. No. 23. For the reasons that follow, the Court recommends that the District Judge grant in part and deny in part the Government's Motion. The Court recommends that the Motion be granted to the extent that it will dismiss the case, but recommends that the Motion be denied to the extent the Government asks that the case be dismissed without prejudice.

BACKGROUND

The Government initiated this case through the filing of a Criminal Complaint on March 24, 2026 charging the Defendant with a violation of 8 U.S.C. § 1326(a) and (b)(2), Reentry of a Removed Alien subsequent to an aggravated felony conviction. Dkt. No. 1. In the Affidavit in support of the Complaint, a Special Agent employed by the U.S. Department of

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Homeland Security, Immigration & Customs Enforcement, Homeland Security Investigations (“HSI”) averred that, on March 21, 2026, U.S. Border Patrol Agents were conducting roving patrol operations in Christiansted, Virgin Islands and encountered the Defendant at a construction site. Dkt. No. 1-1. The Defendant fled but the Agents were able to detain him. *Id.* He “freely admitted being a citizen and national of the Dominican Republic unlawfully present in the United States.” *Id.* He was arrested and transported to Puerto Rico for further investigation. Once there, it was learned that the Defendant entered legally as an immigrant in 1993; he was arrested in 1997 and convicted in 2000 of conspiracy to kidnap and using a machine gun to commit a federal crime; in 2007, his legal immigration status in the United States was cancelled, a Notice of Removal was issued, and he was removed from the United States. *Id.* The Defendant traveled to Tortola, BVI, in October 2025, illegally re-entered the United States in November 2025, and resided on St. Croix until his encounter with immigration authorities in March 2026. *Id.*

After Mr. Lorenzo-Hernandez’s initial appearance on March 24, 2026, the Government moved for detention, primarily arguing that the Defendant posed a risk of flight, and moved to proceed by affidavit at the detention hearing and preliminary hearing. Dkt. Nos. 8, 9. The Court granted the motion to proceed by affidavit. Dkt. No. 11. At the March 27, 2026 Detention Hearing, the Government again focused on the risk of flight factor as supporting detention. The Court denied the Motion, ruling that the Government had not met its burden to establish the Defendant’s risk of flight. The Court set conditions of release, including that the Defendant provide a third-party custodian. Because the Defendant had not

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presented a third-party custodian to the Court at that time,¹ he could not comply with the conditions of release and the Court ordered him detained.

The Government indicated that there was an ICE detainer on the Defendant. This prompted the Court to remark that the Government had brought the criminal case, and expected the Defendant to be in Court to address the matter. The Court asked the Assistant U.S. Attorney to inform his superior about the Court's position.

When the hearing resumed later in the afternoon, the proposed third-party custodian testified. The Court released the Defendant on a \$10,000 unsecured appearance bond, Dkt. No. 15, and set other conditions of release, Dkt. No. 16.

On March 30, 2026, the Government filed the instant Motion to Dismiss without Prejudice; its reasoning was that dismissal would be "in the interest of justice" apparently because "the defendant was taken into Immigration and Customs Enforcement custody." *Id.* It also noted that Defendant's counsel "concur[s] with a dismissal but thinks the classification should be with prejudice." *Id.* at n.1. In a similarly-brief Response, the Defendant indicated that he had no objection to dismissal but requested that the Court order dismissal with prejudice. Dkt. No. 21. In support of that request, the Defendant referred the Court to the opinion of now-retired Senior Judge Wilma A. Lewis on February 10, 2026 in the case of

¹ Although a third-party custodian was present at the detention hearing, the Defendant had not procured an interpreter for the Defendant and counsel to communicate with each other. The Court continued the hearing so that the Defendant could find an interpreter, and the hearing resumed later that afternoon.

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United States v. Linarez-Lugo, 1:25-cr-0006, Dkt. No. 32, given that that case was “analogous in all relevant respects” to this case. *Id.*

In its Reply, the Government pointed out that the Defendant had not provided any additional analysis as to his reliance on *Linarez-Lugo*, and that case was currently on appeal. Dkt. No. 23. It also quoted at length the opinion in *United States v. Erickson*, No. 3:19-cr-0053, 2024 WL 81290, at *5 (D.V.I. Jn. 8, 2024), holding that a court’s role in granting leave to dismiss under Rule 48(a) is limited. Denial of a Rule 48(a) motion was permitted if dismissal would be “clearly contrary to manifest public interest” and that language equated to a finding of prosecutorial bad faith. Dkt. No. 23 at 1-2 (quoting *Erickson*, 2024 WL 81290 at *5). The Government was entitled to a presumption of good faith, and a defendant must rebut that presumption. *Id.* at 2 (citing *Erickson*).

The Government added that the Defendant was released from pretrial detention on March 27, 2026 and was taken into immigration custody that same day, and it promptly moved to dismiss on the next business day, March 30, 2026. *Id.* Given that there was no indication of bad faith, the Complaint should be dismissed without prejudice. *Id.*

DISCUSSION

I. Legal Standards

A. Federal Rule of Criminal Procedure 48(a)

Federal Rule of Criminal Procedure 48(a), entitled “Dismissal,” provides:

By the Government. The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant’s consent.

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Fed. R. Crim. P. 48(a). Dismissal pursuant to Rule 48(a) is generally without prejudice. *United States v. Galloway*, No. 12-cr-0020, 2013 WL 4712042, at *1 (D.V.I. Aug. 30, 2013).

A court is “generally required to grant a prosecutor's Rule 48(a) motion to dismiss unless dismissal is ‘clearly contrary to manifest public interest.’” *United States v. Benjamin*, No. 24-cr-00015, 2025 WL 1918021 at *2 (D.V.I. July 12, 2025) (quoting *In re Richards*, 213 F.3d 773, 787 {3d Cir. 2000}). As the Court stated in *Galloway*:

Rule 48's principal purpose is to protect criminal defendants from “prosecutorial harassment”—“the danger that a prosecutor will engage in a cycle of levying and dismissing charges against a particular defendant.” *Richards*, 213 F.3d at 786; *see also United States v. Derr*, 726 F.2d 617, 619 (10th Cir. 1984) (“The primary purpose of the requirement that the prosecutor obtain leave of court is to prevent harassment of a defendant by a prosecutor's charging, dismissing, and recharging the defendant with a crime.”) (citing *Rinaldi*, 434 U.S. at 29 n.15). Other situations in which dismissal would be “clearly contrary to manifest public interest” include cases “in which the prosecutor appears motivated by bribery, animus towards the victim, or a desire to attend a social event rather than trial.” *Richards*, 213 F.3d at 787 (citing *United States v. Hamm*, 659 F.2d 624, 630 (5th Cir. 1981)). Rule 48(a) can also function as a “sunshine” provision that increases accountability by requiring the Government to articulate the reasons for its prosecutorial decisions. *See Richards*, 213 F.3d at 788. By inquiring into the Government's reasons for dismissal, courts can ensure that judicial processes are not being abused. *See id.*

Several courts have held that the decision to grant or deny the Government's motion for leave to dismiss under Rule 48(a) can be resolved by determining whether the prosecutor was acting in good faith by moving for dismissal.

Galloway, 2013 WL 4712042, at *2.

However, “[n]otwithstanding the significant limitations on a court's authority to deny a Rule 48(a) motion to dismiss altogether, a court retains discretion to determine whether a

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dismissal should be with or without prejudice.” *United States v. Adams*, 777 F. Supp. 3d 185, 214 (S.D.N.Y. 2025) (noting that “the First, Seventh, and Tenth Circuits have either affirmed such dismissals [with prejudice under Rule 48] or otherwise endorsed the practice” and that “[n]umerous district courts have dismissed prosecutions with prejudice, even when the government seeks dismissal without it[.]”).

When courts in the District of the Virgin Islands have addressed motions for Rule 48(a) dismissals with or without prejudice, they have considered numerous factors. For example, in *Erickson*, 2024 WL 81290, at *5, the Court examined the issue of bad faith in dismissing with prejudice. In *United States v. Lang*, No. 15-cr-00013, 2021 WL 2169513, at *1 (D.V.I. May 27, 2021), the Court considered whether there was a risk of prosecutorial harassment from re-charging the offenses, and in *Galloway*, 2013 WL 4712042, at *3, the Court examined multiple reasons for dismissal with prejudice (prosecutorial harassment and gamesmanship and bad faith). Thus, while bad faith is a relevant and can be a possibly determinative consideration in Rule 48(a) dismissals, it is not the sine qua non requirement in this District for dismissal with prejudice that the Government argues it is and upon which it relied in its Reply.

B. Intersection of Rule 48(a) and Immigration Actions

As Senior Judge Lewis wrote in *Linarez-Lugo*,

The Third Circuit has held that “detention of a criminal defendant pending trial pursuant to the [Bail Reform Act (“BRA”)] and detention of a removable alien pursuant to the [Immigration and Nationality Act (“INA”)] are separate functions that serve separate purposes and are performed by different authorities.” *United States v. Soriano Nunez*, 928 F.3d 240, 245-46 (3d Cir.

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2019) (citation modified) (denying a defendant's motion asking the Court to order her to be released from ICE detention due a Court's standing BRA release order). Thus, a defendant's "detention for removal purposes does not infringe on an Article III court's role in criminal proceedings." *Id.* at 246; *see also United States v. Soufan*, 2019 WL 1672418 at *3 (D.V.I. Apr. 17, 2019) ("ICE's detention of an inadmissible alien does not offend separation-of-powers principles simply because a federal court, acting pursuant to the BRA, has ordered that same alien released pending his criminal trial." (citation modified)). Indeed, "nothing in either the INA or the BRA gives a court the authority to require the Executive to choose which laws to enforce." *Soriano Nunez*, 928 F.3d at 247. Further, "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* (citation omitted). Thus, "[i]f the Executive Branch wants to prioritize deportation over prosecution, that is its prerogative." *United States v. Herrera-Quino*, 2024 WL 376677 at *6 (D.N.J. Feb. 1, 2024)[.]

Linarez-Lugo, 2026 WL 370852, at *1. Thus, while criminal prosecutions and immigration actions run on separate tracks that may or may not intersect, defendants have recently raised the issue of Rule 48(a) dismissals of criminal cases being with prejudice if the Government has taken a defendant into immigration custody while the criminal case is pending. In this regard, "some courts have deemed dismissal with prejudice to be warranted" while other courts "have determined dismissal without prejudice to be an adequate remedy." *Linarez-Lugo*, 2026 WL 370852, at *2 (quoting *United States v. Tamup-Tamup*, No. 25-cr-0066, 2025 WL 2662293 at *1 (D.R.I. Sept. 17, 2025) (citing cases)). Other courts "have warned the government that [the Government] must decide whether to pursue criminal charges or deportation." *Id.* (quoting *Tamup-Tamup*, 2025 WL 2662293 at *1).

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II. Application

At this point, due to the dearth of information provided by the Government in its three-sentence Motion to Dismiss, the Court does not know whether the Defendant is in a detention facility somewhere in the United States (on the mainland or in a Territory) or whether he has been deported to the Dominican Republic. The Court will assume the latter, since that is the goal of the ICE detainer placed on the Defendant that has truncated this criminal proceeding.

Here, the Court concludes that the analysis in *Linarez-Lugo* is on point. First, dismissal of the complaint is appropriate in light of the Defendant's apparent deportation to the Dominican Republic and inability to be returned to the United States for trial. *See United States v. Balde*, No. 25-cr-0294, 2025 WL 2476710, at *2 (S.D.N.Y. Aug. 28, 2025) (dismissal of the case warranted because "Defendant is no longer in the United States and extradition from [the country to which Defendant was deported] is not possible. Moreover, he presently has no legal status in the United States and therefore cannot return voluntarily for trial.").

Second, as the *Linarez-Lugo* Court went on to say,

Dismissal is also warranted given that ICE's deportation, or anticipated deportation, of Defendant via civil administrative proceedings has interfered with her Sixth Amendment right to "consult with counsel, to review the evidence against him, and to prepare a defense to the charges" in these criminal proceedings. *Id.* (citation modified); *see also United States v. Escobedo-Molina*, 790 F.Supp.3d 1283, 1289 (D.N.M. 2025) ("Defendant's deportation has, to put it simply, wrought havoc on his Fifth and Sixth Amendment rights. . . . Defense counsel has been unable to speak with Defendant since he was deported and has no known means of doing so. So, too, have Defendant's Sixth Amendment speedy trial rights been impaired."). Notwithstanding that it is the prerogative of the Executive Branch to pursue deportation, the Executive

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Branch's decision to do so has “substantially undermined” the ability of defense counsel to “communicate formal plea offers to the defendant, provide advice during the plea bargaining process, describe risks in sentencing, give advice about the possibility of deportation, assist in any attempt by the defendant to cooperate with the government, and consult with the defendant on lines of defense” in the instant matter. *Balde*, 2025 WL 2476710 at *2 (collecting cases). The question that remains then, is whether dismissal with or without prejudice is the appropriate exercise of judicial discretion.

Linarez-Lugo, 2026 WL 370852, at *2. The Court therefore recommends granting the Motion to Dismiss to the extent that the Complaint be dismissed.

This Court finds the following analysis from *Linarez-Lugo* persuasive on the issue of whether to dismiss the charging document with prejudice, and recommends that the District Judge adopt it in this case.

“[D]eportation of a defendant during a criminal prosecution does not automatically warrant dismissal of the indictment with prejudice.” *Tamup-Tamup*, 2025 WL 2662293 at *2. However, “it is incumbent on Executive Branch agencies to coordinate their actions to ensure that all criminal defendants’ constitutional and statutory rights are preserved.” *United States v. Guimaraes*, 2025 WL 1899046 at *6 (D. Mass. July 9, 2025); *see also United States v. Munoz-Garcia*, 455 F. Supp. 3d 915, 923 (D. Ariz. 2020) (“[T]he government violated the defendant’s statutory right to be released from custody under the Bail Reform Act when it chose not to comply with the court’s release order and continued to detain the defendant pending her trial . . . [t]he result of those violations should be a dismissal of the criminal charges with prejudice.”); *Tamup-Tamup*, 2025 WL 2662293 at *2 (“The executive branch must make an election: prosecution or release to the detainer. There is nothing unreasonable about requiring the government to make the election[.]” (citation modified)); *United States v. Galvan-Orea*, 766 F. Supp. 3d 740, 747 (E.D. Mich. 2024) (“[T]he Government’s deportation of a defendant during the pendency of criminal proceedings reflects its abandonment of those proceedings.”).

This Court joins other courts in concluding that under circumstances such as these, where the Executive Branch has made trial of the charges brought impossible due to its choice to deport Defendant through alternative

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administrative means for the same conduct that it sought to prosecute in the instant criminal proceedings, “the public interest is best served by dismissing [Defendant’s] indictment with prejudice to reindictment on the same charge.” *Guimaraes*, 2025 WL 1899046 at *6 (“Where ICE unreasonably burdens a criminal defendant’s ability to consult with counsel before deportation, such conduct can justify dismissal of an indictment with prejudice following the defendant’s deportation.”); *see also Tamup-Tamup*, 2025 WL 2662293 at *2 (“Under the present circumstances, however, the Court finds [dismissal of the indictment with prejudice] is well within its discretion and doing so best effectuates justice in this case.”); *Escobedo-Molina*, 790 F. Supp. 3d at 1298 (“The interests served by the Court’s exercise of its supervisory powers to dismiss the charges with prejudice in this case [following Defendant’s deportation] . . . are by themselves significant, and become all the more so as balanced against the comparatively weak interest of the public in continuing the prosecution.”).

Linarez-Lugo, 2026 WL 370852, at *3.

As indicated above, the Court rejects the Government’s argument in its Reply that dismissal with prejudice is only appropriate when there has been prosecutorial bad faith,² as the Court may consider other factors as contrary to the public interest and retains discretion in deciding whether to dismiss with or without prejudice.

RECOMMENDATION

For the reasons set forth above, the Court concludes that it is contrary to the public interest to maintain the viability of a prosecution under circumstances such as these. The Court therefore respectfully **RECOMMENDS** that the Government’s Motion to Dismiss Complaint Without Prejudice, Dkt. No. 20, be **GRANTED IN PART AND DENIED IN PART**.

² The Court also points out the irony of the Government’s critique that the Defendant cited *Linarez-Lugo* “without any additional analysis,” Dkt. No. 23 at 1, when its motion requested dismissal “in the interest of justice” without additional analysis, much less a reference to any case law.

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The Court recommends that the Motion be **GRANTED IN PART** to the extent that the District Judge will **DISMISS** the Complaint. The Court recommends that the Motion be **DENIED IN PART** to the extent that the Government seeks to dismiss the Complaint without prejudice, and that the District Judge dismiss the Complaint **WITH PREJUDICE**.

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice, 28 U.S.C. § 636(b)(1), and must “specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis of such objection.” LRCi 72.3. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

ENTER:

Dated: April 20, 2026

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE