No.

In the Supreme Court of the United States

DONAVAN JAY WHITE OWL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The double jeopardy clause prevents the retrial of a criminal case after mistrial unless the defendant consents or if the mistrial was for manifest necessity.

Donavan White Owl did not consent to the mistrial however the Eighth Circuit determined, on an issue of apparent first impression, that a district court may convene a new trial after a mistrial without violating double jeopardy where a defendant impliedly consents to the mistrial and that Mr. White Owl's consent was implied.

The question presented is whether implied consent is valid consent to waive double jeopardy protections and if it is what qualifies as implied consent?

RELATED PROCEEDINGS

United States v. White Owl, 1:19-cr-00068, United States District Court (North Dakota), Order entered denying motion to dismiss on double jeopardy grounds June 13, 2023, jury trial currently scheduled for September 16, 2024.

United States v. White Owl, 23-2431, Eighth Circuit Court of Appeals, Judgment entered April 9, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donavan Jay White Owl respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

United States v. White Owl, No. 23-2431, 2024 WL 1519874 (8th Cir. Apr. 9, 2024)

United States v. White Owl, 93 F.4th 1089 (8th Cir. 2024)

United States v. White Owl, 1:19-cr-00068, June 13, 2023 (Appendix G), June 15, 2023 (Appendix H)

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . .."

> 18 U.S.C. § 3500
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United

States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion

of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

***

STATEMENT

By Indictment filed May 8, 2019 Donavan Jay

White Owl, was charged in Count 1 with Felony Murder within Indian Country; and in Count 2 with Arson within Indian Country. R. Doc. 16.

The charges derived from a cabin fire that resulted in the death of one of its occupants on or about April 4, 2019. Id. The cabin was in rural Mandaree, North Dakota. Id.

On August 10, 2022 the District Court filed an Order setting the jury trial for 2 weeks to begin on March 14, 2023. R. Doc. 133.

Prior to the commencement of trial, the United States noticed its intent to call James Lovejoy to testify that Mr. White Owl confessed to Mr. Lovejoy while in custody together.

Prior to the commencement of trial, Mr. White Owl filed a motion to exclude the testimony of Mr. Lovejoy based in part on the argument that the United States had provided no discovery regarding Mr. Lovejoy's reliability. R. Doc. 162, 1:4. The Court denied Mr. White Owl's motion (R. Doc. 162) without prejudice. R. Doc. 182, 8:14-15.

On March 14, 2023 the jury was sworn in and the trial commenced. R. Doc. 199, 2.

On March 15, 2023, in opening statement, the United States stated to the jury that the jury would hear from Mr. Lovejoy and "the defendant's admissions to Mr. Lovejoy." R. Doc. 214, Trial Transcript Volume II, page 15, line 6 to 7 (TII, 15:6-7). On that day the United States called 7 witnesses but not Mr. Lovejoy. TII, 3.

On March 16, 2023 the United States called 5 witnesses, but not Mr. Lovejoy. TIII, 3.

On March 17, 2023 the United States called 4 witnesses, but not Mr. Lovejoy. TIV, 3.

After a weekend break the jury trial resumed on March 20, 2023 and the United States called 6

witnesses, but not Mr. Lovejoy. TV, 3. Later that day the United States indicated to the Judge that they intended to call Mr. Lovejoy the following day, March 21, 2023. TV, 153:22-154:5.

On March 21, 2023 the United States was on its fourth witness of the day when after a recess outside the hearing of the jury the United States advised the District Court that they were "getting close to the point of resting." TVI, 104:7-14. The District Court then brought up Mr. Lovejoy and how to address the issue of his being in custody to the jury. TVI, 104:17-105:1.

In anticipation of Mr. Lovejoy being called as a witness, Defense Counsel asked if the Court could take a break at the conclusion of Mr. Lovejoy's direct in order to make a motion outside the hearing of the jury regarding undisclosed impeachment information on Mr. Lovejoy. TVI, 106:8-110:15. Defense Counsel was requesting to review impeachment materials prior to conducting a cross of Mr. Lovejoy, specifically asking for an unredacted version of Mr. Lovejoy's proffer meeting, the statements taken by Agent Lipponen of Mr. Lovejoy, Mr. Lovejoy's pretrial release report, Mr. Lovejoy's plea agreement supplement, and a version of Mr. Lovejoy's jail log without the edge cut off. TVI, 109:20-110:7.

The United States responded to the District Court's inquiry regarding the materials requested by Defense Counsel by first claiming the plea agreement supplement had been previously disclosed, the unredacted proffer interview was only available for Defense Counsel to listen to at the Office of the United States Attorney due to an ongoing investigation, and the other materials had not been disclosed. TVI, 110:20-112:2. Defense Counsel explained that the plea agreement supplement had in fact not been

disclosed. TVI, 112:5-14. The District Court then ordered that "Mr. Lovejoy will not be allowed to testify in this proceeding until and unless [Defense Counsel] is provided with each and every one of those documents and provided sufficient time to review them." TVI, 112:25-113:4. The District Court explained to the United States that

> [y]ou can call everybody else. But if you don't have Lovejoy queued up and ready to go, we're going to take a break for the day, [Defense Counsel] can do that, and we're going to call him tomorrow morning. But we're not going to play this ambush game where information is provided to him or not provided to him. [Defense Counsel] needs all of this information before the one witness that you have connecting Mr. White Owl to this incident testifies.

TVI, 113, 5-12.

The District Court called the jury in and the trial continued with the United States calling 2 more witnesses. The District Court sent the jury out for the day and addressed the issue regarding Defense Counsel's request for impeachment materials on Mr. Lovejoy. TVI, 206:24-216:7. The District Court then concluded the day with instructions for the following day stating

> [w]e'll go on the record with Mr. Hill for as long as that takes with the cross-examination. We'll take a break to finish up whatever [Defense Counsel] needs to review prior to Mr. Lovejoy testifying. And then once I receive some confirmation from [Defense Counsel] that he has received everything that he

> believes he should receive, we will have Mr. Lovejoy testify. But until I get that assurance from [Defense Counsel] that he is happy with everything that the United States has provided, there will be no testimony from Mr. Lovejoy. We need to make sure that [Defense Counsel] has everything that he needs to cross-examine and challenge the credibility of this gentleman before he testifies.

TVI, 215:19-216:5.

The following day, March 22, 2023, began outside the hearing of the jury with the District Court providing a timeline. TVII, 5:18-7:10. The District Court then stated that

> [t]he United States Constitution requires the Government to disclose exculpatory and impeachment evidence in criminal cases when such evidence is material to guilt or punishment, according to Brady versus Maryland, 373 U.S. 83 and Giglio versus United States, 405 U.S. 150, this falls under the guarantee to a fair trial. This information must be disclosed regardless of whether the defendant requested the information, Kyles v. Whitley, 514 U.S. 419.
>
> To determine whether the evidence is material, the Court looks to whether there is a reasonable probability that the evidence -- that the effective use of the evidence will result in an acquittal, according to United States v. Bagley, 473 U.S. 667. Failure to disclose this information violates the Constitution

> irrespective of the good faith or bad faith of the prosecution according to Giglio.

TVII, 7:11-25. The District Court then granted Mr. White Owl's renewed motion to exclude Mr. Lovejoy's testimony. TVII, 81-5.

The United States responded to the Court and the Court explained further that "[t]his misconduct is not appropriate. Mr. White Owl's Constitutional rights have been violated, and I am not going to stand for it. You can make your record but my ruling stands." TVII, 9:13-16. After further argument by the United States the District Court again explained that "[t]he Court will not reconsider its position. The ruling stands." TVII, 10:12-13. The United States continued to argue and requested a break to consult with supervisory attorneys. TVII, 12:2-4. The United States returned after break and continued to argue for the District Court to reconsider and the District Court ultimately explained that

> if the Court were to allow Mr. Lovejoy to testify at this late stage in the proceeding, I would be requiring [Defense Counsel] to play catchup. And that is an unacceptable situation for defense counsel, and it is a result of the poor practice on the part of the United States in fulfilling their obligations. So the Court's ruling will stand.

TVII, 15:22-16:3. The United States continued to argue and remind the District Court of the Jencks Act (18 U.S.C. § 3500), the District Court refused to reconsider and proceeded with the trial. TVII, 16:5-25.

A recess was taken from 11:08 a.m. to 11:31 a.m. and upon return the District Court reconsidered its ruling to exclude Mr. Lovejoy and instead declared

a mistrial. TVII, 70:1-11. The District Court invited comment from the parties (TVII, 70:12-13) and the United States suggested in the alternative to a mistrial to instead continue the trial for even several days and allow Defense Counsel an opportunity to review information before cross examining Mr. Lovejoy. TVII, 70:19-71:13. The District Court asked Counsel for Mr. White Owl how long would be needed to review impeachment material on Mr. Lovejoy and Defense Counsel did not know because Defense Counsel did not know what materials were available to look at. TVII, 79:1-4. Defense Counsel could only speculate and when pressed Defense Counsel ultimately surmised that "[i]t's going to take a bit, like a week, maybe more. I just don't know what's there." TVII, 79:18-19.

The District Court began its conclusion stating "that the power to declare a mistrial over the defendant's objection should be exercised only under urgent circumstances and for very plain and obvious causes." TVII, 80:6-9. The District Court then ultimately determined that

> Mr. Lovejoy's prominence and importance in this case has risen in light of the fact that he appears to be the only person who will allege confirmation on the part of Defendant White Owl that he engaged in this activity. That's my understanding of what Mr. Lovejoy is supposed to testify to. He has significant warts, as the Court has noted. Some of that was disclosed in the NCIC report; but the United States Attorney, again, involved in this case was apparently unaware of some additional information which tends to go to the veracity of Mr.

> Lovejoy and was not available to the AUSA's prosecuting this case or to [Defense Counsel]. The information was in part disclosed last night, but [Defense Counsel] has indicated additional time is needed to evaluate this case.
>
> The Assistant U.S. Attorneys involved in this case requested a continuance of the matter for days to allow [Defense Counsel] to review additional information. [Defense Counsel] has indicated he would like to get into the underlying case of Mr. Lovejoy's criminal conspiracy. That may not be necessary. But what [Defense Counsel] should be able to review and consider is the statements that Mr. Lovejoy made concerning others and the veracity of those statements. He should also be given an opportunity to depose Mr. Lovejoy if he thinks that that is appropriate.
>
> In light of that delay, I am unwilling to maintain this jury and grant a brief continuance. And, therefore, I believe a manifest necessity exists to grant a mistrial in this case. The United States needs to be able to present its case including Mr. Lovejoy, warts and all, but defense counsel needs to prepare himself for trial including a thorough examination and cross-examination of Mr. Lovejoy and his record of veracity. And that is my decision.

TVII, 81:17-82:22.

Subsequent to the mistrial Mr. White Owl filed

a motion to dismiss on double jeopardy grounds because he did not consent to the *sua sponte* declaration of a mistrial. The District Court denied Mr. White Owl's double jeopardy motion and Mr. White Owl filed a notice for interlocutory appeal to the Eighth Circuit.

The Eighth Circuit opinion held that "we have jurisdiction over an appeal of the district court's order denying the motion. Abney v. United States, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). We conclude that White Owl impliedly consented to the mistrial, and that a new trial is therefore not forbidden by the Constitution." United States v. White Owl, 93 F.4th 1089, 1091 (8th Cir. 2024).

Mr. White Owl petitioned for rehearing and the Eighth Circuit denied the petition. United States v. White Owl, No. 23-2431, 2024 WL 1519874 (8th Cir. Apr. 9, 2024).

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, that being whether implied consent is valid consent to exclude the protections afforded by the Double Jeopardy Clause of the Fifth Amendment. As a case of first impression the Eighth Circuit reasoned that:

> The record in this case does not include an affirmative request for mistrial by the defendant, but we do not think the rule allowing a new trial should be limited to cases of express consent. The law commonly recognizes that consent may be manifested in various ways, and gives

> effect to consent that is either express or implied. . . . We see no reason why the rule should be different in the context of double jeopardy.

United States v. White Owl, 93 F.4th 1089, 1093 (8th Cir. 2024).

This Court has yet to address whether implied consent is valid consent to exclude the protections of the Double Jeopardy Clause and if it is valid what implied consent is to be defined as. For Mr. White Owl was essentially punished because his request for as much time as he could get to review an unknown amount of information prior to conducting cross examination of a witness that had not been called was determined to be implied consent for a mistrial. "As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949). Oregon v. Kennedy, 456 U.S. 667, 671–72, 102 S. Ct. 2083, 2087, 72 L. Ed. 2d 416 (1982). Interpreting Mr. White Owl's request for time to review undisclosed information prior to cross examination as implied consent to a mistrial wrongfully denies Mr. White Owl his protection afforded by the Double Jeopardy Clause to have his trial completed by a particular tribunal.

The Double Jeopardy Clause of the Fifth Amendment is not implicated when a defendant has consented to a mistrial, because consent, like "[a] defendant's motion for a mistrial[,] constitutes 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.' " Oregon v. Kennedy, 456 U.S. 667, 676 (1982) (quoting United States v. Scott, 437 U.S. 82, 93 (1978)); see also Scott, 437 U.S. at 99–100.

Thus, "the defendant, by deliberately choosing to seek termination of the proceedings against him . . . , suffers no injury cognizable under the Double Jeopardy Clause." Scott, 437 U.S. at 98–99. The Double Jeopardy Clause "does not relieve a defendant from the consequences of [a] voluntary choice." Currier v. Virginia, 138 S. Ct. 2144, 2151 (2018) (quoting Scott, 437 U.S. at 99). Ultimately, then, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." United States v. Dinitz, 424 U.S. 600, 609 (1976).

Case law on the issue of waiver in the context of a mistrial declared *sua sponte* reflects that a defendant's failure to object to a mistrial is not dispositive, in fact the District Court acknowledged the same in both the Order denying Mr. White Owl's double jeopardy motion (R. Doc. 226, page 10 footnote 2)("It appears the Eighth Circuit has not explicitly addressed the question of whether a criminal defendant's failure to object to a declaration of a mistrial constitutes a waiver of the right to bring a double jeopardy claim if he is retried. See Shaw v. Norris, 33 F.3d 958, 961 (8th Cir. 1994) (declining to answer the question). See, e.g., United States v. Gantley, 172 F.3d 422, 428 (6th Cir. 1999) (finding implied consent to a mistrial may bar a double jeopardy claim under certain circumstances). The Eighth Circuit's case of Ford is somewhat unique in that the defendant explicitly agreed to wanting a mistrial declared after the court, on its own motion, asked him if that was his desired course. Ford, 17 F.3d at 1102.") and the Order filed after Mr. White Owl's notice of appeal (R. Doc. 232)("The Court reiterates the Eighth Circuit has not explicitly answered the question of whether a criminal defendant who does

not object to the declaration of a mistrial waives his right to bring a double jeopardy claim. See R. Doc. No. 226, p. 10, n.2. See, e.g., United States v. Morgan, 929 F.3d 411, 424 (7th Cir. 2019) ("[C]onsent to a new trial, implicit or otherwise, forecloses any later objection to double jeopardy.")").

Federal Rule of Criminal Procedure 26.3 provides that "[b]efore ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." Federal Rule of Criminal Procedure 26.3 does not provide that if a defendant fails to consent or object the district court will consider a defendant to have consented. The District Court did not specifically ask anyone if they consented or objected but the District Court did comment "that the power to declare a mistrial over the defendant's objection should be exercised only under urgent circumstances and for very plain and obvious causes" leaving Mr. White Owl to believe that the District Court believed that Mr. White Owl objected to a mistrial. TVII, 80:6-9.

"The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." Dinitz, 424 U.S. at 609. That did not happen for Mr. White Owl however because his request for more time to review information prior to conducting cross examination was interpreted as implied consent to a mistrial. The District Cout doing so wrongfully usurped primary control over the course to be followed that resulted in a *sua sponte* declaration of a mistrial instead of giving Mr. White Owl time to review the undisclosed information before conducting cross examination in the event that the witness was called

to testify.

The District Court did not conclude that Mr. White Owl "deliberately cho[ ]s[e] to seek termination of the proceedings against him." Scott, 437 U.S. at 98–99. Instead, the District Court's decision to imply consent in the circumstances emphasized the failure of Mr. White Owl's counsel to raise an unsolicited objection to a potential mistrial, effectively applying waiver or forfeiture principles to the Double Jeopardy Clause. But "traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error." Dinitz, 424 U.S. at 609. Absent manifest necessity for a mistrial, Supreme Court case law demands "consent" – not waiver or forfeiture, before a defendant may be retried. See id. at 606–07 (emphasis added). Because the implied consent found by the District Court amounts to waiver or forfeiture of Mr. White Owl's rights under the Double Jeopardy Clause of the Fifth Amendment, the implied consent concept used by the District Court and the Eighth Circuit based on Defense Counsel's failure to object should not be adopted. See Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694 (1966)("But a valid waiver will not be presumed simply from the silence of the accused . . .").

Defense Counsel in response to the District Court's declaration of a mistrial asked for as much time as possible to review materials unknown to Defense Counsel and ultimately thought a "week maybe more." TVII, 79:18-19. The District Court then instead of giving Defense Counsel time explained "that a manifest necessity is a high degree of necessity and that the power to declare a mistrial over the defendant's objection should be exercised only under

urgent circumstances and for very plain and obvious causes." TVII, 80:7-9. The District Court did not say that Mr. White Owl consented or failed to object and instead recited the standard for when a defendant objects, leaving Mr. White Owl to believe that the District Court knew that Mr. White Owl did not consent to a mistrial. The District Court was not even willing to grant a brief continuance and Mr. Lovejoy had yet to be called as a witness. Under these circumstances Mr. White Owl's consent cannot be implied because there is no positive indication in the record of any willingness by Mr. White Owl to consent to the District Court's *sua sponte* declaration of a mistrial and waive his Fifth Amendment rights under the Double Jeopardy Clause. See Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694 (1966)("This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) . . .").

No party requested a mistrial. The Defendant did not make a motion for a mistrial and the District Court never asked the Defendant if he consented to a mistrial. Instead, the District Court converted Defense Counsel's request to review undisclosed impeachment evidence into a mistrial. Defense Counsel's request for time to review undisclosed impeachment materials prior to the cross examination of a witness that had not been called is not implied consent to a mistrial nor is it any type of consent to a mistrial.

The Eighth Circuit stated that "[t]he record in this case does not include an affirmative request for mistrial by the defendant, but we do not think the rule allowing a new trial should be limited to cases of express consent." United States v. White Owl, 93

F.4th 1089, 1093 (8th Cir. 2024). That determination conflicts with the opinion in United States v. Jorn, 400 U.S. 470, 485 (1971) where the Supreme Court stated that

> [i]n the absence of such a motion [for mistrial], the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See United States v. Perez, 9 Wheat., at 580.

The Supreme Court in Jorn discussed that a defendant's consent to a mistrial does not bar reprosecution but then went on to mandate that in the absence of a motion for mistrial the Perez doctrine stands as a command to trial judges not to foreclose the defendant's option. Because there was an absence of a motion for a mistrial the District Court was commanded not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. The Eighth Circuit decision is in conflict with and circumvents the United States Supreme Court decision in Jorn by creating an implied consent exception to the requirement that in the absence of a motion for mistrial the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

Defense Counsel did not make a motion for a

mistrial or any affirmative request for a mistrial and the District Court stated to Defense Counsel that it would not grant even a brief continuance, therefore any assumption as to how much time Defense Counsel asked for is irrelevant because the District Court would not grant it, meaning if Defense Counsel wanted time to view the undisclosed evidence before cross examination the District Court was going to declare a mistrial. The Eighth Circuit decision now forces defendants to forego viewing undisclosed impeachment evidence before conducting cross examination or suffer a mistrial with no Double Jeopardy protection. The Eighth Circuit decision thus violates the doctrine of unconstitutional conditions by conditioning the granting of time to review undisclosed impeachment evidence before conducting cross examination upon waiving the valued Constitutional right of a defendant to have his trial completed by a particular tribunal. Compare Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."); Compare Perry v. Sindermann, 408 U.S. 593, 597 (1972)("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a

benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible."); United States v. Jorn, 400 U.S. 470, 484 (1971).

Note that at the time the District Court *sua sponte* declared a mistrial the witness had not testified. Pursuant to the Jencks Act Defense Counsel was unable to compel and the District Court was unable to order the prosecution to disclose impeachment evidence prior to the witness testifying. 18 U.S.C.A. § 3500 (a) ("In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."). The Jencks Act mandates that

> [a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his

> examination and use.

18 U.S.C.A. § 3500(b). The Jencks Act then goes on to state that

> [w]henever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

18 U.S.C.A. § 3500(c). The Eighth Circuit decision fails to recognize that the District Court failed to follow the Jencks Act and instead of recessing proceedings subsequent to the Defendant receiving Jencks Act evidence and the Defendant applying for a recess the District Court instead declared a mistrial thus interpreting a defendant's attempt to comply with the requirements of the Jencks Act as implied consent to a mistrial.

The Eighth Circuit decision conflicts with the United States Supreme Court's directive in Jorn that "even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." Jorn, 400 U.S. 470, 486. The District Court ignored the directive in Jorn and the Eighth Circuit decision further exacerbated the conflict by ignoring Jorn and the Jencks Act to instead determine that despite making no affirmative request for a mistrial the Defendant impliedly consented to a mistrial because Defense Counsel did not know how much time he would need to review an unknown

amount of evidence that had yet to be disclosed and was never delivered to the Defendant.

The Eighth Circuit decision punishes Mr. White Owl, who did not voluntarily consent to a mistrial, for Defense Counsel's alleged acquiescence to the District Court's authority. White Owl, 93 F.4th 1089, 1094 ("White Owl already had implied to the court that he would accept a mistrial, and his contention that the court thereafter lulled him into foregoing an objection is unpersuasive."). The decision forces defendants to forego requesting time to review unknown Jencks Act material to avoid mistrial and ultimately circumvents the Jencks Act itself by declaring a mistrial in lieu of actually reviewing the material and determining the reasonable amount of time required for the examination of such material by said defendant and the defendant's preparation for its use in the trial.

CONCLUSION

Implied consent should not be considered valid consent to waive the constitutional protections of the Double Jeopardy Clause of the Fifth Amendment. Further, no Defendant should be considered to have implied consent to a mistrial based on a request to review undisclosed evidence prior to conducting cross examination of a witness that has not been called and may not testify. The Eighth Circuit's definition of implied consent should be reviewed and definitively defined by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2024

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APPENDIX A

2024 WL 1519874
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United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee
v.
Donavan Jay WHITE OWL, also known as DJ, Appellant

No: 23-2431
|
April 9, 2024

Appeal from U.S. District Court for the District of North Dakota - Western (1:19-cr-00068-DMT-1)

Attorneys and Law Firms

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Thomas Francis Murtha, IV, Murtha Law Office, Dickinson, ND, for Appellant.

Donavan Jay White Owl, Bismarck, ND, Pro Se.

ORDER

***1** The petition for rehearing *en banc* is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

APPENDIX B

93 F.4th 1089
United States Court of Appeals, Eighth Circuit.
UNITED STATES of America, Plaintiff - Appellee,
v.
Donavan Jay WHITE OWL, also known as DJ,
Defendant - Appellant.
No. 23-2431
|
Submitted: October 17, 2023
|
Filed: February 23, 2024

Opinion

Before SMITH, Chief Judge, LOKEN and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Donovan White Owl appeals an order of the district court* denying his motion to dismiss an indictment based on the Double Jeopardy Clause. In a pending criminal case, the district court declared a mistrial after a jury was seated and jeopardy attached. White Owl maintains that a new trial would impermissibly place him in jeopardy twice for the same offense. He unsuccessfully moved to dismiss the indictment on that basis, and we have jurisdiction over an appeal of the district court's order denying the motion. Abney v. United States, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). We conclude that White Owl impliedly consented to the mistrial, and that a new trial is therefore not forbidden by the Constitution.

I.

White Owl is under indictment for felony murder and arson within Indian Country. See 18 U.S.C. §§ 2, 81, 1111, 1153. Trial commenced on March 14, 2023, but the district court declared a mistrial on March 22 after a dispute over White Owl's access to information about a prosecution witness.

The government intended to call as a witness a fellow detainee of White Owl's to testify that White Owl admitted setting the fire at issue in the case. Before the witness was called, defense counsel told the court that he was missing some materials that might be used to impeach the witness. The district court then ruled that the witness could not testify at trial "until and unless [defense counsel was] provided with each and every one of those documents and provided sufficient time to review them."

White Owl later renewed a motion to exclude the fellow detainee's testimony. The district court granted the motion on the ground that the government's nondisclosure of certain material violated White Owl's rights under the Due Process Clause. See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The court cited information known to the prosecutor handling the witness's criminal case that was not disclosed to the defense by the prosecutors in White Owl's case: "It was a situation where the right hand didn't know what the left hand was doing."

Later the same day, however, the district court reconsidered. The court decided that "the United

States should have a full opportunity to present their case," but that "defense counsel also needs sufficient time to prepare himself for trial" and to perform any additional research or work regarding the history of the witness. The court determined that the "harsh remedy" of excluding the witness's testimony was not warranted, and decided instead to declare a mistrial. But before declaring the mistrial, the district court requested the views of the parties. The government informed the court that it would still call the fellow detainee as a witness and proposed a continuance of several days that would allow defense counsel to prepare further.

The court then requested defense counsel's position on the matter. Defense counsel did not speak directly to the question of *1092 a mistrial, but discussed his desire to review certain discovery material, including material that had been available to the defense all along. The court asked why counsel had not reviewed the material before trial, and counsel replied that he "simply didn't have time." When the court asked defense counsel how long he needed to prepare, counsel said he did not know, but that it would be a matter of days, not merely "an hour." The court asked whether it would be days or weeks, and counsel replied as follows:

> I think it's closer to weeks, Your Honor. I don't have the resources at my disposal of having an investigator that can run – I don't have co-counsel here. I have my paralegal. I'm not rigged for that right now. I have to set up – probably put together another team to work on that. I don't have another investigator at my disposal. And I don't think I have a schedule

> that's going to lend itself well to doing that when I'd have to put everything else on hold to make it happen. It's going to take a bit, like a week, maybe more. I just don't know what's there. Listening to that proffer – and then I'd want to go back and actually be able to have a recording of that I could use, and I agree not to disclose it or any of the things I learn from it. There's a lot to unwrap with [the witness].

The court then explained that in light of the delay that would be required to accommodate defense counsel, the court was "unwilling to maintain this jury and grant a brief continuance." The court determined that "a manifest necessity exists to grant a mistrial" in the case: "The United States needs to be able to present its case including [the fellow detainee], warts and all, but defense counsel needs to prepare himself for trial including a thorough examination and cross-examination of [the witness] and his record of veracity." The court asked defense counsel whether there was "anything else," and counsel said, "No, your Honor." The court discharged the jury and again asked whether there was anything further from the defense. Counsel again said, "No, your Honor."

The district court scheduled a new trial for June 2023. At the pretrial conference, fifteen days before trial, White Owl raised no objection to the new trial. Three days later, however, White Owl moved to dismiss the indictment based on the Double Jeopardy Clause.

The district court denied the motion. The court determined that White Owl's failure to object to the declaration of a mistrial defeated his claim of double

jeopardy. The court also reiterated its conclusion that manifest necessity justified a mistrial. The court explained that "White Owl's counsel was the initiating force who requested time to evaluate newly disclosed impeachment evidence," and declared that the court would "not now succumb to this new delay tactic." We review the district court's legal conclusion de novo. United States v. Pierre, 795 F.3d 847, 850 (8th Cir. 2015).

II.

The Double Jeopardy Clause ordinarily prevents multiple prosecutions for the same offense. Oregon v. Kennedy, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). When a trial is terminated over the objection of a defendant, the Double Jeopardy Clause bars a new trial unless "manifest necessity" required the mistrial. Id. at 672, 102 S.Ct. 2083. But where a mistrial is declared "at the behest of the defendant," different principles come into play. Id. When a defendant consents to a mistrial, "double jeopardy is not implicated unless the conduct giving rise to the mistrial was intended to provoke the defendant *1093 to move for a mistrial." United States v. Ford, 17 F.3d 1100, 1102 (8th Cir. 1994). White Owl argues that he did not consent to the mistrial and that no "manifest necessity" supported the district court's action.

In Ford, we held that a defendant consented to a mistrial where he "first stated that he did not want a mistrial, but immediately changed his mind and requested a mistrial." Id. The record in this case does not include an affirmative request for mistrial by the defendant, but we do not think the rule allowing a new

trial should be limited to cases of express consent. The law commonly recognizes that consent may be manifested in various ways, and gives effect to consent that is either express or implied. E.g., Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023) (plurality opinion); Me. Cmty. Health Options v. United States, 590 U.S. 296, 140 S. Ct. 1308, 1327, 206 L.Ed.2d 764 (2020); Birchfield v. North Dakota, 579 U.S. 438, 476, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 685, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015); Ortiz v. Jordan, 562 U.S. 180, 191 n.7, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011) (quoting Fed. R. Civ. P. 15(b)); Roell v. Withrow, 538 U.S. 580, 589-90, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003).

We see no reason why the rule should be different in the context of double jeopardy. To take one stark example, "[i]f a judge should say: 'I think a mistrial would be a good idea, but think this over and let me know if you disagree', the defendant's silence would be assent." United States v. Buljubasic, 808 F.2d 1260, 1265-66 (7th Cir. 1987). We thus agree with other circuits that a district court may convene a new trial after a mistrial where the defendant impliedly consents to the mistrial. United States v. Gantley, 172 F.3d 422, 428 (6th Cir. 1999); Love v. Morton, 112 F.3d 131, 138 (3d Cir. 1997); Earnest v. Dorsey, 87 F.3d 1123, 1129 (10th Cir. 1996); United States v. Ham, 58 F.3d 78, 83 (4th Cir. 1995); United States v. Nichols, 977 F.2d 972, 974 (5th Cir. 1992); United States v. DiPietro, 936 F.2d 6, 9-10 (1st Cir. 1991); Buljubasic, 808 F.2d at 1265-66; United States v. Puleo, 817 F.2d 702, 705 (11th Cir. 1987); United States v. Smith, 621 F.2d 350, 351-52 (9th Cir. 1980);

United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir. 1973).

Whether a party has impliedly consented is a fact-specific inquiry under the totality of the circumstances. When viewed in context, White Owl's responses to inquiries from the court demonstrated his implied consent to a mistrial in this case. The district court stated its intention to declare a mistrial and asked the parties for their views. The government suggested a continuance of several days to avoid a mistrial. White Owl had a clear opportunity to object to a mistrial, but he instead emphasized the need for more time and resources to prepare for cross-examination of a prosecution witness. When asked how much time he required, White Owl responded that it would be closer to weeks than days. Where the court was seeking to discern whether a short continuance without mistrial was a feasible course, White Owl's insistence that more time was required was an implied consent to the court's proposal of a mistrial. The court asked the parties for further views before the jury was discharged, but White Owl still raised no objection to the court's proposal. The colloquy and non-objection amounted to assent.

White Owl maintains that because the district court referred to the manifest necessity standard when reciting the reasons for a mistrial, he reasonably understood that the court knew of an unstated objection *1094 by the defense. The court, however, is always at liberty to state an alternative basis for a ruling. White Owl did not object to the court's proposed mistrial and implicitly consented to a mistrial by insisting that a continuance of several days would be insufficient for his needs. The court

could have rested its order on that circumstance alone, but proceeded to state its view that manifest necessity justified a mistrial. White Owl already had implied to the court that he would accept a mistrial, and his contention that the court thereafter lulled him into foregoing an objection is unpersuasive.

The order of the district court is affirmed.

Footnotes:

*The Honorable Daniel M. Traynor, United States District Judge for the District of North Dakota.

APPENDIX C

United States v. White Owl, 1:19-cr-00068, District Court Oral Decision on the record, Transcript page 69, line 3 to page 82, line 22, March 22, 2023.

THE COURT: Earlier in the record I had excluded the testimony of James Lovejoy who the United States planned to call in light of his being a cooperating witness in this case. Mr. Lovejoy has a significant criminal record, some of which was disclosed to defense counsel but not all by the United States including TSA agent information that was in the possession of the AUSA's office but not these particular Assistant United States Attorneys. They indicate that they were not aware of the complete record and difficulty with Mr. Lovejoy's record of veracity, and I certainly believe them to be honest in that assessment.

The Court's decision to not allow Mr. Lovejoy to testify creates problems with the United States' case that I believe are difficult and should be allowed to be cured by the United States. I believe that the United States should have a full opportunity to present their case and present Mr. Lovejoy -- warts and all -- but defense counsel also needs sufficient time to prepare himself for trial, conduct a deposition of Mr. Lovejoy, if needed, and to perform any additional research or work into the significant history of Mr. Lovejoy. He appears to be somewhat of a lynch pin in connecting Mr. White Owl to the incident that occurred at the Serdahl home in this case.

Excluding Mr. Lovejoy completely is a harsh remedy that the Court in its discretion reconsiders. Instead, the Court believes that more time is needed for the United States to evaluate its position and to

evaluate this case in light of what they now know of Mr. Lovejoy's record and history. It also allows defense counsel an opportunity to evaluate what additional information and research he may need to conduct in order to prepare himself for a potential cross-examination of Mr. Lovejoy.

So the Court will reconsider its decision to exclude Mr. Lovejoy and will instead declare a mistrial in this case. But before I do that, I want to hear from the United States and Mr. Murtha. I think the United States should have an opportunity to present Mr. Lovejoy, but Mr. Murtha also needs time to prepare this case with the understanding of the full record of Mr. Lovejoy.

So Ms. Deitz or Ms. Conroy -- one, not both – what is your feeling with regard to the Court declaring a mistrial?

MS. CONROY: Your Honor, as an alternative, the United States would propose that the Court merely continue the trial. That would allow -- and I have been availing myself of the available research on these issues. To the extent that there is -- and the United States does not believe there is -- material information that was not disclosed, it was raised by Mr. Murtha prior to Mr. Lovejoy testifying. Really, what it seems that we are talking about is an allegation at an airport, and a continuance would allow Mr. Murtha the opportunity to review information related to that and do what he needs to do before cross-examining. That way the work that has been put into this case, the work of the jurors in this case and the Court, would not be for not. The United States thinks that even continuing and asking jurors to come back in several days would allow Mr. Murtha the time that he needs to look at this information.

And I would note -- I know the Court didn't

necessarily mean criminal history in the way that we interpret criminal history. When we say "criminal history," we mean an NCIC, III, which contains arrests and ultimately convictions.

THE COURT: What I meant, Counsel, is Mr. Lovejoy's history of veracity. There's several instances of just, you know, accused of being a liar, presenting false information, not a trustworthy person. And that all goes to the weight and credibility that the jury should be able to give that gentleman with regard to the allegation that Mr. White Owl made an admission to him.

MS. CONROY: Yes, Your Honor. And when we addressed Mr. Lovejoy's testimony and specifically his homicide conviction, under 609 in the motion in limine filed by the United States, we noted that we believed that there were several criminal convictions that Mr. Lovejoy would be impeachable by. The United States believes he is impeachable by a felony conviction -- actually two -- for two different controlled substances offenses and also for a criminal conviction I believe that it is called "false pretenses." So those are included in the NCIC, were contemplated by the United States as well.

To the extent that this other incident would be admissible, extrinsic evidence has not been decided by the Court. But we do believe -- and would concede, in fact – that there are three criminal convictions including one going to false pretenses or -- and whatever crime of dishonesty that is related to Mr. Lovejoy; in addition, of course, to his status as a criminal defendant in a federal case.

So that is the alternative that the United States would propose, is to give Mr. Murtha time to look into that. We did provide last night, and ensured that we did not have anything else related to that. What the

United States was able to locate were approximately four pages of identification documents that were related to that allegation. I believe that they were drivers' licenses and plane tickets. We also consulted with Mr. Lovejoy's --

THE COURT: And he was under an indictment at the time or being investigated, wasn't he?

MS. CONROY: I don't believe so, Your Honor.

THE COURT: I think the allegation is that he presented the false documents, basically, and an allegation of flight.

MS. CONROY: No. It's my understanding from talking with AUSA Volk that it would have been during the course of the conspiracy itself, but I don't believe that he was indicted at

the time. That was my understanding from a conversation with AUSA Volk. We did talk with Mr. Lovejoy's attorney, Scott Brand, last night to ask him whether or not that came -- because I think that pretrial services report noted the allegation. It does not appear that that has resulted in any charges in the other jurisdiction. I can't recall if it was Michigan or Minnesota at this point, Your Honor.

THE COURT: Ms. Conroy, here's my problem. You're playing catchup too. You're having to discover this information last night from your coworker in Bismarck regarding these allegations that he's known about it for months.

MS. CONROY: And, Your Honor --

THE COURT: And, as a result, none of that is considered by you in deciding the veracity or whether even to call Mr. Lovejoy as a witness.

MS. CONROY: Your Honor, we know, as you indicated, Mr. Lovejoy -- warts and all -- and we would still call him as a witness in this case. And I think that Mr. Lovejoy, if asked, would probably tell this Court,

the jurors, Mr. Murtha and everyone what he was doing with those documents that day.

And certainly if the Court rules that that within bounds and it's not extrinsic evidence, that could be asked. So I don't believe that we are playing catchup. We know his criminal history, what it includes. We also know that the information that he has provided in his own case against codefendants and perhaps, more importantly, against coconspirators and others outside the District of North Dakota is significant and in talking with AUSA Volk is credible as well.

THE COURT: All right. Mr. Murtha, what's your position on the matter?

MR. MURTHA: Thank you, Your Honor. I got a recording and listened to it last night. I was under instructions not to make a copy of it and to immediately return it. I did that. It's about three hours long. Somewhere between 30 and 40 people are referenced in there regarding ongoing conspiracy and other crimes that Mr. Lovejoy has knowledge of or has been involved with. My understanding is that he had no direct contact during the investigation with law enforcement agents, so his case is entirely dependent on conspiracy and other witnesses and those are some of those --

THE COURT: Lovejoy's case.

MR. MURTHA: Lovejoy's case.

THE COURT: Okay.

MR. MURTHA: So there is an extensive discovery file. I asked if I could get all the reports on Lovejoy and met with resistance from the U.S. Attorney's Office kind of incredulous because there was so much there. But that's what I would want if we're going to go that route.

I don't have -- he's not an individual that was in

direct contact with the investigative agent; they were going after him through other people. And so I would want that information because that's how I would learn about his veracity and what he was doing and how he came into this whole situation. So there's a large volume of work there for me to look at.

THE COURT: Now, the U.S. Attorney's Office sent you a letter, when was it?

MS. CONROY: Which letter are you referring to, Judge?

THE COURT: Telling Mr. Murtha that this recording existed and he had an opportunity to listen to it.

MR. MURTHA: That's true.

MS. CONROY: March 2, 2023, Your Honor.

THE COURT: All right. So what prevented you from going to their office and listening to that from March 2 until today, the 22nd?

MR. MURTHA: I simply didn't have time. I didn't realize the extent of it. They gave me the recording of the portion that Mr. Lovejoy had done.

THE COURT: And Lovejoy was offered -- identified to you -- according to this court exhibit that was offered by the United States, December 1 of '22 is the first time that you had awareness that Mr. Lovejoy was a witness?

MR. MURTHA: That is true.

MS. CONROY: And, Your Honor, with respect to Mr. Lovejoy and his involvement in the criminal conspiracy, I do not recall -- and in talking with other AUSA's, our supervisory staff, we cannot recall a time that a witness, a coconspirator or otherwise, has -- by testifying has opened up the door to having everything about their case, all discovery in the case provided.

Now, in talking with AUSA Volk, it is my understanding that Lovejoy's involvement in the

conspiracy is encompassed in the plea agreement in the facts that he has plead to. And so I don't know other than being fully aware of the depth and breadth of the criminal conspiracy what more could be done as far as looking into that case. And, frankly, Your Honor, any damage done with respect to Mr. Lovejoy will likely be done by the United States. He's going to walk in in handcuffs as a federal defendant who has plead guilty to a significant drug conspiracy that we will ask about; that the terms of, you know, his plea agreement and plea agreement supplement will be discussed and as will his impeachment information. And so all of that will be for the jury to consider.

We have not encountered a situation where calling an individual like Mr. Lovejoy opens up an opportunity to go into the full discovery file in a different case. I think Jencks requires us to produce Mr. Lovejoy's statements. We originally produced a redacted version of his proffer interview to protect the identity of others he was mentioning. We recognized before trial that more would be necessary, and that was why the offering of the recording was available. But as I mentioned yesterday, we were still trying to protect that because once Mr. White Owl learned about Mr. Lovejoy's information, there were numerous calls that were made by Mr. Lovejoy indicating to tell others that Mr. Lovejoy was a fed; and so we do have an obligation to not do harm to individuals who cooperate with the United States.

We also provided the proffer letter, the plea agreement, the plea agreement supplement, Stutsman County jail logs that provide information about what Lovejoy was doing, arguably more relevant because it is closer in time to this conduct. They're not great, Your Honor. He got in trouble for disciplinary things. There is a lot of information that

has been provided that can be fodder for Mr. Murtha.

THE COURT: Lots of warts.

MS. CONROY: Yes, sir, Your Honor. But notwithstanding those, he does have information that is very important to this case and important for the jury to consider.

THE COURT: Mr. Murtha, why do you need to get into the entire Lovejoy case file?

MR. MURTHA: I should have an opportunity to look at that. I'm not necessarily saying --

THE COURT: Why?

MR. MURTHA: Go ahead.

THE COURT: Why?

MR. MURTHA: Why? To identify impeachment material.

THE COURT: What would be there?

MR. MURTHA: What would be there would be his actions and dishonesty, if it exists, or other reasons for him to fabricate allegations against Mr. White Owl, if he's fabricating allegations against other people. In this proffer agreement I heard him talk about lots of different people, lots of different circumstances. And, frankly, a lot of it wasn't -- was incredible. And I would compare that to what those other people are revealing about him and the truth about what he's allegedly saying. And I don't think he's a credible witness at all. I don't think he's reliable. I think that the information that he's provided to law enforcement in that proffer -- I suspect a lot of it isn't true or is highly suspect, and I'm just asking for an opportunity to look at that.

THE COURT: How long do you need?

MR. MURTHA: I don't know what's there, Your Honor. I don't know what I'm looking at for volumes of stuff. I mean, this is days. This isn't like I can do this in an hour.

THE COURT: I respect that. I think that's what the United States is suggesting, break for days --

MR. MURTHA: I mean, if I took -- you know --

THE COURT: -- but I'm trying to determine if it's days or weeks?

MR. MURTHA: I think it's closer to weeks, Your Honor. I don't have the resources at my disposal of having an investigator that can run -- I don't have cocounsel here. I have my paralegal. I'm not rigged for that right now. I have to set up -- probably put together another team to work on that. I don't have another investigator at my disposal. And I don't think I have a schedule that's going to lend itself well to doing that when I'd have to put everything else on hold to make it happen. It's going to take a bit, like a week, maybe more. I just don't know what's there. Listening to that proffer -- and then I'd want to go back and actually be able to have a recording of that I could use, and I agree not to disclose it or any of the things that I learn from it. There's a lot to unwrap with Mr. Lovejoy, Your Honor.

THE COURT: Indeed.

In evaluating whether a manifest necessity requires a mistrial, the critical inquiry is whether a less drastic alternative is available. The Supreme Court has stated double jeopardy bars a retrial unless there was manifest necessity for a mistrial.

The Court has cautioned that a manifest necessity is a high degree of necessity and that the power to declare a mistrial over the defendant's objection should be exercised only under urgent circumstances and for very plain and obvious causes.

We have a situation here where Mr. Lovejoy was not identified as a witness for the United States until December 1 of 2022, a full three years -- more than three years after Mr. White Owl was charged.

The criminal record of Mr. Lovejoy was disclosed to the defense on February 21 of 2023. And the redacted -- excuse me -- the redacted proffer of Mr. Lovejoy was disclosed to defense counsel on December 22 of 2022. His NCIC, which contains his criminal convictions, was disclosed on February 21 of 2023. On February 28 his proffer letter was disclosed, and on March 2 an email was offered to defense counsel suggesting that a recording was available at the office of the U.S. Attorney's Office in Bismarck. The Government has also made disclosure of Stutsman County logs on March 3 and an interview of Lovejoy that occurred on March 13 of 2023, just days before trial. Finally, last night a boarding pass, ID cards, Citi cards, casino cards, a supplement -- a PA supplement -- and what's a PA?

MS. CONROY: Plea agreement, Your Honor.

THE COURT: Plea agreement supplement and plea agreement were finally disclosed or were additionally disclosed. I think the plea agreement had been previously disclosed.

MS. CONROY: Yes, Your Honor. And until yesterday the United States thought the supplement went with it. There was an issue with that. We didn't know there was an issue with the Bates production.

One note, Your Honor, on March 13, that was a pretrial interview of Ryan Deleon that was disclosed. He is the jail administrator at Stutsman County. Not Mr. Lovejoy's pretrial, but Ryan Deleon.

THE COURT: Okay. But concerning Mr. Lovejoy?

MS. CONROY: Yes, Your Honor.

THE COURT: All right. Mr. Lovejoy's prominence and importance in this case has risen in light of the fact that he appears to be the only person who will allege confirmation on the part of Defendant

White Owl that he engaged in this activity. That's my understanding of what Mr. Lovejoy is supposed to testify to. He has significant warts, as the Court has noted. Some of that was disclosed in the NCIC report; but the United States Attorney, again, involved in this case was apparently unaware of some additional information which tends to go to the veracity of Mr. Lovejoy and was not available to the AUSA's prosecuting this case or to Mr. Murtha. The information was in part disclosed last night, but Mr. Murtha has indicated additional time is needed to evaluate this case. The Assistant U.S. Attorneys involved in this case requested a continuance of the matter for days to allow Mr. Murtha to review additional information. Mr. Murtha has indicated he would like to get into the underlying case of Mr. Lovejoy's criminal conspiracy. That may not be necessary. But what Mr. Murtha should be able to review and consider is the statements that Mr. Lovejoy made concerning others and the veracity of those statements. He should also be given an opportunity to depose Mr. Lovejoy if he thinks that that is appropriate.

In light of that delay, I am unwilling to maintain this jury and grant a brief continuance. And, therefore, I believe a manifest necessity exists to grant a mistrial in this case. The United States needs to be able to present its case including Mr. Lovejoy, warts and all, but defense counsel needs to prepare himself for trial including a thorough examination and cross-examination of Mr. Lovejoy and his record of veracity. And that is my decision.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

United States of America,

Plaintiff,

vs.

Donavan Jay White Owl, a/k/a DJ,

Case No. 1:19-cr-00068

Defendant.

ORDER RESETTING TRIAL

[¶1] THIS MATTER comes before the Court after a mistrial was declared in the Defendant's trial based upon the manifest necessity for the United States to present this case and for defense counsel to prepare himself for trial due to the evidentiary issues relating to the United States' witness, James Lovejoy. Accordingly, trial must be rescheduled.

[¶2] When a mistrial has been declared and the Defendant is to be tried on the indictment again, "the trial shall commence within seventy days from the date of the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e). The Court declared the mistrial on March 22, 2023. By the Court's calculation, trial must therefore begin on or before May 31, 2023, which is seventy days from the date the mistrial occurred.

[¶3] Accordingly, trial in this matter shall be

rescheduled for Thursday, May 25, 2023, at 9:30 a.m. in Bismarck Courtroom 1 before the undersigned. Seven (7) days will be allotted for trial.
[¶4] IT IS SO ORDERED.

DATED March 23, 2023.

/s/Daniel M. Traynor
Daniel M. Traynor, District Judge \
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

United States of America,

Plaintiff,

vs.

Donavan Jay White Owl,

Case No. 1:19-cr-00068

Defendant.

ORDER GRANTING SEALED MOTION FOR IN CAMERA REVIEW OF PRETRIAL SERVICES REPORT

[¶1] THIS MATTER comes before the Court on a Sealed Motion for In Camera Review of Pretrial Services Report filed by the United States on March 21, 2023. Doc. No. 197. The United States asks the Court to review the Pretrial Services Report ("PSR") of trial witness James Alfonzao Lovejoy, who is under federal indictment in case number 1:21-cr-00170. The United States has provided a copy of Lovejoy's PSR for the Court's review. Doc. No. 197-1. The United States has not identified which portions of the PSR it believes may be disclosed to the Defendant.

[¶2] Generally, PSRs are to be kept confidential, available only to the Court, defense counsel, and counsel for the United States. 18 U.S.C. § 3153(c)(1)

(noting PSRs "shall be sued only for the purposes of a bail determination and shall otherwise be confidential Each pretrial services report shall be made available to the attorney for the accused and the attorney for the government"). When information is sought in PSR for impeachment purposes, the Eighth Circuit has permitted disclosure of the information in the PSR that is related to impeachment of the defendant. United States v. Issaghoolian, 42 F.3d 1175, 1177 (8th Cir. 1994) ("[A]dmission of information from the pretrial services report to impeach Issaghoolian was not error."). When a request for a PSR of a third-party seeking impeachment evidence occurs, the Court should conduct an in camera review of the PSR to determine which information will be subject to disclosure. See United States v. Garcia, 562 F.3d 947, 953 (8th Cir. 2009) (requiring the district court to conduct an in camera review of a co-conspirator's statements in a presentence report when the United States realizes there may be exculpatory evidence or evidence that affects the credibility of one of the United States' trial witnesses); see also Baranski v. United States, 2013 WL 718872, *4 (E.D. Mo. Feb. 27, 2013) (noting the tension between 18 U.S.C. § 3153(c)(1)'s confidentiality requirement and the United States' discovery obligations, but concluding in camera review of a PSR to determine which information is relevant for impeachment is an appropriate resolution).

[¶3] The Court has reviewed Lovejoy's entire PSR and concludes the entire PSR may be disclosed to Defense Counsel in this case. Counsel for White Owl and the United States shall keep this document in strict confidentiality and not disseminate it to any other individual. This does not prohibit Defense Counsel from showing and discussing the form with White

Owl. However, Counsel may not provide White Owl a copy of the PSR to keep in his possession. Accordingly, the United States' Sealed Motion for In Camera Review is GRANTED. The United States' Sealed Motion and Lovejoy's PSR shall be maintained under seal.
[¶4] IT IS SO ORDERED.

DATED March 30, 2023.

/s/Daniel M. Traynor
Daniel M. Traynor, District Judge
United States District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

United States of America,

Plaintiff,

vs.

Donavan Jay White Owl, a/k/a DJ,

Case No. 1:19-cr-00068

Defendant.

ORDER GRANTING MOTION TO RESET TRIAL DATE AND LENGTH

[¶1] THIS MATTER comes before the Court on a Motion to Reset Trial Date and Length filed by the United States on April 6, 2023. Doc. No. 205. The Defendant filed a Response on April 6, 2023. Doc. No. 206. A Hearing on the Motion was held on April 24, 2023. Doc. No. 215. For the reasons set forth below, the Motion (Doc. No. 205) is GRANTED.

[¶2] On March 22, 2023, a mistrial was declared in the Defendant's trial based upon the manifest necessity for the United States to present this case and for defense counsel to prepare himself for trial due to the evidentiary issues relating to the United States' witness, James Lovejoy.

[¶3] When a mistrial has been declared and the Defendant is to be tried on the indictment again, "the trial shall commence within seventy days from the

date of the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e). The Court rescheduled trial for Thursday, May 25, 2023, for seven (7) days, which is within seventy days from the date the mistrial occurred.

[¶4] The United States asserts that trial on May 25th is impractical because two essential witnesses are unavailable. Bureau of Alcohol Tobacco, Firearms, and Explosives ("ATF") Special Agent ("SA") Certified Fire Investigator ("CFI") Derek Hill, the case agent, is unavailable for the currently scheduled trial date of May 25-29, 2023. Additionally, Dr. William Massello, the medical examiner who conducted the autopsy of the deceased victim and determined cause of death, is unavailable May 10-28, 2023. The United States also argues that retrial will take more than seven days because the Court declared a mistrial on the seventh day of trial and an additional two days would be needed. Therefore, the United States requests ten (10) days for trial.

[¶5] The Defense did not object to the Court resetting trial within 180 days from the mistrial. [¶6]

Under the Speedy Trial Act, the Court may extend the period for retrial not to exceed 180 days from the date the action occasioning the retrial becomes final "if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical." 18 U.S.C. § 3161(e).

[¶7] The Court finds trial set for May 25th is impractical due to the unavailability of the Government's two essential witnesses. Therefore, resetting the trial, not to exceed 180 days, from March 22, 2023, is proper under 18 U.S.C. § 3161(e). The Motion (Doc. No. 205) is GRANTED. Accordingly, trial in this matter shall be rescheduled for Tuesday, June 20, 2023, at 9:30 a.m. in Bismarck Courtroom 1 before

the undersigned. Eleven (11) days will be allotted for trial.[1]
[¶8] IT IS SO ORDERED.

DATED April 25, 2023.

/s/Daniel M. Traynor
Daniel M. Traynor, District Judge
United States District Court

Footnotes:

1 July 4, 2023, is not included as it is a federal holiday. Trial shall commence on June 20, 2023, and extend into July 5, 2023, if necessary.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT ON DOUBLE JEOPARDY GROUNDS

[¶1] THIS MATTER comes before the Court pursuant to the Defendant's Motion to Dismiss Indictment on Double Jeopardy Grounds filed on the eve of trial. Doc. No. 222. To date, no response has been filed. For the reasons explained below, the Motion to Dismiss is DENIED.

BACKGROUND

[¶2] On May 8, 2019, a two-count indictment was filed against Defendant Donavan White Owl ("White Owl"), charging him with one count of felony murder within Indian County and one count of arson within Indian Country. Doc. No. 15. A jury trial was set for March 14, 2023. Doc. No. 133. The United States filed a witness list on March 7, 2023, naming James Lovejoy ("Lovejoy"), among others. Doc. No. 153.

[¶3] Lovejoy was expected "to testify that Mr. White Owl confessed [his alleged crimes] to Mr. Lovejoy while in custody together." Doc. No. 222. The same day the United States filed its witness list, White Owl filed a Motion in Limine to exclude Lovejoy's testimony. Doc. No. 162. White Owl argued Lovejoy should not be permitted to testify because: (1) he was "acting as an agent of the Prosecution," in violation of White Owl's Fifth and Sixth Amendment rights, when White Owl allegedly confessed to him; and (2) defense

counsel lacked sufficient "time to investigate Mr. Lovejoy and the Prosecution ha[d] provided no discovery regarding Mr. Lovejoy's reliability." Id. The United States disavowed Lovejoy as a "confidential informant" or government agent and argued Lovejoy should be allowed to testify because he had "relevant and admissible evidence to present." Doc. No. 175. The Court agreed, in large part, with the United States and denied White Owl's Motion in Limine without prejudice. Doc. No. 182. The Court made this determination because White Owl presented no evidence of Lovejoy acting at the behest of the United States when White Owl allegedly confessed to him and the determination of Lovejoy's reliability was a matter for the jury. Id.

[¶4] The criminal jury trial began on March 14, 2023. See Doc. No. 199. One week into trial, on March 21, 2023, White Owl's counsel noted he had practically no materials on Lovejoy— specifically, no "impeachment materials" aside from "his NCIC"—and counsel would need such documents if Lovejoy were to testify. Doc. No. 202, pp. 106:12-17, 107:9-15. White Owl's counsel highlighted he had just been made aware that Lovejoy had a pretrial release report allegedly relaying Lovejoy had "tried to pass himself off with false information" at an airport, but, again, counsel did not have that report. Id. at p. 107:14-20. Furthermore, White Owl's counsel alleged (1) the Government had argued in a separate case Lovejoy was "a flight risk and he doesn't comply with court orders and has a history of deceptive behavior"; (2) the magistrate judge overseeing Lovejoy's criminal proceedings had indicated Lovejoy had made "dishonest" motions; and (3) the circumstances surrounding Lovejoy's proffer and plea agreement supplement suggested he may have lied about White

Owl's alleged confession in order to secure a reduced sentence for himself, but White Owl's counsel lacked documented evidence of these alleged instances. Id. at pp. 107:25-110:17. Accordingly, the Court ordered Lovejoy could not testify "until and unless [White Owl's counsel was] provided with each and every one of those documents and provided sufficient time to review them." Id. at pp. 112:25-113:4.

[¶5] Later that day, on March 21, 2023, the United States filed a Sealed Motion for In Camera Review of Pretrial Services Report, which contained Lovejoy's pretrial services report ("PSR") from March of 2022. Doc. No. 197. The Sealed Motion noted White Owl's counsel had not requested the PSR before that very day. Id. ("This was the first such request by counsel for White
Owl.").

[¶6] At trial the following day, on March 22, 2023, and outside of the jury's presence, the Court addressed the contents of Lovejoy's PSR and what the United States knew about Lovejoy and when it was aware of such information. Doc. No. 203. The PSR detailed Lovejoy's criminal history, "including crimes relating to identity theft, forged instrument, forgery with intent to commit a crime, homicide, [and] felony stolen property." Id. at pp. 5:20-6:2. The Court continued:

> On August 31 of 2022, [the] AUSA . . . in the Lovejoy case received information from the TSA regarding Mr. Lovejoy's fraudulent use of IDs in travel. That's noted in Docket Entry Number 156, page 3.
>
> On September 16 of 2022, Mr. Lovejoy filed a third motion for release from custody. And that's in the Lovejoy case at Docket Entry

Number 154.

On September 22 of 2022, [the] AUSA [in Mr. Lovejoy's case] . . . replied providing a response in which he discussed the pretrial services report and indicated that Mr. Lovejoy made efforts to travel using a false identity during the course of the alleged conduct in Lovejoy's case. That's noted in Case Number 21-cr-170, Docket Entry 156, page 3.

On November 21 of 2022, Mr. Lovejoy proffered with the Government on November 21. He formally provided the alleged admission to federal agents concerning Mr. White Owl. That's at Docket Entry Number 175, page 2, note 1. On March 7 of 2023, [White Owl's counsel,] Mr. Murtha[,] filed a motion in limine seeking to exclude Mr. Lovejoy's testimony for, among other reasons, quote, "The prosecution has provided no discovery regarding Mr. Lovejoy's reliability," unquote. That's Docket Number 162, paragraph 4.

On March 10, the United States responded construing Mr. White Owl's motion in limine as one to exclude Lovejoy because he, quote, "has not been deemed reliable," unquote. That's Docket 175, pages 4 and 5.

On March 13, 2023, the Court denied Mr. White Owl's motion in limine regarding Lovejoy's testimony without prejudice concluding White Owl provided no basis for his assertion that . . . Lovejoy should be prevented from testifying due to the Government not providing evidence

> of his reliability. It is clear from the record that the Government has not provided that information.

Id. at pp. 6:3-7:10. Subsequently, White Owl's counsel renewed his motion to exclude Lovejoy's testimony and the Court granted it. Id. at p. 8:1-5. The United States objected, asserting "the same information that is outlined in the pretrial services report" was in the previously disclosed NCIC and other materials, White Owl's counsel was given the opportunity to "receive the additional information via the proffer," and the prosecutors in this case were neither "aware of that particular information" the AUSA had in Lovejoy's criminal case nor was the information necessarily "available to [them]." Id. at pp. 8:10-25, 10:1-6. The Court affirmed its ruling and highlighted the information allegedly relayed in 2022 by TSA agents to the AUSA in Lovejoy's own criminal case was not fully disclosed to White Owl's counsel until just then, and such a late disclosure was "not appropriate." Id. at pp. 9:7-16, 11:4-25.

[¶7] The Court then afforded the prosecutors a break to consult with their supervisory attorneys. Doc. No. 203, p. 12:2-8. Following the break, the United States requested a reconsideration of the Court's order because the disclosed materials were not required under Brady or Giglio, but the Court declined to reconsider its ruling. Id. p. 15:3-10. The Court stated it understood the prosecutors assigned "to this case did not have that information," but the United States had (in Lovejoy's own criminal proceedings) relied on the evidence of Lovejoy's alleged dishonesty. Id. at p. 15:15-21. Thus, to allow Lovejoy to testify so late in the proceeding given the tardy disclosures and the United States' earlier knowledge of such information

would improperly force White Owl's counsel "to play catchup." Id. at pp. 15:22-16:3.

[¶8] Trial proceeded until, following a recess, the Court discretionarily reconsidered its prior ruling excluding Lovejoy's testimony and stated its intention to *sua sponte* declare a mistrial following a consultation with the Parties. Id. at p. 70. Before asking the Parties for their input regarding the potential of the Court declaring a mistrial, the Court explained:

> [M]ore time is needed for the United States to evaluate its position and to evaluate this case in light of what they now know of Mr. Lovejoy's record and history. It also allows defense counsel an opportunity to evaluate what additional information and research he may need to conduct in order to prepare himself for a potential cross-examination of Mr. Lovejoy.

Id. at p. 70:1-9. In response, the United States offered the alternative of a continuance. Doc. No. 203, pp. 70:19-71:13. The Court entertained the idea and posed it to White Owl's counsel. Id. at p. 79:5-9. White Owl's counsel stated he was not sure how long he would need to review the new impeachment evidence, but it would be "weeks." Id. at p. 79:10-23 ("There's a lot to unwrap with Mr. Lovejoy, Your Honor.").

[¶9] Given White Owl's counsel needed not just a week, but estimated needing several "weeks" to unravel the impeachment evidence for Lovejoy's proposed testimony, the Court found "manifest necessity require[d] a mistrial." Id. at pp. 79:10-80:1. The Court said:

> In evaluating whether a manifest necessity

requires a mistrial, the critical inquiry is whether a less drastic alternative is available. The Supreme Court has stated double jeopardy bars a retrial unless there was manifest necessity for a mistrial.

The Court has cautioned that a manifest necessity is a high degree of necessity and that the power to declare a mistrial over the defendant's objection should be exercised only under urgent circumstances and for very plain and obvious causes.

We have a situation here where Mr. Lovejoy was not identified as a witness for the United States until December 1 of 2022, a full three years—more than three years after Mr. White Owl was charged. The criminal record of Mr. Lovejoy was disclosed to the defense on February 21 of 2023. And the . . . the redacted proffer of Mr. Lovejoy was disclosed to defense counsel on December 22 of 2022. His NCIC, which contains his criminal convictions, was disclosed on February 21 of 2023. On February 28 his proffer letter was disclosed, and on March 2 an email was offered to defense counsel suggesting that a recording was available at the office of the U.S. Attorney's Office in Bismarck. The Government has also made disclosure of Stutsman County logs on March 3 and an interview of Lovejoy that occurred on March 13 of 2023, just days before trial. Finally, last night a boarding pass, ID cards, Citi cards, casino cards, a supplement—a [plea agreement] supplement[.][1]

* * *

Mr. Lovejoy's prominence and importance in this case has risen in light of the fact that he appears to be the only person who will allege confirmation on the part of Defendant White Owl that he engaged in this activity. That's my understanding of what Mr. Lovejoy is supposed to testify to. He has significant warts, as the Court has noted. Some of that was disclosed in the NCIC report; but the United States Attorney, again, involved in this case was apparently unaware of some additional information which tends to go to the veracity of Mr. Lovejoy and was not available to the AUSA's prosecuting this case or to Mr. Murtha. The information was in part disclosed last night, but Mr. Murtha has indicated additional time is needed to evaluate this case.

The Assistant U.S. Attorneys involved in this case requested a continuance of the matter for days to allow Mr. Murtha to review additional information. Mr. Murtha has indicated he would like to get into the underlying case of Mr. Lovejoy's criminal conspiracy. That may not be necessary. But what Mr. Murtha should be able to review and consider is the statements that Mr. Lovejoy made concerning others and the veracity of those statements. He should also be given an opportunity to depose Mr. Lovejoy if he thinks that that is appropriate.

In light of that delay, I am unwilling to maintain this jury and grant a brief continuance. And, therefore, I believe a

> manifest necessity exists to grant a mistrial in this case. The United States needs to be able to present its case including Mr. Lovejoy, warts and all, but defense counsel needs to prepare himself for trial including a thorough examination and cross-examination of Mr. Lovejoy and his record of veracity.

Id. at pp. 79:25-82:22

[¶10] White Owl's counsel did not object to the declaration of a mistrial. Id. at p. 83:22-23.

[¶11] The Court then called the jury back in and explained the situation to the members. After providing some detail regarding the need for White Owl's counsel to have time to review the newly disclosed documents, the Court stated:

> [T]he question that was presented to the Court is do we delay you, ask you to come back some days or weeks later, or do we grant a mistrial. And without knowing your circumstances and in light of the manifest necessity of allowing the Government an opportunity to present their full case, allowing Mr. Murtha an opportunity to defend his client well, I have decided to grant a mistrial in this case.
>
> * * *
>
> [S]ome information was lost and skipped and was not provided to Mr. Murtha as it probably should have been in as timely a way as it should have been. And, as a result, I think that this is the best alternative for this case.

Doc. No. 203, p. 85:7-22. The jury was dismissed and

the Parties were again consulted about the Court's declaration of a mistrial. Id. at pp. 85-86. Again, no objection was raised by either White Owl's counsel or the United States. Id. at p. 86:9-15.

[¶12] The Court rescheduled trial to start on May 25, 2023 (Doc. No. 198), but then the date was pushed to June 20, 2023, per request of the United States and without objection by White Owl (Doc. Nos. 205, 206, 215, 216). Now, months after the Court declared a mistrial, three days after a pretrial conference, and less than two weeks before the rescheduled jury trial, White Owl seeks to have his indictment dismissed on double jeopardy grounds. Doc. No. 222.

ANALYSIS

I. Legal Standard

[¶13] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend V. A criminal defendant's new trial following a mistrial implicates this constitutional protection because the right is trigged once the first jury is sworn-in. See Fenstermaker v. Halvorson, 920 F.3d 536, 540 (8th Cir. 2019). "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." Wade v. Hunter, 336 U.S. 684, 688 (1949). Instead, a court's declaration of a mistrial and a new trial is appropriate when, before first jury has given its verdict and "taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public

justice would otherwise be defeated." United States v. Perez, 22 U.S. 579, 580 (1824). See United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion) (explaining Perez's "doctrine of manifest necessity stands" to judge the appropriateness of a mistrial even where the defendant does not move for that remedy). This weighty decision is within the "sound discretion" of the trial judge, but it is intended to be made "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." Renico v. Lett, 559 U.S. 766, 774 (2010).

[¶14] The Supreme Court has clarified a district court's finding of "manifest necessity" means there must be "a 'high degree' of necessity." Id. (internal quotation marks omitted) (quoting Arizona v. Washington, 434 U.S. 497, 516 (1978) (noting "an explicit finding of 'manifest necessity'" is not required so long as the necessity is supported by the record)). When evaluating whether the district court properly determined there was "manifest necessity," the Eighth Circuit is "particularly concerned with whether less drastic alternatives were available." Moussa Gouleed v. Wengler, 589 F.3d 976, 981 (8th Cir. 2009) (internal quotation marks omitted) (quoting Long v. Humphrey, 184 F.3d 758, 761 (8th Cir. 1999)). A court's finding that there are not "less drastic alternative[s]" to substitute for a mistrial does not mean other options were impossible nor does it require the trial judge to discredit "any conceivable option available." Fenstermaker, 920 F.3d at 542 (quoting Moussa Gouleed, 589 F.3d at 983). Rather, it means the trial court considered "a reasonable and satisfactory alternative—a solution to a trial problem which strikes a better balance between 'the defendant's interest in proceeding to verdict' and the 'competing and equally legitimate demand for public

justice' than would a mistrial." Moussa Gouleed, 589 F.3d at 983 (quoting Illinois v. Somerville, 410 U.S. 458, 471 (1973)).

[¶15] "If the defendant does not object [to a mistrial], double jeopardy is not implicated unless the conduct giving rise to the mistrial was intended to provoke the defendant to move for a mistrial." United States v. Ford, 17 F.3d 1100, 1102 (8th Cir. 1994).

II. There Was a Manifest Necessity for the Mistrial

[¶16] Despite raising no objection to the mistrial and explaining to this Court he required "weeks" to evaluate the newly disclosed impeachment evidence (see Doc. No. 202, pp. 106:12- 17, 107:9-15; see also Doc. No. 203, p. 79:10-23), White Owl now contends there was no manifest necessity to support the Court's order of a mistrial. First, he argues the United States had no obligation to provide him with the newly disclosed impeachment materials until after Lovejoy was directly examined, implying the time the Court granted White Owl's counsel to review the materials was unnecessary. Second, White Owl asserts the Court's choice to declare a mistrial in lieu of continuing the trial for weeks was improper because the Court placed too much weight on "scheduling considerations" rather than White Owl's right to be tried by a jury in the first instance, as was found improper in United States v. Rivera, 384 F.3d 49 (3d Cir. 2004). Doc. No. 222. The Court finds White Owl's changing narrative to be ironic and unpersuasive.

[¶17] In the first instance, White Owl failed to object to the Court's declaration of a mistrial and cannot now claim double jeopardy prohibits his new trial or justifies his indictment's dismissal.[2] Ford, 17 F.3d at 1102. See Doc. Nos. 202, 203. Accordingly, White

Owl's double jeopardy rights were not implicated or violated. Ford, 17 F.3d at 1102.

[¶18] Even if White Owl's failure to object to the Court's *sua sponte* declaration of a mistrial did not waive his right to bring this double jeopardy claim, the Court remains convinced a mistrial was manifestly necessary. White Owl presents red herring arguments regarding the timing of the United States' obligations to disclose certain evidence and documents in order to bypass the reality that his counsel requested "weeks" to evaluate such materials—in the middle of a jury trial—in order to properly represent his client. Doc. No. 203, p. 79:10-23. Setting aside that distraction, the Court remains convinced the record in this case demonstrates there was a "manifest necessity" for the mistrial. Perez, 22 U.S. at 580.

[¶19] The mistrial was not declared based on scheduling inconvenience, as was the situation in the Third Circuit's case of United States v. Rivera, 384 F.3d 49 (3d Cir. 2004). In Rivera, prosecutors asked the trial court to grant a continuance of mere hours while a key witness met with his doctor to see if he could return to testify following an injury mid-trial. Id. at 56. The court rejected the continuance option and declared a mistrial because three calendar days had passed from the time the witness's testimony left off, the court had another impeding trial, and the case had been an overall "inconvenience to everyone, Court, counsel, [and] the Government." Id. Various parties objected to the mistrial, and the Third Circuit ultimately found the trial court "prematurely declared a mistrial." Id. at 53, 58.

[¶20] Far from having its eye on its own docket, this Court was primarily concerned White Owl's counsel would be unprepared for trial given the United States' late disclosures concerning Lovejoy—the United

States' "prominen[t] and importan[t]" witness in the case. Doc. No. 203, p. 81:17-82:22. White Owl's counsel himself cited the same concern because there was "a lot to unwrap with Mr. Lovejoy" and he did not object to the Court's declaration of a mistrial. Id. at p. 79:22-23. In sum, judicial economy and convenience were not reasons for the mistrial.

[¶21] Neither was the mistrial declared based on inappropriate "[p]ractical considerations and speculation." United States v. Allen, 984 F.2d 940, 942 (8th Cir. 1993). In Allen, the district court highlighted how "highly desirable, and in the best interests of [the] defendant" it would be to have him jointly tried with another defendant, speculating he might have a lesser likelihood of being found guilty and a greater potential for post-conviction relief. Id. Accordingly, the court sua sponte declared a mistrial. Id. at 943.The Eighth Circuit found the mistrial was improper, noting it was "uncertain whether [the defendant] would benefit from the mistrial" and the court could not base a mistrial on "practicality" and "speculation[s]." Id. 942-43. Here, there is no doubt White Owl has benefitted from the mistrial. The Court reiterates White Owl's counsel was the initiating force who requested time to evaluate newly disclosed impeachment evidence for the United States' "lynch pin" witness. Doc. No. 203, p. 69:23-25. The Court granted counsel the "weeks" of time he requested to adequately protect his client's rights, and the Court will not now succumb to this new delay tactic.

[¶22] The Court considered the Government's suggestion of a continuance but concluded the indefinite span of "weeks" requested by White Owl's counsel to adequately review the impeachment evidence and prepare for trial manifestly necessitated a mistrial. Doc. No. 203, p. 79:8-11. See Moussa

Gouleed, 589 F.3d at 981 (directing trial courts to consider alternatives to mistrial). The request by White Owl's counsel came in the midst of witness testimony. Had a continuance been granted, the jury would have been absent from the jury box for an unknown number of weeks and later asked to recollect a week's worth of prior argument, testimony, and evidence. See Doc. No. 203, p. 79:5-11 (representing to the Court the time needed was "closer to weeks" rather than days). See also Fenstermaker, 920 F.3d at 542 (denying habeas relief and upholding a state court's declaration of a mistrial when the prosecutor was rendered unavailable for an unclear amount of time due to injury and was not easily replaceable). Having now granted White Owl's counsel the time he requested (and him not objecting to the Court's declaration of a mistrial), he now seeks to take advantage of the situation by harkening to double jeopardy grounds and seeking to have the indictment dismissed. As already discussed, the Court took a proposed alternative under advisement, but White Owl's counsel was reticent and needed a specific amount of time to be prepared for trial. The Court concluded the amount of time requested was far too long for a continuance under the circumstances, and the Court declared a mistrial to ensure White Owl would preparedly proceed to a verdict given the United States' late disclosures. In this instance, White Owl's right to a complete trial by a particular tribunal was properly "subordinated to the public's interest in fair trials designed to end in just judgments." Wade, 336 U.S. at 689.

CONCLUSION

[¶23] For the foregoing reasons, the Court DENIES

White Owl's Motion to Dismiss.
[¶24] IT IS SO ORDERED.

DATED June 13, 2023.

/s/Daniel M. Traynor
Daniel M. Traynor, District Judge United States District Court

Footnotes:

1 During this time, the United States also noted it was unaware until just one day prior there was a problem with the Bates production of the plea agreement supplement, so those additional (and unintentionally omitted documents) would be made available. Doc. No. 203, p. 81:7-10.

2 It appears the Eighth Circuit has not explicitly addressed the question of whether a criminal defendant's failure to object to a declaration of a mistrial constitutes a waiver of the right to bring a double jeopardy claim if he is retried. See Shaw v. Norris, 33 F.3d 958, 961 (8th Cir. 1994) (declining to answer the question). See, e.g., United States v. Gantley, 172 F.3d 422, 428 (6th Cir. 1999) (finding implied consent to a mistrial may bar a double jeopardy claim under certain circumstances). The Eighth Circuit's case of Ford is somewhat unique in that the defendant explicitly agreed to wanting a mistrial declared after the court, on its own motion, asked him if that was his desired course. Ford, 17 F.3d at 1102.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
United States of America,
Plaintiff,
vs.
Donavan Jay White Owl,
Defendant.
Case No. 1:19-CR-00068
ORDER GRANTING THE UNITED STATES' MOTION FOR FINDINGS

[¶1] THIS MATTER comes before the Court pursuant to the United States' Motion for Findings filed on June 14, 2023. Doc. No. 231. To date, no response has been filed. For the reasons explained below, the Motion is GRANTED.

BACKGROUND

[¶2] Defendant Donavan White Owl ("White Owl") filed a Motion to Dismiss Indictment on Double Jeopardy Grounds on June 8, 2023—months after the Court declared a mistrial (to which he did not object) and less than two weeks before his new jury trial was set to begin. Doc. No. 222. On June 13, 2023, the Court denied White Owl's Motion to Dismiss without waiting for the United States to file its response because White Owl was employing a meritless "delay tactic" intended to avoid the impending trial. Doc. No. 226.

[¶3] In its Order denying White Owl's Motion to Dismiss, the Court explained White Owl lacked a colorable claim on two grounds: (1) White Owl waived his claim for double jeopardy when he failed to object

to the Court's declaration of a mistrial; and (2) even if he had not waived that claim, the mistrial was manifestly necessary and essentially declared at his behest. Id. See United States v. Perez, 22 U.S. 579, 580 (1824) (specifying the grounds for declaring a mistrial). Specifically, the Court found a mistrial was manifestly necessary because White Owl's counsel requested "weeks" of time—in the middle of an ongoing jury trial—to review newly disclosed documents and information relevant to the impeachment of the United States' seemingly star witness. Doc. No. 226 (citing Doc. No. 203, p. 79:10-23). Given the extensive time White Owl's counsel said he needed to be adequately prepared for the trial to continue, the Court determined the United States' proposed alternative of a continuance was untenable and a mistrial was the "best alternative for this case." Id. (quoting Doc. No. 203, p. 85:7-22).

[¶4] Hours after the Court issued its Order Denying Defendant's Motion to Dismiss Indictment on Double Jeopardy Grounds (id.), White Owl filed his Notice of Interlocutory Appeal (Doc. No. 229). The United States then filed the instant Motion, seeking to have the Court make the following findings:

Defendant's Motion to Dismiss Indictment on Double Jeopardy Grounds (Doc. 222) was frivolous and dilatory;

its Order Denying Motion to Dismiss Indictment on Double Jeopardy Grounds shall not be stayed pending an appeal of the Court's order; and,

trial will proceed as scheduled on June 20, 2023. Doc. No. 231 (footnote omitted).

ANALYSIS

I. Legal Standard

[¶5] "The denial of a motion to dismiss on double jeopardy grounds may be raised in an interlocutory appeal." United States v. Harrington, 997 F.3d 812, 816 (8th Cir. 2021) (quoting United States v. Brown, 926 F.2d 779, 781 (8th Cir. 1991) (per curiam)). The appeal, however, does not automatically deprive the district court of jurisdiction. Id. Where the defendant's claim is found to be frivolous by the district court, "the filing of a notice of appeal will not divest the district court of jurisdiction." United States v. Grabinski, 674 F.2d 677, 679 (8th Cir. 1982) (en banc) (per curiam). This is because the appellate court's jurisdiction in such situations hinges strictly on whether "the defendant has raised a colorable double jeopardy claim." Harrington, 997 F.3d at 816 (quoting United States v. Bearden, 265 F.3d 732, 734 (8th Cir. 2001)).

[¶6] Although the Eighth Circuit asks district courts "to make written findings on the issue of whether the [defendant's] motion is frivolous or non-frivolous," the lack of an explicit finding of frivolousness does not necessarily sever the district court's jurisdiction while the case is on appeal. Id. (quoting United States v. Dixon, 913 F.2d 1305, 1309 (8th Cir. 1990)). Indeed, the finding of frivolousness may be inferred "from the manner in which [the district court] disposed of the motion . . . and its refusal to stay proceedings." Brown, 926 F.2d at 781. See Harrington, 997 F.3d at 816 ("In the absence of such findings, we will look to the record to ascertain whether the claim is colorable.").

[¶7] While the district court retains

jurisdiction, the defendant's trial may proceed despite the pending appeal. United States v. Williams, No. 8:09-cr-457, 2011 WL 1136251, at *1 (D. Neb. Mar. 25, 2011). The circuit court will expedite its review of the defendant's appeal and may stay the district court's proceedings at any time if the appeal merits such a remedy. Id. (citing Grabinski, 674 F.2d at 679-80).

II. White Owl's Motion Was Frivolous & Trial Will Proceed on June 20, 2023

[¶8] The Court's Order found, without stating it explicitly, that White Owl's motion is frivolous. Doc. No. 226. As already noted, the Court issued its Order before the United States filed its response precisely because the motion lacked any colorable claim. His motion is plainly a "delay tactic" set loose on the "eve of trial" months after White Owl's counsel was granted "the 'weeks' of time he requested to adequately protect his client's rights." Id. If White Owl had a colorable claim made in good faith, it should have been made close-in-time to the declaration of the mistrial—not months later and approximately a week before trial.

[¶9] As the Court's Order further noted, White Owl waived his claim for double jeopardy because he never objected to the Court's declaration of a mistrial despite having at least two opportunities to do so. Id. Rather, White Owl acquiesced to the mistrial because it afforded him the time he himself told the Court was necessary to be prepared for trial. Id. (citing United States v. Ford, 17 F.3d 1100, 1102 (8th Cir. 1994) ("If the defendant does not object [to a mistrial], double jeopardy is not implicated unless the conduct giving rise to the mistrial was intended to provoke the defendant to move for a mistrial.")).[1]

[¶10] Furthermore, although the Court remains steadfast in its determination White Owl waived his double jeopardy claim, the Court's Order alternatively found the mistrial was declared based on "manifest necessity." Doc. No. 226.

[¶11] Based on the analysis and conclusions set forth in the record and the Court's Order (Doc. Nos. 203, 226), which already effectively found White Owl's Motion to Dismiss to be frivolous, the Court now explicitly finds:

- White Owl's Motion to Dismiss is frivolous, lacks a colorable claim, and amounts only to a delay tactic, see Brown, 926 F.2d at 781 (noting a district court may implicitly find a motion is frivolous and retain jurisdiction);

- Absent an order from the Eighth Circuit to the contrary, the proceedings are not stayed pending appeal given White Owl's Motion to Dismiss is frivolous; and

- Trial shall begin on June 20, 2023.

1 The Court reiterates the Eighth Circuit has not explicitly answered the question of whether a criminal defendant who does not object to the declaration of a mistrial waives his right to bring a double jeopardy claim. See Doc. No. 226, p. 10, n.2. See, e.g., United States v. Morgan, 929 F.3d 411, 424 (7th Cir. 2019) ("[C]onsent to a new trial, implicit or otherwise, forecloses any later objection to double jeopardy.").

See Grabinski, 674 F.2d at 679 ("If the motion is found to be frivolous, the filing of a notice of appeal will not divest the district court of jurisdiction."). See also Williams, 2011 WL 1136251, at*1 (explaining a district court may proceed to trial pending appeal when the defendant's motion is frivolous).

CONCLUSION

[¶12] For the foregoing reasons, the Court GRANTS the United States' Motion for Findings, and hereby ORDERS the trial to proceed as scheduled on June 20, 2023.

[¶13] IT IS SO ORDERED.

DATED June 15, 2023.
/s/Daniel M. Traynor
Daniel M. Traynor, District Judge
United States District Court

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 23-2431

United States of America

Appellee

v.

Donavan Jay White Owl, also known as DJ

Appellant

Appeal from U.S. District Court for the District of North Dakota - Western

(1:19-cr-00068-DMT-1)

ORDER

Appellant White Owl's motion to stay proceedings in the district court pending disposition of this appeal has been considered and is granted. The court establishes the following briefing schedule:

Appellant's Brief (with addendum) 07/18/2023 (Donavan Jay White Owl)

Appellee's Brief 21 days from the date the court issues the Notice of Docket Activity filing the brief.

Appellant's Reply Brief 7 days from the date the court issues the Notice of Docket Activity filing the brief.

No extensions of time will be granted.

June 17, 2023

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans