No. 25-

IN THE

Supreme Court of the United States

SCOTT BREIMEISTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the fifth week of a healthcare fraud trial, the defendants discovered prosecutorial misconduct that caused the court to order the government to produce all agent reports and witness interview notes. A massive mid-trial production of previously undisclosed documents revealed information favorable to the defendants. The court declared a mistrial *sua sponte* over petitioner's written opposition. It eventually denied his motion to bar a retrial based on Double Jeopardy.

The Fifth Circuit held that petitioner forfeited the Double Jeopardy claim because he consented to the mistrial. Federal circuit courts are deeply divided over what constitutes a defendant's implied consent to a mistrial. The Fifth Circuit also held that, even if petitioner objected, manifest necessity existed to declare the mistrial. The court refused to apply strict scrutiny review, although the government caused the mistrial, because the misconduct was not in "bad faith." This Court requires a reviewing court to apply the "strictest scrutiny" when the government causes a mistrial. *Arizona v. Washington*, 434 U.S. 497, 505, 508 (1978).

The questions presented are:

I. What constitutes implied consent to a mistrial when determining if a defendant has forfeited a Double Jeopardy claim?

II. Does strict scrutiny apply to review a court's *sua sponte* decision to declare a mistrial based on government misconduct over a defendant's objection?

RELATED CASES

- *United States v. Swiencinski, et al.*, No. 4:18-CR-00368, United States District Court, Southern District of Texas, Houston Division. Order entered June 27, 2023.

- *United States v. Breimeister*, No. 23-20326, United States Court of Appeals for the Fifth Circuit. Opinion entered April 7, 2025.

- *United States v. Breimeister*, No. 23-20326, United States Court of Appeals for the Fifth Circuit. Order denying rehearing entered May 5, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Scott Breimeister, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's published opinion (App. 1-19) is available at 133 F.4th 496. The Fifth Circuit's unpublished order denying rehearing (App. 26-27) is unreported. The district court's unpublished order denying petitioner's Double Jeopardy motion (App. 20-25) is unreported.

JURISDICTION

The Fifth Circuit issued its opinion on April 7, 2025, and denied rehearing on May 5, 2025. This Court extended the deadline to file this petition to October 2, 2025. It has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

STATEMENT OF THE CASE

A. Procedural History

Petitioner and four co-defendants pled not guilty to various healthcare fraud offenses and went to trial in

2022. In the fifth week of trial during the government's case-in-chief, the district court declared a mistrial *sua sponte* over petitioner's written objection (ROA.9132, 13336). It eventually denied his motion to bar a retrial based on Double Jeopardy (App. 20-25). He timely filed notice of appeal from that order (ROA.2236). The Fifth Circuit affirmed the district court's order on April 27, 2025. *United States v. Breimeister,* 133 F.4th 496 (5th Cir. 2025) (App. 1-19).

B. Relevant Facts

The issues in this petition do not concern the alleged offenses. Rather, they involve the district court's decision to declare a mistrial *sua sponte* based on government misconduct over petitioner's objection.

In the fifth week of a jury trial on healthcare crimes and conspiracy, petitioner and his co-defendants discovered that prosecutors had coached a witness to provide false testimony and create misleading exhibits (ROA.8291-97, 8302-22). The district court struck some of the testimony and exhibits (ROA.8489-96).

At petitioner's request, the district court then ordered the government to produce all agent reports and witness interview notes (ROA.8575-78). That began a massive production of previously undisclosed documents over seven days. Many of the agents' and prosecutors' interview notes contained information favorable to the defendants that was missing from the interview reports produced before and during trial. This was not a voluntary mid-trial production of inadvertently undisclosed information; the district court ordered it after the defendants caught the government engaging in misconduct.

The government confessed that it failed to disclose reports for some witnesses who had testified and that witnesses had provided information favorable to the defendants that the government failed to disclose before or when those witnesses testified (ROA.1684-85). The district court ordered the government to complete its production that evening and the defendants to file pleadings the next morning advising the court how the disclosed information impacted the case and what relief they wanted (ROA.9086-92). It was considering a mistrial (ROA.9055, 9069, 9088).

Petitioner wrote in that pleading that he "*opposes a mistrial at this juncture unless one or more of the following occurs*:

> 1. the Government makes a binding representation on the record that it will not retry him;
>
> 2. *the Court makes a finding that it was forced to order a mistrial sua sponte solely because of the Government's misconduct* and not at [petitioner's] request; or
>
> 3. the Court makes a finding that Government agents (though not necessarily the prosecutors themselves) intentionally omitted favorable information from the written 302s that the agents prepared for the prosecutors to produce to defense counsel. (The Court has a sufficient factual basis to make this finding given the sheer volume of instances where these omissions occurred.)" (ROA.13336) (emphasis added).

Petitioner explained that he opposed a mistrial if it meant the government could retry him (ROA.13336-38). He proposed alternative remedies and asked that, if the district court declared a mistrial, it immediately conduct an evidentiary hearing to determine whether to dismiss the indictment based on outrageous government misconduct (ROA.13338).

A few hours after petitioner filed this pleading, the district court held a hearing outside the presence of the jury, which did not arrive to the courthouse until that afternoon.[1] The district court stated, "*I've read the filings. I could invite additional comment. I'm not sure it would alter the course that this Court has determined it must take*" (ROA.9127) (emphasis added). It expressly did not find that the government engaged in misconduct (ROA.9131-32) ("I do not know if the failure to provide these disclosures were simple omissions or intentional, and *I make no finding one way or the other today on that issue.* That day is coming, however.") (emphasis added). It then declared a mistrial *sua sponte*—not at petitioner's request (ROA.9132) ("I've come to the heavy decision that justice requires a mistrial. . . . It is the decision of the Court not on motion of any particular defendant."). It would determine in the future, after an evidentiary hearing, whether the government engaged in misconduct and what sanctions to impose (ROA.9133) ("If, in fact, there was nefarious intent behind the failure to disclose *and it is so determined after an evidentiary hearing*, that

1. At the beginning of this hearing, the government dismissed a co-defendant from the indictment with prejudice in light of the mid-trial disclosures (ROA.9126). The hearing proceeded with petitioner and the three remaining co-defendants.

presents perhaps another type of sanction. *Again, that's not a finding for today.*") (emphasis added). Without giving any party the chance to speak, the judge then recessed until the jury arrived that afternoon and stormed out of the courtroom.

When the district court reconvened, it told the jury that it had declared a mistrial earlier that morning and dismissed them (ROA.9137-40).

After the mistrial, petitioner moved to depose the case agents and, alternatively, requested an evidentiary hearing (ROA.1716-19, 1754-64, 13368-73). He eventually moved to bar a retrial based on Double Jeopardy (ROA.2017-28). The district court denied the Double Jeopardy motion—but found that the issue was *not* frivolous (App. 20-25; ROA.2231-35). Petitioner filed notice of appeal and written objections to the order and findings (App. 28-39; ROA.2236, 2277-85).

C. The Fifth Circuit's Decision

The Fifth Circuit affirmed the district court's denial of the Double Jeopardy motion, holding that petitioner consented to the mistrial and that, even if he clearly objected to the mistrial, manifest necessity existed to declare it.

First, the court held that petitioner forfeited his Double Jeopardy claim because he consented to the mistrial—"impliedly, if not expressly" (App. 19). Even though he filed an anticipatory, written objection to a mistrial before the district court declared it, the Fifth Circuit concluded that his objection did not "*clearly* appl[y]

to the mistrial *as declared* by the district court" (App. 11). Specifically, he stated that he opposed a mistrial unless the district court found that it was forced to order a mistrial *sua sponte* "because of the Government's misconduct" and not at his request. The Fifth Circuit held that the district court made this *implied* finding when it "chastised the Government for its failure to disclose favorable evidence, considered sanctions of varying degrees, and promised a more fulsome investigation to determine whether 'there was nefarious intent behind the failure to disclose'" (App. 11). Although neither court said so in plain English, the Fifth Circuit effectively held that the district court found that the government engaged in misconduct.

The Fifth Circuit purported to view the record in petitioner's favor on the question of whether he consented to or objected to the mistrial (App. 12). It was "at best unclear whether the district court satisfied [petitioner's] stated condition and, therefore, whether [he] maintained an objection—or impliedly consented—to the district court's mistrial as declared" (App. 12). As a result, petitioner failed to prove on appeal that he "gave the court sufficient notice and opportunity to resolve [his] concern" (App. 12). The Fifth Circuit concluded that it was "unclear" whether the district court made a finding upon which petitioner would consent to a mistrial. It shifted the burden to petitioner to object *again* after the district court declared the mistrial. In the Fifth Circuit's eyes, petitioner's failure to object *a second time* constituted implied consent to the mistrial.

Alternatively, the Fifth Circuit held that, even if petitioner clearly objected to the mistrial, the district court did not abuse its discretion in declaring a mistrial

because manifest necessity existed (App. 14). The Fifth Circuit wrestled with the appropriate standard of review. It recognized that, at one end of the spectrum, the "strictest scrutiny" applies when government misconduct causes a mistrial (App. 15). At the other end of the spectrum, "'broad deference' is appropriate" when the mistrial is based on jury bias or deadlock (App. 15). Admitting that it had not yet encountered a mistrial based on "the Government's inadvertent failure to disclose favorable evidence to the defense until the fifth week of trial," it concluded that the appropriate standard of review fell between the "broad deference" in juror-bias or jury-deadlock cases and the "strictest scrutiny" required when the government acts "in bad faith for tactical reasons" (App. 16-17).

Instead of applying either "strict scrutiny" or "broad deference," the Fifth Circuit reasoned that "'the ultimate inquiry is whether the trial judge exercised sound discretion in declaring a mistrial'" (App. 17). Although both petitioner and the government proposed reasonable alternatives to a mistrial and asked the district court to complete the trial (App. 18), the Fifth Circuit held that the district court did not abuse its discretion in declaring the mistrial (App. 19).

In sum, the Fifth Circuit held on the one hand that petitioner consented to the mistrial because the district court implicitly found that the government engaged in misconduct; but, on the other hand, the "strictest scrutiny" did not apply to the Double Jeopardy claim because the government misconduct was not bad enough to trigger that standard of review.

Lost in the analysis were the central questions of constitutional policy posed by petitioner: Why should the government profit from misconduct serious enough to cause the district court to declare a mistrial *sua sponte* over petitioner's written objection? And if the government misconduct was not bad enough to bar a retrial, why was it sufficient to warrant a mistrial where petitioner wanted to resume the trial? This Court should reject a published circuit case that fashions a constitutional policy that instructs the government that it can engage in misconduct serious enough to trigger a mistrial *sua sponte* without the defendant's consent and then permit the government to retry the defendant. The government is not entitled to a second bite at the apple where it caused the apple to rot.

REASONS FOR GRANTING CERTIORARI

The Court should grant certiorari to decide two related questions. First, as a threshold matter, it should resolve the circuit court split on what constitutes a defendant's implied consent to a mistrial. Second, it should resolve whether strict scrutiny applies to review a district court's *sua sponte* decision to declare a mistrial based on government misconduct over a defendant's objection. At a minimum, if this Court decides that strict scrutiny applies to review the Double Jeopardy claim, it should vacate the Fifth Circuit's judgment and remand with instructions to apply that standard.

I. Circuit Courts Are Deeply Split On What Constitutes A Defendant's Implied Consent To A Mistrial.

The Double Jeopardy Clause provides, "No person shall . . . be subject for the same offence to be twice put in

jeopardy of life or limb. . . ." U.S. CONST. amend. V. Once a jury is empaneled and sworn, a criminal defendant has the right to receive a verdict from that jury unless he consented to a mistrial or there was a manifest necessity to declare a mistrial. *Illinois v. Somerville*, 410 U.S. 458, 467-68 (1973); *Downum v. United States*, 372 U.S. 734, 738 n.1 (1963).

Circuit courts are widely divided on what constitutes a defendant's implied consent to a mistrial. The First, Fourth, Fifth, Seventh and Eleventh Circuits have adopted a rule that defendants give implied consent to a mistrial if they have an opportunity to object but fail to do so. *See United States v. DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991); *United States v. Ham*, 58 F.3d 78, 83 (4th Cir. 1995); *United States v. Nichols*, 977 F.2d 972, 974 (5th Cir. 1992); *Camden v. Circuit Court*, 892 F.2d 610, 615 (7th Cir. 1989); *United States v. Puleo*, 817 F.2d 702, 705 (11th Cir. 1987). At the other extreme, the Third, Sixth, and Ninth Circuits refuse to infer consent without some positive manifestation of acquiescence by the defense. *See Love v. Morton*, 112 F.3d 131, 138 (3d Cir. 1997); *Glover v. McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991); *Weston v. Kernan*, 50 F.3d 633, 637 (9th Cir. 1995).[2]

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2. *See also* Aaron L. Weisman, Annotation, *What Constitutes Accused's Consent to Court's Discharge of Jury or to Grant of Motion for Mistrial Which Will Constitute Waiver of Former Jeopardy Plea-Silence or Failure to Object or Protest*, 103 A.L.R. 6th 137 § I.2 (2015) ("[T]here exists a split in the law, among various states and federal circuits, as to whether a defendant's silence, or failure to object, may constitute consent to a declaration of a mistrial or jury discharge."); W.R. Habeeb, Annotation, *What Constitutes Accused's Consent to Court's Discharge of Jury or to Grant of State's Motion for Mistrial Which*

The slight majority rule—that presumes defendants consent to mistrials if they do not affirmatively object—conflicts with this Court's requirement that, when considering whether a retrial would violate Double Jeopardy, a court must resolve any doubt in favor of the defendant. *Downum*, 372 U.S. at 738 ("resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion'"). The Fifth Circuit disrespected that mandate when it held that petitioner failed to prove on appeal that his written objection to the mistrial clearly communicated to the district court that he opposed the mistrial. Worse, the Fifth Circuit faulted petitioner for not clarifying his objection after the district court announced its decision to declare a mistrial—even though the district court did not make any findings that the government engaged in misconduct and expressly stated that it would reserve those findings for another day. Petitioner did not renew his objection after the mistrial because the district court had rejected the conditions on which he would have consented to a mistrial, as it expressly refused to find that the government engaged in misconduct.[3] Neither the

Will Constitute Waiver of Former Jeopardy Plea, 63 A.L.R.2d 782 (1959).

3. The district court expressly made no finding of misconduct (ROA.9131-32) ("*I make no finding one way or the other today on that issue*. That day is coming, however."); (ROA.9133) ("Going forward," court would determine whether misconduct occurred). The government denied throughout the post-trial litigation that it committed "misconduct" and complained about petitioner's use of the word where the district court had made no finding. *See* (ROA.13379) ("Defendants' Motion is predicated on the argument that the Court has already identified misconduct by the government. That is not the case."); (ROA.13381) ("Defendants

district court nor petitioner was unclear about the other's position; only the Fifth Circuit lacked clarity about what happened.

Ironically, the Fifth Circuit applied a much harsher standard to petitioner to determine whether he impliedly consented to the mistrial than the majority rule that circuit typically follows. Under that rule, defendants impliedly consent to a mistrial if they have an opportunity to object but fail to do so. Here, petitioner filed a detailed written objection to a mistrial, unless certain events occurred; yet none of them did. And he proposed a variety of curative alternatives to a mistrial. Petitioner's position regarding a potential mistrial was extensively more thorough than what other Double Jeopardy cases present. Petitioner explained his opposition to a mistrial by focusing on the bad public policy that would flow if the government were allowed to retry him (ROA.13337-38) (emphasis in original):

> Declaring a mistrial at this juncture . . .would prejudice [petitioner] for two reasons. First, it would deprive him of the opportunity to have the Court rule on Rule 29 motions after the Government rests or, alternatively, to have *this* jury try to reach verdicts based on the evidence

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ignore that no such finding [of governmental misconduct] has been made in this case."); (ROA.13383) ("There has been no finding by the Court of government misconduct. Whether any misconduct occurred is the very purpose of the Court's inquiry. As such, any sanction predicated on government misconduct is not warranted. . . ."). The record refutes the Fifth Circuit's conclusion that the district court found that the government committed misconduct when it declared the mistrial.

> presented in *this* trial—including the evidence of governmental misconduct that creates a reasonable doubt as to all of the prosecution's evidence. Second, declaring a mistrial would give the Government a windfall if it thereafter is permitted to retry [petitioner]. Essentially, the Government would get a "do-over," or a second bite at the apple. It would be able to correct its mistakes and attempt to retry the case before a different jury that would not know about this egregious misconduct. The message to these prosecutors—indeed, to all prosecutors—is that you can try a case dirty once, and if you get caught, then you can retry the case clean a second time without consequence. The law cannot permit that kind of gamesmanship. There must be punitive consequences for the misconduct. It would violate due process if the Government is allowed to retry [petitioner] after causing a mistrial.

Petitioner could not have been more assertive about his opposition to a mistrial nor more clear about what needed to occur for him to consent to a mistrial. Yet, the Fifth Circuit held that he consented to it by failing to renew his objection after the district court declared it. This Court held in *Douglas v. Alabama*, 380 U.S. 415, 421-23 (1965), that repeated objections regarding the same issue are unnecessary to preserve error once a court overrules the initial objection. The Fifth Circuit's decision squarely conflicts with *Douglas*.[4] It also conflicts with

4. The process that led to the mistrial was consistent with Federal Rule of Criminal Procedure 26.3 ("Before ordering a

the district court's statement that it had read petitioner's pleading and did not need additional argument because petitioner could not say anything to change the court's mind regarding a mistrial. The district court never said that it did not understand whether petitioner opposed a mistrial, nor did it ask him to clarify his position.

Importantly, the district court *did not find* that petitioner consented to the mistrial. Instead, it expressly found that his Double Jeopardy claim was *not* frivolous (ROA.2233), which implied that the mistrial was over his objection and without his consent. Had the court believed that he consented to the mistrial, it would have found the Double Jeopardy claim frivolous and forfeited, and it would not have authorized this interlocutory appeal. The Fifth Circuit effectively rejected the district court's implied finding that petitioner opposed the mistrial without any evidence that this finding was clearly erroneous.

The Fifth Circuit applied a test that conflicts with this Court's precedent. Indeed, it applied a harsher rule to petitioner than those adopted by both sides of the circuit split. It ignored this Court's directive from *Downum* to resolve any doubt in favor of petitioner, as well as this Court's rule from *Douglas* that repeated objections are unnecessary. This Court should grant certiorari to resolve the deep circuit split and clarify what constitutes a defendant's implied consent to a mistrial.

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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."). Rule 26.3 does not require parties who object *before* a mistrial to object *again after* a mistrial. One objection beforehand is adequate. The Fifth Circuit did not discuss Rule 26.3, although petitioner briefed and argued it.

II. Strict Scrutiny Should Apply To Review A District Court's *Sua Sponte* Decision To Declare A Mistrial Based On Government Misconduct Over A Defendant's Objection.

The Fifth Circuit held that, even if petitioner clearly objected to the mistrial, the district court did not abuse its discretion in declaring a mistrial because a manifest necessity existed (App. 14).

The Fifth Circuit admittedly struggled with what standard of review applied to the Double Jeopardy claim. It recognized that, at one end of the spectrum, the "strictest scrutiny" applies when government misconduct causes a mistrial (App. 15). At the other end of the spectrum, "'broad deference' is appropriate" when the mistrial is based on jury bias or deadlock (App. 15). Petitioner's case was the first time the Fifth Circuit had encountered a mistrial based on "the Government's inadvertent failure to disclose favorable evidence to the defense until the fifth week of trial." It concluded that the appropriate standard of review fell between the "broad deference" in juror-bias or jury-deadlock cases and the "strictest scrutiny" required when the government acts "in bad faith for tactical reasons" (App. 16-17). Instead of applying either standard, it reasoned that "'the ultimate inquiry is whether the trial judge exercised sound discretion in declaring a mistrial'" (App. 17).

This Court imposes on the government a "heavy burden" to prove that a manifest necessity existed to declare a mistrial and requires a reviewing court to apply the "strictest scrutiny" when the mistrial results from "the unavailability of critical prosecution evidence"

or when the government uses its superior resources to achieve a "tactical advantage over the accused." *Arizona v. Washington*, 434 U.S. 497, 505, 508 (1978). Until now, the Fifth Circuit had followed this standard. *See United States v. Fisher*, 624 F.3d 713, 718 (5th Cir. 2010) (government has especially high burden to justify retrial where it caused mistrial, and strict scrutiny applies to Double Jeopardy claim); *cf. United States v. Stricklin*, 591 F.2d 1112, 1117-18 (5th Cir. 1979) (once defendant shows that Double Jeopardy claim is not frivolous, burden shifts to government to establish that Double Jeopardy does *not* bar retrial).

The Fifth Circuit concluded that government misconduct caused the district court to declare the mistrial *sua sponte* (App. 11-12). But it expressly refused to apply strict scrutiny and did not require the government to justify a retrial. Instead, it carved out a new rule—contrary to this Court's clear precedent—that strict scrutiny only applies when the government acts in "bad faith" (App. 16-17). In doing so, it apparently conflated the "intentional goading" test from *Oregon v. Kennedy*, 456 U.S. 667 (1982). But the *Kennedy* test does not apply because petitioner did not request the mistrial.

The government's failure to disclose favorable information prevented petitioner from eliciting that information on cross-examination. The government caused "critical prosecution evidence" to be unavailable. The agents' conscious decisions to omit favorable information from the reports produced to petitioner helped the government achieve a "tactical advantage over" him. Yet, when analyzing the Double Jeopardy claim, the Fifth Circuit failed to resolve any doubt in favor of petitioner

and expressly refused to apply strict scrutiny or place any burden, let alone an especially high one, on the government to justify a retrial where it caused the mistrial. This Court should grant certiorari to resolve whether strict scrutiny applies to review a district court's *sua sponte* decision to declare a mistrial based on government misconduct over a defendant's objection.

CONCLUSION

The district court erred in declaring a mistrial *sua sponte* and in denying petitioner's Double Jeopardy motion. The Fifth Circuit erred in holding that petitioner impliedly consented to the mistrial and, therefore, forfeited the Double Jeopardy claim. This Court should grant certiorari to resolve the entrenched circuit split and decide, once and for all, what constitutes a defendant's implied consent to a mistrial.

The Fifth Circuit also erred in refusing to apply the "strictest scrutiny" standard to the Double Jeopardy analysis where government misconduct caused the mistrial. This Court should grant certiorari to clarify what standard of review applies where the government misconduct was not intended to goad the defendant into requesting a mistrial, but was bad enough to cause the trial court to declare a mistrial *sua sponte* over the defendant's objection. At a minimum, if this Court decides that strict scrutiny applies, it should vacate the Fifth Circuit's judgment and remand to apply that standard.

This Court should grant certiorari because the Fifth Circuit has decided important questions of federal law that have not been, but should be, settled by this Court,

or has decided important federal questions in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). The Court should grant review and order briefing and argument on these important constitutional questions.

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20326

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

v.

SCOTT BREIMEISTER,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-368-2

Filed April 7, 2025

Before HAYNES, DUNCAN, and WILSON, *Circuit Judges.*

CORY T. WILSON, *Circuit Judge*:

Scott Breimeister and four codefendants were jointly tried for allegedly defrauding public and private healthcare programs out of more than $140,000,000. Five weeks into trial—after the testimony of twenty-one Government witnesses—the Government made a series

of late disclosures of evidence favorable to the defense which impacted nearly a third of the testimony to date. The district court explored possible remedies for the Government's breach, but ultimately found the curative measures proposed by the parties unlikely to produce a fair verdict. The court *sua sponte* declared a mistrial, and Breimeister then moved to bar retrial. The district court denied that motion, finding that the Double Jeopardy Clause did not preclude a second trial because the mistrial was a "manifest necessity." Breimeister now brings this interlocutory appeal, and we affirm.

I.

Scott Breimeister and four other defendants allegedly engaged in a scheme to defraud public and private healthcare programs through a chain of Houston-area pharmacies. Their indictment alleges that the five codefendants submitted and caused to be submitted "false and fraudulent claims for compounded drugs, 'kits,' 'patches,' and other prescription drugs." Further, Breimeister and his codefendants allegedly took "actions to conceal the scheme or obstruct the investigation" while defrauding the programs of more than $140,000,000 and individually profiting "between hundreds of thousands of dollars and tens of millions of dollars."

The defendants jointly proceeded to trial. During five weeks of trial, the Government presented twenty-one witnesses and a host of exhibits intended to summarize the alleged fraudulent transactions. One of the Government's final witnesses, a certified public accountant and certified

fraud examiner named William Chan, testified that he prepared twelve of the Government's summary exhibits, utilizing only the source materials listed on the exhibits (primarily bank records) and the assistance of one accounting-firm colleague. However, cross-examination exposed holes in Chan's methodology and source materials that raised concerns with the district court about the exhibits' reliability. Based on those concerns and at the defense's request, the court ordered the Government to produce the unredacted notes Chan kept while preparing his summary exhibits.

Chan's unredacted notes conflicted with his testimony in two material ways. First, they revealed that Chan had worked closely with the Government to prepare his summary exhibits, rather than with just one accounting-firm colleague. Second, they showed that Chan relied on sources beyond those listed on the exhibits. Specifically, Chan's notes indicated that he relied on previously undisclosed Government files and that the Government instructed him as to which sources he should and should not cite on the summary exhibits. The defense's continued cross-examination of Chan confirmed those inconsistencies.

The defense moved to strike the entirety of Chan's testimony and exhibits. The district court granted the motion in part, striking four summary exhibits and Chan's related testimony and instructing the jury to disregard them. The Government then conducted its redirect examination of Chan.

Following Chan's testimony, the district court ordered the Government to revisit its files and ensure that all transcripts and notes from the Government's pre-trial interviews of witnesses were turned over to the defense. Over the intervening weekend, the Government disclosed additional interview reports and notes from interviews conducted on twelve separate dates regarding some witnesses who had already testified and others who had yet to do so. Based on those additional disclosures, the defendants jointly moved for relief.

Following the additional disclosures, the district court considered the defense's motion and potential relief, stating that "[t]he motion raise[d] troubling concerns for the [c]ourt." Counsel for the Government represented to the court that counsel had not seen any of the newly disclosed documents before trial and that the Government was still working to ensure that all documents were disclosed to the defense, would complete its review of the documents, and would make any required disclosures by the end of the day. Faced with four Government witnesses tainted by the late disclosures, the district court discussed potential remedies with the parties and grappled with a range of possible relief, from striking testimony and recalling witnesses to declaring a mistrial. The court deferred settling on the appropriate relief and instead ordered the Government to complete its review and make the required disclosures so that both parties could update the court and provide their requested relief in writing by the following morning. The district court also warned that a mistrial might be necessary if more witnesses were affected by additional disclosures.

Appendix A

Overnight, the Government made additional disclosures, and Breimeister, with two other defendants, filed an updated, joint motion for relief that outlined their individual proposals to remedy the untimely disclosures. Breimeister's section of the motion identified at least eight witnesses whose testimony was impacted. And the defendants all took issue with Government Exhibit 1—a large compilation of data upon which "[n]umerous summary exhibits [were] based"—arguing that the belated disclosures showed that the pre-admitted exhibit was unreliable. As for relief, Breimeister stated that he "oppose[d] a mistrial . . . unless one or more of the following" occurred:

> 1. [T]he Government ma[de] a binding representation on the record that it w[ould] not retry him;
>
> 2. the [c]ourt ma[de] a finding that it was forced to order a mistrial *sua sponte* solely because of the Government's misconduct and not at Breimeister's request; or
>
> 3. the [c]ourt ma[de] a finding that Government agents . . . intentionally omitted favorable information from the written 302s that the agents prepared for the prosecutors to produce to defense counsel.

Breimeister further argued that "[d]eclaring a mistrial at this juncture—without any of the above occurring—would prejudice" him by depriving him of the opportunity

to move for acquittal when the Government rested or to have the jury render a verdict, thereby guaranteeing the Government a second bite at the apple. As an alternative to a mistrial, Breimeister proposed a complex, eight-part "combination of relief." The Government filed a response that also proffered alternatives to a mistrial.

The district court reconvened later that morning, stated that it had considered the parties' written motions for relief, and without hearing argument, declared a mistrial *sua sponte*. In doing so, the district court explained that alternative remedies would not suffice and noted that the testimony of at least six of the twenty-one witnesses—roughly a third—had been tainted by the Government's late disclosures. The court determined that "[t]he impacts of these disclosures ha[d] been far ranging and significant." The district court also explained that the burden upon the jury to render a fair verdict would be "too heavy" given the extent of the required curative instructions. Thus, after considering various alternatives, and "not on the motion of any particular defendant," the district court declared a mistrial. No party objected, and the court recessed. Before calling in and dismissing the jury, the court invited the parties to offer argument. No party objected at that time, either, and the district court then dismissed the jury.

Breimeister subsequently moved to dismiss his indictment and to bar retrial under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution due to the Government's misconduct. The district court initially denied the motion summarily,

but Breimeister successfully moved the district court to reconsider. The district court then held a hearing and upon reconsideration again denied Breimeister's request because a mistrial was a "manifest necessity" and because the Government's misconduct was unintentional. Breimeister timely noticed this appeal.

II.

We have jurisdiction over Breimeister's interlocutory appeal because he challenges the denial of a motion to dismiss on double jeopardy grounds, and his double jeopardy claim is at least "colorable," meaning that "there is some possible validity to the claim." *United States v. Sarabia*, 661 F.3d 225, 228–29 (5th Cir. 2011) (quotation marks and citations omitted) (alterations accepted); *accord Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

"We review the district court's denial of a motion to dismiss an indictment on double jeopardy grounds *de novo* and accept the underlying factual findings of the district court unless clearly erroneous." *United States v. Gonzalez*, 76 F.3d 1339, 1342 (5th Cir. 1996). "The decision to declare a mistrial is within the sound discretion of the trial court." *Grandberry v. Bonner*, 653 F.2d 1010, 1014 (5th Cir. 1981) (citing *Arizona v. Washington*, 434 U.S. 497, 514, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). But "[o]ur review of the denial of a double jeopardy claim following declaration of a mistrial is plenary." *United States v. El-Mezain*, 664 F.3d 467, 559 (5th Cir. 2011). The inquiry is "plenary" in that "we are free to scrutinize the entire record and are not

limited to only those findings made contemporaneously with the mistrial order" to assess "whether the trial judge 'carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner.'" *United States v. Bauman*, 887 F.2d 546, 550 (5th Cir. 1989) (quoting *Grandberry*, 653 F.2d at 1014).

III.

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Thus, once a jury is empaneled and sworn, a criminal defendant has the right to receive a verdict from that particular jury. *United States v. Palmer*, 122 F.3d 215, 218 (5th Cir. 1997); *see also Illinois v. Somerville*, 410 U.S. 458, 467–68, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). But that right "is not absolute." *Palmer*, 122 F.3d at 218. Our court has recognized two instances in which a defendant may be retried following a mistrial consistent with the Double Jeopardy Clause. First, "[a]bsent prosecutorial or judicial overreaching, a defendant's motion or consent to mistrial ordinarily is assumed to remove any barrier to reprosecution." *Cherry v. Dir., State Bd. of Corr.*, 635 F.2d 414, 417 (5th Cir. 1981) (en banc). And second, where "a defendant does not consent to a mistrial, the Clause permits reprosecution only if there was manifest necessity for the mistrial." *United States v. Fisher*, 624 F.3d 713, 718 (5th Cir. 2010). Breimeister contends that this case presents neither scenario because the district court declared a mistrial (A) without his consent and (B) without a "manifest necessity" to do so, such that the

Double Jeopardy Clause prohibits the Government from retrying him. We disagree on both points.

A.

Our first inquiry is whether Breimeister consented to a mistrial, thereby forfeiting his double jeopardy claim. "If a defendant consents to a mistrial, . . . double jeopardy ordinarily will not bar a reprosecution." *El-Mezain*, 664 F.3d at 559. The defendant's consent "may be express or implied through a failure to object." *Id.* "If a defendant does not timely and explicitly object to a trial court's *sua sponte* declaration of mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried in a later proceeding." *Palmer*, 122 F.3d at 218. "The determination of whether a defendant objected to a mistrial is made on a case-by-case basis, and the critical factor is whether a defendant's objection gave the court sufficient notice and opportunity to resolve the defendant's concern." *El-Mezain*, 664 F.3d at 559.

According to the Government, Breimeister consented to the mistrial in one of two ways. First, the Government suggests that Breimeister expressly consented to the mistrial because the district court satisfied one of the specific conditions under which he said he would consent to a mistrial as laid out in his motion for relief—that the court find "that it was forced to order a mistrial *sua sponte* solely because of the Government's misconduct and not at Breimeister's request." Second, the Government maintains that even if Breimeister did not expressly consent to the mistrial, he impliedly did so by failing to

object contemporaneously to the mistrial declaration. The Government contends that the mistrial declaration at least arguably satisfied Breimeister's above condition, such that it was incumbent upon Breimeister to put the district court clearly on notice that he continued to object to a mistrial. Failing to do so, he impliedly consented to the court's mistrial declaration.

Breimeister rejoins that his anticipatory, conditional objection was clear enough to put the district court on notice that he objected to the mistrial as declared, and that he was not required to seek clarification or renew that objection in open court.[1]

True enough, once Breimeister filed his written objection, he did not need to renew that objection in open court so long as the district court's ultimate mistrial declaration clearly fell within the scope of his objection. *See United States v. Santiago*, 96 F.4th 834, 848 (5th Cir. 2024) (citing *United States v. Medina-Anicacio*, 325 F.3d 638, 642 (5th Cir. 2003)); *see also Lang v. Tex. & P. Ry. Co.*, 624 F.2d 1275, 1279 (5th Cir. 1980) (explaining that "failure to object may be disregarded if the party's position has previously been made clear to the court and it is plain that

1. Breimeister also maintains that the district court gave him no opportunity to object contemporaneously with the mistrial declaration. But the record belies that assertion. After conferring with counsel outside the presence of the jury, notifying the parties that it would declare a mistrial, and taking a short recess, the district court gave the parties an opportunity to be heard before calling in the jury, ordering a mistrial in its presence, and dismissing it. No party objected in that interlude.

a further objection would have been unavailing"). But the critical question is whether Breimeister's anticipatory objection *clearly* applied to the mistrial *as declared* by the district court. *See El-Mezain*, 664 F.3d at 559.

Breimeister fails to show that it did. Put differently, his written motion did not clearly put the district court on notice that the mistrial as declared failed to satisfy one of his conditions. His motion stated that he would consent to a mistrial if "the [c]ourt ma[de] a finding that it was forced to order a mistrial *sua sponte* solely because of the Government's misconduct and not at Breimeister's request." There is no dispute that the district court declared a mistrial *sua sponte*—"not on the motion of any particular defendant." And the district court at least arguably satisfied the remainder of Breimeister's condition: As it declared a mistrial, the court chastised the Government for its failure to disclose favorable evidence, considered sanctions of varying degrees, and promised a more fulsome investigation to determine whether "there was nefarious intent behind the failure to disclose." Whether the Government's discovery failures "were simple omissions or intentional," either of which can be "misconduct" in the double-jeopardy context,[2] those

2. Breimeister vaguely uses the term "misconduct" in his motion for relief, and on appeal, he ignores that our double jeopardy jurisprudence recognizes varying degrees of "misconduct," including forms of "grossly negligent" misconduct, that do not bar retrial. *See United States v. Singleterry*, 683 F.2d 122, 123 n.1 (5th Cir. 1982). Thus, his broadbrush use of that term, without more, only adds to the lack of clarity in his objection. Further exacerbating the uncertainty, Breimeister's

lapses were the only catalyst cited by the district court in declaring a mistrial. Thus, even viewing the record in Breimeister's favor, it is at best unclear whether the district court satisfied Breimeister's stated condition and, therefore, whether Breimeister maintained an objection—or impliedly consented—to the district court's mistrial as declared.

Given that lack of clarity, Breimeister fails to demonstrate that his anticipatory motion for relief "gave the court sufficient notice and opportunity to resolve the defendant's concern" with the court's ultimate mistrial declaration. *See El-Mezain*, 664 F.3d at 559. As a result, Breimeister's failure to object contemporaneously constitutes implied consent to the mistrial. *See Palmer*, 122 F.3d at 218. For that reason, the Double Jeopardy Clause does not preclude the Government from retrying him. *Id.*

Of course, there is "a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial" where a defendant consents to a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 675–76, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Where "the defense moves for, or consents to, a mistrial, the Double Jeopardy Clause may bar retrial if the [G]overnment intended to goad the defendant into [consenting to] a mistrial." *Martinez v. Caldwell*, 644 F.3d 238, 243 (5th Cir. 2011) (quotation marks and

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third condition also lacks specificity that an intentional omission of "favorable information from the written [Form] 302s that the agents prepared for the prosecutors to produce to defense counsel" would necessarily preclude retrial. *See id.*; *United States v. Wharton*, 320 F.3d 526, 531 (5th Cir. 2003).

citations omitted). But that "standard is exacting." *Id.* It is not enough to show "that the prosecutor intend[ed] to 'seriously prejudice' the defendant's chances of acquittal." *United States v. Singleterry*, 683 F.2d 122, 123 n.1 (5th Cir. 1982) (citation omitted). "Government misconduct 'that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion[,] does not bar retrial.'" *Martinez*, 644 F.3d at 243 (alterations accepted) (quoting *Kennedy*, 456 U.S. at 675–76, 102 S.Ct. 2083). "Not even the [G]overnment's 'gross negligence' would prevent a retrial of the defendant." *Id.* (quoting *Robinson v. Wade*, 686 F.2d 298, 306 & n.17 (5th Cir. 1982)). Rather, "there must be intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *United States v. Wharton*, 320 F.3d 526, 531 (5th Cir. 2003) (emphasis omitted) (quoting *Kennedy*, 456 U.S. at 675–76, 102 S.Ct. 2083). "Once the court determines that the prosecutor's conduct was not intended to terminate the trial, 'that is the end of the matter for purposes of the Double Jeopardy Clause.'" *Id.* at 532 (quoting *Kennedy*, 456 U.S. at 679, 102 S.Ct. 2083).

Here, the district court conducted a thorough post-trial inquiry into the Government's discovery failures by holding "multiple hearings and status conferences" and hearing "from the Government regarding its investigation into the prosecution team's conduct that led the [c]ourt to declare a mistrial." Only then did the district court determine that the Government's oversights in this case were "not malicious or intentionally fraudulent."[3]

3. Breimeister contends that the district court erred by denying him an evidentiary hearing and the opportunity to

That finding was not clearly erroneous. And because the Government did not make late disclosures with the intent to "terminate the trial" in an effort to "subvert the protections afforded by the Double Jeopardy Clause," that "is the end of the matter." *Id.* at 531–32 (quoting *Kennedy*, 456 U.S. at 679, 102 S.Ct. 2083).

B.

Even if we assumed that Breimeister clearly objected to the mistrial ordered by the district court, the Government may still retry him consistent with the Double Jeopardy Clause. That is because the district court did not abuse its discretion in declaring a mistrial due to "manifest necessity."

"When a defendant does not consent to a mistrial, the [Double Jeopardy] Clause permits reprosecution only if there was manifest necessity for the mistrial." *Fisher*, 624 F.3d at 718 (citing *Washington*, 434 U.S. at 505, 98 S.Ct. 824). But "[m]anifest necessity does not mean absolute necessity that a judge declare a mistrial." *Cherry*, 635 F.2d at 418. Instead, "we assume that there are degrees of necessity[,] and we require a high degree before concluding that a mistrial is appropriate." *Id.* at

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question the prosecutors under oath. But "a district court's decision not to hold an evidentiary hearing before denying a motion to dismiss an indictment is reviewed for an abuse of discretion." *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003). Given the district court's efforts in this case to investigate the matter, the court did not abuse its discretion in denying Breimeister a separate evidentiary hearing or the opportunity to depose prosecutors.

418 (quoting *Washington*, 434 U.S. at 506, 98 S.Ct. 824). "Our determination of manifest necessity is not cabined by the explanations that the trial court has explicitly set forth." *Fisher*, 624 F.3d at 718. "Rather, th[is] court is free to scrutinize the entire record." *Id.*

Though we "accord 'great deference' to the trial judge's 'sound discretion' in declaring a mistrial," *Cherry*, 635 F.2d at 418 (quoting *Washington*, 434 U.S. at 514, 98 S.Ct. 824), our "standard of review in such cases is not static" and "varies depending on the cause of the mistrial." *Fisher*, 624 F.3d at 718. At one end of the spectrum, "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington*, 434 U.S. at 508, 98 S.Ct. 824. At the other end, "broad deference is appropriate" where a trial judge declares a mistrial due to jury bias or deadlock. *Fisher*, 624 F.3d at 718. "Thus, our first task is to determine the standard of review by identifying the cause of the mistrial." *Id.* at 719.[4]

4. Breimeister contends that the "manifest necessity" standard does not apply because any "manifest necessity" arose from the Government's discovery failures. Specifically, Breimeister relies on *United States v. Alford*, 516 F.2d 941, 946 (5th Cir. 1975), where this court said in *dicta* that "[m]anifest necessity does not exculpate the prosecution from the constrictions of the [D]ouble [J]eopardy [C]lause where there has been prosecutorial overreaching." But even if this case is one of "prosecutorial overreaching," both our en banc court and the Supreme Court have

In this case, the district court declared a mistrial because of the Government's inadvertent failure to disclose favorable evidence to the defense until the fifth week of trial.[5] The court determined that the untimely disclosures, coupled with the low likelihood that any curative measures or instructions to the jury would ensure a fair verdict, created a "manifest necessity" for the mistrial. While this court has not yet had occasion to place unintentional discovery-related lapses by the Government on our standard-of-review spectrum, we are convinced that this case merits more scrutiny than the "broad deference" afforded trial courts in juror-bias or jury-deadlock cases. *See Fisher*, 624 F.3d at 718. Yet the district court's manifest-necessity finding is entitled to more deferential treatment than the "strictest scrutiny" because, as the district court found, the mistrial was not

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recognized since *Alford* that even "when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused," the manifest-necessity test still applies; the level of Government misconduct merely modifies the degree of deference afforded to the district court on review. *See Washington*, 434 U.S. at 508, 98 S.Ct. 824; *Cherry*, 635 F.2d at 418 n.6.

5. Breimeister casts the Government's conduct as intentional, centering on the evidence in Chan's notes that prosecutors coached Chan on which sources to disclose, and not to disclose, on the summary exhibits he prepared. While those notes suggest some intentionality by the Government, Chan's exhibits and testimony did not in themselves trigger the mistrial; they precipitated the revelation of the broader discovery lapses that did. And nothing in the record before us suggests the district court clearly erred in finding that those lapses by the Government were unintentional.

"br[ought] about . . . in bad faith for tactical reasons." *See Cherry*, 635 F.2d at 418 n.6. Nor was a mistrial declared because "a prosecutor proceed[ed] to trial aware that key witnesses [we]re not available to give testimony," thereby giving the prosecutor a "trial run of his case." *Washington*, 434 U.S. at 508 n.24, 98 S.Ct. 824 (quotation marks and citations omitted).

Wherever we might precisely plot this case along our standard-of-review spectrum, "the ultimate inquiry is whether the trial judge exercised sound discretion in declaring a mistrial." *Lewis v. Bickham*, 91 F.4th 1216, 1223 (5th Cir. 2024) (per curiam) (quotation marks and citation omitted). Indeed, the district court retains discretion to order a mistrial "whenever, in [its] opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Featherston v. Mitchell*, 418 F.2d 582, 583 (5th Cir. 1969) (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824)); *see also Fisher*, 624 F.3d at 720–21 (recognizing that even under the "strictest scrutiny" standard, the district court has discretion to order a mistrial due to manifest necessity after conducting "a careful investigation"). Thus, we ask "whether the trial judge 'carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner.'" *Bauman*, 887 F.2d at 550 (quoting *Grandberry*, 653 F.2d at 1014).

Here, the district court acted within its discretion in declaring a mistrial due to "manifest necessity." Five weeks into a complex healthcare-fraud trial, at least six of twenty-one witnesses' testimony required curative

measures, including the possibility of instructing the jury to disregard specific exhibits and portions of testimony spanning the entire trial to date. Faced with this dilemma, the district court requested briefing from all parties as to their preferred remedies and considered the proposed alternatives. But the district court found it unlikely that the jury could render a fair verdict, given the jury instructions required and the heavy burden that would be placed upon the jury to sort tainted evidence from untainted evidence. Thus, the district court came "to the heavy decision that justice require[d] a mistrial," and declared one *sua sponte*.

Breimeister persists that the district court erred because he and the Government "agreed that reasonable alternatives existed for the trial to proceed and proposed specific alternatives," and because the district court did not "confer with the jury to determine whether those alternatives were viable before declaring a mistrial." But "the mere existence of alternatives does not mean that the granting of a mistrial precludes retrial of the defendant where 'reasonable judges could differ about the proper disposition,' and where the record, considered as a whole, indicates that the trial judge in deciding to declare a mistrial, carefully considered the alternatives. . . ." *Grandberry*, 653 F.2d at 1014 (citations omitted); *see also Cherry*, 635 F.2d at 418–19 (alterations accepted) (quoting *Washington*, 434 U.S. at 511, 98 S.Ct. 824). "Though alternatives to a mistrial must be considered, 'the Constitution does not require canvassing of specific alternatives or articulation of their inadequacies.'" *Lewis*, 91 F.4th at 1226 (quoting *Cherry*, 635 F.2d at 418). The mere "availability of another alternative does not without

more render a mistrial order an abuse of sound discretion." *Cherry*, 635 F.2d at 419.

Here, the district court "'carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner'" in finding that the circumstances of this case necessitated a mistrial. *Bauman*, 887 F.2d at 550 (quoting *Grandberry*, 653 F.2d at 1014). Over several days, mid-trial, the district court conferred with counsel, requested and reviewed briefing, and heard argument regarding potential remedies that might have allowed the trial to proceed to verdict. But the district court found that no alternative was likely to result in a fair verdict and declared a mistrial due to manifest necessity. That decision was not an abuse of discretion, and as a result, the district court did not err in denying Breimeister's motion to dismiss the indictment against him on double jeopardy grounds.

IV.

Because Breimeister consented to a mistrial—impliedly, if not expressly—without the Government's goading him into doing so, he has forfeited his double jeopardy claim. Beyond that, the district court did not abuse its discretion in declaring a mistrial due to "manifest necessity." Either way, the Double Jeopardy Clause does not preclude the Government from retrying Breimeister, and the district court properly denied his motion to dismiss the indictment. The ruling of the district court is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED JUNE 27, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL ACTION NO. 4:18-CR-00368

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

VS.

BRIAN SWIENCINSKI, *et al.*,

Defendants.

Filed June 27, 2023

ORDER

Before the Court are numerous motions and filings; first, Defendants' Joint Motion for an Evidentiary Hearing (Doc. #413), Defendants' Memorandum in Support (Doc. #424), the Government's Response (Doc. #432), and Defendants' Reply (Doc. #440); second, Defendants' Joint Motion for *In Camera* Review (Doc. #427), the Government's Response (Doc. #445), and Defendants' Reply (Doc. #454); third, Defendants' Double Jeopardy

Motions (Doc. Nos. 428, 439, 444, 464), the Government's Response (Doc. #461), Defendant Brian Swiencinski's Reply (Doc. #471), Defendant Ronnie McAda's Reply (Doc. #486), and Defendants' Supplemental Brief (Doc. #509); fourth, Defendants' Motions to Reconsider (Doc. Nos. 463, 465),[1] the Government's Response (Doc. #470), Defendant Brian Swiencinski's Reply (Doc. #488); and fifth, the Government's *Ex Parte, In Camera* Submission (Doc. #508).[2] Having reviewed the parties' submissions, arguments, and the applicable legal authority, the Court denies the Defendants' Joint Motion for Evidentiary Hearing (Doc. #413) and Defendants' Double Jeopardy Motions (Doc. Nos. 428, 439, 444, 464). Defendants' Joint Motion for *In Camera* Review (Doc. #427) and Defendants' Motions to Reconsider (Doc. Nos. 463, 465) are denied as moot.

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1. At the April 4 status conference, the Court orally denied Defendants Swiencinski, Breimeister, and McAda's Double Jeopardy Motions (Doc. Nos. 428, 439, and 444) on the record. On April 11, Breimeister filed a Motion for Relief, asking the Court to withdraw its Order denying Defendants' Double Jeopardy Motions and to conduct a hearing. Doc. #456. The Court granted Breimeister's Motion for Relief on April 17, reviving the previously denied Double Jeopardy Motions. Doc. #462. Also on April 17, Ince joined the other three Defendants in filing his own Double Jeopardy Motion (Doc. #464) and Swiencinski filed a Motion for Reconsideration (Doc. #463). The next day, McAda filed a Motion for Reconsideration. Doc. #465. Because the Court already withdrew its Order denying Defendants' Double Jeopardy Motions, Swiencinski and McAda's Motions for Reconsideration (Doc. Nos. 463 & 465) are DENIED as MOOT.

2. This submission was made in response to the Court's request, independent of Defendants' Joint Motion for *In Camera* Review (Doc. #427).

Appendix B

Defendants Brian Swiencinski, Scott Breimeister, Dr. Christopher Ince, and Ronnie McAda (the "Defendants") moved for a bar on retrial and total dismissal of the case on double jeopardy grounds. Doc. #428; Doc. #439; Doc. #444; Doc. #464. *Downum v. United States* is "understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn." *Crist v. Bretz,* 437 U.S. 28, 35 (1978) (citing 372 U.S. 734). However, when a mistrial is declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the court's inquiry into whether it is required to bar retrial. *Illinois v. Somerville,* 410 U.S. 458, 467 (1973). Only after jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by "manifest necessity" or the "ends of public justice." *Id.* at 468.

Here, the record was clear—the United States of America (the "Government") failed to make required *Brady* disclosures for a third of its witnesses, which equated to approximately half of the evidence presented from a number-of-hours perspective. Before declaring a mistrial, the Court carefully and weightily considered every possible alternative, including a jury instruction to disregard certain testimony and evidence, recalling witnesses for a third (and potential fourth) examination, and an on-the-record admonishment of the Government for its conduct. If the Court had ordered the jury to disregard the tainted evidence, the jury would have had to "unhear weeks of testimony." If the Court had allowed witnesses to be recalled and examined afresh, the trial would have been extended an untold number of weeks without resolving the

attendant problem of disregarding previous testimony and substituting new testimony or evidence in its place. If the Court had admonished the Government on the record before the jury, the severity of that admonishment may have had the unintended impact of tainting the jury's view of the Government's untainted evidence. In the Court's view, these potential consequences were too heavy a burden for the jury to shoulder with the expectation that it would or could reach a fair and just result.[3] Any verdict would have been looked upon as askew. As such, the declaration of a mistrial was a "manifest necessity."[4]

Separately, the Superseding Indictment (Doc. #111) supports probable cause that Defendants engaged in criminal conduct. Granting Defendants' Double Jeopardy Motions would essentially erase the Defendants' conduct and eliminate the Government's opportunity to hold the Defendants accountable for actions that have been deemed potentially criminal by a grand jury. Alternatively, the Government getting a "second bite at the apple" after their failure to disclose *Brady* material and seeing the Defendants' trial strategy also seems unjust. The Court resolves these two competing tensions by focusing on the nature of the Government's conduct. Intentional prosecutorial misconduct should not be rewarded with a second chance at prosecution.

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3. At the May 26 hearing, the Government admitted that the Court's declaration of a mistrial was a just consequence and necessary in light of its failure to make proper *Brady* disclosures.

4. Although the Court reached has this conclusion, it does not find that the Defendants' Motions seeking to bar retrial on double jeopardy grounds were frivolous.

Appendix B

Since declaring a mistrial on December 13, 2022, the Court has held multiple hearings and status conferences (January 17, April 4, and May 26, 2023). At these hearings, the Court heard from the Government regarding its investigation into the prosecution team's conduct that led the Court to declare a mistrial. The Court also invited input from the Defendants, giving them multiple opportunities to argue their positions regarding consequences and pathways forward. Most recently, the Court requested the *in camera* production of certain materials from the Government to help the Court in its review of the Government's conduct. Doc. #499. Per the Court's request, the Government filed its *Ex Parte, In Camera* Submission (Doc. #508) detailing the relationship between the trial team (Aleza Remis, Devon Helfmeyer, and Katherine Raut) and the investigation team (Allan Medina and Alexander Kramer). Doc. #508. The Government's *Ex Parte* Submission also describes the interviews conducted by the investigation team. *Id.*

The Court, while greatly dissatisfied with the conduct of prosecutors Aleza Remis, Devon Helfmeyer, and Katherine Raut, has reached the conclusion that said conduct was not malicious or intentionally fraudulent. Based on the Court's own review and the results of the Government's own investigation into its trial team's actions, the prosecutors did not withhold the legally required *Brady* disclosures with nefarious intent or motive. The failure to disclosure by the Government's trial team was clearly substandard of the conduct expected of prosecutors appearing before this Court and must not happen again. Having made this determination and

issued this written admonishment, the Defendants' Joint Motion requesting an Evidentiary Hearing (Doc. #413) is DENIED. Moreover, the Defendants' Double Jeopardy Motions (Doc. Nos. 428, 439, 444, 464) are DENIED. Lastly, Defendants' Joint Motion for *In Camera* Review (Doc. #427) and Defendants' Motions to Reconsider (Doc. Nos. 463, 465) are DENIED as MOOT.

The Court has yet to make its final determination about what sanction(s) will be appropriate for the retrying of this case.

It is so ORDERED.

JUN 27 2023
Date

/s/ Alfred H. Bennett
The Honorable Alfred H. Bennett
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 5, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20326

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SCOTT BREIMEISTER,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-368-2

Filed May 5, 2025

ON PETITION FOR REHEARING EN BANC

Before HAYNES, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no

member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

APPENDIX D — DEFENDANT'S OBJECTIONS TO THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED SEPTEMBER 1, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. 4:18-CR-00368

UNITED STATES OF AMERICA

v.

SCOTT BREIMEISTER (02)

Filed September 1, 2023

DEFENDANT BREIMEISTER'S OBJECTIONS TO THE ORDER DENYING HIS MOTION TO BAR A RETRIAL BASED ON DOUBLE JEOPARDY

TO THE HONORABLE ALFRED H. BENNETT:

Defendant Scott Breimeister objects to the order denying his motion to bar a retrial based on Double Jeopardy (Doc. 513), and would show as follows:

I.

Breimeister filed an omnibus motion on March 22, 2023, requesting a variety of relief: (1) to bar a

retrial based on Double Jeopardy (Doc. 428 at 2-8); (2) to dismiss the indictment *with* prejudice based on outrageous governmental misconduct (Doc. 428 at 8-9); (3) to dismiss the indictment *without* prejudice based on outrageous governmental misconduct (Doc. 428 at 10); and (4) for alternative relief as punitive sanctions for the governmental misconduct if the Court denied the first three motions (Doc. 428 at 10-11). The pleading presented cascading requests so that, if the Court granted the first motion, it need not address the remainder. The Court heard argument on the first motion—to bar a retrial based on Double Jeopardy—on May 26, 2023.

Other significant defense motions were pending when the Court heard argument on the Double Jeopardy issue. Notably, Breimeister had asked to depose specific witnesses who engaged in or had knowledge of the governmental misconduct (Doc. 391). Alternatively, he requested an evidentiary hearing to determine the cause and rationale for the governmental misconduct (Doc. 413). He also asked the Court to order the Government to disclose the conflicts of interest between the prosecutors assigned to review the misconduct and the prosecutors and agents who committed the misconduct (Doc. 469), as well as the reports and rough notes from the interviews that the reviewing team conducted with the trial team (Doc. 478).

The Court issued an order denying the Double Jeopardy motion and the motion for an evidentiary hearing on June 27, 2023 (Doc. 513 at 2, 4). Notably, that order did not address the remaining motions contained in Doc. 428—the motion to dismiss the indictment *with*

prejudice based on outrageous governmental misconduct, the motion to dismiss the indictment *without* prejudice based on outrageous governmental misconduct, and the requested alternative relief should the Court refuse to bar a retrial based on Double Jeopardy or dismiss the indictment based on governmental misconduct. Nor did the order address the motions to disclose the conflicts of interest (Doc. 469) and the reports and rough notes (Doc. 478). Accordingly, those motions remain pending while Breimeister appeals the denial of the Double Jeopardy issue and the evidentiary hearing to the Fifth Circuit. Should the Fifth Circuit affirm the Court's denial of the Double Jeopardy issue and the evidentiary hearing, Breimeister will then ask the Court to consider the remaining outstanding motions.

II.

Breimeister moved to bar a retrial because it would violate his Fifth Amendment constitutional right not to be twice placed in jeopardy of life or limb. *See* U.S. CONST. amend. V. Because the Court declared a mistrial *sua sponte* and over Breimeister's objection based on governmental misconduct, he argued that the "manifest necessity" test need not apply. He also argued that he need not prove that the Government intentionally engaged in misconduct to "goad" a mistrial because he did not request the mistrial. Therefore, the Supreme Court's test from *Oregon v. Kennedy*, 456 U.S. 667 (1982), did not apply. This is an issue of first impression in the Fifth Circuit, and the Supreme Court has not yet addressed what test applies when a trial court declares a mistrial *sua sponte*

and over a defendant's objection because of governmental misconduct.

The Court did not address Breimeister's argument that the manifest necessity test does not apply in this context. Instead, it found that a manifest necessity existed to declare a mistrial over his objection (Doc. 513 at 2-3). He objects to the Court's application of the manifest necessity test in the first place, where the Court declared a mistrial based on governmental misconduct over his objection. He also objects where the Supreme Court has not held that *Kennedy*'s "goading" test applies when a court declares a mistrial *sua sponte* based on governmental misconduct over the defendant's objection. *See United States v. Alford*, 516 F.2d 941, 946 (5th Cir. 1975). ("Manifest necessity does not exculpate the prosecution from the constrictions of the double jeopardy clause where there has been prosecutorial overreaching.").[1] *Alford* required this Court to conduct the Double Jeopardy analysis without applying the manifest necessity test because the mistrial resulted squarely from governmental misconduct (as opposed to an unavailable witness or party, a hung jury, or some other hiccup in the ordinary administration of a trial separate from governmental misconduct). Breimeister objects to the Court's failure to apply *Alford* to his case.

1. The *Alford* Court commented that the "manifest necessity" test would not apply had the prosecutor withheld valuable information from the defense and the Court and "been able to see the full defense while knowing that a defense motion for a mistrial, or a court declared mistrial, was likely." *Id.* That is exactly what happened in this case.

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III.

Assuming *arguendo* that the manifest necessity test does apply, Breimeister objects to the Court's application of the test. It essentially found that the jury could not or would not have followed instructions to disregard testimony (Doc. 513 at 3). Breimeister objects to the finding that this jury would not or could not have followed instructions. Nothing had occurred during the trial to suggest that the jury struggled to follow the Court's instructions, and the Court already had given an unusual instruction after the William Chan Incident without any concern that the jury could follow that instruction.

The Court also found that a manifest necessity existed for a mistrial because the trial "would have been extended an untold number of weeks" (Doc. 513 at 3). The trial had lasted five weeks when the Court declared a mistrial on December 13, 2022—a point at which the Government had told the Court that it was only one or two days away from resting its case. Based on the *voir dire* examination, the jury was prepared for the trial to last into January of 2023. Had the trial proceeded—as Bremiester requested—it might have lasted two or three more weeks at most. That would have aligned with the jury's expectations. More importantly, it would have taken much less time to finish the trial than the additional two-to-three years that it will take for the parties to litigate the Double Jeopardy issue and, if necessary, retry the case. *See Illinois v. Somerville*, 410 U.S. 458, 472 (1973) (White, J., dissenting) ("[T]rial courts should have constantly in mind the purposes of the Double Jeopardy Clause to protect the

defendant from continued exposure to embarrassment, anxiety, expense, and restrictions on his liberty, as well as to preserve his 'valued right to have his trial completed by a particular tribunal.'"). Moreover, the Court failed to ask the jurors if they could endure a lengthier trial before declaring a mistrial. Breimeister objects to the finding that continuing the trial would have taken too long and been too onerous on the jurors where the Court did not first question them and where they were prepared to be in trial for another month anyway.

The Court also found that a manifest necessity existed to declare a mistrial because an admonishment of the Government in the jury's presence may have prejudiced the Government from receiving a fair trial (Doc. 513 at 3). So what? A defendant has a constitutional right to a fair trial, but the Government does not. Where the Government engages in misconduct severe enough for a court to entertain declaring a mistrial *sua sponte*, it forfeits any "right" not to be prejudiced by an admonishment before the jury. Where the Government caused the mistrial, Breimeister objects to the finding that a manifest necessity existed to declare a mistrial because the Court needed to protect the Government from the consequences of its own actions.

When considering whether a retrial would violate Double Jeopardy, a Court must resolve any doubt in favor of the defendant. *Downum v. United States*, 372 U.S. 734, 738 (1963) ("resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion'"). The Court

gave no doubt to Breimeister in its analysis of the Double Jeopardy issue. He objects to the Court's failure to do so.

IV.

The Court also denied the Double Jeopardy motion, in part, because a grand jury had issued a superseding indictment, meaning probable cause existed to establish that Breimeister committed the alleged crimes (Doc. 513 at 3). It found that barring a retrial based on Double Jeopardy would "essentially erase [Breimeister's] conduct and eliminate the Government's opportunity to hold [him] accountable for actions that have been deemed potentially criminal by a grand jury." Neither the Supreme Court, the Fifth Circuit, nor any other court that counsel knows of has ever held that the existence of an indictment and a finding of probable cause factors into a Double Jeopardy analysis. Indeed, a grand jury indicted every defendant who has ever alleged that a retrial was barred by Double Jeopardy. By the Court's logic, no defendant ever would be entitled to Double Jeopardy relief because a grand jury's finding of probable cause trumps the constitutional right not to be twice placed in jeopardy. That is not the law, never has been the law, and never will be the law. Otherwise, the Double Jeopardy Clause would be forever mooted by the non-adversarial finding of a grand jury. Furthermore, the Court's finding that the Government would lose its "opportunity" to hold Breimeister accountable for potential criminal conduct is too much. The Government had an opportunity to try to convict him during the first trial had it played by the rules and timely disclosed the favorable evidence. It forfeited

that opportunity by engaging in misconduct that the Court deemed so egregious that it warranted a mistrial. The entire point of Double Jeopardy is to prevent the Government from taking unlimited—or even two—bites at the apple. Especially where the Government caused the first bite to be rotten. Breimeister objects to the Court's finding that the existence of an indictment and a grand jury's determination of probable cause bars Double Jeopardy relief.

V.

The Court found that "[i]ntentional prosecutorial misconduct should not be rewarded with a second chance at prosecution" (Doc. 513 at 3). Where a court declares a mistrial *sua sponte* and *over a defendant's objection* based on any prosecutorial misconduct—whether it be intentional, knowing, reckless, or even negligent—the Government should not "be rewarded" with a retrial. Breimeister objects to the Court's conclusion—unsupported by any citation to authority—that only intentional misconduct bars a retrial where the Government admittedly engaged in the conduct that caused the mistrial and the Court declared it over his objection.

The Court's resolution of this particular factor was especially unfair and unreasonable where it continuously refused Breimeister's repeated requests to conduct a transparent, adversarial evidentiary investigation into how and why the governmental misconduct occurred and where it refused his efforts to fully and publicly develop the record to determine the culpable mental state of

the government actors responsible for the misconduct. Instead, the Court shut down, ignored, or denied these efforts and allowed the Government to give speeches in the courtroom but protected its prosecutors and agents from having to answer a single question posed by a defendant. The Court did not make the Government file any report on its "internal investigation." Anything that the Government filed regarding the substance of its review of the misconduct was filed *ex parte* and under seal. Breimester was frozen out of the opaque inquiry and relegated to a sideline commentator.

The denial of an evidentiary hearing was especially erroneous where the Government slipped up during a status conference and admitted that a lead case agent had suppressed evidence intentionally. Prosecutor Allan Medina told the Court that agent Dino Vergara—who sat at the Government's table during the trial and authored many of the 302s at issue—admitted that he did not include information in 302 reports that witnesses told him (and trial prosecutors) during interviews, even if that information was in his handwritten rough notes, if he did not have an independent memory of the witness making the statement or did understand his notes. In other words, Vergara made a conscious decision to exclude information that witnesses provided to the Government from the 302 reports that the Government then provided to the defense. Strange how the excluded information was favorable to the defendants. Breimeister begged the Court to grant an evidentiary hearing in light of the Government's admissions regarding Vergara. He objects to the Court's refusal to do so.

Appendix D

The denial of an evidentiary hearing is especially unfair where the Court decided to impose a *mens rea* element to the Double Jeopardy analysis. Had the Court agreed with Breimeister's argument that he need not prove that the governmental misconduct was intentional—because any *sua sponte* mistrial declared over the defendant's objection based on governmental misconduct bars a retrial under Double Jeopardy—then an evidentiary hearing would have been unnecessary. Breimeister told the Court as much during a hearing. However, the Court implicitly rejected this argument by finding that only intentional misconduct bars a mistrial. The Court acknowledges that it conducted hearings and status conferences and "invited input from the Defendants, giving them multiple opportunities to argue their positions regarding consequences and pathways forward" (Doc. 513 at 4). But the Court did not permit Breimeister to call any witnesses, ask any questions, or conduct an evidentiary investigation. It did not allow him to view the fruit of the Government's internal investigation. Instead, based on only arguments but no evidence that Breimeister could see or respond to, the Court concluded that the trial prosecutors' "conduct was not malicious or intentionally fraudulent" (Doc. 513 at 4). "Malice" and "intentional fraud" are not the standards in any Double Jeopardy test, and the Court cited no authority to support its application of that standard. Breimeister objects to the denial of an evidentiary hearing and Double Jeopardy relief based on the Court's finding that the trial prosecutors did not act with "malice" or "intentional fraud" because that is not the standard. Even if it were, he objects where one or more of the trial prosecutors was present for the witness

interviews that yielded the favorable *Brady* information that was suppressed. They had actual knowledge that the favorable information was excluded from the 302s when they produced the incomplete, misleading 302s to Breimeister.

Moreover, the Court only made findings regarding the three trial prosecutors. It ignored whether the case agents who authored the incomplete, misleading 302s intentionally or knowingly omitted the favorable *Brady* information that was in their rough notes. Breimeister objects to the Court's failure to make any findings regarding the case agents, to the denial of an evidentiary hearing to explore why the case agents made these omissions, and to the denial of Double Jeopardy relief where the *prima facie* evidence on the issue weighs in Breimeister's favor.

In conclusion, Breimeister objects to the *process* by which the Court conducted the Double Jeopardy analysis because it prevented him from participating in a meaningful, adversarial way. Indeed, the Court acknowledged that its conclusion that the prosecutors did not intentionally suppress evidence was "[b]ased on the Court's own review and the results of the Government's own investigation into its trial team's actions" (Doc 513 at 4). Breimeister was not allowed to participate in that investigation, was not allowed to review the product of that investigation, and was not allowed to respond to that investigation (because he did not know what it revealed). The manner in which the Court conducted the Double Jeopardy analysis denied Breimeister due process of law.

Breimeister ends where he began. When considering whether a retrial would violate Double Jeopardy, a Court must resolve any doubt in favor of the defendant. *Downum,* 372 U.S. at 738. The Court ignored that mandate here. He objects to the order denying Double Jeopardy relief and an evidentiary hearing.

Respectfully submitted,

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