No. 12-30529

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GERARD DUGUE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

United States v. *Gerard Dugue*, No. 12-30529

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Parties:

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United States of America (Appellee)

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Date: July 23, 2012

s/ Angela M .Miller
Attorney of record for the United States of America

STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled oral argument for August 8, 2012, pursuant to an expedited schedule. The government is prepared to attend oral argument on that date if oral argument is to be heard. The government's position, however, is that the facts and issues under review are straightforward and plainly presented in the parties' briefs, such that oral argument is not necessary for the disposition of this appeal.

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This is an interlocutory appeal in a criminal case from the district court's order denying defendant's motion to dismiss the indictment on double jeopardy grounds. The district court entered its order denying defendant's motion to dismiss on April 26, 2012. R.E. Exh. C.[1] The district court entered an order on May 15,

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[1] Citations to the certified record on appeal are made using the designation "USCA5 __." Citations to documents not included in the certified record on appeal are made to the district court docket number using the designation "R. __." Citations to the defendant's filed, corrected Record Excerpts are made to the

(continued…)

2012, denying the government's motion to proceed with a trial pending this appeal, finding that the defendant's motion to dismiss was not frivolous. USCA5 3390-3391. This Court has jurisdiction to consider this interlocutory appeal under 28 U.S.C. 1291, as interpreted in *Abney* v. *United States*, 431 U.S. 651 (1977).

STATEMENT OF THE ISSUE

Whether the district court's decision to deny defendant's motion to dismiss the indictment on double jeopardy grounds was correct, where the court found that the prosecutor's actions leading to a mistrial were not intended to provoke defendant into seeking a mistrial and the court explained that its decision to grant defendant's motion for a mistrial was prophylactic and taken out of an abundance of caution.

STATEMENT OF THE CASE

On July 12, 2010, defendant and five other New Orleans police officers were charged in a twenty-seven count indictment for their respective roles following an officer-involved shooting on the Danziger Bridge in New Orleans on September 4, 2005, in the wake of Hurricane Katrina. USCA5 41-72. Defendant was charged in six counts; specifically, defendant was charged with one count of violating 18

(…continued)
relevant page or exhibit number using the designation "R.E. __." References to defendant's brief filed in this Court are made using the designation "Def. Br. __."

U.S.C. 371 (Count 11), two counts of violating 18 U.S.C. 241 (Counts 12 and 13), one count of violating 18 U.S.C. 1519 (Count 15), one count of violating 18 U.S.C. 1512(b)(3) (Count 26), and one count of violating 18 U.S.C. 1001 (Count 27), for his actions in attempting to conceal the truth of what happened on the bridge. On January 19, 2011, the district court severed the trial of the defendant from that of his co-defendants. USCA5 486-487.

Before defendant's trial, the government noted its intent to introduce, pursuant to Federal Rule of Evidence 404(b), information about prior cases in which defendant had allegedly helped cover up police misconduct. R. 376 at 3-5. One of the cases involved the defendant's investigation into the death of Raymond Robair, a civilian who died at the hands of other police officers. R. 376 at 4. The district court granted defendant's motion to exclude the 404(b) evidence on June 3, 2011. R. 443 at 7.

Shortly before trial, the government filed a comprehensive list of potential trial exhibits, which included a two-page excerpt from the investigative report the defendant had written in the Robair case. The defendant moved to preclude admission of the excerpt (R. 949) and the district court granted defendant's motion on January 20, 2012 (R. 952).

Defendant was tried before a jury beginning January 23, 2012. USCA5 2078. On January 27, 2012, defense counsel moved for a mistrial (USCA5 3344)

on the ground that the prosecutor, during cross-examination of defendant, asked her co-counsel to "Get * * * [the] Robair [file]" in potential ear-shot of the jury (USCA5 3337). The district court granted the motion for a mistrial that same day. USCA5 3366.

Following the mistrial, defendant moved to dismiss the indictment on double jeopardy grounds. R. 766. The district court denied the motion (R.E. Exh. C) but declined to characterize the motion as frivolous (R.E. Exh. E). This appeal followed. R.E. Exh. D.

STATEMENT OF FACTS

1. Background

Defendant Gerard Dugue was a veteran homicide detective in the New Orleans Police Department (NOPD). He was with NOPD for over 30 years and investigated hundreds of homicides. USCA5 3165. By his own admission, defendant was one of the most experienced, and well-respected detectives in the Department (USCA5 3165), and worked on the most difficult homicide investigations (USCA5 3172).

In the wake of Hurricane Katrina, a group of NOPD officers responded to a radio call announcing that other officers escorting rescue workers across the I-10 "high-rise" bridge had been fired upon, and that the suspects from that shooting were running toward the Danziger Bridge, which runs parallel to the high-rise. See

USCA5 2156-2157, 2250, 2253, 2676-2677. Although the responding officers expected to encounter armed gunmen, they instead found two groups of unarmed civilians walking westward up the bridge. The officers opened fire upon the civilians, killing two and seriously injuring four others. See USCA5 2122-2134, 2156-2174, 2258-2259. Defendant was not involved in the shootings, and did not respond to the scene.

The officers involved in the shootings and the ranking officers who responded to the bridge after the shootings immediately began a wide-ranging cover-up to conceal the truth of what happened on the bridge, including making it appear that four of the victims had fired at the police officers such that the officers' actions would be justified. See USCA5 2173-2182, 2244, 2254-2274, 2797-2806. The cover-up continued after the investigation was assigned, six weeks later, to defendant. See USCA5 2151-2156, 2176-2188, 2274-2311, 2316-2324, 2793-2797, 2805-2806. The cover-up included false reports, planted evidence, perjured testimony, fabricated eyewitnesses, and false statements. See USCA5 2151-2156, 2176-2188, 2274-2311, 2316-2324, 2797-2806.

In 2010, defendant and five other officers were indicted for their respective roles in the shootings and cover-up. USCA5 41-72. Five additional officers involved in the shootings, the cover-up, or both, pleaded guilty to various offenses and were sentenced to terms of imprisonment. *United States* v. *Jeffrey Lehrmann*,

No. 2:10-cr-51 (E.D. La. Sept. 22, 2010) (Judgment); *United States* v. *Michael Hunter*, No. 2:10-cr-86 (E.D. La. Dec. 1, 2010) (Judgment); *United States* v. *Ignatius Hills*, No. 2:10-cr-142 (E.D. La. Oct. 5, 2011) (Judgment); *United States* v. *Michael Lohman*, No. 2:10-cr-32 (E.D. La. Nov. 2, 2011) (Judgment); *United States* v. *Robert Barrios*, No. 2:10-cr-103 (E.D. La. Dec. 1, 2011) (Judgment). Defendant's trial was severed from his co-defendants' (USCA5 486-487); his co-defendants were convicted on all counts of the indictment[2] and were sentenced to terms of imprisonment ranging from six to sixty-five years (R. 805, 807, 808, 809, 844).

2. Pre-Trial Motions And Rulings

Before defendant's trial, the government noted its intent to introduce, pursuant to Federal Rule of Evidence 404(b), evidence of prior investigations defendant conducted into alleged police misconduct in which defendant concluded that the officers had acted appropriately under the circumstances. R. 376 at 3-5. The government reasoned that defendant conducted these prior investigations with the illegitimate goal of exonerating his fellow officers. R. 376 at 3. One such investigation involved the death of Raymond Robair, who died after being beaten

[2] The district court granted four of the defendants' motions for judgments of acquittal and/or a new trial on three counts of conviction. R. 593. An appeal of that order is currently pending before this Court. See *United States* v. *Bowen*, No. 11-31097 (5th Cir.).

by two New Orleans police officers. R. 376 at 4. Although defendant concluded in 2005 that Robair's death was accidental, both officers involved in the death were later convicted on federal charges related to the beating, the cover-up, or both. *United States* v. *Williams*, No. 2:10-cr-213 (E.D. La.).

The government intended to introduce evidence of the Robair investigation as proof that defendant acted willfully in covering up the shootings on the Danziger Bridge, and as proof of defendant's motive, *modus operandi*, and absence of mistake with respect to his actions in the Danziger investigation. R. 376 at 5; see also Fed. R. Evid. 404(b). The district court granted defendant's motion to exclude the evidence on June 3, 2011, after concluding that the evidence would be more prejudicial than probative. R. 443 at 7 ("Including these other * * * uncharged 'crimes' at trial would serve only to confuse and/or prejudice the jury, who will deliberate only the six counts brought against Dugue in the July 12, 2010 Indictment.").

As defendant's trial approached, the government submitted a comprehensive list of potential exhibits that might be offered in the government's case-in-chief. Included in that list was a two-page excerpt from the conclusion section of a report that defendant wrote in the Robair investigation. It contained defendant's observations about inconsistencies in statements given by civilian eyewitnesses to the beating of Robair, and also documented reasons to doubt the credibility of

those eyewitnesses. Defendant moved to exclude the evidence based upon the district court's June 3, 2011, Order and Reasons. R. 949 at 1-2. The government responded that it was not offering the evidence pursuant to Rule 404(b), but was instead offering it as a party admission pursuant to Federal Rule of Evidence 801. R. 950 at 1, 3-4. The government explained that it did not intend to offer any details of the Robair investigation, and intended to offer the two-page excerpt only "to prove that the defendant knew the proper procedure to follow when witnesses provided inconsistent accounts, and that he knew that the proper procedure was to note and consider those inconsistencies." R. 950 at 4.

The district court excluded the two-page Robair report excerpt. R. 952. Finding that the evidence was unduly prejudicial, the district court ruled that it was not admissible and concluded: "[T]his ruling applies to the report in question, and, absent a strong demonstration of admissibility, any other evidence that the Government might seek to introduce relative to any investigation or prosecution of alleged New Orleans police officer misconduct." R. 952 at 1.

3. Defendant's Trial

Defendant's jury trial began on January 23, 2012. USCA5 2080. The government presented its case without any reference to the Robair investigation, the conclusions in the Robair report, or defendant's involvement in any other police-misconduct investigation. The government rested its case on January 26,

2012. USCA5 2912. The defendant began introducing evidence that same date (USCA5 2913) and testified in his defense on January 27, 2012 (USCA5 3052-3157).

Under cross-examination, defendant acknowledged that there was a cover-up of the events that took place on the bridge (see, *e.g.*, USCA5 3160-3161), but previously denied knowledge of, and participation in, the cover-up (see, *e.g.*, USCA5 3157). Defendant also acknowledged that it was critical for a homicide detective to prepare an honest and accurate investigative report and to draw careful and accurate conclusions from the investigation. USCA5 3162-3163. Defendant admitted that all of the conclusions in his investigative report concerning the events on the Danziger Bridge were incorrect. USCA5 3173-3177.

Defendant explained that his role as a homicide investigator was to "document * * * the facts." USCA5 3169. He agreed that a detective needs to "analyze" what a person is saying to determine whether the account given is truthful (USCA5 3170), and admitted that doing so involves determining whether a person's statement conflicts with either physical evidence, an earlier statement the person provided, another person's statement, or common sense (USCA5 3170-3172). Defendant admitted, however, that some witnesses' statements in his report were in direct conflict with one another. See, *e.g.*, USCA5 3241. Defendant also admitted that he included some information in his report that he considered

concerning and suspicious, but that he did not document these concerns or suspicions; rather, he explained that he simply documented the information he received during the investigation. See, *e.g.*, USCA5 3317 ("I left it on there because that's the way it was presented and I didn't alter it."); see also USCA5 3319 ("I submitted that – that's the way it was submitted to me by Sergeant Kaufman.").

Later during cross-examination, defendant was asked about a particular witness's account that was included in his investigative report of the Danziger shootings. USCA5 3329-3336. Defendant acknowledged that this witness's account, if believed, would have been favorable to the police officers' defense. USCA5 3330. Defendant admitted that he did not find the witness to be credible, but that he did not include in his investigative report any of the concerns that he had about the witness's credibility (including concerns about the witness's mental health and criminal history). USCA5 3331-3334. Instead, defendant specifically included information he had received from the witness's employer, who had vouched for the witness's honesty. USCA5 3333-3334.

> Q: Do you agree that that might make [the witness] sound like a credible witness?
>
> A: I wasn't looking at that in that aspect though, I just put down the facts of what was told to me.
>
> Q: Would you agree that somebody reading that might think, wow, this is a credible witness?

A: Humph.

Q: You need to answer verbally for the record.

A: They could, yeah.

Q: So did you put in your report your concerns that you did not find [the witness to be] a credible witness?

A: No, I did not.

Q: Why not?

A: I just didn't.

Q: Why not?

A: I just didn't.

Q: Did you think that you should, in order to make the report not be misleading?

A: I wasn't thinking it was misleading, that's why I didn't entertain that, you bring that up to me now, so. . .

Q: But you agree that's quite a bit you wrote about how believable [the witness] was, right?

A: I documented what was given to me, I didn't – I followed up on what he told me, and I went and I spoke to his employer and I documented it.

Q: Did you document – because you just document what you get, right, your job is to put it in the report to document, right?

A: Yes.

USCA5 3334-3335.

Defendant then testified that he may have included in previous investigative reports his opinion about a witness's credibility, but could not definitively recall if he had ever done so. USCA5 3336-3337. When pressed, defendant testified that he "probably" had done so, but that he "can't name any right now." USCA5 3337. At that point, the prosecutor asked the court, "May I help him remember?" USCA5 3337. The district court responded, "Go ahead." USCA5 3337. The prosecutor then directed co-counsel to "[g]et me Robair." USCA5 3337.

Defense counsel objected and asked to approach the bench. USCA5 3337. Outside the presence of the jury, defense counsel argued that the prosecutor was attempting to "circumvent" the court's earlier rulings regarding the Robair report. USCA5 3337. The court responded, "No Robair, I've already ruled on it twice." USCA5 3338. The prosecutor questioned whether the Robair report was still considered 404(b) evidence at this point in the trial, given the defendant's testimony that he could not recall including witness credibility assessments in previous reports. USCA5 3338 ("It's 404(b) at this point?"). The district court did not rule on whether the report was admissible as impeachment evidence; rather, the court responded, "I've ruled on it twice. Not Robair, you find another one." USCA5 3338. The prosecutor moved on from the point and cross-examination continued without objection, without a single question about Robair, and without

any attempt to introduce the Robair report, in general, or conclusions from the Robair report, in particular. USCA5 3338-3343.

After the jury was dismissed for the day, defense counsel moved for a mistrial on the ground that the prosecutor engaged in "outrageous behavior" when seeking to admit "high profile" evidence in front of the jury. USCA5 3344-3345. The prosecutor responded that she thought that defendant's testimony had rendered the Robair report admissible as impeachment evidence. USCA5 3345-3346.

The district court questioned why the prosecutor had not approached the bench to discuss the use of evidence that had previously been ruled inadmissible. USCA5 3346. The prosecutor explained that, based upon her interaction with the court immediately before she requested the Robair file, she thought the district court had indicated its approval of using the Robair evidence for impeachment purposes. USCA5 3346-3347. Specifically, the prosecutor referenced a nod from the court that the prosecutor interpreted as approval for using the evidence.[3] USCA5 3347.

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[3] During this discussion, neither the prosecutor nor the court referenced the prosecutor's request to "help [defendant] remember" or the court's response that she could "[g]o ahead." USCA5 3337. Any confusion, however, about whether the communication had been achieved through nonverbal communication alone, or through the spoken word, was settled when the transcript of the hearing later became available, as the transcript makes clear that the oral exchange took place immediately before the prosecutor requested the Robair file from co-counsel. USCA5 3337. Although defendant repeatedly characterizes as "conflicting" the

(continued…)

Prosecutor: Your Honor, let me tell you what I did do. I looked at you and I raised my eyebrows and you nodded your head. And I –

Court: Does that mean that you asked me to use evidence that I excluded?

Prosecutor: Yes, I understood that, your Honor, when I –

Court: Don't try to read my eyebrows, come up here and ask me. We have had how many bench conferences in this case and in the other case? Don't you realize to come up here and have a bench conference when you're about to approach something that is the subject of my ruling?

Prosecutor: I do, your Honor.

Court: Did it occur to you to come up here instead of saying "Get me Robair"?

Prosecutor: I did not say it that loud – two questions, yes, it did occur to me. And I looked at him and I misunderstood when you said, when you nodded –

Court: How was I supposed to know? I nodded my head before you said anything and now I am supposed to read your mind that you're about to say, "Get me Robair"?

Prosecutor: I apologize for that, your Honor.

USCA5 3347.

(…continued)
prosecutor's reasons for believing she had permission to introduce the Robair excerpt (Def. Br. 12; see also Def. Br. 19 n.3, 38), there is nothing "conflicting" about the prosecutor's consistent explanation that she asked co-counsel for the Robair excerpt only because she believed that she had specifically obtained permission from the court to introduce that piece of evidence.

The prosecutor explained that, given defendant's testimony at trial, which suggested that his role as an investigator was simply to document what he is told by witnesses, she thought the Robair excerpt now constituted impeachment evidence that was properly admissible after having laid a foundation for impeachment. USCA5 3345-3346, 3348-3349, 3352-3360. The prosecutor further explained that she did not understand the court's prior rulings on the Robair excerpt to cover impeachment evidence:

> Prosecutor: I understand 404(b), I understand your ruling. But as you acknowledged, as you acknowledged before in the last trial, even something that is not admissible as 404(b) can become admissible if it becomes impeachment evidence. Impeachment evidence and 404(b) evidence, even if they're the same evidence, are separate rules and they're different.
>
> Court: I understand that. And I ruled on both.
>
> Prosecutor: I did not understand you to have been ruling on an impeachment pretrial, I don't know how a court can rule on impeachment pretrial. Impeachment you don't know until the defendant takes the stand. So I was not attempting to circumvent any ruling at all. And, your Honor, I do apologize for misunderstanding the nod that you gave me. I absolutely understood that because we had had this pretrial litigation and because I was looking at you for approval, I intended to be looking at you for approval, I apologize for that.

USCA5 3352-3353.

The prosecutor vigorously denied defense counsel's accusation that her actions were intended to circumvent the judge's earlier rulings. USCA5 3352-3354, 3360. The prosecutor suggested that a curative instruction could remedy any

potential prejudice that might have resulted if the jury heard the word "Robair" (USCA5 3354, 3363), and also questioned whether the use of the single word "Robair," without more, could prejudice the jury (USCA5 3348, 3354, 3361-3363).

Defense counsel responded that the prosecutor did not understand how the word "Robair" could prejudice the jury because "[s]he doesn't live here." USCA5 3363. Defense counsel continued that for those who live in New Orleans, the term "Robair" is a "lightning rod" that suggests a link between corruption and the police. USCA5 3364.

The district court agreed that "in this community" the term "Robair" is associated with police misconduct (USCA5 3348-3349), and explained that the prosecutor was "assum[ing] that Robair is a term that is so foreign to the jury that it would not in any way register to them" (USCA5 3361). See also USCA5 3361-3362. The court acknowledged that "none [of] us want to have to try this case again." USCA5 3364. But "Robair," the court reasoned, "is a well-known case." USCA5 3364. The court indicated that granting a mistrial was "the last thing in the world [it] want[ed] to do," but explained that it "cannot take a chance on having a case go to a jury that has heard something over and above an order" of the court. USCA5 3366.

The prosecutor apologized repeatedly throughout the hearing for not approaching the bench and for misinterpreting the judge's response. USCA5

3347-3350, 3353-3354, 3356, 3362. The district court accepted both the prosecutor's apology (USCA5 3348 ("I accept your apology because I think I know you well enough to know that you're a fine prosecutor."), USAC5 3362 ("I am fine with your apology, Ms. Bernstein, I have a lot of respect for you as a prosecutor and I accept your apology.")), and explanation for misinterpreting the court's actions (USCA5 3353 ("[I]f there is a miscommunication, I certainly will accept your explanation that it wasn't intentional.")). The court, however, "[r]egretfully" granted defense counsel's motion for a mistrial. USCA5 3366.

4. Post-Trial Communications

After the court granted the mistrial, defense counsel and the prosecutor discussed potential next steps. R. 798 at 20 n.6. The next day, the prosecutor sent defense counsel an email to follow up on the previous day's conversation. That email reflected the prosecutor's understanding of Federal Rule of Evidence 801, and asked whether defendant understood "that the things he said on the stand will come in against him at the next trial." R. 803 at Exh. C.

5. Post-Trial Motions And Rulings

Defendant moved to dismiss the indictment on double jeopardy grounds. R. 766. Defendant argued that he would be prejudiced by a retrial because: (1) the prosecutor, following the mistrial, indicated that defendant's testimony at the first trial would be admissible in a retrial; (2) the government indicated it may file a

superseding indictment charging defendant with violating 18 U.S.C. 1001; and, (3) press reports following the mistrial that associated defendant with the Robair investigation will prejudice potential jurors. R. 766 at 6-7. On the merits, defendant acknowledged that a second trial is barred after a defendant's request for a mistrial only where the prosecutor intentionally engaged in misconduct to goad the defendant into requesting a mistrial, *Oregon* v. *Kennedy*, 456 U.S. 667 (1982), but argued that the *Kennedy* standard "[i]s [u]nworkable" (R. 766 at 10) and "must be adjusted" (R. 766 at 13). Specifically, defendant argued that the *Kennedy* standard should include a general intent to commit error and an inference of intent where the prosecutor displays reckless disregard for a defendant's constitutional rights. R. 766 at 14. Defendant acknowledged that the objective facts and circumstances did not indicate "whether the prosecutor acted with intentional bad faith or reckless disregard for the Court's orders and [defendant's] rights" (R. 766 at 14), but argued that the prosecutor's intent to cause a mistrial may be "inferred" by her actions, and by what he claimed was an implausible explanation for those actions, as well as by the government's alleged intent to profit from the mistrial in a subsequent trial (R. 766 at 15).

The district court denied defendant's motions. R.E. Exh. C. The court held, after reviewing all of the parties' arguments and "[d]efendant's arguments regarding the Government's pre-trial, during trial, and post-trial conduct," that the

prosecutor did not intend to goad defendant into seeking a mistrial by saying, "Get me Robair." R.E. Exh. C at 2. The court noted the prosecutor's "vigorous opposition" to the motion for mistrial and "sincere explanation and apology" for her actions, and explained that it granted the mistrial "in an abundance of caution, and as a prophylactic measure" to avoid potential appellate and post-conviction issues. R.E. Exh. C at 2-3. Finally, the court found that defendant would not suffer prejudice from a retrial. R.E. Exh. C at 3-4.

SUMMARY OF ARGUMENT

The district court correctly found that the prosecutor's actions were not intended to goad the defendant into seeking a mistrial. Relying upon the objective facts and circumstances of the case and applying clear Supreme Court precedent, the trial court credited the prosecutor's explanation for her actions that led to the mistrial and found no intent to provoke a mistrial. The district court's decision is consistent with Supreme Court, Fifth Circuit, and other Circuit precedent and should be affirmed.

ARGUMENT

THE DISTRICT COURT'S DECISION TO DENY DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON DOUBLE JEOPARDY GROUNDS WAS CORRECT

A. Standard Of Review

This Court has jurisdiction under 28 U.S.C. 1291 to review a pretrial order rejecting a claim of double jeopardy, provided the claim is "colorable." *United States* v. *Shelby*, 604 F.3d 881, 885 (5th Cir.) (citing *Richardson* v. *United States*, 468 U.S. 317, 322 (1984)), cert. denied, 131 S. Ct. 503 (2010). A claim is colorable if "there is some possible validity to [the] claim." *Ibid.* (quoting *Richardson*, 468 U.S. at 326 n.6). This Court's 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), petition for cert. pending, Nos. 11-1390, 11-10437 (filed May 17, 2012). This Court reviews the factual findings underpinning the district court's decision for clear error. *United States* v. *Campbell*, 544 F.3d 577, 581 (5th Cir. 2008), cert. denied, 555 U.S. 1145 (2009); see also *Oregon* v. *Kennedy*, 456 U.S. 667, 675 (1982) (explaining that determining whether a prosecutor intended to goad the defendant into seeking a mistrial "merely calls for the court to make a finding of fact").

B. The District Court's Decision Denying Defendant's Double Jeopardy Claim Was Correct

The Double Jeopardy Clause provides criminal defendants with the right to have their case heard and decided by the jury originally impaneled. *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). "This right is not absolute, however, and must at times be subordinated to society's interest in just determinations of guilt or innocence." *United States* v. *Bates*, 917 F.2d 388, 392 (9th Cir. 1990) (citing *Wade*, 336 U.S. at 689). Ordinarily, a defendant's successful motion for a mistrial removes any barrier to a retrial. *United States* v. *Wharton*, 320 F.3d 526, 531 (5th Cir.), cert. denied, 539 U.S. 916 (2003). A "narrow exception" to this rule, however, exists where the motion for the mistrial arises from deliberate prosecutorial misconduct that "was intended to provoke the defendant into moving for a mistrial." *Oregon* v. *Kennedy*, 456 U.S. 667, 673, 679 (1982).

The Supreme Court made clear in *Kennedy* that prosecutorial misconduct alone was insufficient to bar a retrial on double jeopardy grounds. 456 U.S. at 675-676. "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion," the Court explained, "does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Ibid.* A retrial is permissible even in circumstances where the prosecutor engages in "gross

negligence," *El-Mezain*, 664 F.3d at 561, or "intentional misconduct that seriously prejudices the defendant," *United States* v. *Singleterry*, 683 F.2d 122, 123 n.1 (5th Cir.) (internal quotation marks and citations omitted), cert. denied, 459 U.S. 1021 (1982). Thus, the only circumstance in which a retrial following a defendant's successful motion for a mistrial is barred by the Double Jeopardy Clause is one "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 676; see also *United States* v. *Beeks*, 266 F.3d 880, 882 (8th Cir. 2001) ("Absent intent to provoke a mistrial, a prosecutor's error in questioning a witness, improper remark in closing statement, and even extensive misconduct do not prevent reprosecution."). Under this "narrow exception," *Kennedy*, 456 U.S. at 673, a court must consider the "objective facts and circumstances" to determine the prosecutor's intent, *id.* at 675. See also *El-Mezain*, 664 F.3d at 561 (same). If the district court determines that the prosecutor acted without the intent to abort the trial before verdict, "that is the end of the matter for purposes of the Double Jeopardy Clause."[4] *Kennedy*, 456 U.S. at 679; see also *Wharton*, 320 F.3d at 532.

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[4] Defendant argues extensively that the *Kennedy* standard, as interpreted by the courts of appeals, is unworkable. Def. Br. 22-37. This Court, however, has applied the standard faithfully for thirty years, without issue, by adhering to the Supreme Court's unambiguous directive that a retrial is barred following a defendant's successful motion for a mistrial "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial."

(continued…)

The district court here correctly concluded that the prosecutor did not intend to goad the defendant into requesting a mistrial. In reaching this conclusion, the court specifically relied upon the prosecutor's "vigorous opposition" to the defendant's motion (R.E. Exh. C at 2) and the prosecutor's "sincere explanation and apology * * * for her actions" (R.E. Exh. C at 3). In fact, the district court accepted the prosecutor's explanation that her actions were *not* intended to violate the court's earlier orders (USCA5 3353 ("[I]f there is a miscommunication, I certainly will accept your explanation that it wasn't intentional.")), and explicitly

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Kennedy, 456 U.S. at 676; see, *e.g.*, *Martinez* v. *Caldwell*, 644 F.3d 238, 243 (5th Cir. 2011) ("A prosecutor or judge must specifically act in 'bad faith' or must intend to goad the defendant 'into requesting a mistrial or to prejudice the defendant's prospects for an acquittal.'") (citation omitted), cert. denied, 132 S. Ct. 1341 (2012); *United States* v. *El-Mezain*, 664 F.3d 467, 561 (5th Cir. 2011) ("A retrial caused by prosecutorial misconduct may violate double jeopardy only if 'the governmental conduct in question [was] intended to 'goad' the defendant into moving for a mistrial.'") (citation omitted); *United States* v. *Wharton*, 320 F.3d 526, 531 (5th Cir.) ("The [Supreme] Court recognized that retrial after a mistrial caused by prosecutorial misconduct may constitute double jeopardy if 'the government [] conduct in question [was] *intended* to 'goad' the defendant into moving for a mistrial.'"), cert. denied, 539 U.S. 916 (2003); *United States* v. *Nichols*, 977 F.2d 972, 975 (5th Cir. 1992) ("[P]rosecutorial misconduct tantamount to harassment or overreaching does not bar retrial unless it is *intended* to thwart a defendant's double jeopardy protection."), cert. denied, 510 U.S. 833 (1993); *United States* v. *Weeks*, 870 F.2d 267, 269 (5th Cir.) ("[T]he Supreme Court [has] held that '[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.'") (citation omitted), cert. denied, 493 U.S. 827 (1989); *United States* v. *Singleterry*, 683 F.2d 122, 123 (5th Cir. 1982) (same), cert. denied, 459 U.S. 1021 (1982).

found that she did not seek to provoke defendant into requesting a mistrial (R.E. Exh. C at 2 ("[T]he Court is not persuaded that * * * [the] prosecutor * * * sought to cause Defendant to seek a mistrial.")). These findings should end the inquiry. *Kennedy*, 456 U.S. at 679; see also *Wharton*, 320 F.3d at 532.

The defendant nonetheless argues that the prosecutor "blatantly violated two (2) orders of the district court under such circumstances where *only* a mistrial could ensue" (Def. Br. 22), and that the prosecutor's actions during and after the trial provide objective evidence that the prosecutor sought to gain an advantage at a subsequent trial (Def. Br. 37-42). This argument grossly misstates the facts, is contrary to case law, and ignores the district court's carefully reasoned decision dismissing these same arguments.

As an initial matter, the extent of the prosecutor's alleged "blatant[]" misconduct consisted of the single sentence, "Get me Robair," which was directed to co-counsel and not the jury. No part of the Robair report was actually admitted, and absolutely no questions were asked of the defendant about the Robair investigation. USCA5 3338-3343. The court had earlier clearly ruled that the government could not introduce evidence of the Robair report in its case-in-chief. R. 443, 952. The prosecutor, however, believed that these rulings were limited to the evidence's admissibility under Rule 404(b), and that evidence subject to the court's orders may still be admissible as impeachment evidence. USCA5 3345-

3346, 3348, 3352-3354. For that reason, when the defendant testified under cross-examination that he could not recall ever questioning a witness's credibility in one of his investigative reports, the prosecutor sought to use the Robair excerpt to show that the defendant's testimony was not true. USCA5 3330-3338. Doing so was not evidence of intentional prosecutorial misconduct, but rather of a prosecutor's conscientious efforts to abide by a court's ruling, the rules of evidence, and applicable case law.

The prosecutor's understanding that evidence ruled inadmissible under Rule 404(b) may be admissible for the specific purpose of impeaching a testifying defendant was entirely consistent with the Supreme Court's, this Court's, and other courts' case law. See, *e.g.*, *Brooks* v. *Tennessee*, 406 U.S. 605, 609 (1972) ("[A] defendant's choice to take the stand carries with it serious risks of impeachment and cross-examination; it may open the door to otherwise inadmissible evidence which is damaging to his case, including, now, the use of some confessions for impeachment purposes that would be excluded from the [government's] case in chief because of constitutional defects.") (internal citations and quotations omitted); *Charles* v. *Thaler*, 629 F.3d 494, 503 (5th Cir. 2011) ("Otherwise inadmissible hearsay evidence may be offered to impeach the defendant on a topic to which he has opened the door."); *United States* v. *Richardson*, 515 F.3d 74, 84 (1st Cir.) ("The government generally may use otherwise inadmissible evidence in

order to impeach a testifying criminal defendant."), cert. denied, 553 U.S. 1072 (2008). Moreover, the prosecutor requested the report from co-counsel only after seeking and receiving what she considered direct and indirect cues from the district court. See, *e.g.*, USCA5 3337 (Prosecutor: May I help him remember?; Court: Go ahead.); see also USCA5 3347. The fact that the prosecutor misinterpreted those cues is hardly evidence of intentional misconduct. And far from representing "circumstances where *only* a mistrial could ensue" (Def. Br. 22), the district court explained that it granted the mistrial "in an abundance of caution, and as a prophylactic measure." R.E. Exh. C at 3.

The sole question before this Court is whether the district court's factual finding that the prosecutor did not intend to goad the defendant into seeking a mistrial is clearly erroneous. Cf. *United States* v. *Nichols*, 977 F.2d 972, 975 n.2 (5th Cir. 1992) (explaining that the merits of the district court's decision to grant a mistrial were not under review, but noting that "the district court may have acted too hastily in declaring a mistrial rather than * * * considering the issues of admissibility of the evidence, or possible limiting instructions, more carefully"), cert. denied, 510 U.S. 833 (1993). The district court's ruling was consistent with numerous rulings from this Court and others. Where, as here, the prosecutor vigorously opposes a mistrial and seeks a corrective, limiting instruction, the government's case is not weak, and/or the district court finds a credible

explanation for the prosecutor's actions after having an opportunity to evaluate the prosecutor's demeanor throughout trial, courts routinely uphold a district court's denial of a defendant's motion to dismiss on double jeopardy grounds following a defendant's successful motion for a mistrial.

For example, in *Wharton*, this Court upheld a district court's denial of a motion to dismiss on double jeopardy grounds where the prosecutor "opposed mistrial in every instance," the government established a "convincing case" against the defendant, and the government did not stand to benefit from a delay in the proceedings. 320 F.3d at 532; see also *Nichols*, 977 F.2d at 975 (upholding district court's denial of motion to dismiss where legal argument supported prosecutor's efforts to introduce prejudicial evidence and prosecutor argued vigorously against mistrial); *United States* v. *Weeks*, 870 F.2d 267, 269 (5th Cir.) (upholding district court's denial of motion to dismiss where prosecutor "vigorously resisted" the motion for a mistrial and government's case "was proceeding quite satisfactorily"), cert. denied, 493 U.S. 827 (1989).

The Tenth Circuit reached a similar conclusion in *United States* v. *Tafoya*, 557 F.3d 1121 (10th Cir.), cert. denied, 129 S. Ct. 2849 (2009). The prosecutor in *Tafoya* elicited evidence during the examination of a witness that was subject to a pre-trial limiting order. *Id.* at 1123-1124. Defendant moved for, and was granted, a mistrial. *Id.* at 1124. The defendant thereafter moved to dismiss the indictment

on double jeopardy grounds; the district court denied the motion, finding that the prosecutor's conduct, "while perhaps negligent, was not sufficient to justify dismissing the indictment" and concluding that the prosecutor did not intend to goad the defendant into moving for a mistrial. *Id.* at 1124-1125. The Tenth Circuit agreed, citing (1) the government's suggestion of a limiting instruction and vehement opposition to a mistrial; (2) the prosecutor's rational explanation for what happened; (3) the prosecutor's statement that he did not intend to goad the defendant into seeking a mistrial; and (4) the absence of any implication of intent to goad the defendant in the prosecutor's question that elicited the inadmissible evidence. *Id.* at 1127. Similarly, in *United States* v. *Ivory*, 29 F.3d 1307 (8th Cir. 1994), the Eighth Circuit concluded that, even though a prosecutor made an improper comment during closing argument, the district court's finding that the prosecutor was "essentially unaware" of the comment's impropriety was not clearly erroneous. *Id.* at 1310-1311. The Eighth Circuit reasoned that that finding, combined with the prosecutor's "strong[] and unequivocal[]" objection to a mistrial, supported the district court's decision to deny the defendant's double jeopardy claim. *Id.* at 1311. And in *United States* v. *Lun*, 944 F.2d 642 (9th Cir. 1991), defendants sought a mistrial after the government's star witness, who had provided testimony over several days, unexpectedly applied for political asylum, indicated foreign officials had tortured him to confess to aspects of the crime, and

admitted perjuring himself on the stand. *Id.* at 644-645. The district court acknowledged that the prosecutor had "lost control of his case," *id.* at 645, but found that the prosecutor's actions were not calculated to induce the defendants into seeking a mistrial, *id.* at 644. The Ninth Circuit affirmed, noting, in particular, that in finding that the prosecutor did not intend to provoke a mistrial, the trial court "had numerous opportunities to observe the prosecutor's conduct during more than a year of pretrial preparations, about a month of trial, and about a week while mistrial issues were under contention." *Id.* at 644. The Ninth Circuit recognized that the trial was going poorly for the government after the witness's revelations, but was not convinced that the prosecutor believed he would benefit from a second trial. *Id.* at 645. In fact, the court noted that the *defendant* would benefit from a second trial after having "had the opportunity to see a substantial portion of the government's case-in-chief." *Id.* at 646.

The objective facts and circumstances of the present case do not support a finding that the prosecutor intended to goad the defendant into seeking a mistrial. First, the prosecutor vehemently opposed the defendant's motion for a mistrial (USCA5 3345-3365) and suggested a limiting instruction to address any potential prejudice from the prosecutor's single mention of the word "Robair" (USCA5 3354, 3363, 3365). *Wharton*, 320 F.3d at 532; *Nichols*, 977 F.2d at 975; *Weeks*, 870 F.2d at 269; *Tafoya*, 557 F.3d at 1127; *Ivory*, 29 F.3d at 1311; *Lun*, 944 F.2d at

644-645. Second, the government's case against the defendant was anything but weak. See, *e.g.*, R. 798 at 22-24 (summarizing some of the critical admissions defendant made during cross-examination); USCA5 2243-2401 (Michael Lohman); USCA5 2481-2688 (William Bezak); USCA5 2792-2859 (Jeffrey Lehrmann); USCA5 3052-3343 (Gerard Dugue); see also, generally, USCA5 2080-3343; see also *Wharton*, 320 F.3d at 532; *Weeks*, 870 F.2d at 269. Third, the prosecutor denied acting intentionally to circumvent the court's ruling, prejudice the defendant or gain an unfair advantage during the trial. USCA5 3353-3354, 3360, 3363; see *Tafoya*, 557 F.3d at 1127. The prosecutor rationally explained that she believed that the evidence subject to the court's pretrial orders could be admitted to impeach the defendant given his testimony during cross-examination, and she believed – albeit incorrectly – that she had received permission from the court to introduce the evidence. USCA5 3345-3349, 3352-3360. Finally, but most important, the district court explicitly found that the prosecutor's actions were *not* intended to goad the defendant into requesting a mistrial. R.E. Exh. C at 2. The district court, having been in a unique position to gauge the prosecutor's demeanor over several months of pretrial proceedings, several days of trial, and the discussion of the pending motion for a mistrial, found the prosecutor's apology to be sincere and accepted the prosecutor's explanation for her actions. USCA5 3348, 3353, 3362; see also R.E. Exh. C at 2-3 (noting the prosecutor's "sincere

explanation and apology to the Court" as one of the bases for denying defendant's motion to dismiss the indictment following the mistrial); see also *Lun*, 944 F.2d at 644; *Tafoya*, 557 F.3d at 1127; see also *United States* v. *Strickland*, 245 F.3d 368, 383-384 (4th Cir.) (upholding district court's finding that prosecutor's actions were not intended to provoke a mistrial where court "was able to assess the prosecutor's demeanor when she offered her explanation for [the error]"), cert. denied, 534 U.S. 894, and 534 U.S. 930 (2001).

Defendant attempts to support his argument by suggesting that the prosecutor's *post*-mistrial action of sending an email to defense counsel about possible next steps supports a finding that the prosecutor intended to provoke a mistrial *during* trial. Def. Br. 37-40. This argument is illogical and unavailing. Def. Br. 37-40. Immediately following the mistrial, the prosecutor and the lead defense counsel discussed the effect of the mistrial and potential next steps in the case. R. 798 at 20 n.6. The next day, as a follow-up to that conversation, the prosecutor sent an email to defense counsel in an effort to facilitate defense counsel's discussion with defendant about the potential next steps the attorneys had discussed the previous day. R. 803 at Exh. C.

Defendant's current claim that this email demonstrates malicious intent on the part of the prosecutor should be soundly rejected. The court reviewed the prosecutor's email and defense counsel's response, and after considering the

arguments of the parties, the district court denied defendant's motion to dismiss the indictment on double jeopardy grounds. The court noted that it had considered fully the prosecutor's conduct following the mistrial, as well as her conduct before and during trial. R.E. Exh. C at 2 (indicating that the court considered "Defendant's arguments regarding the Government's *pre-trial, during trial, and post-trial conduct*" in denying defendant's motion) (emphasis added). Defendant's unsupported assertion that the prosecutor intended to provoke a mistrial near the end of a trial that was proceeding exceedingly well for the government in order to gain a tactical advantage at a subsequent trial "is, at best, mere conjecture and speculation." *United States* v. *Doyle*, 121 F.3d 1078, 1087 (7th Cir. 1997) (upholding district court's denial of motion to dismiss on double jeopardy grounds where defendant could point to "no record evidence that unearths the inner-thoughts of the prosecutors").

Specifically, the prosecutor's indication in the email that defendant's testimony may be admissible against him in a subsequent trial can hardly be interpreted as evidence that the prosecutor intended to goad the defendant into seeking a mistrial so as to abort the current trial and use defendant's testimony at a later date. First, the admissibility of defendant's testimony at a future trial is made by the *trial court*, not the parties. See R.E. Exh. C. at 4 n.5 (directing parties to brief the issue whether defendant's testimony would, in fact, be admissible at a

retrial). Additionally, even assuming that defendant's testimony from the first trial will be admissible against him at a second trial, the admission of that testimony does *not* provide an advantage to the government. A retrial would require the government to rely upon, and the jury to evaluate, a dry record of defendant's prior testimony – a very poor substitute for defendant's real-time reaction to the intense and damaging cross-examination that occurred during the first trial. And having already previewed the government's *entire* case-in-chief, the defendant, not the government, stands in the advantageous position. See, *e.g.*, *Lun*, 944 F.2d at 646.

In any event, as the district court here recognized, whether prejudice to the defendant will result from a retrial is not part of the calculus in ruling on a motion to dismiss the indictment on double jeopardy grounds. R.E. Exh. C at 3. "[T]he standard is intent [to provoke a mistrial]," the court explained, "not merely prejudice to the defendant." R.E. Exh. C at 3; see also R.E. Exh. C at 4 ("[E]ven if the Government seeks to use Defendant's testimony in the first trial against him in the second trial, * * * the appropriate judicial remedy, if any, * * * is not barring a second trial in this matter."); *Wharton*, 320 F.3d at 531-532 (noting that even "intentional misconduct that seriously prejudices the defendant" does not bar re-trial if the prosecutor did not intentionally goad the defendant into seeking a mistrial) (citation omitted).

"[T]he element of intent is critical and easily misinterpreted." *United States v. Gilmore*, 454 F.3d 725, 730 (7th Cir. 2006). Unless the "objective facts and circumstances" indicate that a prosecutor intended to goad a defendant into seeking a mistrial, a retrial following a defendant's successful motion for a mistrial does not implicate double jeopardy concerns. The objective facts and circumstances here lead to no such finding. The district court found – after considering the same arguments defendant presents to this Court – that the prosecutor's actions were not intended to provoke a mistrial. Nothing in the record suggests that this finding was clearly erroneous.

CONCLUSION

For the reasons stated, this Court should affirm the district court's decision denying defendant's motion to dismiss the indictment on double jeopardy grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 23, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that Michael Hill, counsel for defendant, is a registered CM/ECF user and that service to him will be accomplished by the appellate CM/ECF system. Furthermore, when the court requests 7 hard copies of the brief to be mailed, I will also mail, via First Class Mail, 2 hard copies of the brief to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) contains 7805 words;

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Dated: July 23, 2012

s/ Angela M. Miller
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