IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2018 JUN 19 PM 4:13

UNITED STATES OF AMERICA	§	
	§	
v.	§	**EP-16-CR-693-DB-2, 3, 4, 5, 6**
	§	
JAMES ANDERSON, JOHN TANNER, MARK PHILLIP TEGMEYER, DIANE THOMAS, and NANCY LOVE	§ § §	

ORDER

On this day, the Court considered Defendants James Anderson, John Tanner, Mark Phillip Tegmeyer, Diane Thomas, and Nancy Love's ("Defendants") "Motion for an Evidentiary Hearing to Prohibit Retrial and Motion to Dismiss the Indictment Based on Government Misconduct and Due Process Violations" ("Motion"), filed in the above-captioned case on July 12, 2017. Therein, Defendants ask the Court to dismiss the Indictment in this case, or, in the alternative, to dismiss Count Four of the Indictment. Furthermore, Defendants request an evidentiary hearing to supplement the record. The Motion is fully briefed. On June 7, 2018, the United States of America ("the Government") filed its "Memorandum in Opposition to Defendants' Anticipated Request to Compel the Testimony of Federal Prosecutors." Therein, the Government asks the Court to deny Defendants' request to compel the testimony of the Assistant U.S. Attorneys. Defendants filed a response on June 13, 2018. The Court held an evidentiary hearing on June 14, 2018, in which Assistant U.S. Attorney Debra Kanof testified.

Although Defendants ask the Court to dismiss the Indictment because of double jeopardy, due process violations, and prosecutorial misconduct, essentially Defendants argue that the Government intentionally goaded them to request a mistrial. Their theory "is that AUSA Kanof intentionally withheld the Cordero evidence because she wanted to win at trial." Defs.' Resp. Gov.'s Mem., ECF No. 565, at 4. Furthermore, among other things, they argue that the

"nature of the disclosed evidence was critical to the defense theory and timeline regarding Charge IV of the Indictment." Defs.' Mot. for Evid. Hr'g & Mot. Dismiss, ECF No. 481, at 4 n.2. Since the mistrial in 2017, the Government "has concluded that the failure of the U.S. Attorney's Office to receive all relevant evidence in the FBI's possession in this case before trial was unacceptable" and that "an unacceptable risk was created that important evidence could have been unwittingly withheld from the defendants." Gov.'s Mem., ECF No. 561, at 12–13. Furthermore, the Government admits it "made mistakes in implementing [its] disclosure obligations in this case" and "apologizes to the Court and [Defendants] for those errors." *Id.* at 14. Finally, the Government claims the errors "were largely attributable to insufficient efforts to identify the locations of all relevant materials in the possession of the FBI" and that "none of the mistakes [were] intentional." *Id.*

"When the defense moves for . . . a mistrial . . . Double Jeopardy . . . may bar retrial if the government intended to goad the defendant into requesting a mistrial. . . . Government misconduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on [a] defendant's motion . . . does not bar retrial." *Martinez v. Caldwell*, 644 F.3d 238, 243 (5th Cir. 2011) (internal citation and quotation marks omitted) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 675–76 (1982)). "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 of the Fifth Amendment.'" *United States v. Wharton*, 320 F.3d 526, 532 (5th Cir. 2003) (quoting *Kennedy*, 456 U.S. at 676); *see United States v. Buck*, 847 F.3d 267, 272–73 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 149 (2017), *and pet. for reh'g denied*, 138 S. Ct. 536 (2017) (finding that there was no intent to provoke the defendant to move for a mistrial when it came to light on the third day of trial that the government did not turn over

some discovery materials and the government claimed that it did not previously know about the missing discovery).

Like one of the defendants in *Buck*, here, Defendants similarly claim, as one of their arguments, that the Government goaded them into seeking a mistrial because the trial was not going well for the Government, and they attempt to point out weaknesses in the Government's case. Defs.' Mot. for Evid. Hr'g & Mot. Dismiss, ECF No. 481, at 8–9; *Buck*, 847 F.3d at 272. The Government stated it had no prior knowledge of the discovery material in question and asked the FBI if it had turned over everything in its possession. Gov's Resp. Defs.' Mot. for Evid. Hr'g & Mot. Dismiss, ECF No. 521, at 7–8, 12–13, 42, 50–51; Gov.'s Mem., ECF No. 561, at 4, 8, 14, 32–33, 37; *see Buck*, 847 F.3d at 272 (countering the defendant's argument by saying "it had no prior knowledge of the missing items of discovery" and that "it asked the state agencies . . . if they had turned over 'everything' in their possession" and they responded affirmatively). Here, like in *Buck*, the Government heard the "defendants' opening statements and their cross-examination of government witnesses, and had the opportunity to gauge jury reactions to their own witnesses." 847 F.3d at 272–73. Even then, the Fifth Circuit affirmed the district court's determination that there was no goading. *Id.* at 273. After reviewing the evidence in the record and presented during the evidentiary hearing—including the testimony of Assistant U.S. Attorney Debra Kanof—the Court similarly finds there was no goading in this case.

Defendants base their double jeopardy and due process claims on the same argument: the Government concealed and withheld evidence from them for the purpose of goading Defendants into requesting a mistrial. Because the Court has determined there was no goading on their double jeopardy claim, the same finding applies to Defendants' due process claim. Furthermore, the Court finds there was no prosecutorial misconduct because there was

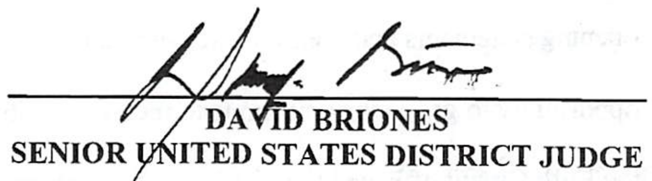
no intentional withholding of discovery materials. Nevertheless, the Government's actions—which it concedes—were at the very least negligent, so the Court will dismiss Count Four of the Indictment. Accordingly, the Court is of the opinion that the following orders should enter:

IT IS HEREBY ORDERED that Defendants James Anderson, John Tanner, Mark Phillip Tegmeyer, Diane Thomas, and Nancy Love's "Motion for an Evidentiary Hearing to Prohibit Retrial and Motion to Dismiss the Indictment Based on Government Misconduct and Due Process Violations" is **GRANTED IN PART**.

IT IS FURTHER ORDERED that Count Four of the Indictment is **DISMISSED WITH PREJUDICE**.

IT IS FINALLY ORDERED that any pending motions before this Court are **DENIED AS MOOT**.

SIGNED this **19th** day of **June 2018.**



DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE