

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**UNITED STATES OF AMERICA**

**v.**

**CHARLES RILEY, JR.,**

**Defendant**

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**CRIMINAL NO. JKB-13-0607**

**MEMORANDUM AND ORDER**

Pending before the Court is Defendant's motion to prohibit retrial (ECF No. 202), pursuant to the Double Jeopardy Clause. U.S. Const. amend. V. The Court has considered the Defendant's submissions (ECF Nos. 202, 207), as well as the Government's response (ECF No. 205), and concludes no hearing is necessary. For the reasons stated below, the motion will be DENIED.

On March 27, 2014, a federal grand jury sitting in Baltimore returned a superseding indictment accusing the Defendant of various illegal drug offenses and of being a previously convicted felon in possession of a firearm. (ECF No. 85.) Specifically, Defendant was charged with four counts. In Count One, he was charged with conspiracy to distribute and possess with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine; in Count Two he was charged with possessing with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine; in Count Three he was charged with possessing with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine; and in Court Five he was charged with possessing a firearm while having been previously convicted of a crime punishable

by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §922(g)(1).<sup>1</sup> (ECF No. 85.)

On the third day of the subsequent jury trial, the Government rested its case in chief. On motion of the Defendant and over the Government's objection, the Court found that the Government's proof in support of the gun offense was fatally insufficient, and judgment of acquittal was entered on that count. The Defendant then moved for a mistrial on the remaining drug counts, and the Court granted that motion, again over the Government's objection, after concluding that the Defendant was unfairly prejudiced by already-admitted proof relating to his alleged criminal history that was relevant only to the now-defunct gun charge. (*See generally* ECF No. 198.)

Defendant now moves to preclude retrial on the remaining drug counts. (ECF No. 202.) Specifically, Defendant argues that “[t]he government knew that [its evidence regarding Defendant’s alleged prior felony in relation to the gun offense] was legally insufficient to secure a conviction on Count Five yet moved it into evidence, elicited testimony concerning its content anyway and rested its case. . . . There are several indications that the government was aware of the insufficiency of [its evidence regarding the gun offense], and was also aware that the insufficiency of this evidence would result in a motion for mistrial.” (ECF No. 202 at 5-6 (internal citations and quotations omitted).)

As a general rule, “the government is not barred from retrying cases when the first trial ends on the defendant’s motion for mistrial.” *U.S. v. Johnson*, 55 F.3d 976, 978 (4th Cir. 1995) (quoting *U.S. v. Borromeo*, 954 F.2d 245, 247 (4th Cir. 1992)). However, in *Oregon v. Kennedy*, the Supreme Court recognized a “narrow exception” to this rule: “Only where the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial may a

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<sup>1</sup> Count Four of the superseding indictment did not concern this Defendant.

defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on its own motion.” 456 U.S. 667, 673, 676 (1982). The Supreme Court emphasized that “[p]rosecutorial conduct, . . . even if sufficient to justify a mistrial on defendant’s motion, . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.” *Id.* at 675-76. In this context, as the Fourth Circuit has explained, the defense “bears the burden of proving that the prosecutor intentionally provoked the defense into moving for mistrial.” *Borromeo*, 954 F.2d at 247.

The Court finds that, here, the defense has not satisfied this high burden. The record makes clear that the judgment of acquittal and subsequent mistrial in this case was not the result of an effort on the part of the prosecutor to subvert the Double Jeopardy Clause. Indeed, the Government was caught by surprise when, on the second day of trial, Defendant renounced a planned stipulation as to his prior conviction. With the stipulation gone, the Government had to put on evidence to prove Defendant’s alleged prior convictions, and this was a task for which the Government was underprepared. The next day, the Government offered some evidence but ultimately the Court found it was insufficient. On a Rule 29 motion by the Defendant, and over the Government’s objection, the Court acquitted the Defendant as to Count Five.<sup>2</sup> (*See* ECF No. 198.)

This judgment of acquittal as to Count Five was a set-back for the prosecution, and the Court finds no basis to believe that it was part of an elaborate effort to “goad” the Defendant into seeking a mistrial as to Counts One, Two, and Three. To the contrary, for two full trial days, the

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<sup>2</sup> The Court once again recognizes that there is some case law supporting the Government’s position that the evidence it presented was sufficient to survive a motion under Rule 29. *Pasterchik v. United States*, 400 F.2d 696, 701 (9th Cir. 1968); *Rodriguez v. United States*, 292 F.2d 709, 710 (5th Cir. 1961). *But see United States v. Jackson*, 368 F.3d 59 (2d Cir. 2004); *United States v. Allen*, 383 F.3d 644, 649 (7th Cir. 2004); *United States v. Weiler*, 385 F.2d 63, 66 (3d Cir. 1967); *Gravatt v. United States*, 260 F.2d 498, 499 (10th Cir. 1958). The Court discussed why it found these precedents unpersuasive in its previous memorandum. (ECF No. 98 at 6-9.) Nonetheless, the Court easily concludes that the Government was acting in good faith when it offered the (inadequate) evidence of Defendant’s prior conviction.

