

1 SHAWN N. ANDERSON  
Acting United States Attorney  
2 MARIVIC P. DAVID  
Assistant United States Attorney  
3 PHILIP KESARIS  
Special Assistant United States Attorney  
4 Sirena Plaza, Suite 500  
108 Hernan Cortez Avenue  
5 Hagåtña, Guam 96910  
PHONE: (671) 472-7332  
6 FAX: (671) 472-7215

7 *Attorneys for the United States of America*

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE TERRITORY OF GUAM

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 vs.

13 MARK S. SMITH and  
GLENN D. WONG,

14 Defendants.  
15

CRIMINAL CASE NO. 17-00020

**UNITED STATES' OPPOSITION  
TO DEFENDANT GLENN D. WONG'S  
MOTION TO DISMISS INDICTMENT**

16 COMES NOW, the United States of America, by and through the undersigned Assistant  
17 U.S. Attorney, and files this response in opposition to defendant Glenn D. Wong's Motion to  
18 Dismiss Indictment. In support thereof, the government states as follows:

19 1. On September 12, 2017, a jury was empaneled for the defendants' trial in this case.

20 2. On September 14, 2017, during examination of government witness Melinda Tatiano,  
21 the government sought to admit Exhibit GE 18a, the March 27-29, 2012 emails between co-  
22 defendant Mark S. Smith and several GHURA employees. These emails referenced Smith's  
23 defense counsel, David Lujan's prior conflict of interest as GHURA legal counsel. Over  
24

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1 defendants' objections, the Court found GE 18a to be admissible because it included a statement  
2 by co-defendant Smith in response to a notice to him about Lujan's prior conflict of interest.

3 3. On September 15, 2017, the government introduced Exhibit GE 18a again during  
4 examination of the same witness. When court staff mistakenly displayed the exhibit on the screens  
5 in front of the jury, both defendants objected. At sidebar, Mr. Lujan informed the Court he was  
6 contemplating withdrawing as counsel because admission of Exhibit GE 18a would undermine his  
7 credibility with the jury. Defendant Wong's counsel, Mr. Maher, stated he would have called Mr.  
8 Lujan as a witness had defendant Wong known of such evidence.

9 4. That afternoon Mr. Lujan moved for a mistrial and argued that his ability to serve as  
10 effective counsel was compromised because the jury saw the exhibit. Mr. Maher joined the motion  
11 for a mistrial and claimed that defendant Wong too was prejudiced by the "taint" on Mr. Lujan's  
12 credibility. The Court denied their motion. As an alternative, the Court ordered the government  
13 to redact that exhibit and other exhibits that reflected Mr. Lujan's name.

14 5. On September 18, 2017, the government moved the Court to reconsider its ruling to  
15 redact exhibits, and argued that Mr. Lujan has a conflict of interest in his continued representation  
16 of defendant Smith.

17 6. On September 19, 2017, co-defendant Smith moved the Court to reconsider its denial  
18 of the motion for a mistrial. Defendant Wong joined in that motion.

19 7. On the morning of September 21, 2017, the Court held a hearing on the motions. After  
20 hearing arguments from the parties, the Court stated it was inclined to declare a mistrial. There  
21 was no objection from either defendant.

22 8. On September 21, 2017, defendant Wong joined in co-defendant Smith's Motion for a  
23 Mistrial, and Motion for Reconsideration of Order Denying Motion for Mistrial.



1 permissible so long as there was “manifest necessity for the [mistrial], or the ends of public justice  
2 would otherwise be defeated.” *Illinois v. Somerville*, 410 U.S. 458, 461 (1973) (quoting *United*  
3 *States v. Perez*, 22 U.S. 579, 580 (1824); see also *United States v. Elliot*, 463 F.3d 858, 864 (9th  
4 Cir. 2006).

5 B. Defendant Wong’s Retrial is Constitutionally Permissible

6 1. The Defendant Has Waived His Double Jeopardy Claim

7 The defendant’s consent to a mistrial removes any double jeopardy bar to re prosecution.  
8 The consent may come in the form of a motion or express request for that result. *Kennedy*, 456  
9 U.S. at 672-73 and 684. Defendant Wong, like co-defendant Smith, requested a mistrial, although  
10 based on other grounds. The defendant cannot invoke the protections of the Double Jeopardy  
11 Clause because he himself requested the premature termination of his first trial. In light of  
12 defendant’s specific request for a declaration of a mistrial, his current attack on this Court’s  
13 decision to do just that is inexplicable.

14 Consent may also be inferred from the circumstances, such as where a defendant who is  
15 aware of the possibility of a mistrial declaration fails to object to dismissal of the jury despite an  
16 opportunity to do so. See *United States v. You*, 382 F.3d 958, 964 (9th Cir. 2004) (Implied consent  
17 to a mistrial removes any double jeopardy bar to a retrial); *United States v. McKoy*, 78 F.3d 446  
18 (9th Cir. 1996) (an argument that a defendant has not consented to the order of mistrial has no real  
19 force in light of the fact that he asked the court to grant one); *United States v. Smith*, 621 F.2d 350,  
20 352 (9th Cir. 1980) (defense counsel did not object to the order of mistrial despite adequate  
21 opportunity to do so; finding that the failure to do so supported the determination that defendant  
22 had implicitly consented to the mistrial).

1 In this case, after the Court stated on the morning of September 21 that it was inclined to  
2 declare a mistrial, a window of opportunity existed for defendant Wong to object. He did not. The  
3 defendant not only failed to object to a mistrial, but he expressly moved for one. Wong deliberately  
4 elected on his part to forgo his valued right to have his guilt or innocence determined before the  
5 first trier of fact. In effect, the defendant expressly conceded that it was legally appropriate for the  
6 Court to declare a mistrial.

7 2. The Court Exercised Sound Discretion in Determining  
8 There was Manifest Necessity to Declare a Mistrial

9 Even if the Court finds that defendant Wong did not consent to the mistrial, a retrial will  
10 not violate his double jeopardy rights because the mistrial was manifestly necessary. A  
11 defendant's consent is not required when a mistrial is otherwise supported by "manifest necessity."  
12 *See Kennedy*, 456 U.S. at 672.

13 The double jeopardy rule does not apply in cases of manifest necessity where trial courts,  
14 in the exercise of sound discretion under established legal principles, have the power to declare a  
15 mistrial and discharge a jury without the consent of the defendant. In this case, manifest necessity  
16 made it incumbent upon the Court to declare a mistrial.

17 Under the manifest necessity standard, courts may declare a mistrial only if its exercise of  
18 judicial discretion "leads to the conclusion that the ends of public justice would not be served by  
19 a continuation of the proceedings." *Jorn*, 400 U.S. at 485. The Supreme Court described the "ends  
20 of public justice" as "the public's interest in fair trials designed to end in just judgments."  
21 *Somerville*, 410 U.S. at 463; *see also Wade v. Hunter*, 336 U.S. 684, 689 (1949) (the Double  
22 Jeopardy Clause permits retrial when the defendant's "valued right" to a verdict from an  
23 empaneled jury is "subordinate[] to the public's interest in fair trials..."). The Ninth Circuit has  
24 also recognized that a defendant's interest may sometimes be subordinate to the public interest in

1 affording the government one full and fair opportunity to present its entire evidence to an impartial  
2 jury. *See Elliot*, 463 F.3d 858, 864 (9th Cir. 2006).

3 The manifest necessity standard was enunciated by Justice Story in *United States v. Perez*,  
4 22 U.S. 579 (1824):

5 [T]he law has invested Courts of justice with the authority to discharge a jury  
6 from giving any verdict, whenever, in their opinion, taking all the circumstances  
7 into consideration, there is a manifest necessity for the act, or the ends of public justice  
8 would otherwise be defeated. They are to exercise a sound discretion on the subject;  
9 and it is impossible to define all the circumstances, which would render it proper  
10 to interfere. To be sure, the power ought to be used with the greatest caution,  
11 under urgent circumstances, and for very plain and obvious causes; ...  
12 But, after all, they have the right to order the discharge; and the security which the  
13 public have for the faithful, sound, and conscientious exercise of this discretion, rests,  
14 in this, as in other cases, upon the responsibility of the Judges, under their oaths of  
15 office.

16 *Id.*

17 In this case and in light of the Court’s evidentiary rulings, both Mr. Lujan and defendant  
18 Wong’s counsel recognized that co-defendant Smith no longer had conflict-free counsel. Mr.  
19 Lujan had divided loyalties, and an actual conflict of interest in continuing to represent co-  
20 defendant Smith. Mr. Maher already had previously acknowledged, on September 15, 2017, that  
21 defendant Wong had been prejudiced before the first jury by the “taint” on Mr. Lujan’s credibility.  
22 Given the broad discretion afforded to trial courts to declare a mistrial when there is a “manifest  
23 necessity,” here, the Court had the authority to declare a mistrial as to both defendants.

### 19 3. The Court Complied with Fed. R. Crim. P. 26.3

20 Rule 26.3 of the Federal Rules of Criminal Procedure provides that before ordering a  
21 mistrial, the court must give the defendant and the government an opportunity to comment on an  
22 order of mistrial. Rule 26.3 was not designed to change the substantive law governing mistrials.  
23 Fed. R. Crim. P. 26.3 Advisory Comment Notes.

1 Defendant's reliance on *United States v. Bates*, 917 F.2d 388 (9th Cir. 1991) is misplaced.  
2 In *Bates*, the district court declared a mistrial *sua sponte* after a government witness blurted out  
3 potentially prejudicial testimony before a proper foundation was laid in spite of a prior admonition  
4 from the court that such a foundation would be required. The court immediately declared a  
5 mistrial, discharged the jury, adjourned court, and refused repeated efforts by both government  
6 counsel and defense counsel to address the court regarding the mistrial ruling. *Id.* at 390-391.  
7 Defendant moved to dismiss the indictment on double jeopardy grounds. Although the district  
8 judge conceded that in his anger, he failed to afford defendant an opportunity to object to the  
9 mistrial, he nonetheless denied the motion to dismiss, finding "manifest necessity" in what he  
10 regarded as an incurable trial error. *Id.* at 392.

11 On appeal, the Ninth Circuit reversed, finding that the declaration of a mistrial was not  
12 justified by "manifest necessity." In so doing, the Court relied on numerous factors, not present  
13 in this case, such as the fact that the court did not allow either defense counsel or government  
14 counsel an opportunity to comment on the mistrial even though both tried repeatedly to do so, that  
15 the court failed to consider or explore any options to a mistrial, and that the alleged trial error  
16 would have been rendered harmless if the government had been permitted to lay the proper  
17 foundation. *Id.*

18 In contrast, the record here shows that the Court did so provide the parties an opportunity  
19 to comment. The Court in fact alerted the parties on the morning of September 21, 2017, that it  
20 was inclined to declare a mistrial. In response, defendant Wong stated his position by joining with  
21 co-defendant Smith in his Motion for a Mistrial, and Motion for Reconsideration of Order Denying  
22 Motion for Mistrial. The Court had no reason to believe, based on the actions of defendant Wong's  
23 counsel by joining in the above-referenced motions, that Wong opposed a mistrial.

1 Furthermore, the Court's consideration and declaration of the mistrial did not occur in a  
2 hasty and abrupt fashion. At the September 21 motions hearing, the Court permitted counsel for  
3 all parties an opportunity to be heard. When the particular issue of a mistrial was raised by the  
4 Court, defendant Wong had ample opportunity to raise a specific, contemporaneous objection but  
5 failed to do so. *See United States v. Berroa*, 374 F.3d 1053, 1058-59 (11th Cir. 2004), *cert. denied*,  
6 543 U.S. 1076 (2005) (no abuse of discretion, notwithstanding failure to comply with Rule 26.3,  
7 where circumstances as a whole reveal that decision to declare mistrial was not abrupt or  
8 precipitous response but a deliberate decision).

9 Thus, contrary to the defendant's claim, here the record shows that the Court complied  
10 with Rule 26.3.

11 For the foregoing reasons, defendant Wong's motion to dismiss indictment should be  
12 denied.

13 RESPECTFULLY SUBMITTED this 18th day of October, 2017.

14 SHAWN N. ANDERSON  
15 Acting United States Attorney  
16 Districts of Guam and the CNMI

17 By: /s/ Marivic P. David  
18 MARIVIC P. DAVID  
19 Assistant United States Attorney  
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