DechertOnPoint

July 2011 / Special Alert

A legal update from Dechert LLP

Related Practice

- White Collar and Securities

Has Roger Clemens Hit A Double? The Double Jeopardy Clause and the Clemens Mistrial

U.S. District Judge Reggie B. Walton of the U.S. District Court for the District of Columbia on July 14, 2011 declared a mistrial in the highly publicized criminal trial of William "Roger" Clemens, a former starting pitcher for several Major League Baseball teams. Clemens' trial on federal criminal charges of obstruction of a Congressional committee's investigation,[1] making false statements to Congress,[2] and perjury,[3] arises from his February 2008 Congressional testimony before the U.S. House of Representatives Committee on Oversight and Government Reform, in which he denied using anabolic steroids and human growth hormones ("HGH"). Commentators and interested observers wonder whether the government has committed a game ending error, namely whether a new prosecution of Clemens will be barred.

Prior to trial, Judge Walton had ruled that the prosecution could not introduce evidence of certain statements that Clemens' former teammate (and good friend) Andy Pettitte had made to his wife, Laura Pettitte. Andy Pettitte allegedly told his wife that Clemens had told him that he had used HGH.

Clemens' defense counsel moved, pre-trial, for the exclusion of Laura Pettitte's statements, arguing that the statements are inadmissible hearsay.[4] In fact, as Clemens' counsel noted, Laura Pettitte's statements are "double hearsay"—*i.e.*, the out of court statements of Laura Pettitte, recounting out of court statements relayed to her by Andy Pettitte—and are therefore particularly unreliable.[5] Judge Walton had granted Clemens' motion *in limine* in an order dated July 6, 2011, holding that "[t]he government will be permitted to introduce the evidence referenced in the defendant's motion *in limine* only as rebuttal evidence, provided that defense counsel's cross-examination provides a sufficient predicate for the introduction of such evidence."[6]

Despite this ruling, on the second day of trial, the government played for the jury video footage of U.S. Representative Elijah Cummings' statements during the Committee hearing, in which Cummings read from an

1 18 U.S.C. §§ 1505, 1515(b).

2 18 U.S.C. § 1001(a)(2), (c)(2).

3 18 U.S.C. § 1621(1).

4 *See* Fed. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

5 *See* Defendant's Motion *In Limine* And Memorandum Of Law (2 Of 2) To Preclude Hearsay Evidence Regarding Mr. Clemen (Doc. No. 55), *United States v. William R. Clemens*, 1:10-cr-00223-RBW (D.D.C. June 21, 2011).

6 *See* Order of Judge Reggie B. Walton (Doc. No. 76), *United States v. William R. Clemens*, 1:10-cr-00223-RBW (D.D.C. July 7, 2011).

Dechert LLP

affidavit of Pettitte's wife, describing the conversation she had with her husband. In the footage, Cummings offered his view that such testimony was more credible than Clemens' account.[7]

According to press accounts, in declaring a mistrial, Judge Walton was "furious" that the prosecution had violated his order excluding reference to Laura Pettitte's statements in the government's case in chief. The Judge stated, "I think that a first-year law student would know that you can't bolster the credibility of one witness with clearly inadmissible evidence."[8]

The Clemens case raises the interesting legal issue of when and under what circumstances the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution prevents the prosecution from re-trying the case following a mistrial. The District Court scheduled a hearing for September 2, 2011 to consider whether or not Clemens may be retried by the Government in view of the prohibition against a defendant being tried twice for the same charge under the Double Jeopardy Clause.[9]

In reaching a decision on that issue, Judge Walton will be guided, in part, by the U.S. Supreme Court's decision in *Oregon v. Kennedy*, 456 U.S. 667 (1982). In that case, the Supreme Court, in a majority opinion by then-Associate Justice William H. Rehnquist, held that a mistrial that follows from a defendant's motion will ordinarily not preclude a second trial on the same charges, with a narrow exception. That exception is in the event that the defendant's motion for a mistrial was prompted by prosecutorial "conduct . . . intended to provoke the defendant into moving for a mistrial."[10] As the U.S. Court of Appeals for the Second Circuit has since explained, the so-called "*Kennedy* exception . . . is intended to prevent the prosecution from forcing a mistrial when things are going badly for it, in the hope of improving its position in a new trial."[11] The question before Judge Walton therefore, will be whether the prosecutors "intended to 'goad' the defendant into moving for a mistrial."[12]

Under *Kennedy*, the District Court will have "to make a finding of fact," and "[i]nfer[] the existence or nonexistence of intent from objective facts and circumstances . . . ."[13] In this regard, Judge Walton might take into account the fact the prosecution's videotape gaffe was the second occasion it had disregarded his order—the first being when, during opening statements, the prosecution referenced use of HGH by other players, something Judge Walton had prohibited in a pretrial order out of concern that it could improperly taint Clemens.[14] The improper opening statement comment by the prosecution, which prompted an instruction from the District Court to the jurors to disregard the prosecution's statement, in addition to the videotape error, which Judge Walton suggested was beyond even a first-year law student, might raise a question for Judge Walton regarding the prosecution's intent.

Ultimately, however, the requirement that the prosecution must have intentionally sought to deprive Clemens of a trial before this jury is a high standard. The Sixth Circuit has held that even a deliberate violation of a trial court's order that is a result of

---

7 *See* Richard A. Serrano, "Judge declares mistrial in Roger Clemens perjury case," L.A. TIMES, July 14, 2011, *available at* http://www.latimes.com/news/politics/la-pn-clemens-mistrial-20110714,0,1724711.story (last visited July 15, 2011).

8 *See* Sean Gregory, "The Roger Clemens Mistrial: Isn't the Government Broke Enough?" TIME, *available at* http://newsfeed.time.com/2011/07/14/the-roger-clemens-mistrial-isnt-the-government-broke-enough/ (last visited July 15, 2011).

9 *See* U.S. Const. amend. V (stating that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb"). Judge Walton also set a briefing schedule, with any defense motion due by July 29, 2011, the prosecution's opposition due by August 19, 2011, and replies, if any, due by August 26, 2011. *See* Minute Entry of July 14, 2011, *United States v. William R. Clemens*, 1:10-cr-00223-RBW (D.D.C.).

10 *Kennedy*, 456 U.S. at 679.

11 *United States v. GAF Corp.*, 884 F.2d 670, 673 (2d Cir. 1989). *See also United States v. Oseni*, 996 F.2d 186, 187-88 (7th Cir. 1993) ("If after a criminal trial begins the government decides that the case is going badly for it, it cannot dismiss the case and reprosecute the defendant. Nor is it permitted to achieve by indirection what it is not permitted to do directly; and thus it cannot engage in trial misconduct that is intended to and does precipitate a successful motion for mistrial by the defendant.").

12 *Kennedy*, 456 U.S. at 676.

13 *Id.* at 675.

14 *See* Jeremy Pelofsky & Keith Harriston, "U.S. judge declares mistrial in Clemens perjury case," REUTERS, July 14, 2011, *available at* http://www.reuters.com/article/2011/07/14/us-baseball-clemens-idUSTRE76A53E20110714 (last visited July 15, 2011).

"prosecutorial inexperience," but not specifically intended to prompt a mistrial, is insufficient to preclude retrial.[15] Furthermore, while some defendants try to demonstrate that the prosecution's case is "going badly" in order to establish that the prosecution had a motive to force a mistrial, such an argument will be challenged here, given the very early stage of the Clemens case,[16] and the apparent lack of any concern by the prosecution about this particular jury. Indeed, the prosecution here opposed a mistrial.[17] The defense may argue that it has been disadvantaged by having laid out its overall strategy before the jury and that a second trial would therefore give the prosecution an unfair advantage to tailor its case to meet that defense.

Of course, Judge Walton may well conclude that the prosecutors' error was exceedingly sloppy but not undertaken for the purpose of causing a mistrial. If this is the result of the Double Jeopardy argument, Mr. Clemens then would face another trial, making the Clemens prosecution a doubleheader for sports and legal enthusiasts to watch.

■ ■ ■

This update was authored by Robert J. Jossen, Michael J. Gilbert and Justin C. Danilewitz.

15 *United States v. White*, 914 F.2d 747, 752 (6th Cir. 1990).

16 *See United States v. Cornelius*, 623 F.3d 486, 501 (7th Cir. 2010) (comparing the case on appeal, which the Seventh Circuit remanded for an evidentiary hearing to determine the possible existence of prosecutorial intent to compel a mistrial, to other cases not requiring such a hearing where "there were no indications that the cases were going badly for the government" and where "the trial had just commenced").

17 *See* Pelofsky & Harriston, *supra* note 14 (noting that the prosecutor "pressed [Judge] Walton to reconsider or instead instruct the jury to disregard the information presented in [the] video"). *See also White*, 914 F.2d at 752 ("There was no sequence of overreaching that pervaded the trial; the Assistant United States Attorney resisted and apparently was surprised by the granting of the motion for a mistrial."). *But see Cornelius*, 623 F.3d at 499-500 (stating that "[i]t cannot be the case that the government's opposition to a mistrial can *per se* negate any inference of intent to goad the defense into moving for one. If that were so, the government could simply object to a mistrial, present an option it knew to be untenable to the other side (and likely to be rejected by the judge), and thus inoculate itself from accusations of *Kennedy*-style intent in every case").

Practice group contact

If you have questions regarding the information in this legal update, please contact the attorney listed below or the Dechert attorney with whom you regularly work. Visit us at www.dechert.com/white_collar.

Robert J. Jossen
New York
+1 212 698 3639
robert.jossen@dechert.com

Michael J. Gilbert
New York
+1 212 698 3886
michael.gilbert@dechert.com

If you would like to receive any of our other *DechertOnPoints*, please click here.