UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Criminal No. 10-223 (RBW)
WILLIAM R. CLEMENS,	)	
Defendant.	)	

DEFENDANT'S MOTION AND MEMORANDUM OF LAW
TO PROHIBIT RETRIAL AND TO DISMISS THE INDICTMENT

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Defendant William R. Clemens, by and through his attorneys, respectfully submits this motion to dismiss the indictment in this case and to bar re-prosecution of charges initially tried on and after July 6, 2011, on the grounds of double jeopardy.

INTRODUCTION

The Double Jeopardy Clause of the United States Constitution prevents the federal government from depriving a criminal defendant of his right to have his guilt or innocence determined in a single trial.[1] The underlying and "deeply ingrained" policy served by this Clause is that the Government, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense.[2] As the U.S. Supreme Court has observed, "[a] power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial."[3] When prosecutors act in a way that forces a trial to reset once it has begun, a criminal defendant is unconstitutionally subjected to "embarrassment, expense and ordeal," compelled to "live in a continuing state of anxiety and insecurity," and exposed to an enhanced possibility that "even though innocent he may be found guilty."[4] This is precisely where Mr. Clemens stands today.

On July 14, 2011, the sixth day of trial in this matter and the second day of testimony, the Government triggered double jeopardy by deliberately defying a pretrial order precluding use of prejudicial hearsay statements by Laura Pettitte. Before this violation occurred, the Court had already sustained objections to evidentiary transgressions by the Government in its opening

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1 U.S. CONST., amend. V.

2 *See Green v. United States*, 355 U.S. 184, 187 (1957).

3 *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion).

4 *Green*, 355 U.S. at 187–188.

statement and with one of its first witnesses. The prosecutors then went too far. The Government presented irrelevant, "bolstering" hearsay testimony regarding the specific statements precluded by the Court in a pretrial order, published those statements to the jury through both a written transcript and video, and then left the offending evidence on the juror's monitors for several minutes while the Court conducted a bench conference admonishing the Government for its conduct. The Court declared a mistrial after finding that the Government's conduct "put this case in a posture where Mr. Clemens cannot now get a fair trial before this jury."[5]

Although the Government is permitted to prosecute its case "with earnestness and vigor," there are limits to this approach:

> [W]hile [the U.S. Attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[6]

The publication of Mrs. Pettitte's statements to the jury exceeded these limits. Worse, the Government's conduct here was no accident. The Government chose to ignore this Court's orders and shirked its duty to conform its exhibits to the Court's pretrial rulings. This decision has constitutional implications. To find otherwise would allow "a prosecutor [to] have the option of first trying his case with inadmissible, prejudicial, and irrelevant evidence—that is, committing known error—in hopes of 'getting away' with it, with the ability to retry the case properly if the first trial is aborted by a mistrial."[7]

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5 Transcript of Jury Trial Proceedings on July 14, 2011, excerpts of which are attached hereto at Exhibit 6 ("7/14/11 Tr."), at 50.

6 *See Berger v. United States*, 295 U.S. 78, 88 (1935).

7 *United Stated v. Kessler*, 530 F.2d 1246, 1253 (5th Cir. 1976).

The controlling authority as to whether prosecutorial misconduct bars re-prosecution is *Oregon v. Kennedy*, 456 U.S. 667 (1982). Under *Kennedy*, Mr. Clemens does not get to advance from court to home merely because the Government committed inadvertent errors. To dismiss the indictment with prejudice, this Court must find, among other things, that the Government engaged in misconduct with the intent to provoke a mistrial.[8]

This is the rare case that meets the *Kennedy* standard. The full record supports both: (i) a finding by a preponderance of the evidence that the prosecutor's misconduct was intentional; and (ii) a reasonable inference that the prosecutor's misconduct was intended to provoke a mistrial. As explained in detail below, by the time the Government provoked the mistrial, its highly experienced counsel had suffered a series of setbacks that cast doubt on the case against Mr. Clemens. Moreover, the *in limine* rulings that the Government chose to ignore—evidence about the use of steroids and HGH by other players, and hearsay statements by Mrs. Pettitte—were critical, hotly-contested pretrial issues that no experienced prosecutor could simply have "missed" when it came time to finalize exhibits and prepare witnesses.

Finally, and tellingly, the best evidence of the Government's intent was provided in real time on July 14, 2011. In the heat of the moment when the misconduct was raised in court, the Government did not suggest, much less offer any evidence to support a suggestion, that the prosecutor's misconduct was unintentional. Nor did the Government rebut the reasonable inference that the misconduct was intended to provoke a mistrial. Instead, the explanation that the Government provided—that the Government's conduct was somehow excused because the defense did not immediately object—is entirely consistent with a finding that the prosecutors intended to "goad" the defense into asking the Court to start the trial over from scratch.

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8 *Kennedy*, 456 U.S. at 675–76.

The law is many things in this nation but most of all it is about fairness. The Government had its day in Court and squandered it with misconduct that irretrievably wasted time, money, and the opportunity for a one-time, fair resolution of these charges for all involved. Mr. Clemens expended substantial resources to prepare for trial, resources now wasted through no fault of his own. The Court, its staff, and 60 citizens who answered the call of jury service were ill-served by the waste of judicial resources caused by the Government's decision to ignore the Court's orders.

What is fairness? The concept may be elusive in some circumstances, but we know it cannot embrace an outcome in which the only cost to the prosecution of its own misconduct is actually a reward: a second trial in which the Government can improve its jury selection, hone its trial strategy, and tackle issues raised by the defense in opening. This outcome is untenable under the Constitution precisely because it is so unfair to the accused and our system of justice. For all of these reasons, the Court should dismiss the indictment and bar further prosecution under the Double Jeopardy Clause.

FACTUAL BACKGROUND

Roger Clemens was indicted on August 11, 2010, following a nearly three-year investigation involving federal agents from multiple agencies, a private investigation headed by an international law firm, and an investigation by a Congressional committee. Less than a year after his indictment, Mr. Clemens announced ready and was put to trial. At all times prior to the trial setting, Government counsel in this matter stated they would be ready for trial and consistently expressed a preference for a trial setting sooner rather than later.

A. Pre-Trial Evidentiary Rulings

The Court heard argument on pre-trial motions on July 5, 2011, the day before jury selection began. Mr. Clemens filed two, and only two, motions *in limine*, and the Government filed memoranda opposing each.[9] During the motions hearing, the Court sharply focused the discussion on two *in limine* requests made by Mr. Clemens: (1) that the Government be prohibited from arguing that the use of performance enhancing drugs by other professional players is evidence that Mr. Clemens allegedly used the same thing;[10] and (2) that the Government be prohibited from presenting evidence from or about Mrs. Pettitte concerning her recollection of a conversation she had with her husband about Mr. Clemens.[11]

The Court engaged in an extended colloquy with counsel for the Government and defense on both of these issues. During argument, counsel for the Government explicitly confirmed its intent to use the disputed evidence for each issue as proof during its case-in-chief.[12] The Court expressed serious reservations about the Government's approach to Mr. Clemens' first *in limine* issue—whether to permit evidence of the use of performance enhancing drugs by other players—and explained:

> [T]he concern I would have is that if you bring in that evidence showing that these other individuals were getting these substances from Mr. McNamee and they knew that they were getting, that the

9 *See* Defendant's Mot. *In Limine* And Memo. Of Law (1 Of 2) To Preclude Introduction of Other Witness Evidence Concerning Dealings and Discussion with Brian McNamee, filed June 21, 2011 [D.E. 55]; Defendant's Mot. *In Limine* And Memo. Of Law (2 Of 2) To Preclude Hearsay Evidence Regarding Mr. Clemens, filed June 21, 2011 [D.E. 56]; U.S. Opp. to Defendant's First Motion in Limine Regarding Evidence about Other Players, filed June 29, 2011 [D.E. 64]; U.S. Opp. to Defendant's Second Motion in Limine Regarding Purported Hearsay, filed June 29, 2011 [D.E. 65].

10 *See* Transcript of Jury Trial Proceedings on July 5, 2011, excerpts of which are attached hereto at Exhibit 1 ("7/05/11 Tr."), at 15–24.

11 *See id.* at 24–31.

12 *See, e.g.*, 7/05/11 Tr. at 17–22 & 25–28; *see also* D.E. 64 at 2 & 8 n.5; D.E. 65 at 3.

> jury may say well, if they knew what they were getting from McNamee, then why wouldn't Clemens also know that he was getting the same thing. And that doesn't necessarily compute. That may not be true. And so, I think there is a significant potential for him being unduly prejudiced by that information coming in.[13]

After reviewing legal authority offered by the Government to support its position, the Court explained that it was not inclined to permit the "other players" evidence:

> [I]t seems to me that there's a real danger, that the jury may say, well, if they all knew, and that's especially I guess true in reference to players who are also on the same team, that why wouldn't Mr. Clemens know? And I think that would be a problem, for them to in some way use the evidence regarding what he was doing with these other players to impute knowledge on the part Mr. Clemens.[14]

Acknowledging the Court's decision, Government counsel asked if he would be allowed in opening statement to "tell the jury that there were other players who may testify in this trial, who played for the Yankees during this time period."[15] The Court asked if that was all Government counsel intended to say, to which counsel replied, "Yes, pretty much. Yes."[16]

The Court then heard argument concerning Mrs. Pettitte's potential testimony. The Court spent considerable time exploring the defense's potential cross-examination of Mr. Pettitte and whether such cross-examination might or might not open the door to Mrs. Pettitte's statements. As it did with the "other players" evidence, the Court again indicated that it was inclined to exclude the testimony.[17] The Court explained:

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13 7/05/11 Tr. at 20.

14 *Id.* at 47.

15 *Id.* at 48.

16 *Id.*

17 *Id.*

> [T]o then let in these statements that Pettitte made to his wife that are consistent with what Pettitte is going to say, it seems to me, really doesn't aid the jury in their assessment as to whether Mr. Clemens is correct that Andy Pettitte misheard him, or whether Mr. Pettitte is correct that he heard him correctly and he's now repeating again in court what he says he heard back then.
>
> So, it just seems to me that to let this in under that circumstance would be a misuse of the limited purpose for which prior consistent statements can be introduced. Now, something may occur during the course of the trial that could change the course of how I thought, how I think this issue should be resolved. But I think, based upon what I'm hearing now, I think it would be err[or] for me to, to let that information in.[18]

The following day, the Court issued an order granting Mr. Clemens' motion *in limine* concerning Mrs. Pettitte's statements.[19]

B. Jury Selection

The Court then devoted four full days to jury selection. *Voir dire* began with a panel of approximately 50 citizens who were read a list of 82 questions. After that, all 50 members of the panel were individually examined by the Court and counsel for the parties. By the end of the third full day of jury selection, it became clear that fewer than four alternates would be seated as part of the jury. At the Government's urging, and with Mr. Clemens's consent, the Court brought in ten more citizens for additional *voir dire* the following morning. On the afternoon of July 12, 2011, the Court qualified a jury and four alternates.[20] Mr. Clemens accepted this jury without objection.

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18 *Id.* at 30.

19 *See* Order, issued July 7, 2011 [D.E. 76].

20 *See* Transcript of Jury Trial Proceedings on July 12, 2011 (afternoon session), excerpts of which are attached hereto at Exhibit 3, at 93.

C. The Government's First Violation of This Court's Orders

Both parties delivered opening statements on July 13, 2011. Less than twenty minutes into an hour-long presentation, Government counsel violated one of the Court's *in limine* rulings. In this first violation, the prosecutor explained to the jury that they were going to hear testimony from three former baseball players who played for the New York Yankees in 2000 and 2001.[21] In spite of the Court's ruling and the prosecutor's own post-ruling representation about what he would say about these players,[22] the prosecutor explained that each of these players was named in the Mitchell report as having used human growth hormone. He then ignored the Court's ruling and unfairly prejudiced Mr. Clemens by telling the jury:

> [E]ach one of them will tell you that they used the drug human growth hormone, this drug that's injected into the abdomen with a small insulin needle. And they'll tell you why they used it, and they used it to recover from injuries. They used it because there was a lot of pressure in Major League Baseball to play and perform. And at the high levels, there was great financial reward and great recognition.[23]

Before the prosecutor finished making the statement described above, defense counsel rose from his seat to address the improper statements. When Government counsel stopped talking, defense counsel asked for permission to approach the bench. A bench conference followed during which defense counsel objected to the Government's statements and noted that the statements violated the Court's ruling on the motion *in limine* concerning evidence of other players' use of performance enhancing drugs.[24]

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21 *See* Transcript of Jury Trial Proceedings on July 13, 2011 (morning session), excerpts of which are attached hereto at Exhibit 4 ("7/13/11 A.M. Tr."), at 45.

22 *See* 7/5/11 Tr. at 48.

23 7/13/11 A.M. Tr. at 45.

24 *See id.* at 46.

When asked by the Court to explain the violation, Government counsel tendered the same theory of admissibility rejected in the Court's *in limine* ruling: "Why [Mr. Clemens] would use these drugs. These are teammates of him. They play at the same time on the same team. It explains why in the world this man would choose to use these drugs."[25] The Court rejected the Government's proffered justification, reminded counsel that the Court "clearly had said it couldn't come in for the purpose of suggesting that, because they knew what they were using, that Mr. Clemens would have known what he was using," and also stated, "I have not given the leeway for this information to come in."[26] Then, at defense counsel's request, the Court immediately instructed the jury to disregard the statements by the Government during opening concerning other players.[27]

D. The Government's Second Violation of This Court's Orders

The Government called its first witness immediately after opening statements. Direct and cross-examination of the witness was completed on the afternoon of July 13, 2011. The Government next read excerpts of Mr. Clemens's deposition testimony into the record through an FBI agent witness. The Government then called its third witness, Phil Barnett, the former staff director to the Chairman of the House Committee on Oversight and Government Reform. During the direct examination of Mr. Barnett, the Court sustained an objection that Mr. Barnett was being asked to offer the views of the House Committee instead of personal knowledge.[28]

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25 *Id.* This justification not only violated the Court's *in limine* ruling, it also directly contradicted the prosecutor's own representation, in the wake of the Court's ruling, about the limited purpose for which he would mention the other players. *See* 7/05/11 Tr. at 48.

26 7/13/11 A.M. Tr. at 47.

27 *See id.* at 48.

28 *See* Transcript of Jury Trial Proceedings on July 13, 2011 (afternoon session), excerpts of which are attached hereto at Exhibit 5 ("7/13/11 P.M. Tr."), at 106.

The Government did not complete its direct examination of Mr. Barnett by the time the Court adjourned on July 13, 2011.

As part of the continuation of direct-examination of Mr. Barnett on July 14, 2011, Government counsel began identifying and preparing to introduce videotaped clips of Mr. Clemens's testimony from his appearance before the House Oversight Committee:

> Q I'm going to show you what's been marked for identification as Government's Exhibit 3-B. I'll ask you to take a look at that. The record should reflect it's two DVD disks. Have you seen the recorded version—the video version of this hearing?
>
> A I've seen parts of it, but not in its entirety.
>
> Q You've seen excerpts of it?
>
> A Yes.
>
> Q And the excerpts, to be clear, you saw, I showed you those excerpts several weeks ago, correct?
>
> A That's correct.
>
> Q And referred them to—referred to them by Exhibit Numbers 3-B1, 3-B2, 3-B3, 3-B4, 3-B5, 3-B6 and 3-B7; is that correct?
>
> A That's correct.[29]

Government counsel then moved into evidence, *en masse*, a series of fourteen clips and transcripts of the videotaped Congressional hearing. Defense counsel did not object to the admission of the clips into evidence, but the Government did not ask permission to publish, nor were the exhibits otherwise published, to the jury immediately after they were admitted.[30]

Later in the examination, Government counsel played for the jury, one at a time, the videotaped excerpts (while simultaneously displaying a written transcription of the statements

29 7/14/11 Tr. at 20–21.

made on video), and asked Mr. Barnett several rote, obviously rehearsed questions after each excerpt. The fifth video clip, Exhibit 3B-2, featured video footage of U.S. Representative Elijah Cummings' lengthy and opinion-laced statements during the House Oversight Committee hearing.[31] Near the end of the excerpted footage, Representative Cummings read verbatim from an affidavit of Mrs. Pettitte, describing a conversation she had with her husband about Mr. Clemens.[32]

At this point during the publication of the video, the Court asked the parties to approach the bench. The jury remained seated in the courtroom. The following video portion of the exhibit and written transcript (detailing the content of Mrs. Pettitte's affidavit), though paused, remained visible to the jury during the entire bench conference:[33]

30 *See id.* at 22–23.

31 *See id.* at 31–32.

32 *See* Government Exhibit 3-a-2, attached hereto as Exhibit 7, at 89.

33 *See* 7/14/11 Tr. at 41–43.

E. Objection to Misconduct and Mistrial

The Court immediately expressed concern that the video clip was played in "total contradiction" to the Court's ruling on Mr. Clemens' motion *in limine* concerning Mrs. Pettitte.[34] Counsel for the defense explained the dilemma he faced now that evidence Mr. Clemens had vigorously sought to exclude from trial was before the jury.[35] Counsel for the Government argued that the material had been available to the defense prior to trial and, if there was a problem, it should have been addressed before the exhibit was admitted.[36] The Government did not, at this time, address the Court's concern as to why its order had been violated. The Court excused the jury.[37]

After a break, further argument and discussion with counsel for the parties ensued with the Court again focusing on the still unexplained violation of the order concerning Mrs. Pettitte's testimony:

> And I think clearly this information about Pettitte's wife runs totally afoul of what I said could come in in reference to her. And now we've got this before the jury. The clear implication is that Andy Pettitte said to this wife something consistent with what he says Mr. Clemens told him. So now we've got a prior inconsistent statement that otherwise doesn't qualify for admissibility, at least on the current record, before this jury.[38]

In addition to repeating its initial excuse that the hearing excerpts had been admitted into evidence without objection, the Government implicitly admitted that it knew precisely what was in the exhibits, assuring the Court "that there are no other references to Mrs. Pettitte or any other

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34 *Id.* at 33.

35 *See id.* at 32–33.

36 *See id.* at 33.

37 *See id.* at 34.

38 *Id.* at 41.

players [in those exhibits]."[39] The Government further argued that Mrs. Pettitte's statements were "within the context of a question that was being posed Representative Cummings."[40]

After another break, defense counsel reluctantly suggested that a mistrial was warranted because of the repeated violations of Court orders by the Government.[41] The Government's only answer to the Court was to repeat its earlier point that the defense did not object.[42] Counsel for the Government suggested that an instruction to the jury, like the one given the day before when the Government violated the Court's other *in limine* ruling, would suffice.[43]

The Court disagreed. The Court concluded that the Government had "put this case in a posture where Mr. Clemens cannot now get a fair trial before this jury."[44] The Court declared a mistrial and noted that the Government's conduct precipitated the decision.[45] The Court then brought in the jury—the product of substantial resources, careful analysis, and effort deployed by the Court and the parties both before and during trial—and released the members of the jury from their service.[46] The Court apologized to the jurors for the ultimately wasted expenditure of their time and government resources.[47] Rather than resetting the case for another trial, the Court scheduled briefing on whether the Government's misconduct bars re-prosecution under the Double Jeopardy Clause.

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39 *Id.* at 38.

40 *Id.*

41 *See id.*

42 *See id.* at 43.

43 *See id.* at 47.

44 *Id.* at 50.

45 *See id.*

46 *See id.* at 51–53.

47 *See id.*

ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment "protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense."[48] It contemplates that the Government will be afforded *one* full and fair opportunity to marshal its resources to convict a defendant,[49] but also that criminal defendants will not be required to live in a "continuing state of anxiety and insecurity" without a definite resolution of the criminal charges against them.[50] The double jeopardy bar also protects against prosecutorial overreaching, particularly efforts by the Government to gain an unfair advantage by learning its weaknesses and the strengths of the defense from the first trial.[51] This is important because, as the U.S. Supreme Court has pointed out, multiple trials "enhanc[e] the possibility that even though innocent [a defendant] may be found guilty."[52]

The Double Jeopardy Clause protects individuals "not against being twice punished, but against being twice put into jeopardy."[53] A defendant is placed in jeopardy in a criminal proceeding when he is put to trial before the trier of fact.[54] In the case of a jury trial, jeopardy attaches when the jury is empaneled and sworn.[55] In this case, jeopardy attached on July 12, 2011. Once that occurred, Mr. Clemens had a right to have his case presented to that jury.[56]

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48 *United States v. Dinitz,* 424 U.S. 600, 606 (1976).

49 *See Arizona v. Washington,* 434 U.S. 497, 505 (1978).

50 *Dinitz,* 424 U.S. at 606.

51 *See United States v. DiFrancesco,* 449 U.S. 117, 128 (1980).

52 *Green,* 355 U.S. at 187.

53 *Ball v. United States,* 163 U.S. 662, 669 (1896).

54 *United States v. Jorn,* 400 U.S. 470, 479 (1971).

55 *See Crist v. Bretz,* 437 U.S. 28, 35 (1978).

56 *Arizona,* 434 U.S. at 503; *Jorn,* 400 U.S. at 485.

The U.S. Supreme Court has recognized a few "limited circumstances" when a second trial on the same offense is constitutionally permissible under the Double Jeopardy Clause:

> A new trial is permitted, *e.g.*, where the defendant successfully appeals his conviction; where a mistrial is declared for a "manifest necessity;" where the defendant requests a mistrial in the absence of prosecutorial or judicial overreaching; or where an indictment is dismissed at the defendant's request in circumstances functionally equivalent to a mistrial.[57]

None of these circumstances applies in this case. Here, the Court granted Mr. Clemens's request for a mistrial because of grave prosecutorial misconduct that occurred not once but twice in a two-day span.

In *Oregon v. Kennedy*, a plurality of Supreme Court Justices attempted to settle conflicting authority governing cases like this one by stating that a defendant who has successfully moved for a mistrial on grounds of prosecutorial misconduct may successfully claim double jeopardy as a bar to retrial "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial."[58] The *Kennedy* standard was 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. In the plurality opinion issued by a sharply divided court,[59]

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57 *United States v. Sanabria*, 437 U.S. 54, 63 & n.15 (1978) (citations omitted).

58 456 U.S. at 676.

59 Four justices joined in the judgment on the facts of the case, but they disagreed with the specific intent standard set forth by Justice Rehnquist. The dissenting justices instead maintained that double jeopardy should attach when the prosecutor had intended to force the mistrial motion *as well as* when the prosecutor had intended to "substantially reduce[] the probability of an acquittal." *Id.* at 689–90 (J. Stevens, concurring). Commentators have sided with this and similar views. *See, e.g.*, Ponsoldt, *When Guilt Should be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After* Oregon v. Kennedy, 69 Cornell L. Rev. 78 (1983) (retrial should be prohibited where requested mistrial was occasioned by prosecutorial or judicial error "sufficient in magnitude and clarity" to meet the plain error standard of Rule 52, which requires an error "so serious and manifest that it affects the very integrity of the trial process"); Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. Pa. L. Rev. 1365 (1987) (retrial should be barred where prosecutorial impropriety was

Justice Rehnquist emphasized the narrowness of the *Kennedy* rule, stating that harassing or overreaching conduct on the part of the prosecutor that justifies a mistrial nevertheless "does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."[60] That said, the Government is not 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. In such a situation, "the Constitution treats matters as if the mistrial had been declared on the prosecutor's initiative," and re-prosecution would be barred.[61]

Evidence of the Government's intent to provoke a mistrial need not be express or direct. The intent standard, the *Kennedy* court explained, "merely calls for the [trial] court to make a finding of fact" using the "familiar process in our criminal justice system" of "[i]nferring the existence or nonexistence of intent from objective facts and circumstances."[62] The "objective facts and circumstances" in this case satisfy the *Kennedy* standard and support a decision that the Government published Mrs. Pettitte's statements in continued violation of the Court's pretrial orders with the intent of inducing the defense to object and seek a mistrial. The defense was then faced with an impossible choice of whether to try a tainted case to completion or to reluctantly seek a mistrial. The Double Jeopardy Clause is designed to protect criminal defendants from having to make such a choice. Accordingly, the Court should preclude re-prosecution of Mr. Clemens and dismiss the indictment with prejudice.

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sufficiently egregious to meet the plain error standard and defendant persuades the reviewing court that remedies short of a mistrial would have been "unavailing"). The Double Jeopardy Clause would even more clearly bar re-prosecution of the charges against Mr. Clemens if this standard was the prevailing law in this Circuit.

60 456 U.S. at 676.

61 *United States v. Higgins*, 75 F.3d 332, 333 (7th Cir. 1996).

I. THE BURDEN OF PROOF DOES NOT EXCLUSIVELY LIE WITH MR. CLEMENS.

Mr. Clemens bears the initial burden of proof to show that the Government intended to provoke the declaration of a mistrial.[63] According to *Kennedy*, the defense can satisfy this burden by raising a reasonable inference of deliberate misconduct from the objective evidence.[64] As shown below, Mr. Clemens is more than capable of meeting that burden here.

But the defense does not bear the sole burden of proof. Once a defendant establishes a nonfrivolous, *prima facie* claim to bar re-prosecution under the Double Jeopardy Clause, the burden of persuasion shifts to the Government to prove that no constitutional violation exists.[65] Depending on the Government's response and the quantum of evidence introduced in its memorandum of opposition, Mr. Clemens reserves the right to seek an evidentiary hearing regarding the state of mind of the Government at the time it improperly published inadmissible hearsay to Mr. Clemens's first and preferred jury.[66]

II. DOUBLE JEOPARDY BARS RETRIAL OF MR. CLEMENS.

In order to meet the *Kennedy* test when, as here, a mistrial is declared in response to a defendant's motion, the Court must attempt to examine the subjective intent of the Government at the time of the prosecutorial misconduct causing the mistrial. Justice Powell, the swing vote in the *Kennedy* court's decision, however, wrote separately to underscore that "'subjective' intent often may be unknowable," and, therefore, a trial court should "rely primarily upon the objective

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62 456 U.S. at 675.

63 *See United States v. Williams*, 472 F.3d 81, 85–86 (3d Cir. 2007); *United States v. Perlaza*, 439 F.3d 1149, 1173 (9th Cir. 2006).

64 *See* 456 U.S. at 675 (J. Rehnquist, plurality) & 690 n.29 (J. Stevens, concurring).

65 *See United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1360 (11th Cir. 1994); *cf. United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985) (shifting burden in multiple offenses case).

facts and circumstances of the particular case" in determining intent.[67] Although doing so "merely calls for the court to make a finding of fact" using circumstantial evidence,[68] no reported case in this Circuit has set forth guidelines for doing so in this factual setting. Objective factors designed to assist other courts in assessing the prosecutor's state of mind when it engaged in misconduct that resulted in the request for and grant of mistrial include:

(a) Whether the Government had a reason to provoke a mistrial because the trial was "going badly" for conviction at the time that the prosecutor acted;

(b) Whether the misconduct "was repeated despite admonitions from the trial court;"

(c) Whether the Government's conduct was "clearly erroneous;"

(d) Whether the Government's conduct was "intentional or reckless;" and

(e) Whether the Government provided any "reasonable, good faith explanation" for its conduct at the time the conduct occurred.[69]

Every one of these "objective facts and circumstances" is present in this case.

A. Even at the early stages, the trial provided an unfavorable opportunity to convict Mr. Clemens.

Although the trial of Mr. Clemens had only just begun, it was already "going badly" for the Government in at least three ways.

First, the strength of the Government's case was severely damaged by the Court's *in limine* rulings dealing with "other players evidence" and Mrs. Pettitte's hearsay testimony. As Mr. Clemens contended, both of these pieces of evidence were powerfully but unfairly prejudicial. As to Mrs. Pettitte, the Government hotly contested the admissibility of her

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66 *See generally United States v. Hagege*, 437 F.3d 943, 952–53 (9th Cir. 2006) (examining circumstances where evidentiary hearing on prosecutorial intent is appropriate).

67 456 U.S. at 679–80.

68 *See id.* at 675.

69 *See Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006).

testimony and described it in pretrial briefing as "highly probative" and "highly relevant" to its case-in-chief.[70] The Court also found Mr. Pettitte's testimony, and any effort to bolster that testimony through statements to Mrs. Pettitte, to be "critical to the government's case."[71] The Court's pretrial exclusion of that evidence was a substantial blow to the prosecution. Unfortunately, the Government attempted to overcome this setback by inappropriately attempting to sneak the evidence in through the back door.

Second, the Government was seemingly uninterested and/or unprepared with respect to substantial, newly-discovered, exculpatory evidence undermining the credibility of the Government's key witness, Brian McNamee. This new evidence, an autobiographical manuscript written by Mr. McNamee in 2009, contains numerous false and inconsistent statements. The autobiography establishes Mr. McNamee, beyond any doubt, to be a serial liar and a deeply troubled man. Although the manuscript purports to describe Mr. McNamee's relationship with Mr. Clemens in detail, the Government somehow neglected to obtain it despite Mr. McNamee's "cooperation" and the rather obvious step of a grand jury subpoena to the publisher. After the manuscript was provided to the Government as a result of a subpoena *by the defense* shortly before trial, Mr. McNamee went from a witness whose credibility was seen as a "central issue in the case" in pretrial briefing[72] to a seemingly bit role as "one of the government's 45 witnesses" in the Government's opening statement.[73]

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70 U.S. Opp. to Defendant's Second Motion in Limine Regarding Purported Hearsay, filed June 29, 2011 [D.E. 65], at 6 & 7.

71 *See* 7/14/11 Tr. at 48–49.

72 *See* U.S. Opp. to Defendant's First Motion in Limine Regarding Evidence about Other Players, filed June 29, 2011 [D.E. 64], at 8.

73 7/13/11 A.M. Tr. at 53.

Third, the Court questioned the Government's charging strategy so thoroughly on the eve of trial that the prosecutors revised their opening statement to exclude discussion of what had been a prominent alleged obstructive act in the indictment. The evidence at issue—Mr. McNamee's intentionally misleading and inconsistent statements to DLA Piper about Mr. Clemens's attendance and conduct at a pool party hosted by Jose Canseco in 1998—was somehow elevated during the Congressional hearings to a matter of significant "legislative" interest. The U.S. Attorney's Office and the FBI continued this charade and, after expending enormous government resources on the "pool party" investigation, caused the grand jury to include Mr. Clemens's testimony on the subject as an obstructive act in the indictment.[74]

On July 12, 2011, the Court made it clear that it had "some questions about how information about [the Canseco pool party] is going to be relevant to the issues the jury's got to assess in this case."[75] The Court went on to suggest that the Government's strategy of charging Count I (Obstruction of Congress) was flawed:

> Because I think sometimes when the government plays its hand too hard, you look at the Blagojevich case. That's why the government didn't prevail the first time. They learned their lesson. They scaled back their case, did what they should have done and got a different result. And I'm not going to just let anything come in just because it happened. I mean it's got to be somehow relevant to what this jury is being asked to decide. And I'm having

74 The Government went so far as to spend taxpayer dollars to have a helicopter fly over Mr. Canseco's former home—twice—in order to take several aerial photographs of the property "from all different angles." *See* EM-FBI-0115 (pursuant to the parties' agreement that non-public discovery will not be filed without appropriate safeguards, Mr. Clemens will have the referenced email available at the hearing). And all of this was intended to prove an allegedly "obstructive act" about whether Mr. Clemens attended a particular barbeque on a particular day, even though Mr. Clemens testified in his congressional deposition that he "sure could have been" at Mr. Canseco's house and "could have gone by there after a golf outing." *See* Government Proposed Exhibit 2d, attached hereto as Exhibit 8.

75 Transcript of Jury Trial Proceedings on July 12, 2011 (morning session), excerpts of which are attached hereto at Exhibit 2, at 33.

> some questions about whether this event down there in Florida is relevant to what allegedly took place later up in Toronto.[76]

After defense counsel argued further that having a "mini trial on whether Mr. Clemens went swimming" at Mr. Canseco's house or not in 1998 is "absurd,"[77] the Court again questioned the Government's charging strategy:

> Well, I mean, obviously, we have to, you know, stay focused on what the purported purpose of the hearing was because, obviously, that's going to be relevant to the Court's, I mean, to the jury's assessment as to whether there was some, as far as the obstruction count is concerned, whether there was some intent to obstruct the, you know, due and proper proceedings that were being conducted by the Congress. And sounds like this is going to be, you know, somewhat far afield from establishing that. And I just hope that, you know, we, you know, appreciate that, you know, I think sometimes simpler is better.[78]

The Court's comments appear to have had a significant impact on the Government's presentation of its case-in-chief. For example, one day before the hearing, the Government produced a list of exhibits to be used during opening statements pursuant to an agreement between the parties. That list indicates that, as of July 11, 2011, the Canseco party was going to play a prominent role in the prosecution's intended overview of the evidence. Three of the nineteen proposed exhibits had to do with Mr. Canseco or the party guests in June 1998, and the list suggested that the Government intended to end its opening remarks with two photographs of Mr. Clemens and Mr. Canseco with a young boy expected to testify that he attended the barbeque. When the Government gave its opening statement less than twenty-four hours after the July 12, 2011 hearing, however, the Government declined to use the alleged party

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76 *See id.* at 33–34; *see also id.* at 38 ("I have some concerns about whether this or other type of information of this nature is going to be put before this jury that might have a prejudicial impact. And it's really not proving the issues that this jury is going to be asked to decide.").

77 *See id.* at 44.

78 *See id.* at 45–46.

photographs, and discussion of Mr. Canseco was confined to one paragraph informing the jury, "You'll also learn that Mr. Canseco used anabolic steroids at various points in time during his career."[79]

In sum, the record shows that the Government had a plausible reason to provoke a mistrial here. Not only would a new trial provide a clean slate on the setbacks listed above, but, like any second prosecution, it would also give the Government an opportunity to conduct a stronger *voir dire*, to reshape its case in the wake of the Court's *in limine* rulings, and to rehearse its presentation of proof, thus increasing the Government's chances of obtaining a conviction.[80] Having provoked a mistrial by willfully ignoring this Court's *in limine* rulings, the Government should not be afforded this second bite of the apple.

B. The Government repeatedly engaged in misconduct despite admonitions from the Court.

Another important indicator of whether the prosecutors intended to provoke a mistrial through their actions is whether there was a "sequence of overreaching" leading up to the misconduct.[81] An isolated act of misconduct may tend to show the Government simply made a mistake, but bald violations of Court rulings on back-to-back days supports a finding that the Government intended to cause a mistrial (or intended to provoke the defense to ask for a mistrial).

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79 *See* 7/13/11 A.M. Tr. at 42–43.

80 *See, e.g.*, *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (noting that the Double Jeopardy Clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction"); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (the State conceded that, after the defendant was acquitted in one trial, the prosecutor did, at a subsequent trial, "what every good attorney would do—he refined his presentation in light of the turn of events at the first trial"); *Hoag v. New Jersey*, 356 U.S. 464 (1958) (after an alleged robber was acquitted, the State altered its presentation of proof in a subsequent, related trial—calling only the witness who had testified most favorably in the first trial—and obtained a conviction).

81 *Kennedy*, 456 U.S. at 680 (J. Powell, concurring).

In granting Mr. Clemens's motion for a mistrial, the Court was troubled by repeated acts of government misconduct. A substantial part of the parties' initial discussion with the Court about the Government's conduct related to what appeared to be a pattern of the Government overstepping proscribed evidentiary boundaries.[82] As the Court explained during that discussion, "I don't particularly like making rulings and lawyers not abiding by those rulings."[83]

The objective facts and circumstances here demonstrate that the Government engaged in a "sequence of overreaching" by repeating acts of misconduct that violated settled rules pronounced by this Court that govern the conduct of a prosecutor. The Government raised guilt by association concerns in violation of the Court's pretrial rulings in its opening statement;[84] the Government had to be warned to limit the testimony of Mr. Barnett to personal knowledge;[85] and the Government published Mrs. Pettitte's statements to the jury in "direct violation of the pretrial ruling I made in response to a motion *in limine* that had been filed by counsel for Mr. Clemens."[86] Even with a *single* act of misconduct, Justice Powell indicated that *Kennedy* was a close call.[87] In this case, the sequence of overreaching by the Government creates a strong inference of an intent to provoke a mistrial.

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82 *See* 7/14/11 Tr. at 38–41.

83 *Id.* at 37.

84 *See* 7/13/11 A.M. Tr. at 48.

85 *See* 7/13/11 P.M. Tr. at 106.

86 7/14/11 Tr. at 49.

87 *See* 456 U.S. at 680.

C. The Government's publication of Mrs. Pettitte's irrelevant and prejudicial hearsay testimony to the jury was clearly erroneous.

Although the Supreme Court ruled in *Kennedy* that prosecutorial "overreaching" alone will not bar a retrial, such overreaching is still evidence of the prosecutor's true intent.[88] "The more egregious the prosecutorial error, and the harsher its impact on the defendant, the more readily the inference [of deliberate misconduct to provoke a mistrial can] be drawn."[89]

The Court has already found the Government's publication of Mrs. Pettitte's statements to the jury to be a serious and direct violation of its pretrial evidentiary rulings.[90] Later, while it was weighing whether the Government's conduct was so improper that the "severe remedy" of a mistrial was required,[91] the Court stated:

> [G]overnment counsel doesn't do just what government counsel can get away with doing. And I think a first-year law student would know that you can't bolster the credibility of one witness or a witness with clearly inadmissible statements.[92]

Again, the Government itself viewed Mrs. Pettitte's statements to be "highly probative" and "highly relevant" to its case-in-chief.[93] The defense viewed the statements to be so extremely and unfairly prejudicial that they warranted a motion *in limine*. The prosecutors' effort to make

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88 *Id.* at 679–80 (J. Powell, concurring).

89 *Id.* at 690 n. 29 (J. Stevens, concurring); *see also United States v. Simonetti*, 998 F.2d 39, 42 (1st Cir. 1993) ("[R]etrial also may be barred where egregious or unfair behavior by the prosecution could be considered, objectively, as equivalent to an intentional effort to provoke mistrial.") (internal quotations and citation omitted).

90 *See* 7/14/11 Tr. at 33 (stating that the Government's conduct was in "total contradiction" to pretrial rulings); *see also id.* at 37–38 (stating that the publication "clearly runs afoul of my pretrial rulings").

91 *See United States v. Clarke*, 24 F.3d 257, 270 (D.C. Cir. 1994) ("A mistrial is a severe remedy—a step to be avoided whenever possible, and one to be taken only in circumstances manifesting a necessity therefor.")

92 7/14/11 Tr. at 46.

93 U.S. Opp. to Defendant's Second Motion in Limine Regarding Purported Hearsay, filed June 29, 2011 [D.E. 65], at 6 & 7.

an end run around the Court's ruling on that motion in order to get this evidence before the jury was not related to some collateral matter. Accordingly, in declaring a mistrial, the Court necessarily found the force of the evidence and the unfair prejudice to Mr. Clemens to be great.[94] This provides more objective support for an inference that the Government's misconduct was not happenstance.

D. The Government's publication of Mrs. Pettitte's irrelevant and prejudicial hearsay testimony to the jury was deliberate.

An important part of finding whether the Government intended to provoke a mistrial is making a determination whether the prosecutors' actions leading up to the mistrial were (i) consistent with "inadvertence, lack of judgment, or negligence," or (ii) consistent with "intentional or reckless misconduct."[95] A mere "blunder" at trial does not bar a retrial, even if the blunder precipitates a successful motion for a mistrial.[96] But finding that the Government acted intentionally is a lower bar than it appears. Even a "blunder" will "almost always be intentional—the product of a deliberate action, not of a mere slip of the tongue."[97]

In this case, is it plausible to believe that two highly experienced prosecutors, in a high-profile case involving the expenditure of enormous government resources, would simply "forget" to conform witness testimony and government exhibits to critical *in limine* rulings made by this Court and then suffer a lapse of attention at the precise moment the testimony and exhibits are displayed to the jury? Although the question answers itself, at least four objective facts and

94 *See United States v. Eccleston,* 961 F.2d 955, 959–60 (D.C. Cir. 1992); *United States v. Tarantino,* 846 F.2d 1384, 1413 (D.C. Cir. 1988).

95 *See Ex parte Wheeler,* 203 S.W.3d at 324.

96 *See Kennedy*, 456 at 674–76; *see also Illinois v. Somerville,* 410 U.S. 458, 473 (1972).

97 *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993).

circumstances here show that the publication of Mrs. Pettitte's statements to the jury was no accident.

First, the prosecutors in this case are experienced. Messrs. Durham and Butler are some of the most seasoned prosecutors in the U.S. Attorney's Office, and there can be no dispute that they are well aware of the rules governing trials, the Court's General Order, and professional conduct. Evidence of the prosecutors' knowledge and experience supports an inference that playing the video and transcribed testimony relaying Mrs. Pettitte's statements to the jury—and then leaving that evidence on the screens during the parties' colloquy with the Court—was intentional; not inadvertent.

Second, the comments by the prosecutors at the critical moment the misconduct was raised and objected to reveal that the Government (a) knew the contents of all exhibits it sought to introduce in detail and (b) was willing to go as far as possible until its conduct raised an objection. Government counsel's very first statement to the Court in response to questions about the objectionable evidence was that no objection had been lodged to the offensive material.[98] After a brief break, the Government's next tact was to assure the Court "that there are no other references to Mrs. Pettitte or any other players [in those exhibits]" and to argue that Mrs. Pettitte's statements were "within the context of a question that was being posed by Representative Cummings."[99] At no time did the Government state that the publication of

98 *See* 7/14/11 Tr. at 33 ("Well, but these exhibits, these admissions have been turned, this video clip and this transcript was turned over in early May.").

99 *Id.* at 38. This argument was of no particular relevance under the circumstances, and, if anything, it underscored the Government's willful effort to slip in unfairly prejudicial evidence. Indeed, what the Government did in front of the jury was far worse than what Mr. Clemens had objected to in the first place. Had Mrs. Pettitte been permitted to testify, there would at least have been an opportunity for cross-examination. By using Representative Cummings' hostile questioning of Mr. Clemens as a Trojan Horse, the Government was able to present Mrs. Pettitte's affidavit with no cross-examination.

Mrs. Pettitte's statements to the jury was accidental—because it wasn't. If the publication of Mrs. Pettitte's statements to the jury was an accident, the more natural response would have been for the prosecutors to apologize immediately or to otherwise express remorse or contrition for the oversight. Notably, to this day, the Government still has never claimed that the publication of Mrs. Pettitte's statements to the jury was a mistake.[100]

Third, in hindsight, the Government's discovery and trial preparation practices leading up to trial show that the introduction of Mrs. Pettitte's hearsay statements through videotaped hearing testimony was a calculated strategy. As Government counsel told the Court immediately after trial was stopped, the offending evidence was "delivered to the defense two months ago."[101] This statement appears to refer to a letter from the Government sent on May 6, 2011, designating "Mr. Clemens's statements that the government intends to introduce at trial in our case-in-chief." After advising that the designations are "still very much a work in progress," that letter listed 54 designations of statements in the course of three pages. The fortieth designation is, "Pages 86-90 (beginning with Mr. Cummings "Thank you very much Mr. Chairman," and continuing to Page 90 where Mr. Clemens's testimony finishes)." The government also produced 6 CDs on May 6, the first of which contained a folder entitled "Admissions Exhibits – Hearing," which in turn contained, among other things, the hearing transcript excerpt that was later marked as Government Exhibit 3a-2.

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100 The Government's statement to the Court that "[t]here was no intention to run afoul of any Court ruling, Your Honor," *id.* at 37, does not count. The prosecutors' other comments to the Court during the mistrial debate show that this statement was made to support the theory that the publication might not violate the pretrial order because Mrs. Pettitte's statements were presented in the context of a Congressional hearing rather than from Mrs. Pettitte herself. *See, e.g.*, *id.* at 38. Indeed, the prosecutor's attempted explanation simply proves Mr. Clemens's point—the Government believed it had found an end-run around the Court's ruling and decided to take its chances that neither the defense nor the Court would intercede. Such tactics should not be rewarded, particularly when they are undertaken by the United States.

The Government's May 6 letter and production were not identified to defense counsel as trial exhibits until June 30, 2011, and the Government did not deliver marked copies of the testimony to the defense until July 8, 2011. However, the prosecutors appear to have been treating the hearing excerpts as exhibits for quite some time. For example, in his direct examination of the Government's third witness, Mr. Barnett, counsel for the Government revealed that he had rehearsed the publication of each video excerpt from the House Oversight Committee hearing "several weeks ago" with enough foresight to use the eventual exhibit numbers during the rehearsal.[102] The Court precluded Mrs. Pettitte's statements in a bench ruling on July 5, 2011, and an order issued July 7, 2011, but the Government chose not to redact or alter the exhibits to ensure that there was no violation of those rulings. Finally, Government counsel decided to move all fourteen clips and transcripts of the videotaped Congressional hearing into evidence *en masse* instead of doing so individually and after a predicate had been laid with the witness.[103] Taken together, it would be reasonable for the Court to infer that the Government's behavior as trial approached indicates that it sought to gain any advantage possible rather than to infer that the publication of this evidence was accidental.

Fourth, at the very least, the specific circumstances under which the offending statement was put before the jury evidences the Government's deliberate intent. When the Court intervened, the prosecutor was at the lectern, the Government's first substantial witness was on the witness stand, the Government's pre-prepared video and transcription was queued up to play over the Court's audio-visual system, the prosecutor had heard the exhibit transgress the Court's clear evidentiary rulings, *yet* the prosecutor was standing silent, doing nothing to stop the video

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101 *Id.* at 37.

102 *See id.* at 20–21.

103 *See id.* at 22–23.

from continuing or directing Government team members to black out the jurors' screens once a question had been raised about the exhibit. As the Court made clear, it was the Government's responsibility to obey the Court's orders at that moment and before.[104] Put simply, even if the publication of Mrs. Pettitte's statements to the jury was not premeditated, once the prosecutor saw the precluded statements on the horizon he "should have taken steps to ensure that we were not in this situation."[105] The Government's failure to do so was intentional.

A fellow trial court's analysis of similar circumstances in *United States v. Broderick*, 425 F. Supp. 93 (S.D. Fla. 1977), is instructive. The defendant in that case was charged with attempting to transport illegal refugees from Haiti.[106] Before presentation of the evidence began at trial, the Court granted a motion *in limine* by the defense precluding hearsay statements among the refugees suggesting that they expected to be transported upon their arrival to the United States.[107] On the second day of trial, however, the prosecutor, without requesting a bench conference or giving any indication of his intent to do so, elicited the hearsay statement from a government witness regarding those very statements.[108] When the Court asked the prosecutor why he had continued a line of precluded testimony, the prosecutor offered a legal justification for his questioning rather than saying it was a mistake. The Court declared a mistrial and found

104 *See id.* at 37.

105 *Id.* at 47.

106 425 F. Supp. at 94.

107 *See id.* at 94–95.

108 *See id.* at 95.

that "the prosecutor triggered the mistrial through intentional misconduct."[109] The exact same finding is warranted here.[110]

E. The Government failed to provide any reasonable, innocent explanation for its conduct at the time.

Because the Government has not proffered any plausible, innocent, explanation for its misconduct, the only rational explanation is that the Government disclosed Mrs. Pettitte's statements to the jury to deliberately jeopardize the trial. Evaluating the real-time explanation for the Government's action that lead to a mistrial is a good way to detect the Government's actual intent.[111] As noted briefly above, the Government's explanation on July 14, 2001, was particularly telling here.

After the misconduct occurred, the Court repeatedly asked the Government to explain itself:

> I'm perplexed, having made that ruling [that statements that Mr. Pettitte allegedly made to his wife could not come in unless certain prerequisites were established], as to why these exhibits were not altered to ensure that there was not a violation of my order.[112]

Counsel for the Government provided one excuse for its actions—that the exhibits had been introduced by the Government and defense counsel had not objected to them.[113] Setting aside

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109 *Id.* at 97; *see also United States v. Martin*, 561 F.2d 135, 140 (8th Cir. 1977) (finding the government's decision to read irrelevant and highly prejudicial testimony to the jury to constitute "gross negligence" at a minimum); *Kessler*, 530 F.2d 1246 (same).

110 Because the *Broderick* case was decided before the U.S. Supreme Court attempted to clarify the legal standard with respect to cases of prosecutorial misconduct mistried on the motion of the defendant, the Court did not consider whether the prosecution intended to provoke a mistrial.

111 *See Oseni*, 996 F.2d at 188 (citing *United States v. Jozwiak*, 954 F.2d 458, 460 (7th Cir. 1992)).

112 7/14/11 Tr. at 36–37.

113 *See, e.g., id.* at 33, 37 & 43. The Government also attempted to argue that Mrs. Pettitte's statements should somehow be treated differently because they were merely repeated "in the

the faulty premise of such an explanation,[114] this excuse, by itself, makes a *prima facie* case under *Kennedy* and its progeny that the Government harbored a deliberate plan to put the trial setting at risk. The fact that the Government allegedly circulated the exhibit in advance shows that the prosecutors planned to put Mrs. Pettitte's statements before the jury in this backdoor fashion for some time. And the suggestion that the defense failed to object ignores the fact that the defense filed, and the Court granted, a pretrial motion *in limine* that specifically objected to this very evidence.

These facts and circumstances are entirely consistent with a finding that that the prosecutors deliberately acted in a way that, if caught, would invite Mr. Clemens to seek a mistrial.

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context of a question that is asked to Mr. Clemens," but counsel for the Government quickly agreed with the Court that such an argument "doesn't override [the Court's] ruling." *See id.* at 44.

114 It is not necessary to bring "[p]lain errors or defects affecting substantial rights" such as the Government's conduct here to the immediate attention of the Court in order to preserve it. *See* Fed. R. Crim. P. 52(b). Moreover, the lack of an immediate objection by defense counsel in this case can be easily justified as a tactical decision and/or the result of improper sandbagging by the Government. On the latter point, the Government's May 6 letter and production were not identified as trial exhibits until June 30, 2011, at the earliest. Despite repeated assurances from Government counsel that they would produce exhibits significantly in advance of trial, the Government advised defense counsel on May 31, 2011, that it would not provide an exhibit list earlier than the three days required under Para. 10(k) of the Court's General Orders. On June 30, 2011—two business days, and five calendar days before trial—the Government filed a proposed exhibit list just before 6:00 P.M. Government Exhibit 3b-2 was described as a video clip and Government Exhibit 3a-2 was described solely in terms of that clip ("Transcript of Video Clip (pp.86-90)"), so defense counsel could not readily determine that the exhibit was the same as a document produced on May 6. The Government did not actually provide a paper copy of Government Exhibit 3a-2 until approximately 4:30 P.M. on Friday, July 8, 2011, and it did not provide an electronic copy of Government Exhibit 3b-2 until approximately 1:00 P.M. on Monday, July 11, 2011. Defense counsel presented this timeline to the Court during argument over whether a mistrial was warranted without objection from the Government. *See id.* at 44–45.

CONCLUSION

Accordingly, and for each of the reasons set forth above, this Court should dismiss the indictment in this case as a matter of law and prohibit subsequent retrial of Mr. Clemens of the charges in the indictment on the grounds of double jeopardy.

Respectfully submitted,

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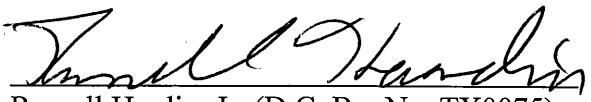

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