White Collar Update: The Roger Clemens Trial: Double Jeopardy on Steroids?

September 1, 2011

Mistrials in federal criminal cases are rare. Barring reprosecution when a defendant successfully moves for a mistrial is even rarer. However, in the case of former baseball star Roger Clemens, a federal judge in the District of Columbia will soon determine whether the Double Jeopardy Clause prevents his reprosecution. As discussed below, based on relevant precedent, Clemens faces an uphill battle in attempting to prevent a re-trial.

The Clemens Trial

On August 11, 2010, Roger Clemens was indicted for perjury, false statements, and obstruction based on his assertions to a congressional committee in 2008 that he had not used performance-enhancing drugs.1 The trial began on July 6, 2011.

The day before the trial began, Judge Reginald B. Walton ruled on pretrial motions, including two motions in limine filed by the defense. At issue were statements made by Laura Pettitte, the wife of Clemens' teammate Andy Pettitte, in which she discussed a conversation her husband had with Clemens about his use of human growth hormone. The judge ruled that evidence from Laura Pettitte about Clemens' statements would be excluded as inadmissible hearsay because she did not hear Clemens speak firsthand.2

On the second day of testimony, the government called its third witness, Phil Barnett, the former staff director to the Chairman of the House Committee on Oversight and Government Reform, who was present during the hearing in which Clemens gave the allegedly false testimony. The government used Mr. Barnett to introduce a videotape to the jury.3

The videotape portrayed Clemens' February 13, 2008 testimony before congress, in which he denied using performance-enhancing drugs. In the tape, Rep. Elijah Cummings, D-Md., noted that Clemens' teammate Andy Pettitte said that Clemens admitted using human growth hormone in a private conversation. Clemens responded that Andy Pettitte "misheard" or "misremembered" the conversation.4 But then Cummings referenced an affidavit given by Laura Pettitte, in which she stated that Andy Pettitte told her about the conversation with Clemens at the time it happened. A portion of the text of that affidavit and Rep. Cummings' question to Clemens regarding that statement were published to the jury and remained frozen on TV

screens while the parties discussed the videotape with Judge Walton.5

When the comments about Laura Pettitte's statement played on the videotape, the judge quickly cut off the video. Judge Walton noted that "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."6 Clemens' attorney then moved for a mistrial. The prosecutors objected to the defense's motion for a mistrial, noting that the exhibits were admitted without objection from defense counsel. But prosecutors also conceded that it was their responsibility to redact their exhibits in light of the pretrial rulings.7

Clemens' attorneys also complained that the prosecutor told jurors in his opening statement that Clemens' former teammates would testify about their use of performance-enhancing drugs, even though Judge Walton had already ruled that such testimony might lead jurors to believe that Clemens was guilty by association.8

Judge Walton granted Clemens' motion for a mistrial, stating "I don't see how I can un-ring the bell."9 He then instructed the parties to brief the issue of whether double jeopardy bars reprosecution.10

Double Jeopardy Clause

The Fifth Amendment to the U.S. Constitution states "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This has been interpreted to mean that a defendant in a criminal proceeding cannot be subjected to multiple punishments or multiple prosecutions for the same crime.11 Jeopardy attaches when the jury is empaneled and sworn, or in a bench trial, when the judge begins to receive evidence.12 The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect "a defendant's ‘valued right to have his trial completed by a particular tribunal.'"13

The interest underlying the amendment is to prevent the government from "subjecting [a defendant] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."14 These interests generally do not apply when it is the defendant who requests the mistrial, however, because "[a] defendant's motion for a mistrial constitutes ‘a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'"15

When a defendant asks for a mistrial, the general rule is that the Double Jeopardy Clause does not bar a retrial.16 However, there is a "narrow exception" to the general rule, "where the governmental conduct in question is intended to ‘goad' the defendant into moving for a mistrial."17 But it is not enough for a defendant to show that the prosecutor acted in bad faith or that his or her conduct was overreaching or harassment.18 The defendant must show that the prosecutor had the intent to provoke the defendant into asking for a mistrial.19

Clemens' Motion to Prohibit Retrial and Dismiss the Indictment

Clemens filed a written motion to prohibit retrial and dismiss the indictment, arguing that to do otherwise would violate the Double Jeopardy Clause. In addition, Clemens reserved the right to seek an evidentiary hearing on the government's state of mind when it committed the error.

Clemens argued that Double Jeopardy bars retrial of the case because the government acted intentionally to provoke him into asking for a mistrial. Clemens claimed the government had suffered setbacks in the trial and therefore had a reason to provoke a mistrial.20 Clemens also argued that the government's error in publishing the inadmissible hearsay statements to the jury was deliberate and clearly erroneous, and that the government engaged in a "sequence of overreaching."21 The defense queried whether it is "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."22

The government denied any intent to cause a mistrial. It noted that prosecutors turned over copies of the videotape and transcripts to defense counsel months before the trial began, and also before Judge Walton ruled on the motions in limine. The government argued that it inadvertently failed to redact the exhibits after the Judge ruled on the motion not to admit Laura Pettitte's testimony.23 It pointed out that prosecutors immediately opposed the motion for a mistrial, and asked for an opportunity to brief the motion before the judge ruled, arguing that these contemporaneous efforts to continue the trial demonstrate a lack of intent to goad Clemens into asking for a mistrial.24

Judge Walton will consider these arguments at a hearing on Clemens' motion to prohibit retrial and dismiss the indictment on Friday, September 2, 2011.

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1 Juliet Macur, Lawyers for Clemens Ask Judge to Dismiss Charges, NYTimes.com, July 30, 2011, available at http://www.nytimes.com/2011/07/30/sports/baseball/lawyers-for-clemens-ask-judge-to-dismiss-charges.html?_r=2; Def. Mot. at 4.

2 Def. Mot. at 6-7; Associated Press, New Trial Would Be Double Jeopardy, Roger Clemens Argues, The Crime Scene, Washington Post, July 29, 2011, available at http://www.washingtonpost.com/blogs/crime-scene/post/new-trial-would-be-double-jeopardy-roger-clemens-argues/2011/07/29/gIQAfpVUhI_blog.html.

3 Def. Mot. at 9.

4 New Trial Would Be Double Jeopardy, Roger Clemens Argues, supra note 2; Lester Munson, Blunder Jeopardizes Clemens Case, ESPN.com, updated July 15, 2011, available at http://espn.go.com/espn/otl/story/_/id/6770227/roger-clemens-mistrial-mean-former-all-star-pitcher-walks-perjury-charges.

5 Def. Mot. at 11.

[6] Transcript of July 14, 2011 Jury Trial Proceedings at 41.
[7] Id. at 43-44.
[8] Macur, supra note 1.
[9] Transcript of July 14, 2011 Jury Trial Proceedings at 47.
[10] Id. at 50.
[11] *United States v. Wilson*, 420 U.S. 332, 343 (1975) (quoting *North Carolina v. Pearce*, 395 U. S. 711, 717 (1969)).
[12] *United States v. Martin Linen Supply Co*., 430 U.S. 564, 569 (1977); see generally *Downum v. United States*, 372 U.S. 734 (1963).
[13] *Crist v. Bretz*, 437 U.S. 28, 35-36 (1978) (quoting *Wade v. Hunte*r, 336 U.S. 684, 689 (1949)).
[14] *Green v. United States,* 355 U.S. 184, 187-88 (1957).
[15] *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (quoting *United States v. Scott*, 437 U.S. 82, 93 (1978)).
[16] *See United States v. Dinitz*, 424 U.S. 600, 607-10 (1976).
[17] *Kennedy,* 456 U.S. at 673, 676.
[18] Id. at 674-76.
[19] Id. at 675.
[20] Def. Mot. at 21-22.
[21] Id. at 23, 25.
[22] Id. at 25.
[23] Gov'ts Opp'n at 16-17.
[24] Id. at 19.