UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO PROHIBIT RETRIAL AND TO DISMISS INDICTMENT (DKT. NO. 80)

On the second day of what was expected to be a 4-to-6 week trial, the government mistakenly played a video clip that included evidence this Court had ruled inadmissible. At defendant's request, this Court therefore declared a mistrial. Now, defendant seeks to gain an unwarranted windfall from this inadvertent error. Defendant seeks to bar a retrial, arguing the government did not make a mistake, but rather engaged in deliberate misconduct intended to provoke his mistrial request.

The record refutes defendant's claim. Although this crucial fact is nowhere discussed in defendant's motion, the government vigorously opposed a mistrial. That opposition was natural, because the government had no reason to want a mistrial. The government's case was – and is – strong. Nothing had happened thus far at trial that would have provided the government with any motive to cause a mistrial. Moreover, the government's error was a mistake, not misconduct, and certainly not misconduct intended to provoke a mistrial. As government counsel informed this Court when the video clip mistake occurred: "There was no intention to run afoul of any Court ruling."

Because defendant has failed to demonstrate that the government's conduct was intended to provoke him into requesting a mistrial, the double jeopardy bar does not apply. Thus, this

Court should deny his present motion.

PROCEDURAL HISTORY

The day before jury selection, this Court considered defendant's two *in limine* motions.

A. The first *in limine* motion

Defendant first sought to preclude the government from introducing evidence about a conversation Andy Pettitte had had with his wife, Laura, about defendant's HGH use (5/5/11 AM Tr. 24). Specifically, after speaking with defendant in 1999 or 2000, Mr. Pettitte told his wife that defendant admitted using HGH (id. 28). The government argued that evidence of this conversation was relevant because, in his congressional testimony, defendant claimed that Mr. Pettitte had "misremembered" his conversation with defendant (id. 26-27). Indeed, as part of its congressional obstruction charge, the government has identified defendant's attack on Mr. Pettitte's memory as Obstructive Act No. 12 (see id. 27). Thus, the government argued that it was entitled to use Laura Pettitte's description of her conversation with Mr. Pettitte to show "there was nothing wrong with Mr. Pettitte's memory" (id.). Ultimately, however, this Court ruled that, because defendant was not now claiming that Mr. Pettitte had misremembered their conversation, but, rather that Mr. Pettitte had *misheard* him (id. 28-29), Laura Pettitte's statement would not "aid the jury" (id. 30-31). Accordingly, this Court ruled, unless defendant somehow opened the door by again challenging Mr. Pettitte's memory, Laura Pettitte's statement could not be admitted (id.).

B. The second *in limine* motion

In his second *in limine* motion, defendant asked that the government be precluded from "introducing evidence or making argument about Brian McNamee's conduct and discussions

with Chuck Knoblauch, Mike Stanton, Anthony Corso, or any other third-party associated with anabolic steroids or human growth hormone other than Andy Pettitte" (Mot. at 6). Or, as this Court characterized the scope of defendant's motion, defendant wanted to preclude evidence about "other former Major League Baseball players . . . getting either steroids or human growth hormones from Mr. McNamee" (7/5/11 AM Tr. 15).[1] For its part, the government sought to introduce this testimony because "the defense theory from the outset will be to attack the credibility of Brian McNamee," to "tear[] Mr. McNamee down" (id. 16). Thus, the government asserted, allowing the other Major League players to testify about their interactions with Mr. McNamee would "corroborat[e] what Mr. McNamee had said" (id. 16-17).

This Court, however, was concerned about the inference that the jury might draw from this testimony: "if [defendant's] position is that yes, McNamee was giving me injections, but he was injecting me with what I thought were vitamins and other items that are not banned, the concern I would have is that if you bring in that evidence showing that these other individuals were getting these substances from Mr. McNamee . . . the 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" (id. 20). Accordingly, this Court's "tentative position" was that the government would not be permitted to introduce this evidence (id. 48). But, this Court deferred any final ruling until the Court saw "what the exact line of attack is in reference to Mr. McNamee" (id.

[1] Consistent with this Court's characterization of the scope of defendant's second *in limine* motion, the government in its opposition explained that defendant's motion did "not encompass" certain other "relevant facts," including testimony from former players such as Pettitte, Knoblauch, Stanton, and Segui about the "reasons why players chose to use these drugs," *i.e.*, steroids and HGH (Opp. at 8 n.5).

46). Although this Court deferred its final ruling,[2] this Court simultaneously forbid "any reference to these other individuals during the opening statement" (id.).

Before leaving this topic, the government asked this Court for clarification of the scope of its tentative ruling (id. 48). Referring to its written opposition (see supra n.1), the government noted that there were other "areas of testimony" from the Major League players that were "not the subject of the defense motion in limine" (7/5/11 AM Tr. 48). Although government counsel did not expressly quote from its opposition, this was clearly a reference to footnote five of the government's opposition, where the government had explained that it did not understand defendant to be seeking a general bar on testimony from the other players about personal HGH use. Rather, the government understood defendant's second *in limine* request to relate only to evidence about *McNamee's* HGH-based dealings with these other Major League players. As government counsel explained when asking for clarification, the government did not want to "run afoul of any of the Court's ruling by mentioning that there were other players who may testify in this trial, who played for the Yankees during this time period" (id.).[3] In response to the prosecutor's request for clarification, defense counsel appeared to indicate that he had no objection to an opening-statement reference to HGH abuse by other Major League players (id.).

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[2] See also 7/6/11 Order, at 2 ("ORDERED that the defendant's motion *in limine* to preclude introduction of other-witness evidence concerning their interactions and discussions with Brian McNamee is HELD IN ABEYANCE until such time when the government requests that such evidence be presented to the jury.").

[3] The government acknowledges it could have articulated its position at this hearing with greater clarity. For example, the government could have either quoted from its written opposition (see supra n.1) or more precisely explained that it wanted to "mention[]" in its opening statement "that there were other players who may testify in this trial *about past HGH use*."

C. Jury selection and opening statements

Jury selection began the next day, on Wednesday, July 6. The selection process extended over five days, through Tuesday, July 12 (see 7/12/11 AM Tr. 46). Thereafter, the parties presented their opening statements.

In its opening statement, the government outlined its perjury and obstruction case against defendant, noting that it expected to call approximately 45 witnesses in its case in chief (7/13/11 AM Tr. 3). As the government also revealed, it had DNA and other scientific evidence corroborating McNamee's expected testimony that he injected defendant with steroids (id. 29). Moreover, consistent with its understanding of this Court's resolution of defendant's second *in limine* motion, the government referred to the anticipated testimony of Major League players Pettitte, Knoblauch, and Stanton: "[E]ach one of them will tell you that they used the drug human growth hormone . . . . [T]hey used it to recover from injuries. They used it because there was a lot of pressure in Major League Baseball to play and to perform." (Id. 15.) Also consistent with its understanding of this Court's resolution of defendant's motion, the government made no reference to McNamee's interactions with any of these players (see id.). Defense counsel, however, objected to this portion of the government's opening statement (id.).

At the subsequent bench conference, the prosecutor explained that this was precisely the issue he had sought "clarifi[cation]" on when he had asked this Court about the scope of its preliminary *in limine* ruling: "I said . . . I want to follow the Court's ruling that I would refer to players, that players would testify as to why they used these substances" (id.). As government counsel added, however, he had not referred to McNamee's relationship with any of these other Major League players; in that regard, government counsel emphasized, "I don't believe this runs

afoul at all of the Court's ruling" (id. 15-16). As counsel further explained, evidence about the contemporaneous HGH use of the other Major Leaguers was relevant to "explain[] why in the world this man would choose to use these drugs" (id. 16).

Importantly, referring to government counsel's earlier request for clarification, this Court indicated it did not "doubt that you said what you said earlier" (id.). However, this Court additionally noted, it was the Court's understanding that it had "not really rule[d] ultimately on the issue as to whether this could come in under any circumstance," adding that it had "clearly" held it "couldn't come in for the purpose of suggesting that, because they know what they are using, that Mr. Clemens would have known what he was using" (id.). Thus, following the bench conference, this Court instructed the jury to disregard the remark about "other players' use of performance enhancing drugs" (id. 18).

D. The inadvertent disclosure of the Laura Pettitte evidence

As its first witness, the government called Charles Johnson, the former Parliamentarian of the House of Representatives (id. 45). Thereafter, following the reading of a number of excerpts from defendant's congressional deposition (see 7/13/11 PM Tr. 33-84), the government called its second substantive witness, Phil Barnett, the staff director of the House Committee on Oversight and Government Reform (id. 88-89). Mr. Barnett's testimony continued into the trial's second day.

During the morning session of the second trial day, the government had Mr. Barnett authenticate certain video clips of defendant's testimony before the Committee. Unfortunately, one of these video clip exhibits contained a reference to the Laura Pettitte evidence this Court

had previously ruled inadmissible.[4] Specifically, in a question posed by Representative Elijah Cummings to defendant during his congressional testimony, the congressman quoted Laura Pettitte's affidavit (see 7/14/11 AM Tr. 31-32). Further, in the same video clip, Representative Cummings opined about Andy Pettitte's honesty and asked defendant if he believed Mr. Pettitte was an honest man. Defendant indicated he believed Mr. Pettitte was honest.

Defendant did not object to this video clip when it was played for the jury. Instead, after approximately 2/3 of the clip had been played, this Court called counsel to the bench (id. 32). There, this Court asked defense counsel if his decision not to object was a "tactical" one (id.). Counsel declared it was not. Specifically, counsel explained, his inaction was attributable to his failure to object when the exhibit had first been offered (see n.4 supra). Counsel explained that this created a "dilemma": "I didn't know how in good faith I could stand up in front of the Court and object to portions that I hadn't objected [to] when he put the entire thing in" (id. 32-33). Moreover, although counsel claimed playing the video clip constituted a "violat[ion of] the motion in limine," he simultaneously conceded that it was "just simply a cross-examination by Representative Cummings of Mr. Clemens" (id. 32). Counsel also admitted that he had not reviewed the exhibit before trial, suggesting it had been provided to the defense "late" (id. 33).

The government disputed counsel's suggestion, noting the transcript had been provided to defense counsel in early May (id.). Government counsel also echoed defense counsel's point

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[4] This video clip was marked as Government Exhibit 3b-2 (7/14/11 AM Tr. 32). The transcript was marked as Government Exhibit 3a-2 (id. 31). These exhibits had previously been admitted without objection (id. 23). The government had previously provided the transcript to defense counsel on May 6, 2011, and had designated it as a government exhibit (along with 3b-2) on June 30, 2011. On July 8, 2011, the government provided the defense with Exhibit 3a-2 in un-redacted form. On July 11, 2011, the government provided the defense with Exhibit 3b-2, also in un-redacted form.

about the general nature of the Laura Pettitte reference: "This is part of the Congressman's question to Mr. Clemens" (id.). Following this brief colloquy,[5] this Court excused the jury and left the bench (id. 34).

When this Court returned, the parties discussed the issue further. This Court questioned government counsel about why the exhibit was "not altered to ensure that there was not a violation" of the Court's first *in limine* ruling:

> THE COURT: . . . I had made a ruling that statements that Mr. Pettitte allegedly made to his wife could not come in unless certain prerequisites were established. And I'm perplexed, having made that ruling, as to why these exhibits were not altered to ensure that there was not a violation of my order. I don't particularly like making rulings and lawyers not abiding by those rulings.
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> MR. DURHAM: There was no intention to run afoul of any Court ruling, Your Honor. (Id. 36-37.)

And, when this Court followed up by asking "how would this come in," government counsel began to explain, but did not complete his explanation:

> MR. DURHAM: Well, these items were delivered to the defense two months ago, these clips. This is part --
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> THE COURT: It's not their prerogative to say, come back to you after I've made a ruling and say, okay, and based on the Court's ruling, you've got to make these alterations of your exhibits. That's the government's responsibility. (Id. 37.)

Thereafter, defense counsel raised a new topic. Defense counsel sought assurances from the government that the video clips also did not make reference to HGH use by other Major League

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[5] As was later discovered, the captions accompanying the video clip had been frozen on the screen during this first bench conference. Specifically, when this Court called counsel to the bench, the government paralegal in charge of the clips stopped Exhibit 3b-2. Thus, for the length of that bench conference, the following was displayed on the screen in the jury's view: "'I, Laura Pettitte, do depose and state in 1999 or 2000, Andy told me he had a conversation with Roger Clemens in which Roger admitted to him using human growth hormones'" (7/14/11 AM Tr. 43).

players (id.). Government counsel assured the Court and the defense that there were no other references to Laura Pettitte "or any other players" in the video clips (id. 38),[6] and reiterated that this single reference to the Pettitte affidavit had been embedded in a question from Representative Cummings, "which obviously is not evidence at all" (id.).

Referring to the government's opening statement, defense counsel then raised the specter of a pattern of government misconduct (id.). Government counsel flatly rejected this suggestion: "There is no bad faith on the part of the government here in trying to prove this case" (id. 39). In response, this Court acknowledged the possibility of "some misunderstanding" relating to the scope of its ruling on HGH use by other Major League players (id.). As this Court further noted, however, this still left the "problem" of Representative Cummings's reference to Laura Pettitte's affidavit (id. 41). The Court then took another recess (id.).

Upon the Court's return, defense counsel moved for a mistrial (id.). The government opposed defendant's mistrial request, noting that the exhibit had been admitted without objection (id. 43). However, this Court explained, the "obligation of doctoring those exhibits to make sure that my ruling was . . . not violated rests with the government" (id. 44). The government agreed, "[w]e're not evading any responsibility, Your Honor" (id.). The government argued, however, that any damage could be remedied by an appropriate instruction to the jury (id. 47). This Court believed otherwise, noting that "Mr. Pettitte's testimony is going to be critical" (id.). The Court then took a final break (id.).

Following this recess, this Court granted defendant's mistrial request. "[T]he testimony of Andy Pettitte has been inappropriately bolstered through evidence that was presented by the

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[6] During the recess, the government had confirmed these facts.

government" (id. 48). Specifically, this Court focused on two aspects of the video clip:

> One, in reference to the comments made by Congressman Cummings, which not only got Mr. Clemens to indicate that Andy Pettitte is an honest person, but the congressman himself to have opined, which should not have . . . been before the jury, his impressions of the credibility of Mr. Clemens. But we also have, which was a direct violation of the pretrial ruling I made in response to a motion in limine that had been filed by counsel for Mr. Clemens, and that was to keep out the testimony of Mr. Pettitte's wife in light of the fact that you'd have a prior consistent statement before the jury indicating from the wife that shortly after Mr. Clemens is supposed to have admitted his use of HGH, that Mr. Pettitte came home and told his wife that Mr. Clemens had, in fact, made that admission. (Id. 48-49.)

Thus, the Court concluded, "the government not having" redacted the video clip, "Mr. Clemens cannot now get a fair trial before this jury" (id. 50).[7]

Immediately after the Court's ruling, government counsel asked the Court for an "opportunity to brief the Court's ruling on the mistrial" (id.). This Court denied the government's request: "You're not going to be able to convince me. . . . I will not give time for this matter to be briefed on that issue." (Id.)[8] Instead, this Court asked for briefing "on whether

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[7] Defendant erroneously contends (at 15) that "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." (Emphasis added.) This Court did not, however, grant defendant's mistrial request "because" of anything that happened during the prior day's opening statements. This Court was quite clear about the reason it was declaring a mistrial, and made no mention of the government's opening: "I have reached a conclusion that to permit this case to go forward with the government having done what it did, because it was the government's obligation, once I made my ruling, to go back, look at its evidence and make sure that the information that it would be presenting to this jury did not, did not violate a clear ruling that this Court had made. And the government not having done that, . . . I will declare a mistrial." (7/14/11 AM Tr. 49-50.)

[8] Had the government briefed this, it likely would have set forth in greater detail how this oversight – the government's failure to redact the exhibit to conform with the Court's ruling – occurred and would have argued that there was limited prejudice attributable to the Laura Pettitte evidence in light of defendant's defense. In defendant's opening, counsel explained that the issue was not Mr. Pettitte's honesty, but, rather, whether Mr. Pettitte "misunderstood" defendant's admission that he had previously taken HGH (7/13/11 AM Tr. 30-32). Accordingly, defendant's

double jeopardy bars re-prosecution" (id.). As the government shows below, the Double Jeopardy Clause does not bar retrial in this case.

ANALYSIS

Where a defendant, like Mr. Clemens, received that which he asked for in the form of a mistrial, the rule is that the Double Jeopardy Clause is no bar to retrial. United States v. Dinitz, 424 U.S. 600, 607-10 (1976). "[T]here is a narrow exception to th[is] rule." Oregon v. Kennedy, 456 U.S. 667, 673 (1982) (plurality opinion). "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Id. at 676.

"[T]his standard is exacting." Martinez v. Caldwell, 644 F.3d 238, 243 (5th Cir. 2011). "Kennedy distinguishes intent to improve the chance that the trier of fact will return a favorable decision from the forbidden intent to *avoid* decision by the trier of fact." United States v. Jozwiak, 954 F.2d 458, 460 (7th Cir. 1992). Further, "Kennedy does not bar retrial if the government simply 'blunders at trial and the blunder precipitates a successful motion for mistrial.'" United States v. Cornelius, 623 F.3d 486, 497 (7th Cir. 2010) (citation omitted); see also United States v. Wills, 902 F.2d 1009 (D.C. Cir. 1990) (unpub.) ("In Kennedy, the Supreme Court was reluctant to extend double jeopardy protection beyond situations in which the government intentionally provoked the defendant into moving for a mistrial.").

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challenge to Mr. Pettitte's testimony would have been narrowly focused on the contention that Mr. Pettitte simply misheard defendant during their 1999/2000 conversation. As defense counsel explained at the July 5th hearing, "the fact that [Mr. Pettitte] misheard it on day one, repeated it to his wife on day two, is really not probative of anything" (7/5/11 AM Tr. 26).

By reference to "objective facts and circumstances" in the record, 456 U.S. at 675, defendant thus has a heavy burden to show more than government negligence, overreaching, or, even, harassment; rather, defendant "must demonstrate" government conduct specifically intended to abort the trial. United States v. Perlaza, 439 F.3d 1149, 1172 (9th Cir. 2006); see also United States v. Williams, 472 F.3d 81, 85-86 (3d Cir. 2007) ("[A]pplication of the double jeopardy bar is dependent on a showing of the prosecutor's subjective intent to cause a mistrial in order to retry the case."); United States v. Smith, 441 F.3d 254, 265 (4th Cir. 2006) ("defendant bears the burden of proving that the prosecution acted with specific intent to provoke a mistrial"); United States v. Catton, 130 F.3d 805, 808 (7th Cir. 1997) (to prevail on double jeopardy motion, "it was Catton's burden to prove" that prosecutor deliberately injected error into trial); United States v. McKoy, 78 F.3d 446, 449 (9th Cir. 1996) ("Where a mistrial has been declared at the request of the defendant, the Double Jeopardy Clause is no bar to retrial unless the defendant can show that the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." (internal quotations and citations omitted)).[9]

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[9] Defendant concedes (at 17) that he "bears the initial burden of proof to show that the Government intended to provoke the declaration of a mistrial." He additionally contends, however, that, once he has established a "*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." The government disagrees. As the government's numerous textual citations reflect, these authorities uniformly apply a one-step approach to the issue and all of them place the burden on the defendant. This is understandable because, as Kennedy notes, "[i]nferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." 456 U.S. at 675. Moreover, all such "objective facts and circumstances" can be ascertained from the extant record of the prior proceeding. Cf. United States v. Coughlin, 610 F.3d 89, 97 (D.C. Cir. 2010) (in collateral-estoppel context, "'the burden [is] on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was [necessarily] decided in the first proceeding'" (citation omitted)). For his part, defendant

As the government demonstrates infra, the "relevant facts and circumstances strongly support the view that prosecutorial intent to cause a mistrial was absent." Kennedy, 456 U.S. at 680 (Powell, J., concurring). In particular, the prosecutor's contemporaneous comments demonstrate "there was no intention . . . to cause a mistrial"; "the prosecutor not only resisted, but also was surprised by, the defendant's motion for a mistrial"; and "there was no sequence of overreaching prior to the single prejudicial" mistake. Id. (internal quotations and citation omitted). That all of these pertinent factors weigh against a finding of intent makes sense because there was no possible reason why the government would have wanted a mistrial on only the second day of this multi-week trial.[10]

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cites (at 17 n.65) only two authorities, but neither addresses the burden in a double jeopardy claim of the "goading" type. See United States v. Thomas, 759 F.2d 659, 662 (8th Cir. 1985); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1360 (11th Cir. 1994). Rather, defendant's authorities reflect double jeopardy claims of the successive-prosecution type and thus are easily distinguished. See United States v. Olmeda, 461 F.3d 271, 282-83 (2d Cir. 2006) (in context of successive-prosecution double jeopardy claim, "as between the government and the defendant, the government being the party that drafts indictments, should bear any burden resulting from imprecise language"); United States v. Ziskin, 360 F.3d 934, 943 (9th Cir. 2003) (in context of pretrial, successive-prosecution claim, burden properly placed on government because "'government is in a better position to know what it expects to prove at that [second] trial'").

[10] Citing Ex Parte Wheeler, 203 S.W.3d 317 (Tex. Crim. App. 2006), defendant proffers (at 18) several factors for this Court's consideration. This Texas authority is both irrelevant and, now, obsolete. Ex Parte Wheeler enunciated a broad double jeopardy standard premised on the Texas state constitution. A retrial would be barred if "the prosecutor acted recklessly and played 'foul' to 'win at any cost' because the first trial was likely to end in an acquittal were it tried fairly." Id. at 323. This standard was broader than the federal standard – premised on the United States Constitution – which requires the defendant prove the prosecutor intended to goad him into requesting a mistrial. In any event, in 2007, the Texas Court of Criminal Appeals overruled this expanded standard and held that the "proper rule under the Texas Constitution is the rule articulated by the United States Supreme Court in Oregon v. Kennedy." Ex Parte Lewis, 219 S.W.3d 335, 337 (Tex. Crim. App. 2007).

A. "There was no intention to run afoul of any Court ruling."

Important evidence that the government did not intend to provoke defendant into moving for a mistrial is the prosecutor's contemporaneous declaration that he did not intend to violate any of this Court's rulings. See Holloway v. Arkansas, 435 U.S. 475, 486 (1978) ("attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court their declarations are virtually made under oath" (internal quotations and citations omitted)).

At the time of defendant's mistrial motion, when this Court asked why the video clip had not been "altered" to ensure compliance with the Court's pretrial ruling, the government explained that it had "no intention to run afoul" of any of this Court's rulings. And, the government added, there was "no bad faith on the part of the government" in "trying to prove this case." Moreover, when this Court admonished the prosecutor that it was his obligation "in the first instance" to ensure the government's exhibits had been appropriately redacted, government counsel made clear he understood this obligation and that he was not seeking to "evad[e] any responsibility." (7/14/11 AM Tr. 37, 39, 44.)

Disclosure of the Laura Pettitte evidence was the product of a government mistake.[11] And, because the video clip disclosure reflected an oversight, the double jeopardy bar does not apply. The prosecutor's in-court declarations, when coupled with this Court's observations of the pretrial and trial proceedings, thus should be conclusive and end this matter. See, e.g., United

[11] Defendant repeatedly asserts (at 3, 12, 26-27, 30) that, to this date, the government has "never claimed" the disclosure of the Laura Pettitte evidence was a "mistake" or "proffered any plausible, innocent explanation for its misconduct." As the government has shown, this is not accurate. The prosecutor's in-court declarations establish that the disclosure was inadvertent and not the product of bad faith or willful disregard of this Court's authority. In any event, a more detailed explanation for the inadvertent disclosure is provided infra at pp. 15-17.

States v. Tafoya, 557 F.3d 1121, 1124-27 (10th Cir.) (where prosecutor explained that his solicitation of inadmissible "other crimes" evidence from police officer was product of an "inartful question" and district court concluded prosecutor's conduct was "negligent," reprosecution not barred by Double Jeopardy Clause), cert. denied, 129 S. Ct. 2849 (2009); United States v. Gilmore, 454 F.3d 725, 728-30 (7th Cir. 2006) (where prosecutor explained to district court's satisfaction that his opening-statement references to defendant's incarceration status were "inadvertent" and that he had "made a mistake," reprosecution not barred by Double Jeopardy Clause); United States v. Barcelona, 814 F.2d 165, 167-68 (5th Cir. 1987) (where prosecutor admitted he had a "continuing duty of disclosure" and explained to district court's satisfaction that his failure to provide defendant with original bank documents was "inadvertent," reprosecution not barred by Double Jeopardy Clause).

However, if this Court desires a fuller explanation of the precise circumstances surrounding the government's failure to redact Exhibit 3b-2, the government provides it now.[12] As government counsel started to explain at the time of defendant's mistrial motion, over "two

[12] Numerous courts have recognized that an "informal explanation" will generally suffice in this context. Jozwiak, 954 F.2d at 459. "To say that intent is an element of the constitutional rule is not to say that intent is to be proved by testimony and cross-examination." Id. "[A] judge may evaluate the prosecutor's informal explanation for an action that leads to a mistrial." Id.; see also Tafoya, 557 F.3d at 1128 ("[A] formal evidentiary hearing is not a requirement, but, instead, if the district judge is satisfied with both the prosecutor's explanation for his missteps and also by 'what she witnessed in overseeing the trial,' there is 'no need to hold an evidentiary hearing to probe the prosecutor's intent.'" (citation omitted)); United States v. Hagege, 437 F.3d 943, 953 (9th Cir. 2006) ("[T]he district court elicited reasonable explanations from the prosecutor regarding the alleged misconduct and assessed that the trial was going favorably for the government. Based upon all of the objective facts and circumstances, the district court concluded that there was no indication or evidence of prosecutorial misconduct intended to provoke a mistrial. Under any of the approaches formulated by our sister courts, we find no error in the district court's determination that an evidentiary hearing was unnecessary.").

months ago" the government notified the defense of its intent to seek admission of a number of defendant's statements, including the congressional testimony at issue here (7/14/11 AM Tr. 37). Specifically, on May 6, 2011, the government notified defendant's counsel that it intended to introduce a series of defendant's admissions, including pages 86-90 of the official congressional hearing transcript, *i.e.*, Exhibit 3a-2. In this same letter, the government also notified defense counsel that it intended to introduce a video clip recording of these transcript passages, *i.e.*, Exhibit 3b-2. Thereafter, on June 28, the government met with Phil Barnett. Mr. Barnett authenticated Exhibits 3a-2 and 3b-2. Two days later, on June 30, the government filed its proposed exhibit list with this Court; this list included Exhibits 3a-2 and 3b-2. On July 5, this Court then ruled on defendant's first *in limine* motion, precluding the admission of the Laura Pettitte evidence during the government's case in chief absent defendant opening the door on that issue. The next day, jury selection began. Jury selection continued apace until opening statements on July 13th.

As this time line reveals, all of counsels' work on the government's exhibits had been completed by the time of the July 5th *in limine* ruling: the proposed exhibits had been designated; the exhibits had been authenticated by the government's witness; and an exhibit list had been filed with this Court. By the time of the July 5th *in limine* ruling, these exhibits were not at the forefront of either prosecutor's mind, rather, among other things, jury selection, opening statements, and jury instructions were.[13] Moreover, when this Court issued its July 5th *in limine* ruling, government counsel focused on the most obvious component of that ruling – the

[13] During this time period, the government was responding to questions about the instructions, drafting jury instructions, and identifying objections to specific defense instructions.

government could not call Laura Pettitte as a witness in its case in chief unless and until this Court approved it. Unfortunately, neither government counsel additionally focused on whether the substance of Laura Pettitte's testimony might be embedded in a question of one of defendant's congressional interlocutors. To be sure, this reference violated this Court's first *in limine* ruling and would have been removed had government counsel adequately focused on it.

All that said, as government counsel acknowledged at the time of the July 14th mistrial ruling and as the government reiterates now, it is not seeking to "evad[e] any responsibility" for its failure to review its exhibits and redact them to accord with this Court's July 5th *in limine* ruling (7/14/11 AM Tr. 44). Appropriate redaction *was* the government's duty. The government accepts responsibility for its oversight, and regrets the burdens that error has placed on this Court and defendant. But, the core point remains: this was a mistake attributable to the chronology of events (the *in limine* ruling came after the substantive work on the exhibits) and the press of other trial matters (jury selection, opening statements, jury instructions, and other matters). Or, as government counsel assured this Court at the time the error was discovered: "There was no intention to run afoul of any Court ruling, Your Honor" (id. 37).[14]

Despite government counsel's express disavowal of any intent to violate the Court's

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[14] Defendant claims (at 27 n.100) that this statement to the Court "does not count," asserting that context shows that the prosecutor's 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." He is wrong. As the government has already demonstrated, see supra pp. 8-9, the context of the prosecutor's statement shows that he was directly responding to this Court's query about why the government had failed to ensure that the video clip exhibits were "altered" to comply with the Court's pretrial *in limine* ruling (7/14/11 AM Tr. 36-37). Thus, when the prosecutor declared there was "no intention" to violate "any Court ruling," the prosecutor was specifically addressing the Court's redaction question.

rulings, defendant argues (at 25) it is implausible to suggest that "two highly experienced prosecutors in a high-profile case . . . 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."

In proffering this argument, defendant himself ignores that his own experienced counsel suffered a similar "lapse of attention" when the government introduced – and then played – the video clip. As defendant's counsel conceded at the bench, although the transcript pages and video clips had been provided to the defense team days prior, he had not reviewed them. Moreover, although the transcript of defendant's congressional testimony had been provided to defense counsel two months before this Court's July 5th *in limine* ruling, counsel did not object when the government sought admission of both the transcript and the video clip. And, finally, even after the video clip had been played in open court, defendant's counsel did not immediately object. Instead, this Court called the parties to the bench and asked "experience[d] counsel" for the defense whether his failure to object was a tactical decision (7/14/11 AM Tr. 32). This sequence of events involving defendant's own counsel rebuts defendant's baseless suggestion that only inexperienced counsel can make mistakes.[15] See Gilmore, 454 F.3d at 731 (three times during his opening statement, "trained prosecutor" inadvertently violated district court's *in limine* ruling and made reference to defendant's incarceration status).

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[15] To be clear, the government is not suggesting that defense counsel's failure to object relieved the government of its responsibility to review its exhibits. Instead, the government describes defense counsel's inaction only to rebut defendant's claim that the obviousness of the error supports an inference of an intent to goad. Cf. United States v. Curtis, 683 F.2d 769, 777 (3d Cir. 1982) ("In view of the failure of both the defense counsel and the trial judge to recognize immediately the need for a mistrial, it is difficult to credit the premise that the prosecutor could not have committed such conduct without knowing and intending that a mistrial would result.").

In sum, government counsel's contemporaneous declarations in and of themselves show that the government did not intend to goad defendant into moving for a mistrial. However, this Court need not rely solely on these declarations. Numerous other objective facts and circumstances corroborate them and confirm that the government did not intend to violate any of this Court's orders in order to trigger a mistrial motion.

B. The prosecutor's immediate response to the defendant's mistrial request was to argue against it.

Noticeably absent from defendant's factor-by-factor analysis is any mention of what transpired *after* he requested a mistrial. Government counsel not only opposed defendant's request (7/14/11 AM Tr. 43), but also suggested a middle-ground approach to alleviate any prejudice, a limiting instruction (id. 47). And, when the Court rejected this suggestion, in a further effort to avoid mistrial, the government asked for time to brief the issue (id. 50). These contemporaneous government actions are strong record evidence that the government's playing of the video clip was not designed to goad defendant into asking for a mistrial.

Defendant omits any discussion of the government's myriad arguments *against* mistrial, but numerous courts have recognized that a "prosecutor's opposition to the mistrial motion is a significant factor" in the double jeopardy analysis. Cornelius, 623 F.3d at 500 (dicta).[16] It is a

[16] See also Tafoya, 557 F.3d at 1127 ("the government suggested a limiting instruction to cure any prejudice and argued vehemently against a mistrial"); United States v. Radosh, 490 F.3d 682, 685 (8th Cir. 2007) ("government counsel vigorously opposed a mistrial, suggesting instead that the court either give a cautionary instruction or ignore this portion of Officer Wiedemann's testimony so as not to highlight it for the jury"); Gilmore, 454 F.3d at 730 ("While the prosecutor wanted the evidentiary hearing on Martin's incarceration to go the government's way, he did not want to abort the trial. In fact, he vigorously argued against the defendants' motion for mistrial, reasoning that the mistake could be cured with a limiting instruction to the jury."); United States v. Wharton, 320 F.3d 526, 532 (5th Cir. 2003) ("The prosecution opposed mistrial in every instance, particularly with respect to the testimony of Sepulvado."); McKoy, 78 F.3d at 449 ("the

significant factor for obvious reasons. If the government's specific intent is to goad a defendant into requesting a mistrial, the government would not simultaneously argue against granting a mistrial. Certainly, the government would not offer the court possible remedies short of a mistrial, as the prosecutor did here.

Although the government understands 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," Cornelius, 623 F.3d at 499, there is nothing in this record to suggest that the government's opposition was anything but genuine. When this Court turned to the prosecutor after defendant had requested a mistrial, it asked for the government's "response" (7/14/11 AM Tr. 43). The first words out of the prosecutor's mouth were "We object, Your Honor" (id.). Cf. United States v. Rodriguez, 229 Fed. Appx. 547, 548 (9th Cir. 2007) (unpub.) ("the prosecutor at no point objected to Rodriguez's repeated motions for a mistrial").

Further evidence that the prosecutor was not simply "going through the motions" in arguing against a mistrial can be found in the government's proffered alternative – a limiting instruction to the jury. Certainly this was not such an untenable suggestion that the government must have known it would be "wholly unacceptable" to defendant or this Court. See Cornelius, 623 F.3d at 499. Indeed, before moving for a mistrial, defense counsel also suggested a curative instruction (7/14/11 AM Tr. 38). A court should "normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it." United States v. Roy, 473 F.3d 1232, 1238 (D.C. Cir. 2007) (citations omitted). That is precisely what the

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government attempted to talk [the district court] out of doing anything but granting a continuance to the McKoys at the first trial").

government was asking of this Court when it proffered the limiting-instruction remedy – inadmissible evidence about Laura Pettitte's affidavit had been inadvertently played for the jury and the government believed the jury could follow an instruction to disregard that evidence. This is particularly true where, as was the case here, the Laura Pettitte evidence was embedded in the congressman's question and the government had not attempted to emphasize it.[17]

Finally, any doubt about the vehemence of the government's opposition to the mistrial request is dispelled by consideration of the prosecutor's final request to allow briefing on the matter. Having failed to convince this Court that any prejudice attributable to the Laura Pettitte evidence could be remedied by a limiting instruction, the government sought leave of this Court to further focus its arguments against mistrial. The government's request for an opportunity to brief its previously voiced opposition further undermines defendant's claim that the government wanted a mistrial.

C. There was no "sequence of overreaching" before the inadvertent disclosure of the Laura Pettitte information.

In an effort to bolster his claim of "intent to goad, " defendant attempts (at 8-9, 22-23) to show a "sequence of overreaching" by the government. Specifically, he contends (at 8) that the

[17] On the date of the inadvertent disclosure, defense counsel disavowed any "bad faith" on the part of the government paralegal in charge of playing the video clip (7/14/11 AM Tr. 42). Nonetheless, defendant now ascribes (at 28-29) such bad faith to the prosecutors, who did "nothing to stop the video from continuing or directing Government team members to black out the jurors' screens once a question had been raised about the objection." Of course, as the government has described, defense counsel also took no such actions and, instead, similarly stood silent while the video clip played. Further, like the prosecutors, defense counsel also apparently did not notice that the Laura Pettitte material remained frozen on the video screen during the first bench conference. In short, except for this Court, it appears that all of the key players failed to immediately appreciate the significance of Exhibit 3b-2. In light of this fact, it simply cannot be inferred that the government's initial inaction translates into malicious intent, as defendant now suggests.

government not only intentionally played the video clip to provoke a mistrial request, but also "ignored" this Court's second *in limine* ruling when it informed the jury about the HGH use of other Major League players during its opening statement. Thus, defendant erroneously concludes (at 22), the government's conduct reflects "bald violations of Court rulings on back-to-back days."

As the government has already demonstrated, see supra pp. 2-6, the parties had a simple misunderstanding about the scope of the Court's second *in limine* ruling. Indeed, this Court has already suggested that the government's opening-statement misstep was the product of this misunderstanding. At the time of defendant's mistrial request premised on the video clip, defense counsel sought to bolster his argument by citing to the government's opening – "this happened during opening statement, too" (7/14/11 AM Tr. 38). At that time, however, this Court acknowledged that "maybe there was some misunderstanding" about the Court's ruling on defendant's second *in limine* motion (id. 39). This Court should reject defendant's attempt to spin the government's opening-statement misstep into something sinister.

The record denotes the prosecutor's scrupulous efforts to abide by the Court's second *in limine* ruling, not intentionally to violate it. In response to defendant's second *in limine* motion, the government's opposition outlined its understanding of precisely what defendant was seeking. See n.1 supra. Then, after this Court issued its tentative ruling on the *in limine* motion, the government expressly referred to this opposition in an effort to get a clear understanding of the parameters of the Court's *in limine* ruling. See p. 4 supra. These are hardly the actions of a prosecutor bent on intentional misconduct. Rather, these are the actions of a cautious and careful prosecutor endeavoring to understand, and adhere to, the exact contours of this Court's rulings.

That there ultimately might have been some confusion does not mean that the government "ignored the Court's ruling" in order to "unfairly prejudice[] Mr. Clemens," as defendant now baselessly argues (at 8). See generally Williams, 472 F.3d at 87 ("Reviewing the record, we conclude that at most there was confusion about the basis for the District Court's direction to the prosecutor not to do 'it.'").

Thus, the record does not remotely suggest a pattern of misconduct. Instead, the record shows at most confusion about the scope of the Court's second *in limine* ruling and an unintentional error relating to the un-redacted video clip, the topic of the first *in limine* motion.[18]

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[18] As part of his strained effort to paint a picture of "repeated acts of government misconduct," defendant also alludes (at 9-10, 23) to an objection he lodged during the testimony of Phil Barnett:

> Q: What about Major League Baseball's awareness of performance enhancing drugs, was that a concern?
>
> A: That was –
>
> MR. HARDIN: Your Honor, again, if it is limited to him, I have no objection; but if he is talking about what the congressmen say –
>
> THE COURT: Rephrase. (7/13/11 PM Tr. 106.)

It is absurd to suggest that this single question to Mr. Barnett constitutes evidence of a pattern of prosecutorial overreaching: "[t]here are few vigorously contested lawsuits – whether criminal or civil – in which improper questions are not asked. Our system *is* adversarial and vigorous advocacy is encouraged." Kennedy, 456 U.S. at 680 (Powell, J., concurring). Indeed, another portion of Mr. Barnett's testimony – not cited by defendant – provides a compelling example of the government's sensitivity to the inadvertent disclosure of potentially prejudicial evidence. As Mr. Barnett was generally describing testimony to Congress on the effects of steroids, he began to discuss the testimony of two families whose sons had committed suicide after using steroids (7/13/11 PM Tr. 108). However, before Mr. Barnett could utter anything other than "testimony from parents," government counsel immediately interrupted him and asked to approach the bench (id.). The government's scrupulous and successful effort to prevent this potentially inflammatory testimony is consistent with how defense counsel had been portraying the government's actions *until* this motion. See, e.g., 7/13/11 AM Tr. 3 (defendant's opening: "[y]ou're not going to hear

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In sum, the objective facts and circumstances show the government did not intend to goad defendant into seeking a mistrial. Every facet of the record confirms this conclusion, including (a) government counsel's contemporaneous declarations that he had "no intention" to violate any Court order and that there was "no bad faith" on the government's part in "trying to prove this case"; (b) the government's vigorous arguments in opposition to defendant's mistrial request; and (c) the absence of any pattern of misconduct preceding the video clip mistake. Of course, it is not at all surprising that every feature of the record refutes defendant's current claim. There was no reason to suppose the government's case was heading to an acquittal. To the contrary, the government had every reason to want defendant's trial to continue to verdict.

D. The objective facts and circumstances demonstrate no intent to goad because the government had no reason to seek a mistrial.

"Only a prosecutor who thinks the trial going sour – or who seeks to get just far enough into the trial to preview the defense – would want to precipitate a mistrial. Otherwise the mistrial means a waste of time for both sides, injuring the prosecutor along with the defense." Jozwiak, 954 F.2d at 460 (citation omitted). Here, contrary to defendant's claims (at 18-22), the prosecution was not "going sour."[19]

At the outset, the government notes this – putting aside jury selection, the government's mistake occurred on the morning of the second day of what was expected to be a 4-to-6 week

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anybody accusing these guys of bad faith or anything"); see also 12/8/10 Tr. 6; 4/21/11 Tr. 73.

[19] Defendant nowhere suggests the government goaded him into a mistrial in order to glean a "preview" of his defense. Nor could he. As reflected in his opening statement, defendant's core defense – that McNamee was lying – was hardly a surprise to the government (7/13/11 AM Tr. 12-14, 30-32, 37).

trial. By that time, only two substantive witnesses had testified. And, even these two witnesses were simply setting the table for the meat of the government's case in chief, first-hand testimony and physical evidence demonstrating the false and misleading nature of defendant's testimony before Congress. Thus, Mr. Barnett (the Oversight Committee's staff director) and Mr. Johnson (the former House Parliamentarian) only established the authority of Congress to conduct its steroid hearings and described the materiality of certain of defendant's statements. That the trial was at such a preliminary stage has great significance in the double jeopardy analysis. It is impossible to credibly assert that the government had a motive for derailing defendant's prosecution because it believed the case was going badly when the case was barely going. See Jozwiak, 954 F.2d at 460 ("The prosecutor's case against these nine defendants was not going downhill; it was not *going*, period. It ended within minutes after the prosecutor rose to speak."); Radosh, 490 F.3d at 685 ("[t]he [improper] testimony came early in the first trial"); see also Cornelius, 623 F.3d at 501 (remanding for hearing on issue of prosecutorial intent and distinguishing cases relied upon by the government, including Jozwiak: "unlike here, there were no indications that th[ose] cases were going badly for the government; in both cases, the trial had just commenced").

Moreover, even though the government's prosecution was at a very early stage, by many contemporaneous accounts, it was moving along well.[20] The perceptions of these disinterested

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[20] See Lester Munson, "Prosecution Case Boring But Effective," available at: http://espn.go.com/espn/otl/story/_/id/6770227/roger-clemens-mistrial-mean-former-all-star-pitcher-walks-perjury-charges;

Andrew Cohen, "Government Errors, Judge Hits, Roger Clemens Runs," available at: http://www.theatlantic.com/entertainment/archive/2011/07/government-errors-judge-hits-roger-clemens-runs/241949/; and

observers corroborates that the government had no motive for wanting to goad defendant into a mistrial request. See generally McKoy, 78 F.3d at 449 ("[T]he case was not going badly for the government, and it could not be said that the government would gain an advantage if a mistrial were granted."); Curtis, 683 F.2d at 777 ("Nothing in the record indicates that the prosecutor believed that the jury was about to acquit Curtis."). Cf. Cornelius, 623 F.3d at 499 (remanding for evidentiary hearing on issue of prosecutorial intent where, *inter alia*, "things were 'clearly . . . going badly for the government'").

Further, from the government's perspective, there are always disincentives for a mistrial. Whenever a defendant consents to a mistrial, the "prosecutor suffers substantial costs." Kennedy, 456 U.S. at 686 (Stevens, J., concurring). Specifically, with every such mistrial the "prosecutor must go to the time, trouble, and expense of starting over with the criminal prosecution." Id.

Nonetheless, despite the cost to the government upon any retrial, defendant argues (at 18) that the government desired a retrial in this particular case because it was already "going badly" in "at least three ways": (a) the government had "lost" the two pretrial *in limine* motions; (b) in response to this Court's pretrial comments, the government planned on scaling back its Obstructive Act No. 15 evidence, relating to defendant's presence at Jose Canseco's house in June 1998; and (c) the government had recently received an autobiographical manuscript written by Mr. McNamee which undermined Mr. McNamee's credibility. Defendant first contends (at 22) that these "setbacks" meant the government had a motive to seek a mistrial because a new

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Les Carpenter, "Clemens' Lawyer Fires Away In Opening Remarks," available at: http://sports.yahoo.com/mlb/news?slug=lc-carpenter_clemens_lawyer_hardin_mcnamee_071311

trial would provide the government with "a clean slate." Defendant additionally asserts (at 22) that a second trial "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."

Defendant's first argument proceeds from a flawed premise. There is no reason to believe that any of the legal "setbacks" suffered by the government would necessarily be reversed – and the "slate" wiped "clean" – in advance of a new trial. For example, the government has no expectation that the original arguments it presented to this Court in opposition to defendant's *in limine* motions will somehow – magically – carry the day in the event of any retrial. Moreover, even assuming the government planned on scaling back its obstructive-act evidence in response to this Court's pretrial comments,[21] if the government had initially failed to convince this Court of that evidence's significance, there is no reason to believe the government will succeed in advance of any retrial. In short, contrary to defendant's suggestion, the government expects the legal framework of any second trial to remain the same. Thus, it cannot plausibly be argued that the government had a motive to provoke a mistrial because the government hoped to attain a "clean slate" on these legal rulings.

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[21] A point the government does not concede. Indeed, before this Court granted defendant's mistrial motion, Mr. Barnett had already testified in some detail about why establishing defendant's presence at the Canseco pool party in June of 1998 was important to the House Committee (7/14/11 AM Tr. 14-17). Defendant's counsel argued to congressional staffers that, because the Mitchell Report indicated he *did* attend this pool party, this "show[ed] how inadequate a job Senator Mitchell had done" (id. 15). Mr. Barnett's testimony thus established that this was a material issue precisely because *defendant* made it an important issue before the Committee and, further, that defendant's repeated denials about his presence at Mr. Canseco's house obstructed Congress's investigation.

This leaves defendant's baseless suggestion that the government wanted a mistrial because it needed time to regroup in light of the Court's *in limine* rulings and the recently subpoenaed McNamee manuscript. As for the *in limine* rulings, the government routinely adjusts to such adverse pretrial rulings. Certainly, these particular rulings were not so damaging as to force the government into the extreme action of goading defendant to move for a mistrial. Although, as defendant notes (at 19), the government argued this evidence was "highly probative" and "highly relevant," a "prosecutor's vigorous advocacy for his case does not translate into a finding that he intentionally goaded defendants into moving for a mistrial." Gilmore, 454 F.3d at 729-30. As for the McNamee manuscript, if it were true that its pretrial production had left the government scrambling,[22] it would have been much simpler for the government to ask for a continuance rather than orchestrate defendant's mistrial request. At any rate, any delay attributable to a mistrial likely will assist defendant as much as the government; defendant will now have months to hone his cross-examination of Mr. McNamee based on the manuscript. See United States v. Curry, 328 F.3d 970, 973 (8th Cir. 2003) (mistrial declared because government failed to disclose impeachment evidence relating to credibility of "key" government witness; at any retrial, defendant will "have the opportunity to impeach this witness with her prior statements").[23]

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[22] A point the government does not concede. The government received a copy of the manuscript over two weeks before opening statements. As the government understands it, Mr. McNamee's manuscript was ghost-written by another person and, indeed, in the possession of yet a separate third party when it was subpoenaed by defendant. As the government expects will be shown at trial, the government does not believe the manuscript contains "numerous false and inconsistent statements," as defendant contends (at 19).

[23] Without any elaboration, defendant additionally posits (at 22) that a mistrial was in the government's interest because a retrial will provide the government "an opportunity to conduct a

In sum, there is a reason the government vigorously opposed defendant's mistrial request: it had no incentive to derail the proceeding. Although it is true, for example, that this Court preliminarily ruled defendant's way on certain *in limine* matters, the government still had dozens of witnesses to present, including Mr. Pettitte, the man this Court described as the government's most "critical witness" (7/14/11 AM Tr. 46). Further, the government was prepared to present DNA and other scientific evidence linking defendant to the steroids found in the syringe and cotton balls kept by Mr. McNamee. Clearly, the government's case was not "going sour" on just the second day of trial. The government, rather, was just starting to build its case against defendant. Simply stated, the government had absolutely no reason to seek a mistrial. In any event, even assuming the above-cited "setbacks" could plausibly be portrayed as providing the government with a motive to seek a mistrial, the other objective facts and circumstances – described supra at pp. 14-24 – overwhelmingly demonstrate that such a motive never translated into an actual intent to goad.[24]

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stronger *voir dire*." Nothing in the record supports defendant's conjecture that the government was dissatisfied with the sworn jury. To the contrary, the extant record suggests the opposite. Out of approximately 60 panel members, the government moved to strike only two for cause. This Court sustained one of those objections and the government used a peremptory to strike the other panel member.

[24] Notably, defendant has not cited to a single post-Kennedy precedent that barred a retrial based on facts remotely similar to the present facts. At best, defendant claims (at 29-30) that United States v. Broderick, 425 F. Supp. 93 (S.D. Fla 1977), is "instructive" because that court forbid a retrial after finding "'prosecutorial overreaching'" when government counsel elicited inadmissible hearsay. Id. at 95-96. Specifically, Broderick found the prosecutor had "invited the mistrial" when she "deliberately ask[ed] the witness the prohibited question in the presence of the jury" despite having been "twice cautioned not to do so because of its prejudicial and hearsay nature." Id. at 97. However, as defendant simultaneously concedes (at 30 n.110), Broderick was "decided before" Kennedy. And, Kennedy expressly eschewed reliance on prosecutorial "'overreaching'" in the double jeopardy context, choosing instead to narrowly restrict application of the double jeopardy bar to only those cases where the defendant has shown prosecutorial intent

E. Because the extant objective facts and circumstances clearly show no intent to goad, defendant has failed to meet his burden and an evidentiary hearing is not necessary.

"[A] formal evidentiary hearing is simply not required when the district court is satisfied with the explanation received" from the government. Tafoya, 557 F.3d at 1128.[25] The government's explanation for the video clip mistake precludes the need for an evidentiary hearing. At the time defendant moved for his mistrial, government counsel disavowed any intent to violate this Court's rulings and explained that all of the government's actions in proving the case against defendant were taken in good faith. Further, in accepting responsibility for its failure to redact the video clip, the government made clear it had committed a mistake. And, as the government has explained supra at pp. 15-17, this mistake was a function of the timing of this Court's *in limine* ruling in relation to the prosecutors' previous work on the government's exhibits. Moreover, the government's explanation is fully corroborated by all the other objective facts and circumstances, which show the government wanted this case to proceed to verdict. For example, when defendant moved for his mistrial, government counsel immediately objected and

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to provoke a mistrial request. 456 U.S. at 674-75. Broderick is thus not "instructive" at all. See United States v. Staton, 25 F.3d 1042 (4th Cir. 1994) (unpub.) (noting it is "questionable" whether prosecutorial conduct considered in Broderick "would pass" Kennedy's "narrow test"). In any event, as the government has demonstrated, there was not even prosecutorial overreaching here, just a mistake.

[25] See also Gilmore, 454 F.3d at 730 ("the evidentiary hearing serves as a backstop for the district judge if she is not, or a reasonable judge would not be, satisfied with the prosecutor's explanation"); United States v. Pavloyianis, 996 F.2d 1467, 1475 (2d Cir. 1993) ("No rule of law requires a hearing in this sort of case where the relevant facts can be ascertained from the record."); Jozwiak, 954 F.2d at 460 ("the judge may evaluate the prosecutor's informal explanation in light of the circumstances"); United States v. Wentz, 800 F.2d 1325, 1328 (4th Cir. 1986) ("If there existed a genuine question in the mind of the court about whether the prosecutor had deliberately goaded Wentz into moving for a mistrial, an evidentiary hearing should have been held before the second trial, not afterward.").

offered an alternative remedy. However, when this Court rejected that alternative, the government still fought a mistrial by asking for time to brief the issue. Further, the government had no reason to seek a mistrial on the second day of the trial because all the government's best evidence was yet to come.

Thus, this Court should deem a formal evidentiary hearing unnecessary. See, e.g., Gilmore, 454 F.3d at 730 (affirming district court's decision not to hold formal evidentiary hearing where court "satisfied" with "prosecutor's explanation" that his opening-statement references to defendant's incarceration status were "inadvertent"); Hagege, 437 F.3d at 953 (affirming district court's decision not to hold formal evidentiary hearing where court "elicited reasonable explanations from the prosecutor regarding the alleged misconduct and assessed that the trial was going favorably for the government"); Curry, 328 F.3d at 973-74 (affirming district court's decision not to hold formal evidentiary hearing "'concerning the prosecutor's intent'" where court "concluded that because it had heard the trial and was familiar with the objective facts and circumstances of the case, a hearing was not necessary"); Jozwiak, 954 F.2d at 459-60 (affirming district court's decision not to hold formal evidentiary hearing where court "believed" prosecutor's assertion that government's opening-statement reference to non-testifying codefendants' guilty pleas was due to "inexperience").[26]

[26] Of course, should this Court want to question any member of the prosecution team at the upcoming hearing, the government has no objection to such an inquiry pursuant to any procedures this Court deems appropriate. See, e.g., Tafoya, 557 F.3d at 1127-28 (affirming procedure whereby district court asked prosecutor to explain actions at podium, but did not place prosecutor under oath); Gilmore, 454 F.3d at 730 (affirming procedure whereby "district court conducted an informal hearing and accepted argument from both the prosecution and defense on the motion for a mistrial"); Hagege, 437 F.3d at 953 (affirming procedure whereby district court "elicited" the "prosecutor's representation at oral argument").

The government suspects that, if defendant argues for a formal evidentiary hearing, he will rely on the Seventh Circuit's Cornelius decision. Any such reliance will be misplaced, however.

In Cornelius, the government charged Cornelius and his co-defendant Castillo with cocaine distribution and conspiracy. 623 F.3d at 488. In the grand jury, the government's cooperator (Delportillo) testified that co-defendant Castillo had told Delportillo that Cornelius supplied Castillo with cocaine. Id. at 489. However, in advance of Delportillo's testimony on the third day of trial, the district court forbid the government from asking Delportillo about Castillo's out-of-court statement. Id. Despite this ruling, the prosecutor asked Delportillo if he knew whether Castillo had any other sources of cocaine besides Delportillo. Id. at 490. Delportillo identified Cornelius as another such source. Id. As a result, the district court declared a mistrial. Id. at 492. But, when Cornelius thereafter moved to dismiss his indictment on double jeopardy grounds, a magistrate recommended the district court deny the motion without a hearing, reasoning that Delportillo was to blame for the disclosure. Id. at 493. The district court adopted the magistrate's recommendation. Id. at 494.

In vacating the district court's double jeopardy ruling and remanding the matter for a formal evidentiary hearing, the Cornelius court emphasized that the prosecutor's question to Delportillo about other cocaine sources was "bizarre" in light of the fact that the government knew Delportillo had "identified only one other source of cocaine for Castillo besides himself – Michael Cornelius." Id. at 498. "[W]e are at a loss to explain why the government asked the question that it did in light of the court's evidentiary ruling." Id. And, to the extent that the government explained it had not expected Delportillo to identify Cornelius as the other source,

but only to answer the yes-no question in the affirmative, the Cornelius court concluded that explanation did "not hold water." Id. at 499. As the Cornelius court reasoned, there was significant danger latent in the prosecutor's question to Delportillo and, moreover, a mere "yes" response from Delportillo would not have permitted the government to argue that Castillo and Cornelius were conspiring with one another. Id. at 498-99. Indeed, "the prosecutor conceded during the trial that without Delportillo's testimony about Cornelius, the conspiracy charge against [Cornelius] could not survive." Id. at 499. Thus, Cornelius held, an evidentiary hearing was necessary because of the "serious questions about the government's intent given the timing and circumstances of what occurred." Id. at 501. Further, because the government claimed it had cautioned Delportillo about the scope of the district court's evidentiary ruling, a hearing would allow the district court to explore what Delportillo had been told. Id. at 499. Finally, Cornelius explained, its decision was partly influenced by the fact that "it was the magistrate judge, who was not present at the trial, who actually engaged in the analysis regarding the prosecutor's intent." Id. at 498 n.6.

This case is nothing like Cornelius. First, this Court's analysis of defendant's present motion obviously will be premised on its first-hand observations of the trial and, more particularly, the circumstances surrounding the video clip error. Thus, unlike the magistrate in Cornelius, this Court is "quite familiar with the events surrounding defendant's motion for a mistrial" and is "uniquely positioned to characterize the conduct of the government" based on this Court's observations of "the government's presentation of the non-conforming proof." Wentz, 800 F.2d at 1328. Second, in contrast to Cornelius, where the government essentially conceded it had reason to seek a mistrial because the district court's evidentiary ruling meant the

conspiracy charge would not survive a Rule 29 motion, here, as the government has explained supra pp. 25-26, its case is strong and was going well. Finally, there is nothing "bizarre" about the government's current explanation for the inadvertent Laura Pettitte disclosure – the government made a mistake in the press of trial when counsel failed to return to Exhibit 3b-2 and review it for necessary redactions. Cf. Cornelius, 623 F.3d at 500-01 (distinguishing Gilmore and Jozwiak, which "involved what appeared to be 'blunders'" by the prosecution).

CONCLUSION

There is a single "narrow exception" to the general rule that the Double Jeopardy Clause does not bar a retrial where the defendant himself asked for a mistrial. Kennedy, 456 U.S. at 673. Defendant has come nowhere close to fitting his case into this narrow exception. The objective facts and circumstances he points to do not demonstrate prosecutorial intent to goad a mistrial request. Rather, the record facts confirm the prosecutor's affirmation to this Court, "[t]here was no intention to run afoul of any Court ruling." The record thus shows only that the government made a mistake when it failed to review Exhibit 3b-2 for necessary redactions. And, as regrettable as this mistake was, it does not warrant the extreme measures of a prohibition on

any retrial and the dismissal of defendant's indictment. Accordingly, this Court should deny defendant's motion.

Respectfully Submitted,

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