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 *IN LIMINE* AND MEMORANDUM OF LAW (2 OF 2)
TO PRECLUDE HEARSAY EVIDENCE REGARDING MR. CLEMENS

The Confrontation Clause of the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. Pursuant to this mandate, courts have clearly expressed a strong preference for face-to-face confrontations at trial:

> A personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242–43 (1895); *see also Crawford v. Washington*, 541 U.S. 36, 43–50 ("The right to confront one's accusers is a concept that dates back to Roman times."); *United States v. Hsia*, 87 F. Supp.2d 10, 13 (D.D.C. 2000). The purpose of the Confrontation Clause is defeated when the Government presents the testimony of an out-of-court declarant "through the mouth of another witness." *United States v. Evans*, 216 F.3d 80, 89 (D.C. Cir. 2000). In other words, the Government cannot prosecute its case through hearsay. *Id.* at 86–87.

In this case, the Government has conducted hundreds of interviews in preparation for trial of its case against defendant William R. Clemens, but the only individuals in the world who claim to have had one-on-one conversations with Mr. Clemens regarding his alleged use of anabolic steroids or human growth hormone are Brian McNamee and Andy Pettitte, respectively. All other statements about or attributed to Mr. Clemens are hearsay to the extent they are offered to prove the truth of the matter asserted.

On June 10, 2011, the Government provided a partial list of anticipated fact witnesses. If their testimony at trial is consistent with statements made to Congress or in pre-trial proceedings, at least five potential witnesses on this list are expected to offer the following testimony regarding Mr. Clemens:

(1) Laura Pettitte is expected to testify that her husband, Andy Pettitte, told her about two conversations between Mr. Pettitte and Mr. Clemens; and

(2) David Segui, C.J. Nitkowski, Andy Pettitte, and Anthony Corso may testify that Brian McNamee told them that he injected Mr. Clemens with human growth hormone or steroids, kept so-called physical evidence of such injections, or relayed alleged conversations with Mr. Clemens and Mr. McNamee about such injections.

This testimony is inadmissible hearsay, and the Court should bar introduction of it under Rules of Evidence 802 and 403.

ARGUMENT

1. Anticipated Testimony By Laura Pettitte Regarding Second-Hand Conversations With Mr. Clemens Should Be Excluded.

In a three-paragraph affidavit prepared in connection with the investigation of Mr. Clemens by the U.S. House Committee on Oversight and Government Reform, Mrs. Pettitte testified about two (and only two) events: (a) a conversation Mrs. Pettitte had with her husband in 1999 or 2000 regarding a conversation between Mr. Pettitte and Mr. Clemens outside the presence of Mrs. Pettitte regarding human growth hormone; and (b) a conversation Mrs. Pettitte

had with her husband in or around 2005 regarding another conversation between Mr. Pettitte and Mr. Clemens. Mr. Clemens and Mrs. Pettitte never discussed human growth hormone or anabolic steroids themselves, and the defense is not aware of any other relevant, admissible evidence capable of being offered through Mrs. Pettitte at trial.

Testimony regarding Mrs. Pettitte's second-hand conversations regarding Mr. Clemens is classic hearsay to which no exception appears to apply. Fed. R. Civ . P. 801(c). Indeed, to the extent the Government seeks to use Mrs. Pettitte's testimony to offer Mr. Clemens's purported statements to Mr. Pettitte for the truth of the matter asserted, the testimony may actually comprise hearsay within hearsay, or "double hearsay." *See* Fed. R. Evid. 805. Hearsay evidence is generally inadmissible because it is less reliable than nonhearsay testimony: it may not have been offered under oath; there may have been no opportunity for cross-examination; and the jury is given no opportunity to observe the demeanor of the witness. *See United States v. Lynch*, 499 F.2d 1011, 1022 (D.C. Cir. 1974). "Double hearsay" is even less reliable, and this Court has considered the admission of such evidence to be "extremely questionable." *See, e.g.*, *Ragsdale v. Holder*, 668 F. Supp.2d 7, 24 (D.D.C. 2009) (discussing admissibility of double hearsay in context of investigative reports); *see also* 2 McCormick on Evidence § 324.1 n.5 (6th ed. 2009) ("[A]ttenuation of probative value may occur as the layers increase, and exclusion under Federal Rule 403 may be the proper result.").

Additionally, in the event that the Government offers Mr. Pettitte himself to testify regarding his conversations with Mr. Clemens (and the Government successfully convinces the Court that statements made in such conversations are non-hearsay under Rule 801(d)(2)), subsequent testimony by Mrs. Pettitte regarding the same conversations would be improperly cumulative. Under Rule of Evidence 403, otherwise admissible evidence nevertheless may be

excluded because "its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403; *see also, e.g.*, *United States v. Duran*, 884 F. Supp. 537, 541 (D.D.C. 1995) (excluding document because contents were cumulative of previously-admitted information); *United States v. Libby*, 475 F. Supp.2d 73, 88 (D.D.C. 2007) (finding portion of stipulated statement of facts to be inadmissible, in part, due to their "cumulative character"). Accordingly, Mrs. Pettitte's affidavit and oral testimony consistent with the affidavit contain double, cumulative hearsay, the low probative value of which is substantially outweighed by the dangers set forth in Rule 403. Neither should be admitted into evidence at trial.

2. Statements By Brian McNamee To Third Parties Regarding Mr. Clemens's Alleged Use of Performance-Enhancing Drugs or Evidence Thereof Should Be Excluded.

Four individuals listed by the Government as potential witnesses at trial—David Segui, C.J. Nitkowski, Andy Pettitte, and Anthony Corso—have testified or informed law enforcement investigators that Mr. Clemens's former trainer and the Government's key witness, Brian McNamee, privately told them or implied that he injected Mr. Clemens with human growth hormone or anabolic steroids (Mr. Corso and Mr. Pettitte), kept so-called physical evidence of such injections (Messrs. Segui, Nitkowski, and Corso), or conveyed alleged conversations with Mr. Clemens vaguely referring to such injections (Mr. Corso). None of these individuals other than Mr. Pettitte are expected to testify that they spoke directly with Mr. Clemens regarding his alleged use of performance-enhancing substances.

Introducing Mr. McNamee's statements into evidence through these or other third-party witnesses would violate the hearsay rule because those statements would be offered for the truth of the matter asserted. Fed. R. Evid. 802. Indeed, once again, to the extent the Government seeks to use someone like Mr. Corso's testimony to offer Mr. Clemens's purported statements to

Brian McNamee for the truth of the matter asserted, the testimony may actually comprise double hearsay. *See* Fed. R. Evid. 805. In addition to the reasons for keeping hearsay out of evidence set forth above, the fact that Mr. McNamee, a purported accomplice with Mr. Clemens in impropriety, is the hearsay declarant in each instance makes the reliability of such evidence even more "inevitably suspect." *United States v. Leonard*, 494 F.2d 955, 970 (D.C. Cir. 1974) (citation omitted).

Mr. Clemens anticipates that the Government will try to characterize Mr. McNamee's statements to clients and associates like Messrs. Segui, Nitkowski, Pettitte, and Corso as "prior consistent statements" under Federal Rule of Evidence 801(d)(1)(B). Under that rule, a prior consistent statement of a declarant testifying at trial and subject to cross-examination may be admissible to "rebut an express or implied charge against him of recent fabrication, improper influence or motive." Fed. R. Evid. 801(d)(1)(B). The Government should not be permitted to argue or introduce such statements into evidence, however, unless and until Mr. McNamee's testimonial motives are attacked and the Government has laid a proper foundation for the exception at trial. An order *in limine* is therefore appropriate.

Mr. McNamee's statements to people like Messrs. Segui, Nitkowski, Pettitte, and Corso should also be excluded because any probative value of repeating Mr. McNamee's statements through different witnesses would be substantially outweighed by undue prejudice. Fed. R. Evid. 403. These statements are susceptible to a "barn door" problem; regardless of the evidentiary reason for which the evidence could be offered, once the door is open for Mr. McNamee's statements to come in, "the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice." *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994). Unless and until the Government can obtain a ruling outside of the presence and

hearing of the jury that the resulting prejudice involved with airing Mr. McNamee's out-of-court statements offered for the truth of the matter asserted is insubstantial, the Court should exclude evidence regarding those statements.

CONCLUSION

Accordingly, and for each of the reasons set forth above, this Court should preclude counsel for the Government from introducing the hearsay evidence specified above or making argument regarding such evidence unless and until the matter has first been called to the Court's attention out of the presence and hearing of the jury and a favorable ruling received on the admissibility and relevance of the matter.

Respectfully submitted,

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ORDER

Upon consideration of defendant William R. Clemens's Motion *In Limine* (2 of 2) to Preclude Hearsay Evidence Regarding Defendant William R. Clemens; any Opposition memoranda thereto; and the entire record herein,

it is this _____ day of _____, 2011, hereby

ORDERED that defendant William R. Clemens' Motion *In Limine* (2 of 2) to Preclude Hearsay Evidence is **GRANTED**; and it is further

ORDERED that counsel for the Government shall not mention, refer to, or bring before the jury, directly or indirectly, on *voir dire* examination, reading of the pleadings, statement of the case, interrogation of the witnesses, argument, objections before the jury, or in any other manner hearsay testimony by Laura Pettitte unless and until the matter has first been called to the Court's attention out of the presence and hearing of the jury and a favorable ruling received on the admissibility and relevance of the matter; and it is further

ORDERED that counsel for the Government shall not mention, refer to, or bring before the jury, directly or indirectly, on *voir dire* examination, reading of the pleadings, statement of the case, interrogation of the witnesses, argument, objections before the jury, or in any other

manner hearsay testimony regarding statements by Brian McNamee to David Segui, C.J. Nitkowski, Andy Pettitte, Anthony Corso, or any other third party concerning Mr. Clemens's alleged use of anabolic steroids or human growth hormone unless and until the matter has first been called to the Court's attention out of the presence and hearing of the jury and a favorable ruling received on the admissibility and relevance of the matter.

SO ORDERED.

_____
Reggie B. Walton
United States District Judge

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