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 SECOND MOTION *IN LIMINE* REGARDING PURPORTED HEARSAY (Dkt. No. 55)

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to the Defendant's Motion *in Limine* and Memorandum of Law (2 of 2) To Preclude Hearsay Evidence Regarding Mr. Clemens (Dkt. No. 55) (hereinafter "Def. Mot.").

The defense motion asks this Court to bar testimony from various witnesses about the prior statements of government witnesses Andy Pettitte and Brian McNamee. Although the defense begins its motion with a paean to the Sixth Amendment's Confrontation Clause (Def. Mot. 1), in truth no Confrontation issues are posed in this case. Because both Mr. Pettitte and Mr. McNamee will testify at trial, the defense will have ample chance to cross-examine each declarant as to the circumstances and bases of their prior statements. As even the defense notes, their actual objections are exclusively on the basis of purported hearsay and Rule 403 of the Federal Rules of Evidence. (Def. Mot. 2). The objections fail, however, and the testimony should be admitted – either as admissible hearsay for the truth of the matters asserted, or for other non-hearsay purposes (such as rehabilitation) based on the defense's likely cross-examination.

Argument

I. Laura Pettitte Should Be Permitted to Testify About Her Husband's Contemporaneous Recounting of His Conversations with the Defendant.

The government expects that Andy Pettitte[1] will testify that in 1999 or 2000, defendant and he had a conversation in which defendant admitted that he had taken human growth hormone ("HGH"). *See* Pettitte Aff., ¶ 1.[2] Mr. Pettitte recounted this conversation to his wife Laura Pettitte soon after it happened. *Id.* ¶ 2. Mr. Pettitte also approached Mr. McNamee privately to inquire about HGH, and told Mr. McNamee that defendant had told him (Pettitte) that he had used it. *Id.* ¶ 3. Mr. McNamee became angry and told Mr. Pettitte that defendant should not have told him about what was supposed to be a confidential fact. *Id.* In March, 2005, around the time of the first Congressional hearings on steroid use in Major League Baseball, Mr. Pettitte had a second conversation with defendant at the Houston Astros' spring training facility in Kissimmee, Florida, in which Mr. Pettitte asked defendant what he would say if asked by reporters if he ever used performance enhancing drugs. *Id.* ¶ 4. When defendant asked Mr. Pettitte what he meant, Mr. Pettitte reminded defendant that defendant had previously told him about defendant using HGH. *Id.* Defendant responded by telling Mr. Pettitte that he must have misunderstood him, and that it was

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[1]Mr. Pettitte was defendant's close friend and teammate for a number of years. They were both starting pitchers who played together on the New York Yankees (1999-2003, 2007) and the Houston Astros (2004-2006). Mr. Pettitte and defendant have both lived in the Houston, Texas area for most of their adult lives and, beginning in 1999, would often work out together at each other's houses. Beginning after the 1999 season, and continuing for a period of approximately 8 years, Brian McNamee – a strength and conditioning coach – would travel to Houston to provide private strength training sessions to Mr. Pettitte and defendant.

[2]In February, 2008, Mr. Pettitte was deposed by Committee staff. Mr. Pettitte also executed a sworn affidavit that summarizes his knowledge of events that are relevant to this trial. A copy of Mr. Pettitte's affidavit is attached hereto as Exhibit 1.

defendant's *wife* Debbie who used HGH. *Id.* This was not Mr. Pettitte's recollection of the 1999/2000 conversation, but he did not want to argue with defendant. *Id.* ¶ 6. Mr. Pettitte told his wife Laura about this second conversation as well. *Id.* ¶ 7. Mrs. Pettitte, in turn, is expected to testify that her husband told her about each of these conversations with defendant soon after each conversation happened.[3]

At the Hearing on February 13, 2008, defendant acknowledged that Mr. Pettitte was "a very honest fellow" and "would have no reason" to fabricate a story about defendant. Hearing at 86, 88. Not wishing to call Mr. Pettitte out as a liar as he has with Mr. McNamee, defendant nevertheless attempted to discredit Mr. Pettitte at the Hearing by assailing both his memory and his hearing ability.[4] Indeed, defendant's statement to the Committee concerning Mr. Pettitte's alleged impaired memory serves as the basis for Obstructive Act 12 in Count One of the grand jury indictment.

There are two independent bases on which a party may admit a witness' prior consistent statements. *First,* under Rule 801(d)(1)(B), where the declarant himself has actually testified at trial, his prior consistent statements are not hearsay at all if admitted "to rebut an express or implied

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[3]Mrs. Pettitte provided the Committee with a sworn affidavit that recounts these events and that affidavit is attached hereto as Exhibit 2.

[4]*See, e.g.,* Hearing Testimony of William Roger Clemens, February 13, 2008 at page 87:

> Mr. CLEMENS. I believe Andy has misheard. Mr. Congressman, on his comments about myself using HGH, which never happened. . . . My problem with what Andy says, and why I think he misremembers, is that if Andy Pettitte knew that I had used HGH, or I had told Andy Pettitte that I had used HGH, before he would use the HGH, what have you, he would have come to me and asked me about it. That is how close our relationship was. And then when he did use it, I am sure he would have told me that he used it.

(Emphasis added.)

charge against the declarant of recent fabrication or improper influence or motive." Fed. R. Evid. 801(d)(1)(B). As the Supreme Court has made clear, this non-hearsay status is only available where the motive to fabricate postdated the earlier consistent statement. *Tome v. United States*, 513 U.S. 150 (1995). In such a circumstance, the earlier statement is admissible as substantive evidence – *i.e.*, for the truth of the matter asserted.

Second, and independently, a witness' prior statement that is consistent with his trial testimony is admissible non-hearsay when offered not substantively, but rather to rehabilitate the witness from a charge of poor memory, or after cross-examination made use of a partial reference to an inconsistent portion of the statement. As the D.C. Circuit has explained, "[e]ven where the suggestion of contradiction is only imputation of an inaccurate memory, a prior consistent statement is admissible to rebut the inference." *United States v. Coleman,* 631 F.2d 908, 914 (D.C. Cir. 1980). In such a circumstance, the prior statement is admissible as bearing on credibility, but is not to be used substantively.

These two principles establish the admissibility of Mrs. Pettitte's testimony about her husband's prior recounting of his conversation, as shown below.

1. If the defense either expressly or impliedly raises a charge that Mr. Pettitte has a motive to fabricate his trial testimony or is subject to "improper influence or motive," then Rule 801(d)(1)(B) is clear that Mr. Pettitte's prior statements are admissible non-hearsay regardless of the use to which they are put – something that defendant's motion does not seek to deny.

2. Even if the defense does not raise a charge of recent fabrication or improper influence or motive, however, the government is independently entitled to introduce evidence of Mr. Pettitte's prior statements nonsubstantively – because they help to show that his trial testimony is not the

product of defective memory. As the D.C. Circuit made clear in *Coleman,* a testifying witness' prior consistent statement is admissible to rebut an "imputation of an inaccurate memory." *Coleman*, 631 F.2d at 914. *See also, e.g., Henderson v. Norris*, 118 F.3d 1283, 1287 (8th Cir. 1997) (noting that federal practice is congruent with a state evidentiary rule that allowed admission of a prosecution witness' prior consistent statement once the defense had "attack[ed] the accuracy, even without impugning the integrity, of [the] witness's testimony" (citing *Coleman*)). Such a use of Mrs. Pettitte's statement for non-substantive evaluation of her husband's credibility does not depend on Rule 801(d)(1)(B) and does not require satisfaction of that Rule's requirements. *See* Saltzburg, Martin & Capra, 4 Federal Rules of Evidence Manual § 801.02[4][c], at 801-37 (9th ed. 2006 & Supp. 2010) ("Prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on credibility," and without regard to Rule 801(d)(1)(B) (emphasis in original)). Mrs. Pettitte's testimony about her husband's earlier statements, if offered purely for credibility purposes, will not be hearsay under Rule 801(c), because it will not be offered "to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Instead, the government will offer Mrs. Pettitte's testimony simply to show that Mr. Pettitte's memory of his conversations with Mr. Clemens is accurate and has not worsened over time. *See Coleman,* 631 F.2d at 914; Cleary *et al.*, McCormick on Evidence § 49, at 119 n.18 (3d ed. 1984) (approving of reasoning that "'[t]he accuracy of memory is supported by proof that at or near the time when the facts deposed to have transpired, and were fresh in the mind of the witness, he gave the same version of them that he testified to on the trial"). Given the limited intended use of the evidence, the government will not object to an appropriate limiting instruction to ensure the jury's appropriate use of the statement. *See United States v. White*, 11 F.3d 1446, 1449 (8th Cir. 1993) ("When a trial court

gives an instruction to the jury that the out-of-court statements that are being related are admissible only to buttress the credibility of a witness, the statements are not hearsay. We find no error in admitting evidence of a prior consistent statement for the narrow purpose of rehabilitating a witness.") (citation omitted).[5]

3. The defense's objections under Rule 403 (Def. Mot. 3-4) are without merit. Under Rule 403, the *opponent* of the evidence – here, the defense – has the burden to show not just that the evidence at issue may hurt their case, but rather that the evidence's "probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 (emphasis added). *See United States v. Pettiford*, 517 F.3d 584, 589-90 (D.C. Cir. 2008) ("Rule 403 "does not bar powerful, or even 'prejudicial' evidence. Instead, the Rule focuses on the 'danger of unfair prejudice,' and gives the court discretion to exclude evidence only if that danger '*substantially* outweigh[s]' the evidence's probative value."). The defense falls far short of meeting its burden.

The relevance of Mr. Pettitte's prior statements cannot be doubted. If defendant admitted HGH use to Mr. Pettitte in the 1999-2000 time frame, and denied such use during Congressional proceedings, then his prior admission directly bears on the obstruction and perjury charges in this case. The accuracy of Mr. Pettitte's memory as to those conversations is thus highly relevant, and Mr. Pettitte's contemporaneous statements to his wife are highly probative of the accuracy of his

[5]There is at least one other conceivable basis of admissibility for Mrs. Pettitte's testimony, depending on defense tactics at trial. If the defense attempts, at any point, to impeach Mr. Pettitte with any portion of his prior statements to his wife, then the rest of those prior statements may also be admitted to explain the apparent inconsistency. *See United States v. Stover*, 329 F.3d 859, 867 (D.C. Cir. 2003); *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir. 1994).

memory. *See* Cleary *et al.*, McCormick on Evidence § 49, at 119 n.18 (3d ed. 1984) ("If the witness's accuracy of memory is challenged, it seems clear common sense that a consistent statement made shortly after the event and before he had time to forget, should be received in support."). Similarly, if defendant in 2005 began making up a cover story (that his 1999-2000 statements were about his *wife* using the HGH) which conflicts with his later Congressional testimony, that helps to establish both that the HGH was used by him earlier rather than by his wife, and that he was in 2005 already developing plans for how to deceive those who might inquire into his substance use. Once again, Mrs. Pettitte's testimony about her husband's contemporaneous account of his discussion with defendant is highly relevant to showing that Mr. Pettitte's present memory is not mistaken due to the passage of time.

In contrast, any danger of unfair prejudice is remote and speculative. Contrary to the defense's argument, the government does not propose to introduce "hearsay within hearsay, or 'double hearsay'." (Def. Mot. 3). Mr. Pettitte told his wife about things that *defendant* said, and the defendant's statements "[are] not hearsay" when offered by the government. Fed. R. Evid. 801(d). At most, therefore, the defense is really talking about one level of potential hearsay – Mrs. Pettitte's recounting of her husband's statements – and even that is not hearsay where it is offered for rehabilitation rather than for the truth of the matter asserted.

The Court can address any potential misuse of this evidence by giving an appropriate limiting instruction, just as it would if a party was using an unsworn inconsistent statement to impeach the declarant's memory. *See White,* 11 F.3d at 1449 (approving of limiting instruction that out-of-court prior statement was to be used only to buttress the credibility of a witness, rather than substantively); Saltzburg et al., *supra* § 801.02[4][c], at 801-38 ("Where a consistent statement is admissible for

other rehabilitation purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence . . . , the adversary is entitled to a limiting instruction as to the appropriate use of the evidence."). As the analogous example of prior inconsistent statements show, such an instruction can be straightforward and easily applied. *Cf.* Criminal Jury Instructions for the District of Columbia, Instr. 2.216 Part A, at 2-52 (Supp. 2010) (instruction regarding use of unsworn prior inconsistent statements).

Finally, the Court should give no credit to defendant's argument that it must be Mr. Pettitte rather than his wife who testifies to Mr. Pettitte's prior statement. A party is generally permitted to make its case how it sees fit, and courts do not micromanage a party's choice about how to present its case. The defense has pointed to no case – and cannot point to any – requiring that a prior statement (whether consistent or inconsistent) be offered through the utteror's mouth, so long as the original declarant is available for cross-examination and confrontation. Indeed, the law in this circuit is to the contrary. *See United States v. Montague*, 958 F.2d 1094, 1099 (D.C. Cir. 1992) (prior consistent statement *can* be introduced "through a witness other than the declarant"); *see generally Pettiford,* 517 F.3d at 588 ("evidentiary relevance ... [is not] affected by the availability of alternative proofs of the element."). Similarly meritless is the defense's complaint that a few minutes of Mrs. Pettitte's testimony will cause undue delay in this trial or be excludably cumulative.[6]

[6]The defense's citation (Def. Mot. 4) to *United States v. Libby*, 475 F. Supp. 2d 73, 88 (D.D.C. 2007), is wholly off-point. In *Libby*, the Court precluded the defense from introducing a written stipulation (called the "Statement") that had been "agreed to by the parties as a substitution for various classified information" that might be made relevant if the defendant testified. *Id.* at 85. Because the defendant's decision not to testify in *Libby* meant there was no evidentiary basis for most of the assertions in the Statement, the Court deemed the Statement inadmissible as a whole. *Id.* at 85-86. The "cumulative" analysis on which the defense now hangs its hat was but a single sentence, stating an alternative basis for the decision as to two paragraphs of the Statement. *Id.* at 88. In any case, as *Libby* makes clear, the problem of purportedly cumulative evidence was only of

In short, Mrs. Pettitte's testimony about her husband's contemporaneous accounts of his conversations with defendant are admissible in this trial, either substantively or at the very least as they bear on credibility. Defendant's motion should be denied.

II. Evidence of Mr. McNamee's Prior Reports About Defendant's Statements Are Admissible

The government also expects that various witnesses at trial will testify that Mr. McNamee told them that he had saved needles he had used to inject defendant with performance enhancing drugs and, in the case of Mr. Pettitte, told Mr. Pettitte in 2003 that defendant had used steroids. The defense attempt to preclude this evidence (Def. Mot. 4) is likewise baseless. The evidence will be admissible to rebut the defense's all-but-certain express or implied charges of recent fabrication or improper motive, which they will claim has influenced Mr. McNamee's testimony.

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secondary concern: While the Court decided to exclude the evidence "in the absence of the defendant's own testimony," *id.*, the Court's willingness to admit the testimony if the defendant *did* testify shows that the Court's concern was less about cumulation of evidence than about admitting what amounted to a stipulation in the absence of an agreement between the parties and in a way that would have precluded cross-examination by the party against whom the Statement was offered. Here, by contrast, the government proposes live testimony rather than a quasi-stipulation, and nothing prevents the defense from examining Mr. Pettitte, Mrs. Pettitte, and indeed even defendant himself about the content of each statement.

Similarly off-point is the defense's reliance (Def. Mot. 4) on *United States v. Duran*, 884 F. Supp. 537 (D.D.C. 1995). There, too, the court's decision that evidence was cumulative was an alternative *and non-independent* basis of decision. In *Duran*, the court excluded certain evidence as falling within the marital communication privilege. *Id.* at 541. The court stated that, if the defense asserted its privilege, but the privilege was rebutted, then the court would also exclude the evidence as cumulative. However, the court made clear that it was the marital privilege concern that was driving the decision – for even with respect to the cumulative evidence decision, the court made clear that it was only excluding the evidence "in the event that the Defendant chooses to assert the [marital communication] privilege," *id.*, something that obviously had nothing to do with whether the evidence was in fact cumulative.

1. The defense never disclaims what has been evident from the start of this case – that the defense strategy is to portray McNamee as a liar with a motive to lie.[7] Defense counsel has told this Court that "the defense theory in this entire case is . . . that Brian McNamee is conning everybody." 4/21/11 Tr. at 37. The defense has listed various dates for the time they believe McNamee began to fabricate. *Compare id.* ("the con began, according to us, with the Mitchell Commission"), *with id.* at 37-38 ("It actually began with the federal agents [on the second day of questioning]"). But the defense has never wavered in stating that they believe Mr. McNamee had a motive to lie – that, as the defense counsel put it, Mr. McNamee "figure[d] out my future lies in saying they did it and now I got to be sure I say it." *Id.* at 38. It is thus highly relevant that a variety of witnesses are expected to testify about the following statements in which Mr. McNamee said essentially the same thing as he will testify to at trial, but said it well before – indeed, in most cases, *years* before – those alleged motives to fabricate arose:

- Mr. Corso will testify that Mr. McNamee told him sometime in or before 2005 that he had saved some of the needles that Mr. McNamee had used to inject defendant.

[7]The defense strategy to call Mr. McNamee out as an epic liar long predates this litigation. Indeed, defendant employed numerous tactics at the February, 2008, Hearing to attack his credibility. Before the Hearing, defendant's efforts to attack Mr. McNamee's credibility featured the filing of a now-dismissed civil defamation suit in Texas. *See Clemens v. McNamee,* 4:08-CV-471 (S.D. Tex.), original complaint at para. 8 ("According to McNamee, he originally made his allegations to federal authorities after being threatened with criminal prosecution if he did not implicate Clemens. McNamee has stated that he later affirmed his allegations to the Mitchell Commission, again only after being expressly threatened with criminal prosecution."). *See Clemens v. McNamee,* 608 F. Supp. 2d 811, *reconsideration denied*, 638 F. Supp. 2d 742 (S. D. Texas 2009). Defendant appealed the District Court's dismissal of this action to the Fifth Circuit which affirmed the dismissal. *See Clemens v. McNamee,* 615 F.3d 374 (5th Cir. 2010). Defendant then petitioned the United States Supreme Court for writ of certiorari which has now been denied. *See Clemens v. McNamee,* ___ S. Ct. ___, 2011 WL 247181 (U.S. June 28, 2011).

- As set forth above, Mr. Pettitte will testify that in about 2003, Mr. McNamee told him that defendant had used steroids.
- Mr. Segui will testify that as early as 2001, and on occasions thereafter, Mr. McNamee told him that he had saved needles he had used to inject players.
- Mr. Radomski will testify that in about 2004, Mr. McNamee told him that he had saved needles he had used to inject players.

All of these conversations occurred well before Mr. McNamee's first, June 2007 contact with federal agents, and before his meeting with the Mitchell Commission investigators in July of 2007. They thus occurred well before the defense's purported motive for Mr. McNamee to fabricate arose. As a result, each of Mr. McNamee's prior consistent statements is admissible substantively, under Rule 801(d)(1)(B).

Rather than disclaim the intent to portray Mr. McNamee as someone making up evidence to save his own skin, the defense motion essentially argues that the Court should close its eyes to the defense's clear strategy, forcing the government to wait for the defense opening[8] and the defense cross-examination of Mr. McNamee before admitting or mentioning substantive evidence that is certain to be admissible. While this strategy may pose tactical benefits for the defense (which would get to make arguments in opening statements or cross-examination that the government cannot meet until later), those tactics are not a sound basis for delaying the inevitable. Unless the defense is willing to completely and firmly foreswear arguments and cross-examination implying that Mr. McNamee was making things up to avoid prosecution, the Court should recognize the obvious: Mr.

[8]We anticipate that defense counsel will devote significant attention to attacking Mr. McNamee's credibility in his opening statement.

McNamee is going to be attacked as having a motive to fabricate, and the government will be permitted to admit his prior consistent statements in response. *Cf. Montague,* 958 F.2d at 1096 (finding it relevant to determination of implied charge of recent fabrication, that defense counsel had refused the government's offer "to withhold tender of the prior statement if the trial counsel would agree not to argue in closing to the jury that [a witness] hoped by his testimony to influence the sentencing judge toward leniency").

2. The defense's arguments under Rule 403 (Def. Mot. 5-6) are likewise meritless. Once again, the defense misunderstands the burden of persuasion in its Rule 403 discussion. Contrary to the defense's argument, the government, as proponent of the evidence, does not have the burden to show that the potential for prejudice is "insubstantial." (Def. Mot. 6). Rather, the defense, which seeks to exclude otherwise relevant evidence, has the burden to show that the risk of unfair prejudice "substantially outweigh[s]" the evidence's probative value. Fed. R. Evid. 403. *See United States v. Starnes,* 583 F.3d 196, 215 (3d Cir. 2009) (stressing that exclusion under Rule 403 requires "*unfair* prejudice, not just prejudice," and that "unfair prejudice 'does not simply mean damage to the opponent's cause'") (citation omitted). In other words, the defense must show the Court that there is an undue risk of the jury using the evidence for impermissible purposes, rather than for the limited purpose for which it was admitted. But with a statement admitted under Rule 801(d)(1)(B), that risk is essentially nil, because once a prior statement is admitted under Rule 801(d)(1)(B), the jury is *entitled* to use the prior statement substantively, for the truth of the matter asserted.

In short, this Court should recognize what defendant's counsel have already made clear – their strategy at trial will be to impugn Mr. McNamee as making up a story to avoid punishment. Mr. McNamee's prior statements are therefore admissible.

Conclusion

For the reasons set forth, defendant's motion should be denied.

Respectfully Submitted,

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