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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	.	
Plaintiff,	.	
vs.	.	Docket No. CR 10-223
	.	
WILLIAM R. CLEMENS,	.	Washington, D.C.
	.	Tuesday, July 5, 2011
aka Roger Clemens,	.	
	.	
Defendant.	.	9:35 A.M.
. . . . .	.	Day One A.M. SESSION

TRANSCRIPT OF MOTIONS HEARING  
 BEFORE THE HONORABLE JUDGE REGGIE B. WALTON  
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 Court Reporter: Cathryn J. Jones, RPR  
2 Official Court Reporter  
3 Room 6521, U.S. District Court  
4 333 Constitution Avenue, N.W.  
5 Washington, D.C. 20001

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7 Proceedings recorded by machine shorthand, transcript  
8 produced by computer-aided transcription.  
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## 1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Criminal Action Number 10-223,  
3 United States of America versus William Clemens.

4 Please identify yourselves for the record.

5 MR. DURHAM: Your Honor, good morning. Steven  
6 Durham appearing on behalf of the United States.

7 MR. BUTLER: Daniel Butler for the United States,  
8 Your Honor.

9 MR. HARDIN: Good morning, Your Honor. Rusty  
10 Hardin on behalf of the defendant, as well as Mr. Mike  
11 Attanasio.

12 MR. ATTANASIO: Good morning, Your Honor.

13 THE COURT: Good morning. Okay. We have a number  
14 of matters we need to resolve today so we can proceed  
15 promptly tomorrow with the jury selection. One of the  
16 things I wanted to indicate is the starting time. When I  
17 don't have matters, other matters that I have to deal with  
18 at nine o'clock, I mean, 9:30, I would intend to start at  
19 nine o'clock because I want to try to move this matter along  
20 and get it resolved. So, I will let you know the day before  
21 when we're going to sit at 9:30 as compared to nine o'clock.

22 I know there had been a request by both parties  
23 for a written questionnaire. I don't use written  
24 questionnaires, I never have. And my principle reason for  
25 not doing so is I think it disadvantages less-educated

1 people. And I give counsel the opportunity to conduct a  
2 thorough, oral voir dire of the potential jurors. And as  
3 long as the questions aren't repetitive or totally  
4 irrelevant, I give you a wide latitude in asking questions  
5 to make sure that you know as much as you can about the  
6 jurors before the selection process starts.

7           There also was a joint request to increase the  
8 time of the opening statements from 30 minutes to 60  
9 minutes, that's fine. Also, there's a request, the  
10 defendant's request for a waiver under Local Rule 442. And  
11 I'll hear from counsel in reference to that. I think that's  
12 the request regarding Mrs. Clemens?

13           MR. HARDIN: Yes. Simply that she is to be a  
14 witness, she will be testifying. So, I understand the  
15 government is opposed to us having her present in the  
16 courtroom. We, of course, have no objection to, as the  
17 rules allow, for a case agent for the government to be  
18 present, even though Mr. Longmire is going to be a key  
19 witness. He's going to be here throughout the trial.

20           And we think it's discretionary with the Court as  
21 to whether the spouse of the defendant is allowed to attend  
22 during the trial. But there is no question that we will be  
23 calling her as a witness, and that's why we wanted to raise  
24 it with the Court.

25           THE COURT: I mean, obviously, we permit the case

1 agent to be present because his presence is designed to  
2 assist the government in the presentation of their case. I  
3 would assume that that's not the case in reference to  
4 Mrs. Clemens. I mean, obviously I don't want to restrict a  
5 spouse's ability to be present. But if she's going to  
6 testify, and if the testimony that she would hear would in  
7 some way give her a tactical advantage in reference to what  
8 she's going to say, then obviously that's a problem.

9 I don't know exactly what she's going to say,  
10 whether there would be some witnesses that her presence  
11 would be more problematic than others. I just don't know  
12 because I don't know what she's going to say and I don't  
13 know what other people are going to say.

14 But the government's position?

15 MR. DURHAM: Your Honor, Mr. Hardin and counsel,  
16 we've talked about this. It's not our objective to  
17 foreclose family members to come into the courtroom. The  
18 fundamental problem we have here is that at least we believe  
19 Mrs. Clemens' proffered testimony relates to an issue that's  
20 central to this case, that not just one witness, but several  
21 witnesses will testify either directly or in a  
22 circumstantial fashion. Of course, the underlying rationale  
23 of Rule 615 is to prevent a party from being, a witness from  
24 potentially being influenced by the testimony that they hear  
25 in the courtroom.

1           And we find it difficult to separate out witness,  
2 on a witness-by-witness basis. Now, what I will say --

3           THE COURT: Are there some witnesses that you know  
4 their testimony would, would not in any way aid her  
5 testimony?

6           MR. DURHAM: The answer to that is probably.  
7 Mr. Butler and I would have to give that some thought. The  
8 answer is probably.

9           THE COURT: Well, I'd ask that you make that  
10 assessment. And if it's clear that certain witnesses'  
11 testimony will not in some way aid her in reference to the  
12 testimony she's going to present, that you let me know. And  
13 obviously, she would not have to, she would not be present  
14 during the opening statements. But during the testimony, if  
15 a witness isn't going to say something that would aid her,  
16 then I think it would be appropriate to permit her during  
17 those witnesses to be present. Otherwise, in reference to  
18 other witnesses, she would have to be outside the courtroom.

19           MR. HARDIN: That's very fair, Your Honor. Did I  
20 understand, let me make sure I understand. She can or  
21 cannot be present during opening statement?

22           THE COURT: She cannot, since I assume there will  
23 be comments by both sides in reference to witnesses who will  
24 be saying things that may relate to her testimony.

25           MR. HARDIN: And then one final thing. Would I be

1 permitted in opening statement to explain her absence, that  
2 she's like any other witness, that she can't be in the  
3 courtroom when other witnesses might be testifying, so the  
4 jury doesn't wonder why the wife of the defendant is not  
5 here?

6 THE COURT: Any objection?

7 MR. DURHAM: No, Your Honor.

8 THE COURT: Very well.

9 MR. DURHAM: If I might add one additional thing,  
10 Your Honor. After Mrs. Clemens testifies, if she were to be  
11 called, we would have no objection at that point, after  
12 she's been fully excused.

13 MR. HARDIN: Right.

14 MR. DURHAM: Just like any other witness.

15 MR. HARDIN: That's very fair. Thank you, Your  
16 Honor.

17 [Brief pause.]

18 THE COURT: I'm sorry, I actually made a mistake.  
19 We discussed something I intended to discuss later. But the  
20 Local Rule 442 deals with only one lawyer making the closing  
21 arguments. And if -- I mean, obviously, in reference -- and  
22 the government is requesting that you bifurcate the  
23 presentation?

24 MR. DURHAM: Your Honor, what we had planned is  
25 that Mr. Butler will deliver the closing argument of the

1 United States, and then that I will deliver the rebuttal  
2 argument.

3 THE COURT: That's fine. And is there a request  
4 also from the defense for some type of bifurcation of  
5 presentation?

6 MR. HARDIN: Yes, Your Honor. Not on opening  
7 statement, but on closing argument, we would hope to be able  
8 to split it between Mr. Attanasio and myself.

9 THE COURT: I think that's fine. Any objection?

10 MR. DURHAM: No, Your Honor.

11 THE COURT: Very well. Now, also, there's a  
12 request that there be a modification of my standing order  
13 regarding counsel remaining in the courtroom during the  
14 course of the proceedings while we're in session.  
15 Obviously, if there's some need for a lawyer to go outside  
16 in order to prepare for a next witness or something critical  
17 to the presentation of the case, I'm not going to hold  
18 counsel to the obligation to be present in the courtroom.

19 Also, there's a request from the government that  
20 there be excerpts from the defendant's congressional  
21 deposition, that they be read either by the Court or by  
22 court staff. I've never done that and I have a problem, I  
23 guess, with doing that. It seems to me if the government is  
24 presenting such information, you're presenting it as  
25 affirmative evidence. So, you can have somebody obviously



1 from the United States Attorney's Office read that, but I  
2 don't think it should be someone associated with the Court.

3 MR. DURHAM: My concern, Your Honor, I don't mean  
4 to pass the potato as it were, but there's somebody  
5 associated with the government, there's infliction of voice  
6 and tone and things that are not captured in a transcript  
7 itself. And what Mr. Butler and I want to try to avoid is  
8 any notion that there's some type of partisanship injected  
9 into the reading of the transcript itself.

10 THE COURT: But if it's affirmative action, I  
11 assume you're offering it because you're seeking to have it  
12 used in some way against Mr. Clemens. And I don't think the  
13 Court should be in a position where it is, in a sense,  
14 sponsoring that testimony or that evidence.

15 MR. DURHAM: I understand.

16 THE COURT: I understand your concern, but, I  
17 mean, if it's evidence being presented by you for the  
18 purpose of trying to adversely impact Mr. Clemens, I think  
19 it's got to come from a government witness.

20 MR. DURHAM: Very well.

21 MR. HARDIN: Your Honor, may I approach on an  
22 issue --

23 THE COURT: Yes.

24 MR. HARDIN: -- in connection with that?

25 The government has informed us that they have been

1 unable to get an audio of the deposition, that this fits  
2 into what we were just talking about. For the Court to be  
3 reminded, they're going to be introducing statements of  
4 Mr. Clemens from the deposition, and then a week later from  
5 his testimony before Congress live. The Congress deposition  
6 or hearing is fine. They've got the audio, they've got the  
7 video and there's no issue there. We have, of course, the  
8 deposition of his taking back on February the 5th, I think.  
9 That deposition we do not have an audio for. Both sides  
10 have --

11 THE COURT: Was there an audio at some point  
12 produced?

13 MR. HARDIN: No.

14 THE COURT: I mean, was there one made?

15 MR. HARDIN: Yes, yes, there was. And the  
16 government informs us that they, like us, would like to have  
17 the audio. What we want to do is to be able to have the  
18 jury hear his voice as he is saying these things that the  
19 government challenges is untrue or is misleading or  
20 whatever.

21 THE COURT: What's the problem with getting it?

22 MR. HARDIN: I think perhaps they can tell us.

23 MR. DURHAM: Your Honor, we've investigated that  
24 through House counsel, and they've reported to us; that is,  
25 House counsel, that these tapes are proprietary to the House

1 reporter, and that the House report is not willing to  
2 produce these tapes. We have made efforts. We do believe  
3 that they are beyond --

4 THE COURT: Not willing to produce them, why?

5 MR. DURHAM: They're proprietary. And I believe  
6 that there may be some -- well, I don't know exactly.  
7 Perhaps the best person to answer that question would be  
8 House counsel. I don't want to speak on their behalf. They  
9 are beyond the subpoena power, at least as far as we can  
10 tell because they are in the possession of the legislative  
11 branch.

12 MR. HARDIN: Your Honor, if I may, apparently I'm  
13 not going to reopen the speech and debate clause --

14 THE COURT: But it's interesting. I mean, if they  
15 are proprietary, how did you get the transcript?

16 MR. HARDIN: That was going to be my point.

17 MR. DURHAM: The transcripts, Your Honor, were  
18 produced by the committee. The transcript was made and then  
19 produced to the committee, and then the committee made the  
20 determination to disseminate the transcript publicly. The  
21 tape itself is not, does not leave, typically does not leave  
22 the House reporter's office or possession and the committee  
23 has not asked for it.

24 MR. HARDIN: May I suggest that without revisiting  
25 this speech and debate clause issue that the Court has ruled

1 on in another context, can we perhaps present the Court for  
2 a potential order or request of the committee? I can't  
3 imagine that the committee can't do the same thing with the  
4 audio that they've done with the other. I would be very  
5 surprised if the court reporting people will tell the  
6 committee, no, you, the committee, cannot have our audio,  
7 though you've got our deposition. I don't think they can  
8 selectively waiver these things.

9 THE COURT: Was there any request made of the  
10 committee itself to have the reporter produce that to the  
11 committee so the committee could make it available?

12 MR. DURHAM: Yes, Your Honor.

13 THE COURT: And they've declined to do that?

14 MR. DURHAM: That is the best of my knowledge,  
15 yes, Your Honor.

16 MR. HARDIN: May I ask if it was a written request  
17 or if it was just a phone call?

18 MR. DURHAM: We deal directly verbally, in-person,  
19 on the phone with House counsel on a regular basis in  
20 connection with the case.

21 THE COURT: Well, I mean, obviously, I haven't had  
22 an opportunity to look into this particular issue and  
23 whether we have a speech and debate issue as it relates to  
24 the audio or not. So, I don't know. I mean.

25 MR. HARDIN: If I may, I think if we can perhaps

1 give the Court a short memo as a proposal. And I don't even  
2 know what that is as yet, Your Honor. But I, I think there  
3 is a lurking, and the Court raised this is in the last  
4 hearing on another issue, there's a lurking due process  
5 issue here as to whether or not if a man is being prosecuted  
6 for what he said to a group, and the group says we're only  
7 going to let you have the written exposition of it, but we  
8 will not let the jury hear the tone and the voice of the  
9 person as they're trying to decide from a written record  
10 whether he was intentionally misleading somebody or not.  
11 And so, the best evidence of that obviously would be the  
12 audio.

13           And Congress can be in a situation -- if the  
14 speech and debate clause is invoked in this issue, and I'm  
15 not sure, like the Court has just said, I'm not sure it is.  
16 But if it is, we have a centrally due process issue as to a  
17 defendant.

18           THE COURT: I mean, that's fine. I kind of hate  
19 being in this position because I don't want to find myself  
20 in the situation where if I agreed with your position and I  
21 ordered it be produced, I assume if the Congress were of the  
22 view that it is covered by the speech and debate clause,  
23 they would refuse to produce it and then we have an  
24 appellate issue. And if we have an appellate issue that  
25 goes up, then we're not going to be able to start this

1 trial. And we have expended a lot of resource to put the  
2 case in this posture.

3 So, I kind of regret that the case is in this  
4 posture where this issue is just being presented to me  
5 today. It should have been presented to me some time so  
6 that we could have tried to resolve this before today.

7 MR. HARDIN: Well, I think we had requested and  
8 the government believed, I think, in fairness to the  
9 government, the government did not anticipate this problem.  
10 Our understanding from the government is the audio was going  
11 to be produced. And so, it's never been an issue necessary  
12 to the Court.

13 Now, we've only learned recently, like within a  
14 week or so, that the audio was denied to the government and  
15 they were not going to be able to produce it. I understand  
16 the Court's dilemma. May I suggest that the prosecution and  
17 we try to seek if we can be kind and gently persuading to  
18 the House to give us the audio? It certain doesn't --

19 THE COURT: Maybe remind them of the fiscal issues  
20 that we're dealing with in this country, and why fight an  
21 issue like this. And it's going to cost the court a lot of  
22 money if we have to have this matter delayed.

23 MR. HARDIN: I think that's a very good idea and  
24 we'll certainly try it.

25 THE COURT: Okay.

1           MR. HARDIN: So, we can take this off the table  
2 for the moment and see what we can do with the government.

3           THE COURT: Okay.

4           MR. HARDIN: Thank you, Your Honor.

5           THE COURT: I think the only matters we have left  
6 now are the motions in limine, and we have the defendant's  
7 motion in limine to preclude the introduction of other  
8 witness evidence concerning dealings and discussions with  
9 Mr. McNamee. As I understand, the government is seeking to  
10 have a number of other former Major League Baseball players  
11 testify about their interactions with Mr. McNamee and the  
12 fact that they were getting either steroids or human growth  
13 hormones from Mr. McNamee.

14           And I don't know what the defense is going to be,  
15 but it would seem to me that the position that the defense  
16 takes may have an impact on that issue. If they are not  
17 challenging, for example, Mr. McNamee's ability to gain  
18 access to these substances, if they're not challenging his  
19 ability to administer them, if they're not challenging his  
20 knowledge of these substances, if none of those issues are  
21 going to be at issue, then I assume these witnesses would be  
22 talking about, I do have some concerns about that testimony.

23           I would assume, at least in part from at least  
24 things that I've had some privy to, that Mr. Clemens'  
25 position will not be that Mr. McNamee never administered

1 anything to him, but what was being administered to him, he  
2 had no knowledge. It was either human growth hormone or  
3 steroids, that it was vitamins and other things that are not  
4 banned, I guess, by Major League Baseball. If that is, in  
5 fact, a position that he's taking, then I guess I wonder how  
6 evidence that other individuals were getting these  
7 substances from Mr. McNamee and they knew they were getting,  
8 how that could somehow be imputed to Mr. Clemens.

9 But I'll hear from the government as to why this  
10 evidence is relevant, unless in some way the defense puts it  
11 at issue.

12 MR. DURHAM: Your Honor, thank you. As we point  
13 out in the papers, Your Honor, the defense theory from the  
14 outset will be to attack the credibility of Brian McNamee,  
15 and to do that in legitimate ways with prior inconsistent  
16 statements with other acts where he's been dishonest. And  
17 they have the right to do that.

18 But what we're saying is that, this is  
19 corroboration. This is mainstream corroboration of  
20 Mr. McNamee's testimony. And we cite for Your Honor's  
21 consideration Judge Illston's opinion in the Bonds case, in  
22 which, what Mr. McNamee is saying, so on one hand the  
23 defense tears Mr. McNamee down and says that he can't be  
24 believed. He can't be believed on anything.

25 There's a symmetry, we submit, to the Federal Rule



1 of Evidence. And the symmetry allows us to introduce  
2 evidence that corroborates what Mr. McNamee had said. Let  
3 me give the Court --

4 THE COURT: But aren't you seeking to corroborate  
5 him on matters collateral to this case?

6 MR. DURHAM: No, Your Honor. These matters are  
7 central to this case. And let me explain why. If, for  
8 instance, Mr. McNamee, in Senator Mitchell's report, had  
9 referred to distributing or facilitating the distribution of  
10 human growth hormone to Mr. Pettitte, Mr. Stanton and  
11 Mr. Knoblauch. If, for instance, Mr. Pettitte, Stanton and  
12 Knoblauch were to say, well, that's simply not true, I got  
13 no human growth hormone from Mr. McNamee. Then that  
14 obviously, or at least I think from a defense perspective,  
15 would be highly relevant, highly probative. The defense  
16 would say --

17 THE COURT: But that would be predicated on his  
18 inconsistent statement.

19 MR. DURHAM: No.

20 THE COURT: If McNamee said that he had given them  
21 these substances and they said no, then obviously, bringing  
22 in their testimony that would conflict with what he said  
23 would be relevant because it would go to his credibility.

24 MR. DURHAM: That's correct. This is the reverse  
25 situation, Your Honor, where there's corroboration.

1           Another example is, if there was evidence out  
2 there that Brian McNamee knew nothing about human growth  
3 hormone, had no information on it, this would be relevant  
4 because it would make it less likely that what he's saying  
5 with respect to Mr. Clemens is true.

6           THE COURT: You got me there. I agree. If they  
7 in some way suggest that he had no knowledge about human  
8 growth hormone, and you had other witnesses who said that  
9 well, yeah, we were getting it from him and over a period of  
10 time, then I think that would undermine that suggestion.  
11 But I don't know if they're going down that road.

12           MR. DURHAM: We cite a case, Your Honor, it's a  
13 D.C. Circuit case, United States versus Sumlin, in our  
14 papers. And it stands for the general proposition that past  
15 truthful testimony is relevant in that, not because it  
16 corroborates what the witness is saying, it builds the  
17 witness up in a fashion that's consistent --

18           THE COURT: What was the factual situation in that  
19 case? Was it similar to this when it was talking about some  
20 other individuals and not specifically about the defendant?

21           MR. DURHAM: Someone was an informant that the  
22 government, that someone was a defendant. The government  
23 used an informant and the government was permitted in that  
24 case, as I read the case, to make the argument and to put on  
25 evidence that the informant had in the past provided

1 truthful information with respect to essentially the same  
2 subject matters.

3 THE COURT: And was that on the guilt/innocence  
4 issue? It wasn't a probable cause?

5 MR. DURHAM: No, Your Honor. It was very much on  
6 that issue. That is a case --

7 THE COURT: But what -- I mean, had there been a  
8 line of attack by the defense that made that relevant?

9 MR. DURHAM: Yes.

10 THE COURT: And what was the line of attack there?

11 MR. DURHAM: That it was improper bolstering.  
12 That it was just naked bolstering.

13 THE COURT: No, I understand. I'm saying, did the  
14 defense in some way attack the individual's credibility in  
15 some way?

16 MR. DURHAM: I do not know the answer to that from  
17 the context of the case.

18 THE COURT: Okay. Well, what's the case name  
19 again? I'll have to go back and look at the case.

20 MR. DURHAM: Sumlin, United States versus Sumlin.  
21 It's D.C. Circuit and it's cited in our papers. It is 271  
22 F.3d at 274, 2001.

23 THE COURT: Okay. My law clerk will find the  
24 case. He'll look at it and we'll get back to that because I  
25 have to read that case to see if that's convincing to me.

1 Because otherwise, it does seem to me problematic because I  
2 can understand why you'd want to do it, but my concern is  
3 that if his position is that yes, McNamee was giving me  
4 injections, but he was injecting me with what I thought were  
5 vitamins and other items that are not banned, the concern I  
6 would have is that if you bring in that evidence showing  
7 that these other individuals were getting these substances  
8 from Mr. McNamee and they knew that they were getting, that  
9 the jury may say well, if they knew what they were getting  
10 from McNamee, then why wouldn't Clemens also know that he  
11 was getting the same thing. And that doesn't necessarily  
12 compute. That may not be true.

13 And so, I think there is a significant potential  
14 for him being unduly prejudiced by that information coming  
15 in. But I'll look at the case and see if the facts in that  
16 case match up to what we're talking about here and we'll  
17 come back to that issue.

18 MR. DURHAM: And if I might just raise one other  
19 point in connection with that. Mr. Clemens was quite clear  
20 at the hearing and in the deposition that he believed the  
21 substances in the needles that Mr. McNamee used were, in  
22 fact, B-12 and lidocaine.

23 So, Mr. Clemens' knowledge, and then there was  
24 some questions about, that suggested well, you know, did  
25 McNamee fool you? Did, the upshot of which was, was it

1 possible that McNamee advertised that it was B-12 and  
2 lidocaine when, in fact, he was tricking? When, in fact, it  
3 was something else? This issue was raised in the  
4 deposition, and it was raised also in the hearing through  
5 questions that asked Mr. Clemens what color B-12 was.

6 We want to be in a position, Your Honor, to rebut  
7 any notion that Mr. Clemens somehow thought that what  
8 McNamee was giving him was B-12, when, in fact, it wasn't.  
9 This is also a central issue of proof in the government's  
10 case.

11 Your Honor may recall in the Bonds case,  
12 Mr. Bonds' defense was, I thought that this was flaxseed oil  
13 and arthritic balm, that it was not, the clear and the cream  
14 were not, in fact, anabolic steroids. Mr. Clemens, this  
15 issue has come up through the questions that the committee  
16 has asked Mr. Clemens.

17 I don't know if Mr. Clemens is in a position or if  
18 Mr. Hardin is in a position to come before the Court and say  
19 we will foreswear any notion or suggestion that there was  
20 any type of switcheroo by McNamee, that what I got I know  
21 was vitamin B-12. But this is another issue that I think is  
22 important for the Court's consideration. Because what the  
23 players will testify to Your Honor, Knoblauch, Stanton and  
24 Pettitte, is that there was no mis-advertising; McNamee told  
25 them what they were getting, and that is, in fact, what they

1 got.

2           We don't want to be in a position where there is  
3 even by inference on a jury panel this notion of, well, you  
4 know, McNamee said it was B-12 and Mr. Clemens believed him.  
5 But you know, what, you know, maybe it was anabolic  
6 steroids. That would stop a perjury prosecution in its  
7 tracks. The reason is because Mr. Clemens would then not  
8 knowingly have made a false statement, very similar to the  
9 situation in the Bonds case. So, that's an independent  
10 basis, Your Honor, that we would ask the Court to consider  
11 here.

12           THE COURT: Okay. I'll look at the case. I'm  
13 just really still having some real problems with this  
14 because I can see how even with a cautionary instruction,  
15 assuming I could craft one that would intelligible to the  
16 jury, I could see how they could still potentially misuse  
17 that evidence. I mean, I don't know. I mean, I use to get  
18 cortisone shots when I was playing football in college. And  
19 I had to rely upon what the trainer was giving me. And I  
20 would not want to be held responsible for having done  
21 something inappropriate based upon what that trainer was  
22 giving to other people. And that's the concern that I have.

23           I mean, if you're and if Mr. Clemens is going to  
24 say that he was told by McNamee this is what he was getting,  
25 and to bring in testimony from other people that they were

1 getting other substances that are banned and that they knew  
2 what they were getting, I just fear that somehow the jury  
3 will use that to impute knowledge on Mr. Clemens' part as to  
4 what he was getting.

5 But I'll look at the case and then we'll revisit  
6 this issue again.

7 MR. DURHAM: Very well.

8 THE COURT: Mr. Hardin, is there anything you want  
9 to add before I --

10 MR. HARDIN: Mr. Attanasio, Your Honor.

11 MR. ATTANASIO: Thank you, Your Honor. Mike  
12 Attanasio for the defendant and I'll be very brief. And I  
13 appreciate that the Court has framed the issue.

14 The only thing I wanted to add is a salient that  
15 hasn't been mentioned either by the Court or by the  
16 government. The government relies, as the Court is aware  
17 and as we just heard, virtually exclusively on the Bonds  
18 case. What we haven't talked about, though, is the fact  
19 that the reason Judge Illston made a rather extraordinary  
20 ruling --

21 THE COURT: Because the trainer didn't testify in  
22 that case.

23 MR. ATTANASIO: Yes, sir. And so, you take the  
24 two facts, the unique nature of the Bonds case, which was to  
25 challenge Greg Anderson's use of steroids or Greg Anderson's use

1 of steroids, combined with the fact that Mr. Anderson  
2 declined to testify and was held in contempt of court.  
3 Judge Illston herself called it an extraordinary  
4 circumstance that justified what is really, as the Court has  
5 already outlined, an extraordinary type of evidence, to have  
6 someone come in and say, I obtained drugs from Brian  
7 McNamee; therefore, the defendant must have, too.

8 So, we agree with the way the Court has framed the  
9 issue. I just wanted to add that one piece. Thank you.

10 THE COURT: I'll look at the case and then we'll  
11 revisit that issue.

12 [Brief pause.]

13 THE COURT: Okay. The next motion is the  
14 defendant's motion in limine to preclude hearsay evidence  
15 regarding Mr. Clemens. As I understand, this evidence is  
16 evidence regarding what Mr. Pettitte allegedly said to his  
17 wife after he had a conversation or was in a conversation  
18 with Mr. Clemens when he says Mr. Clemens made reference to  
19 him using human growth hormone.

20 And also as I understand, statements that  
21 Mr. McNamee would have made to other individuals, including  
22 other players, about the fact that he was keeping these  
23 syringes and gauzes and so forth. Is that what we're  
24 talking about?

25 MR. ATTANASIO: Yes, Your Honor.



1           THE COURT:   Okay.   Now, in reference to  
2 Mr. Pettitte's wife.   As I understand, the government would  
3 only be proposing to use that testimony if it believed it  
4 became relevant in rebuttal.   Is that right?   Or possibly in  
5 your case-in-chief, if evidence comes out beforehand  
6 suggesting something that may warrant her testimony being  
7 admitted?

8           MR. DURHAM:   Yes, which would be an attack on  
9 Mr. Pettitte's memory, which Mr. Clemens made at the  
10 February 2008 hearing.

11          MR. ATTANASIO:   Just to pick up that point.   First  
12 of all, I would suggest respectfully the proper remedy here  
13 is to have Mr. Pettitte testify and then to see where we  
14 are.   I don't know that the ruling on this --

15          THE COURT:   I think that's probably right.   I  
16 think until I see what your line of inquiry on  
17 cross-examination is going to be, I think I'm going to be  
18 hard pressed to assess whether that is going to be relevant  
19 or not.

20          MR. ATTANASIO:   Yes.   Yes, Your Honor.   And just  
21 to put that in context and to put in context what counsel  
22 for the government said, what we expect will happen,  
23 depending on Mr. Pettitte's direct testimony, is that the  
24 defense position is and has been, going back to the February  
25 hearing, that Mr. Pettitte misheard.   There was a failure to

1 communicate at the outset. It's not a recent motive to  
2 fabricate certainly. We have no quarrel with Mr. Pettitte  
3 in that regard.

4 THE COURT: And it's not a claim of lost memory?

5 MR. ATTANASIO: Yes, sir.

6 THE COURT: It's that he misheard --

7 MR. ATTANASIO: Correct.

8 THE COURT: -- what your client purportedly said?

9 MR. ATTANASIO: Correct. And if that's the way it  
10 develops and that's the way we think it will develop, then  
11 the fact that he misheard it on day one, repeated it to his  
12 wife on day two, is really not probative of anything.  
13 That's the defense position.

14 THE COURT: Do you disagree with that?

15 MR. DURHAM: Well, the reservation that I have is  
16 that it was Mr. Clemens himself at the 2008 hearing who  
17 alleged that Mr. Pettitte's memory was faulty. He said that  
18 he used the word "misremembered". And he used it a number  
19 of times, that Andy has misremembered. Andy has  
20 misremembered our conversation. Mr. Clemens has put  
21 Mr. Pettitte's memory squarely at issue.

22 THE COURT: Maybe that was a inarticulate way of  
23 him expressing what the situation was.

24 MR. DURHAM: Well, it's possible, but we don't  
25 know that. The point that we're trying to make here, Your

1 Honor, is that Obstructive Act Number 12; Mr. Clemens came  
2 to a hearing, he was represented by counsel, presumably he  
3 was well prepared. He chose this word and he repeated it  
4 over and over again. It's an attack on Mr. Pettitte's  
5 memory. And I think that we're fairly entitled to show,  
6 especially given the fact that we've pled it in Count One of  
7 the Grand Jury indictment, that Mr. Pettitte's memory, there  
8 was nothing wrong with Mr. Pettitte's memory. That's the  
9 fair use of this.

10 THE COURT: I don't dispute what you say in  
11 reference to what Mr. Clemens said and the fact that he used  
12 this word on several occasions. But if his position now is  
13 what is being represented, that he is saying that  
14 Mr. Pettitte misconstrued at the inception what he was  
15 saying, are you saying that even though he uses the word,  
16 "misremember", that that somehow opens the door for the  
17 government to bring in the fact that Mr. Pettitte told his  
18 wife shortly after that discussion that this is what Roger  
19 Clemens said to him?

20 MR. DURHAM: Yes. And the reason is because  
21 Mr. Clemens himself has made it an issue with the words that  
22 he carefully chose at the hearing. And now what we have at  
23 trial is, oops, never mind. I really didn't mean there was  
24 a memory issue, even though it came out of my mouth four or  
25 five times. I'm going to limit my attack now on

1 Mr. Pettitte, my former friend and teammate, on simply that  
2 his hearing, there's something wrong with his hearing or his  
3 ability to process information.

4 We take exception with that, Your Honor, because  
5 it was this man who put that into Mr. Pettitte's memory in  
6 issue in the first place. And we believe that we are fairly  
7 entitled to bring that in to some --

8 THE COURT: And there was, the purported original  
9 statement was made when?

10 MR. DURHAM: The original statement was made in  
11 1999 or 2000, in that time frame.

12 THE COURT: And then the testimony before the  
13 committee was, what, 2008, you said?

14 MR. DURHAM: Yes. Yes, 2008. I'm sorry.

15 THE COURT: And Mrs. Pettitte would say that her  
16 husband, Andy Pettitte, told her about that statement how  
17 long after the original discussion?

18 MR. DURHAM: Same day.

19 MR. ATTANASIO: Yes, Your Honor. We need to be  
20 careful here. And the Court touched on something.  
21 Mr. Clemens, when he sat in that deposition room or when he  
22 sat in that hearing room, he used the best words he could.  
23 He's not a scholar of linguistics. So let's be real careful  
24 about how we describe that.

25 What Mr. Clemens said first was, and it's quoted

1 in the government's brief in Footnote Four, "I believe Andy  
2 has misheard." That's his statement. He then goes on,  
3 "Mr. Congressman, on his comments about myself using HGH,  
4 which never happened. My problem with what Andy says and  
5 why I think he misremembers is that if Andy Pettitte knew  
6 that I had used HGH, or I had told Andy Pettitte that I had  
7 used HGH, before he would use the HGH, what have you, he  
8 would have come to me and asked me about it."

9           So, again, the government, this would be a trial  
10 issue, but they're parsing these transcripts too fine to put  
11 specific linguistic exactness on a former Major League  
12 Baseball Player. His first statement is, his first  
13 statement, which Mr. Durham left out is, "I think  
14 Mr. Pettitte has misheard." And that will be our position  
15 at this trial, depending on Mr. Pettitte's testimony.

16           So, we just don't see why when he misheard the  
17 statement, would be the defendant's position, repeating the  
18 same misheard statement to a third party in a hearsay fact,  
19 having then that third party testify in a hearsay fashion is  
20 probative of anything.

21           THE COURT: I mean, that's sort of the way I see  
22 it because otherwise, it seems to me the government then  
23 puts before the jury a prior consistent statement that  
24 really is not meeting the force of any attack on that  
25 statement. Because I think as counsel says, the position as

1 expressed by Mr. Clemens himself at least initially, was  
2 that Andy Pettitte misunderstood what he was saying. And  
3 that, as I understand, is going to be his position  
4 throughout this proceeding.

5           And I think that being his position, to then let  
6 in these statements that Pettitte made to his wife that are  
7 consistent with what Pettitte is going to say, it seems to  
8 me, really doesn't aid the jury in their assessment as to  
9 whether Mr. Clemens is correct that Andy Pettitte misheard  
10 him, or whether Mr. Pettitte is correct that he heard him  
11 correctly and he's now repeating again in court what he says  
12 he heard back then.

13           So, it just seems to me that to let this in under  
14 that circumstance would be a misuse of the limited purpose  
15 for which prior consistent statements can be introduced.  
16 Now, something may occur during the course of the trial that  
17 could change the course of how I thought, how I think this  
18 issue should be resolved. But I think, based upon what I'm  
19 hearing now, I think it would be err for me to, to let that  
20 information in.

21           I understand the use of the word "misremember" may  
22 suggest that there's a memory issue, but I think clearly the  
23 position that's going to be taken, which is consistent with  
24 what Mr. Clemens said at one point, is that his view is that  
25 Mr. Pettitte misunderstood what he said, not that he has a

1 faulty memory about what was said.

2           Okay. The next question we have is the  
3 government's motion in limine to preclude evidence, comments  
4 and arguments regarding the, I guess this is the  
5 investigation regarding Mr. McNamee in reference to the  
6 sexual abuse allegations that were made down in Florida.

7           And in reference to that, I think the government  
8 concedes that it would be appropriate to bring out the fact  
9 generically that there was an investigation and that  
10 Mr. McNamee, in reference to that generic investigation,  
11 made some false statements. Is that right?

12           MR. BUTLER: Yes, Your Honor. Is it okay if I  
13 address the Court?

14           THE COURT: That's fine.

15           MR. BUTLER: Okay.

16           THE COURT: That being the case, I guess I'll hear  
17 from the defense first, even though it's the government's  
18 motion, as to why it would be relevant to bring in the  
19 nature of the investigation. It seems to me that would be  
20 extremely prejudicial to bring out the fact that Mr. McNamee  
21 had some type of rape allegations lodged against him. When,  
22 in fact, there were never any charges filed against him.  
23 So, I assume the authorities concluded that the allegations  
24 had no merit. And, therefore, did not proceed with a  
25 prosecution.

1           And it seems to me it would be unfair, under those  
2 circumstances, to then bring out that information with the  
3 defense having the ability to bring out the fact that there  
4 was a generic investigation and in reference to that  
5 investigation, Mr. McNamee did make some false statements.  
6 But I'll hear from the defense as to why it's necessary to  
7 bring in the nature of the underlying allegation.

8           MR. HARDIN: Thank you, Your Honor. First, I  
9 think I want to start out with what we said in our briefing.  
10 I think it's way premature right now for the Court to be  
11 asked for a ruling on this. I agree that I should not be  
12 allowed to go into those details during opening statement,  
13 and that what the case is really about will depend upon how  
14 the trial develops. And so, I'm readily willing to concede  
15 that at this point the Court does not have enough in front  
16 of it to be able to make a decision one way or the other.

17           At first blush, the idea that somebody was the  
18 object of an investigation that did not result in charges, I  
19 would always agree, at first blush, that's not admissible on  
20 an issue in this trial, unless it becomes and is, as we want  
21 to show, and then the Court would have a basis to rule, that  
22 it's inextricably bound to this entire case. Reader's  
23 Digest version chronologically as to why we predict that  
24 when we come to the Court and ask to be able to get into  
25 details, that it will be relevant and would be admissible



1 is, is that it's the timing and what happens afterwards. We  
2 want to offer and explain to the jury that this incident in  
3 Florida guided and led Mr. McNamee into a whole course of  
4 conduct that ultimately led to us being here.

5           The rape is in October of 2001. It is the year  
6 ultimately the Yankees go to the World Series. In the, the  
7 rape occurs in like either next to last or maybe the last  
8 Series of the 2001 season, while the Yankees are in Tampa.  
9 And that particular case, Mr. McNamee has had throughout his  
10 history of talking about Mr. Clemens and testifying to  
11 different people, an almost unending denial of what  
12 everybody involved in the investigation of that case would  
13 say is the truth. He is to this day still lying to the  
14 government.

15           The government has, is going to sponsor a man who  
16 has had a exculpatory version of an investigation that all  
17 the law enforcement officers, the victim herself, the people  
18 who were on the scene that arrived to see him, having what  
19 they believe was sex naked in a pool. Throughout it he  
20 blamed it on somebody else, he has blamed it on  
21 Mr. Knoblauch, he has blamed it on the man he was with.

22           The government has chosen, for whatever reason in  
23 this case, to never interview those people or find out what  
24 the facts. All they have done, we've interviewed every one  
25 of them, and discovered that neither the Congressional

1 committee nor the Mitchell commission nor the government in  
2 this case has ever sought to try to find out truly what  
3 happened. They simply ordered the whole investigative  
4 report and turned it over to us, which we also had through a  
5 Freedom of Information Act.

6 If they had done so, they would have found out  
7 that Mr. McNamee's version of this event has guided him in  
8 what he has done throughout this case.

9 THE COURT: I guess I'm not making that nexus.

10 MR. HARDIN: The connection is, our contention is  
11 going to be that the physical evidence the Court is going to  
12 hear, has been fabricated and manipulated by Mr. McNamee.  
13 And that that occurs after the rape case. And that it  
14 occurs after the rape case because he's afraid he's going to  
15 be fired from the Yankees, which he is ultimately because of  
16 this and another incident. That in the rape case, the GMP;  
17 that is, the date rape drug that was used on this woman and  
18 it is found, if the Court allows us to get into it, at some  
19 day will find that when Yankees' security people arrived  
20 that night or early morning of the rape, McNamee asked them  
21 to get rid of it.

22 Mr. McNamee has taken a totally different version.  
23 And it becomes relevant during this case too, that after  
24 he's fired from the Yankees at the end of 2001, because of  
25 this and another date rape incident in Seattle where he

1 becomes comatose in a bar when he wasn't even really drunk  
2 using it, that all of these situations, he's fired in 2001,  
3 and from that moment, back after the rape, he engages in a  
4 course of conduct designed to protect him to hold something  
5 over Mr. Clemens' head. And that's why he fabricates all  
6 this stuff. He never knew when he was going to use it.

7           We -- that part of the defense is going to be as a  
8 suggestion, that part of his motive here, and that's one of  
9 the reasons that we talk about it is 404(b), we're entitled  
10 to get into it.

11           THE COURT: Why don't you accomplish your  
12 objective by just bringing out the fact that he was the  
13 subject of a criminal investigation? And in reference to  
14 that criminal investigation, he has made false statements?

15           MR. HARDIN: Because it would be like sort of --  
16 let's assume, if I can, the analogy I would use, Judge, is,  
17 is that all the jury won't know whether that's almost a  
18 crosswalk investigation. How serious is it? Is it serious  
19 enough to guide his conduct from then on? They've got to  
20 learn the nature and the seriousness of it in order to be  
21 able to give fair import to whether it was really enough to  
22 guide his conduct. And one of the things about it -- and  
23 that's why I say it's really premature here. I don't expect  
24 the Court -- I mean, I think the Court's questions are very  
25 legitimate and they rise up immediately right now.

1           THE COURT: Well, I mean, I don't think we have to  
2 have a long dialogue then about it because I will reserve a  
3 final ruling. But I would indicate that if counsel at some  
4 point believes it is appropriate to go into that, that  
5 before anything regarding the nature of the investigation is  
6 revealed, that you ask for a sidebar.

7           MR. HARDIN: Absolutely.

8           THE COURT: So then we can discuss it.

9           MR. HARDIN: That's my suggestion. And if I might  
10 just as a sidenote to that, I take the government's position  
11 is, and that there be no disagreement here, that in opening  
12 statement, which to me what a motion in limine is already,  
13 we can talk about, there was an investigation in Florida,  
14 similar to the rules they've asked to govern. I don't  
15 quarrel with that for opening statement. And then we, of  
16 course, when we believe it's come time for the Court to be  
17 able to let us reveal the full details and history of it, we  
18 will come to the Court for a sidebar.

19           THE COURT: Any objection?

20           MR. BUTLER: No, Your Honor. The, consistent with  
21 what the Court has said about that Mr. McNamee was a subject  
22 of a generic criminal investigation, nothing more than that.

23           THE COURT: And like I said, if counsel believes  
24 there's a reason to bring out more than that, then we'll  
25 have to discuss it at that point before that comes in.

1           MR. HARDIN: At face value would I be permitted to  
2 say a serious criminal investigation? I mean, otherwise,  
3 they may think he didn't renew his license or lied on his  
4 license revocation or something. I just want to be able to  
5 say it's serious. I don't think anybody can argue that a  
6 date rate accusation is not serious.

7           MR. BUTLER: Under 608(b), Your Honor, what, the  
8 issue is whether he made a false statement to a police  
9 officer, that goes to his credibility. Whether it was a  
10 serious allegation or nonserious allegation doesn't go to  
11 whether the fact he made a false statement to a police  
12 officer. So, Mr. Hardin --

13           THE COURT: I'll limit it to a criminal  
14 investigation.

15           MR. HARDIN: Thank you, Your Honor.

16           MR. BUTLER: Can I just add one thing, Your Honor?

17           THE COURT: Yes.

18           MR. BUTLER: Just because we didn't have a chance  
19 to reply to the brief. But the, in the defense motion, they  
20 talk about some sort of complete-the-story theory. And in  
21 U.S. versus Bowie, B-O-W-I-E, which is at 232 F.3d 923 D.C.  
22 Circuit, 2000. The Court, there's language at pages 928,  
23 929 that, where the, the Court had allowed in certain  
24 evidence under a intrinsically intertwined or  
25 complete-the-story theory. And the Court of Appeals said,

1 "We are confident there's no general complete-the-story or  
2 expand-the-circumstances exception to Rule 404(b) in the  
3 Circuit. Such broad exclusions have made the -- grounded in  
4 the other crimes drawing or acts language of the rule. Rule  
5 404(b) particularly, those requirements shall not be  
6 regarded on such a flimsy basis."

7 That's just to respond to, in the brief that they  
8 filed the issue of, that they needed this evidence to  
9 complete the story, that type of thing. And Bowie and other  
10 cases in the Circuit have rejected that notion as a basis  
11 for admissibility.

12 THE COURT: And I guess, you know, I'll throw this  
13 out because it is a concern to me. I assume what was being  
14 suggested by Mr. Hardin is that McNamee develops some motive  
15 to try and, I guess, retaliate against the Yankees. And  
16 that that retaliation has focused on Mr. Clemens. Now, I  
17 understand Mr. Clemens was one of, I guess, the major, one  
18 of the major stars of the Yankees at that time. But it  
19 seems to me that there would have to be more that would show  
20 that he would have a motive to focus on Mr. Clemens to try  
21 and harm him.

22 And it just seems to me, the fact that it seems  
23 Mr. Clemens had nothing, I assume, to do with these  
24 allegations regarding the date rape, he wasn't providing any  
25 information that would be harmful to McNamee in reference to

1 that, so I just don't know if the nexus -- but, again, we'll  
2 address it when we get there, can be made to show that  
3 somehow his animus, if that is, in fact, the case, would be  
4 directed at Mr. Clemens and not at the Yankees, which was  
5 responsible for his firing.

6 MR. HARDIN: Yes. The only correction I would  
7 there make, Your Honor, I didn't mean, or maybe I misspoke.  
8 What I was trying to say is, what he developed was, he  
9 needed a way to continue to make a living in the future  
10 because he was afraid the Yankees were going to fire him.  
11 So, the animus wasn't against the Yankees, it was to protect  
12 himself financially. If he came up with a way to ultimately  
13 one day convince Roger Clemens that Roger Clemens should  
14 continue to employ him and pay him in the future because he  
15 wasn't going to be employed by the Yankees, and that is part  
16 of what we're saying we think the evidence will show. The  
17 nexus would be it gives him a motive to try to fabricate and  
18 prepare an argument against Roger Clemens as to why he, in  
19 the future, should continue to employ him, et cetera.

20 And, in fact, he tells Mr. Clemens, we'll show  
21 with the evidence, just as he tells others and tells the  
22 government, he was really trying to rescue this woman in the  
23 pool and he wasn't in there trying to have sex with her.  
24 And all of his explanations to what happened in that event  
25 that he gives the government and others, is the same

1 explanation he gives Roger Clemens. And so that Roger  
2 Clemens, after the Yankees fire him, continues to employ  
3 him.

4 But what he intended to have, according to the  
5 defense contentions in this case, is a backup to one day be  
6 able to say, if Roger quit hiring him, if Roger quit paying  
7 him or anything, Roger, I got this on you. If you don't  
8 keep working, if you don't let me keep working with you,  
9 this is what I can do. That never happened because the  
10 Radomski case came along and he had to then deal with the  
11 government.

12 THE COURT: Okay. Well, like I say, it seems  
13 somewhat tenuous to me, but I'll reserve a ruling until we  
14 reach that point. And I'll revisit the issue at that time.

15 MR. HARDIN: Thank you, Your Honor.

16 THE COURT: Besides the one other issue I reserved  
17 on and I've got to look at this case, are there any other  
18 matters we need to address at this time?

19 MR. ATTANASIO: Your Honor, if I may? On the  
20 hearsay motion in limine, and I apologize for not saying  
21 this when I sat down. We dealt with Laura Pettitte, as the  
22 Court recalls.

23 THE COURT: Yeah. The other player?

24 MR. ATTANASIO: The other players, yes, sir. And  
25 I should have brought that up, I apologize. I'm sure the



1 Court has read the brief. Our position simply, again, I  
2 think fairly stated, is that, until Mr. McNamee testifies,  
3 it's premature to be talking about what he said to others.

4 THE COURT: And these are statements McNamee  
5 allegedly made to these other players in reference to his  
6 involvement with Mr. Clemens?

7 MR. ATTANASIO: Yes, Your Honor. Two or three  
8 players and one non player. A client and friend of  
9 Mr. McNamee's, a man name Corso, C-O-R-S-O.

10 As Mr. Hardin just alluded to, it's premature  
11 until we hear Mr. McNamee testify, until we hear him  
12 cross-examine, to conclude precisely when his motive to  
13 fabricate arose. This is one, obviously, where we are  
14 talking the position that Mr. McNamee has fabricated  
15 testimony and fabricated evidence. So that's the framework.  
16 However, the prior consistent statements must have been made  
17 prior to the motive to fabricate arising. And as Mr. Hardin  
18 has just alluded to, part of the defense theory of this case  
19 will be that the motive to fabricate arose earlier than 2007  
20 or 2008. And I would respectfully suggest we ought to let  
21 that develop before so-called corroborating evidence is  
22 presented to the jury by argument or testimony.

23 THE COURT: Well, I think the government does  
24 agree, from what I understand, that this evidence would only  
25 come out if something occurs during the course of

1 Mr. McNamee's testimony that would justify it coming in.

2 MR. DURHAM: Yes, Your Honor. The motive to  
3 fabricate, which has been identified quite clearly by  
4 counsel at the April 21st hearing and at many other places,  
5 occurred when Agent Novinski approached Brian McNamee in  
6 May, June of 2007. This the defense has already identified  
7 clearly as a point in which the motive to fabricate  
8 occurred. We do agree, Your Honor, that this would become  
9 relevant if Mr. McNamee is cross-examined and impeached with  
10 any type of deviation from what he had said in the past,  
11 from what he had told Agent Novinski and Senator Mitchell.

12 But to be clear, there may be a dual motive to  
13 fabricate the defense is now proffering. Frankly, it's  
14 somewhat novel to us. It certainly wasn't proffered at the  
15 committee hearing. But clearly in April of 2011, before  
16 Your Honor, Mr. Hardin made it quite clear that the motive  
17 to fabricate occurred when Mr. McNamee encountered Special  
18 Agent Novinski in 2007.

19 THE COURT: And I guess, even thinking back on  
20 what we've discussed in the past, one of the defense  
21 theories as I understand is that there's been a progression  
22 in McNamee's allegations over time query. If that is, in  
23 fact, going to be the theory that this tale has grown over  
24 time, if he made earlier statements that are consistent with  
25 what he's saying now, which would tend to undermine the

1 suggestion of a progression, would that come in? Because I  
2 think there is some evidence to that effect that he may have  
3 made some statements in the past. And those statements are  
4 not exaggerated, even though conceivably, I guess, there's a  
5 theory that at least in between that point there was some  
6 exaggerations. If that were to be the case, would those  
7 earlier statements then be admissible to rehabilitate him,  
8 to show that he said something before that's consistent with  
9 what he's saying now and, therefore, there is no  
10 exaggeration?

11 MR. ATTANASIO: Understand the question, Your  
12 Honor. To put it in a hypothetical that's somewhat germane  
13 to the framework, Mr. McNamee, in testimony, has said under  
14 oath, for instance, that he gave four to six injections of a  
15 certain kind of substance to a player. He has evolved that  
16 statement and now said I gave about 50 injections. So, a  
17 gross change of his story.

18 If on a, if the defense took the approach that he  
19 had fabricated that 50 injection story recently, and way  
20 back when he had told somebody else, you know, I actually  
21 gave 50 injections to that player, and that could be  
22 corroborated that way, then Your Honor might very well be  
23 right that the prior statement about a specific number of  
24 injections that lines up with today's testimony might be  
25 admissible to corroborate the current testimony.

1           I don't think we're going to have that type of  
2 alignment here, and I don't think that the prior statements  
3 will be able to rehabilitate where Mr. McNamee has gone in  
4 his evolving story, which his number has changed with  
5 respect to number of injections, locations, those sorts of  
6 things. We're talking about sort of the whole enchilada  
7 here, whether he injected Mr. Clemens or not with steroids.  
8 The ultimate question. And whether he said that some period  
9 of time ago to some third party.

10           And our position is simply that if you allow all  
11 of those, if one allows all of those statements in, it  
12 basically swallows the rule. It swallows the hearsay rule.  
13 The moment we cross-examine the man, every time he roamed  
14 around telling anybody else in a slanderous way, I injected  
15 Roger Clemens with steroids, I don't think that opens the  
16 door under the rules to all of those statements. And that's  
17 really where we are here.

18           But we certainly have to wait, at a minimum, until  
19 it is developed fully in front of this jury when Mr. McNamee  
20 had his motive to fabricate and acted on it.

21           THE COURT: Okay. Well, obviously, I'll be able  
22 to put it into better context when I see what actually  
23 transpires during the trial. And we'll revisit the issue at  
24 that time. But, again, if either side, I guess it would be  
25 the government, desires to go into that, then you'll need to

1 let me know ahead of time so I can revisit the issue and try  
2 and make the right determination at that time.

3 MR. ATTANASIO: Fair enough, Your Honor. I  
4 appreciate that. And may I just clarify just one thing very  
5 briefly? And that is, is this constant reframe from the  
6 government about Mr. Hardin's statements. What Mr. Hardin  
7 said at that hearing was, the con began. Our position is  
8 the con began when Mr. McNamee was encountered by  
9 Mr. Novinski and then when he talked to DLA and Senator  
10 Mitchell.

11 Those statements about Mr. McNamee beginning his  
12 pulling the wool over the eyes of the government, that was  
13 the context of that. That's not to say when Mr. McNamee  
14 actually himself began to fabricate or have a motive to  
15 fabricate evidence. If carefully read, that's what that  
16 transcript passage reads. So, the government cites it as  
17 the notion that that's the first time Mr. McNamee had a  
18 motive to lie. I don't believe that would be the defense's  
19 position.

20 THE COURT: Okay. Let me take a ten-minute break  
21 so I can look at this case now to make a ruling.

22 [Thereupon, recess taken at 10:40 a.m., resuming  
23 at 10:50 a.m.]

24 THE COURT: Okay. After looking at the Sumlin  
25 case, I still have my concerns about whether this evidence

1 comes in. But I just don't think I'm going to be in a  
2 posture of making an assessment as to whether it comes in  
3 until I see what the exact line of attack is in reference to  
4 Mr. McNamee.

5           And I would point out that in the Sumlin case the  
6 circuit was reviewing the issue under the main plain error  
7 standard because there had not been an objection and  
8 obviously, that makes a difference by way of the Court's  
9 review. Although the Court did say that despite the fact  
10 that there had been no objection, they said there was no  
11 plain error, but they also say there was no error and that  
12 what occurred did not fundamentally impact the outcome of  
13 the case.

14           Be that as it may, I just think I'm going to have  
15 to defer making a decision until I see what occurs.  
16 Therefore, I'd have to preclude any reference to these other  
17 individuals during the opening statement. As I say, the  
18 major concern I have, and I would agree with defense  
19 counsel, that this case is different than the Bonds case in  
20 light of the fact that we have Mr. McNamee here himself  
21 testifying. And I think that does make a difference. Now,  
22 is it a difference that should cause a different result in  
23 what was reached by the judge in that case? I would tend to  
24 feel that's probably the case. But again, I've got to see  
25 the context in which I'm being asked to introduce the

1 evidence, and I obviously won't know that until I see how  
2 the defense pursues its line of cross-examination against  
3 Mr. McNamee, to assess whether this other evidence would in  
4 some way be appropriate to rehabilitate him on an issue that  
5 the jury is going to have to assess.

6 I fully appreciate that the jury is going to have  
7 to assess Mr. McNamee's credibility, and that his  
8 credibility is going to be seriously attacked by the  
9 defense. But I don't think, at least at this point, that  
10 the mere fact that they're going to seriously attack his  
11 credibility necessarily opens the door to bring in evidence  
12 regarding Mr. McNamee's dealings with other players.  
13 Because as I say, my main concern is that if Mr. Clemens'  
14 position, and I understand it is at least in part his  
15 position that he did not know what he was receiving, to then  
16 bring in evidence that McNamee was giving all these other  
17 players substances and they did know what they were  
18 receiving, it seems to me that there's a real danger, that  
19 the jury may say, well, if they all knew, and that's  
20 especially I guess true in reference to players who are also  
21 on the same team, that why wouldn't Mr. Clemens know? And I  
22 think that would be a problem, for them to in some way use  
23 the evidence regarding what he was doing with these other  
24 players to impute knowledge on the part Mr. Clemens.

25 But I'll reserve a final ruling until I see what

1 transpires during the trial. And if somehow I feel that the  
2 door has been opened, I may be inclined to change my  
3 position. But my tentative position is that that evidence  
4 is not going to come in.

5 Are there any other matters that we need to  
6 discuss before we break?

7 MR. HARDIN: I don't believe so from the defense,  
8 Your Honor.

9 MR. DURHAM: The other players, as we point out in  
10 the motion, there are areas of testimony there are not the  
11 subject of the defense motion in limine that we set forth  
12 and proffer in our opposition pleading. I just want to make  
13 sure that I don't run afoul of any of the Court's ruling by  
14 mentioning that there were other players who may testify in  
15 this trial, who played for the Yankees during this time  
16 period.

17 THE COURT: That's all you're going to say?

18 MR. DURHAM: Yes, pretty much. Yes.

19 MR. HARDIN: No problems.

20 THE COURT: Okay. And other matters?

21 Okay. I don't think we're going to be able to get  
22 the jury here by nine tomorrow, right? It's 9:30? It's at  
23 nine?

24 So, hopefully, we'll get started at nine. There  
25 was one issue that we had raised, I don't know if that's



1 been addressed or not. But I don't want to not be able to  
2 start on time because I intend to start on time to try to  
3 move this case along, because counsel or Mr. Clemens can't  
4 get into the courthouse because I assume we may have some  
5 significant lines. Although I was told, and I guess it's  
6 the case, that the Constitution Avenue exit is going to be  
7 open. It had been closed, but they're going to open it for  
8 this trial so there will be greater access to the  
9 courthouse.

10 But I guess you all need to try and make sure  
11 you're here around 8:30. So, hopefully, you're here in the  
12 courtroom so we can start promptly at nine o'clock. I know  
13 we had talked to the marshals about that.

14 Didn't they say they were going to give out some  
15 type of --

16 [Brief pause.]

17 THE COURT: Okay. We're going to check and make  
18 sure that the marshals and the court security personnel know  
19 that when you get here, you should be able to go to the  
20 front of the line. And they will let you all in, so that we  
21 don't have delays because of that.

22 MR. HARDIN: Thank you, Your Honor. No matter  
23 what entrance we have used so far, they have been great.  
24 I'm sure we can work it out. Thank you very much.

25 MR. DURHAM: Thank you, Your Honor.

1           THE COURT: Okay. We'll see you all at nine  
2 o'clock.

3           [Thereupon, the proceedings adjourned at  
4 10:55 a.m.]

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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 50 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 5th day of July, 2011.

/s/ Cathryn J. Jones  
Cathryn J. Jones, RPR  
Official Court Reporter

/	above [1] 51/6 absence [1] 7/1 Absolutely [1] 36/7 abuse [1] 31/6 access [2] 15/18 49/8 accomplish [1] 35/11 according [1] 40/4 accusation [1] 37/6 Act [2] 27/1 34/5 acted [1] 44/20 action [2] 3/2 9/10 acts [2] 16/16 38/4 actually [4] 7/18 43/20 44/22 45/14 add [5] 7/9 23/9 23/14 24/9 37/16 additional [1] 7/9 address [3] 31/13 39/2 40/18 addressed [1] 49/1 adduced [1] 51/5 adjourned [1] 50/3 administer [1] 15/19 administered [2] 15/25 16/1 admissibility [1] 38/11 admissible [4] 32/19 32/25 43/7 43/25 admitted [1] 25/7 advantage [1] 5/7 adversely [1] 9/18 advertised [1] 21/1 advertising [1] 21/24 affirmative [2] 8/25 9/10 afoul [1] 48/13 afraid [2] 34/14 39/10 after [11] 7/10 7/11 24/17 27/18 28/17 34/13 34/14 34/23 35/3 40/2 45/24 afterwards [1] 33/1 again [9] 19/19 23/6 27/4 29/9 30/11 39/1 41/1 44/24 46/24 against [7] 9/12 31/21 31/22 38/15 39/11 39/18 47/2 agent [5] 4/17 5/1 42/5 42/11 42/18 ago [1] 44/9 agree [7] 18/6 24/8 32/11 32/19 41/24 42/8 46/18 agreed [1] 13/20 ahead [1] 45/1 aid [4] 6/4 6/11 6/15 30/8 aided [1] 2/7 aka [1] 1/6 alignment [1] 44/2 all [16] 25/12 33/16 33/24 35/2 35/5 35/17 39/24 44/10 44/11 44/16 47/16 47/19 48/17 49/10 49/20 50/1 allegation [3] 32/7 37/10 37/10 allegations [5] 31/6 31/21 31/23 38/24 42/22 alleged [1] 26/17 allegedly [2] 24/16 41/5 allow [2] 4/17 44/10 allowed [3] 4/21 32/12 37/23 allows [3] 17/1 34/18 44/11 alluded [2] 41/10 41/18 almost [2] 33/11 35/17 along [3] 3/19 40/10 49/3 already [3] 24/5 36/12 42/6 also [12] 4/7 4/9 8/4 8/11 8/19 20/10 21/4 21/9 24/20 34/4 46/11 47/20 Although [2] 46/9 49/5 always [1] 32/19 AMERICA [2] 1/3 3/3 anabolic [2] 21/14 22/5 analogy [1] 35/16 Anderson [1] 24/1 Anderson's [2] 23/25 23/25 Andy [9] 26/19 26/19 28/16 29/1 29/4 29/5 29/6 30/2 30/9 animus [2] 39/3 39/11	another [6] 12/1 13/4 18/1 21/21 34/16 34/25 answer [4] 6/6 6/8 11/7 19/16 Anthony [1] 1/20 anticipate [1] 14/9 any [19] 6/4 7/2 7/6 7/14 8/9 9/8 12/9 21/7 21/19 21/20 29/24 31/22 36/19 38/24 40/17 42/10 46/16 48/5 48/13 anybody [2] 37/5 44/14 anything [7] 16/1 16/24 23/8 26/12 29/20 36/5 40/7 apologize [2] 40/20 40/25 apparently [1] 11/12 Appeals [1] 37/25 APPEARANCES [1] 1/13 appearing [1] 3/6 appellate [2] 13/24 13/24 appreciate [3] 23/13 45/4 47/6 approach [2] 9/21 43/18 approached [1] 42/5 appropriate [4] 6/16 31/8 36/4 47/4 April [2] 42/4 42/15 April 21st [1] 42/4 are [32] 5/13 6/3 9/6 10/25 11/3 11/9 11/10 11/15 15/6 15/16 15/20 16/3 17/6 20/5 23/1 25/14 27/15 28/6 30/6 33/8 35/24 38/1 40/17 41/4 41/13 42/24 43/3 44/17 47/20 48/5 48/10 48/10 areas [1] 48/10 aren't [2] 4/3 17/4 argue [1] 37/5 argument [6] 7/25 8/2 8/7 18/24 39/18 41/22 arguments [2] 7/21 31/4 arising [1] 41/17 arose [2] 41/13 41/19 around [2] 44/14 49/11 arrived [2] 33/18 34/19 arthritic [1] 21/13 as [57] ask [5] 6/9 12/16 22/10 32/24 36/6 asked [8] 11/23 21/5 21/16 29/8 32/11 34/20 36/14 46/25 asking [1] 4/4 assess [4] 25/18 47/3 47/5 47/7 assessment [3] 6/10 30/8 46/2 assist [1] 5/2 associated [2] 9/2 9/5 ASSOCIATES [1] 1/18 assume [11] 5/3 6/22 9/11 13/21 15/21 15/23 31/23 35/16 38/13 38/23 49/4 assuming [1] 22/15 attack [10] 16/14 19/8 19/10 19/14 25/8 27/4 27/25 29/24 46/3 47/10 attacked [1] 47/8 Attanasio [5] 1/20 3/11 8/8 23/10 23/12 attend [1] 4/21 ATTORNEY'S [2] 1/15 9/1 audio [12] 10/1 10/6 10/9 10/11 10/17 12/4 12/6 12/24 13/12 14/10 14/14 14/18 AUSA [2] 1/14 1/14 authorities [1] 31/23 available [1] 12/11 Avenue [2] 2/2 49/6 avoid [1] 9/7 aware [1] 23/16
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