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 MOTION TO ADMIT EVIDENCE OF BRIAN MCNAMEE'S HGH-BASED INTERACTIONS WITH OTHER PLAYERS AND HIS COOPERATION RELATING TO THE SAME TO REHABILITATE THE WITNESS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this motion to introduce evidence of Brian McNamee's HGH-based interactions with other players and his cooperation relating to the same for rehabilitation of Brian McNamee. As this Court repeatedly has recognized, the public has a right to a fair trial. See, e.g., Arizona v. Washington, 434 U.S. 497, n.11, 511 (1978). The thrust of the cross-examination of McNamee and IRS Special Agent Novitzky is that McNamee was and is an unreliable and unscrupulous witness who would do or say anything in order to curry favor with the government and advance his personal interest in fame and fortune. Because of the sustained and vigorous attack on McNamee's credibility by the suggestions that he is and was biased and self-interested–at every stage of this matter–in being rewarded by maintaining his "non-target" status and with celebrity and riches, the government must now be permitted to introduce evidence regarding McNamee's HGH-based interactions with other players and his cooperation regarding the same, in order to rebut the false impressions that have been left with the jury that McNamee falsely accused defendant of using performance enhancing drugs in the hope of avoiding being charged with a crime

and in the hope of gaining publicity and riches and, in particular, that both of those reasons for bias hinge only upon McNamee's statements about defendant. United States v. Martinez, 775 F.2d 31, 37 (2d Cir. 1985) ("Evidence whose probative value might not be thought to outweigh its prejudicial effect if offered on direct examination may well be admitted during redirect examination 'for the purpose of rebutting the false impression which resulted from . . . cross examination.'" (quoting United States v. Finkelstein, 526 F.2d 517, 527 (2d Cir. 1975))).

BACKGROUND

Prior to the first trial date, defendant moved *in limine* to preclude (among other things) the government from "introducing evidence or making argument about Brian McNamee's conduct and discussions with Chuck Knoblauch, Mike Stanton, Anthony Corso, or any other third-party associated with anabolic steroids or human growth hormone other than Andy Pettitte" (Dkt. 54 at 6). The Court deferred any final ruling until the Court saw "what the exact line of attack is in reference to Mr. McNamee" (7/5/11 Tr. AM 46). The next day, the Court revisited the topic and correctly forecasted the state of the record at this point in trial that, if the defendant maintained (as has happened) that McNamee "creat[ed] the evidence that would suggest" defendant used performance enhancing drugs because, following the 2001 Florida incident, McNamee became worried that he was going to be fired from the Yankees and thus he needed to ensure that he remained on defendant's payroll, the evidence of the other players' HGH-based dealings with McNamee likely would be admissible to show that McNamee did not attempt to extort them: "it would be unfair . . . for the government not to be able to introduce this evidence to show well, there were other individuals who were knowingly receiving banned substances from Mr. McNamee." (7/6/11 AM Tr. 29-32). The Court's written Order of the same date "ORDERED that the

defendant's motion *in limine* to preclude introduction of other-witness evidence concerning their interactions and discussions with Brian McNamee is HELD IN ABEYANCE until such time when the government requests that such evidence be presented to the jury." 7/6/11 Order, Dkt. 76, at 2.

That time has come, as the defense's line of attack is now clear: the defense vigorously contends that McNamee is biased and self-interested, and that he was biased and self-interested at every stage of this matter. That is, that McNamee was biased and self-interested when he saved defendant's medical waste; when he spoke to IRS Special Agent Jeff Novitzky; when he spoke to Senator Mitchell; when he turned over the physical evidence; when he testified before Congress; and when he testified in this trial. Indeed, the main thrust of the defense in this case is that McNamee fabricated the evidence and information he provided to the federal government, to the Mitchell commission, to Congress, and in his testimony before this Court in the hopes of being rewarded by maintaining his "non-target" status and with celebrity and riches.

During opening statement, defendant began his attack on Brian McNamee's credibility by claiming that McNamee made up the allegations and evidence against defendant for fame and fortune. (4/24/12 Tr. AM 35-36.) The defense claimed that "nobody cared about" what McNamee had to say "until he made these allegations about" defendant. Id. at 36. As part of McNamee's fabrication, the defense asserted McNamee manipulated and created the physical evidence. Id. at 41. The defense further suggested without specifics that McNamee had some "motive." Id. at 59. Finally, the defense stated that McNamee "has lied to first the government agents, starting in June of '07"; "to the Mitchell Commission"; and to the prosecutors in this case. Id. at 59.

The attack on McNamee's credibility continued through the cross-examination of Special Agent Jeff Novitzky. The defense repeatedly highlighted that McNamee was told he was not a target

of the federal investigation, that as a condition of being considered a "non target" McNamee was required to cooperate with the federal government's investigation and Senator Mitchell's investigation, and questioned the government's decision to use McNamee as a witness and not charge him with a crime. (5/3/2012 Tr. PM 43-50, 52-54, 60-61, 70-71, 73.) Moreover, on the cross-examination of Special Agent Novitzky, the defense highlighted the fact that no individual had been charged with a crime based on McNamee's contention that he gave that player HGH or steroids:

> Q. Was anybody charged that Brian McNamee contended he had given HGH or steroids to?
> A. Mr. Clemens was charged.
> Q. Anybody other than Mr. Clemens?
> A. No.
> Q. All right. And Mr. Clemens was not charged with receiving steroids or HGH from Mr. McNamee, was he? . . . Isn't that true?
> A. Correct.
> Q. All right. Is it a true statement that nobody has ever been charged with any criminal offense that involved them receiving steroids or HGH from Brian McNamee? . . . . Isn't it true that whatever the believability or reliability one attaches to what Mr. McNamee said to you about people he was giving things to, no one has been charged based on that information?
> . . .
> THE WITNESS: Based on the information that Brian McNamee has provided, no, I'm not aware of anybody being charged other than Mr. Clemens.
> . . .
> Q. Mr. Clemens has never been charged with receiving steroids or HGH from Brian McNamee, has he?
> A. That's correct.

Id. 50-52.

That attack on McNamee's credibility culminated in the vigorous, almost twelve-hour cross-examination of McNamee by defense counsel (which remains ongoing at the time of this filing). Early in the cross-examination, the defense focused the jury on its theory that McNamee's credibility was suspect and that he falsely implicated defendant because of his self-interest in fame, based on his allegations against defendant: "Ever since February the 13th, 2008, would you agree with me that

you have been seeking to take advantage of the fame you achieved by making the allegations you have against Roger Clemens?" (5/16/2012 Tr. AM 34.) Immediately prior to that, the defense asked McNamee about his discussion of defendant on the Howard Stern Show. Id. at 33. In reality, on that show, McNamee discussed defendant and Andy Pettitte. Immediately after the defense's comment that McNamee has taken advantage of the fame that he achieved by making allegations against defendant, the defense asks about McNamee's manuscript. Id. 35-40. In reality, McNamee's manuscript discusses the performance enhancing drug use of more players than just defendant, including Andy Pettitte, Jason Grimsley, Chuck Knoblauch, David Justice, and Glenallen Hill. The defense also asked McNamee, "Can you and I agree that, before December the 13th of 2007, nobody would have cared about Brian McNamee pushing a company on YouTube?"[1] (5/15/2012 Tr. PM 115.)

Moreover, during cross-examination, the defense focused the jury on its theory that McNamee's credibility was suspect because he was self-interested in maintaining his "non-target" status.[2] The defense repeatedly suggested that McNamee was given a "free pass" by the federal government and, more specifically, defense cross-examination repeatedly suggested that he would have been charged with a crime if McNamee had not told the federal government and the Mitchell Commission that he had given steroids to defendant. (See, e.g., 5/17/2012 Tr. AM 71, 92-93.) The defense–like it did with Agent Novitzky–repeatedly highlighted that McNamee was told he was not a target of the IRS investigation. See,e.g., Id. at 91-92, 94-95, 119. The defense additionally

[1]The Mitchell Report was released on December 13, 2007. In that report, McNamee is attributed with providing information regarding more players than Roger Clemens.

[2]At the time of this filing, the government had not yet thoroughly reviewed the transcripts for May 17, 2012, and the cross-examination of Mr. McNamee remained on-going.

suggested that McNamee's failure to comply with the government investigation and the government's request that McNamee speak with the Mitchell Commission would result in McNamee becoming a target, essentially placing McNamee in the category of cooperator status. (5/15/2012 Tr. PM 106-07; 5/17/2012 Tr. AM 109-10.)

Through questioning on cross-examination, the defense also highlighted again and again that McNamee admitted that he lied to federal investigators when he spoke with Agent Novitzky and the Mitchell Commission (in front of federal investigators) and McNamee by minimizing the number of shots of performance enhancing drugs that he had given to defendant and failing to tell them about the physical evidence, but that McNamee had not been charged with the crime of False Statements, under 18 U.S.C. § 1001. (5/17/2012 Tr. AM 92-93; 5/17/2012 Tr. PM 78-79 ("by December the 24 31st of 2007, you had lied about various matters to federal 25 agents and the Mitchell Commission in the presence of federal agents and repeatedly, and not one blankedly blank thing had happened to you, isn't that true?")) And the defense asked McNamee about whether he believed that the government could charge him with felonies relating to his distribution of performance enhancing drugs and McNamee said that he did. (5/17/2012 Tr. AM 117.)

In addition, the defense repeatedly suggested that McNamee was lying or "mak[ing] stuff up," including the following examples:

- "[W]hy in the world in June of 1998, this man would have picked you?" (5/16/2012 Tr. AM 65)
- "Now, tell the jury any and every bit of evidence you have or have ever had in God's green earth that would make you assume in the dressing room this man who's never used the words 'steroids' with you was already doing it?" (5/16/2012 Tr. AM 66-67)

- "Can you sense that maybe this is a moving target for you as to what you're telling us?" (5/16/2012 Tr. AM 71-72)
- "I just have to rely and the jury has to rely on your memory of some vague conversations you just don't remember?" (5/16/2012 Tr. AM 73)
- "Well, Mr. McNamee, . . . is it fair to say that over the last four years your testimony and your memory and statements have sort of evolved as to what happened?" (5/16/2012 Tr. AM 86.) McNamee answered that it was fair to say that his "recollections of certain things have gotten better." Id.
- After McNamee testified about a brief conversation he had in 2003 with defendant about steroids, the defense impeached him by asking him whether he had ever mentioned that conversation before to the federal government or Mitchell Commission and asked McNamee to tell the jury about whether that was a bad memory, mistake, or a lie. McNamee responded that it was due to a bad memory. (5/16/2012 Tr. AM 92-93; see also id. at 96 "Now, are you saying to the jury, then, that this conversation that you didn't remember to tell the investigators about for so long, are you saying that that occurred in the December part of 2003 or the early part of 2004?")
- "Mr. McNamee, do you sometimes just make stuff up?" (5/16/2012 Tr. AM 98.)
- "Well, I mean, is that a true statement or did you just make it up?" (5/16/2012 Tr. AM 99.) McNamee answered, "I didn't make anything up."
- The defense additionally has repeatedly noted that McNamee did not believe that the Mitchell Commission ultimately would result in a report that named names. (5/17/2012 Tr. PM 75. ("thought you would ride under the radar").)

Finally, the defense used the cross-examination to imply to the jury that McNamee had fabricated the physical evidence. The defense questioned McNamee about the fact that he did not provide that evidence to the federal government until January of 2008 and suggested that this evidence was "some way [for McNamee] to save [him]self." (5/17/2012 Tr. PM 99-101.)

ANALYSIS

Bias is one of several acceptable methods of attacking credibility and is relevant, as "[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." United States v. Abel, 469 U.S. 45, 50-52 (1984). *So too is testimony rebutting bias*. See United States v. Smith, 232 F.3d 236, 241 (D.C. Cir. 2000) (rejecting defense claims that testimony about an informant's prior truthfulness under a plea agreement was irrelevant where testimony followed cross-examination about informant's possible bias); see also United States v. Lindemann, 85 F.3d 1232, 1243 (7th Cir. 1996) (finding relevant evidence about informant's participation in other cases because it rebutted the allegation that the informant was biased; the informant's "successful participation in numerous other cases meant that at the time he was negotiating over his plea deal, he had lots of information to use as bargaining chips," making it less probable that the informant was lying in the instant case out of self-interest).[3] "Once a witness's credibility has been attacked, . . . the non-attacking party is permitted to admit evidence to 'rehabilitate' the witness." Id. (citation

[3]"'Bias is never classified as a collateral matter which lies beyond the scope of inquiry, nor as a matter on which an examiner is required to take a witness's answer. Bias maybe proved by extrinsic evidence even after a witness's disavowal of partiality.'" United States v. Robinson, 530 F.2d 1076, 1079 (D.C. Cir. 1976) (quoting 3 Weinstein's Evidence ¶ 607[03], at 607-17 (1975)); see also United States v. Moore, 529 F.2d 355, 357 (D.C. Cir. 1976) ("unlike other types of impeachment, bias is not collateral and may be proved by extrinsic evidence").

omitted). Where such evidence is offered to rebut a claim of bias, the standard for admissibility is governed by Federal Rules of Evidence 402 and 403. See, e.g., id.; see also United States v. Sumlin, 271 F.3d 274, 282 (D.C. Cir. 2001).

"Several circuits have held that evidence of cooperation on other matters is admissible to justify a cooperation agreement and to rebut allegations of bias." United States v. Lochmondy, 890 F.2d 817, 821 (6th Cir. 1989) (where defense attacked credibility of cooperator by cross-examining on immunity agreement, not improper bolstering to elicit testimony about cooperation in other cases); see also United States v. Penny, 60 F.3d 1257, 1264 (7th Cir. 1995) (after defense attacked credibility of cooperator, not improper bolstering to ask case agent about results of witness's cooperation in other investigations); United States v. Gambino, 926 F.2d 1355, 1366 (3d Cir. 1991) (reference to a guilty plea of a former co-defendant during closing argument by the prosecution to rebut a specific argument about a witness's credibility by the defense was appropriate); United States v. Sanchez, 790 F.2d 1561, 1564 (11th Cir. 1986) (where defense cross-examined DEA agent about informant's suitability for federal investigative work, not improper bolstering for agent to testify that other agents had worked with informant in prior investigations and found him reliable); United States v. Martinez, 775 F.2d 31, 37 (2d Cir. 1985) (attacks on witness's credibility through cross-examination about witness's accusations against prison guards, suggesting they were motivated by desire to obtain early release from prison, opened door to evidence that guards accused by witness had pleaded guilty); United States v. Fusco, 748 F.2d 996, 998 (5th Cir. 1984) (testimony about informant's work in other investigations was not improper "bolstering," but rather was proper attempt to convince jury that informant was not biased).

This case is directly analogous to cases decided by the U.S. Court of Appeals for the Seventh

Circuit: United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996) (Attachment A), United States v. Curry, 187 F.3d 762 (7th Cir. 1999) (Attachment B), and United States v. Scott, 267 F.3d 729 (7th Cir. 2001) (Attachment C). In Lindemann, the district court admitted evidence that a witness had cooperated with the government, including evidence that the cooperation had resulted in guilty pleas, in other cases to rebut the allegation that the witness was biased out of self-interest in the defendant's case. During the witness's cross examination, "Lindemann attacked the credibility of [the witness's] testimony by suggesting that [the witness] would not have gotten a plea deal if he hadn't come up with the name of a 'big fish' like Lindemann." Id. at 1242. Seeking to rebut Lindemann's assertion, the government offered evidence that Lindemann's indictment and the witness's cooperation were the result of a much larger investigation. Id. The testimony the government elicited on redirect from the witness included that the witness had discussed about 30 different people with the government and that 90 percent of them had pleaded guilty. Id. The district court immediately instructed that this testimony should only be considered to understand the scope of the investigation, not defendant's guilt. Id.

The Seventh Circuit held that the district court did not abuse its discretion in allowing this testimony. The court explained that while "Lindemann was perfectly entitled to suggest his theory that [the witness] was lying about Lindemann in order to better" his plea deal – *i.e.,* to attack the witness's credibility by an attempt to show bias, "the direct consequence of the attack was that the government was entitled to introduce evidence to rehabilitate [the witness] on the issue." Id. at 1243. The court concluded that the admission of that testimony was relevant "because it made less probable the assertion that [the witness] was lying in Lindemann's case out of self-interest," stating "[t]he evidence specifically rebutted the allegation that [the witness] was biased out of self interest

in Lindemann's case: [the witness's] successful participation in numerous other cases meant that at the time he was negotiating over his plea deal, he had lots of information to use as bargaining chips." Id.

Likewise, in United States v. Curry, 187 F.3d 762, 766-67 (7th Cir. 1999) (Attachment B), defendant Curry attacked a witness's credibility during cross-examination "by suggesting that she had falsely implicated him in order to obtain a favorable plea agreement." The district court permitted the government to rebut the attack on the witness's credibility by explaining to the jury that the witness's testimony also had implicated another individual and that the individual had pleaded guilty. Id. at 767. The Seventh Circuit held that the district court did not abuse its discretion when it admitted this evidence. Id. Like in Lindemann, the evidence was relevant because the fact that the witness had successfully participated in another case in which the individual pleaded guilty made it more probable that the witness was telling the truth about defendant Curry and less probable that she was lying out of self-interest. Id. The Seventh Circuit also noted that the district court's instruction that this evidence was only to be considered by the jury to assess the witness's credibility satisfied any concerns regarding the potential of undue prejudice. Id.

Finally, in United States v. Scott, 267 F.3d 729 (7th Cir. 2001) (Attachment C), defendant Scott attacked the credibility of a cooperating witness. The district court permitted the government to counter the attacks on the witness's credibility and the suggestions that he was biased in favor of the government by introducing the testimony of an agent concerning the witness's cooperation in an unrelated investigation. Id. at 733. Further, the court permitted the agent to testify that, due in part to the witness's cooperation, several persons were indicted and one of the main targets pleaded guilty. Id. The Seventh Circuit held that the district court did not abuse its discretion when it

admitted this evidence. Id. at 737. That evidence was relevant and presumptively admissible because it "made it less probable that [the witness] was lying out of self-interest against the defendants." Id. at 736. The Seventh Circuit also noted that the district court's cautionary instruction that focused the jury on the witness's credibility rather than the defendant's guilt diminished the chance of undue prejudice. Id.

Here, the defense vigorously has challenged the credibility of McNamee by suggesting (among other things) that he is biased out of self-interest in the defendant's case and that he was so biased at every stage of this matter. In order to rebut those assertions, the government should be permitted to introduce evidence–like that introduced in Lindemann, Curry, and Scott – to rehabilitate McNamee by showing that at all stages of this matter there was a bigger picture than just defendant. To rebut defendant's suggestions that McNamee lied to Special Agent Novitzky, Senator Mitchell, Congress, and this jury to avoid being charged with a crime and to gain fame and fortune as a result of the allegations against defendant, the government should be permitted to show that McNamee provided information about the use of HGH by Major League Baseball players Andy Pettitte, Chuck Knoblauch, and Mike Stanton, who all subsequently admitted to Congress (Pettitte and Knoblauch) or to the grand jury (Stanton, Pettitte, and Knoblauch) that the information that McNamee provided about them was accurate. Pettitte's, Knoblauch's, and Stanton's admissions of their illegal behavior to Congress and the grand jury are the functional equivalent of guilty pleas. In the face of the attacks on McNamee's credibility, that evidence makes it less probable that McNamee was or is simply lying out of self-interest against defendant and thus is relevant. This evidence specifically rebuts the notion that McNamee was biased out of self-interest in defendant's case because McNamee's association with these other players at the time he saved defendant's medical waste, as well as the

fact that he had and shared the information about other players at the time he was dealing with law enforcement, at the time of his publicity relating to what he told law enforcement, and now, shows that McNamee had "lots of information to use as bargaining chips." Lindemann, 85 F.3d at 1242.

Moreover, because McNamee had multiple "bargaining chips" and "successfully cooperated" in the government's investigation regarding a number of players, it simply is unfair to leave the jury with the wrong impression that the evaluation of McNamee's cooperation and the determination as to whether he should be a target was based on only what they have heard about so far in this trial. And, to be clear, the defense has repeatedly suggested that McNamee should have been charged with a crime for lying to the federal investigators when he minimized the number of shots that he gave to defendant. But in order for the jury to fairly evaluate that bias claim and determine McNamee's credibility, the jury must understand the full extent of his cooperation, including regarding Pettitte, Knoblauch, and Stanton and their subsequent admissions, so that the jury is not left with a completely distorted picture because–like the Seventh Circuit similarly held–such evidence makes it more probable that McNamee was telling the truth about defendant and less probable that he was lying out of self-interest. In light of the defense's vigorous attack on McNamee's credibility, information regarding his cooperation and the results of that cooperation must be introduced, like it was in Lindemann, Curry, and Scott .[4]

This case also is analogous to cases decided by the U.S. Court of Appeals for the Second,

[4]The defense also has repeatedly suggested that the federal government has some sort of bias, in that it had predetermined what evidence McNamee would have to provide in order to remain a "non target." The defense suggested that McNamee was required to tell the truth as the government believed the truth to be. (See, e.g., 5/17/2012 Tr. 86-87.) To fairly evaluate that issue as well, the jury must be permitted to hear what evidence the federal government had before it spoke with McNamee, what evidence the federal government learned from McNamee, and what out of that evidence was determined to be empirically true through admissions.

Sixth, and Eleventh Circuits holding that admission of similar evidence to rehabilitate a witness by rebutting allegations of bias and self-interest after an attack on the witness was not an abuse of discretion by the district courts. United States v. Martinez, 775 F.2d 31, 37 (2d Cir. 1985) (Attachment D); United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989) (Attachment E); United States v. Sanchez, 790 F.2d 1561 (11th Cir. 1986) (Attachment F). First, in Martinez, the district court allowed the government to introduce evidence of guilty pleas entered into by persons whom the witness–an incarcerated government informant, whose testimony served as the chief evidence against defendant Martinez at trial–had accused of breaking the law in a matter unrelated to the matter on trial. 775 F.2d at 37. Defendant Martinez's defense had two parts: (1) defendant Martinez's testimony that he did not commit the crimes charged; and (2) "a vigorous attack on [the witness's] credibility." Id. at 34. Defendant Martinez suggested that the witness "fabricated his story about Martinez in order to gain early release from prison"; brought out that the witness "had made incriminating statements against other unincarcerated law breakers and inmates at [the detention facility where the men were housed, MCC], but also against MCC guards and guards at another prison"; and suggested that the witness "would readily make false accusations in order to advance the time of his own release from prison." Id. To rehabilitate the witness, the prosecution introduced evidence that the MCC guards that the witness had previously accused had pleaded guilty. Id.

On appeal, defendant Martinez argued that the guilty pleas were inadmissible hearsay and violated his due process right to a fair trial. Id. at 36-37. The Second Circuit rejected the argument that the guilty pleas were hearsay:

The guilty pleas of the MCC guards were not hearsay. Hearsay is "a statement, other

> than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The issue at Martinez's trial was not whether the MCC guards were guilty; it was, rather, whether [the informant] was a witness whose testimony was worthy of belief or whether, instead, he typically fabricated the wrongdoings with which he charged others and had fabricated the story against Martinez in hope of gaining a reduction of his own sentence.

Id. at 37. The Second Circuit also rejected defendant Martinez's "so-called 'due process' argument,'" holding that there was no abuse of discretion in admitting this evidence showing that the accusations had not been fabricated, but were substantiated by the pleas because the attack on the witness's credibility and character had opened the door to such evidence. Id. The Court noted that the "thrust of Martinez's defense was that [the witness] was an unscrupulous and unreliable individual who would say or do anything in order to curry favor with prosecutors and prison authorities in the hope of advancing the date for his own release from prison." Id. The Second Circuit held that "[a]gainst the background of [the] attacks by the defense on [the witness's] credibility, which included outright statements that [the witness] was lying in his charges against Martinez and suggestions that he had a long history of fabricating accusations, the trial court was within the bounds of discretion to admit the evidence that all of the MCC guards accused by [the witness] had pleaded guilty." Id. at 38.

Second, in United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989) (Attachment E), defendants Lochmondy and Ludlow argued that the government had improperly bolstered testimony of the main witness against the defendants by eliciting testimony that he had cooperated on other cases that resulted in convictions and by referring to that testimony during rebuttal closing argument. The Sixth Circuit stated that the record showed that credibility of the witness "was strongly attacked by defendants at trial," noting that defense counsel told the jury that the witness was "lying to" them

and, on cross-examination, the witness was questioned about various drug and income tax violations that he was not prosecuted for pursuant to his immunity agreement. Id. at 820-21. The government elicited on redirect that the witness had cooperated with the government in expansive investigations and that some of those investigations had resulted in convictions of various defendants. Id. at 821. In closing, defendant Ludlow argued, among other things, that the witness had "'lied about everything'"; that he had lied "to the government, to the grand jury, and to the trial jury"; and that he had "manufactur[ed] the evidence against" Ludlow. Defendant Lochmondy argued that the witness "'would do and say anything the government asked" in exchange "for that grant of immunity." The Sixth Circuit held that, in light of the attacks on the witness's credibility, the testimony and argument regarding his cooperation on other cases was not error. The Court also rejected defendants' argument that government improperly used guilty pleas of co-defendants as substantive evidence of guilt because the prosecutor's comments focused on the witness's credibility as it was impacted by the codefendants' guilty pleas. Id. at 822.

Third, in United States v. Sanchez, 790 F.2d 1561 (11th Cir. 1986) (Attachment F), defendant Sanchez contended that the government improperly bolstered a witness's credibility. Defendant Sanchez had cross-examined a DEA agent about the witness's suitability for federal investigative work. "On redirect examination, the agent testified that other DEA agents had worked with [the witness] in prior investigations and found him reliable." Id. at 1564. The Eleventh Circuit noted that the "purpose of this testimony was not to bolster [the witness's] credibility, but to justify the DEA's decision to employ him" and held that the government was entitled to respond to the attention given this matter on cross-examination. Id.

Like in Martinez, Lochmondy, and Sanchez, the defendant here has attacked McNamee's

credibility by suggesting that he fabricated the allegations, evidence, and information in this case because he is biased and self-interested. The defense went so far as to leave the jury with the false impression that all of the information that McNamee provided in this matter was false. For example, the defense asked Special Agent Novitzky, "whatever the believability or reliability one attaches to what Mr. McNamee said to you about people he was giving things to, no one has been charged based on that information?" (5/3/2012 Tr. PM 51-52; see also 5/17/2012 Tr. AM 119-20 (defense cross-examining McNamee on fact that he was told players would not be charged for using)) The answer, of course, is "no," because the other individuals that McNamee named as individuals that McNamee knew were taking performance enhancing drugs did not lie under oath about it. Instead, Petttitte and Knoblauch confirmed to Congress and the grand jury and Stanton confirmed to the grand jury what McNamee had said about them. Because of the defense's choice to suggest that McNamee is incredible because no one has been charged with the drug-related crime based on what McNamee told the federal government, the jury in fairness must be informed of the admissions by Pettitte, Knoblauch, and Stanton so that the jury is not left with a completely distorted picture of McNamee's credibility. In light of the defense's vigorous attack on McNamee's credibility, information regarding his cooperation and the results of that cooperation must be introduced.

Finally, this case also is analogous to United States v. Sumlin, 271 F.3d 274 (D.C. Cir. 2001) (Attachment G), where the U.S. Court of Appeals for the District of Columbia Circuit reviewed for plain error Sumlin's complaint that the district court should not have allowed a DEA agent to testify about a witness's record for assisting the DEA in other drug investigations as a confidential informant. The testimony included statements from the DEA agent that the witness-informant had assisted the DEA in other investigations that resulted in numerous arrests. That testimony "followed

Sumlin's efforts to impeach [the witness-informant's] credibility by questioning the arrangements of his plea agreement with the DEA."

The D.C. Circuit found no plain error. Id. at 281-82. Rejecting Sumlin's argument that the testimony was irrelevant, the court stated, "the fact a paid informant 'has informed and testified truthfully in the past under his plea agreement certainly bears on his response to similar pressures and temptations in the present.'" Id. at 281-82 (quoting United States v. Smith, 232 F.3d 236, 241 (D.C. Cir. 2000)). In addition, the court explained that "testimony that tends to *rebut* bias" is acceptable and noted that such testimony falls outside Federal Rule of Evidence 608(b): "'If offered only to bolster an informant's credibility, the extrinsic evidence is barred by Rule 608(b). . . . If offered for an alternate and legitimate reason, such as to justify a cooperation agreement [or] rebut allegations of bias, the evidence falls outside Rule 608(b)'s narrow confines." Id. at 282 (citations and quotation marks omitted; alteration in original).

Simply put, these cases support that, in the face of the attacks the defense has engaged in against McNamee's credibility–suggesting that at every stage in this case McNamee was bias and self-interested–the government should be permitted to introduce evidence that rehabilitates McNamee. The evidence is relevant because the fact that McNamee had these other HGH-based interactions with players, told the government and the Mitchell Commission about those interactions, and these players admitted to the truth of that information, makes it less probable that McNamee lied about defendant in order to obtain some benefit. Fed. R. Evid. 402. The evidence, therefore, is presumptively admissible to rebut the claims that McNamee falsely has implicated defendant in order to obtain some benefit from the government or some other personal benefit.

Moreover, this evidence is not unduly prejudicial, under Federal Rule of Evidence 403:

"Evidence whose probative value might not be thought to outweigh its prejudicial effect if offered on direct examination may well be admitted during redirect examination 'for the purpose of rebutting the false impression which resulted from . . . cross examination.'" Martinez, 775 F.2d at 37 (quoting United States v. Finkelstein, 526 F.2d 517, 527 (2d Cir. 1975)). Any potential for prejudice to defendant by such rehabilitation may be cured by a limiting instruction that the jury is not to consider the evidence for any purpose other than weighing the veracity of McNamee. See, e.g., Lochmondy, 890 F2d at 822.

CONCLUSION

Accordingly, the government respectfully seeks to admit evidence of McNamee's HGH-based interactions with other players and his cooperation relating to the same to rebut the attacks on his credibility through suggestions of bias and self-interest in defendant's case.

Respectfully Submitted,

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