UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Defendant William R. Clemens, by and through his attorneys, respectfully submits the following proposed jury instructions pursuant to the Court's request of June 15, 2011. These instructions are based on, and respond to, proposed jury instructions prepared by the Government and provided on June 27, 2011. Mr. Clemens seeks leave to make any additional requests for general or specific jury instructions that may become necessary as a result of trial proceedings at a later time. In particular, Mr. Clemens's Theory of the Defense instruction will not be complete until the jury has finished hearing testimony. The defense will submit a final version soon after that occurs.

Mr. Clemens joins the Government's request that the Court give the following instructions taken from *Criminal Jury Instructions for the District of Columbia* (5th Ed. Revised 2010) (The Redbook) to the jury before trial, during trial, or at the conclusion of the trial in this case, as applicable:

1.102 Preliminary Instruction Before Trial
1.104 Question Not Evidence
1.105 Notetaking by Jurors
1.107 Preliminary Instruction Where Identity of Alternates Is Not Disclosed
1.108 A Juror's Recognition of A Witness or Other Party Connected to the Case

1.202 Cautionary Instruction on Publicity and Use of the Internet

2.100 Furnishing the Jury With a Copy of the Instructions
2.101 Function of Court
2.102 Function of Jury
2.103 Jury's Recollection Controls
2.104 Evidence in Case – Judicial Notice, Stipulations (if applicable)
2.105 Statements of Counsel
2.106 Indictment Not Evidence
2.107 Burden of Proof -- Presumption of Innocence
2.108 Reasonable Doubt
2.109 Direct and Circumstantial Evidence
2.110 Nature of Charges Not to be Considered
2.111 Number of Witnesses
2.200 Credibility of Witnesses
2.203 Witness with a Plea Agreement
2.207 Law Enforcement Official's Testimony
2.208 Right of Defendant Not to Testify (If Applicable)
2.209 Defendant as Witness (If Applicable)
2.215 Expert Testimony
2.216 Evaluation of a Prior Inconsistent Statement of a Witness
2.218 Impeachment by Proof of Conviction of Crime – Witness
2.310 Transcripts of Tape Recordings
2.402 Multiple Counts
2.405 Unanimity
2.407 Verdict Form Explanation
2.501 Exhibits During Deliberations
2.502 Selection of Foreperson
2.505 Possible Punishment Not Relevant
2.508 Cautionary Instruction on Publicity, Communication and Research
2.509 Communications Between Court and Jury During Deliberations
2.510 Attitude and Conduct of Jurors During Deliberations

3.101 Proof of State of Mind
3.103 "On or About" – Proof of

As stated in Mr. Clemens's motions *in limine*, the defense contends that prior consistent statements are inadmissible, and therefore opposes the Government's request that the Court give Instruction 2.217 (Evaluation of a Prior Consistent Statement of a Witness) in The Redbook.

Mr. Clemens also requests that the Court give the following additional instructions taken from The Redbook to the jury at the conclusion of the trial in this case:

2.112 Inadmissible And Stricken Evidence
2.406 Unanimity—Special

Mr. Clemens also requests that the Court give the following additional instruction to the jury at the conclusion of the trial in this case:

Good Faith Defense

The good faith of Mr. Clemens is a complete defense to each of the charges in the indictment because good faith on the part of the defendant is inconsistent with a finding that he knowingly and intentionally committed any of the alleged offenses.

A person who makes a statement based on a belief or opinion honestly held is not punishable under these statutes merely because the statement turns out to be inaccurate, incorrect, or wrong. Making an honest statement that turns out to be inaccurate, incorrect or wrong because of mistake, confusion, or faulty memory, or even carelessness in one's recollection, does not rise to the level of criminal conduct. An honest belief or "good faith" belief is a complete defense to the charges because such an honest or "good faith" belief is inconsistent with the intent to commit the alleged offenses.

In determining whether or not the government has proven that Mr. Clemens acted with an intent to commit the offenses alleged in the indictment or whether Mr. Clemens acted in good faith, you must consider all of the evidence received in this case bearing on his state of mind.

The burden of proving good faith does not rest with Mr. Clemens, because he does not have any obligation to prove anything in this case. It is the government's burden to prove beyond a reasonable doubt that Mr. Clemens acted with the intent to commit the offenses charged. If the evidence in this case leaves you with a reasonable doubt as to whether Mr. Clemens acted with criminal intent or in good faith, you must find Mr. Clemens not guilty.

See 7th Circuit Pattern Criminal Federal Jury Instructions (1998).

Mr. Clemens also requests that the Court give the instructions which are thereafter set forth in full and which pertain to the offenses charged in the indictment.

PROPOSED INSTRUCTION 1 (Obstruction of Congress):

In order for you to find Mr. Clemens guilty of the crime of Obstruction of Congress, the jury must unanimously agree that the government has proven each of the following elements beyond a reasonable doubt:

(1) That on or about February 5, 2008 and February 13, 2008, a proceeding was pending before The House Committee on Oversight and Government Reform;

(2) Second, the defendant knew that proceeding was pending before The House Committee on Oversight and Government Reform;

(3) Third, that proceeding was conducted within the due and proper exercise of the power of inquiry held by a Committee of the United States House of Representatives; and

(4) Fourth, that the defendant did corruptly endeavor to influence, obstruct or impede any such due and proper exercise of the power of inquiry under which that proceeding was being had.

See Modern Federal Jury Instructions – Criminal § 46.02 (modified).

The term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement.

18 U.S.C. § 1515(b).

The term "misleading" means (a) knowingly making a false statement; (b) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; or (c) knowingly using a trick, scheme, or device with intent to mislead.

See 18 U.S.C. § 1515(a)(3) (modified).

The first element the government must prove beyond a reasonable doubt is that on or about February 5, 2008 and February 13, 2008, a proceeding was pending before The House Committee on Oversight and Government Reform. In this regard, you are instructed that The

The second element the government must prove beyond a reasonable doubt is that the defendant knew that the proceeding was pending before The House Committee on Oversight and Government Reform.

The third element the government must prove beyond a reasonable doubt is that the proceeding at issue was being held within the due and proper exercise of the power of inquiry bestowed upon a Committee of the United States House of Representatives. The "power of inquiry" is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. However, the power of inquiry is not unlimited. A Committee of the United States House of Representatives does not have authority to expose the private affairs of individuals, nor does it have the power to attempt to resolve differences between two individuals by conducting a hearing unrelated to existing or potential legislation. A legitimate investigation must be related to, and in furtherance of, a legitimate legislative activity of Congress.[1]

The final element the government must prove beyond a reasonable doubt is that the defendant did corruptly endeavor to influence, obstruct or impede the House Committee on Oversight and Government Reform in the due and proper exercise of the power of inquiry bestowed upon it.

Success of the endeavor is not an element of the crime. The term endeavor is designed to reach all conduct which is aimed at corruptly influencing, intimidating and impeding the proceedings. Thus, it is sufficient to satisfy this element if you find that the defendant made any effort or did any act for the improper purpose of corruptly influencing, obstructing or impeding the proceeding.

In order to find the defendant guilty of Count One, you must all agree that the defendant intentionally made at least one false or misleading statement with an improper purpose, namely, to obstruct Congress. And, as to each act below, all of you must agree on which statement, if any, was intentionally false or misleading. The underlined portions are hereby alleged as false or misleading.

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[1] Authority: *Watkins v. United States*, 354 U.S. 178, 187–88 (1957) ("There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. Nor is the House Committee on Oversight and Government Reform a law enforcement or trial agency. These are functions of the executive and judicial departments of government. And no investigation is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."); *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1956) (finding the power to investigate does not include extracting testimony with a view to a perjury prosecution or investigations conducted solely for the personal aggrandizement of the investigators).

Act 1:

Q. And human growth hormone, have you ever used human growth hormone?

A. Never.

Deposition Testimony of William Roger Clemens, February 5, 2008 at page 23.

Act 2:

Q. Did you ever speak with Mr. McNamee about human growth hormone?

A. I have not.

Deposition Testimony of William Roger Clemens, February 5, 2008 at page 66.

Act 3:

Q. And did you do any research on your own about human growth hormone?

A. No, I haven't. Again, just basically in general when it would come up over the last, you know, few years of baseball or talks when it was on TV and things of that nature. But I've never researched it. I couldn't tell you the first thing about it.

Deposition Testimony of William Roger Clemens, February 5, 2008 at page 67.

Act 4:

Let me be clear. I have never taken steroids or HGH.

Hearing Testimony of William Roger Clemens, February 13, 2008 at page 21.

Act 5:

Q. And let me ask just a general question. Did you during your playing career use steroids?

A. I never used steroids. Never performance-enhancing steroids.

Deposition Testimony of William Roger Clemens, February 5, 2008 at pages 22-23.

Act 6:

Let me be clear. I have never taken steroids or HGH.

Hearing Testimony of William Roger Clemens, February 13, 2008 at page 21.

Act 7:

Q. Let me move on to injections from Mr. McNamee. You have said that Mr. McNamee gave you B12 shots. I want to ask you about that. Let me just start with how many times Mr. McNamee would have injected you with B12?

A. I mean – again, I am going to guess, because I have had so many. McNamee would have been somewhere between four and six times of B12.

Q. And when would he have given you those shots?

A. I am sorry?

Q. When – do you have any recollection of when Mr. McNamee would have injected you?

A. Toronto and New York, when I was with the Yankees.

Q. So 1998?

A. 1998, definitely.

Deposition Testimony of William Roger Clemens, February 5, 2008 at page 36.

Act 8:

Mr. Hardin. Create a visual scene for them, how shots are handled.

Mr. Breuer. Coming out of the shower or something.

The Witness. Yes, a B12-shot. And the same way McNamee after a game, and I am passing the room, and I told him, you know, that I need a B12 or the doctor, whatever, and there is four or five needles already lined up ready to go. And you get it in your shirt or you pull your jeans down, and they give you a B12-shot, and you are out the door.

Most of mine – most of mine were always after a game.

Deposition Testimony of William Roger Clemens, February 5, 2008 at page 145.

Act 9:

Mr. DAVIS OF VIRGINIA. Did you inject yourself with B-12 or would Mr. McNamee ever inject you or do you remember?

Mr. CLEMENS. I have never injected myself. Mr. McNamee's given me three shots–when we were traveling, three shots of B-12, two in New York.

Hearing Testimony of William Roger Clemens, February 13, 2008 at page 96.

Act 10:

Q. Yeah. In your 60 Minutes interview, you said that Mr. McNamee gave you lidocaine shots. In your press conference, you said this happened when you were with the Blue Jays, and it was for lower back pain. Can you tell us about the times Mr. McNamee injected you with lidocaine?

A. It was a lidocaine shot. He only gave me lidocaine once, and it did give me comfort in my lower back.

Deposition Testimony of William Roger Clemens, February 5, 2008 at page 42.

Act 11:

Mr. MICA. Mr. Clemens, you claim that–you did admit that you were injected with vitamin B-12, and also you admitted to Lidocane. OK, what color is the vitamin B-12 shot? You told me you had quite a few shots.

Mr. CLEMENS. Brian McNamee gave me shots on four to six occasions of B-12. It is red or pink in color. Lidocaine, I do not know the color of Lidocaine. He gave me one shot of Lidocaine in my lower back, and that happened in Toronto.

Hearing Testimony of William Roger Clemens, February 13, 2008 at page 122.

Act 12:

Mr. CUMMINGS. Now, Mr. Clemens, I reminded you that you are under oath. Mr. Clemens, do you think Mr. Pettitte was lying when he told the committee that you admitted using human growth hormones?

Mr. CLEMENS. Mr. Congressman, Andy Pettitte is my friend. He will–he was my friend before this. He will be my friend after this. And again, I think Andy has misheard.

Mr. CUMMINGS. I am sorry, I didn't hear you?

Mr. CLEMENS. I believe Andy has misheard. Mr. Congressman, on his comments about myself using HGH, which never happened.

The conversation that I can recall, that I had with Andy Pettittte, was at my house in Houston, while we were working out. And I had expressed to him about a TV show something that I have heard about three older men that were using HGH and getting back their quality of life from that. Those are the conversations that I can remember.

Andy and I's friendship and closeness was such that, first of all, when I learned when he was–when he said that he used HGH, I was shocked. I had no idea.

When I just heard your statement and Andy's statement about that he also injected himself, I was shocked. I had no idea that Andy Pettitte had used HGH.

My problem with what Andy says, and why I think he misremembers, is that if Andy Pettitte knew that I had used HGH, or I had told Andy Pettitte that I had used HGH, before he would use the HGH, what have you, he would have come to me and asked me about it. That is how close our relationship was. And then when he did use it, I am sure he would have told me that he used it.

Hearing Testimony of William Roger Clemens, February 13, 2008 at page 87.

Act 13:

Q. There was a grouping, I think, in the way it was asked. So let me ask you specifically with regard to family members, do you have any knowledge of any family members using HGH?

A. I do. My wife received a shot of HGH from Brian McNamee at my house. I think it was in our master bedroom. The year, I'm going to say 2003 possibly. I believe there was an article, from what I understand, about HGH in the USA Today that came out a couple days earlier that week. I don't know if it was the only article my wife had read. And he gave her a shot of HGH. She tells me that it happened extremely quick. He was gone after it happened, literally gone. He went to the airport, I found out. I was not present at the time. I found out later that evening. And the reason I found out, because she was telling me that something was going on with her circulation, and this concerned me.

* * *

The Witness. That night when I came back. I was not – I think – again, what I can remember, I know I wasn't present.

Deposition Testimony of William Roger Clemens, February 5, 2008 at pages 173-174, 176.

Act 14:

Mr. Barnett. That's why I think my question has been confusing. I wasn't trying to ask when you knew about the allegations. I am asking when did you know that Senator Mitchell –

Mr. Hardin. I am saying the same thing.

Mr. Barnett. – wanted to talk with you about – Senator Mitchell wanted to talk to you as part of his investigation?

The Witness. I had no idea that Senator Mitchell wanted to talk to me. If it was about baseball and steroids in general, I would have went to see him. And obviously, if I knew what Brian McNamee was stating about me in his report I would have been – I would have been there.

Deposition Testimony of William Roger Clemens, February 5, 2008 at pages 113-114.

Act 15:

Q. Let me just go back here. So you have or you haven't been to Mr. Canseco's house?

A. I sure could have been. I wasn't here at this – at a party that he had. I could have gone by there after a golf outing. So – but I was not at this party.

Q. And could you have been at his house during this time period, June 8th to 10, 1998?

A. No.

Deposition Testimony of William Roger Clemens, February 5, 2008 at page 16.

PROPOSED INSTRUCTION (Making a False Statement):

The defendant is charged in Counts Two, Three and Four with the offense of Making a False Statement in violation of 18 U.S.C. §1505. In order for you to find Mr. Clemens guilty of Making a False Statement, you must unanimously agree that the government has proven each and every one of the following elements beyond a reasonable doubt:

(1) That the defendant knowingly made a false, fictitious, or fraudulent statement or representation to the government of the United States;

(2) That the statement or representation pertained to a matter within the jurisdiction of the House Committee on Oversight and Government Reform;

(3) That in making the false, fictitious, or fraudulent statement, the defendant acted willfully, knowing that the statement or representation was false; and

(4) That the statement or representation was material.

Now I will give you more detailed instructions on some of these terms.

A statement is "false" or "fictitious" if it was untrue when it was made, and the defendant knew it was untrue at that time. A statement is "fraudulent" if it was untrue when it was made, the defendant knew it was untrue at that time, and the defendant intended to deceive.

A "material" statement or representation is one that has the natural tendency to influence or is capable of influencing a decision of the House Committee on Oversight and Government Reform. The question for you to answer in determining whether the statement or representation is material is whether it has the capacity to influence the actions of the House Committee on Oversight and Government Reform. In other words, a statement is material if it relates to an important fact that had the capacity to affect or influence a legitimate Congressional investigation, as distinguished from an unimportant or trivial fact that did not have the capacity to affect or influence a legitimate Congressional investigation. A statement need not actually influence the Committee in order to be material.

A person acts "willfully," as that term is used in these instructions, when that person acts deliberately, voluntarily, and intentionally, and with the intent to do something the law forbids; that is to say with a purpose either to disobey or disregard the law.

Mr. Clemens may have given incorrect statements to investigators because of an honest mistake of fact, confusion, or faulty memory. If you, the jury, find that he made an erroneous and incorrect statement because he honestly could not remember, or

because of some kind of innocent misunderstanding or mistake, then Mr. Clemens would not be guilty of making the false statement knowingly and willfully.

A matter is "within the jurisdiction of the legislative branch of the United States government" if the House Committee on Oversight and Government Reform had the power to exercise its authority as it did in this matter. The power of the House Committee on Oversight and Government Reform to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. However, the power of inquiry is not unlimited. A Committee of the United States House of Representatives does not have authority to expose the private affairs of individuals, nor does it have the power to attempt to resolve differences between two individuals by conducting a hearing unrelated to existing past, current, or potential legislation. A legitimate investigation must be related to, and in furtherance of, a legitimate legislative activity of Congress.

See note 1, *supra*.

It is not necessary that the government prove that the defendant knew the matter was within the jurisdiction of the United States government.

Government sources: O'Malley, Grenig, and Lee §§ 40:07, 40:14 (5th ed. 2011); 6th Circuit Criminal Pattern Jury Instruction (2009); 7th Circuit Pattern Criminal Federal Jury Instructions (1998); United States v. Moore, 612 F.3d 698, 701-702 (D.C. Cir. 2010).[2]

[2] The Government appears to rely on the *Moore* case to support its proposed definition of "materiality." The *Moore* case does not, however, support the Government's unduly weak definition of "willfully." To the contrary, in *Moore*, the D.C. Circuit arguably approved of a higher burden than the parties propose at this time—that "willfully" requires "proof that the defendant knew his conduct was a crime." 612 F.3d at 704.

COUNT TWO

Count Two alleges that Mr. Clemens committed the crime of Making a False Statement when he made the following underlined statements:

> Q. The focus of our investigation is, in a lot of ways, the Mitchell Report; and the Mitchell Report contains allegations about your use of anabolic steroids and human growth hormones, HGH. And you have been very clear in your public statements that these allegations about your use are not true.
>
> I will in a bit go through some specific statements in the Mitchell Report, but, before I do that, I want to give you an opportunity for you to raise with us areas where you think are the most glaring inaccuracies or problems in the Mitchell Report as it relates to you.
>
> A. . . . I have read the report, what it pertains to me. . . . I have actually the report in front of me.
>
> And, like I have stated in the press conferences and when I first came out to make my statements when I heard about these allegations, basically it pertains to what [Strength Coach #1] is saying about me. It is false. I have not used steroids or growth hormone.

(Deposition at 7-8.)

* * *

> Q. And human growth hormone, have you ever used human growth hormone?
>
> A. Never.

(Deposition at 23.)

* * *

> Q. I think you have already answered this, but let me just ask it again. Have you ever taken human growth hormones during your baseball career?
>
> A. No, I have not.

(Deposition at 101.)

For you to find the defendant guilty of Count Two, you must find that the government has proved each and every one of the elements of the crime of Making a False Statement beyond a reasonable doubt.

COUNT THREE

Count Three alleges that Mr. Clemens committed the crime of Making a False Statement when he made the following underlined statements:

> A. . . . I am just making it as possibly as clear as I can. I haven't done steroids or growth hormone.

(Deposition at 9.)

* * *

> Q. And let me ask just a general question. Did you during your playing career use steroids?
>
> A. I never used steroids. Never performance-enhancing steroids.
>
> . . .
>
> Q. Anabolic steroids, which are performance-enhancing steroids, you have never used those?
>
> A. That is correct.

(Deposition at 22-23.)

For you to find the defendant guilty of Count Three, you must find that the government has proved each and every one of the elements of the crime of Making a False Statement beyond a reasonable doubt.

COUNT FOUR

Count Four alleges that Mr. Clemens committed the crime of Making a False Statement when he made the following underlined statements:

> Q. Let me move on to injections from Mr. McNamee. You have said that Mr. McNamee gave you B12 shots. I want to ask you about that. Let me just start with how many times Mr. McNamee would have injected you with B12?
>
> A. I mean -- again, I am going to guess, because I have had so many. McNamee would have been somewhere between four and six times of B12.
>
> Q. And when would he have given you those shots?
>
> A. I am sorry?
>
> Q. When -- do you have any recollection of when Mr. McNamee would have injected you?
>
> A. Toronto and New York, when I was with the Yankees.
>
> Q. So 1998?
>
> A. 1998, definitely.

(Deposition at 36.)

For you to find the defendant guilty of Count Four, you must find that the government has proved each and every one of the elements of the crime of Making a False Statement beyond a reasonable doubt.

PROPOSED INSTRUCTION (Perjury – Counts 5 and 6):

Count Five alleges that Mr. Clemens committed the crime of Perjury in violation of 18 U.S.C. § 1621 when he made the following underlined statement:

> "Brian McNamee has never given me growth hormone or steroids." (Hearing at 123.)
> "And again, this man [Brian McNamee] has never given me HGH or growth hormone or steroids of any kind . . ." (Hearing at 138.)

Count Six alleges that Mr. Clemens committed the crime of Perjury in violation of 18 U.S.C. § 1621 when he made the following underlined statement:

> "Let me be clear. I have never taken steroids or HGH." (Hearing at 21.)

In order for you to find Mr. Clemens guilty of Perjury, you must unanimously agree that the government has proven the following seven essential elements beyond a reasonable doubt:

(1) The defendant testified under oath before the House Committee on Oversight and Government Reform;

(2) The oath was taken before a competent tribunal;

(3) The oath was taken in a proceeding in which the law authorized the administration of an oath.

(4) In that proceeding, the defendant testified as I have just stated;

(5) The testimony was material;

(6) The testimony was false; and

(7) The defendant knew his testimony was false when he made it.

Criminal Jury Instructions for the District of Columbia Instruction 6.110 (5th Ed. Revised 2010).

The House Committee on Oversight and Government Reform was a "competent tribunal" if it had the power to conduct these proceedings as it did. The power of the House Committee on Oversight and Government Reform to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. However, the power of inquiry is not unlimited. A Committee of the United States House of Representatives does not have authority to expose the private affairs of individuals, nor does it have the power to attempt to resolve differences between two individuals by conducting a hearing unrelated to existing past,

current, or potential legislation. A legitimate investigation must be related to, and in furtherance of, a legitimate legislative activity of Congress.

See note 1, *supra.*

False testimony is "material" if the testimony was capable of influencing the Committee on Oversight and Government Reform on a legitimate legislative issue that was before it. In other words, false testimony is material if it relates to an important fact that had the capacity to affect or influence a legitimate Congressional investigation, as distinguished from an unimportant or trivial detail that did not have the capacity to influence a legitimate Congressional investigation. A statement need not actually influence the Committee in order to be material.

6th Circuit Criminal Pattern Instruction

Mr. Clemens cannot be convicted of perjury if the evidence against him consists solely of the sworn testimony of only one person. The government may satisfy its burden of proof by producing the testimony of two witnesses to the alleged falsity of the statements, or by producing the testimony of one sworn witness and documentary or other evidence corroborating the alleged falsity.

Criminal Jury Instructions for the District of Columbia Instruction 6.110 (5th Ed. Revised 2010).

Respectfully submitted,

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